

THE RELATIONSHIP BETWEEN EU LAW AND ROMANIAN CONSTITUTION. RECENT DEVELOPMENTS IN THE CASE-LAW OF THE ROMANIAN CONSTITUTIONAL COURT

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Abstract

This paper deals with the consequences arising from the recent practice of the Romanian Constitutional Court regarding the application of EU law by the Romanian courts. In particular, this paper aims to determine the consequences on the primacy of EU law and on the rule of law in the Romanian legal system, arising from the Decision no 390/2021 of the Romanian Constitutional Court, which concerned the constitutionality control of the Law no 304/2004 regarding the judicial organization and of the Emergency Ordinance of the Government no 90/2018 regarding the department for the investigation of offences committed within the judicial system.

To this end, this study examines the impact of the legally binding Decision no 390/2021 of the Romanian Constitutional Court, which held, in interpreting the primacy of EU law over contrary national law, enshrined by Article 148(2) of the Romanian Constitution, that a national Romanian court does not have the power to review the conformity of a provision of national law with the provisions of EU law, if that provision of national law was previously found to be constitutional by the Romanian Constitutional Court. Also, in this context, the study will outline the relationship between EU law and Romanian Constitution, as interpreted recently by the Romanian Constitutional Court.

The paper deals also with the legally binding decision of the Court of Justice of the European Union (“CJEU”) delivered in case C-355/19, which concerned also the primacy of EU law and the rule of law in the Romanian legal system.

From this perspective, the paper emphasizes the differences between the interpretation of the Romanian Constitutional Court and the interpretation of the Court of Justice of the European Union, with the purpose of highlighting the possible conflict between these interpretations. Finally, the paper will emphasize what are the principles and the rules that must be observed by the Romanian national courts during the judicial review after these decisions and will try to determine what are the circumstances in which a national Romanian court may review the conformity of a provision of a national law with the provisions of EU law and decide not to apply the national law or to annul the administrative measures which are contrary to EU law.

Points for Practitioners

The paper presents interest for practitioners in public law, especially the aspects concerning the field of application of EU Law in Member States of EU, the primacy of EU Law and the relationship between EU law and national Constitutions. Also, for practitioners in public law it is important to know what are the specific situations in which a national Romanian court may review the conformity of a provision of a national law with the provisions of EU law and decide not to apply the national law or to annul the administrative measures

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which are contrary to EU law.

Key words

EU law, national law, constitutional law, national Constitution, relationship between EU law and national law, relationship between EU law and Romanian Constitution, primacy of EU law, judicial review, rule of law, Romanian Constitutional Court, constitutionality control, national constitutional identity.

Methodology

This study is based, mainly, on the relevant case-law of the Romanian Constitutional Court, CJEU case-law, legislation and papers regarding the primacy of EU law. Also, this paper analyzes the possible impact of the legally binding Decision no 390/2021 of the Romanian Constitutional Court, on the primacy of EU law and on the relationship between EU law and Romanian law.

1. Introduction

The primacy of EU law over contrary national law is one of the most important general principles of EU law. It was developed gradually by the CJEU, in the beginning of the construction of the EU legal order. According to the CJEU, “national courts are required to give immediate effect to EU law, of whatever rank, in cases which arise before them, and to ignore or to set aside any national law, of whatever rank, which could impede the application of EU law.”¹

The doctrine of the primacy of EU law was established by the CJEU decision in *Costa* case², where it held that “it follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question”.

Later, in other cases, the CJEU ruled that EU law should be awarded primacy over any contravening national law, including the constitutions of the Member States: “It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/09 [2011] ECR I-1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, paragraph 3, and Case C-409/06 Winner Wetten [2010] ECR I-8015, paragraph 61). It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.”³

Thus, according to the CJEU, the substance of the primacy of EU law, as a general principle of EU law, is that “any norm of EU law takes precedence over any provision of national law, including the national

¹ P. Craig, G. de Burca, *EU Law, Text, Cases and Materials*, Fifth Edition, Oxford University Press, 2011, 256.

² Case C-6/64, *Costa v. Enel*, CJEU.

³ Case C-399/11, *Melloni*, CJEU.

constitutions.”⁴

Even if the perspective of the CJEU on the primacy of EU law was expressed in a clear manner in its consistent case-law, together with the requirement that national courts must apply this principle, the perspective of the Member States on the primacy of EU law has not always been the same as the perspective of the CJEU.

Since the national courts of the Member States are the ones that should ensure the effectiveness of the primacy of EU law at national level, it follows that, in the end, the acceptance and the application of the primacy of EU law are decided, in practice, by the judicial authorities of the Member States.

That is why, even if national courts “accept the requirements of supremacy in practice, most regard this as flowing from their national constitutions rather than from the authority of the EU Treaties or the ECJ, and retain a power of ultimate constitutional review over measures of EU law.”⁵

The result is, sometimes, a conflict between the interpretation of the national courts (and especially of the national Constitutional Courts) and the interpretation of the CJEU regarding the primacy of EU law.

After the establishment of the doctrine of the primacy of EU law by the CJEU in *Costa* case⁶, constitutional conflicts continued to arise in the Member States regarding the primacy of EU law, and some Constitutional Courts stipulated limits on their acceptance of the primacy of EU law. In the last years, the recent case-law of some Constitutional Courts “highlights thus a growing tendency among domestic constitutional Courts to shape an idea of national constitutional identity that, as someone observed, emerges as a <counter-concept> to EU constitutional identity”⁷.

In this context, a recent example is the *Weiss* judgment of the German Constitutional Court, regarding the European Central Bank’s Public Sector Purchase Program, issued in May 2020⁸, in which the German Constitutional Court denied the legal binding force of the earlier judgment of the CJEU of 11 December 2018 and initiated its own judicial review of the Eurosystem’s decisions on the Public Sector Purchase Program.

With regard to other Member States, some authors believe that “the Weiss decision is far from being an isolated and completely unpredictable episode” and that it “should rather be understood as the latest milestone of a more complex and far-reaching phenomenon”.⁹

In Hungary, for example, a decision of the Hungarian Constitutional Court issued on December 2016, was described as a decision „in which the judges refer to the country’s constitutional identity to justify the government’s refusal to apply the EU’s refugee relocation scheme in Hungary”.¹⁰

Since the primacy of EU law still raises a number of concerns and uncertainties, this article intends to examine the current and future application of the primacy of EU law in Romania, following the legally binding Decision no 390/2021 of the Romanian Constitutional Court, which offered a more nuanced interpretation of the primacy of EU law.

In order to achieve this scope of work, this paper will first analyze the case-law of the Romanian

⁴ P. Craig, G. de Burca, *EU Law, Text, Cases and Materials*, Fifth Edition, Oxford University Press, 2011, 256.

⁵ P. Craig, G. de Burca, *EU Law, Text, Cases and Materials*, Fifth Edition, Oxford University Press, 2011, 256.

⁶ Case C-6/64, *Costa v. Enel*, CJEU.

⁷ R. Uitz, *National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades*, 2016 (<https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/>).

⁸ BVerfG, Case No. 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 of 5 May 2020.

⁹ M. Galimberti, S. Ninatti, *Constitutional Resistance to EU Law: The Courts and the test of Constitutional Identity Conflicts*, *Pravni Zapisi*, vol. 11, 2/2020, 415.

¹⁰ Gábor Halmai, *National(ist) Constitutional Identity? Hungary’s Road to Abuse Constitutional Pluralism*, *EUI Department of Law, Working Paper*, no. 08/ 2017, available at SSRN: <https://ssrn.com/abstract=2962969> or <http://dx.doi.org/10.2139/ssrn.2962969>.

Constitutional Court regarding the primacy of EU law before the Decision no 390/2021, and then will analyze the main rules established by the Constitutional Court in the Decision no 390/2021, trying to determine the perspective of the Romanian Constitutional Court on the primacy of EU law before and after this decision. Also, the paper will outline the possible differences between the Decision no 390/2021 and the previous case-law of the Constitutional Court, regarding the primacy of EU law, and the possible impact of the new elements of interpretation contained in the Decision no 390/2021 on the current and future application of the primacy of EU law in Romania, in the context of judicial review.

2. The perspective of the Romanian Constitutional Court on the primacy of EU law before the Decision no 390/2021

The Romanian Constitutional Court is empowered with the interpretation of the Constitution and with the constitutional review of the national laws, according to Articles 142–147 Constitution of Romania¹¹ and Law no 47/1992¹², and it is a political and jurisdictional public authority that is independent from the judiciary authorities and independent from any other public authorities.¹³

The Romanian Constitutional Court is empowered with an essential role - it must guarantee the supremacy of the Romanian Constitution in the Romanian legal order, according to Art 142(1) Constitution of Romania. From this perspective, it should be mentioned that the respect of the Constitution and its supremacy is mandatory, according to Art 1(5) Constitution of Romania.

The necessary constitutional provisions for the accession of Romania to the EU were included in the Constitution of Romania by Law no 429/2003¹⁴ on the amendment of the Constitution. This amendment of the Constitution of Romania introduced Art 148 (Integration into the European Union), which stipulates the constitutional premises of the Romanian EU membership.

Art 148 Constitution of Romania stipulates that:

- “(1) Romania’ s accession to the constituent treaties of the European Union, with a view to transferring certain powers to Community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.*
- (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory Community provisions shall take precedence over the contrary provisions of national law, in compliance with the provisions of the accession act.*
- (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts amending the constituent treaties of the European Union.*
- (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and from the provisions of paragraph (2) are implemented.*
- (5) The Government shall send to the two Chambers of the Parliament the projects of the mandatory acts before they are submitted to the European Union institutions for approval.”*

¹¹ The Constitution of Romania is available in English at www.presidency.ro/en/the-constitution-of-romania.

¹² Republished in Monitorul Oficial [Official Journal of Romania] no 807/03.12.2010.

¹³ I. Muraru, E. S. Tănăsescu, *Drept constituțional și instituții politice* [Constitutional law and political institutions], 13th edn, vol II, Bucharest, CH Beck, 2009, 261.

¹⁴ *Monitorul Oficial* no 758/29.10.2003.

Art 148(2) Constitution of Romania enshrines the primacy of EU law over national law, specifying that “the constitutive treaties of the European Union” and other mandatory provisions of EU law have primacy over national law, when these provisions of EU law are in contradiction with provisions of national law. On the other hand, Art 148(2) Constitution of Romania does not specify what are the categories of the normative acts which are included in the “national law” that should be set aside when it is in contradiction with EU law, which means that all normative acts issued by the state authorities, should be set aside when a contradiction with EU law occurs.

Another important provision regarding the primacy of EU law, that should be emphasized, is that according to Art 148(4) Constitution of Romania, all the public authorities, even the judiciary authorities, must apply the primacy of EU law and even more than that, must *guarantee* that the obligations resulting from EU law and from the primacy of EU law are effectively implemented in practice.

Thus, from a constitutional perspective, in the Romanian legal order, the relationship between the national law and the EU law, is governed by the special provisions of Art 148 Constitution of Romania. This was also recognized by the Constitutional Court of Romania in Decision no 127/06.03.2019¹⁵.

According to the provisions of the Constitution of Romania previously mentioned, it follows that:

- (i) the Romanian Constitution has primacy in the Romanian legal order;
- (ii) EU law has primacy over national law, when the provisions of EU law are in contradiction with the provisions of national law, without being provided what are the categories of the national normative acts which are included in the “national law” that should be set aside when it is in contradiction with EU law;
- (iii) EU law can be used by the Constitutional Court of Romania in the context of constitutionality control, as a legal ground for constitutional control of national law, if the EU law is sufficiently clear, precise and unconditional and includes constitutional relevance¹⁶.

These rules have been reflected in the case-law of the Constitutional Court of Romania. The primacy of EU law over national law has been recognized by the Constitutional Court of Romania, based on the Art 148(2) Constitution of Romania and based on the Romania’s EU membership¹⁷. Regarding the judicial review of the compatibility between national law and EU law, the Constitutional Court of Romania held that it lacks jurisdiction to apply such a control, but it recognized the jurisdiction of the national courts in this regard, which are empowered, according to the Romanian Constitutional Court, with the application of EU law based on the primacy of EU law.¹⁸

In **Decision no 2/2012**¹⁹, the Romanian Constitutional Court held that Romania, based on its EU membership, must apply the EU law and must implement the recommendations established in the mechanism for cooperation and verification (‘MCV’), established by European Commission Decision no 2006/928/EC of 13 December 2006, on the accession of Romania to the European Union in 2007, in the areas of judicial reform and the fight against corruption:

“According to the case-law cited, the Member States cannot avoid the liability for infringement of EU law,

¹⁵ Constitutional Court of Romania, Decision no 127/06.03.2019, *Monitorul Oficial* no 189/08.03. 2019.

¹⁶ Constitutional Court of Romania, Decision no 668/18.05.2011, *Monitorul Oficial* no 487/08.07. 2011.

¹⁷ Constitutional Court of Romania, Decision no 2/11.01.2012, *Monitorul Oficial* no 131/23.02. 2012; Constitutional Court of Romania, Decision no 414/26.06.2019, *Monitorul Oficial* no 922/15.11. 2019; Constitutional Court of Romania, Decision no 534/18.07.2018, *Monitorul Oficial* no 842/03.10. 2018.

¹⁸ Constitutional Court of Romania, Decision no 137/25.02.2010, *Monitorul Oficial* no 182/22.03. 2010..

¹⁹ Constitutional Court of Romania, Decision no 2/11.01.2012, *Monitorul Oficial* no 131/23.02. 2012.

arguing that such infringement is determined by the way in which national courts interpret the law, assess facts or evidence, and that State's liability cannot be without effect regarding the liability of the national judge. (...)

With regard to these commitments, the Court notes that, by Decision 2006/928/EC of the European Commission of 13 December 2006 establishing a mechanism for cooperation and verification of the progress made by Romania in achieving certain specific reference objectives in the field of reform judicial system and the fight against corruption, published in the Official Journal of the European Union L 354 of 14 December 2006, it was noted that the Commission had identified "unresolved issues, in particular as regards the accountability and efficiency of the judiciary" in Romania. The Commission's report to the European Parliament and the Council on Romania's progress in the cooperation and verification mechanism of 20 July 2011 states that "Romania has not yet engaged in a thorough reform of the disciplinary system.

*Or, the quality of member of the European Union imposes on the Romanian state the obligation to apply this mechanism and to follow the recommendations established in this framework, in accordance with the provisions of Art 148(4) of the Constitution, according to which <the Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfillment of the obligations resulting from the acts of accession and from the provisions of paragraph (2)>."*²⁰

In the recent **Decision no 414/2019**²¹, the Romanian Constitutional Court clearly acknowledged that the provisions of EU law are mandatory and that the Romanian authorities have the obligation to apply the EU law based on the rules established by EU law and by Art 148(4) Constitution of Romania. In addition, the Court held that the Romanian authorities can't adopt normative acts which are contrary to the obligations resulting from the EU law:

"Regarding the provisions of Art 11 (1) and Art 148 (2) Constitution of Romania, by reference to the EU law provisions invoked in support of the objection of unconstitutionality, the Court observes that, according to Art 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adaptations of the Treaties on which the European Union is founded, part of the Accession Treaty, ratified by Law no. 157/2005, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005, <from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and this Act.> Therefore, adhering to the legal order of the European Union, Romania has accepted that, in the areas in which the exclusive competence belongs to the European Union, regardless of the international treaties it has concluded, the implementation of the obligations resulting from them should be subject to European Union rules. Otherwise, it would be undesirable for the Member States to severely affect the Union's competence (...). Therefore, in the application of Art 148 (2) and (4) of the Constitution, Romania in good faith applies the obligations arising from the act of accession, not interfering with the exclusive competence of the European Union, and, as the Court has established in its case law, by virtue of the compliance clause contained in the text art. 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations to which it has committed itself as a member state (see Decision no. 887 of 15 December 2015, published in the Official Gazette of

²⁰ Constitutional Court of Romania, Decision no 2/11.01.2012, *Monitorul Oficial* no 131/23.02. 2012.

²¹ Constitutional Court of Romania, Decision no 414/26.06.2019, *Monitorul Oficial* no 922/15.11. 2019.

Romania, Part I, no. 191 of 15 March 2016, paragraph 75). All of the above has a constitutional limitation, expressed in what the Court described as a "national constitutional identity" (see Decision no 683 of June 27, 2012, published in the Official Gazette of Romania, Part I, no 479 of July 12, 2012, or Decision no 64 of February 24, 2015, published in the Official Gazette of Romania, Part I, no 286 of April 28, 2015)."²²

Besides recognizing the primacy of EU law, the Romanian Constitutional Court also set a limit to the application of EU law in Decision no 414/2019²³, which consists of the "national constitutional identity", a concept that gained more and more relevance in the recent case-law of the Romanian Constitutional Court, as a concept opposing to the primacy of EU law.

In Decision no **887/2015**²⁴, the Constitutional Court of Romania held that it lacks jurisdiction to review the compatibility between the national law and the EU law in the areas which are governed by the EU law: "Therefore, in the field of competition, any State aid falls within the scope of the European Commission, and the procedures for challenging it fall within the jurisdiction of the Union. Therefore, in the application of Art 11 (1) and Art 148 (2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the Act of accession, not interfering with the exclusive competence of the European Union and, as established in its jurisprudence, by virtue of the compliance clause contained in the text of Art 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations to which it has committed itself as a member state."

In **Decision no 137/2010**²⁵, the Constitutional Court of Romania also held that it lacks jurisdiction to review the compatibility of EU law with national law, but it clearly recognized the jurisdiction of the other national courts in this regard, which are empowered, according to the Romanian Constitutional Court, with the application of EU law based on the primacy of EU law:

"The Constitutional Court does not have the competence to resolve a conflict between the national and the EU law, this competence belonging to the common law courts.

In Decision no 1596 of November 26, 2009, published in the Official Gazette of Romania, Part I, no 37 of January 18, 2010, the Constitutional Court ruled that it is not within its competence <to examine the conformity of a provision of national law with the text of the Treaty establishing the European Community (now the Treaty on the Functioning of the European Union) in the light of Art 148 of the Constitution. It is up to the common law court to determine whether there is a conflict between national law and the EU law, which, in order to reach a correct conclusion, may send a preliminary question based on Art 234 EC Treaty to the Court of Justice of the European Union. If the Constitutional Court would consider itself competent to rule on the conformity of national legislation with that of the European Union, then a conflict of jurisdictions between the two courts might occur, which, at this level, is inadmissible. (...)

All these aspects converge to demonstrate that the task of enforcing the primacy of EU law provisions in relation to the provisions of the national legislation falls within the competencies of the common law national courts. It is a matter of law enforcement, not constitutionality. The Court notes that in the relations between EU law and national law (with the exception of the Constitution), there is only the priority of EU law over the national law, which is a matter which falls within the jurisdiction of the common law national courts.

Furthermore, the Court notes that, if the contrary view would be accepted, in the sense that the Constitutional

²² Constitutional Court of Romania, Decision no 414/26.06.2019, *Monitorul Oficial* no 922/15.11. 2019.

²³ Constitutional Court of Romania, Decision no 414/26.06.2019, *Monitorul Oficial* no 922/15.11. 2019.

²⁴ Constitutional Court of Romania, Decision no 887/15.12.2015, *Monitorul Oficial* no 191/15.03. 2016.

²⁵ Constitutional Court of Romania, Decision no 137/25.02.2010, *Monitorul Oficial* no 182/22.03.2010.

court may determine the constitutionality or unconstitutionality of a national law in relation to the provisions of EU law, it would clearly infringe the jurisdiction of the Court of Justice of the European Union, since it has the power to interpret the Treaties (Art 267 of the Treaty). ”²⁶

It follows clearly that by these decisions, the Constitutional Court of Romania accepted the primacy of EU law over the national law, without any other limitations except the Constitution itself and the concept of the "national constitutional identity". However, these limitations were only mentioned in the text of the decisions, without an attached detailed explanatory doctrine and without a significant impact in the final outcome of the decisions.

In the decisions mentioned above, the general perspective of the Romanian Constitutional Court on the primacy of EU law was similar to the perspective of the CJEU in many aspects.

However, this general perspective of the Romanian Constitutional Court on the primacy of EU law expressed in a consistent line of case-law changed with the Decision no 390/2021²⁷ of the Romanian Constitutional Court, which brought additional nuances to the previous perspective.

3. The perspective of the Romanian Constitutional Court on the primacy of EU law in the Decision no 390/2021

Decision no 390/2021²⁸ of the Romanian Constitutional Court concerned the constitutionality control of the Law no 304/2004 regarding the judicial organization and of the Emergency Ordinance of the Government no 90/2018 regarding the department for the investigation of offences committed within the judicial system.

The objection of unconstitutionality was raised, among others, by the Association "Forumul Judecătorilor din România", in a case concerning the annulment of the Order no 252/2018 regarding the section for the investigation of offences committed within the judicial system by magistrates (hereinafter "Section"), organized within the Prosecutor's Office attached to the High Court of Cassation and Justice.

The authors of the objection argued that the establishment of this Section allows the redirection of dozens of high corruption cases, by simply formulating fictitious complaints against a magistrate, abolishing a significant part of the investigations against the high corruption cases.

The authors of the objection argued also that the national laws in question breached Art 148(2) and (4) Constitution of Romania and the recommendations established in the mechanism for cooperation and verification ('MCV'), established by the European Commission Decision no 2006/928/EC of 13 December 2006, on the accession of Romania to the European Union in 2007, in the areas of judicial reform and the fight against corruption. In the same case, the authors of the objection proposed also a request for a preliminary ruling to the CJEU.

On March 29, 2019, the Pitești Court of Appeal sent both the objection of unconstitutionality to the Constitutional Court, which was solved by Decision no 390/2021, and a request for a preliminary ruling to the CJEU, which was solved by the decision issued on May, 18, 2021 in joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România' & Others.

In joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, the requests for a

²⁶ Constitutional Court of Romania, Decision no 137/25.02.2010, *Monitorul Oficial* no 182/22.03.2010.

²⁷ Constitutional Court of Romania, Decision no 390/ 08.06.2021, *Monitorul Oficial* no 612/22.06.2021.

²⁸ Constitutional Court of Romania, Decision no 390/ 08.06.2021, *Monitorul Oficial* no 612/22.06.2021.

preliminary ruling concerned, in essence, the interpretation of Art 2, Art 4(3), Art 9 and the second subparagraph of Art 19(1) TEU, Art 67(1) and Art 267 TFEU, Art 47 of the Charter of Fundamental Rights of the European Union and Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption²⁹.

In these joined cases, the CJEU held:

*„(...) **Decision 2006/928 falls within the scope of the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania (...). That decision is binding in its entirety on Romania, as long as it has not been repealed. The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.***

The legislation governing the organisation of justice in Romania, such as that relating to the interim appointment to the management positions of the Judicial Inspectorate and that relating to the establishment of a section of the Public Prosecutor's Office for the investigation of offences committed within the judicial system, falls within the scope of Decision 2006/928, with the result that it must comply with the requirements arising from EU law and, in particular, from the value of the rule of law, set out in Article 2 TEU.

Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation adopted by the government of a Member State, which allows that government to make interim appointments to the management positions of the judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, without following the ordinary appointment procedure laid down by national law, where that legislation is such as to give rise to reasonable doubts that the powers and functions of that body may be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.

Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, where the creation of such a section

- is not justified by objective and verifiable requirements relating to the sound administration of justice, and*
- is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union. (...)*

The principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to

²⁹ OJ 2006 L 354, p. 56.

which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU.³⁰

After the CJEU rendered this decision in the joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, the Romanian Constitutional Court issued its own decision, in the same case, on the objection of unconstitutionality, having the opportunity to analyze, also, what CJEU previously held in this case in the preliminary ruling:

„Regarding the interpretation of the principle of the 'supremacy of EU law' in the sense that it opposes the Constitution of a Member State, as interpreted by its Constitutional Court, according to which a lower court is not authorized to disapply ex officio a national provision which it considers to be contrary to EU law, the Constitutional Court reaffirms that the establishment of the organization, functioning and delimitation of competences between the different structures of the criminal investigation bodies fall within the exclusive competence of the Member State and reiterates the provisions of Decision no. 80/16.02.2014, paragraph 456, according to which the Constitution is the expression of the will of the people, which means that it cannot lose its binding force only by the existence of a discrepancy between its provisions and EU law, because the EU membership cannot affect the supremacy of the national constitution over the entire national legal order. Also, by Decision no. 683/27.06.2012, the Constitutional Court stated that (...) Member States maintain powers that are inherent in preserving their constitutional identity. (...)

The relationship between national law and European Union law is regulated by a special provision in the Romanian Constitution, which is Art 148 (2) and (4) (...).

Thus, the clause of accession to the European Union comprises in subsidiary a conformity clause with EU law, according to which all national bodies of the state are obliged, in principle, to implement and apply EU law. This also applies to the Constitutional Court, which ensures, by virtue of Art 148 of the Constitution, the priority of application of EU law. But this priority of application of EU law should not be perceived in the sense of removing or disregarding the national constitutional identity, enshrined in Art 11(3) in conjunction with Art 152 of the Constitution (...). By virtue of this constitutional identity, the Constitutional Court is empowered to ensure the supremacy of the Constitution in Romania (...) According to the compliance clause contained in Art 148 of the Constitution, Romania cannot adopt a regulatory act contrary to its obligations as a Member State (...), but those shown above have a constitutional limit which is the concept of “national constitutional identity” (...).

*The Court notes that a lower court has the power to examine the conformity of national law with EU law in the light of Art 148 of the Constitution and, in case it finds that national law is contrary to EU law, it has the competence to apply, with priority, the provisions of EU law (...). **Art 148 of the Constitution does not recognize to the EU law priority of application over the Romanian Constitution, so a lower court does not have the power to analyze the conformity of a provision of national law, found as being constitutional in the light of Art 148 of the Constitution, with the provisions of EU law.***

The Court therefore finds that the application of paragraph 7 of the operative part of the CJEU preliminary ruling, according to which a lower court is allowed to disapply ex officio a national provision which falls within the scope of application of Decision 2006/928 and which it considers to be contrary to

³⁰ CJEU, joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația ‘Forumul Judecătorilor din România’ & Others.

this decision or to the second subparagraph of Article 19(1) TEU, has no basis in the Romanian Constitution, whereas, as previously mentioned, Art 148 of the Constitution enshrines the priority of application of the EU law over the contrary provisions of national law. Or, the MCV reports, drawn up in the basis of Decision 2006/928, by their content and effects, as determined by the CJEU in its preliminary ruling of 18 May 2021, do not represent provisions of EU law, which the lower national court can apply with priority, dissaplying the contrary national law. (...) This conclusion is all the more necessary in case the national law in question was previously declared in accordance with the Constitution by the Romanian Constitutional Court in the light of Art 148 of the Constitution.

Last but not least, the Court states that the rule of law implies legal certainty (...). Or, to the extent that some courts disapply ex officio national provisions which they consider to be contrary to EU law, while others apply the same national provisions, considering them to be in line with EU law, the standard of predictability of the law would be severely affected, which would lead to serious legal uncertainty and, implicitly, would breach of the rule of law.”³¹

Based on these arguments, the Romanian Constitutional Court dismissed the objection of unconstitutionality. With reference to the principle of the primacy of EU law, there are several main conclusions that can be drawn from this recent decision of Romanian Constitutional Court:

- the Romanian Constitutional Court still recognizes the priority of EU law over the national contrary law and the obligation of conformity with EU law, provided by Art 148 of the Constitution of Romania, but it adds a few nuances to this principle;
- the Romanian Constitutional Court still acknowledges that a lower national court has the power to examine the conformity of national law with EU law in the light of Art 148 of the Constitution of Romania and that, in case the national court finds that national law is contrary to EU law, it has the power to apply, with priority, the provisions of EU law;
- the Romanian Constitutional Court does not recognize the priority of EU law over the Constitution of Romania, stating that the priority of EU law is limited by the “national constitutional identity”;
- because the Romanian Constitutional Court considers that Art 148 of the Constitution does not recognize the priority of EU law over the Romanian Constitution, the Romanian Constitutional Court concluded that a lower national court does not have the power to analyze the conformity of a provision of national law with the provisions of EU law, if the provision of national law in question was previously found as being constitutional in the light of Art 148 of the Constitution, by the Constitutional Court of Romania;
- the Romanian Constitutional Court does not embrace the same opinion as CJEU on the legally binding character of the reports drawn up by the European Commission on the basis of Decision 2006/928, and in particular the recommendations made in those reports;
- the Romanian Constitutional Court argues that the application with priority of EU law could lead to legal uncertainty and, implicitly, could breach the rule of law.

Even if the Romanian Constitutional Court, in its previous case-law before the Decision no 390/2021, has stated that the Constitution and the concept of the “national constitutional identity” are limits to the principle of the primacy of EU law, in Decision no 390/2021 it develops a doctrine regarding the effects of these

³¹ Constitutional Court of Romania, Decision no 390/ 08.06.2021, *Monitorul Oficial* no 612/22.06.2021.

limitations on the competences of the national courts in relation to the primacy of EU law in the judicial practice.

The main specific effect of these limitations, as interpreted of the Romanian Constitutional Court, is that, according to the Decision no 390/2021, the national Romanian courts are not allowed anymore to apply with priority the EU law and to disapply the provisions of national law which are contrary to EU law, if the Romanian Constitutional Court has already declared that the national provisions in question are compatible with the Constitution of Romania.

Another result of these limitations is that the Romanian Constitutional Court created a precedent, in Decision no 390/2021, of expressing a different opinion than the opinion expressed by the CJEU, on the legal effects of the acts adopted by the EU institutions.

Last but not least, Romanian Constitutional Court identified some concerning possible effects of the primacy of EU law, which are, according to the Decision no 390/2021, legal uncertainty and the breach of the rule of law.

4. Conclusions

In Romania, before Decision no 390/2021, the concept of the "*national constitutional identity*" was not presented as a fully developed concept in the previous case-law of the Romanian Constitutional Court.

Analyzing the reasoning of the Decision no 390/2021 of the Romanian Constitutional Court, there are some important conclusions that can be drawn, regarding the concept of the "*national constitutional identity*" in relation to the application of the primacy of EU law in Romania.

It can be clearly observed that Decision no 390/2021 reiterates older conclusions of the Romanian Constitutional Court, regarding the Constitution and the "*national constitutional identity*" as limits of the primacy of EU law, but also creates new rules for the Romanian judiciary system which are generally binding for the national courts, according to Art 147(4) of the Constitution of Romania³².

After the Decision no 390/2021, the Romanian national courts do not have the power to review the conformity of a provision of national law with the provisions of EU law, if that provision of national law was previously found to be constitutional by the Romanian Constitutional Court. Therefore, the Romanian national courts will not be able, after Decision no 390/2021, to apply with priority the EU law and to disapply the provisions of contrary national law, if the provisions of national law in question, which are contrary to EU law, have already been declared to be compatible with the Constitution of Romania, by the Romanian Constitutional Court.

This is a new nuance added by the Romanian Constitutional Court to the application of the primacy of EU law in Romania, which is not in line with the decision of the CJEU ruled in joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' & Others*.

Thus, the Romanian national courts are now positioned between the Romanian Constitutional Court and the CJEU when it comes to the application of the primacy of EU law in the judicial review, because the Romanian national courts must choose between two different interpretations of the principle of the primacy of EU law, which are both legally binding on all the Romanian national courts.

Since the Decision no 390/2021 is recent and the judicial practice of the Romanian national courts after this

³² Art 147(4) of the Constitution of Romania: "The decisions of the Constitutional Court are published in the Official Gazette of Romania. From the date of publication, decisions are generally binding and have legal force only for the future."

decision is not yet developed, in order to analyze the approach of the judiciary system regarding these two different interpretations, we can conclude that it is still early to evaluate the impact of the Decision no 390/2021 in judicial practice.

However, it can be assumed that some national courts will adopt the interpretation of the Romanian Constitutional Court, while others might adopt the interpretation of the CJEU on the primacy of EU law, situation which can, indeed, lead to a legal uncertainty in the practice of the Romanian national courts. Even if the judiciary system of Romania is not based on judicial precedent and each national court is able to have its own interpretation of the applicable law, the existence of two binding different decisions regarding the primacy of EU law can create additional difficulties in practice. That is because the primacy of EU law represented a clear and established rule for the Romanian judiciary system, which had the potential to simplify the situations of conflict between the national law and EU law.

After the Decision no 390/2021, the principle of the primacy of EU law over the contrary national law became more elaborated and complex, since the Romanian national courts must first analyze if the Romanian Constitutional Court has declared the national law to be constitutional, and only if the national law hasn't been declared constitutional by the Romanian Constitutional Court, the national courts can examine the conformity of the national law with EU law.

In conclusion, according to Decision no 390/2021, the Romanian national courts will be able to apply the priority of EU law only in relation to the national law which hasn't been declared compatible with the Romanian Constitution by the Romanian Constitutional Court.

References:

P. Craig, G. de Burca, *EU Law, Text, Cases and Materials*, Fifth Edition, Oxford University Press, 2011.

I. Muraru, E. S. Tănăsescu, *Drept constituțional și instituții politice* [Constitutional law and political institutions], 13th edn, vol. II, Bucharest, CH Beck, 2009.

R. Uitz, *National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades*, 2016 (<https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/>).

M. Galimberti, S. Ninatti, *Constitutional Resistance to EU Law: The Courts and the test of Constitutional Identity Conflicts*, *Pravni Zapisi*, vol. 11, no. 2/2020, p. 413-460.

Gábor Halmai, *National(ist) Constitutional Identity? Hungary's Road to Abuse Constitutional Pluralism*, EUI Department of Law, Working Paper, no. 8/2017, available at SSRN: <https://ssrn.com/abstract=2962969> or <http://dx.doi.org/10.2139/ssrn.2962969>.

Decisions of the Romanian Constitutional Court:

Constitutional Court of Romania, Decision no 127/06.03.2019, *Monitorul Oficial* no 189/08.03. 2019.

Constitutional Court of Romania, Decision no 668/18.05.2011, *Monitorul Oficial* no 487/08.07. 2011.

Constitutional Court of Romania, Decision no 2/11.01.2012, *Monitorul Oficial* no 131/23.02.2012.

Constitutional Court of Romania, Decision no 414/26.06.2019, *Monitorul Oficial* no 922/15.11.2019.

Constitutional Court of Romania, Decision no 534/18.07.2018, Monitorul Oficial no 842/03.10. 2018.

Constitutional Court of Romania, Decision no 137/25.02.2010, Monitorul Oficial no 182/22.03. 2010.

Constitutional Court of Romania, Decision no 887/15.12.2015, Monitorul Oficial no 191/15.03. 2016.

Constitutional Court of Romania, Decision no 390/ 08.06.2021, Monitorul Oficial no 612/22.06.2021.