

INTERPRETATION AND ENFORCEMENT OF ARTICLE 148 OF THE CONSTITUTION OF ROMANIA REPUBLISHED, ACCORDING TO THE DECISIONS OF THE CONSTITUTIONAL COURT

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Abstract

The provisions of Article 148 establish the internal legal framework, at the level of basic law, in order for Romania to acquire the status of Member State with full rights and obligations, of the European Union. Regarding the interpretation and enforcement of the constitutional text, the case law of the Constitutional Court of Romania has evolved, leading to the following conclusion: the Constitution is the only direct reference in constitutional control.

Keywords: *Constitution of Romania, republished; Article 148; decisions of the Constitutional Court; interpretation; European Union law.*

1. Introductory aspects

The provisions of Article 148 establish the internal legal framework, at the level of basic law, in order for Romania to acquire the status of Member State with full rights and obligations, of the European Union, taking into account the provisions of Article 49 of the Treaty on European Union that provide that "the conditions of admission and the adjustments required by the Treaties on which the Union is based shall be the subject of an agreement between the Member States and the requesting State. This agreement is subject to ratification by all contracting states¹ in accordance with their constitutional regulations".

Having the marginal name of *Integration into the European Union*, Article 148 of the Constitution of Romania, republished, regulates the following aspects:

- Romania's adhesion to the constituent treaties of the European Union, including the acts revising the constitutive treaties, for the purpose of transferring tasks to the institutions of the European Union, as well as joint exercising with the other member states, of the competences provided in these treaties, is done by law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a two-thirds majority of the number of deputies and senators;

- as a result of adhesion, the provisions of the constitutive treaties establishing the European Union, the acts revising the Treaties, as well as other binding

Union regulations, take precedence over the contrary provisions of the national laws, in compliance with the provisions of the act of accession;

- The Parliament, the President of Romania, the Government and the judiciary authority guarantee the fulfillment of the obligations resulting from the act of accession and from the previous provisions;

- The Government delivers drafts of binding documents to the two Chambers of Parliament before they are subject to the approval of the institutions of the European Union.

"The constitutional text of reference is not distinguished through clarity or detail, so it is the task of the Constitutional Court to establish, based on the systematic interpretation of the Constitution, the relations of legal regulations in the two legal systems and how the rules of the European Union law interfere with the constitutional control"². Furthermore, as the doctrine has shown, "due to the lack of specific regulation of the significance/role of some legal institutions in the Constitution of Romania, it is incumbent on the Constitutional Court of Romania to establish, in its jurisprudence, through binding decisions, the way of interpreting constitutional texts"³.

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¹ Romania adhered to Law no. 157/2005 for the ratification of the Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the Republic of Bulgaria and Romania on the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005, published in the Official Gazette of Romania, Part I, no. 465, of 1 June 2005.

² Tudorel Toader, Marieta Safta, *Rolul normelor europene în controlul de constituționalitate*, http://www.nos.iem.ro/bitstream/handle/123456789/1134/1-Toader.T_Safta.M.pdf?sequence=1&isAllowed=y, p. 2.

³ Elena Emilia Stefan, *Scurte considerații asupra răspunderii membrilor Guvernului*, Drept Public Journal, no. 2/2017, p.83.

2. Article 148 paragraph (1) of the Constitution republished, according to the interpretation of the Constitutional Court of Romania

As it is known, acquiring the status of EU Member State implies, inter alia, the transfer to the EU institutions of some of the competences exercised under sovereignty⁴. Naturally, EU membership is a result of the candidate's consent and compliance with the provisions included in the pre-accession agreements.

The provisions of Article 148 paragraph (1) of the Constitution of Romania, republished, creates the legal constitutional framework necessary for the accession of Romania to the European Union. Thus, the constituent legislator established the rule according to which "the accession to the European Union is by law, adopted by the joint sitting of the Chamber of Deputies and the Senate, with a qualified majority of two-thirds of the number of members of the Parliament". It should be noted that the option according to which "accession (...) is done by law" is in accordance with the provisions of Article 61 paragraph (1)⁵ of the Constitution, which states that "Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country". According to the Constitutional Court, "the accession rule of law is intended to bring to the attention of the supreme representative body not only the importance of joining the European Union, but also the responsibility⁶ that is conferred upon the Romanian state, as it acquires membership of the European Union"⁷.

As regards the provision referring to the transfer of "tasks to the Community institutions", the Constitutional Court held that Article 148 paragraph (1) "refers to the sovereign exercise of the Romanian State's will to adhere to the constituent treaties of the European Union by a law, the adoption of which is conditioned by a qualified two-thirds majority. The Act of Accession has a dual consequence, namely the

transfer of tasks to the Community institutions and, on the other hand, the joint exercise with the other Member States of the powers provided in those Treaties. As regards the first consequence, the Court notes that, by the simple belonging of a State to an international treaty, it diminishes its powers⁸ within the limits set by international law"⁹. "But this consequence needs to be correlated with the second consequence of Romania's integration into the European Union. In this regard, the Constitutional Court notes that the act of integration also has the meaning of sharing the exercise of these sovereign tasks with the other constituent states of the international body. Therefore, the Constitutional Court notes that, through acts of transfer of tasks to the structures of the European Union, they do not acquire, through endowment, a "super-competence", their own sovereignty. In fact, the Member States of the European Union decided to jointly exercise certain attributions that traditionally fall within the scope of national sovereignty"¹⁰.

The transfer of some tasks to the Union's institutions and the joint exercising of competences with the other Member States "do not affect the sovereignty of the states but, on the contrary, ensure that it is achieved at a higher level (...) for the benefit of each and every one"¹¹.

Under these circumstances, Article 148 paragraph (1) contains a "general Community clause"¹² of delegation of tasks, from national to supranational level, a mark specific to the integration system on which the European Union is based. Thus, we note the surprise of the EU's special functioning as an integration (and not cooperative) organization, which borrows elements relating to the federal organization of competences"¹³. In view of the importance of social relations "(involving the transfer of duties (...) and the exercise of common tasks¹⁴ with the other Member States)", the legislator considered it necessary that the law of ratification of the Accession Treaty would be adopted by a special procedure, "which differs from that provided by the Constitution for other international

⁴ According to the judgment of the Court of Justice in Luxembourg on 15 July 1964, *Flaminio Costa v. / ENEL*, case 6-64, EU: C: 1964: 66: "by establishing a Community of unlimited duration, with its own institutions with legal capacity, with personality, capable of international representation and, in particular, with real powers derived from (...) the transfer of States' tasks to the Community, the latter have limited their sovereign rights even in restricted areas and thus created a body by law applicable to their own nationals and themselves",

⁵ The former Art. 58 par. (1) in the 1991 Constitution.

⁶ About the forms of legal liability, see Elena Emilia Stefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Prouniversitaria Publishing House, Bucharest, 2013, p. 94 et seq.

⁷ Decision CCR no. 148 of 16 April 2003 on the constitutionality of the legislative proposal for the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 317 of 12 May 2003.

⁸ According to the Constitutional Court, "from this first point of view, Romania's membership to the United Nations Organization, the Council of Europe, the Organization of the States of the European Community, the Central European Free Trade Agreement, etc. or Romania's status as a party to the Convention for the Protection of Human Rights and Fundamental Freedoms or other international treaties has the significance of a restriction of the powers of state authority, a relativization of national sovereignty" - CCR Decision no. 148 of 16 April 2003, cited above.

⁹ Decision CCR no. 148 of 16 April 2003, cited above.

¹⁰ *Idem*.

¹¹ Mihai Constantinescu, Ioan Muraru, Antonie Iorgovan, *Revizuirea Constituției. Explicații și comentarii*, Rosetti Publishing House, Bucharest, 2003, p. 132.

¹² Simina Tănăsescu, *Despre autoritatea constituțională a unui tratat european*, in "Despre constituție și constituționalism – Liber Amicorum Ioan Muraru", Hamangiu Publishing House, Bucharest, 2006, p. 310.

¹³ Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, 2nd edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2015, p. 209.

¹⁴ *Idem*.

treaties"¹⁵. The regulation of such a special procedure leads to the idea that "in the internal legal order, the legal act by which Romania adheres to the European Union has a juridical power inferior to the Constitution and constitutional laws, but superior to the organic and ordinary laws"¹⁶.

3. Article 148 paragraph (2) of the Constitution republished, in the light of the decisions of the Constitutional Court of Romania

The accession to the EU implies a number of consequences. One of these consequences follows from the judgment¹⁷ of the Court of Justice in Luxembourg ruled in 1978, in which the Court ruled that, under the "principle of the supremacy of Community law"¹⁸, the provisions of the Treaty and the acts of the directly applicable institutions have the effect, with the mere fact of their entry into force, not only to determine the inapplicability of any provision contrary to that of the existing national legislation, but also - to the extent that those provisions and acts form an integrant part, with the national law of the Member States rank higher than the internal rules of the legal order applicable in the territory of each Member State - to prevent the adoption of new national legislation in force in so far as they are incompatible with Community rules"¹⁹.

The priority of European Union law to the domestic law of the Member States was settled by way of case law in *Costa / Enel*²⁰. According to the Luxembourg Court of Justice, "the incorporation of Community provisions into the law of each Member country and, more generally, the meaning and spirit of the treaty have as a corollary the impossibility of states to prevail against an accepted legal order on the basis of reciprocity, a subsequent unilateral measure which cannot be relied upon in that way".

The interpretation of the Luxembourg Court requires the integration of the *acquis* of the European Union into national law, as well as the "determination of the relation between Community and national law"²¹. The solution proposed by the Constitution of our country is to implement the EU law in the internal legal

order and to establish the rule of priority enforcement of EU law to the contrary provisions of the internal laws, in compliance with the provisions of the act of accession. Thus, according to Article 148 paragraph (2), "as a result of accession, the provisions of the Treaties establishing the European Union and other binding Community rules shall take precedence over the contrary provisions of national laws, in compliance with the provisions of the act of accession". The Constitutional Court notes that "this provision brings no prejudice to the constitutional provisions regarding the limits of the revision or other provisions of the Basic Law, being a particular enforcement of the provisions of the present Article 11 paragraph (2) of the Constitution"²², according to which "the treaties ratified by the Parliament, according to the law, are part of the national law"²³.

It should be noted that, regarding the notion of "internal laws", the Constitutional Court, in its decisions, made a distinction between the Constitution and the other laws²⁴, thus pointing out that the provisions of Article 148 paragraph (2) do not take into account constitutional regulations. Thus, according to the Court, "constitutional provisions are not declaratory, but constitute mandatory constitutional rules without which the existence of the rule of law cannot be conceived. (...) The Basic Law is the framework and the extent to which the legislator and other authorities can act"²⁵. In the view of the Constitutional Court, the enforcement in the internal legal order of European Union law without distinguishing between the Constitution and the other internal laws would mean that the Basic Law would be in a lower place than the legal order of the European Union because it would lose the binding legal force only by the inconsistency between its provisions and those of the European Union. At the same time, the Constitutional Court also noted the observation that "the accession to the European Union cannot affect the supremacy of the Constitution over the entire legal order"²⁶. The Constitutional Court states that this would be impossible to accept because it would amount to "denying that the expression of the people's will is the Constitution itself"²⁷.

¹⁵ Simina Tănăsescu, *cited above*, pp. 310-311.

¹⁶ Ioan Muraru, Elena-Simina Tănăsescu (coord.), *Constituția României. Comentariu pe articole*, C.H.Beck Publishing House, Bucharest, 2008, p. 1433.

¹⁷ Judgment of the Court of 9 March 1978, *Simmmenthal*, Case 106/77, EU:C:1978:49.

¹⁸ Of the European Union at present.

¹⁹ Judgment of the Court, *Simmmenthal*, EU:C:1978:49, *cited above*, point 17.

²⁰ *Cited above*.

²¹ Decision CCR no. 148 of 16 April 2003 on the constitutionality of the legislative proposal for the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 317 of 12 May 2003.

²² Decision CCR no. 148 of 16 April 2003, *cited above*.

²³ Details on the consideration of treaties and international conventions sources of administrative law, see: Elena Emilia Stefan, *Drept administrativ Partea I, Curs universitar*, second edition, reviewed and updated, Universul Juridic Publishing House, Bucharest, 2016, p. 34 and seq.

²⁴ The same distinction is made, at the level of the Basic Law, also by art. 20 par. (2) the final sentence providing the enforcement of international rules as a matter of priority, unless the Constitution or domestic laws contain more favourable provisions.

²⁵ CCR Decision no. 80 of 16 February 2014 on the legislative proposal on the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 246 of April 7, 2014.

²⁶ Judgment of 11 May 2005, K 18/04, ruled by the Constitutional Court of the Republic of Poland.

²⁷ *Idem*.

The Constitutional Court "established that binding acts of the European Union were regulations interposed in the framework of constitutional control"²⁸. However, there is not one among the attributions of the CCRs concerning the enforcement of the "European Union rules to clarify or establish their content"²⁹. "The competence to ensure the interpretation of Union law for the purpose of uniform enforcement at the level of all Member States lies with the Court of Justice of the European Union, which, as a Union jurisdiction authority within the meaning of Article 19 paragraph (3) section b) of the Treaty on European Union, shall give a preliminary ruling, at the request of the national courts, on the interpretation of Union law or on the validity of acts adopted by the institutions"³⁰. The legal effects of the preliminary ruling of the Court of Justice of the European Union have been established by jurisprudence. Thus, "the Luxembourg Court held that such a ruling, bearing on its interpretation or validity of an act of the European Union, was binding on the court making the reference for a preliminary ruling and the interpretation, in common with the European provisions it interpreted, was also vested with authority vis-à-vis other national courts, which cannot give their own interpretation to those provisions"³¹. At the same time, "the effect of the preliminary rulings is direct, in the sense that nationals of the Member States have the right to rely directly on European regulations before national and European courts and on retrospective grounds, in the sense that the interpretation of a rule of law of the European Union in a preliminary reference clarifies and specifies its meaning and scope since its entry into force"³².

The Constitutional Court acknowledges, however, that, due to the place that the European Union's regulations occupy, according to Article 148 par. (2) of the Constitution, in relation to its domestic law, it is "called upon to invoke in its case law the binding acts of the European Union"³³ whenever they are relevant to the case, as long as their content is not unequivocal and does not require an interpretation of its own"³⁴. However, the Constitutional Court is not competent to rule on issues related to "potential collisions between the domestic and relevant European Union legislation in different areas"³⁵, because the issue it is brought before "is not a matter of unconstitutionality, but of enforcement of the law, in

the jurisdiction of the court ". *Per a contrario*, "the Court of Justice of the European Union has no jurisdiction to rule on the validity or invalidity of national law"³⁶.

What it is worthy to be kept in mind is that Romania does not accept the priority of enforcing European Union law based on the jurisprudence of the Court of Justice, but based on its own constitutional provisions.

4. Article 148 paragraph (3) of the Constitution republished

According to Article 148 paragraph (3), Romania's accession to the acts of revision of the constitutive treaties of the European Union is made by a law passed at the joint sitting of the Chamber of Deputies and the Senate, with a two-thirds majority of the deputies and senators. Unlike the situation regulated in paragraph (1) of the same article (the situation that applied prior to the acquisition by Romania of the status of EU Member State), the situation in para. (3) is different because this time, the status of Romania as a Member State of the European Union is taken into account because the Constitutive Treaties of the European Union are reviewed only by the Member States³⁷.

5. Article 148 paragraph (4) of the Constitution republished, according to the decisions of the Constitutional Court of Romania

The provisions of par. (4) of Article 148 state that "the President of Romania, the Parliament, the Government and the judiciary authority guarantee the fulfillment of the obligations resulting from the act of accession" and have the competence to guarantee the fulfillment of the obligations resulting from the acts of accession "and the implementation of the constitutional provisions of the Union and the mandatory regulations derived from them. "In this sense, the Government is constitutionally empowered to guarantee the fulfillment of Romania's obligations towards the European Union by the means at its disposal"³⁸.

²⁸ CCR Decision no. 80 of 16 February 2014, cited above.

²⁹ Tudorel Toader, Marieta Safta, *Constituția României* (decizii C.C.R., hotărâri C.E.D.O., hotărâri C.J.U.E., legislație conexasă), 2nd edition, Hamangiu Publishing House, Bucharest, 2016, p. 462.

³⁰ CCR Decision no.1.039 of 5 December 2012, published in the Official Gazette of Romania, Part I, no.61 of 29.01.2013.

³¹ *Idem*.

³² *Idem*.

³³ For more details about the acts of the European Union, see Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, pp. 45-50.

³⁴ Decision CCR no. 383 of 23 March 2011, published in the Official Gazette of Romania, Part I, no. 281 of 21 April 2011.

³⁵ Decision CCR no. 300 of 3 March 2009, published in the Official Gazette of Romania, Part I, no. 188 of March 26, 2009 and CCR Decision no. 729 of May 7, 2009, published in the Official Gazette of Romania, Part I, no. 401 of 12 June 2009.

³⁶ Decision CCR no. 350 of June 24, 2014, published in the Official Gazette of Romania, Part I, no. 571 of July 31, 2014.

³⁷ Romania implemented the provisions of that paragraph when it adopted the ratification law of the Treaty of Lisbon, ratified by Law no. 13/2008, published in the Official Gazette of Romania, Part I, no. 107 of 12 February 2008.

³⁸ Tudorel Toader, Marieta Safta, *Constituția României...*, cited above, p. 462.

However, when it comes to the power of the Government to regulate by means of emergency ordinances, the Constitutional Court ruled that their use "for the purpose of harmonizing the national legislation with the Community law in the situation in which the infringement procedure was imminent before the Court of Justice was fully constitutional"³⁹.

In a case in which the Court held that there was a dispute between the Government and the authors of the objection of unconstitutionality regarding the directive applicable to the contractual and / or institutional public-private partnership, the violation of the provisions of Article 148 of the Constitution was invoked. The Court appreciated that the uncertainty present in the case in question "was given by the fact that the legislature failed to fulfill its obligation to indicate, in the criticized law, the acts of the European Union which are transposed through it, which is inadmissible. Irrespective of the applicable directive⁴⁰ (...), the Court noted that both contain conditions which coincide almost to detail with regard to the unilateral amendment or termination of the contract, while the text of Art. 38 paragraph (1) of the law on public-private partnership is unconstitutional] contains a normative solution that tends to evade these conditions. Consequently, the legislative solution contained in the criticized text represents a violation by the Parliament of the provisions of Article 148 paragraph (4) of the Constitution, which regulates its role as guarantor of the fulfillment of the obligations resulting from the act of accession. As a result, the Court admitted, in part, the objection of unconstitutionality formulated and found that the provisions of Article 38 para. (1) of the Public-Private Partnership Law were unconstitutional"⁴¹.

According to the Constitutional Court's opinion, expressed in Decision no. 64/2015⁴², "disagreements of the provisions of Art. 86 par. (6) the first sentence of Law no.85 / 2006 with binding acts of the European Union with constitutional relevance during the activity of Law no.85 / 2006 constitutes *eo ipso* a violation of the provisions of Article 148 par. (4) of the Constitution, since the legislator has allowed legal relations to be governed by these national provisions, and is disregarded by its constitutional obligation to guarantee, at legislative level, at least the same level of protection of the right to measures of social protection of the work with that stipulated in the binding acts of the European Union, as well as to permanently and continuously harmonize the national legislation with the binding acts of the European Union. In fact, the

ordinary legislator identified those regulatory deficiencies and changed the legislative solution by Law no. 85/2014 on Insolvency and Insolvency Prevention Procedures"⁴³.

In Decision no. 602/2016⁴⁴, "the Court ruled on the legislator's obligation to adopt rules within the meaning of the judgments of the Court of Justice of the European Union (...) "⁴⁵, with the effect of reimbursing the amounts collected as motor vehicle pollution tax and the pollutant emissions tax to motor vehicles plus the interest calculated until the date of full payment and court costs as well as other amounts set by the courts. The Court held that the legislator complied with the ruling of the Court of Justice of the European Union precisely through the provisions of the Constitution"⁴⁶.

6. Conclusions

The case law of the Constitutional Court of Romania regarding the interpretation and enforcement of the provisions of Art. 148 of the Constitution of Romania, republished, "has seen an evolution that led to the following conclusions in essence: the Constitution is the only direct reference in the framework of constitutional control; a rule of European law can be used in constitutional control as a rule interwoven with the direct reference, which can only be the Constitution, subject to certain conditions (an objective condition, regarding the clarity of the regulation, and a subjective one, which concerns the margin of appreciation of the constitutional relevance of the European Union legal regulation)"⁴⁷. In that respect, the Constitutional Court held that "the use of a rule of law of the European Union in the framework of constitutional control as an interdependent rule (...) [of the Constitution] implied, under Art. 148 par. (2) and (4) of the Constitution of Romania, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unambiguous by itself or its meaning has been clearly, precisely and unequivocally established by the Court of Justice of the European Union and, on the other hand, the rule must be circumscribed to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution - the only direct reference in constitutional control. In such a case, the action of the Constitutional Court is distinct from the simple enforcement and

³⁹ Decision CCR no. 802/2009, published in the Official Gazette of Romania, Part I, no. 428 of 23 June 2009.

⁴⁰ In case Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the granting of concession contracts or Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, both published in the Official Journal of the European Union, L series no. 94 of 28 March 2014.

⁴¹ Decision no. 390 of 2 July 2014, published in the Official Gazette of Romania, Part I, no. 532 of July 17, 2014, paragraph 38.

⁴² Published in the Official Gazette of Romania, Part I, no. 286 of April 28, 2015.

⁴³ Paragraph 33.

⁴⁴ Published in the Official Gazette of Romania, Part I, no. 859 of November 18, 2015.

⁴⁵ For example, the judgment of the Court of 7 April 2011, *Ioan Tatu v. / The Romanian State through the Ministry of Finance and Economics and Others*, Case C-402/09, EU:C:2011:219.

⁴⁶ Tudorel Toader, Marieta Safta, *Rolul normelor europene...*, cited above, pp. 8-9.

⁴⁷ Marieta Safta, <https://europunkt.ro/2017/01/18/interviu-cu-marieta-safta-prim-magistrat-asistent-la-ccr-efectul-cooperarii-si-interactiunii-intre-curtile-constitutionale-si-cele-europene-este-pozitiv-intrucat-ele-conduc-la-consol/>

interpretation of the law, jurisdiction of the courts and administrative authorities, or any issues related to the legislative policy promoted by the Parliament or the

Government, as the case may be"⁴⁸. "The appreciation of the constitutional relevance lies exclusively with the Constitutional Court of Romania"⁴⁹.

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⁴⁸ Decision CCR no. 903 of 30 June 2011, published in the Official Gazette of Romania, Part I, no. 673 of September 21, 2011.

⁴⁹ Marieta Safta, <https://europunkt.ro/2017/01/18/interviu-cu-marieta-safta-prim-magistrat-asistent-la-ccr-efectul-cooperarii-si-interactiunii-intre-curtile-constitutionale-si-cele-europene-este-pozitiv-intrucat-ele-conduc-la-consol/>