The Legal Nature of the Obligation to Harmonize the Romanian Legal System with the Acquis Communautaire

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In 1997, the European Council requested to the European Commission to prepare a document outlining the political and institutional status of the candidate countries, particularly with a view to the start the next enlargement of European Union negotiations[1]. Mention should be made that we do not refer in this paper at the European Union as the same entity with the European Community. The European Union is in fact an entity without legal personality, which includes three components, the so-called "pillars" of the European Union, namely: the Community pillar which consists in two communities based on multilateral treaties concluded in 1958 between six European states, which are the European Economic Community (until 1993), and the European Atomic Energy Community (previously, there was also a third community, the European Coal and Steel Community, which was founded in 1952 for 50 years and terminated on 23 July 2002), the second pillar which is the "common foreign and security policy" and the third pillar which is the "police and justice cooperation in criminal affairs", all of them furthering the aim to build a "community of justice" within the bounds of the European Union.

The main criterion for the evaluation of the European Commission was the ability of the candidate countries to enforce the harmonization of their national legal order with the *acquis communautaire*, to which we can refer in a broad sense, as the system of the obligations in force within the European Union boundaries.

This system is constantly developing and involves generally speaking, the European Law which is a concept covering the laws of all the above mentioned three pillars[2]. The Community law is a far narrower concept, which can be construed basically as an independent European legal order, whilst the laws corresponding to the second and third pillars are, in contrast with the Community law, much closer to the international law.

In this legal order, differentiable as primary and secondary sources of the European Law, the following elements are included:

1. Content, principles and political objectives of the European Union founding treaties, in particular, the Treaty establishing European Coal and Steel Community of 18 April 1951, the Treaty establishing European Atomic Energy Community of 25 March 1957, the Treaty establishing European Economic Community of 25 March 1957 with annexes and protocols, amended and supplemented by Single European Act (1986), the Maastricht Treaty on European Union (1993) with protocols and declarations, the Amsterdam Treaty on European Union with protocols and declarations, the Nice Treaty (2001) after its enforceability date, in addition to which we can also mention the Convention on Certain Institutions Common to the European Communities (1957), the Merger Treaty (1965), the Luxemburg Treaty on Budgetary Matters (1970), the first Treaty of Accession and its Annexes (1972), the second Budgetary Treaty (1975), the Act of the Council concerning direct elections to the European Parliament (1976), the second Treaty of Accession and its Annexes (1979), the third Treaty of Accession and its Annexes (1985), the fourth Treaty of Accession and its Annexes (1994);

2. Legislation adopted on the execution of the Treaties (regulations, directives, decisions);

3. Case law of the European Court of Justice, including general principles of EU law;

4. Declarations and resolutions of the EU;

5. Measures adopted within the framework of Common Foreign and Security Policy;

6. Measures adopted within the framework of Justice and Home Affaires;

7. International agreements concluded by EU and agreements concluded between member states in the field of competence of the EU.

From this approximation it would result that the harmonization[3] is a very complex and lasting process, that affects different fields of law and refers to both material and procedural rules applicable in the national legal order of candidate countries, both taken into account when signing between 1991 and 1995 the European Agreements with the Central and East European candidate countries, among which Romania, which entered in 1993 into the European Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Romania, of the other part[4].

The scope of the European Agreement was to create within our national legal order the necessary framework for the introduction of the *acquis communautaire* into the Romanian legal system, particularly related to the consequences of Romanian membership of the Council of Europe and association with the European Communities[5].

Considering the purpose of this association between Romania and European Communities and the advanced state of the negotiations for our country's accession to European Union we believe that there are clearly two major issues that need to be distinguished before analyzing the legal nature of such a *obligation to harmonize.* First, the formal ones that relate to the process of harmonization between our national legal order and the European Union legal standards, which can be circumscribed to a so-called legislative part of Romania's integration to the European Union. Secondly, the material ones, that relate to the implementation phase of the *acquis communautaire*, which derives from the aforementioned criterion, that require the candidate states to establish also the administrative features for the *acquis* implementation.

While both are equally important, we will focus in this paper only to the legal obligation to harmonize the Romanian legal system with the law of the European Union as it arises from the European Agreement, whose integration into the Romanian legal order will be examined first as the "reception" of an international law agreement by the national law, a more appropriate prospective, which emphasizes both the formal and material aspect of the process.

From this prospective, the Romanian legal system is traditionally considered to be dualist. The dualist concept is based on the Romanian Constitution's provision in respect to the integration of international law and international legal obligations into the national legal order.

The incorporation of the international agreements provisions into the Romanian legal system is made without any further need for transformation. The transformation in this regard has been realized by the Constitution itself. However the international agreements, as the European Agreement, are not a part of the Constitution, they are considered to be national law; hence the harmonization between these norms and the internal legal system shall be secured with regard to the entire internal legal system, including the Constitution. Consequently, no contradiction is allowed between international legal obligations – either taken under the Constitution itself or by international agreement – and the internal legal system[6].

The integration of the international law into the national law provided for in the Romanian Constitution[7] is implemented by the transposition of the international agreements into the national legal system. Accordingly, all international agreements entered into by Romania have to be transformed into the Romanian legal system by ratification issued by the Romanian Parliament in the form of a Law, promulgated by the President of Romania and published in the "Monitorul Oficial"[8].

The transposition does not mean the mere enactment of the international agreements by way of ratification, but includes the obligation to remove any contradiction with the national legal system. This compliance is usually achieved either by considering during the negotiation of an international agreement the internal legislation in force or, after ratification of an international agreement, by amending the internal legislation in accordance with its content.

At the scale of our national legal order, the international norms falling within *ius cogens* domain, as well as the generally respected principles of international public law, supersede the provisions of the Constitution. However, in the latter case, this prevalence is limited to the effective application of the international law[9]. Should such norms be in conflict with the Constitution provisions, according to the well-

established interpretation of the former, their effective application is prevailing, therefore the Constitution provisions are overridden by the *ius cogens* norms. On the other hand, when internal legislation, having the same position in the legal order to that of the law promulgating the international agreement, is in conflict with such an agreement, the solution can be found by an amendment to either the internal legislation or the international agreement.

In our national legal order other norms of international law, such the norms deriving from international agreements, share the legal regime of their promulgating laws. Internal legislation in conflict with an international agreement, of the same rank or inferior to the law promulgating the international agreement, is unconstitutional[10].

The Constitutional Court has the competence to review international agreements with regard to constitutionality, including any possible conflict with internal legislation.

The Court must declare void all internal legislation inferior or at the same level of the laws promulgating the international agreement, should any conflict arise between them. In the situation that the Constitution itself is in conflict with the provisions of the international agreement, the Court must defer to the Parliament the conflict, in order to adopt a restatement of the Constitution.

In the light of this normative hierarchy that represents our national legal order, we may say that the European Agreement enjoys a somewhat privileged position. Due to the fact that the European Agreement was ratified by the Parliament it ranks among the national Laws. Furthermore, as an international agreement it prevails over all internal norms either of the same normative level or inferior to the Laws, but it is subordinated to the Constitution.

The provisions of the European Agreement shall be respected when new international agreements are negotiated, meaning that no international agreement contrary to the European Agreement may be concluded. The same applies to internal legislation: internal Laws contrary to the European Agreement cannot be adopted.

It can be concluded that the European Agreement prevails over national law except for the Constitution.

As regards the internal status of the decisions of the Association Council, which according to the European Agreement are mandatory[11], we consider these instruments as international agreements in the context of national legal order. Therefore, the general rules mentioned herein above should apply for these decisions too with the difference that, depending on the type of the Government's act implementing them[12], they can be transformed into national law by either promulgation and publication in the case of the Government Ordinances or merely publication in case of the Government Resolutions.

Due to this dualist concept of international and national law, the direct applicability and direct effect of international agreements is determined by the content of international agreements. Without the necessary transformation of international law, individual rights and obligations may not arise there from, nor may they be established. The Romanian Constitution recognizes direct applicability only via transformation of the international law into national law, which can be construed as the denial of direct applicability. Consequently, the European Agreement and the decisions of the Association Council may only be applied through promulgating national Laws.

However, in the light of the European Court of Justice case law, the direct effect of the European Agreement might be established when it confers rights or obligations directly on natural and legal persons and directly imposes sanctions or other legal consequences as well. The direct application of the decisions of the Association Council can be justified very much the same. Similarly, the preconditions of clarity, precision and unconditionally established in the aforementioned case law should be considered in tailoring the principle of direct effect of the European Agreement into the Romanian legal order.

In this respect, mention should be made about the wider constitutional context. Accession to the European Union requires that Member States legal systems accept the highly important doctrines of supremacy, direct applicability and direct effect of European Law. Nevertheless, the rule of sovereignty established by the Constitution requires that any form of public power shall be exercised by and under democratic legitimacy as provided by the Constitution, with regard to both internal legislation and international obligations, which in a few words means that the enactment of any Law shall ultimately be based on sovereignty.

Therefore, it must be emphasized that the Parliament cannot breach the Constitution, namely the national sovereignty, even by ratifying international obligations of the Romanian State. Furthermore, the Parliament may not make any disguised amendment to the Constitution in such a way.

It can be concluded that the European Union legal order can only be enforced in Romania by specific authorization of the Constitution, thus one of the outstanding legal issues of Romania's accession to the European Union has been the insertion into the Romanian Constitution of a so called accession to European Union article[13]. This amendment has paved the way for accession to the European Union by giving an express authorization for the exercise of certain elements of Romania's national sovereignty to European institutions.

In conclusion, at this moment, the provisions of the European Agreement are applicable in the Romanian legal system not as European Law but as an international agreement, which is only directly effective when the preconditions mentioned herein above are fulfilled and the agreement is transposed into the Romanian legal order by promulgation and publication.

According to art. 69 of the European Agreement, *"The Contracting Parties recognize that the major precondition for Romania's economic integration into the Community is the harmonization of that country's existing and future legislation to that of the Community. Romania shall use its best endeavors to ensure that future legislation is compatible with the Community legislation".*

According to this wording it can be accepted that this is an obligation to act, not the obligation of the result. We are in the presence of the classical best endeavors clause. Consequently, a lack of success in harmonization of the Romanian legal system shall not be considered as breach of this international agreement, providing that the Romanian Parliament will enact the harmonized laws[14].

An analysis of the legal sources of this obligation would not be complete without at least a few brief remarks on other provisions of the European Agreement, which refer to the adaptation of Romanian legal system to the European law in particular sectors. The exemplification of these special provisions can be found in some articles of the European Agreement as: article 57.5 (harmonization in the field of the air and inland transport), article 61.1&2 (harmonization to approximation in the field of free movement of capital), article 66 (harmonization in the field of state owned enterprises), article 67 (harmonization of intellectual property legislation).

Taking into account the possible forthcoming accession of Romania to the European Union, expected for 2007, the provisions presented above shall be subject to following reinterpretations.

The harmonization task should mean an obligation to incorporate the respective Community rules into the Romanian legal order to the fullest extent possible as an important condition of membership in the European Union. The process of harmonization has a voluntary character, which can be defined as the situation where a third state is adapting its national legal system to the European law rules, which have no binding force in relation to that state. In other words, *the obligation to harmonize* is a unilateral obligation according to which a third state implements into its national legal system, through a legislative process, an external legal system to whose creation it has had no opportunity to participate[15].

A literal interpretation of article 69 of the European Agreement leads to the conclusion that the highly important issues of the scope, timetable and methods of harmonization remain the exclusive competence of the Romanian authorities.

However, the scope of harmonization is defined by the regulatory body of the European Union law. Since the major aim of bilateral relations between both signatory parties is Romania's accession to the European Union, the only element relating to the adaptation of the Romanian legal system which may be subject to negotiations is the timetable of this process.

As a matter of fact, the European Agreement gives only a slight suggestion as to what fields of law shall fall under the process in question. According to article 70 of the European Agreement *"the harmonization of legislation system shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animal*

and plants, consumer protection, indirect taxation, technical rules and standards, transport and environment".

It should be noted that this enumeration does not have an exhaustive character but may rather be considered as a specific type of guideline.

It must be emphasized that partial performance of this *obligation to harmonize* cannot be taken into account. As the European Commission has explicitly underlined, *"the Council has ruled out any idea of partial adoption of the acquis [...] [...] without solving the underlying problem [...] could create new difficulties which would be even more considerable."*[16]

However, it is important to note that it is possible to distinguish some limitations to the scope of this obligation. Indeed, there are certain parts of European legislation that should not be implemented into Romanian legal system before certain criteria (that is, economic ones) are fulfilled or until accession takes place[17].

In practice, this refers to selected aspects of internal market legislation, institutional provisions along with company law, trade marks, transport, insurance sector etc. It also refers to international treaties concluded between Member States of the European Union.

Although certain provisions of the European Agreement establish time limits for the harmonization in different fields of law, these do not result into a mandatory timetable. The entire problem of the timetable and the enforcement of the *obligation to harmonize* should be considered from a much broader perspective and not just in the light of the European Agreement.

As mentioned by the European Commission[18], unlike the case of the 1995 enlargement of the European Union, the adaptation of the *acquis* by the Central and East European candidate countries is part of the pending process of democratic reforms. Consequently, it seems obvious that the final timetable and the enforcement of the harmonization must be the result of a deep interdisciplinary analysis. The entire harmonization process must have its basis in a regularly updated timetable and definitely cannot be enforced on an *ad hoc* basis[19].

In fact, in Romania several papers of national interest relating to this topic were published. The most important of these was the National Strategy for Preparing Romania's Integration to European Union, elaborated in 1995[20]. The strategy covers both the legislative aspects of the harmonization and also the implementation implications, including possible administrative changes and necessary financial expenses concerned. The particular tasks are presented by sectors and it was pointed that the responsibility for the proper implementation of the strategy lies not only in hands of the Government and Parliament, but also extends to the whole state administration, local administration and courts system. In many cases the co-operation of representatives of the private sector was also considered to be highly relevant. Mention should be made that the strategy was amended in 2000, since the pre-accession preparatory strategy created by the Accession Partnership[21] have been proven to be of a very dynamic character.

The Regular Reports published annually by the European Commission are, to some extent, a continuation of the 1997 Commission's Opinion on the membership application.

Presented in the same structure as the latter, the reports identify (amongst other things) the level of performance of the obligation to harmonize the Romanian legal system to the law of the European Union[22].

Another important factor that needs to be considered at this point is the form of the harmonization. Following the division announced in the introduction of this paper, between the formal and material aspects of harmonization, the various forms of harmonization could be reduced to a common denominator, according to which we may distinguish between legislative harmonization and interpretative harmonization, the so-called pro-European interpretation of law[23].

According to the characteristics, scope and procedures of the harmonization process outlined by the European Agreement, we may say that in the Romanian legal system the legislative form of the harmonization has been used.

Legislative harmonization is achieved by the amendment or repeal of the Romanian legislation currently in force or, when required, by the enactment of new legislation. Further to what is known as the euro conformal interpretation of national legislation it should also be mentioned what is known as the indirect effect of the harmonization, which means that the state authorities are obliged to apply the national legislation consistently with the Community legal acts, if possible. From this it results that the

subject of the application precedence principle is the Community law whereas the direct effect principle concerns the national legislation.

Considering the legislative harmonization in connection to the various sources of the European Law it results that this method applies in general to both primary and secondary *acquis communautaire*, as described herein above.

However, in the case of the harmonization of the Romanian law to matters regulated by primary European legislation some examples of limitations to the harmonization extent could be mentioned. For instance, the basic rules on free movement of persons and services provided in the European Agreement differ, to a large extent, from the rules for Member States as specified in the European Community Treaty. They cannot, therefore, be subject to harmonization in this phase of Romania's accession to European Union.

The issue becomes more complex when the secondary sources of the European Law are taken into consideration. According to article 249 of the European Community Treaty *"a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."* Therefore, since the moment of the accession, that part of the *acquis* formed by the European Regulations in force will be directly applicable in the Romanian legal system. Consequently, the relevant internal legislation will have to be repealed, although this will take place only within the scope of the European Law.

A less cumbersome aspect is the harmonization of the Romanian legal system to directives, as the current legislation will be implicitly transformed after Romania's accession to European Union into national implementation measures of such directives, in the sense of the article 249 of the European Community Treaty. However, because of the character of directives, Romanian legislators should also take into account the implementation measures as applied in the Member States.

As far as decisions are concerned, we believe that they are not subject to harmonization, except for those that require certain financial and logistic support, such as research and development programmes.

Since international agreements entered into by the European Union and third states or international organizations are also an integral part of the *acquis communautaire*, the scope of the harmonization should be extended accordingly. As a result, all the international agreements that shall be concluded by Romania must be in compliance with the European Law. The international agreements that are already in force have to become subject of renegotiations and, if no compromise can be reached, will have to be terminated.

Besides the primary and secondary sources of the European Law, the *acquis communautaire* also includes the jurisprudence of the European Court of Justice as well as a wide variety of non-binding acts (recommendations, guidelines, communications, etc.). Under European Agreement no distinction in this respect was made, but we consider unreasonable to claim that it is mandatory to implementing all of the European Court of Justice's judicial decisions or the non-binding acts of the European Commission into the Romanian legal system.

Nevertheless it is important to note that after Romania's accession to the European Union the role of the European Court of Justice in the implementation of the European Law in our legal system will be significant, taking into account that the utility of its decisions contributes to achieve the aims of the European Union, by developing the application principles of the European Law, namely the principle of application precedents of binding community regulation over national law regulation and the principle of the direct effect of the European Law. The principle reciprocates in the event that an individual is impaired by a Community law act, when he can ask the European Court of Justice to enforce the liability of a European Union member state for damage caused to the individual by the breach of community legal acts. A classic example of a breach of a Community law arises where the Member State does not implement a directive into its national legislation within the time limits and, as a consequence, rights, which would normally be created in favor of an individual, are not created. The European Court decisions outlining provisions of the European Law should also be used in the implementation measures (for example, in case of the directives).

To conclude, we should keep in mind that the framers of the Romanian Constitution intended for international law to become a part of Romanian law and for Romania to participate in a united Europe. After the signature and ratification of the

European Agreement, Romania bound its destiny to Western integration and participation in the European Union in the context of a supranational community. Since the European Agreement, in the harmonization process they the line between integration and sovereignty followed, holding that the obligation to harmonize must be understood and construed in the overall context of the entire Constitution.

The Constitution explicitly provides for the possibility to transfer sovereign powers to intergovernmental institutions, by legislation.

However, intergovernmental organizations may not, through legislation or otherwise, infringe on the basic structure of the Constitution. Through legislation, Romania may transfer limited sovereign rights to intergovernmental organizations, but the fundamental rights in the Constitution, as well as the basic structure and identity of the Constitution, remain inalienable.

If prior to our accession to European Union, the Romanian Parliament enacts the appropriate internal laws for the transposition of the European Law, then the European Law, as international law, may receive priority over national law. Enacting this kind of law opens up the Romanian legal system in such a way that the exclusive claim to control its sphere of sovereignty can be withdrawn and room can be given for the direct validity and application of a law from another source within that sphere of the sovereignty. Nonetheless, the basic structure and identity of the Constitution, particularly fundamental rights, remain inviolate.

Therefore, construing the obligation to harmonize stipulated in the European Agreement in relation to the recent amendments to the Constitution[24] we have the basis for the direct application of the European Law in Romania and even for preempting the Romanian law.

The fulfillment of this obligation not only will allow Romania to accede to the European Union, but may also strengthen the principles of democracy as integration proceeds.

Such obligation in the European Agreement must be regarded as consistent with the Romanian legal order, since it subjects the validity of European integration to the Romanian Law, which will become, after harmonization, the European Law transposed into the Romanian Law, thus becoming an obligation simultaneously parallel to, and enmeshed in the Romanian legal system.

However, mention should be made that such condition imposed by the European Agreement is attenuated by the possibility that the candidate states agree with the European Union on a timeframe for implementing the *acquis* standards, which could result in a situation in which a candidate state is considered an eligible member state of the European Union on the basis of a planned but not yet completed implementation of the European Law. As a result of negotiations, the candidate state could be allowed a transition period for the complete implementation of the *acquis* after the date of entering the European Union.

NOTES:

[1] From this point of view there are also other relevant documents: the European Council's Conclusions of the Presidency from Copenhagen (June 1993), Essen (December 1994) and Cannes (June 1995).

[2] Philippe Schmitter defined acquis communautaire as "the sum total of obligations that have been accumulated since the founding of the European Coal and Steel Community and are embedded in innumerable treaties and protocols". See Philippe Schmitter, "Imagining the Future of the Euro-Polity with the Help of New Concept", in Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter and Wolfgang Streeck, *Governance in the European Union*, London, ed Sage, 1996, p. 162

[3] See A. Evans, "Voluntary Harmonisation in Integration between the European Community and Eastern Europe", in *European Law Review*, no. 22, 1997, p. 201.

[4] The Parliament ratified the *European Agreement* by the Law no.20/April 6th, 1993, promulgated by the Decree no. 50/April 5th, 1993 and published in the Official Gazette no.73/April 12th, 1993.

[5] Romania has the full membership of the Council of Europe, OECD, World Trade Organisation and NATO.

[6] According to art.11, para.3 of Romanian Constitution, in the situation that Romania has entered into an international agreement whose provisions do not comply with the constitutional provisions, its ratification is permitted only after the restatement of the Constitution.

[7] Art.11, para.2 of Romanian Constitution: "The treaties [the international agreements n.n.] ratified by the Parliament according to the Law, are an integral part of the internal law [the Romanian legal system n.n.]".

[8] According to the art.78 of the Romanian Constitution the Law becomes enforceable in three calendar days after its publication in "Monitorul Oficial".

[9] International legal obligations falling outside the scope of *ius cogens* of international public law shall not however prevail over the Constitution.

[10] Romania is a part of the international legal order; therefore any source of international law is an order for the national law. Consequently, the Constitution and national law shall be interpreted in such a way that the generally respected rules of international law shall prevail effectively.

[11] See article 108 of the *European Agreement.*

[12] In accordance with the provisions of the articles 107 and 108 of the *European Agreement* the Government represent Romania in the Association Council and in the Association Committee and has the direct obligation to implement the decisions of these bodies and to provide for the implementation of the European Agreement.

[13] This is the article 148 of the Romanian Constitution, as amended by referendum in 2003, which provides that the accession of Romania to European Union and the transfer of certain competencies to the European institutions as well as the exercise of the prerogatives recognized by the founding treaties along with the other member states is approved by Law voted by a qualified majority of both chambers of the Romanian Parliament.

[14] In other words, the breach of the international law obligation will not be the lack of harmonization of the new Romanian Laws with the European Law, but the failure to take best endeavours to achieve this goal.

[15] See A. Evans, "Voluntary Harmonization in Integration between the European Community and Eastern Europe", in *European Law Review*, no. 22, 1997, p. 203.

[16] See The European Commission, *White Paper: Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union*, COM (95) 163 final / 03.05.1995 and COM (95) 163 final / 2, 10.05.1995.

[17] See *Agenda 2000 for a stronger and wider Union*, European Commission, Bulletin of the European Union, Supplement 5/97, 1997, p. 44-45.

[18] See *Agenda 2000 for a stronger and wider Union*, European Commission, Bulletin of the European Union, Supplement 5/97, 1997, p. 10.

[19] See K. Henderson, *Back to Europe: Central and Eastern Europe and the European Union*, London, ed. UCL Press, 1999.

[20] See in this respect, Tudorel Postolache, *De la Essen la Cannes. Itinerarul strategiei româneşti de integrare europeană,* Bucureşti, Editura Academiei Române, 1995.

[21] The Accesion Partnership was decided in March 1998 and its current version that we refer to represents an up-date as provided for in the Council Regulation 622/98, article 2 on the establishment of Accession Partnerships, published in the Official Journal L85, 20.03.1998, p.1. As noted in this updated version: *"The purpose of the Accession Partnership is to set out in a single framework the priority areas for further work identified in the Commission's Opinion on Romania's application for membership of the European Union, the financial means available to help Romania implement these priorities and the conditions which will apply to that assistance."*

[22] See point *B3.1. Chapters of the Acquis*, in Commission of the European Communities, *2004 Regular Report on Romania's Progress towards accession*, COM (2004), 657 final/6.10.2004.

[23] See A. Evans, "Voluntary Harmonization in Integration between the European Community and Eastern Europe", in *European Law Review*, no. 22, 1997, p. 206.

[24] See *infra* 14.