

TRENDS AND PATTERNS IN PRELIMINARY REFERENCES IN COURTS OF ROMANIA. ISSUES RELATED TO THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS•

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Abstract

The case-law of the courts of Romania reveals significant disparities concerning interpretation and application of the two main European sources in the field of human rights - the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. That is the reason that the present chapter deals with case-law of Romanian courts concerning the said issue raised in requests for a preliminary ruling, covering both references for a preliminary ruling and judgments rendered by courts of Romania in which those courts rejected such requests. The subject-matter is liable to trigger a heated debate about limits of powers and their exercise by courts in relation to references involving the application of different legal standards - national law, European Union law and the European Convention on Human Rights.

Keywords: *preliminary reference; Article 267 TFEU; national court or tribunal; Constitutional Court of Romania; rejection of a request for a preliminary reference; European Convention on Human Rights; Charter of Fundamental Rights of the European Union*

1. Preliminary issues

There are few doubts that practice of courts in Romania and of the Constitutional Court alike reveals difficulties in understanding and application of

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European Union law and such difficulties are confirmed also by the mix-up between the mechanism of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”) and the legal order of the European Union.

The case-law of the courts of Romania concerning the Charter and the ECHR, from the point of view of preliminary references (ordered by court or requested by parties to proceedings), reveals certain intriguing and more or less consistent lines: on one hand, certain courts managed well the relationship between EU law, ECHR system and national law, on the other, there are courts that shown difficulties in assessing the relevance of EU law or ECHR rules in proceedings¹. In other words, the latter line of case-law raised issues connected to scope *ratione materiae* of EU law or of the preliminary ruling procedure. What might be the subject-matter of an order for reference to the Court of Justice? Moreover, the Court of Justice emphasized in some of its decisions rendered in preliminary references made by courts of Romania the scope *ratione materiae* of EU law².

In the first part of the chapter (Section 2) preliminary references made by courts of Romania in the field of human rights (the Charter and/or the ECHR) are discussed; then (Section 3) some judgments by which courts of Romania rejected requests of parties to proceedings for an order for reference are examined. The next part (Section 4) perhaps the most significant request made by a court of Romania in the relevant field (the ECHR and the Charter), more precisely in the field of European arrest warrant, along with the answer provided by the Court of Justice and the subsequent judgment rendered by the referring court, is considered.³

All these judgments have a common feature: all concern interpretation and application of various provisions of the ECHR and the Charter of Fundamental Rights, in various circumstances linked more or less to the EU law. The chapter ends with a brief account concerning the case-law of Romanian courts in the relevant field.

¹ For a more comprehensive collection of examples concerning mainly this latter case, see Mihai Șandru, Mihai Banu, Dragoș Călin, *Procedura trimiterii preliminare. Principii de drept al Uniunii Europene și experiențe ale sistemului român de drept [Preliminary ruling procedure. Principles of European Union law and experiences encountered in the Romanian legal order]*, C.H.Beck, Bucharest, 2013, especially Chapter 2.

² On this issue, see *ibid.*, Chapter 10 Section 3, pp. 593-595.

³ Court of Appeal Constanța, chamber for criminal cases and children and family disputes, file No 1230/36/2009, resolution of 18 May 2011 („*Radu Ciprian Vasile*”), not reported. For a record for this case, see http://portal.just.ro/36/SitePages/Dosar.aspx?id_dosar=3600000000028408&id_inst=36. The order for reference was registered at the Court of Justice as Case C-396/11, *Radu*, and the judgment was rendered on 29 January 2013, not yet reported. It is worth another remark here: this case is the only reference made by courts of Romania that was so far assigned to the Grand Chamber of the Court.

2. References from courts of Romania for a preliminary ruling

2.1. Compensation granted to former political prisoners and international instruments in the field of human rights as European “Community provisions”

The first preliminary reference discussed here was made by a resolution of the Tribunal Argeş of 4 April 2011⁴ (hereinafter “the resolution of 4 April 2011”), request registered at the Court of Justice as Case C-483/11 (*Boncea and Others*). A second reference was made by a resolution of 4 July 2011 of the same court⁵ (hereinafter “the resolution of 4 July 2011”), registered at the Court of Justice as Case C-484/11 (*Budan*).⁶ These two cases were joined by the Court as their subject-matter was very similar: both cases concerned claims for compensation payable to persons sentenced in political trials during the Communist regime, under Law No 221/2009⁷, as amended. More precisely, these disputes rose as consequence of a legislative vacuum caused by two decisions of the Constitutional Court⁸ that established that certain provisions (concerning the amount of compensation for non-material harm suffered as consequence of these trials) of the said Law and of the amending act – the Government Emergency Ordinance No 62/2010⁹ – were not compliant with the Constitution. The resolution of 4 April 2011 took note of the request filed on 21 February 2011 by the plaintiffs for a preliminary reference “concerning the incompatibility of domestic provisions with the Treaty on Functioning of the European Union, related to Article 5 of Law No 221/2009, as amended by the Constitutional Court of Romania by Decision No 1358 of 21 October 2010”; the plaintiffs supported the view that the law breached “provisions to which Romania is a party as a result of accession, more precisely it breaches Article 5 of the European Convention on Human Rights, according to which “Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”, and also Article 8 of the Universal Declaration of Human Rights, according to which “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.””

⁴ Tribunal Argeş, civil chamber, file No 2984/109/2010, resolution of 4 April 2011, not reported.

⁵ Tribunal Argeş, civil chamber, file No 2217/109/2011, resolution of 4 July 2011, not reported.

⁶ Mihai Şandru, “*Respingerea trimiterilor preliminare ca fiind vădit inadmisibile: Corpul Național al Polițiștilor (C-434/11), Cozman (C-462/11), cauzele conexe Boncea și Budan (C-483/11 și C-484/11)*” [“The rejection of preliminary references as manifest inadmissible: *Corpul Național al Polițiștilor (C-434/11), Cozman (C-462/11), Joined Cases Boncea and Budan (C-483/11 and C-484/11)*”], *Curierul Judiciar*, No 1/2012, p. 61-62.

⁷ Law No 221 of 2 June 2009 on political convictions and administrative measures who are equated to those, rendered from 6 March 1945 to 22 December 1989, published in *Monitorul Oficial* [Official Gazette of Romania] No 396 of 11 June 2009.

⁸ Decision No 1354 of 20 October 2010 and Decision No 1358 of 21 October 2010, respectively, both published in *Monitorul Oficial* No 761 of 15 November 2010.

⁹ Published in *Monitorul Oficial*, No 446 of 1 July 2010.

Subsequently, the same resolution lists provisions considered relevant, in order that these should be interpreted by the Court of Justice: Article 5 of the European Convention on Human Rights and Article 8 of the Universal Declaration of Human Rights, and concludes that “[t]herefore, according to Community provisions, every person who has been a victim of a political conviction contrary to [those] provisions, has a right to compensation, yet according to Article 5 as amended by Decision No 1358/2010 of the Constitutional Court this right is precluded.”

The two referred questions were the following:

“Do the provisions of Article 5 of Law No 221/2009, as amended by decision No 1358 of the Constitutional Court of Romania of 21 October 2010, infringe Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 8 of the Universal Declaration of Human Rights?

Do Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 8 of the Universal Declaration of Human Rights preclude national legislation which, in the case of the politically-motivated conviction of an individual by a decision contrary to law, allows that individual’s right to compensation for the non-material damage suffered to be limited?”

By the second resolution, that of 4 July 2011, having a similar background, the same court (Tribunal Argeș) supported the need to make a preliminary reference “taking into account the following rules of Community law, that enjoy primacy according to Articles 11(1) and 20 of the Constitution of Romania”¹⁰; the relevant European “Community” law in the instant case were: Article 6 TEU, Article 267 TFEU, “Chapter I: Dignity” of the Charter of Fundamental Rights of the EU (Article 1 “Human dignity” and Article 4 “Prohibition of torture and inhuman or degrading treatment or punishment”).

The proceedings were stayed pending “forwarding” the Court’s answer. The questions referred were the following: “In the interpretation given by the Court of Justice of the European Union of the fundamental principles laid down by the Charter of Fundamental Rights of the European Union and by the Treaties of the European Union – and in the absence of any domestic legislation (as result of the declaration that Article 5 of Law No 221/[2009] is unconstitutional) – are the

¹⁰ There has been a manifest confusion between the scope of those two provisions and that of Article 148 of the Constitution. Article 11 of the Constitution, which establishes the relationship between international law and national law and Article 20 of the Constitution, that provides the status of international treaties on human rights in the national legal order were considered as applicable in the instant case, even if the Article 148 of the Constitution (“Integration into the European Union”) establishes a *lex specialis* in that regard, providing *inter alia* the status of EU law in the domestic legal order. In various instances, courts of Romania referred to Article 20 rather to Article 148 of the Constitution.

applicant and the intervener entitled to compensation for non-material damage as victims of the Communist regime and now citizens of the European Union?"

By Order of 14 December 2011¹¹, the Court of Justice found that it lacked jurisdiction to answer the referred questions in both cases. The Court held that in the framework of Article 267 TFUE, it is called to interpret Union law only within competences it was granted¹². In a reference for a preliminary ruling, where national legislation falls within the scope of Union law, the Court must provide all the criteria of interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights which derive in particular from the Charter¹³. The lesson learned from here is twofold: on one hand, the national legislation has to fall within the scope of EU law in order the Court to answer the preliminary reference; on the other, the source of fundamental rights is the Charter. The latter issue is emphasized by the Court in its Judgment in Case *Radu*: in other words, even if an order for reference mentions rights provided by the ECHR, the Court of Justice will most likely strive to find and assess the equivalent provisions of the Charter.

On the contrary, other Romanian courts, in a similar framework, rejected requests for making a preliminary reference to the Court of Justice, relying on the Order rendered in Joined Cases *Budan and Boncea*.

By resolution of 18 May 2012¹⁴, in a similar dispute, the Court of Appeal Bucharest rejected a request containing four preliminary questions:

"1) Whether Article 5(1) first sentence point (a) of Law No 221/2009, in original version, established or not a right to compensation for the plaintiff, "legitimate expectation", which is included in the concept of "goods" according to Article 6 of the Treaty on the European Union, read in conjunction with Article 17 of the Charter of Fundamental Rights of the European Union in the light of provisions of Article 1 of the Additional Protocol No 1 to the Convention for the protection of human rights and fundamental freedoms to which the European Union has acceded (sic!).

2. To establish that provisions of Article 5(1) first sentence point (a) of Law No 221/2009, in original version, are inapplicable to actions brought previously to Decision No 1358/2010 [of the Constitutional Court] [...], actions that rely on this decision of the Constitutional Court to the disregard of the principle of equality provided by Article 6 of the Treaty on European Union, read in conjunction with

¹¹ Order of 14 December 2011, Joined Cases C-483/11 and C-484/11, *Boncea and Budan*, not reported.

¹² Judgment of 5 October 2010, Case C-400/10 PPU *McB*. [2010] ECR I-8965, para. 51; Order of 22 June 2011 Case C-161/11 *Vino II*, not reported, paras. 25 and 37.

¹³ Judgment of 29 May 1997 Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 15; Judgment of 15 November 2011 Case C-256/11 *Dereci and Others*, not yet reported, para. 72.

¹⁴ Court of Appeal Bucharest, fourth chamber for civil cases, file No 12336/3/2010, not reported.

Articles 20 and 21 of the Charter of Fundamental Rights of the European Union in the light of Article 1 of Protocol No 12 to ECHR Convention (sic!), liable to establish discriminatory legal positions between persons, as certain of them benefit from final judgments prior to decision of establishing the incompatibility of these [legislative] provisions to the Constitution, while in case of other persons judgments or final judgments are not rendered, even if they brought proceedings prior to the said decision [...] [of the Constitutional Court].

3) To establish that Decision No 1358/2010 of the Constitutional Court finding a contradiction of Article 5(1) first sentence point (a) of Law No 221/2009 with the Constitution infringes the principle of equality provided by Article 6 of the Treaty on European Union read in conjunction with Articles 20 and 21 of the Charter of Fundamental Rights of the European Union in the light of provisions of Article 14 ECHR and Article 1 of the Protocol No 12 to ECHR Convention (sic!).

4) To establish whether the Decision in the interests of the law No 12/2011 of the High Court of Cassation and Justice, that provides that Article 5(1) first sentence of Law No 221/2009 concerning political trial is no longer in force and is not anymore able to be the legal basis for cases that are not yet final on the day of publication of the decision of the Constitutional Court in *Monitorul Oficial*, is contrary to principle of equality established in Article 6 of the Treaty on the European Union read in conjunction with Articles 20 and 21 of the Charter of Fundamental Rights of the European Union in the light of provisions of Article 14 of the ECHR Convention (sic!) and Article 1 of the Additional Protocol No 12 to the ECHR Convention.”

In its ruling, the court reprised almost literally points of the Order of the Court rendered in Joined Cases *Boncea and Budan* (along with references made by the Court of Justice). The court rightly held that “Law No 221/2009 does not have a basis in any Community act and it also does not aim to transpose any Community act, be it primary or secondary, at national level or the European Charter (sic!), so that interpretation and application of the domestic regulation escape the jurisdiction of the European court.” In other words, for the point of view of that court, the request for an order for reference was deemed as inadmissible.

Other judgments are consistent with this line: the resolution of 14 September 2011 of the Court of Appeal Bacău¹⁵, resolutions of 20 June 2012¹⁶ and 22 June 2012 respectively of the Court of Appeal Bucharest¹⁷, and also the resolution of 12 April 2012 of Tribunal Argeș¹⁸.

¹⁵ Court of Appeal Bacău, chamber of civil cases, children, family, labour and social security disputes, file No 2296/103/2010, not reported.

¹⁶ Court of Appeal București, fourth chamber for civil cases, file No 12335/3/2010, not reported.

¹⁷ Court of Appeal București, fourth chamber for civil cases, file No 41169/3/2010, not reported.

¹⁸ Tribunal Argeș, civil chamber, file No 4933/109/2011, not reported.

2.2. Reductions in remuneration and scope of the Charter in preliminary references. The “*Corpul Național al Polițiștilor*” series¹⁹

The first decision in the following series of preliminary references is a resolution rendered by Tribunal Alba²⁰, registered at the Court of Justice on 22 August 2011 as Case C-434/11, *Corpul Național al Polițiștilor*. The main action concerned reductions in remuneration (by 25%) for public sector employees (civil servants). The plaintiff - an association representing the interests of policemen - Corpul Național al Polițiștilor - asked the court to make a reference to the European Court of Justice. That request was (partly²¹) allowed by the court, which referred the following question: “Must the provisions of Articles 17(1), 20 and 21(1) of the Charter of Fundamental Rights of the European Union be interpreted as precluding reductions in remuneration such as those imposed by the Romanian State under Law No 118/2010 and Law No 285/2010?”

The substantive part of this reference raises the issue of the absence a link to EU law, issue that was emphasized by the European Court of Justice in its answer: by Order of 14 December 2011, Case C-434/11, *Corpul Național al Polițiștilor*²², relying on (former) Articles 92(1) and 103(1) of its Rules of procedure²³, the Court found it lacked jurisdiction to answer the question. Yes, according to the Court of Justice, “the fact remains that the order for reference does not contain any specific information enabling Law No 118/2010 and Law No 285/2010 to be considered as aiming to implement Union law so that the jurisdiction of the Court to answer the present preliminary reference is not proven.”²⁴

Very shortly afterwards, in the same type of proceedings, Court of Appeal Constanța²⁵ admitted the request of the appellant on points of law, Corpul Național al Polițiștilor, and made a preliminary reference to the European Court of Justice (registered at the latter as Case C-134/12, *Corpul Național al Polițiștilor*). The two questions were the following:

“Must the provisions of Articles 17(1), 20 and 21(1) of the Charter of Fundamental Rights of the European Union be interpreted as precluding reductions in remuneration such as those imposed by the Romanian State under Law No 118/2010 and Law No 285/2010?”

¹⁹ Parts of this section were previously published as M. Banu, *Reduceri salariale și domeniul de aplicare a Cartei drepturilor fundamentale a UE în contextul unei trimiteri preliminare* [Reductions in remuneration and scope of the Charter of Fundamental Rights in the framework of a preliminary reference], *Curierul Judiciar* No 11/2011, 615-617.

²⁰ Tribunal Alba, chamber of commercial and administrative disputes, file No 94/57/2011, resolution No 1389/CAF/2011, 20 June 2011, not reported.

²¹ In that the court dropped Article 47 of the Charter from the referred question.

²² Not reported.

²³ Under the new Rules of procedure of the Court of Justice, in force since 1 November 2012 (OJ L 265, 29.9.2012, p. 1), the legal basis for rendering such an order is Article 53(2).

²⁴ Order of 14 December 2011, Case C-434/11, *Corpul Național al Polițiștilor*, not reported, para. 16.

²⁵ Court of Appeal Constanța, second chamber for civil, administrative and tax disputes, resolution of 8 February 2012, file No 1191/88/2011, not reported.

Must the provisions of Article 15(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, whereby the Romanian Government was required to inform the Secretary General of the Council of Europe of its intention to adopt measures to reduce remuneration and to specify the time-limit laid down for implementing them, be interpreted as rendering invalid Law No 118/2010 and Law No 285/2010?"

Obviously, the answer of the Court of Justice²⁶ was by no means different than that given in Case C-434/11, *Corpul Național al Polițiștilor*: again, the Court found it manifestly lacked jurisdiction to answer those questions.

Nonetheless, another preliminary reference with the same subject-matter soon followed: on 27 June 2012, the Court of Appeal Brașov²⁷ made a preliminary reference in an appeal on points of law lodged by the same appellant on points of law - *Corpul Național al Polițiștilor*. This time, the Romanian court raised six questions. Relying on Article 53(2) of its (new) Rules of procedure, by Order of 15 November 2012 in Case C-369/12²⁸, the Court of Justice found it manifestly lacked jurisdiction.

2.3. Also on reductions in remuneration (but this time) under the ECHR. Case *Cozman*

In the same framework of reductions in remuneration under Law No 118/2010, the Tribunal Dâmbovița decided in February 2011, under "Article 234(2) of the Treaty establishing the European Community", to refer two preliminary questions to the Court of Justice. Those questions concerned interpretation of some provisions of the European Convention on Human Rights²⁹:

"Must Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms be interpreted as allowing the salaries of staff paid from public funds to be reduced by 25%, pursuant to Article 1(1) of Law No 118/2010 laying down certain measures necessary to restore budgetary balance?

If the answer is in the affirmative, is entitlement to salary an absolute right which the State may not make subject to any limitations?"

In its resolution of February 2011, the court briefly pointed out: "Taking note that in the instant case a motion to ask the Court of Justice of the European Union

²⁶ Order of 10 May 2012, Case C-134/12, *Corpul Național al Polițiștilor*, not reported. See also Mihai Șandru, "Necompetența vădită a CJUE în trimiterea preliminară *Corpul Național al Polițiștilor*" ["Manifest lack of jurisdiction of the ECJ concerning the preliminary reference in *Corpul Național al Polițiștilor*, C-134/12"], *Curierul Judiciar*, 7/2012, p. 442.

²⁷ Court of Appeal Brașov, chamber for administrative and tax disputes, resolution of 27 June 2012, file No 4547/62/2011, not reported.

²⁸ Not reported.

²⁹ Tribunal Dâmbovița, civil chamber, file No 393/120/2011, resolution of 7 February 2011, not reported. The reference was registered at the Court only on 5 September 2011 as Case C-462/11, *Victor Cozman v Teatrul Municipal Târgoviște*.

to answer a preliminary question concerning interpretation of Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms was submitted, the proceedings will be stayed." In other words, apparently the referring court did not question at all the issue if the reference was necessary and useful.

In its request for a preliminary ruling, under the heading "Relevant national case-law", the court mentioned Decision No 72 of 25 June 2010³⁰, in which the Constitutional Court found that provisions of Law 118/2010 were constitutional. On the other hand, under the heading "Applicable Community provisions", reference was made to Article 1 of the First Additional Protocol to the ECHR.

Outlining the "reasons that prompted the request", the referring court stated: "By reducing remunerations for budgetary employees by 25% during a period of 6 months, from 3 July 2010 to 31 December 2010, it becomes apparent that the right to property provided by Article 1 of the First Additional Protocol for a possession consisting in workers' outstanding claims relating to pay from public funds is breached." In the heading concerning arguments of parties to the main proceedings, the respondent's arguments were provided at length. The respondent relied on case-law of the European Court of Human Rights ("hereinafter the "ECtHR") in order to claim that reduction in remuneration did not infringe the right to property, as protected by the ECHR. In the heading devoted to the "opinion of the national court", a detailed analysis of case-law of the ECtHR was performed, in order to reach the conclusion that "tribunal is of opinion that reduction in remuneration by 25% falls within the right of the State to establish certain limits on the rights provided at Article 1 of the First Additional Protocol."

The issue raised here is very similar to that concerning the scope of EU law in the framework of the Charter of Fundamental Rights of the EU: there is no doubt that the national court would have to assess whether the dispute was linked to EU law. Presumably, the conclusion reached by the court would have been that the reduction in remuneration did not fall within the scope of EU law.

By Order of 14 December 2011³¹, the Court of Justice found it manifestly lacked jurisdiction to answer the question referred. As, for example, in the Order rendered in the same day in Case C-434/11, *Corpul Național al Polițiștilor*, above, the Court held that the fact remains that the order for reference does not contain any specific information enabling Law No 118/2010 to be considered as aiming to implement Union law so that the jurisdiction of the Court to answer the present preliminary reference is not proven.³²

³⁰ Monitorul Oficial No 433 of 2010.

³¹ Not reported.

³² See also Steve Peers, *The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights*, *Human Rights Law Review*, 2012:12(2), 375-389.

3. Rejection of a request for reference for a preliminary ruling

In other instances, courts of Romania rejected requests directed by parties to proceedings for making a preliminary reference to the Court of Justice. The present section deals with some of the rulings of Romanian courts.

i) In proceedings similar to those discussed above (Section 2.1), Tribunal Argeș rejected a request of the plaintiffs to make a preliminary reference³³. The judgment does not reprise the proposed questions, the court holding briefly that “[...] making a preliminary reference to the Court of Justice of the European Union is requested”. The court noticed that following decisions of the Constitutional Court by which it ruled that legislative provisions concerning the right to compensation for moral damages granted to political prisoners during the Communist regime were unconstitutional “there is not anymore a legal framework for the plaintiff’s request”. The request was therefore rejected as ungrounded.

ii) In an appeal on points of law brought before the High Court of Cassation and Justice, one of the appellants on points of law lodged a request for making a reference to the Court of Justice, which was rejected by resolution of 24 February 2009³⁴. The request contained two questions, concerning mainly the interpretation of Articles 41 and 47 of the Charter of Fundamental Rights of the European Union as having direct effect and concerning also the right of defence in the domestic law in a procedural framework of a settlement agreement.

The High Court of Cassation and Justice rejected the request, relying mainly on *ratione temporis* grounds. First of all, principles underlying Article 267 TFEU were reminded and then the highest court in Romania found it met the criteria required for a “court or tribunal of a Member State”; then, it also found out that it was under the duty provided in Art. 267(3) TFEU, but it reminded the *CILFIT* criteria, in order to state its margin in assessing if the preliminary question was necessary and useful.

On the substance of its reasoning, the High Court held: “[...] Articles 41 and 47 of the Charter of Fundamental Rights do not have a direct bearing on the case, taking into account that those comprise regulations very general in nature and that there are analogous provisions in domestic law of Romania with full applicability. These regulations are to be found in Romanian regulations and they are applied in a constant and consistent manner by courts of Romania. Therefore, interpretation and application of mentioned rules - Articles 41 and 47 of the Charter of Fundamental Rights - can be adequately performed by courts of Romania, so that there is no room for reasonable doubt liable to support the relevance of a preliminary question on these provisions.

³³ Tribunal Argeș, civil chamber, file No 1677/109/2010, civil judgment No 222/2011 of 23 June 2011, not reported.

³⁴ High Court of Cassation and Justice, file No 2712/3/2006, resolution of 24 February 2009, not reported.

In order to substantiate that the proposed preliminary questions are necessary and useful, the appellant on points of law relied, as a public policy mean (as she have not relied by her appeal on points of law on that mean within required time-limit), on breaching the principle of availability and on the fact that the court did not acknowledge the settlement of dispute, and also on Articles 304(5), 129 and 270-273 of the Code of civil procedure, trying therefore to link this new ground for an appeal on points of law to Community law in order to enhance chances of success concerning this mean understood as one of public policy and granted by the court responsible with appeal on points of law. Yet, this new mean [of appeal on points of law] will be subject to contradictory debates during the appeal on points of law, according to domestic regulations that are very clear on that point and, according to settled case-law, that will lead to deprive the proposed preliminary questions of their relevance and necessity for solving the substance of the appeal on points of law."

The second point to reject that request concerned the scope *ratione temporis* of the Charter, taking into account the relevant date of proceedings: "The Charter of Fundamental Rights of the European Union was proclaimed by Parliament, Council of the European Union and Commission during the European Council of Nice on 7-11 December 2000. According to Article 51 of the Charter, it shall apply to institutions and bodies of the European Union, with due respect to principle of subsidiarity, and also to Member States, only when they will implement Union law.

Concerning the legal nature of the Charter of Fundamental Rights of the EU, regard should be paid to the fact that it does not yet have binding legal nature and is not part of the sources of Community law. It appeared as a proclamation of institutions of the Union and the decision concerning its legal status has been postponed a certain period and it was finally included in the Treaty establishing a Constitution for Europe, therefore it would obtain binding legal nature once this Treaty will enter into force. Taking into account that this Treaty, which comprises the Charter of Fundamental Rights, did not come into force, the Charter does not have currently binding legal nature and is not part of the sources of Community law. Therefore, in the instant case, the requirement imposed by Article 234 EC and mentioned by the ECJ in Case 6/64 *Costa v ENEL*, according to which national courts may ask the ECJ to interpret Community law is not fulfilled."

Certain brief comments are needed here. As already stated, the main issue was the scope *ratione temporis* of the Charter, and the reasoning of the court was grounded, taking into account the appeal on points of law was pending in court at the beginning of 2009 and the Charter (along with the Treaty of Lisbon) entered into force on 1 December 2009. Interestingly, the resolution of the court mentioned the former Constitutional Treaty, which was already dropped at that time (February 2009). Yet, during that period, the ratification at what now becomes the Treaty of Lisbon (signed in Lisbon on 13 December 2007) had been taking place.

On the other hand, a second issue raised by this resolution concerns its substance – i.e. the scope *ratione materiae* of the Charter. Even if the High Court referred to Article 51 of the Charter, it did not draw any precise consequences thereof. The court was of course right when it held that proposed preliminary questions did not have any relevance and were not necessary to solve the main proceedings. The court did not substantiate the potential inapplicability of Articles 41 and 47 of the Charter. Apparently, Article 41 was not applicable, as it concerns institutions, bodies, offices and agencies of the Union, and not States (as such); the provision was therefore immaterial for the instant case. The case is somewhat more complex regarding Article 47 of the Charter. The High Court merged the two provisions of the Charter, holding that “[...] Articles 41 and 47 [...] do not have a direct bearing on the case, taking into account that these comprise regulations very general in nature and that are analogous provisions with full applicability within domestic law of Romania. These regulations are to be found in Romanian regulations and are applied in a constant and coherent manner by courts of Romania. Therefore, interpretation and application of mentioned rules [...] can be adequately performed by courts of Romania, so that there is no room for reasonable doubt liable to support the relevance of a preliminary question on these provisions.” From a methodological point of view, this remark is not entirely accurate, as according to *CILFIT* criteria, the point of reference should be EU law and not domestic law (and more exactly the reference should acknowledge the standard provided in Union law). Yet, the statement that Articles 41 and 47 “comprise regulations very general in nature and that are analogous provisions with full applicability within domestic law of Romania.” remains intriguing, in that it is liable to substantiate a rejection of a request of a party to make a preliminary reference.³⁵

Finally, the court should have to substantiate at length why these two provisions (and more precisely Article 47) did not have any “direct” link to the instant case, by relying explicitly on the general rule included in Article 51 of the Charter. Perhaps, an assessment of the fact that circumstances of the case did not have any link to Union law would have to be performed. It is debatable whether the mentioned provisions of the Code of civil procedure would amount to a measure of implementation of EU law. And a final question: where there any rights conferred to the appellant on points of law that were derived from the EU legal order?

³⁵ Similar statements are to be found in other judgments delivered by courts of Romania. See, for example, Court of Appeal București, second chamber for criminal cases, file No 7998/2/2011, criminal sentence No 501/F/02.11.2011, final by criminal decision no 686/12.03.2012 of the High Court of Cassation and Justice, criminal chamber, both not reported; these judgments are discussed in Mihai Șandru, Mihai Banu, Dragoș Călin, *Procedura trimiterii preliminare. Principii de drept al Uniunii Europene și experiențe ale sistemului român de drept*, above, chapter 2.

iii) In an appeal on points of law concerning a civil fine (and more precisely whether an enforceable title amounts to a positive obligation or an obligation to transfer), *Tribunalul Vaslui* rejected a request of the appellant for an order for reference to the Court of Justice³⁶.

The appellant claimed that the court of first instance (*judecătorie*) breached Article 6(1) ECHR “by not enforcing or deferred enforcing of a judgment which amounts to a breach of the right to a fair trial.” The request lodged by the appellant for an order for reference concerned Article 6(1) ECHR, Articles 47(2) and 20 of the Charter of Fundamental Rights.

The court rejected the request, finding that an answer of the Court of Justice was not “relevant and useful in order to solve the main action” and also that “the questions put forward [were] irrelevant to solve the case.” The court assessed both the Charter and the ECHR system. Firstly, the court held that “[t]he Charter [...] is binding starting with December 2007 only on Community institutions, but not on Member States³⁷. It belongs to Community law of the EU (sic!), and the European citizens enjoy a double system of protection of fundamental rights: the ECHR and the Charter [...].

The questions put forward by the appellant concerning interpretation of Articles 47 and 20 of the Charter do not bear any relevance compared to the subject-matter of the application.”

Secondly, “[c]oncerning interpretation of Article 6 ECHR, the court finds that this Convention is not part of Community law.”

Thirdly, the court held also that: “[t]he Charter [...] is part of the new Treaty of Lisbon, both concerning acts and legislation of the European Union and of the Member States of the European Union respectively.”

Finally, the court maintained that “provisions of the ECHR may not be subject to questions in the framework of preliminary reference procedure provided in [Article 267 TFEU].

Yet, assessing the questions proposed by the appellant concerning interpretation of provisions of the Convention, the court finds that these are inadmissible [...].”

There is no doubt that there are certain similarities between the present case and the one in which the above discussed resolution of 24 February 2009 of the High Court of Cassation and Justice was delivered: both cases concerned the fundamental issue of the scope of provisions of the Charter regarding proceedings

³⁶ Tribunal Vaslui, civil chamber, file No 1181/244/2008, civil decision No 1559/R, 3 December 2008, not reported.

³⁷ There is a double error here. On one hand, the Charter was proclaimed in December 2007 and entered into force along with the Treaty of Lisbon (1 December 2009). Before this latter date, the Charter did not have a binding legal nature. On the other hand, according to Article 51(1) of the Charter, it is binding on the Member States when they are implementing Union law. The court acknowledged nonetheless below that the Charter concerned also the Member States.

involving regulations of civil procedure without a link to EU law. The reasoning of the tribunal was short, and certain references mentioned above (starting with the scope *ratione temporis* of the Charter and with discussing Article 51(1) thereof a.s.o.) were absent. Nonetheless, the solution reached was of course well-grounded. Finally, concerning again Article 51(1) of the Charter, regard should be taken that according to the Court of Justice the limits related to this provision were not altered once the Treaty of Lisbon entered into force, when, according to Article 6(1) TEU, the Charter gained the same legal status as the Treaties³⁸.

iv) Similar judgments, this time in the field of pension adjustments, were rendered by resolutions of 26 October 2011³⁹ and 18 January 2012⁴⁰ respectively of the Court of Appeal București, but also by civil judgment No 1674 of 13 October 2011 of the Tribunal Olt⁴¹, all rejecting request for an order for reference.

These concerned „interpretation of Articles 2, 6 and 10 TEU, Article 128(2) of the Treaty establishing the European Community (sic!) and Decision 2008/618/EC on guidelines for the employment policies of the Member States:

1. Must a national court against whose decisions there is no judicial remedy under national law bring the matter before the ECJ when actions are brought before it that raise grounds of European Union that are interpreted differently in similar cases, meaning in the instant case irrevocable decisions with contrary solutions?

2. According to Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms, is the Romanian State under a duty to inform the Secretary General of the Council of Europe, when it restricted the exercise of two fundamental rights, taking into account that restrictions are a consequence of the Memorandum of Understanding between the European Community and Romania and of the Loan Agreement between the European Community and Romania, concluded in 2009? Does the Romanian State comply with the duty to inform the Council of Europe on occurrence of exceptional circumstances by the fact that it is part of the Memorandum of Understanding between the European Community and Romania and of the Loan Agreement between the European Community and Romania, concluded in 2009? Are political statements exceptional circumstances in case these are not to be found in the Memorandum of Understanding between the European Community and Romania or in the Loan Agreement between the European Community and Romania?

³⁸ Order of 1 March 2011, Case C-457/09 *Chartry* [2011] ECR I-819.

³⁹ Court of Appeal București, seventh chamber for civil, labour and social security disputes, file No 46937/3/2010, not reported.

⁴⁰ Court of Appeal București, seventh chamber for civil, labour and social security disputes, file No 42780/3/2011, not reported.

⁴¹ Tribunal Olt, first chamber for civil cases, file No 3513/104/2011, not reported.

3. Must provisions of Articles 6(2) TEU, 216(2) TFEU and of the Protocol on Article 6(2) TEU concerning the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms be interpreted that a mandatory measure requiring suspension of pension rights, like that provided by Articles 17-26 of Law No 329/2009, amounts to a discriminatory measure having equivalent effect to nationalization, going thus against Articles 15, 17 and 21 of the Charter of Fundamental Rights of the European Union?

4. If the answer to previous question is negative, then must be admitted that the measure of suspending pension payment is non-discriminatory, justified objectively and reasonably by a legitimate objective, is proportional to objective pursued and does not contradict in any way the declarations annexed to the Final Act concerning the Charter of Fundamental Rights of the European Union and to the Declaration concerning Article 6(2) of the Treaty on European Union and the ECHR case-law, even if it is liable to reach a result contrary to the ECHR case-law?

5. If the answer to third question is negative and the answer to fourth question is affirmative, must be admitted that the fundamental rights and freedoms are concurring? In the instant case, the freedom to choose an occupation and employment is subject to yielding the right of ownership over the pension?"

The Court of Appeal Bucharest held that, „taking into account the mentioned regulations, quoted also by this Court, it should be noted that extensive arguments that were mentioned in application by appellant do not belong strictly to interpretation of European Union law, but aim to obtain an assessment from the European judge on national legislation, issue that is beyond the jurisdiction of the ECJ. Yet, Law No 329/2009 was not enacted in order to implement any Community (sic!) rule liable to pose a duty on the Romanian legislator to comply with primary or secondary law of the European Union, and this conclusion concerns also the arguments of the appellant concerning the compliance with the Charter of Fundamental Rights of the European Union (Article 51 of the Charter). As regards the Council Decision (2008/618/EC) on guidelines for the employment policies of the Member States, the appellant has not pointed clearly what provisions thereof should be interpreted.”⁴²

Therefore, in the reasoning of the court three distinct directions are to be found: even if the first statement is somehow a „conventional” one, meaning an acknowledgment of a division of competences between courts in preliminary ruling procedure, it fails to describe exactly the relationship between EU law and the ECHR. The second argument underlined correctly the lack of a link of the relevant law to EU law (the law „was not enacted in order to implement any Community rule”). The last argument emphasized the vague nature of the position expressed by the party to proceedings which requested an order for reference. Yet, this is an illustration of the principle of availability.

⁴² See also the Court of Appeal C.A. Bacău, first chamber for civil cases, resolution of 25 April 2012, file No 980/110/2011, not reported.

v) By resolution of 20 April 2012⁴³, Tribunal Timiș rejected a request for a reference to the Court of Justice in order that the latter to assess the potential applicability of „provisions of Article 15(3) of the European Convention on Human Rights, under which the Government of Romania is under a duty to notify the General Secretary of the Council of Europe on the intention to enact the abusive and discriminatory measure of reductions in remuneration and also to state the time-limit provided for its applicability.” Here, the same issue discussed above is to be found.

The court judged that a reference to the Court was not necessary, because the latter „is not able to provide, in the framework of a request for a preliminary decision, guidance concerning needed interpretation in order the national court to establish whether the national legislation is in compliance or not with fundamental rights, whose observance is ensured by the Court, including those resulted from the European Convention on Human Rights (Judgment of 29 May 1997, Case C-299/95, *Kremzow v Austria*, Order of the Court of 3 October 2008, Case C-287/08, *Crocefissa Savia and Others*).” Yet, such reasoning lacks precision in that it does not state the relationship between domestic law and EU law.

vi) By resolution of 30 January 2012⁴⁴, the High Court of Cassation and Justice rejected a request for making an order for reference to the Court of Justice; the proposed question was the following: “Does the Criminal Law Convention on Corruption, adopted at Strasbourg on 27 January 1999, include in its personal scope liable for trade in influence the institution/person of a lawyer?” In arguing this request, the premise was supported by the fact that the essence of charges brought against the appellant-defendant T.S. is confined to the concept of corruption offence, and the fundamental element for qualification of his actions under the Criminal Code is based on his capacity of lawyer. In relation to the object of the Criminal Law Convention on Corruption, adopted at Strasbourg on 27 January 1999, ratified by Romania by Law No 27/2002, more precisely the active bribery in the private sector, there is a manifest inconsistency between the object of Convention, meaning the duty of the Contracting States to establish legal mechanisms able to fight corruption in public and private sectors, and the object of Law No 78/2000 on preventing, finding and criminalizing corruption activities, which went beyond Article 20(2) of the Constitution of Romanian in terms of criminalizing.

Taking into account the particular circumstances of the case, it was held that at the relevant time of the first instance proceedings, 31 January 2011, the provisions of Article 39(8) of Law No 51/1995 for the organization and practice of the lawyer’s

⁴³ Tribunal Timiș, chamber for administrative and tax disputes, file No 532/59/2011, not reported.

⁴⁴ High Court of Cassation and Justice, criminal chamber, file No 1585/2/2010, not reported; available at <http://www.scj.ro/SP%20rezumate%202012/SP%20inch%20r%2030%20ian%202012.htm>.

profession, republished, regulated a case for exemption the criminal responsibility, fully applicable also for the appellant-defendant, which is provided in Article 37(6¹) of the mentioned Act (prior to republication): “The lawyer shall not be held criminally liable for recommendations and professional opinions that he communicate to his client and for legal acts proposed to his client, that are followed by acts provided in criminal law, committed by the client. The present paragraph shall not be applicable in case of offences provided by the Criminal Code in Articles 155-173, 174-192, 197-204, 205-206, 236-244, 273-277, 279-281, 303-307, 308-313, 314-316, 317-330, 331-347, 348-352, 353-355, 356-361.”

Later, the mentioned case for exemption the criminal responsibility was reprinted by Article 39(8) of Law No 51/1995 for the organization and practice of the lawyer’s profession, republished in *Monitorul Oficial* No 98 of 7 February 2011, and it was subsequently repealed by the Government Emergency Ordinance No 10 of 14 February 2011⁴⁵.

Assessing that the above mentioned sequence in criminal legislation that has led to excluding the case for exemption criminal responsibility was liable to insecurity concerning the possibility of holding a lawyer as criminally liable for committing the offence of trade in influence, it was though a preliminary ruling of the Court of Justice of the European Union clearing if, under the Criminal Law Convention on Corruption, the lawyer might be active subject for the offence of trade in influence was necessary.

The High Court of Cassation and Justice stated the following: “Whether, concerning the locus standi (sic!), the High Court of Cassation and Justice fulfils the requirement of a national court having jurisdiction to refer to the Court of Justice of the European Union, and also the requirement that a preliminary reference should be made in proceedings pending the national court, the requirement concerning the subject-matter of the preliminary reference in relationship with the general competence of the Community (sic!) court, regulated by Article 267 TFEU, is not fulfilled.” Then, the High Court reminded Articles 267 TFEU and 19(3)(b) TEU and held that “[t]he above mentioned regulation establishes that the subject-matter of a request for a preliminary ruling concerns exclusively interpretation or validity of European Union law, and the Court of Justice of the European Union has no jurisdiction to answer preliminary questions that fall outside the scope of Community (sic!) law.

Therefore, the Court of Justice of the European Union may be referred only for establishing the meaning of acts of the European Union, being immaterial their sources.

For this purpose, Article 288 TFEU establishes the faculty of making a request for a preliminary ruling for interpretation of European Communities/Union Treaties (the original and revised Treaties, annexes and protocols), legal acts

⁴⁵ *Monitorul Oficial* No 113 of 14 February 2011.

included in secondary law of the European Union (regulations, directives and decisions respectively, adopted by Community institutions in pursuing their conferred powers by founding Treaties, in order to attain their purpose), international agreements concluded by the European Union (international agreements concluded by the Council under Article 218 TFEU or association agreements concluded under Article 217 TFEU) and statutes of bodies established by act of Council, if these statutes provide such rules.

Also, even if it was provided in principle that the interpretation of a preliminary ruling of the Court of Justice of the European Union is not subject to a preliminary reference, in practice, there were instances where the Community court gave such rulings.

Equally, the jurisdiction of the Court of Justice of the European Union to render a preliminary ruling concerning validity of legal acts relates exclusively to legal rules adopted by legal acts of the European Union, and the Court has no jurisdiction to perform a review of legality of domestic law rules.

From that point of view, concerning the instant case, it should be noted that by a request brought at sitting of 16 January 2012, the appellant-defendant T.S. requested an order for reference to the Court of Justice of the European Union concerning interpretation of the Criminal Law Convention on Corruption, adopted in Strasbourg on 27 January 1999, regarding the issue if the lawyer is liable to be the active subject for the offence of trade in influence.

The Criminal Law Convention on Corruption, adopted in Strasbourg on 27 January 1999, ratified by Romania through Law No 27/2002, is a international legal act issued by the Council of Europe in applying the Programme of Action against Corruption adopted by the Committee of Ministers of the Council of Europe in November 1996, following the recommendations of the 19th Conference of European Ministers of Justice (La Valetta, 1994), having as parts the Member States of the Council of Europe.

This legal act is not a source of Community (sic!) law, because the Council of Europe does not take part at the formal decision-making process established by Community Treaties, its role being confined to exclusively express a political point of view. Moreover, the duty to implement the Community policy belongs to Community institutions, especially to the Council of the European Union.

As the Council of Europe is not an institution of the European Communities or of the European Union, decisions and acts issued by this institution are not adopted following the procedure provided by Community Treaties, because they are not acts of an institution of the Community.

As these legal acts do not entail legal effects of a Community legal act, the legal acts issued by the Council of Europe - in the instant case, the Criminal Law Convention on Corruption, adopted in Strasbourg on 27 January 1999, do not fall within the judicial review of the Court of Justice of the European Union and therefore they are not able to be covered by a preliminary reference concerning interpretation and validity under Article 267 TFEU.

Acknowledging therefore that the subject-matter of the preliminary reference proposed to the court does not concern a Community rule, the High Court of Cassation and Justice holds the request to make an order for reference to the Court of Justice of the European Union, put forward by the appellant-defendant T.S. is not admissible, and that finding make useless the analysis concerning relevance and conclusiveness of the preliminary question proposed for the substance of proceedings pending before the national court.

Likewise, it should be noted that even if manner the proposed question is drafted aims to obtain a preliminary clarification from the Court of Justice of the European Union, and that aims the interpretation of the Criminal Law Convention on Corruption adopted in Strasbourg on 27 January 1999 concerning the issue of lawyer's criminal liability for committing trade in influence, the real purpose of the appellant-defendant is to obtain a ruling on consistency of the national law with the above mentioned act, assessment that does not fall within the jurisdiction of the review performed by the Court of Justice."

vii) The criterion of lack of a rule of Union law likely to be implemented in domestic law is relevant also in the next judgment rendered in an appeal on points of law.

By decision No 223 of 16 February 2012⁴⁶, the Court of Appeal Bacău rejected a request for an order for reference. The three proposed preliminary questions concerned issues related to objection of illegality concerning individual administrative acts in administrative proceedings. More specific, these questions sought to establish the relationship between this remedy and the principle of legal security, "provided in Article 263 TFEU". The third question was drafted as follows: "Does the principle of legal certainty preclude national legislation when the latter is relied in order to protect human rights and liberties, as provided in the Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union?"

The Court of Appeal Bacău held that these questions "does not include any specific element under which the provisions of the national legislation mentioned by the appellant might be assessed as implementing Union law, circumstance in which a reference to the Court of Justice of the European is not admissible."

viii) *Rejection of a request for an order for reference in the framework of a European arrest warrant*

The following example is that of a case⁴⁷ having as subject-matter a request made by a court of another Member State concerning execution of a European

⁴⁶ Court of Appeal Bacău, second chamber civil, administrative and tax disputes, file No 6904/110/2010/a1, not reported.

⁴⁷ Court of Appeal Iași, chamber for criminal cases and disputes concerning children, file No 725/45/2010, sentence of 26 November 2010, not reported.

arrest warrant against an arrested person, for surrendering that person for the purpose of the investigation in that Member State for offences provided in the warrant. The court of Romania granted the request of the judicial authorities of the issuing Member State, ordering the surrender of the requested person to the latter State.

The requested person lodged an application for an order for reference, relying on Articles 19(3) TEU and 267 TFEU “read in conjunction with” Article 148(2) of the Constitution of Romania⁴⁸, request alleging breaching of his right of defence, because “the European arrest warrant is executed without the court of Romania to be able to verify whether this warrant is legal and grounded.” The presumption of legality concerning a warrant, established by Law No 302/2004, modified and supplemented by Law No 224/2006, would encroach the presumption of innocence, because the warrant is issued in absentia and the requested person “would not be able to request evidences in his defence or in order to support his means of defence.” Manifest breaches of rights provided by the Charter of Fundamental Rights of the European Union and by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms were also claimed.

In the sentence delivered, the court assessed also the request for a preliminary reference to the Court of Justice. The proposed question concerned the fact whether the requested person under the European arrest warrant enjoyed the presumption of innocence provided by Article 48 of the Charter of Fundamental Rights of the European Union. The request for a preliminary reference was rejected and the court provided the following arguments. First, the court mentioned Article 267 TFEU. Second, the main argument employed to reject the request was that “[i]n the instant case, the court considered a decision of the European Court of Justice was not needed, *taking into account especially that the sentence delivered might be challenged by an appeal on point of law*” (emphasis added).

Third, the reasoning was built upon the principle of “mutual recognition and trust”:

“Having also regard that according to Article 77(1) of Law No 302/2004, as amended, the European arrest warrant is a judicial decision by which a responsible judicial authority of a Member State of the European Union requests arresting and surrendering of a person to another Member State, for the purpose of a criminal investigation, judging and execution of a sentence.

The European arrest warrant is executed under the principle of mutual recognition and trust, according to provisions of the Council Framework Decision

⁴⁸ Apparently, this formulation is among the few of its kind (perhaps the only one so far), in mentioning Article 148 of the Constitution of Romania as legal basis for a request for an order for reference. This latter provision – Article 148(2) – reads as follows: “Following the accession [of Romania to the European Union], provisions of the founding Treaties of the European Union and other binding Community rules shall have priority over conflicting provisions of domestic legislation, under conditions provided in the Act of Accession.”

2002/584/JHA of 13 June 2002⁴⁹, Framework Decision that refers to the duty of the Member States to comply with fundamental rights and general principles of law, as provided by Article 6 TEU.

Article 90(6) of the same Law provides that the requested person may lodge an opposition against his surrender only in case of an error concerning his identity or of a ground for rejecting the execution of the European arrest warrant and in support of this opposition concluding evidence are needed.

Rules applicable to the institution of European arrest warrant rely on a fundamental principle for judicial cooperation between Member States of the European Union that made declarations concerning the application of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, namely that of the mandatory nature of execution of European arrest warrants.”

It should be noted that the court did not approach directly the issue of breaching the right of defence of the requested person, as that issue was judged as being lacked of relevance in order to solve the instant case. The court confined itself to state that under the Framework Decision the Member States are under a duty to comply “with fundamental rights and general principles of law, as provided by Article 6 TEU.”⁵⁰

4. Case C-396/11, *Radu*. The preliminary reference made by the court of Romania, the judgment of the Court of Justice and the subsequent decision of the referring court

Another court of Romania - Court of Appeal Constanța - made a reference to the Court of Justice concerning the European arrest warrant⁵¹, reference comprising six questions.

The prosecutor’s office by the Court of Appeal Constanța brought before that court the request made by judicial authorities of the Federal Republic of Germany concerning surrender of a requested person (Radu Ciprian Vasile). The application concerned the execution of certain European arrest warrants. The offences concerning the requested person were acts of aggravated robbery. On the other hand, the court held that the double criminality rule was fulfilled. The requested person did not consent to his surrender and did not renounce his entitlement to the speciality rule. The High Court of Cassation and Justice quashed the criminal sentence and referred the case back to the court of first instance in order the latter to re-examine the requests for surrender. In its order for reference (issued on 18 May 2011, and received at the Court registry on 27 July 2011), this latter court of

⁴⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, 1.

⁵⁰ Cf. also recital (12) of the Framework Decision.

⁵¹ Court of Appeal Constanța, chamber for criminal cases and children and family disputes, file No 1230/36/2009, resolution of 18 May 2011, not reported.

first instance (Court of Appeal Constanța) approached the following “issues for interpretation”:

“1. The issue of express incorporation of fundamental rights included in the Charter and the Convention into Treaties and the issue of their legal nature in relation to another legal act different from Treaties, a Framework Decision issued previously to amendment of the Treaties respectively.

2. The issue of the legal stand of judicial authority of the State executing a European arrest warrant, in the light of the principle of mutual recognition of judicial decisions between Member States of the European Union, more precisely whether the action of this authority to deprivation of liberty and forcible surrender of the requested person amounts to a direct and unmediated interference on the part of the State executing the warrant, from the point of view of enjoying fundamental rights of the Convention and the Charter.

3. When the State executing the warrant performs a direct interference with these rights, the interpretative issue concerning whether the State executing the warrant, performing an interference with these fundamental rights, is or not under a duty to satisfy the requirements of necessity in a democratic society and of proportionality in relation to the objective actually pursued, this latter requirement being linked to the principle of subsidiarity provided for by Treaties.

4. If the answer to the third issue is positive, the clarification of the exhaustive nature of cases of refuse to surrender [the requested person] and execute a European arrest warrant, based on a decision of the issuing judicial authority, consisting in provisional deprivation of liberty for the requested person, in order to carry the criminal investigation to establish the factual circumstances meant to keep or drop the charges, prior to their express formulation before a court, is necessary.

5. The consequential issue of the faculty to refuse the execution of the European arrest warrant on ground of failure to transpose fully, partially, different or deficient and also that of failure to comply with the condition of reciprocity in implementing of the Framework Decision by the issuing State.

6. The issue of conformity of domestic law for transposition of the Framework Decision, tasking into account its interpretation, in relation to incorporation of the Charter and the Convention into Treaties, taking into account this Decision and the legal rules contained in the Charter and the Convention.”

The referring court stated its position concerning these issues and contented that the answer was positive for all these questions:

“1. After the provisions of the Charter and the Convention that were expressly mentioned in the request were included in the Treaty on European Union, the legal rules comprising fundamental rights and freedoms and procedural guarantees concerning a natural person requested to be surrendered under a European arrest warrant issued by the issuing State, under a decision of provisional deprivation of liberty prior to a final decision of conviction, are provisions of primary Community

(sic!) law under which other legal rules that are not included in the Treaties and are issued by the Union bodies in application of the Treaties should be interpreted.

2. The judicial authority of the State executing a European arrest warrant which is not grounded in a judicial decision for conviction performs a direct and unmediated interference with the exercise of fundamental rights provided for by the Charter and the Convention, interference that should be subjected to requirements and guarantees provided for by the Charter and the Convention, included that of necessity of interference in a democratic society, of a specific objective and of proportionality in relation to the objective actually pursued.

3. When the interference that is requested [by the issuing State] to be performed with the exercise of fundamental rights provided for by the Charter and the Convention does not comply with the cumulative requirements for performing it, the judicial authority of the State of execution may refuse the surrender relying on that reason.

4. The duly and full transposition of the Framework Decision into the domestic law, as interpreted and applied in relation with legal rules of the Treaty under which it was issued or with rules having higher legal status, amounts to a specific requirement that may be taken into account when a judgment concerning the request for surrender is rendered, and the requirement of mutual recognition of judicial decisions is subject to duly compliance with duties derived from the membership to the European Union and the primary legal rules contained in the TEU.

5. In the light of the foregoing, the domestic legislation implementing the Framework Decision may be assessed as inadequate, because it is liable to infringe the TEU from the point of the Union membership to the Convention and also concerning the fundamental rights provided for by the Charter, by a formal application, confined to the cases expressly provided for the refuse to surrender."

The order for reference contained six preliminary questions:

"(1) Are Articles 5(1) [of the ECHR] and 6 [of the Charter], read in conjunction with Articles 48 and 52 [of the Charter], with reference also to Article 5(3) and (4) and Article 6(2) and (3) of [the ECHR], provisions of primary [European Union] law, contained in the founding Treaties?

(2) Does the action of the competent judicial authority of the State of execution of a European arrest warrant, entailing deprivation of liberty and forcible surrender, without the consent of the person in respect of whom the European arrest warrant has been issued (the person whose arrest and surrender are requested) constitute interference, on the part of the State executing the warrant, with the right to individual liberty of the person whose arrest and surrender are requested, which is authorised by European Union law, pursuant to Article 6 TEU, read in conjunction with Article 5(1) of the [ECHR], and pursuant to Article 6 of the [Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of the [ECHR]?

(3) Must the interference on the part of the State executing a European arrest warrant with the rights and guarantees laid down in Article 5(1) of the [ECHR] and in Article 6 of the [Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of the [ECHR], satisfy the requirements of necessity in a democratic society and of proportionality in relation to the objective actually pursued?

(4) Can the competent judicial authority of the State executing a European arrest warrant refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of [European Union] law, by reason of a failure to observe all the cumulative conditions under Article 5(1) of the [ECHR] and Article 6 of the [Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of the [ECHR]?

(5) Can the competent judicial authority of the State executing a European arrest warrant refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of [European Union] law, on the ground that the [Member] State issuing the European arrest warrant has failed to transpose or fully to transpose or has incorrectly transposed (in the sense that the condition of reciprocity has not been satisfied) [Framework Decision 2002/584]?

(6) Is the domestic law of Romania, a Member State of the European Union – in particular Title III of Law No 302/2004 – incompatible with Article 5(1) of the [ECHR] and Article 6 of the [Charter], read in conjunction with Articles 48 and 52 thereof, with reference also to Article 5(3) and (4) and Article 6(2) and (3) of the [ECHR], to which Article 6 TEU refers, and have the above provisions properly transposed into national law [Framework Decision 2002/584]?"

In its judgement rendered on 29 January 2013, the Court of Justice ascertained *inter alia* that it was called to interpret Framework Decision 2002/584 and certain provisions of the Charter in an actual dispute concerning the execution of several European arrest warrants issued by the German authorities for the purposes of prosecuting Mr Radu on criminal charges⁵². The Court of the Union rephrased the preliminary questions (except the fifth), finding that it had to establish whether Framework Decision 2002/584, read in the light of Articles 47 and 48 of the Charter and of Article 6 of the ECHR, must be interpreted as meaning that the executing judicial authorities could refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the issuing judicial authorities did not hear the requested person before that arrest warrant was issued⁵³.

⁵² Judgment in case C-396/11 *Radu*, above, para. 25.

⁵³ *Ibid.*, para. 31.

The Court of the Union stated that the fact that the European arrest warrant had been issued for the purposes of conducting a criminal prosecution, without the requested person having been heard by the issuing judicial authorities, did not feature among the grounds for non-execution of such a warrant as provided for by the provisions of Framework Decision 2002/584⁵⁴. Also, the observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued⁵⁵. The Court of Justice subsequently appealed to a ground of efficiency of the system brought by the European arrest warrant: “[...] an obligation for the issuing judicial authorities to hear the requested person before such a European arrest warrant is issued would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom, security and justice, in so far as such an arrest warrant must have a certain element of surprise, in particular in order to stop the person concerned from taking flight.”⁵⁶ And the answer of the Court of Justice was that under Framework Decision 2002/584 the executing judicial authorities cannot refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued⁵⁷.

By a resolution of 1 February 2013, the referring court resumed proceedings in the main action. Finally, the decision was rendered by criminal sentence No 26/P of 11 March 2013⁵⁸. In sum, the court rejected all four applications to surrender the requested person. The court recalled arguments of the Court of Justice concerning the legal status of the Framework Decision 2002/584 and its relationship with the Charter (referring more precisely to Article 1(3) of the former). Then, the court stated: “On the occasion of assessing the request to make a preliminary reference it emerged clearly that the judicial authority executing a European arrest warrant interfere directly with fundamental rights of the requested person, provided by the European Charter of Rights (sic!) and the European Convention on Human Rights (ECHR).

This premise requires that the judicial authority of the requested State should carry out its own analysis concerning the way the fundamental rights are complied with on occasion on a application to execute a European arrest warrant, and it is in a position to refuse, arguably in exceptional cases, to surrender the requested

⁵⁴ *Ibid.*, para. 38.

⁵⁵ *Ibid.*, para. 39.

⁵⁶ *Ibid.*, para. 40.

⁵⁷ *Ibid.*, para. 43.

⁵⁸ Not reported.

person and to execute the European arrest warrant for other reasons that those exhaustively listed in Framework Decision and in domestic rule transposing this Decision, when the reasoning rests on protecting fundamental rights and limiting the interference with their exercise, save where it [the interference] it is provided by law, is necessary in a democratic society and is proportional in relation to the objective pursued.

In the instant case, the Court of Appeal Constanța judges that, taking into account the specific circumstances of the case, the refuse to surrender under the four European arrest warrants is substantiated on two grounds:

Regarding the European arrest warrant issued by the prosecutor's office in Bielefeld, taking into account the circumstance that, by applying the principle of personality of criminal law, the Romanian judicial authorities performed their own investigation and initiated proceedings before the court that rendered a final decision convicting the defendant to three years in prison, in case bearing relevance the principle "*non bis in idem*", and therefore the Romanian requested national may not be surrendered for a criminal investigation in the State requested concerning the same fact that were subjected to proceedings in the Romanian State.

Concerning the refusal to surrender for the other three European arrest warrants, the court finds that in the instant case there is not interference with the rights to personal freedom and family life of the requested person, R.C.V., convicted by final decision in Romania, because, in this case, the interference would be disproportionate to objective pursued. Specifically, the Romanian court finds that the objective that could be pursued in executing the European arrest warrant would rest in assessing of the evidence concerning the requested person during the criminal investigation in order to institute proceeding for criminal responsibility, according to domestic German law, bringing the matter to court in relation to specific indictments.

The application for surrender do not substantiate specifically whether the surrender of requested person supports to supplement the evidences by the German criminal investigation body or what is the reason those [applications] were made after a long period since the offences occurred, and also what is the reason why during proceedings carried in Romania in order to execute the European arrest warrant evidences likely to demand the presence of the defendant were not assessed, for example by lodging to the Romanian judicial bodies a request for judicial assistance or direct requests.

From the wording of requests to surrender the specific need of the requested person and the way that presence would help to solve proceedings by final decision of German judicial authorities are not apparent.

Moreover, as it comes out from the notes issued by the requesting judicial authorities, those have previously expressed their opinion meaning they were contemplating the option of yielding the application to surrender.

More specifically, it is acknowledged that the facts concerned by the indictment were committed on 10 August 2011, 19 November 1999, 24 July 2001 and 21 June 2001 respectively, and in the instant case 12 year have passed from the date the last acts were committed and therefore the disproportion between the objective pursued by judicial authorities of the requested State and the interference with the exercise of fundamental rights, [the latter – the interference being] liable to be performed by the Romanian court in its capacity of judicial authority for execution the European arrest warrants, becomes manifest.

Both the time lapsed and the circumstance that the defendant is already serving a conviction for committing one of the alleged offences in a prison located near his family, with whom he has closed relations, lead to the conclusion that the objective immediately pursued, namely that of engaging the criminal responsibility of the requested person, could be better achieved by carrying criminal proceedings in the country of which he is a national and in where he reside, these circumstances being supported also by the fact that proceedings were likely to take place in a shorter time-limit in front of Romanian courts, under the principle of personality of criminal law, ensuring therefore both the requirement of defence and of preserving the public policy and in the same time carrying proceedings within a legal order familiar to the defendant, where he is able to effectively defend and preserving also his family relations.”

5. Conclusion. A provisional assessment

From a historical point of view, a first major wrong reference to EU law where it was obviously inapplicable was made by the Constitutional Court itself. In Decision No 568/2006⁵⁹, the Constitutional Court took note of the fact that one plea consisted in disregarding the Recommendation (2002)2 on access to official documents, adopted by the Committee of Ministers of the Council of Europe, and also in disregarding provisions of the Chapter 2 of the Charter of Fundamental Rights of the European Union⁶⁰ (hereinafter “the Charter”) concerning the freedom of information, and that plea was ungrounded. “In order to apply provisions of Article 148 of the Constitution, the process of accession of Romania to the European Union has to be completed, and therefore at the material time the present decision is rendered a potential disagreement between the cited [Romanian] legislation and provisions of relevant international documents cannot be reviewed.”

Later, in Decision No 588/2007⁶¹, the Constitutional Court held that “neither criticism concerning Recommendation No (94)12 of the Committee of Ministers of the Council of Europe, adopted on 13 October 1994 at its 516th meeting of State Secretaries⁶² is grounded. Yet, [...] this type of Community acts (sic!) are legal measures that allow European Union institutions to inform Member States on their

⁵⁹ Monitorul Oficial No 890 of 1 November 2006.

⁶⁰ In fact, at that time, in the version included in the former “Constitutional Treaty”, Title II – Article II-71, now Title II – Article 11.

⁶¹ Monitorul Oficial No 581 of 23 August 2007.

⁶² Recommendation (94) 12 concerns the independence, efficiency and role of judges.

points of view, without the latter being under a duty to follow the solution proposed by the Community administration. Recommendations, unlike opinions, may be rendered by own motion, representing only the position of the issuing institution, their real nature being moral or political one.”

Unfortunately, such confusions between acts of Council of Europe and of European Union were meant to continue, so one might say that recent preliminary references concerning right to compensation for former political prisoners and reduction in remuneration respectively from the point of view of scope of the Charter of Fundamental Rights of the European Union continue the said chain of errors in interpreting and applying EU law.

One extreme example is a resolution issued by the Court of Appeal, Pitești, in which that court labelled five times the European Court of Human Rights as the “European Constitutional Court of Human Rights” (sic!)⁶³.

An even more recent judgment - judgment No 9333 of 13 June 2012⁶⁴, by which the court rejected a request for a preliminary reference to the European Court of Justice contains a confusion between EU law and ECHR system. The court was asked to grant a request for a preliminary reference containing two questions in order to assess the compatibility of provisions of Government Emergency Ordinance No 119/2007⁶⁵ with Directive 2000/35/EC⁶⁶. That court concluded that “there [were] not any uncertainties in transposing Directive 2000/35/EC [...], so that a request to the European Court [was] of no use; secondly, the court contemplate[d] opportunity criteria, assessing that, according to case-law of the ECJ, a dispute of such a value (sic!) [did] not prompt a reference.” The apparent *de minimis* criterion is reminiscent of the ECHR system, and more precisely of the Protocol No 14 to the Convention⁶⁷, by which a new admissibility criterion was put in place - that of a lack of a significant disadvantage.

An a final word: in the preliminary ruling procedure, the national court plays (or at least has to play) the crucial role, by establishing the need to refer to the European Court of Justice, the relevance of the questions sent, the usefulness of Court’s answer in order to solve the issues raised in the main action.

⁶³ Court of Appeal, Pitești, chamber for civil, labour, social security and family disputes, resolution of 20 June 2011, file No 1594/109/2010, not reported.

⁶⁴ Court of the Second District, Bucharest, civil chamber, file No 783/300/2012, not reported.

⁶⁵ Government Emergency Ordinance No 119 of 24 October 2007 concerning measures to combat late payment in commercial transactions, Monitorul Oficial No 738 of 31 October 2007 (currently repealed).

⁶⁶ Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, p. 35.

⁶⁷ Adopted on 13 May 2004, into force since 1 June 2010. Romania ratified it by Law No 39/2005, Monitorul Oficial No 238 of 22 March 2005. The decision *Adrian Mihai Ionescu v. Romania* of 1 June 2010 is the first example in which the European Court of Human Rights assessed this new admissibility criterion, in case the subject-matter of the case having a value of 90 EUR. See among later decisions rendered by the ECtHR: *Dorina Margareta Gaftoniuc v. Romania*, decision of inadmissibility of 22 February 2011; *Manuela Ștefănescu v. Romania*, decision of inadmissibility of 12 April 2011.