Speech by the President of the Constitutional Court, Mr Marian ENACHE, at the international conference "Evolution of European Union Law. Dialogue between the Court of Justice of the European Union and Constitutional Courts", organised by the National Institute of Magistracy on 30 September 2022, on the occasion of the 30th anniversary of its existence

Distinguished guests,

Honourable participants,

First of all, I want to convey congratulations on the anniversary of the three decades of the National Institute of Magistracy, which trains judges and prosecutors in the exercise of their professions to serve justice and the values of the rule of law.

Please allow me to address to President Koen Lenaerts and Judge Octavia Spineanu-Matei a friendly welcome to Bucharest.

I came to this meeting in an optimistic spirit, animated by the thought that meeting with you, to share ideas and opinions, is already a tacit agreement of understanding.

The topic of the conference and the necessity of discussing it are of double interest, both theoretically and in practice, for all of us who have responsibilities and duties in the interpretation and application of the law.

In my opinion, the topic of the conference is one of the topics that requires answers and clarifications both in the relationship of legal cooperation between our jurisdictional courts, based on the treaties of the European Union, derivative legislation, the case-law of the Court of Justice of the European Union and of national courts, and at the level of European policy institutions vested with democratic representativeness.

It should be noted that through the establishment of the European Union another type of diplomacy has emerged, apart from traditional, governmental and parliamentary diplomacy, namely judicial diplomacy, whose method of implementation is dialogue and judicial procedures, which contribute to maintaining the legal stability of the entire Union construction. In this respect, law must be valued not only as a cultural foundation of Europe, but also as a set of instrumental and institutional means, as a method of shaping and consolidating the Union's developments and the values on which it is founded, the rule of law and democracy.

In judicial diplomacy, the relationship between constitutional courts and the Court of Justice of the European Union, which, in their capacity as guarantors of the national legal order and the legal order of the European Union, play an essential role, contribute to the

creation and consolidation of a European constitutional space. And we are part of this common space in which two constitutional dimensions coexist, as you said, President Lenaerts, last year in Riga: national and European.

Constitutional courts are a fundamental political and constitutional structure of the Member States of the European Union. Their main function is to control the constitutionality of legal norms, to apply general legal principles, values and categories for shaping and guiding fundamental processes within society and institutions, as well as their relations with citizens, in relation to the requirements of democracy and the rule of law.

The constitution must always be respected and regarded as a fundamental act expressing the will of a political community and its rule should be seen as a guarantee of supreme values, which, without being defended, could be threatened by legal uncertainty, destabilisation of the rule of law and constitutional democracy in a given legal system. This obligation is felt by judges, whether from the Constitutional Court or the ordinary courts, as a natural duty and an issue of their own legal awareness, commitment to the values enshrined in the Constitution, and respect for the Constitution and the laws add responsibility to each judge.

The same Constitutions, however, must be interpreted according to their complexity and implications, including in conjunction with the international commitments made in order to achieve an interactive and complementary interpretation of national law, in the light of the Accession Treaty and the European Union law. This complex task lies with the constitutional courts, which, in terms of their composition, bring together independent judges with various legal orientations existing in the society. From liberal to conservative visions, from judicial activism to enhanced textualism, from originalism to living law, from pragmatic to philosophical approach, all these lines of thought can be found in the mentality and culture of independent judges of constitutional courts in interpreting the Constitution.

It is certain that once a State ratifies or accedes to an international treaty, the interpretation of constitutional provisions must take into account the commitments made. Law No 157/2005 for the ratification of the Treaty of Accession to the European Union, a law that established Romania's membership of the European family, so provides.

I note that the Romanian Constitutional Court, even before our country's accession to the European Union, used the case-law of the Court of Justice of the European Union to substantiate its decisions; I refer here to the considerations underlying the Mangold judgment on non-discrimination on grounds of age (Constitutional Court Decision No 513 of 20 June 2006).

In this context of European openness and integration, constitutional courts cannot remain trapped in strictly positivistic legal empiricism and within the limits of immutable jurisprudence, but, in the exercise of their judicial powers, must rise to the level of a unitary and harmonised integrative vision in order to synchronise and strengthen the European constitutional order. Without this approach, constitutional courts – as well as courts – tend to isolate themselves in a closed, self-sufficient, autarchic legal system.

But we must bear in mind that as of 1 January 2007, the date of Romania's accession to the European Union, the case-law of the Court of Justice of the European Union became mandatory. The Treaty of Rome established a European legal order integrated into the legal

system of the Member States (Case of the Court of Justice of the European Union Costa v. Enel — 1964). We are faced with a new legal order of international law for the benefit of which states have limited their sovereign rights, and whose subjects are not only the Member States but also their citizens (Case of the Court of Justice of the European Union van Gend & Loos – 1963).

With regard to the typology and content of the relationship between the two legal orders – national and European one – there is a certain concern in segments of Romanian society, sometimes even specialists in the field or within public institutions with regard to the application of the principle of priority of EU law in relation to the supremacy of the country's Constitution and, consequently, affecting the sovereignty of the Romanian State. This concern must be identified and made aware as such, as the national constitutional courts themselves face this phenomenon, even if it manifests itself informally at the level of some voices of the public opinion or even among legal professionals.

I do not refer in this context to the sovereignist movements or currents that have emerged in the political communities of the European Union area, because, in this regard, oppositions seem to be irreducible, by the very promotion of this type of ideology. However, remaining within the perimeter of analyses and evaluations of constitutional rationality in the relationship between Union law and constitutional courts in their capacity as guarantors of their own constitutions, which express the manifestation of will of each people in their capacity as the sole holder of political power that has established its fundamental settlement for the organisation and functioning of the rule of law and democracy, it is appropriate to provide the answers, explanations necessary to the holder of this constitutional right, namely to the community of people who free and equal before the law.

We all know that there is no human process and no implementation of systems without contradictions, misunderstandings and even inherent or induced obstacles. In general, harmonisation has always been the predilection of avant-garde thought systems, which have often made pragmatic progress, but sometimes failed. At the same time, however, the intrinsic logic of democracy and the rule of law, the need for interactive and complementary pluralism, as a guarantee of avoiding the use of reductionist processes, cannot be ignored.

All these possible assertions at the level of society's assessments, stemming from the most common way of thinking, must constitute sufficient grounds for reflection and decision, primarily political, at EU level, which could clarify the directions, ways and mechanisms for implementing European Union law precisely in order to avoid speculative expressions from the national legal area.

But because our debates take place in the sphere of positive EU and national law, and not in the sphere of political decisions of the European Union, we need to support and follow some orientations of the stage at which we find ourselves, that of established powers and mutual guarantees necessary in the "ordered" application of the two autonomous, complementary and interactive legal levels, European Union law and national law, including constitutional provisions.

First, there is no relationship of subordination or superordination between the two legal orders, European and national.

These legal orders do not operate separately, but in a relationship of complementarity, each preserving the identity of its own positive right. In other words, there is no competition between the priority of European law and the supremacy of national constitutions, this possible perception being a misinterpretation and may have harmful effects on the rule of law itself and on democracy, which are common founding principles of the two legal orders. The main idea is the correct circumscription of the two types of legal preeminence, which are rather part of a system of communication vessels; even if each retains its form and autonomy, they communicate and find themselves in the same system of vision, action and purpose.

I would point out that the priority of EU law must not be understood as the hegemony of that type of law, which must be understood and applied through harmonisation procedures arising from judicial dialogue between courts interpreting and applying law. Therefore, an attitude of openness and cooperation between the national constitutional court and the European court, as well as the judicial dialogue between them, does not raise issues relating to the establishment of hierarchies between those courts, as is apparent from Decision No 668 of the Constitutional Court of 18 May 2011.

The application of Union law does not affect the sovereignty and supremacy of the national Constitution, since the areas of competence and duties of the Constitutional Court and the Court of Justice of the European Union differ. In the light of their case-law, the variable rule of play must be observed, depending on the nature of the legal rule, its scope and the fair relationship of prevalence between a European and a national rule.

In these circumstances, it seems to me that in order to better distinguish between the rules which apply in a particular case, the preliminary ruling procedure before the Court of Justice of the European Union is a viable solution which does not diminish the authority and prestige of the national court, but, on the contrary, through a dialogue based on trust and mutual respect, contributes to the correct application of the legal rule in the cases under consideration.

The application of the two legal orders, in which, in fact, the source of the European legal order was the common political will of the Member States of the European Union, must be understood in their active and complementary interaction, not separatist but congruent, according to the powers assigned to the European order by the Act of Accession. Although these legal orders contain different procedures and legal natures, they have converging aims, namely a higher degree of integration into the Union, citizens' access to the realisation of their rights and freedoms, while ensuring harmonised standards and safeguards of protection.

National constitutions and the legal order of the European Union complement each other and are therefore susceptible to co-existence and consubstantial development. Also in that regard, I consider that the reference judgment of the Court of Justice of the European Union in the Melloni case is relevant, according to which 'in essence... where there is a regulatory conflict between provisions of (constitutional) national law and provisions of EU law, in a situation where the EU legislature has fully harmonised the level of protection of a fundamental right, the compatibility of a national measure with such a right must be examined in the light of EU law and not in the light of national constitutional rules'. Another landmark judgment of the Court of Justice of the European Union is that given in the Akerberg Fransson

case: 'Where no such harmonisation exists, higher national standards than those guaranteed by the Charter of the European Union may apply, provided that "the sovereignty, unity and effectiveness of [EU] law is not thereby compromised".'

In this context, I consider that, in order to achieve such an extensive process of interactive and complementary European constitutionalisation within the European Union, the Court of Justice of the European Union, constitutional courts and ordinary courts, which must promote a type of cooperative judicial conduct without unnecessary competition and tendencies to dominate one order over the other, have a decisive role to play.

Therefore, the rational and realistic way in which European and national institutions, including judicial ones, will react, will dictate the way in which the process of European constitutionalisation will develop and impose in an organic rather than artificial way. We lawyers, with the responsibilities we have in different institutions, are aware of the role of the law in achieving integration in the European Union and we understand that the law, as a means of regulating and underpinning European values, has long transcended the borders of nations, imposing itself through its universal values and standards of more efficient organisation of societies and the fuller guarantee of citizens' fundamental rights and freedoms. This is the case with the Charter of Fundamental Rights of the European Union, to which we refer in the statement of reasons for our decisions.

In carrying out the process of European constitutionalisation, a special role lies with the preliminary reference procedure initiated by the constitutional courts.

In that regard, I note that in 2016 the Constitutional Court of Romania made, for the first time, a request for a preliminary ruling in the context of the *a posteriori* constitutional review, in a case relating to the principle of freedom of residence laid down in Article 21 of the Treaty on the Functioning of the European Union. The Court of Justice of the European Union ruled in June 2018 that this text of the Treaty precludes the competent authorities of the Member State of which the Union citizen is a national from refusing to grant a right of residence on the territory of that State to a third-country national of the same sex, on the ground that the law of that Member State does not provide for same-sex marriage, and the solution given by the Court of Justice of the European Union was also followed by the Constitutional Court of Romania, which held that the relevant national provisions are constitutional in so far as they allow the right of residence on the territory of the Romanian State, under the conditions laid down by European law, to spouses – citizens of the Member States of the European Union and/or third-country nationals – of same-sex marriages concluded or contracted in a Member State of the European Union (Constitutional Court Decision No 534 of 18 July 2018).

It should also be pointed out that, in accordance with the case-law of the Constitutional Court of Romania, it is possible to make a request for a preliminary ruling in the context of the *a priori* constitutional review, in so far as the European measure is of interest in resolving the referral of unconstitutionality.

Therefore, the Constitutional Court of Romania considers itself competent to make requests for a preliminary ruling both in the context of the *a posteriori* constitutional review and in the context of the *a priori* constitutional review.

But the relationship between the Court of Justice of the European Union and constitutional courts cannot be one without inherent inaccuracies in the case-law, and these arise when the two legal orders set different standards for the protection of values protected by the Constitution, the basic treaties and the Charter of Fundamental Rights of the European Union. Both legal orders call into question an upward protection of these values, and between them there is a permanent race to better and more effective protection thereof.

According to Andreas Paulus, judge of the Constitutional Court of the Federal Republic of Germany, in the context of the co-existence of the two legal orders, the Federal Constitutional Court has developed three doctrinal instruments, the so-called counter-limits, as regards the binding nature of international treaties and integration into international institutions, namely: effective protection of human rights (Solange Decisions of 1974 and 1986), constitutional review of *ultra vires* acts (Weiss Case of 2020) and absolute protection of constitutional identity.

Even selective reception of the doctrine of counter-limits by some constitutional courts does not mean that they guide them and determine the case-law conception in relation to European Union law. In fact, other constitutional courts have not even implemented these theories.

The cliché of whether or not we are pro-European in terms of pronounced decisions must be removed from our public debate, being, like any politicised cliché also a false one, because we Romanians are simply European, both through the elements of historical-cultural continuity, through the knowledge and educational structures, but also by our unequivocal option of joining the Euro-Atlantic structures. We are, therefore, part of Europe both through our essentially Western culture, but also by our will to exist and to remain in this space of civilisation.

Therefore, the cliché of pro-European or anti-European can be considered in the conditions of the historical present that we are living obsolete, a "embedded brake" in the overall effort of institutions and people who want to live in a better and more just world. In fact, we ourselves, Romanians, can talk about the existence of a system of law that has European origins, if we take into account the Constitutions of 1866 and 1923, as well as the basic laws adopted in the field of civil law and continuing with the other branches of our legal system.

Thus, moving beyond this false pro-European/anti-European problem which, in the reality of the existence of a European State, we are trying to concentrate our efforts towards deeper integration into EU structures.

The degree and intensity of EU integration are directly proportional to the modernisation of Romanian institutions. In my view this is the stakes of Europe for Romania, which obviously means a convergent effort by the institutions, but also by the Romanian society as a whole, towards achieving deep qualitative changes in the mentalities of our political community. Romania is a country with a decisive role in the Euro-Atlantic structures, both in terms of geostrategic and its potential to be a factor of stability and security in this area of Europe.

In my opinion, as a citizen, the fundamental option for Romania is and must be the model of civilisation of the European Union, sharing and implementing the same heritage of European values in which law represents a cultural foundation, an integrative and civilising means of the common legal and socio-economic space of a European society, in which we find ourselves as equal and free citizens.

In fact, the Romanian Constitution of 1991 and the 2003 revision made this firm option unequivocal. The values and principles of European legal culture have been enshrined in this fundamental legal document, which we consider to be part of the Western-type constitutional order in which the Romanian State, with its national identity, inherent in the fundamental political and constitutional structures, entered with the accession to the Euro-Atlantic structures.

Integration into the EU is not a mere political phrase, but a constitutional value to which we must relate as an orderly and structuring reference system of the entire continental construction and reconstruction in which the resistance structure of the rule of law principle, democracy and unity in diversity must prevail.

I must emphasise that Romania and the countries integrated in the last wave have the chance and historical right to participate in the reconstruction of this complex project, generically called the EU. Through the accession of these countries to the EU, the objectives and modalities have become more complicated, but have also been strengthened with the potential and will of these States to contribute together to the realisation of the European edifice, to the reconstruction of a European society, in which the peoples of the States will become aware of their membership to this type of society.

In turn, the European institutions must adopt integration policies to strengthen the common legal space in relation to the system of constituent treaties, establish clear formal relations between the constitutional levels of the EU and the Member States, move from the rhetorical approach to the pragmatic approach with the purpose to mitigate the periphery-centre complex. We can no longer operate, at this historic moment, of generalisation of democratic procedures, with "-isms", using the measure of things in which we all find ourselves fully in the status of European citizens, members of a true European society. Of course, it is a goal, but in order to get closer to it, we must use both in law and in politics the appropriate methods and means of shaping these processes that meet the problem of cultural and historical diversity.

We need more rule of law through guarantees and standards effectively controlled by legal means. The promotion of a fair law has always replaced violence and disorder, has established the order and peace of the peoples, and every time social peace.

The rationale and rationality characterise the European spirit and must be used as such. Therefore, the paradigm of integration exists, is unanimously accepted, and we need to find the balances and adjustments of the mechanisms for a normal operating cadence. I believe that in this whole process of integration, the irreversible will of states to develop and improve the European project and defeat inertial mentalities is essential.

We must understand that the institutions and those who represent them must, equally, give answers to both the European institutions and their own citizens. The examination of the institutions before their citizens is decisive, because only with such a democratic agreement can we fulfil our responsibilities in relation to the European and international commitments.

It is imperative that we apply and fulfil our obligations as an EU Member State, but at the same time there is a need for Member States to explain and promote institutional approaches, European decisions and EU law in their relations with their citizens. On this line of thought, the constitutional courts themselves have a great responsibility towards their

own citizens because respecting and guaranteeing the Constitution as a fundamental act is a function of constitutional courts.

As regards the case-law of the Constitutional Court of Romania, I must note that there should have been a more open dialogue in the decisions that both the national Constitutional Court and the Court of Justice of the European Union have pronounce on how to relate European law to the national provisions relating to the establishment and operationalisation of the Section for the Investigation of Offences in the Judiciary, the regime of the protection of the European Union's financial interests. Experience has shown that the use of the preliminary questions should become the rule when fundamental questions concerning the interpretation of European Union law are raised. Admittedly, it is for the Constitutional Court to put into practice the theory of the 'acte clair' developed in the judgment of the Court of Justice of the European Union in the Simmenthal case by directly applying binding acts of the European Union, which are sufficiently clear, precise and unequivocal in themselves, and those the meaning of which has been clearly, precisely and unequivocally established by the Court of Justice of the European Union.

The degree and intensity of integration into the European Union are directly proportional to the modernisation of the Romanian institutions. From my point of view, this is Europe's stake for Romania, which obviously implies a convergent effort of the institutions, but also of the Romanian society as a whole, in order to achieve profound qualitative changes in the mentality of our political community.

I therefore believe that we can mark a new stage in relations of judicial cooperation, with an honest opening for references to the European Court for a preliminary ruling, giving priority to the application of EU law whenever there is a regulatory difference between the European legal norm and that of national law, under the conditions of the application of the Treaties and the derived Union legislation, as well as within the limits of the Romanian Constitution.

At the same time, as I stated in June this year, during the meeting with Mrs Věra Jourová, Vice-President of the European Commission for Values and Transparency, the dialogue must be bivalent and "based on mutual trust, good faith and courtesy".

As a constitutional judge and for a three-year term also the representative of the constitutional authority, I follow and even study the movement of ideas, solutions and arguments used in the process of clarifying the relations between the constitutional courts of the Member States of the European Union and the Court of Justice of the European Union regarding the priority of application of EU law in the situations regulated in this regard, according to Article 148(2) of the Romanian Constitution, of the understanding of this process by constitutional judges and I am interested in prefiguring agreed solutions as a result of the full harmonisation at the level of the cas-law of the Court of Justice of the European Union and the application of these solutions at the level of national courts which face situations where the level of protection of the fundamental right has been fully harmonised (see cases Melloni and Akerberg Fransson).

Thank all the participants and guests for the patience and the willingness to listen to me.

President of Constitutional Court of Romania,
Marian ENACHE