NATIONAL AND INTERNATIONAL LEGAL AND CONSTITUTIONAL ORDER. CONVERGENT AND DIVERGENT

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Abstract

The relationship between the national law and the EU law is interpreted differently, there are several doctrinal concepts and different jurisprudence solutions. One school of thought asserts the supremacy of the Constitution, including over EU law, even if it accepts the priority of application of the latter, in its mandatory rules, over all other rules of domestic law, and another the priority of unconditional application of all the provisions of the EU law compared to all the rules of the internal law, including the constitutional rules.

There are European constitutional jurisdictions that have established that they have the competence to control the constitutionality of EU law, integrated into the internal legal order, by virtue of the principle of the supremacy of the Fundamental Law

The Romanian Constitution enshrines two principles of a different nature and with specific implications whose effects are convergent but also divergent: the supremacy of the Constitution and the priority of EU law.

In this study we analyze the interferences between the principle of priority of EU law and the principle of supremacy of the Constitution with reference to the relevant doctrine and jurisprudence in the matter.

Keywords: *national legal and constitutional order, international legal order, principle of priority of EU law, principle of the supremacy of the Constitution, obligation of EU legal norms, conformity national law with EU law.*

1. Introduction

One of the most important defining elements of the EU is the existence of its own system made up of principles, written norms and rules established by jurisprudence. Therefore, it is important to clarify the relations between the EU law and national law. The solution to this problem is found in a set of rules that are not explicitly provided in the Constituent Treaties but were developed by the Court of Justice through several decisions, some of them controversial. The constitutions of the EU Member States state rules of principle regarding the relationship between EU law and national law.

In practical terms, the interference between EU law and national law occurs especially when there are contradictions between the legal norms belonging to the legal systems. Of course, the problem of the relationship between the two categories of legal norms is of interest not only in such a situation, but also in cases where a court can apply a norm of EU law. One of the most important aspects of this issue is the relationship between the supremacy of the constitution, and, on the other hand, the priority of the principle of the law of EU as well as the competences of the constitutional jurisdiction in the matter of application and interpretation of the rules stated by the EU legal acts.

We believe that this issue can be analyzed on two levels: 1. the relationship between domestic law (other than the constitutional law) and the EU; 2. the relationship between the constitutional norms of the Member States, and, on the other hand, the EU law.

One of the most interesting discussions, jurisprudential and doctrinal, involving the constitutional courts of the EU member states, concerns the cooperation mechanisms with the CJEU. The CJEU jurisprudence, the doctrine, but also the internal legislation refers to the principle of priority or supremacy, primacy, pre-eminence of EU law over the national law systems.

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2. Paper content

The relationship between the constitutional norms and EU Law is interpreted differently, there are several doctrinal conceptions. One current of thought affirms the supremacy of the Constitution, including over the European Union law, even if it accepts the priority of applying the latter, in its mandatory norms, over all other norms of domestic law, and another the priority of systematic and unconditional application of all the provisions of the EU Law in relation to all the norms of the internal law, including the national constitutions. Some traditional European constitutional jurisdictions have reached, at certain moments and historical contexts, the conclusion that it is within their competence to control the constitutionality of the EU law, integrated into the internal legal order, by virtue of the principle of the supremacy of the fundamental law (for example, the German Constitutional Tribunal).

The Court of Justice reached the development of the principle of priority of the EU law, considering the rule of public international law, according to which „A party cannot invoke the provisions of his domestic law to justify the non-execution of a Treaty". Another source was represented by the provisions of art. 10 TEC, modified by the Treaty of Lisbon. The norm contained in the provisions of art. 10, however, remained unchanged until now and establishes the obligation of the member states to take all the necessary measures to ensure the fulfillment of the obligations resulting from the treaties and acts of the Community institutions. The same provisions impose the negative obligation of the Member States to refrain from taking measures that would endanger the achievement of the Treaty's goals. These are not the only regulations from the EU Treaties that underpin the principle of priority of the European Union law over the national law.

The principle of priority and obligation of the EU Law was built especially through jurisprudence. In this matter, the historical CJEU jurisprudence is relevant, which marks a certain evolution of the affirmation of this principle in relation to the national law.

A significant moment is represented by the *Costa v. Enel* case[1]. The Italian court submitted two requests for interpretation, one to the Constitutional Court of Italy and the other to the CJEU. The Constitutional Court considered that the Treaty establishing the European Community can only have a normative value to the extent that it is incorporated into the law national through a law. At the same time, it was admitted that a national law can derogate from the provisions of the Treaty.

The Court of Justice had a different opinion expressed in the pronounced decision: „It follows from these considerations that the legal system born from the Treaty, an independent source of law, cannot, due to its special and original nature, be superseded by the internal legal norms or that would be their legal force, without being deprived of its community law feature and without the very legal foundation of the Community being called into question".

Another moment of the evolution of the CJEU jurisprudence in this matter is represented by the „International H" cases[2]; „Simmenthal I[3] [35/76, Simmenthal SpA (1976) ECR 1871] and Simmenthal II"[4].

The following considerations from the decision pronounced in the *Simmenthal II* case are relevant for our research topic: „as such, any provision of the national legal order or any practice, legislative, administrative or judicial, which would have the effect of being incompatible with the requirements inherent in the nature of the Community law diminishing the effectiveness of the Community law by refusing the competent judge to apply it, the power to do, at the very moment of this application, all that is necessary to remove the national legal provisions that, possibly, would represent an obstacle to the full effectiveness of community norms. Therefore, the answer to the first question is that the national judge tasked, according to his competence, to apply the provisions of Community law, has the obligation to ensure the full effectiveness of these rules, leaving unapplied, *ex officio*, if necessary, any provision contrary with the national legislation, even later, without requesting or waiting for its prior legislative elimination or by any other constitutional procedure" (para 22 and 24 of the decision).

Moreover, the Court considered that the national courts have the power to constrain and even sanction the legislative power and the executive power in order to guarantee the full efficiency of the principle of priority of European Union law over national law.

[1] 6/64 *Costa v. Enel* (1964) ECR 585.
[2] 11/70, *Internationale H.*, (1970) ECR 1125.
[3] 35/76, *Simmenthal SpA* (1976) ECR 1871.
[4] 106/77, *Simmenthal* (1978) ECR 629.

This principle must also be understood from the perspective of the rule of obligation of community acts. The *regulation* has general applicability and is mandatory in all its elements. In contrast, the *directive* is addressed to some or all of the Member States and is mandatory with regard to the result to be achieved, leaving for the national authorities the competence regarding the form and the means they use to achieve the set objectives. The *decision* is binding in all its elements on the addressees it indicates.

The rule of direct application that characterizes some of the legal acts of EU law is of interest to the understanding and application of the priority principle of the EU law. The regulations have direct application because they do not require transposition into national law. As the court indicated in its jurisprudence, Member States do not have to adopt national legislation to take over the regulations. Their provisions can be invoked by natural and legal persons directly before the national courts. In contrast, the directive is not directly applicable. It must always be transposed into the legal system of each Member State to which it is addressed. The domestic normative act transposing the directive is the one through which the content of the directive will enter the national legal system.

The principle of priority of the EU law over the national law must also be understood according to the criterion of the possibility of direct invocation of community acts before national courts. The phrase „direct effect" denotes the attribute of a community normative act to create in the patrimony of natural and legal persons rights that they can invoke directly before the national courts. Without going into details, we emphasize that under certain conditions, regulations, directives and decisions can have a direct effect.

One of the consequences of the principle of priority of the EU law is the obligation of national courts to interpret domestic law in accordance with the EU law. In an attempt to ensure the effectiveness and uniformity of the EU law, CJEU established several means to stimulate the states to implement the directives correctly and on time and to ensure their implementation. One of these means is the creation of the doctrine of direct vertical effect of directives.

In the hypothesis in which the provisions of an unimplemented or incorrectly implemented directive cannot have a direct vertical effect because they do not meet the condition of being sufficiently clear, precise and unconditional, in order to be able to deduce the right that the litigant wishes to exploit before the courts national, the Court established the obligation, for the national judge, to interpret the national legislation in relation to the content of the directive.

Among the first cases in which this obligation was expressly stated was the *Van Colson* case. The Court held in the considerations of the pronounced decision that the national legislation limits the right to reparation of persons who have been the object of discrimination in the case of exercising the right to work. Such a situation does not comply with the requirements of the effective transposition of Directive 76/207. Therefore, the court in Luxembourg ruled: „It follows that in the activity of applying the national law and in particular the provisions of a national law specially introduced in order to apply Directive 76/207, the national court is required to interpret the national law in the light of the text and the finality of the directive to obtain the result provided for in art. 189 para 3) of the TCE". Consequently, the Court specified: „It is in the competence of the national court to issue laws adopted in order to apply the directive, to the extent that the national law grants it a margin of appreciation, an interpretation and an application in accordance with the requirements of Community law".

The CJEU decision, pronounced in the case of *Seda Kücükdeveci v. Swedex GmbH & Co.*[5], is also edifying. The Court reaffirms the existence of the principle of non-discrimination on grounds of age, as well as the role of the national court in its application. The German regulation which stipulates that periods of work completed before the age of 25 are not taken into account for the calculation of the notice period is contrary to the principle of non-discrimination on grounds of age, as provided by Directive 2000/78. In this situation, the national court must remove, if necessary, any contrary internal regulation, even in the context of a dispute between individuals.

From the considerations of this decision, it follows that Directive 200/78 concretizes the principle of equal treatment in the field of employment. The principle of non-discrimination on grounds of age is a general principle of the Union law. Therefore, the national court referred to a dispute in which the principle of non-discrimination on grounds of age, as provided by Directive 2000/78, is brought into question, is obliged to ensure, within the framework of its competences, the legal protection arising for justiciable in Union Law and to guarantee the full right of this principle, removing, if necessary, the application of any provision, possibly contrary, of the national law.

[5] Decision C-555/07.

In accordance with these conclusions of the CJEU, it follows that the Romanian courts, in the situations where they will apply the provisions of a national law implementing a directive, interpret it in accordance with the text and purpose of the directive. From the jurisprudence of the Court, it follows that the national court is obliged, when it has to apply a law implementing a directive, to take into account not only that law, but the whole set of national law rules and to interpret them in accordance with the requirements the respective directive, in order to pronounce a solution in accordance with the purpose pursued by the community act.

Given that the Romanian law is characterized by excessive procedural formalism and especially by significant inconsistencies and contradictions, the realization of this obligation by the national courts will be very difficult.

Moreover, in its jurisprudence, CJEU considers that this obligation of the national courts is subject to certain limits. The obligation to interpret domestic law taking into account the text and purpose of the directive exists only to the extent that national law grants a margin of appreciation to the court. In this sense, the Court held the following in the Papino case: „The principle of interpretation in the light of the directive cannot serve as a foundation for a *contra legem* interpretation of national law"[6].

We believe that whenever the national law confers on the court a „related competence" that excludes the existence of a margin of appreciation, the aforementioned obligation does not exist for the national judge. By way of example, some of the procedural normative provisions can be included in this category. Also, in criminal matters, the national courts cannot aggravate the criminal liability of persons in the event that they commit an act criminalized by a directive, if it has not been implemented in domestic law.

Another important issue is the relationship between the constitutional norms, the decisions of the Constitutional Court, and on the other hand the law of the European Union.

Constantly, the constitutional courts of some Member States, especially Germany, Italy and France, considered that the principle of priority of the European Union law does not apply in relation to the regulations included in a constitution, because the fundamental law of a state expresses the identity and national sovereignty. This solution particularly concerned the regulations regarding fundamental human rights and freedoms. Until December 1, 2009, when the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union entered into force, the EU law did not include a coherent normative system for guaranteeing fundamental human rights. Consequently, the courts of the Member States invoked the internal constitutional regulations in such situations.

Moreover, the practice of the courts of the EU Member States does not offer many examples of conflict between the rules of the EU law, and on the other hand, the constitutional regulations. This situation is explained by the fact that, following the process of joining the EU, the Member States adapted their constitutional regulations of principle to the specific requirements of the European Union law and established in one form or another the principle of priority of this legal system against domestic law whenever there is a contradiction between the rules of the two categories of legal norms. Of course, this problem remains open and is far from being solved. We note that in the jurisprudence of the Constitutional Council and the French Council of State in recent years, the concept of „constitutional national identity" has been developed. According to this principle, the national courts will always apply the internal constitutional norms, but also the rules inscribed in the ordinary legislation whenever they have no counterpart in the EU law.

The Romanian Constitution makes the distinction between the principle of the supremacy of the fundamental law, and on the other hand, the principle of the priority of EU law over national law. Thus, the provisions of art. 1 para. (5) of the Constitution enshrines the principle of the supremacy of the fundamental law: „In Romania, compliance with the Constitution, its supremacy and the laws are mandatory". This principle cannot be mistaken with that of the priority of the law of the European Union over the contrary regulations of the internal laws enshrined in Art 148 Para 2 from the Constitution.

The CCR jurisprudence reflects this difference. By CCR dec. no. 148/16.04.2003 regarding the constitutionality of the legislative proposal to revise the Romanian Constitution, our constitutional court clearly distinguishes between the supremacy of the Constitution and the principle of priority of the EU law, stating: „The consequence of accession starts from the fact that the EU Member States have understood to place the communitarian acquis, the EU constitutive treaties and the regulations derived from them in an intermediate position between the Constitution and the other laws when it comes to binding European normative acts". In

[6] Decision C-105/03.

the specialized legal literature, with reference to the provisions of art. 148 of the Constitution and in accordance with CCR dec. no. 148/16.04.2003, it was stated that „Therefore, it can be stated that in the internal legal order, the legal act by which Romania joins the EU has a legal force inferior to the Constitution and constitutional laws, but superior to organic and ordinary laws”[7].

In its subsequent jurisprudence, CCR seems to have renounced this distinction, basing its decisions only on the principle of the priority of the EU law[8].

However, by CCR dec. no. 1258/08.10.2009[9], which we consider to be of historical importance in subsequent constitutional jurisprudence, the Court finds that an internal law transposing an EU directive into internal law is unconstitutional. Such a solution, in our opinion, enshrines the principle of supremacy of the Constitution and the obligation to respect it in relation to the principle of priority of the EU law.

Through the decision with the number above, the constitutional court found that the provisions of Law no. 298/2008[10] are unconstitutional. From the considerations of the decision, it follows that Law no. 298/2008 was adopted to transpose into national legislation the Directive 2006/24/EC of the European Parliament and of the Council of March 15, 2006, regarding the retention of data generated or processed in connection with the provision of publicly accessible electronic communication services or public communication networks. The Court refers to the legal regime of such community acts, emphasizing that: „(...) it imposes its obligation on the EU Member States in terms of the regulated legal solution, not in terms of the specific methods by which this result, the states benefiting from a wide margin of appreciation in order to adopt them according to the specifics of national legislation and realities”. Examining the content of the Law no. 298/2008, the Court found that this normative act is likely to affect the exercise of rights or fundamental freedoms, namely the right to intimate, private and family life, the right to secrecy of correspondence and freedom of expression. The constitutional court considers that the restriction of the exercise of these rights does not correspond to the requirements established by art. 53 of the Romanian Constitution[11].

CCR dec. no. 80/16.02.2014[12], on the legislative proposal regarding the revision of the Romanian Constitution is relevant for our research topic. Regarding the interpretation of the provisions of art. 148 regarding integration into the EU, the Court notes that: the „constitutional provisions do not have a declarative character, but represent mandatory constitutional norms, without which the existence of the rule of law, provided for by art. 1 para. (3) from the Constitution. At the same time, the Basic Law represents the framework and extent in which the legislator and the other authorities can act; thus, the interpretations that can be brought to the legal norm must take into account this constitutional requirement, included in art. 1 para. (4) of the Fundamental Law, according to which in Romania the compliance with the Constitution and its supremacy is mandatory”.

Another aspect analyzed in the constitutional jurisprudence refers to the application of the Charter of Fundamental Rights of the European Union within the framework of the constitutional review. Our constitutional court ruled that, in principle, this is applicable within the framework of constitutionality control „to the extent that it ensures, guarantees and develops the constitutional provisions in the matter of fundamental rights, in other words, to the extent that their level of protection is at least at the level of constitutional norms in the field of human rights”[13].

Also in connection with the application of the European Union norms, regarding human rights within the framework of constitutionality control, it was stated that the reporting of the provisions contained in an act having the same legal force as the constitutive treaties of the European Union must be done according to the provisions of art. 148 of the Constitution, and not those stated by art. 20 of the Basic Law, which refers to international treaties on human rights, other than those of the EU[14]. Our constitutional court ruled that the

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[7] M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii*, All Beck Publishing House, Bucharest, 2004, p. 331.

[8] CCR dec. no. 308/2006, published in the Official Gazette of Romania no. 390/05.05.2006; CCR dec. no. 59/2007, published in the Official Gazette of Romania no. 98/08.02.2007; CCR dec. no. 1042/2007, published in the Official Gazette of Romania no. 12/08.02.2008 and CCR dec. no. 1172/2007, published in the Official Gazette of Romania no. 54/23.01.2008.

[9] Published in the Official Gazette of Romania no. 798/23.11.2009.

[10] Published in the Official Gazette of Romania no. 780/21.11.2008.

[11] CCR dec. no. 17/21.01.2015, published in the Official Gazette of Romania no. 79/30.01.2015 through which our constitutional court established the unconstitutionality of the law on Romania's cyber security

[12] Published in the Official Gazette of Romania no. 246/07.04.2014.

[13] CCR dec. no. 871/25.06.2010, published in the Official Gazette of Romania no. 433/28.06.2010.

[14] CCR dec. no. 967/20.11.2012, published in the Official Gazette of Romania no. 853/18.12.2012 and CCR dec. no. 206/06.03.2012, published in the Official Gazette of Romania no. 254/17.04.2012.

provisions of art. 41 of the Charter of Fundamental Rights of the European Union, regarding the right to good administration, can be invoked through the prism of art. 148, and not art. 20 of the Constitution[15].

Also, in the constitutional jurisprudence it was established that it is not within the competence of the Constitutional Court to analyze the conformity of a provision of constitutional law with the text of the Treaty on the Functioning of the European Union, through the prism of art. 148 of the Constitution. Such a competence, namely that of determining whether there is a contradiction between the national law and the treaty, belongs exclusively to the court, which also has the possibility to formulate a preliminary question to the CJEU. It is interesting that the constitutional court considers itself incompetent to verify the conformity of a provision of national law with the text of the constituent treaties of the European Union and for the fact that, if it were to arrogate such competence, a possible conflict would be reached of jurisdiction between CCR and CJEU, which, at this level, is considered inadmissible[16].

Regarding the cooperation between CCR and CJEU, our constitutional court stated that it remains at its discretion, in the application of the CJEUs judgments or the Court's formulation of questions preliminary in order to establish the content of the European norm. „Such an attitude is related to the cooperation between the national and the European constitutional court, as well as to the judicial dialogue between them, without bringing into discussion aspects related to the establishment of a hierarchy between these courts".

CJEU, in its recent jurisprudence, has a different opinion and ruled the supremacy of the legal order of the European Union Law, over the internal legal order and even over the constitutional order.

Thus, through the Judgment delivered on May 18, 2021[17], CJEU rules on a series of reforms in Romania regarding the judicial organization, the disciplinary regime of magistrates, as well as the patrimonial liability of the state and the personal liability of judges for judicial errors.

Six requests for a preliminary decision were made before the Romanian constitutional court in the context of the disputes between legal entities or natural persons, on the one hand, and authorities or bodies such as the Judicial Inspection, the Superior Council of the Magistracy and the Prosecutor's Office attached to the HCCJ, on the other hand. The main disputes are in the context of a far-reaching reform in the field of justice and the fight against corruption in Romania, a reform that has been subject to monitoring at the EU level since 2007, based on the cooperation and verification mechanism established by dec. 2006/928[18] with the occasion of Romania's accession to the Union (hereinafter referred to as CVM).

In this context, the referring courts raised the issue of the nature and legal effects of the CVM, as well as the scope of the reports drawn up by the Commission pursuant to it. According to these courts, the content, legal nature and temporal extent of the mentioned mechanism should be considered circumscribed by the Accession Treaty, and the requirements formulated in these reports should be binding for Romania. In this regard, however, the respective courts mention a national jurisprudence according to which the Union law would not prevail over the Romanian constitutional order, and dec. 2006/928 could not constitute a reference rule in the framework of a constitutionality review, since this decision was adopted prior to Romania's accession to the Union, and the issue of whether the content, nature and scope of dec. 2006/928/EC falls within the scope of the Accession Treaty has not been the subject of any interpretation by the Court.

Regarding the legal effects of the dec. 2006/928, the Court found that it is binding in all its elements for Romania from the date of its accession to the Union and obliges it to achieve the reference objectives, also mandatory, which appear in the annex to this. The respective objectives, defined as a result of the deficiencies noted by the Commission before Romania's accession to the Union, aim, among other things, to ensure compliance by this member state with the value of the rule of law. Romania is thus obliged to take the appropriate measures in order to achieve the mentioned objectives and to refrain from implementing any measure that risks compromising the achievement of the same objectives.

[15] CCR dec. no. 12/22.01.2013, published in the Official Gazette of Romania no. 114/28.02.2013.

[16] CCR dec. no. 1249/07.10.2010, published in the Official Gazette of Romania no. 764/16.11.2010 and CCR dec. no. 137/25.02.2010, published in the Official Gazette of Romania no. 182/22.03.2010.

[17] Decision in connected cases C-83/19, the Association „The Forum of Judges in Romania"/Judicial Inspection, C-127/19, the Association „The Forum of Judges in Romania" and the Association „The Movement to Defend the Status of Prosecutors" and OL/Prosecutor's Office attached to the HCCJ – General Prosecutor of Romania and C-397/19, AX/Romanian State – Ministry of Public Finances.

[18] 2006/928/EC: Commission Decision of 13.12.2006 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 corruption (OJ 2006 L 354, p. 56, Special Edition, 11/vol. 51, p. 55).

The Court ruled that the principle of the supremacy of the Union law opposes a national regulation of constitutional rank that deprives a lower court of the right to leave unapplied *ex officio* a national provision that falls within the scope of dec. 2006/928 and which is contrary to the Union law. The Court recalls that, according to established jurisprudence, the effects associated with the principle of the supremacy of the Union law are imposed on all organs of a Member State, without the internal provisions relating to the distribution of judicial powers, including constitutional ones, being able to prevent this. Also recalling that national courts are obliged, as far as possible, to give domestic law an interpretation that complies with the requirements of the Union law or to leave unapplied *ex officio* any contrary provision of national legislation that could not be subject to such a compliant interpretation, the Court notes that, in the event of a proven violation of the EU Treaty or dec. 2006/928, the principle of supremacy of the Union law requires the referring court to leave the provisions in question unapplied, regardless of whether they are of legislative or constitutional origin.

Through the Decision of December 21, 2022[19], CJEU ruled that the EU law opposes the application of a case law of the constitutional court to the extent that it, in conjunction with the national provisions on prescription, creates a systemic risk of impunity.

The supremacy of the EU law requires that national judges have the power to leave unenforced a decision of a constitutional court that is contrary to this right, without being exposed to the risk of being engaged in disciplinary liability.

In the reasoning of the decision, the following is essentially noted:

In these cases, the question arises as to whether the application of the jurisprudence resulting from various CCR decisions, regarding the rules of criminal procedure applicable in matters of fraud and corruption, is likely to violate the Union law, in particular the provisions of this law that aim to protect the financial interests of the Union, guarantee the independence of judges and the value of the rule of law, as well as the principle of the supremacy of the Union law.

The Court, gathered in the Grand Chamber, confirmed its jurisprudence resulting from a previous decision, according to which the CVM is binding in all its elements for Romania[20]. Thus, the acts adopted before accession by the institutions of the Union are binding for Romania from the date of its accession. This is the situation of dec. 2006/928, which is binding in all its elements for Romania as long as it has not been repealed. The benchmarks that aim to ensure respect for the rule of law are also binding. Romania is thus required to take the appropriate measures to achieve these objectives, taking into account the recommendations formulated in the reports drawn up by the Commission[21].

The Union law opposes the application of a jurisprudence of the Constitutional Court that leads to the annulment of judgments handed down by illegally composed panels of judges, to the extent that this, in conjunction with the national provisions on prescription, creates a systemic risk of impunity for acts that constitute serious crimes of fraud affecting the Union's financial interests or corruption.

It was also noted that in this case, the application of the jurisprudence of the Constitutional Court in question has the consequence that the respective cases of fraud and corruption must be re-judged, if necessary, several times, at first instance and/or on appeal. Given its complexity and length, such a retrial inevitably has the effect of prolonging the duration of the related criminal proceedings.

The Court recalls that, taking into account the specific obligations incumbent on Romania under dec. 2006/928, national regulation and practice in this matter cannot have the consequence of extending the duration of investigations into corruption offenses or weakening the fight against corruption in any other way. On the other hand, taking into account the national statutes of limitation, the retrial of the cases in question could lead to the statute of limitations of the crimes and could prevent the sanctioning, in an effective and dissuasive way, of the persons who occupy the most important positions in the Romanian state and who were convicted of committing acts of serious fraud and/or serious corruption in the exercise of their functions. Therefore, the risk of impunity would become systemic for this category of persons and would call into question the objective of combating high-level corruption.

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[19] Decision for the connected cases C-357/19 Euro Box Promotion et al., C379/19 DNA, Oradea Territorial Service, C-547/19 Association „The Forum of Judges", C-811/19 FQ et al., and C-840/19 N.

[20] Decision of 18.05.2021, the Association „The Forum of Judges" *et al.*, C-83 C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (see also CP no. 82/21).

[21] Pursuant to the principle of loyal cooperation, enshrined in art. 4(3) TEU.

In the reasoning, the supremacy of the European Union law is invoked and it is noted that the principle of the supremacy of the Union law prevents national courts from being able, at the risk of applying disciplinary sanctions, to leave unapplied the decisions of the Constitutional Court contrary to the Union law.

The Court recalls that, in its jurisprudence regarding the TEEC, it established the principle of the supremacy of Community law, understood in the sense that it enshrines the prevalence of this right over the law of the Member States. In this regard, the Court found that the establishment by TEEC of a legal order of its own, accepted by the Member States on the basis of reciprocity, has as a corollary the impossibility of the mentioned states to prevail against this legal order, a subsequent unilateral measure or to oppose to the right born from the TEEC norms of national law, regardless of their nature, otherwise there is a risk that this right will lose its community character and that the legal foundation of the Community itself will be called into question.

In addition, the executive force of the Community law cannot vary from one Member State to another depending on subsequent domestic laws, otherwise there is a risk that the achievement of the TEEC objectives will be jeopardized, nor can it give rise to discrimination on the grounds of citizenship or nationality, prohibited by this treaty. The Court thus considered that, although it was concluded in the form of an international agreement, the TEEC constitutes the constitutional charter of a community of law, and the essential features of the community legal order thus constituted are in particular its supremacy in relation to the law of the Member States and its direct effect of a whole series of provisions applicable to Member States and their nationals.

According to the Court, the effects associated with the principle of the supremacy of Union law are imposed on all organs of a member state, without the internal provisions, including constitutional ones, being able to prevent this. National courts are required to leave unapplied, *ex officio*, any national regulation or practice contrary to a provision of Union law which has direct effect, without having to request or wait for the prior elimination of that national regulation or practice by legislative means or by any another constitutional procedure.

On the other hand, the fact that national judges are not exposed to procedures or disciplinary sanctions for having exercised the option to refer the Court under art. 267 TFEU, which belongs to their exclusive competence, constitutes an inherent guarantee of their independence. Thus, in the hypothesis in which a national common law judge would come to consider, in the light of a Court decision, that the jurisprudence of the national constitutional court is contrary to Union law, the fact that this national judge would leave the said jurisprudence unapplied cannot engage his disciplinary liability.

3. Conclusions

In the opinion of our constitutional court, to consider that the EU law is applied without any differentiation within the national legal order, not distinguishing between the Constitution and the other internal laws, is equivalent to placing the Fundamental Law in a secondary plan compared to the EU legal order. The legitimacy of the Constitution is the will of the people itself, which means that it cannot lose its binding force, even if there are inconsistencies between its provisions and the European ones. Moreover, it was emphasized that Romania's accession to the EU cannot affect the supremacy of the Constitution over the entire internal legal order.

The Constitutional Court has established that the mandatory acts of the EU are norms introduced within the framework of constitutionality control[22]. At the same time, the lack of constitutional relevance of the EU law norm, interposed in constitutional reference norms within the framework of constitutionality control, was emphasized. In this case, it is inadmissible to refer the Court based on non-compliance with the provisions of art. 148 para. (4) of the Constitution[23]. Through the same decision, the Court established that it is necessary for the legal norm of the European Union law to be circumscribed to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution – „the only direct norm of reference in within the framework of constitutional control". The constitutional court consecrated, just like the French Constitutional Council, the concept of „national constitutional identity", by which it understands the relevance of the supremacy of the constitution whenever the question of compliance of internal laws with the EU acts arises[24].

[22] CCR dec. no. 668/18.05.2011, published in the Official Gazette of Romania no. 487/08.07.2011.
[23] CCR dec. no. 157/19.03.2014, published in the Official Gazette of Romania no. 296/23.04.2014.
[24] CCR dec. no. 64/24.02.2015, published in the Official Gazette of Romania no. 286/28.04.2015.

CCR, in a press release, stated the following, with reference to the recent CJEU decisions issued recently regarding the relationship between the internal constitutional order and, on the other hand, the EU law: according to art. 147 para. (4) of the Constitution, the CCR decisions are and remain generally binding.

Moreover, CJEU also recognizes, in its decision of December 21, 2021, the binding feature of the decisions of the Constitutional Court. However, the conclusions of the CJEU decision according to which the effects of the principle of the supremacy of the EU law are imposed on all organs of a member state, without internal provisions, including those of a constitutional order, being able to prevent this, and according to which national courts are required to leave unapplied, *ex officio*, any regulation or national practice contrary to a provision of the EU law, assumes the revision of the Constitution in force.

In practical terms, the effects of this decision can be produced only after the revision of the Constitution in force, which, however, cannot be done as a matter of law, but exclusively at the initiative of certain legal subjects, in compliance with the procedure and under the conditions provided for in the Romanian Constitution itself.

We fully agree with the opinion expressed by the Constitutional Court.

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