CONSIDERATIONS REGARDING THE RELATIONSHIP BETWEEN THE RIGHT OF THE EUROPEAN UNION AND THE ROMANIAN JURIDICAL ORDER

DOI: 10.47743/rdc-2016-1-0002

Dr. Marian ENACHE

Abstract

The European right represents the set of juridical norms that may be enforced in the European juridical order and, according to an interpretation of the Court of Justice within the European Communities' Union, the current Court of Justice of the European Union, it constitutes "an own juridical order that is integrated into the juridical system of the member states"[1]. As for the content of the European right, it has the character of a juridical order, namely it represents an organised and structured series of juridical norms having its own sources, endowed with bodies and procedures able to issue them, to interpret them as well as to find and sanction the possible violations[2].

Making reference to the internal juridical order of the member states, the European right is an autonomous and original juridical order that involves the following aspects: the autonomy of the European right's sources, the autonomy of the European right's notions that do not depend on the qualifications acknowledged by the national right, the autonomy of the European norms that cannot be deprived of efficacy (of the useful effect[3]) by the internal right rules of the member states[4].

Several criteria to classify the European juridical norms have been expressed in the doctrine whereas the juridical force criterion had the largest support. Thus, according to its sources, the European right can be divided into the original or primary right[5] and the derived or secondary right[6].

Keywords: *EU right sources; Constitution; application of EU law; juridical order*

[1] Case 6/64, Court's decision dated 15 July 1964, *Costa/ENEL*, in *Recueil de jurisprudence* (hereinafter called "Rec.") 1964, p. 585.
[2] D. Vătman, *Drept comunitar european (The European Communitarian Right)*, Universul Juridic Publishing House, Bucharest, 2009, p. 98.
[3] Cf. "*effet utile*" (French), "*effectiveness*" (English).
[4] Octavian Manolache, *Tratat de drept comunitar (A Treaty of the Communitarian Right)*, C.H. Beck Publishing House, Bucharest, 2006, p. 67.
[5] Created by the institutive treaties and by the modifying ones.
[6] Resulted from the activity of the European institutions while enforcing the European treaties.

1. The derived sources of the European right

Great emphasis was placed in the specialty literature upon the definition and classification of the European right sources. Therefore, the latter are defined as specific modalities by which the conduct rules considered necessary in the European structures become lawful norms by the willing agreement of the member states[7]. The Court of Justice within the European Union established a logical order for the system of the European right sources, according to the origin or to the juridical base that allowed their adoption and the relationships between them.

Thus, we can see the following classification:

- the *primary sources* of the European right represented by the institutive treaties[8] and the modifying ones as well as the adhesion acts related to the expansion of the European Communities/European Union;

- the *derived* or *secondary sources* represented by regulations, directives, decisions, recommendations and approvals;

- the *complementary sources* represented by the lawful norms that come from the external commitments of the European Communities (agreements with third states or international organisations as well as certain treaties concluded by member states with third states), internal order regulations issued by European institutions;

- unwritten sources (the lawful general principles, the jurisprudence of the Court of Justice within the European Union).

We shall pay attention, in the following lines, to the derived sources of the European right as we consider them to be relevant for the present study having in view that they pose the problem of transposition (in the case of directives) or execution/performance (for regulations and decisions), in the national right of the member states within the European Union.

The group of the secondary sources[9], that makes the subject of the derived European right, is made up of all the normative acts issued by the European institutions

---

[7] D. Mazilu, *Integrare europeană (The European Integration)*, Lumina Lex Publishing House, Bucharest, 2006, p. 69.

[8] These are the three treaties that instituted the European Communities: The Institutive Treaty of the European Communities of the Coal and Steel ("TECCS"), also known under the name "Treaty of Paris" signed on the date 18 April 1951, that entered into force on the date 23 July 1952 and was out of force 50 years later. The Instituting Treaty of the European Economic Community, subsequently Instituting Treaty of the European Community (TEC) and Instituting Treaty of the European Community of the Atomic Energy ("ECAE" or "Euroatom") known under the name "Treaties of Rome", both of them were signed on the date 25 March 1957, entered into force since 1 January 1958. At present, after the Treaty of Lisbon entered into force (1 December 2009), the treaties of the European Union are Treaty regarding the European Union ("TEU"), Treaty regarding the Functioning of the European Union ("TFEU") as well as Euratom Treaty.

[9] W. Cairns considers that the name of secondary legislation is wrong because very often "form and substance are given to certain communitarian policies" in such kinds of acts. It is the reason why he uses the term of derived legislation. W. Cairns, *Introducere în legislația Uniunii Europene (Introduction into the Legislation of the European Union)*, Universal Dalsi Publishing House, 2001, p. 79.

in the virtue of the competences that were conferred to them and in the enforcement of the provisions included in the treaties. The specific of the derived sources consists in the following:

- they are issued by European institutions in the virtue of the competences they have;

- their mission consists in the implementation of the institutive treaties and, in this way, of the involved objectives;

- their hierarchical subordination position to the treaties they enforce;

This category of the European right sources is made up of all the unilateral acts of the European institutions whereas the nomenclature and the legal definitions of the different categories of European acts are included in the three institutive treaties. Thus, at Article 189 EEC [subsequently Article 249 TEC], Article 161 TECAE and Article 14 TECCS contain similar provisions related to the main categories of acts of the European institutions whereas the mentioned articles also include a systematic presentation of the juridical effects specific to each category of acts. Also, Article 288 within the Treaty regarding the Functioning of the European Union[10] (hereinafter called "TFEU") shows that "in order to exert the Union's competences, the institutions adopt regulations, directives, decisions, recommendations and approvals".

The regulations. Pursuant to Article 288 TFEU, "The regulations have general applicability. They are compulsory in all their elements and they are enforced directly in each membre state". Hence it results that the regulations have the following characteristics:

- general applicability (they contain general and impersonal provisions addressing an abstract category of persons, being a normative act by definition);

- a compulsory character in all their provisions, not being able to be enforced in an incomplete or selective way. The Court of Justice within the European Union considered that a state can neither oppose to the enforcement of the regulations nor invoke a partial or optional enforcement for having made objections at its issue or because in the internal juridical order there are normative acts that contain contrary provisions[11]. By this specific, the regulations can be distinguished especially from recommendations and approvals that do not have a compulsory character but also from directives that oblige only in terms of the results which must be achieved.

- direct applicability in all the member states (it addresses directly to the internal right subjects whereas the member states are not able to adopt national measures that could modify the enforcement field of the Union's act or to add its stipulations except for the case where the regulations themselves stipulate that). Therefore, the regulations produce

[10] The enhanced version was published in the Official Monitor of the European Union no. 326C dated 26 October 2012.

[11] Case 18/72, Decision of the Court of Justice dated 30 November 1972, *Granaria/Produktschap voor Veevoeder*, in Rec. 1972, p. 1163, quoted by F. Cotea in *Drept comunitar european (The European Communitarian Right)*, Wolters Kluwer Publishing House, Bucharest, 2009, p. 441.

juridical effects directly in the juridical order of the member states, without needing acts of confirmation, interpretation or enforcement from national institutions[12].

The regulations acquire direct applicability automatically by being published in the Official Journal of the European Union, entering into force on the scheduled date or after 20 days since the publication, in cases where there is no express indication of such a date (pursuant to Article 297 para. (1), the third, TFEU). The Court of Justice within the European Union sanctioned several times in its jurisprudence the practice of certain states of ratifying by internal juridical acts the enforcement of the regulations on the national territory or the practice of reproducing its content in such acts. The instance mentions that such a procedure leads to the removal of the European right[13].

The directive. Similar to the regulations, the directive has a compulsory force for the member states but in terms of the result that has to be achieved, it leaves the national authorities the competence to decide upon the shape and the utilized means for this purpose. Within the ordinary legislative procedure (before the Treaty of Lisbon – the "co-decision" procedure), the Council of the European Union and the European Parliament adopt directives at the proposal of the European Committee.

The definition given by Article 288 TFEU ("The directive is compulsory for each membre state in relation to the result that has to be obtained, leaving to the national authorities the competence related to the form and means") shows that the directive has the following characteristics:

- general applicability when it contains provisions with a general content that are addressed to all the member states. Such a character cannot be attributed to the directive that contains individual measures for one or several nominated states[14];

- a compulsory force that can be noticed under a triple aspect, and namely: compelling the member states only about the result that has to be achieved whereas they are granted the liberty to choose the forms and the meanings by which the result has to be obtained; compelling the member states to take all the necessary measures for the final step; compelling the enforcement of the directive for all the institutions of the member states as well as for their trial instances[15];

- the possibility to create rights and to impose obligations directly for the member states only[16] (the so-called "vertical direct effect"), whereas for the private ones are acknowledged only the rights to invoke directly the benefit of the directive before the

---

[12] O. Manolache, *Drept comunitar (The Communitarian Right)*, fourth edition, All Beck Publishing House, Bucharest, 2003, p. 164.

[13] Case 74/69, Court's Decision dated 18 June 1970, *Hauptzollamt Bremen Feihafen/Krohn*, in Rec. 1970, p. 451; case 14/73, Court's Decision dated 10 October 1973, *Fretelli Variola Spa/Ministrul Finanțelor (Ministry of Finances)*, in Rec. 1973, p. 981; case 39/72, Court's Decision dated 7 February 1973, *Committee/Italy*, in Rec. 1973, p. 101.

[14] C. Leicu, *Drept comunitar (The Communitarian Right)*, Lumina Lex Publishing House, Bucharest, 1998, p. 38.

[15] F. Cotea, *cited paper*, p. 443.

[16] O. Manolache, *Drept comunitar (The Communitarian Right)*, quoted *supra*, p. 167; case 152/84, Court's Decision dated 26 February 1986, *Marshall/Southampton*, in Rec. 1986, p. 723.

national instances ("the direct effect"), when the member states did not take the necessary measures in order to obtain the expected results and these ones were brought prejudice in their rights whereas the prejudice is in direct connection with the failure to enforce the directive. Nevertheless, the private ones cannot invoke against other particular ones the failure to enforce the directives by the states to which they are addressed ("the horizontal direct effect")[17];

- the lack of the direct applicability whereas the addressee membre state has the obligation to enforce the directive by adopting the necessary legislation or by modifying it as it was required by the directive. In certain cases, the Court of Justice within the European Union admitted that a directive may produce direct effects, being motivated by the fact that its provisions are clear enough and accurate[18].

The state that did not take the adequate measures for the enforcement of the directive, meaning that it did not adopt or modify the national legislation accordingly or it did not enforce the directive fully or in the expected period of time, cannot invoke this aspect as a justification of the failure to enforce the directive[19] (in other words, it cannot be grounded on the own fault). The national trial instance notified by a person about the violation of their rights as a consequence of the failure to enforce a directive or of its faulty transposition into the internal right shall have to take this request into consideration and consequently it shall not be able to enforce the provisions of the internal right which are not consistent with the ones in the directive. In parallel, the plaintiff shall be able to ask for damage in order to repair the mentioned prejudice. Such a solution is imposed as the member states have a double obligation: to obtain a result and to take all the necessary measures for the enforcement of the directive[20].

The decision. The decisions do not contain general rules that are valid *erga omnes*. Pursuant to Article 288 TFEU, "the decision is compulsory in all its elements. In case the addressees are indicated, the decision is compulsory only for these ones". Contrary to the directive, the decision is compulsory not only about the result that has to be obtained as it is able to foresee even the means with which the imposed result can be obtained. As a consequence of their compulsory character, the decisions create rights and obligations for the persons to whom they are addressed; therefore they can be invoked directly in front of the national instances who must consider them as elements of the European right. The decisions may be issued by the Parliament together with the Council and the Committee. The decision has the following characteristic aspects:

- it is an individual act that addresses a determined subject; from this point of view, it can be distinguished especially from the regulations that has a general character, being aimed at undetermined abstract subjects[21];

[17] Case 41/74, Court's Decision dated 4 December 1974, case *Van Duyn/Home Office*, in Rec. 1974, p. 1337.
[18] Case 8/81, Court's Decision dated 19 January 1982, *Becker/Finanzamt Münster Innenstadt*, in Rec. 1982, p. 53.
[19] Case 91/92, Decision – the Court of Justice within the European Communities dated 14 July 1994, in the case *Faccini Dori v. Recreb*, in Rec. 1994, p. I-3325.
[20] O. Manolache, *Drept comunitar (The Communitarian Right)*, quoted *supra*, p. 169.
[21] L.A. Ghica, *Enciclopedia Uniunii Europene (The Encyclopedia of the European Union)*, Meronia Publishing House, Buchaest, 2005, p. 115.

- it has a compulsory force about the addressee subject under the aspect of all its elements, a characteristic that makes it resemble the regulations and makes it different from the directive[22];

- the addressees of the decision may be other European institutions than the ones mentioned as the issuers, as well as the membre states or the private right persons;

- it produces direct effects, it automatically generates rights and obligations for the addresses but it does not leave them the possibility to appreciate its enforcement, either to confirm it or to ratify[23].

The approval and the recommendation. The existence of the approvals and recommendations is regulated at Article 288 para. 5 TFEU that stipulates: "the recommendations and the approvals are not compulsory". The doctrine made the distinction between approvals and recommendations, considering that the former are acts by which a European institution expresses its point of view about a determined problem and the others represent acts by means of which indirectly it is aimed at bringing together the different legislative systems[24].

The recommendations are regularly used to obtain a certain action or conduct from the ones to whom they are addressed. In exchange, the approvals are used to express a point of view, having the character of simple suggestions. These approvals must not be mistaken for the approvals with a consultative character given by the European institutions or bodies within a decision procedure[25].

The approvals represent the point of view of a European institution or body about an issue which falls within the competence field by its nature and content. They are requested when another institution wants either to adopt an act with normative power or to take measures or to take action that is related to the preoccupation of another one[26].

As for the recommendations, their role is to suggest a common orientation when the purpose is to leave a fully decision independence to the one who is about to issue an act or to take action, making eventually use of the willing acceptance of the mission that the Union wants.

The characteristic of these acts (less the accurate approvals) that may be issued by the European institutions, by the European Parliament, by the Economic and Social Committee, by the Regions' Committee or any other European institutional structure

---

[22] F. Cotea, *cited paper*, p. 446.

[23] W. Cairns, *cited paper*, p. 82.

[24] A. Fuerea, *Drept comunitar european (The European Communitarian Right), Partea generală (General Part)*, All Beck Publishing House, Bucharest, 2003, pp. 127-128; O. Manolache, *Drept comunitar (The Communitarian Right)*, quoted *supra*, pp. 179-180; T. Ştefan, *Introducere în dreptul comunitar (Introduction into the Communitarian Right)*, C.H. Beck Publishing House, Bucharest, 2006, p. 22, *apud* F. Cotea, *cited paper*, p. 446.

[25] For example, the approvals issued by the European Parliament, the Economic and Social Committee or the Regions' Committee.

[26] F. Cotea, *cited paper*, p. 447.

when the legislation decides for this purpose or when these ones consider as opportune such a request, is the lack of the compulsory force[27].

As for the recommendations, the jurisprudence of the Court of Justice within the European Union established that they must be taken into consideration by the national instances, to the extent they were given in order to clarify the interpretation of national norms or in order to complete European norms that have compulsory effects, or because they offer the possibility to see the way in which the national authorities complied with a viewpoint expressed by a European institution[28].

2. The role of the member states in the enforcement of the European right in the internal juridical order

Even in Article 5 of the Institution Treaty of the European Community, that became Article 10 of the European Community, after receiving a new number by the Treaty of Amsterdam, at present Article 4 para. (3) TEU, there was clear emphasis upon the role of the member states in the European system[29]: "The member states take all the general measures or their own special measures in order to ensure the execution of the obligations that derive from the treaty or from the acts of the Community institutions. They help the Community to fulfil its mission. The member states refrain from any measures that are susceptible to jeopardise the achievement of the Treaty's objectives"[30]. This obligation in the account of the member states is also called loyal cooperation obligation.

The general provisions related to the role of the member states must be completed with other different provisions from treaties that establish interdictions in their task or that involve intervention obligations for the national public authorities, possibly mentioned by the acts adopted by the European institutions.

The Court of Justice paid much attention to Article 5 of the EEC Treaty considering that it constitutes the basis of what was called the communitarian loyalty or loyal cooperation, whereas the enforcement of this text is accompanied by limits.

---

[27] Case C-322/88, Court's Decision dated 13 December 1989, *Grimaldi/Fonds des maladies professionnelles*, in Rec. 1989, p. 4407.

[28] *Ibidem.*

[29] R. Munteanu, *Punerea în aplicare a dreptului comunitar în ordinea juridică internă (The Enforcement of the Communitarian Right in the Internal Juridical Order)*, in Studii de Drept Românesc (Studies of the Romanian Right), year 20 (53), no. 1-2, pp. 43-83, Bucharest, January-June 2008.

[30] This text was preceded by Article 86 of the Instituting Treaty of the European Community of Coal and Steel (ECCS Treaty was concluded for a period of 50 years since the date it entered into force: 25 July 1952). The text had the folowing content: "The membre states must take all the general measures or their own special measures in order to ensure the enforcement of the obligations resulting from the decisions and the recommendations of the Community's institutions and to enable it to fulfill its mission". In the Instituting Treaty of the European Community of the Atomic Energy (Euratom), Article 192 corresponds to Article 5 of the EC Treaty.

As for the content of this article[31], the Court of Justice distinguished in the first paragraph especially the obligations that emphasize the original impact of this provision just as it was interpreted by the European jurisprudence whereas the consequences that result from the second paragraph comply largely, according to the Court, with the implications of the preeminence/priority principle of the European right upon the national right.

The Court of Justice relied on Article 5 of the EEC Treaty in order to reinforce the obligations established by other provisions of the Treaty or by the acts of the derived European right. Thus, according to the Court, Article 5 EEC imposes to the member states the obligation to do everything in order to provide the useful effect of all the provisions belonging to the regulations[32].

The second paragraph of Article 5 EEC was especially used by the Court in order to *limit* the member states' use of their own competences[33] or in order to assert the member states' obligation not to take susceptible measures to prevent the internal functioning of the institutions[34], in order to condemn the measures taken by a state which did not only put an end to the failure to perform the obligations found by the Court of Justice, but it also adopted measures that tended to prorogate Court's Decision, a fiscal exoneration regime sanctioned by the Court, affecting thus the essential foundation itself of the European juridical order[35].

The Court of Justice also relied on Article 5 EEC in order to ground the member states' obligation to sanction the violation of the European right. The Court pointed out that, in case the European regulations do not include any specific provisions stipulating a sanction for its violation or makes reference, under this aspect, to the national administrative and legislative provisions, Article EEC imposes to the member states to take all their own measures in order to guarantee the content and the efficacy of the European right.

For this purpose, the member states keep a discretionary power about the choice of the sanctions; they must particularly observe that the violations of the European right are sanctioned in trial and procedure conditions which could resemble the conditions that may be applied to the violations of the national right of a similar nature and

---

[31] In general, in terms of Article 5 of the EEC Treaty (that became Article 10 EC), see V. Constantinesco, *L'article 5 CEE, de la bonne foi à la loyauté communautaire*, in: *Du droit international au droit de l'intégration*, Liber Amicorum Pierre Pescatore, Baden-Baden, Nomos Verlag, 1987, pp. 97-114; J. Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty,* in Common Market Law Review, no. 4, 1990, p. 645; M. Blanquet, *L'article 5 du Traité CEE.. Recherches sur les obligations de fidélité des États membres de la Communauté*, Paris, LGDJ, 1994.

[32] Case 30/70, Court's Decision dated 17 December 1970, *Scheer/Einfuhr und vorratsstelle fur Getreide und Futtermittel*, in Rec., p. 1197.

[33] For example, case 804/79, Court's Decision dated 5 May 1981, *Committee/United Kingdom*, in Rec. 1981, p. 1045.

[34] Case 208/80, Court's Decision dated 5 May 1981, *Lord Bruce of Donington/Aspalen*, in Rec. 1981, p. 2205.

[35] Case C-101/91, Court's Decision dated 19 January 1993, *Committee/Italy*, in Rec. 1993, p. I-191.

importance and which, in any situation, could confer the sanction an effective and proportional character[36].

Moreover, the national authorities must deal with the violations of the European right with the same diligence as the one utilized for the enforcement of the corresponding national legislation[37]. These rules are subsumed to the so-called principle of the procedural autonomy (of the member states), which includes two components: the equivalence principle and the efficacy principle[38]. By following the assertions made by the Court of Justice, we notice here: "in the absence of the [Union's] regulations in this matter, the juridical order in each member state gets the task of appointing the competent instances and of establishing the procedural modalities applicable to the actions in justice aimed at providing the protection of the rights conferred to the justice people by [the Union's] right, provided that these modalities are not less favourable than the applicable ones to similar actions in the internal right (the equivalence principle) and provided that do not make impossible or excessively difficult the exertion of the rights conferred by the [Union's] public order (the efficacy principle)"[39].

Also, the Court reminded that the member states are kept to exert the competence of choosing sanctions that correspond to the compliance with the European right and its general principles, especially by complying with the proportionality principle[40].

It was also emphasised that the obligation of the member states of taking all their own measures in order to guarantee the content and the efficacy of the communitarian right imposed by Article 5 EEC also includes the commitment of all the actions of administrative/fiscal/civil right that are related to the charge or recovery of the rights and fees that were eluded fraudulently or related to the attainment of the

[36] Case C-354/99, Court's Decision dated 18 October 2001, *Committee/Ireland*, in Rec. 2001, p. I-7657, pnt. 46; case 14/83, Court's Decision dated 2 October 1991, *Vandevenne and others/Belgium*, in Rec. 1991, p. I-1891; cauza C-326/88, Court's Decision dated 10 July 1990, *Hansen*, in Rec. 1990, p. I-2911, pnt. 17; case C-341/94, Court's Decision dated 26 September 1996, *Allain*, in Rec. 1996, p. I-4631, pnt. 24. The Court of Justice had established previously that, in the absence of a provision in the European regulations that could stipulate specific sanctions in case of failure to comply with the mentioned regulations, the membre states are competent to choose the sanctions they consider to be corresponding (case 50/76, Court's Decision dated 2 February 1977, *Amsterdam Bulb BV/Produktschap voor siergewassen*, in Rec. 1977, p. 137), without making reference to Article 5 EEC, as a foundation of the membre states' obligation to sanction the violation of the European right.

[37] Case 68/88, Court's Decision dated 21 September 1989, *Committee/Greece*, in Rec. 1989, p. 2965, especially pnt. 23-25.

[38] See also, for example, Robert Schütze, *Dreptul constituțional al Uniunii Europene (The Constitutional Right of the European Union)*, Universitară Publishing House, Bucharest, 2012, chapter 11 („Dreptul european: căi procesuale și răspunderi" – "The European Right: trial ways and responsibilities"), p. 376 and the following; Michal Bobek, *De ce nu există principiul „autonomiei procedurale" a statelor membre (Why is there no principle of "the procedural autonomy"*, in Revista română de drept european (The Romanian Review of European Right), no. 5/2010, pp. 36-51.

[39] Case C-432/05, Court's Decision dated 13 March 2007, *Unibet*, Repertory of jurisprudence (hereinafter called "Rep."). 2007, p. I-2271, pnt. 43; related cases C-222/05-C-225/05, Court's Decision dated 7 June 2007, *van der Weerd and others*, in Rep. 2007, p. I-4233, pnt. 28 etc.

[40] Case C-210/91, Court's Decision dated 16 December 1992, *Committee/Greece*, in Rec. 1992, p. I-6735.

compensation for damage[41], as well as taking all the effective measures in order to sanction conducts that bring prejudice to the Union's financial interests. In case the European regulations stipulate some sanctions for its violation but do not establish exhaustively the sanctions that can be applied by the member states, the national measures can include penal sanctions even if the European regulations stipulate only a sanction of the civil nature[42].

It is precisely what was emphasized in the doctrine, namely that in the absence of a general competence of establishing sanctions, especially criminal ones that could sanction the violations of the European regulations, the European institutions can stipulate that the member states are the ones which will have to establish administrative or criminal sanctions[43].

The Court of Justice also pointed out that the member states' obligation that comes from a directive, of reaching the expected result, as well as their obligation, pursuant to Article 5 of the EEC Treaty, of taking all the general measures or their own private ones in order to provide the *execution* of this obligation, are imposed to all the authorities of the member states, including to the jurisdictional authorities, within their competences[44].

On the one hand, the Court made reference to the constraining character of the directives and on the other hand to the enforcement of Article 189 of the EC Treaty (which became Article 249 EC, at present Article 288 TFEU) corroborated with Article 5 of the EEC Treaty [subsequently Article 10 EC, at present Article 4 para. (3) TEU] in order to justify the admitted possibility to invoke certain directives or provisions from the directives that were not transposed or that were transposed incorrectly by the member state concerned, provisions that are aimed to be enforced in the absence of the enforcement measures or at removing the contrary national right or at substituting it in case these directives or provisions have an insufficiently conditioned and precise character[45].

The obligation of the member states' jurisdictions to ensure *the juridical protection that derives from the direct effect* of the European right's provisions results, according to the Court, from the enforcement of the cooperation principle[46]. Although the EC Treaty did not consecrate the loyal cooperation principle, the Court of Justice interpreted Article 5 EEC, namely it expressed the necessity of a loyal cooperation between the European institutions and member states. According to the Court, the loyal cooperation between institutions and member states imposes especially to the member states to comply with the specific and general obligations of information that are

[41] Case C-352/92, Court's Decision dated 14 July 1994, *Milchwerke Köln/Wuppertal, Hauptzollamt Köln-Rheinau*, in Rec. 1994, p. I-3385, pnt. 23.
[42] Case C-186/98, Court's Decision dated 8 July 1999, *Nunes and de Matos*, in Rec. 1999, p. I-4883, pnt. 9, 12, 14, pnt. 2 from the device.
[43] See also C. Haguenau, *Sanctions pénales destinées à assurer le respect du droit communautaire*, in Revue du Marché Commun et de l'Union Européenne, 1993, p. 351.
[44] Case 14/83, Court's Decision dated 10 April 1984, *Van Colson and Kamann*, in Rec. 1984, p. 1891.
[45] Case 148/78, Court's Decision dated 5 April 1979, *Ratti*, in Rec. 1979, p. 1629.
[46] Case 68/79, Court's Decision dated 27 February 1980, *Just*, in Rec. 1980, p. 501.

incumbent and that have the role of allowing the European Committee to fulfil its mission, which consists in observing the enforcement of the Treaty and the provisions taken by the institutions in accordance with this one[47].

The member states must cooperate in good faith to any investigation conducted by the Committee and to provide the required information[48].

In this respect, it was considered as being non-execution the fact that a state refused to collaborate with the Committee during the conducted investigations in order to establish the violation of the European right, a violation that resulted from the regulations and the practices of that state. The Court considered as being a mitigating circumstance the fact that the collaboration refusal was maintained before the Court of Justice, by preventing it from accomplishing its mission that was conferred to it, which constitutes an obstacle in exerting the justice[49]. Nevertheless, the Court emphasized that the execution of the obligations imposed to the member states by the derived treaty and right could not be subject to a reciprocity condition[50].

The Court of Justice established *the principle of the state's responsibility for the damage caused to the private ones as a consequence of violating the communitarian right that is imputable to it.* It relied on the system of the treaty in whose virtue the membre states must take all the general measures and the private ones in order to ensure the enforcement of the European right[51].

The Court of Justice also established the *limits* related to the role and to the obligations of the member states. Thus, according to the Court, if the loyal cooperation obligation of the states can justify in certain cases the maintenance and the institution of national measures in case the Council refrains from taking the measures that result from the exclusive competence of the European Union, but it does not justify the acknowledgement of a general principle according to which the member states would have the obligation to be substituted to the Council in case the latter would refrain from taking the measures that are related to its competence[52].

The loyal cooperation principle obliges not only the member states to take all their own measures in order to guarantee the efficacy of the communitarian right but it also

---

[47] Case 96/81, Court's Decision dated 25 May 1982, *Committee/Netherlands*, in Rec. 1982, p. 1791; case C-69/90, Court's Decision dated 13 December 1991, *Committee/Italy*, in Rec. 1991, p. I-6011.
[48] Case 192/84, Court's Decision dated 11 December 1985, *Committee/Greece*, in Rec. 1985, p. 3967.
[49] Case 272/86, Court's Decision dated 22 September 1988, *Committee/Greece*, in Rec. 1988, p. 4875; case 240/86, Court's Decision dated 24 March 1988, *Committee/Greece*, in Rec. 1988, p. 1835.
[50] Case C-142/01, Court's Decision dated 16 May 2002, *Committee/Italy*, in Rec. 2002, p. I-4541 (pnt. 7); case C-405/01, Court's Decision dated 30 September 2003, *Colegio de Oficiales de la Marina Mercante Española*, in Rec. 2003, p. I-10391, pnt. 61.
[51] Related cases C-6/90 and C-9/90, Court's Decision dated 19 November 1991, *Francovich and Bonifaci/Italy*, in Rec. 1991, p. I-5357; related cases C-46/93 şi C-48/93, Court's Decision dated 5 March 1996, *Brasserie du pêcheur SA/Bundesrepublik Deutschland and Secretary of State for Transport ex parte: Factortame Ltd. and others*, in Rec. 1996, p. I-1029.
[52] Case 165/68, Court's Decision dated 5 December 1989, *OKO Amsterdam Beheer en concerto (Inspecteur der Omzetbelasting)*, in Rec. 1989, p. 4081.

imposes to the Union's institutions reciprocal obligations of loyal cooperation with the membre states. The loyal cooperation obligation that is imposed to the Union's institutions presents a particular importance in case it is established with the judicial authorities of the membre states, having the role of observing the enforcement and the compliance with the European right in the national juridical order[53].

The Court of Justice also reminded the fact that the European institutions had the obligation of complying with the provisions adopted by the member states within their competences[54].

3. The enforcement of the European right by the member states[55]

The adoption of the European right is focused at the level of the European institutions but they do not have a monopoly at the level of its effective enforcement that is very often entrusted to the member states. Such dissociation between the legislative competence and the enforcement competence has its origin in the European system of the competence distribution[56]. The collaboration of the member states to the enforcement of the European right takes variable forms and dimensions, which means that the effective enforcement of the European right depends to a large extent on the normative action (the legislative and executive intervention) and on the judicial action of the member states.

The intervention of the member states in the enforcement of the European right has its juridical ground either in the general obligation of collaboration stipulated in the European treaties or in the special qualifications granted by the institutions in the derived right acts. Therefore, the enforcement of the European right by the member states presents some main aspects and namely the normative enforcement and the judicial enforcement[57].

---

[53] Case C-2/88, Court's Decision dated 13 July 1990, *Zwastveld and others*, in Rec. 1990, p. I-3365.

[54] In the Decision delivered in the case *Luxemburg/European Parliament*, the Court of Justice admitted for the European Parliament the right to take the corresponding measures in order to ensure the good functioning and progress of its procedures. Nevertheless, it indicated that, in the virtue of the rule imposed to the membre states and to the European institutions mutual obligations of loyal cooperation, these decisions must comply with the competence of the membre states' governments to establish the head office of the institution as well as the provisory decisions that were taken until the head office of the institutions is established irrevokably (cases C-213/88 and C-39/89, Decision dated 28 November 1991, *Luxemburg/Parliament*, in Rec. 1991, p. I-5643).

[55] R. Munteanu, *cited paper*, pp. 43-83.

[56] R. Kovar, *Compétence des Communautés européennes*, in *Juris-Classeurs*, "Europe", 1990, fasc. 420, no. 90-115; more recently, R. Schütze, *De la Roma la Lisabona: "Federalism executiv" în (noua) Uniune Europeană (From Rome to Lisbon: "Executive Federalism" in the (new) European Union*, in Revista română de drept european (Romanian Review of the European Right), no. 2/2011, pp. 15-49 ; *idem*, *cited paper*, Chapter 7 – "Puteri executive: competențe și proceduri" ("Executive powers: competences and procedures), Sections 3 and 4, pp. 242-255.

[57] J. Rideau, *Le rôle des États membres dans l'application du droit communautaire,* in Annuaire français de Droit international, 1972, p. 864 and the following.

Moreover, according to the Court of Justice, the necessity to guarantee the complete enforcement of the European right imposes to the member states not only to have their legislations in accordance with the European right but also to do that by adopting juridical provisions susceptible of creating a sufficiently precise, clear and transparent situation in order to allow the private ones to know the plenitude of the rights and avail themselves in front of the national trial instances.

This demand is also imposed in the hypothesis that involves general principles of the constitutional right such as the general principle of the fair treatment and presents a special interest in case the provisions of the European right concerned pursue to grant rights to the citizens from other member states, to the extent to which these ones are not normally informed about the mentioned principles.

The unchanged maintenance, in the legislation of a member state, of a text that is incompatible with a provision of the treaty leads, according to the Court, to an ambiguous factual situation and maintains for the lawful subjects concerned a state of incertitude about the possibilities that are reserved to them to make use of the European right and constitutes for the state concerned a failure to comply with the obligations that are incumbent according to the treaty[58].

The normative enforcement is according to the nature of the European texts that are about to be enforced; it may present different degrees in comparison to the ampleness of the necessary normative completions. Having in view that it is about the derived European right, distinctions are imposed according to the nature of the institutions' acts.

In principle, the nature of the **regulations** excludes the intervention of the national normative completions. In this respect, the Court of Justice pointed out that, to the extent to which the member states attributed to the Union normative competencies in a determined field, the normative competences of the member states cease to exist in that field. The European regulations are directly enforceable in all the member states, so it is excluded, except for a provision, that the member states, in order to provide their enforcement, could take measures having as an object the modification of their expansion or the addition of other provisions[59].

Even more general, according to the Court of Justice, the member states can neither directly nor by means of the created/acknowledged bodies, derogate or tolerate a derogation from the European right or bring prejudice to it[60]. The Court also mentioned that the direct enforceability of the European regulations imposes that its entry into force and its enforcement in favour or against the lawful subjects should be made without any reception measure in the national right. In the virtue of the obligations that derive from the treaty, the member states are not to prevent the direct effect that is specific to the regulations and to the other rules of the European right.

---

[58] Case C-162/99, Decision dated 18 January 2001, *Committee/Italy*, in Rec. 2001, p. I-541, pnt. 22, 23 and 33.
[59] Case 40/69, Decision dated 18 February 1970, *Hauptzollamt Hamburg Oberelbe/Bollmann*, in Rec. 1970, p. 69.
[60] Decision dated 2 February 1977, *Amsterdam Bulb*, quoted *supra*.

The strict compliance with this obligation is an indispensable condition for the even and simultaneous enforcement of the European regulations within the Union. Consequently, the member states could not adopt or allow the national bodies having a normative competence to adopt an act by which the European nature of a juridical rule and the deriving effects should be dissimulated to the justice clerks.

In case it is difficult to interpret, the national administration can take enforcement measures of the European regulations and thus to explain the occurred doubt. However, it can do that only by complying with the European provisions whereas the national authorities cannot edict the interpretation rules having compulsory effects[61].

Nevertheless, the practice points out the European institutions' constant use of the member states' qualifications in order to adopt enforcement acts. These texts may be simple enforcement measures but in some cases, they may present a higher normative degree as a consequence of the liberty granted to the national authorities, a hypothesis in which the Court is called to control such a practice that risks jeopardizing the smooth enforcement of the regulations[62].

The Court of Justice also mentioned that, in case the enforcement of the European regulations is to be made by the national authorities under the control of the national jurisdictions, this enforcement must follow the procedure and form rules stipulated by the national right of the member state (for example, by making use of the equivalence principle, a component of the member states' procedural autonomy principle which has been mentioned above). However, the use of the national rules is possible only if it is necessary to enforce the provisions in the European right and if the enforcement of these national rules does not bring prejudice to the content and efficacy of the European right[63].

The directives, by their nature, impose national normative completions as they are limited to indicate the result that has to be achieved, leaving the member states to choose the forms and the means in order to meet the objectives concerned, which supposes the adoption of national transposition texts. Even the accurate character of the directives does not suppress this necessity. The transposition will have to be performed by national texts that take over the provisions edicted by the European texts (however, it is suggested avoiding to literally copy the provisions of the directive by the national legislative transposition stipulations), whereas the public authorities will be

[61] Case 94/77, Decision dated 31 January 1978, *Zerbone*, in Rec. 1978, p. 99.

[62] Case C-190/91, Decision dated 14 January 1993, *Antonio Larte/Regione Veneto*, in Rec. 1993, p. I-67, which refers to the interpretation of the limits of the competences established by the regulations in the benefit of the states.

[63] Related cases 146, 192 şi 193/81, Decision dated 6 May 1982, *BayWa/Bundesanstalt für landwirtschaftliche Marktordnung*, in Rec. 19892, p. 1503, especially pnt. 29; in the same respect, in a previous decision, it was shown that "in case the enforcement of the communitarian regulations has to be performed by the national institutions, it usuallt takes place according to the provisions of form and procedure in the national right; this rule has to be consistent with the necessity to *enforce smoothly* the communitarian right" (cauza 94/71, Decision dated 6 June 1972, *Schlüter & Maack/Hauptzollamt Hamburg Jonas*, in Rec. 1972, p. 307).

often obliged to adopt national provisions that go beyond the simple transposition[64], provisions that will indicate the different modalities to enforce the national texts.

The Court of Justice also emphasized that each member state is free to distribute its competences at the internal level and to enforce a directive by means of measures taken by federal, regional, local or independent authorities. But this distribution of the competencies could not exempt that state from the obligation of making sure that the provisions of the directive should be faithfully transposed in the internal right[65] or in internal provisions with a compulsory character. Under this last aspect, according to the Court, the simple administrative practices which by their nature can be modified in a discretionary way by the administration's action cannot be considered as being a valid enforcement of the obligation derived from the directive concerned[66].

It was pointed out that it is necessary to provide the complete enforcement of the national provisions to execute the directives. It was shown that the national right of a member state, by which the enforcement of a European directive was made, must find the complete enforcement, even if the directive has not been transposed yet and it has not entered into force yet in the legislations of the other member states.

As for the necessity to provide the efficacy of the directives, the Court of Justice pointed out the authorities' obligations and particularly the national jurisdictions' obligations in this respect. Thus, according to the Court, it is true that Article 189 para. 3 EEC [that became Article 249 para. 3 EC, at present Article 288 para. 3 TFEU] allows the member states to be free when choosing the ways and the means aimed at ensuring the enforcement of the directive. However, this liberty leaves the integral obligation, for each of the addressee states, of taking within its national juridical order, all the necessary measures in order to provide the complete effect of the directive, according to the objective pursued by this one.

In all the cases where a directive is correctly enforced, its effects reach the private ones by means of the enforcement measures taken by the member state concerned. The Court of Justice emphasized that the member states' obligation, deriving from a directive, of obtaining the result expected by this one, is imposed to all the authorities of the member states, within their competences as well as to the jurisdictional authorities (trial instances).

---

[64] Related to this assertion, in the practice of certain membre states there is a so-called tendency of "over-regulation" or "over-transposition" (English "*gold-plating*"), that supposes edicting at the national level by the transposition acts of the directive of conditions, provisions, regulations etc. which exceed the framework aimed by the directive. See also M. Banu, *"Raportul Bellis" şi problematica transpunerii acquis-ului comunitar în dreptul intern al statelor membre ale Uniunii Europene ("Bellis Report" and the issues of transposing the communitarian acquis into the internal right of the membres states within the European Union)*, in Revista română de drept comunitar european (The Romanian Review of the European Communitarian Right), no. 2/2005.

[65] Related cases 227, 228, 229 and 230/85, Decision dated 14 January 1988, *Committee/Belgium*, in Rec. 1988, p. 1, pnt. 9.

[66] Related cases 96/81 and 97/81, Decision dated 25 May 1982, *Committee/Netherlands*, in Rec. 1982, pp. 1791, 1819, pnt. 12.

It results that when enforcing the national right and particularly the provisions of a national law especially introduced in order to execute a directive, the national trial instance is to interpret its national right in the light of the directive's text and final purpose in order to obtain the result that was taken into account by Article 288 para. 3 TFEU (the so-called obligation of the consistent interpretation)[67].

As for the national jurisdictions' obligation of interpreting the national right in the light of the directive's text and final purpose, the Court of Justice introduced, in some decisions, the formula "if it is possible" whereas it added in others "previous or subsequent provisions" (for example, the directive's transposition date in the internal right).

In the decision dated 11 July 2002, Marks & Spencer, it is shown: "It results that, by enforcing the national right, the national jurisdiction called to interpret it, has to do it if it is possible in the light of the directive's text and final purpose in order to obtain the result that was taken into account by it and in order to comply thus with Article 189 para. 3 of the Treaty (that became Article 249 para. 3 EC)"[68]. In another previous decision, it was mentioned: "By enforcing the national right and particularly the provisions of a law that were especially introduced in order to execute a directive, the national jurisdiction has to interpret its national right if it is possible in the light of the directive's text and final purpose in order to obtain the result that was taken into account by Article [288 para. 3 TFEU]"[69].

In the decision delivered on 13 July 2000, in the case Centrosteel, the Court of Justice emphasized: "When the national jurisdiction enforces provisions from the national right that are previous or subsequent to a directive, it has to interpret them, if it is possible, in the light of the text and of its final purpose, so that it could be enforced in accordance with the objectives of this directive"[70].

Also, the Court of Justice evoked the member states' obligation, deriving from a directive, to obtain the result stipulated by it, and then it came to the same conclusion, meaning that "by enforcing the national right, whether it is about provisions that are previous or subsequent to the directive, the national jurisdiction called to interpret it has to do it, if it is possible, in the light of the directive's text and final purpose, in order to obtain the result that was taken into account by this one and in order to comply with Article [288 para. 3 TFEU]"[71].

However, the Court also mentioned the limits of the national jurisdiction's obligations of interpreting the national right in the light of the directive's text and final

---

[67] Case 222/84, Decision dated 15 May 1986, *Johnston/Chief Constable of the Royal Ulster Constabulary*, in Rec. 1986, p. 1651, pnt. 51 and 53; Decision *Von Colson and Kamann*, quoted *supra*, pnt. 15 and 26; case 79/83, Decision dated 10 April 1984, *Harz/Deutsche Tradax*, in Rec. 1984, p. 1921, pnt. 15 and 26; case 31/87, Decision dated 20 September 1988, *Beentjes/Staat der Nederlanden*, in Rec. 1988, p. 4635, pnt. 39.

[68] Case C-62/00, Decision dated 11 July 2002, *Marks & Spencer*, in Rec. 2002, p. 6325, pnt. 24.

[69] Case C-185/97, Decision dated 22 September 1998, *Coote/Granada Hospitality*, in Rec. 1998, p. I-5199, pnt. 18.

[70] Case C-456/98, Decision dated 13 July 2000, *Centrosteel*, in Rec. 2000, p. I-6007, pnt. 16 and 19.

[71] Case C-91/92, Decision dated 14 iuly 1994, *Faccini Dori/Recreb*, in Rec. 1994, p. I-3325, pnt. 26.

purpose. According to the Court, this obligation finds limits in the general lawful principles that belong to the European right and especially to the right of the juridical security and of the non-retroactivity. Therefore, a directive cannot have as an effect by itself and independently from an internal law taken from a member state for its enforcement, to determine or to aggravate the criminal responsibility of the ones who violate its provisions[72].

In another case, the Court showed that the obligation for the national judge to refer to the directive's content when interpreting the pertinent rules of its national right finds its limits in cases where such an interpretation leads to opposing to a private one an obligation stipulated by a non transposed directive or, particularly, in cases where it leads to the determination or aggravation, according to the directive and in the absence of a law taken for its enforcement, the criminal responsibility of the ones who violate its provisions[73].

Moreover, the national judge's obligation to interpret and to enforce the pertinent rules of its national right if it is possible in the light of the directive's text and final purpose whose enforcement is provided, in order to obtain the result that was taken into account by this one and thus to comply with Article 288 TFEU, finds its limits especially when such an interpretation leads to the determination or aggravation, according to the directive and in the absence of a law taken for its enforcement, the criminal responsibility of the ones who violate its provisions.

In case it is about determining the length of the criminal responsibility resulting from a law especially adopted for the enforcement of a directive, the principle that imposes not enforcing the criminal law extensively in the disadvantage of the prosecuted, which is the corollary of the legality principle of the offences and of the sentences and in general the corollary of the juridical security, is opposed to the commitment of the criminal prosecution in the case of a behaviour whose blameable character does not result clearly from the law. This principle belongs to the general lawful principles that lie at the foundation of the common constitutional traditions of the member states and it was consecrated by different international treaties and particularly by Article 7 of the Convention for the defence of the human rights and of the fundamental liberties.

Therefore, it is the national jurisdiction that has to provide the compliance with this principle while interpreting, in the light of the directive's text and final purpose, the national right adopted for its enforcement[74].

In general, according to the Court of Justice, all the authorities of a member state that enforce the national right have to interpret it, if it is possible, in the light of the

[72] Case 80/86, Decision dated 8 October 1987, *Kolpinghuis Nijmegen*, in Rec. 1987, p. 3969, pnt. 12 and 13.
[73] Case C-168/95, Decision dated 26 September 1996, *Arcaro*, in Rec. 1996, p. I-4705, pnt. 41 and 43, pct. 3 of the device.
[74] Related cases C-74/95 and C-129/95, Decision dated 12 December 1996, *X*, in Rec. 1996, p. I-6609, pnt. 24-26.

European directives' text and final purpose, in order to obtain the result expected by them. It is true that this demand of an accurate interpretation could not go further so that a directive by itself and independent from an internal law of transposition should create obligations for the private ones or should determine or aggravate the criminal responsibility of the ones who violate its provisions. Nevertheless, the state can, in principle, oppose to the private ones an accurate interpretation of the national right[75].

The national trial instances (**jurisdictions**) have the vocation to accomplish an important role in the enforcement of the European right. According to a consecrated phrase by a decision of the (former) Tribunal of First Instance – at present, the Tribunal of the European Union, the national jurisdictions appear as European jurisdiction of the common right[76], unlike the European instances grouped at present [according to Article 19 para. (1) TEU], under the name "Court of Justice within the European Union" – the Court of Justice, the Tribunal of the European Union and "specialised tribunals" (at present – the Tribunal of the Public Function), that has assigning competences.

While exerting the role of European jurisdictions of common right, the territorial and functional competence of the national jurisdictions remains regulated, apart from exceptional cases, by the national right. Consequently, the judicial enforcement of the European right is performed within the organisation and procedure rules of the national right.

In conclusion, the member states are invested in general with a subsidiary responsibility related to the enforcement of the European Union's right. This responsibility is susceptible of being sanctioned by action for the failure to meet the obligations, which is stipulated by Article 258-260 TFEU[77].

4. The correlation between the Constitution, the Romanian laws and the European Union's right

The Constitution's review in 2003 had among other objectives the one of enabling Romania's adhesion to the European Union by the newly introduced Article 148. Thus, it was stipulated expressly at the level of a fundamental law: "As a consequence of the adhesion, the stipulations of the constitutive treaties of the European Union as well as the other communitarian regulations with a compulsory character have priority compared to the contrary provisions in the internal laws, by complying with the stipulations of the adhesion act"[78].

[75] Case C-321/05, Decision dated 5 July 2007, *Kofoed*, in Rep. 2007, p. I-5795, pnt. 45.
[76] Case T-5/89, Decision dated 10 July 1990, *Tetra Pak/Committee*, in Rec. 1990, pp. II-309, pnt. 42; for theoretical considerations, A. Barav, *La plénitude de compétence du juge national en sa qualité de juge communautaire*, in *L'Europe et le droit. Mélanges en honneur de Jean Boulouis*, Paris, Dalloz, 1991, p. 1 and the following; F. Grevisse, J.C. Bonichot, *Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction jurisdictionnelle dans les États membres*, in *ibidem*, p. 297 and the following.
[77] G. Isaac, *Droit communautaire général*, eighth edition, Masson, Paris, 2001, pp. 224-225.
[78] Article 148 para. (2) of the Constitution of Romania, published again.

From the perspective of the European Union and especially from the consecration of certain general principles to enforce the European right by jurisprudence way at the beginning of the activities carried out by the Court of Justice, the priority of the communitarian right is justified according to the implicit objective negotiated together with the membre states and accepted in the constitutive treaties, namely the purpose of unifying the national normative systems by creating a European juridical order[79]. "The internal legal provisions, regardless of the way in which they would be adopted or expressed, could not have priority to the juridical rules resulting from the treaty, an independent lawful source due to the special and original nature of the latter; thus, the communitarian right would be deprived of its juridical system character of a states' community whereas even the juridical fundament of the Community would be subject to doubts"[80].

The priority principle of the European right was even better enhanced by the Court of Justice within the European Union, several years after the previous decision: "In accordance with the priority principle of the communitarian right, there is a ratio between the stipulations of the treaty and the ones of the provisions directly enforceable adopted by the institutions on the one hand and by the internal right of the member states on the other hand; the communitarian stipulations and provisions make any stipulations of the internal right seem automatically implacable ever since their entry into force. However, as long as they represent an integrating part of the juridical order enforceable on the territory of each member state and they have priority to that one, they prevent even the valid adoption of new national regulations having in view that they would be incompatible to the stipulations of the communitarian right. Indeed, any recognition of a juridical effect of the national regulations that would trespass the field where the Community exerts its legislative competences or which would be incompatible to the stipulations of the communitarian right would mean a corresponding denial of the efficiency of the obligations that are undertaken unconditionally and irrevocably by the member states by means of the treaty and thus it/they would jeopardize the base of the Community"[81].

Nowhere in the jurisprudence of the Court of Justice within the European Union can there be found (in an explicit way) the supremacy concept of the communitarian right compared to the internal one of the member states. The national authorities that faced conflict situations of norms between the communitarian right and the internal right, especially the trial instances, are not advised to abrogate, to annul and not even to invalidate the internal norms that are contrary to the ones of the European Union. They are only advised not to enforce them in certain cases and to give enforcement

[79] E.S. Tănăsescu, *Constituția României – comentariu pe articole (Constitution of Romania – commentary on articles)*, C.H. Beck Publishing House, Bucharest, 2008, p. 1437 and the following.
[80] Court's Decision dated 15 July 1964, *Costa/ENEL*, quoted *supra*.
[81] Case 106/77, Decision dated 9 March 1978, *Amministrazione delle finanze dello Stato/Simmenthal*, in Rec. 1978, p. 629.

priority to the stipulations with direct enforceability in the European right. Thus the internal right norms that are not enforced do not disappear from the national juridical order but remain valid and can be enforced anytime in factual situations where there is no risk of interference with the competence of the European Union[82].

The Court of Justice within the European Union asserts that the national instances notified with a potential conflict between internal right norms and European right norms have the obligation to remove from enforcement the internal right norms and to give priority systematically to the ones coming from the European right, even if the own norms' validity in the internal right is to be established at a subsequent date. It is not about supremacy but it is about a priority to enforce the European right norms that are directly enforceable, which also results from the jurisprudence of the Court of Justice within the European Union: "Contrary to the Committee's assertions, it is impossible to deduce from *Simmenthal* decision that the incompatibility to the communitarian right of a national juridical rule adopted subsequently has the effect of establishing the inexistence of that national juridical rule. Facing such a situation, the national instance is obliged not to enforce the rule concerned, always assuming that this obligation does not restrain the of the competent national instances to enforce, among the diverse available procedures within the national right, the ones that are adequate to the protection of the rights granted to the lawful individual subjects by the communitarian right"[83].

From Romania's point of view, the priority of the European right is accepted not in the virtue of the jurisprudence of the Court of Justice within the European Union, but in accordance with its own constitutional stipulations [Article 148 para. (2) of the Romanian Constitution, published again].

The enforcement of the European right must be made by all the state authorities in charge with accomplishing the provisions in the juridical order of the European Union, which means in an equal measure to the legislator but also to the executive and especially to the trial power. Nevertheless, as a direct consequence of the juridical pluralism, the internal law cannot be invalidated within the internal juridical power as a consequence of its incompatibility to the European right, just as it was found out by the Constitutional Court of Romania[84].

---

[82] E.S., *cited paper*, p. 1438; see also: R. Schütze, *Supremație fără aplicare prioritară? Apariția foarte lentă a doctrinei comunitare a aplicării prioritare (The Supremacy without a Preliminary Enforcement? The Very Slow Emergence of the Communitarian Doctrine of the Priority Enforcement)*, in Revista română de drept european (The Romanian Review of the European Right), no. 5/2010, pp. 15-35; *idem,, Dreptul constituțional al Uniunii Europene (The Constitutional Right of the European Union)*, quoted *supra*, Chapter 10 – „Dreptul european: supremație și prioritate" ("The European Right: supremacy and priority"), pp. 344-375.

[83] Decision *Simmenthal*, quoted *supra*.

[84] The Decizion of the Constitutional Court no. 59/2007 regarding the notification of unconstitutionality related to the provisions of Article 1 and Article 3 of the Law regarding the approval of financial measures for small and medium-sized entreprises in the brewing industry, published in the Official Monitor no. 98 dated 8 February 2007.

As for the transposition mechanism of the European norms into the internal legislation of Romania (and here we have in view the directives of the European Union), the concrete transposition modality is left at the latitude of the member states. In the case of Romania, we are talking about normative acts with legal power, respectively the laws adopted by the Parliament of Romania, the ordinances and the emergency ordinances issued by the Government of Romania and subject to approval by the Parliament[85]. We are mentioning that the transposition terminology does not necessarily mean a word by word copying in the internal legislation of the directive that is to be transposed but it is an adaptation of its stipulations which should be harmoniously integrated in the internal legislation. Law no. 24/2000 regarding the legislative technique norms for the elaboration of the normative acts, published again, with the subsequent modifications and completions[86], mentions at Article 45 that, after the main part of the normative acts that transpose European norms directly into the internal right, there is a notification that should include the identification elements of the normative act that was taken over, after the following model: "The present .... (the type of the normative act is mentioned) transposes the Directive no. .../... regarding ..., published in the Official Journal of the European Union no. .../...".

As for the relationship between the Romanian laws and the European Union right, we have to remind the system of the preliminary references, a system that is applied to Romania beginning with the adhesion date to the European Union[87].

The system of the preliminary references represents a fundamental mechanism of the European Union's right, a mechanism aimed at conferring to the national instances the means of ensuring a smooth interpretation and a smooth enforcement of this right in all the membre states. The Court of Justice within the European Union is competent to rule preliminarily about the interpretation of the European Union's right and about the validity of the acts adopted by the Union's institutions, bodies, offices and agencies. This general competence is conferred by Article 19 para. (3) letter b) TEU and by Article 267 TFEU.

Moreover, when the Treaty of Lisbon entered into force, the provisions of Article 35 of the EU Treaty were abrogated (according to Article 1 pnt. 51 of Treaty of Lisbon). But the protocol on the transitory provisions (attached by means of the Treaty of Lisbon) stipulates that there are no modifications related to the competencies of the

[85] For the perspective of the Constitutional Court of Romania upon the constitutionality of the emergency ordinances for the transposition of the Union's right, see I. Alexe, M. Banu, *Transposition and/or Implementation of the European Union Right by means of the Government Emergency Order. Requirements set in the Case-law of the Constitutional Court of Romania*, in Curentul juridic (Juridical Trend), no. 2 (61), 2015, pp. 49-56.

[86] Published again in the Official Monitor no. 260 dated 21 April 2010.

[87] See in detail M. Şandru, M. Banu, D. Călin, *Procedura trimiterii preliminare. Principii de drept al Uniunii Europene şi experienţe ale sistemului român de drept (The Procedure of the Preliminary Reference. Lawful Principles of the European Union and Experiences of the Romanian Lawful System)*, C.H. Beck Publishing House, Bucharest, 2013.

Court of Justice in the matter of the police and judicial criminal cooperation for a period of 5 years since the entry into force of this treaty.

As for the procedure of the preliminary questions, the role of the Court is to offer an interpretation of the Union's right or to rule about its validity, and not to enforce this right to the factual situation that makes the subject of the main action, a role that belongs to the national instance. The Court is not competent to rule about the factual problems occurred within the main action or to solve the different opinions in the interpretation or enforcement of the national right norms. The Court rules about the interpretation or the validity of the Union's right, trying to offer a useful answer for the settlement of the litigation but the reference instance is the one that has the task of drawing the adequate conclusions from the Court's answer, by removing, if it is the case, the enforcement of the national norm discussed.

In the context of Article 267 TFEU, any instance of the member state, when it has to rule within a procedure aimed at leading to a decision with a jurisdictional character, can in principle address a preliminary question to the Court. The instance quality is interpreted by the Court as an autonomous notion of the Union's right. It does not matter if the parties in the main action requested or did not request the preliminary reference; the national instance is the only one that can have the initiative to notify the Court in a preliminary way.

The procedure to rule preliminary decisions is the procedure by means of which the national instances may address to the Court of Justice questions related to the interpretation or validity of norms of the European Union's right. The ruling requests of preliminary decisions represent extremely useful instruments aimed at enabling the interpretation and the enforcement of the European right for all the national instances. After the end of the preliminary procedure, the national judge enforces in the case, with priority, the interpretation norm of the European Union's right.