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# The Protection of National Sovereignty and Constitutional Identity in the Case Law of the Constitutional Court of Romania

**ABSTRACT:** *One of the most crucial issues in the European Union arises in the relationship between its law and national constitutions. This issue has emerged as one of the breaking points of European integration, which could shape the future development of the EU and the integration process in the years to come. Although the Romanian Constitution recognises the primacy of EU law over national law (in Article 148 paragraph (2)), the case law of the Constitutional Court of Romania reflects that this primacy is far from absolute, since the Constitutional Court interpreted that EU law has no primacy over provisions that form the Romanian constitutional identity. Moreover, during the past few years the Court of Justice of the European Union opened a new area of interpretation of EU law, namely its primacy over the decisions of the national constitutional courts. This issue was first raised in relation to Romania and provoked fierce protest from the Constitutional Court. In the following contribution, I intend to analyse these cases and reflect on the judicial dialogue between the Constitutional Court of Romania and the Court of Justice of the European Union.*

**KEYWORDS:** *Constitutional Court of Romania, Court of Justice of the European Union, constitutional identity, national sovereignty, primacy of EU law.*

## 1. Introduction

The aim of this contribution is to provide a synthesis of the Romanian approach to the primacy of EU law – which may be useful not only for lawyers but also for the political community. In the words of the Portuguese jurist and politician Poiares Maduro,

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European integration challenges not just national constitutions, but constitutional law itself.<sup>1</sup>

All these challenges can only be understood if we properly analyse the position of each member state and its relationship with EU law. This article undertakes such an in-depth analysis, presenting not only the constitutional regulatory framework, but also the relevant recent cases.

The dialogue between EU institutions and the Romanian public law authorities – in particular the Constitutional Court of Romania – has recently brought to the surface a number of diverging views. Their examination and analysis could play a significant role in shaping the future of the European Union.

Prior to this examination, however, it is necessary to refer to the principles of primacy and direct applicability of EU law. The principle of primacy has been laid down by the Court of Justice of the European Union (CJEU) in its case law, starting with the famous *Costa Enel* case.<sup>2</sup> Based on this principle, if there is a conflict between an EU law provision and a national standard, the EU law prevails. Nonetheless, this primacy does not lead to the invalidity of the national provision.<sup>3</sup> At the same time it is pivotal to separate primacy from supremacy, because “while supremacy is simply a doctrine of hierarchy of powers, of subordination, the principle of primacy expresses the rules of division of competences between the Union and the Member States.”<sup>4</sup> In contrast, the principle of direct applicability – which also appeared in the case law of the CJEU – presupposes that EU law is applied uniformly and entirely by the member states in a direct manner.<sup>5</sup>

## 2.

### The Primacy of EU Law and the Concept of Sovereignty in the Romanian Constitution

In the years following the revolution of 1989, Romania made European and the North Atlantic integration a declared political priority. The state's objective was therefore to join both the EU and NATO as soon as possible. At the same time, in the steps taken to achieve these objectives, it soon became clear – in the early 2000s – that the Constitution of Romania was not adequate to resolve the issues arising from

1 Vincze and Chronowski, 2018, p. 17.

2 Judgment of the Court in case C-6/64. ECLI:EU:C:1964:66. Available at: <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A61964CJ0006> (Accessed: 26 July 2023).

3 Lupu, 2022, p. 112.

4 Gombos, 2019, p. 33.

5 Lupu, 2022, p. 94.

the relationship between domestic law and EU law.<sup>6</sup> The Romanian legislator soon remedied the shortcomings and enshrined the primacy of EU law in the Romanian Constitution by Law No 429/2003 on the revision of the Constitution of Romania.<sup>7</sup>

The constitutional basis for the primacy of EU law in Romania therefore is provided by Article 148 (2) and (4) of the Constitution.<sup>8</sup> According to these two paragraphs:

*“(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. [...]”*

*(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.”<sup>9</sup>*

The provisions of Article 148 (2) and (4) of the Constitution are often referred to – both in the legal literature and the case law of the Constitutional Court of Romania – as the compliance clause (Ro. *clauză de conformitate*)<sup>10</sup> thus justifying its purpose – namely, to ensure the conformity of domestic law with EU law. As can be seen, the provisions on the primacy of EU law “[enjoy] a separate, carefully tailored, locus standi and a peculiar status quo in the Romanian constitutional architecture.”<sup>11</sup>

Article 148 is fundamentally concerned with the essential elements deriving from the status of a member state, and as such recognises the primacy of EU law as one of these essential elements. Moreover, by virtue of paragraph (4), all three branches of power are responsible for guaranteeing this primacy.<sup>12</sup>

It is important to underline – in the context of the provisions of the Constitution on the primacy of EU law – that in the Romanian constitutional system, primacy is only given to the constituent treaties of the EU and to the other mandatory community regulations. Furthermore, the primacy of EU law does not apply in cases in which national rules are inconsistent with it, but only in relation to those which contain

6 Popescu, 2017.

7 I consider that it is a true reflection of the Romanian people's commitment to European values that the only constitutional amendment since 1991 was adopted in order to join the European Union and the North Atlantic Treaty Organisation (although there have been subsequent attempts to amend the Constitution of Romania, none of them have gone beyond the stage of the referendum).

8 Enache, 2014, p. 142.

9 The Constitution of Romania. Available at: <https://www.presidency.ro/en/the-constitution-of-romania> (Accessed: 02 June 2023).

10 Varga, 2019a, p. 24.

11 Viță, 2016, p. 1631.

12 Fuerea, 2019.

contrary provisions.<sup>13</sup> On this basis, some scholars held that “Article 148 (2) of the Constitution partially restricts and also partially extends the scope of the primacy of Community law.”<sup>14</sup>

Moreover, this article creates the constitutional framework for the transfer of certain national competences to the European Union. However, as it has been expressed in the legal literature:

“[t]he transfer is neither a full transfer of sovereignty, nor can it be, as it would lead to the dissolution of the statehood of those who compose the Union, and the latter would turn into a federal state, which is not the reality, nor an explicit wish of the (majority) of the states.”<sup>15</sup>

It is pivotal to underline that all these observations are also in line with the case law of the Constitutional Court, which has already pronounced on Article 148 when examining the constitutionality of the proposed amendments in 2003. In the given decision, the Constitutional Court pointed out that the EU had not acquired its own sovereignty by the transferring of certain competences, and on the other hand stressed that EU provisions are in an intermediate position between the Constitution and other laws.<sup>16</sup> All these findings were upheld by the Constitutional Court in its subsequent case law.<sup>17</sup>

The new approach to national sovereignty, resulting from the accession to the EU, is well reflected by the fact that the provisions of Article 148 (1) do not merely refer to the transfer of certain competences, but also to the exercise of some powers in common with the other member states.<sup>18</sup>

Therefore, it can be concluded that the provisions of the Constitution of Romania concerning the primacy of EU law must be interpreted in accordance with the constitutional framework on national sovereignty, since with its accession Romania did not completely abdicate its sovereignty, but merely transferred certain state competences and powers to the EU.

The provisions on sovereignty can be found in Article 2 of the Constitution of Romania, which states in (1) that “[t]he national sovereignty shall reside within the

13 Tănăsescu, 2008, p. 1440.

14 Ibid, p. 1441.

15 Varga, 2019b, p. 453.

16 Decision No 148 of 2003 of the Constitutional Court of Romania. Published in Official Gazette No 317/2003.

17 See for example: Decision No 683 of 2012 of the Constitutional Court of Romania. Published in Official Gazette No 479/2012; Decision No 64 of 2015 of the Constitutional Court of Romania. Published in Official Gazette No 286/2015.

18 Vrabie and Balan, 2004, p. 46.

Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum."<sup>19</sup>

It can be observed that – when it comes to defining sovereignty – the Romanian Constitution applies the so-called ‘mystification strategy’<sup>20</sup> developed by French constitutional doctrine.<sup>21</sup> Article 2 (1) of the Constitution traces its foundation of sovereignty back to Rousseau’s concept of popular sovereignty,<sup>22</sup> where the sovereignty is the expression of the general will (Fr. *volonté générale*).<sup>23</sup> Similar to the French Constitution, the Romanian Constitution’s model of sovereignty, vested in the people, combines in itself “the national sovereignty based on the principle of representation and the republican popular sovereignty based on the principle of direct democracy.”<sup>24</sup> The text of the Constitution explicitly refers to both of the main elements of this mixed model: the possibilities offered by direct democracy (referendums) and by representative, indirect democracy (free, periodical and fair elections). As it was noted in the legal literature, by this model Romania tried “to reconcile fire and water and to combine the two theories in a compromise formula.”<sup>25</sup> However, according to some scholars, national sovereignty in the given context should not be seen in its traditional sense, but as equivalent to the sovereignty of the state.<sup>26</sup> On the basis of this interpretation, the Romanian Constitution’s definition of sovereignty can no longer be considered deficient, but merely open to criticism from a terminological point of view.<sup>27</sup>

Undisputedly, this concept of sovereignty is – due to the accession to the EU – subject to a number of challenges. In its current form, the EU is able to harmonise integration with the sovereignty of the nation-states only if both the member states and the union respect the provisions of the founding treaties regarding competences. Although it is possible to go further, to the point of abdicating national sovereignty, at present this is not the case, nor is it in the interest of Romania.<sup>28</sup>

19 The Constitution of Romania. Available at: <https://www.presidency.ro/en/the-constitution-of-romania> (Accessed: 02 June 2023).

20 For further information on the mystification strategy, see: Jakab, 2016, pp. 98–106.

21 The first sentence of Article 3 of the Constitution of France is almost verbatim the same as the Romanian Constitution’s concept of sovereignty: “[n]ational sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum.” Available at: [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/constiution\\_anglais\\_oct2009.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf) (Accessed: 03 June 2023).

22 For more on Rousseau’s concept, see: Balogh, 1899, pp. 42, 156.

23 Jakab, 2016, p. 99.

24 Ibid, p. 101.

25 Drăganu, 1993, p. 165.

26 Ibid, p. 166.

27 Ibid, p. 166.

28 Severin, 2020.

Furthermore, national constitutional courts have recently developed several control mechanisms to defend their sovereignty in the light of EU integration. One such mechanism – used by the Constitutional Court of Romania as well – is the identity control, under which member states act in defence of their constitutional identity. According to some scholars, constitutional identity “is a narrative, a story that is developed along constitutional principles, values, history and experience.”<sup>29</sup>

Originally the concept of constitutional identity emerged as a defence against constitutional amendments – and eventually led to the development of the so-called ‘eternity clause’.<sup>30</sup> The Constitutional Court of Romania (similar to the case law of the German or French constitutional courts) considers as elements of the Romanian constitutional identity those provisions of the Constitution that are protected by eternity clause and thus cannot be subject to constitutional amendments.<sup>31</sup> Under Article 152 of the Constitution of Romania, it is protected by eternity clause and, as such, is an element of the Romanian constitutional identity: “the national, independent, unitary and indivisible character of the Romanian state, the republican form of government, territorial integrity, independence of justice, political pluralism and official language” (Article 152 (1) of the Constitution of Romania). In addition, paragraph (2) points out that “no revision shall be made if it results in the suppression of the citizens’ fundamental rights and freedoms, or of the safeguards thereof.”

Nevertheless, as has been noted by some scholars, historically the Romanian constitutional identity has been characterised by an interesting dichotomy. This Janus-facedness can be still observed today: it is simultaneously Eurocentric and ethnocentric.<sup>32</sup> It “reflects the strong desire of the Romanians to acquire constitutional modernisation in terms of constitutional Europeanisation and, at the same time, to keep their national ethnic identity.”<sup>33</sup> Ethnocentrism can be justified by historical reasons, such as the union of the Romanian-inhabited territories or the negative effects<sup>34</sup> of the system established during more than a century of domination by the Phanariot rule.<sup>35</sup> This dichotomy also permeates the spirit of the post-communist Constitution of 1991, since “the Constitution of 1923 was largely considered by the fathers of the post-communist constitution, who, however managed to recover not only some of its liberal elements but also its illiberal ethnocentric ethos.”<sup>36</sup>

29 Boros, 2023, p. 24.

30 Orbán, 2020, p. 52.

31 Decision No 390 of 2021 of the Constitutional Court of Romania. Published in Official Gazette No 612/2021. Reasoning 81.

32 Guţan, 2022a, pp. 32–39.

33 Guţan, 2022b, p. 124.

34 This period is basically characterised as “*rapid turnover of princes and a high degree of corruption*.” See: Veress, 2022, p. 174.

35 Guţan, 2022b, pp. 109–110.

36 Ibid, p. 122.

In order to achieve the necessary balance between the protection of sovereignty and further integration, the EU institutions and the public law authorities of the member states have a key role to play, as a dialogue between them is essential to overcome the challenges. Therefore, it is worth examining how the Romanian public law authorities – in particular the Constitutional Court of Romania – relates to EU law and its primacy. In the following, I intend to review the relevant, recent case law of the Constitutional Court of Romania, reflecting also on the dialogue between the Constitutional Court and the CJEU.

### 3.

## A Synthesis of the Relevant Case Law of the Constitutional Court of Romania

By the accession to the European Union, the provisions of EU law became “a reference instrument for the review of constitutionality, in the application and with the distinctions laid down in Article 148 of the Constitution.”<sup>37</sup>

Recently, there have been a number of major cases in which the Constitutional Court of Romania interpreted the primacy of EU law. Moreover, the CJEU also ruled in some cases related to Romania, thus providing an opportunity to present the constitutional dialogue between the two institutions.

### ***3.1. Decisions on the Establishment and Operation of the Section for the Investigation of Offences in the Judiciary***

Romania, since its accession to the EU, has committed itself to the EU’s additional expectations through judicial reforms and the fight against corruption. A Cooperation and Verification Mechanism (hereafter: CVM) was established at the time of the accession, by Decision 2006/928/EC, in order to review and monitor these reforms. Later, Romania established an authority to investigate criminal offences committed by judges and prosecutors. This special authority was the so-called Section for the Investigation of Offences in the Judiciary (Ro. *Secția pentru investigarea infracțiunilor din justiție*, hereafter: SIOJ). Nonetheless, in 2018 – some days before the SIOJ came into force – the rules governing its operations were amended by a Government Emergency Ordinance (Government Emergency Ordinance No 90 of 2018 on certain measures for operationalisation of the SIOJ).

37 Stanciu and Safta, 2021.

These amendments have been shown to be relevant in several cases pending before national courts (e.g., proceedings for the annulment by an administrative litigation court of the Ordinance on the organisation and functioning of the SIOJ). In one of these cases an exception of unconstitutionality (*ex post* review) was raised against the provisions of the Government Emergency Ordinance and against Law No 304 of 2004 on the organisation of the judicial power. In several other cases references for preliminary ruling have been made to the CJEU, asking for an assessment of the compatibility of the amendments with EU law provisions.

In its Judgment of 18 May 2021,<sup>38</sup> the CJEU – acting jointly on the references for preliminary ruling – held *inter alia* that

*“the principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status [...] according to which a lower court is not permitted to disapply of its own motion a national provision [...] which it considers, in the light of a judgment of the Court, to be contrary to that decision.”<sup>39</sup>*

In essence, the CJEU underlined that – according to the principle of the primacy of EU law - national courts must disregard even constitutional rules if they are contrary to EU law provisions.

To support this conclusion, the CJEU pointed out that

*“[b]y virtue of the principle of the primacy of EU law, a Member State’s reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that.”<sup>40</sup>*

Already in the light of this judgment, the Constitutional Court of Romania examined the exception of unconstitutionality brought before it and, as will be seen below, reached a very different conclusion from that of the CJEU.

38 Judgment of the Court of Justice of the European Union in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19. ECLI:EU:C:2021:393. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=378468> (Accessed: 07 June 2023).

39 Ibid, Reasoning 252.

40 Ibid, Reasoning 245.

In its Decision No 390 of 2021<sup>41</sup> the Constitutional Court of Romania examined the exception of unconstitutionality raised by the associations "*Forumul Judecătorilor din România*" ('Forum of Judges of Romania') and "*Mișcarea pentru apărarea statutului procurorilor*" ('Movement to Defend the Status of Prosecutors') and by a natural person.

In the given decision, the Constitutional Court of Romania stated that 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 those of the European Union."<sup>42</sup> The supremacy of the Constitution over the legal order should not be affected by the fact that a state, in our case Romania, is a member of the European Union. In addition, the Constitutional Court, referring to its case law, pointed out that although the member states delegate certain powers to the union in order to achieve community objectives, this transfer of competences must not, however, infringe the national constitutional identity of these member states.<sup>43</sup> According to this opinion, the member states do not transfer the powers and competences that are necessary to preserve their national constitutional identity. In this sense, national constitutional identity has a double purpose: it empowers the Constitutional Court to ensure the supremacy of the Constitution, and acts as a barrier to the prohibition of the adoption of rules contrary to EU law.

Moreover, the Constitutional Court also underlined in its decision that, although Article 148 of the Constitution provides that national courts must apply the EU law in the event of a conflict with national law, the terms 'national law' and 'domestic law' only refer to 'infra-constitutional legislation'.<sup>44</sup> In the light of this, as interpreted by the Constitutional Court, Article 148 does not give primacy to EU law over the provisions of the Constitution of Romania.<sup>45</sup>

41 Published in the Official Gazette No 612/2021.

42 Decision No 390 of 2021 of the Constitutional Court of Romania, Reasoning 79. This opinion was already stated by the Constitutional Court of Romania in its Decision No 80 of 2014 of the Constitutional Court of Romania. Published in the Official Gazette No 246/2014.

43 Decision No 390 of 2021 of the Constitutional Court of Romania, Reasoning 79. With regard to the term "*national constitutional identity*" it is worth pointing out that national constitutional courts use the phrase "*constitutional identity*", while the Court of Justice of the European Union operates with the phrase "*national identity*", which is also expressed in this way in Article 4 (2) of the Treaty on European Union. Nevertheless, in the case law of the Constitutional Court of Romania, the two terms are combined, somewhat strangely, in the term "*national constitutional identity*". Since it is not the explicit purpose of my study to examine the substantive content of the two terms in depth (which I would not be able to do, due to the space limitations), I consider it important to simply point out that when the Constitutional Court of Romania refers to "*national constitutional identity*", it is essentially referring to "*constitutional identity*", as it is known in the legal literature.

44 Decision No 390 of 2021 of the Constitutional Court of Romania, Reasoning 83.

45 Ibid. This opinion was already stated by the Constitutional Court of Romania in its Decision No 148 of 2003 of the Constitutional Court of Romania. Published in Official Gazette No 317/2003.

In the meantime, the Craiova Court of Appeal also issued a reference for a preliminary ruling on the operation of the SIOJ and its compliance with EU law. This reference was ruled by the CJEU by Judgment of 22 February 2022.<sup>46</sup> In that Judgment, the CJEU – already aware of the relevant case law of the Constitutional Court of Romania – emphasised that:

*“[i]f a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, that constitutional court must stay the proceedings and make a reference to the Court for preliminary ruling under Article 267 TFEU, in order to assess the validity of that provisions in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid.”<sup>47</sup>*

This ‘exchange of judgments’ between the Constitutional Court of Romania and the CJEU, as described above, accurately reflects the fact that the issues raised go well beyond the changes in the functioning of the SIOJ and their compatibility with EU law. In essence, the two institutions cannot find common ground on the question of the extent of a member state’s constitutional identity, nor on who has the power to declare that an EU norm infringes on that identity.

It is salient to note that, as the case law presented above also reflects, the Constitutional Court interpreted that an EU law provision that is contrary to the Constitution has primacy over domestic law only after the amendment of the Constitution, in accordance with Article 11(3) of the Constitution. Nevertheless, in Romania constitutional amendments must also comply with certain material limits, which are contained in the eternity clause, in Article 152 of the Constitution.<sup>48</sup> On this basis, the Constitutional Court linked the eternity clause to the core of the Constitution, against which EU law does not prevail.

In accordance with the opinion expressed by some scholars, we can state that “[t]he eternity clause provides a strong constitutional basis for invoking the national constitutional identity in relation to the principle of (possibly) absolute primacy of the European law.”<sup>49</sup>

46 Judgment of the Court of Justice of the European Union in Case C-430/21. ECLI:EU:C:2022:99. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=8&docid=254384&pageIndex=0&doclang=EN&mode=lst&dir=8&occ=first&part=1&cid=21075214> (Accessed: 12 June 2023).

47 Ibid, Reasoning 71.

48 Guțan, 2022a, 31.

49 Varga, 2019a, p. 23.

The possibility that an EU law norm may infringe the constitutional identity of a member state should be examined by the CJEU in close cooperation with the constitutional court of the member state concerned. This solution would also be in line with the principle of sincere cooperation between the European Union and its member states.

Moreover, in this cooperation the CJEU should also take into account the fact that "[c]onstitutional courts are best placed to be familiar with national evolutions when analysing complex issues arising in the relationship between national and EU law."<sup>50</sup> On this basis, the role of the national constitutional courts is indisputable in determining whether an EU law provision violates the constitutional identity of the state in question.

### **3.2. A New Issue: the Question of the Primacy of EU Law Over the Decisions of the National Constitutional Courts. The Euro Box Promotion Judgment.**

Over the past few years, the CJEU opened up a new area of interpretation of EU law, namely its primacy over the decisions of the national constitutional courts. This issue was first raised in relation to Romania and initiated a considerable political and legal debate in the country.

Of particular relevance to this issue is the Judgment of the CJEU of 21 December 2021<sup>51</sup> (hereafter the *Euro Box Promotion* judgment). This judgment was delivered in connection with five references for preliminary ruling.

All five references for preliminary ruling were based on the same factual situation: the Constitutional Court of Romania (in the context of *ex post* reviews or solving legal disputes of a constitutional nature between public authorities) had pronounced decisions finding either that criminal procedural rules were unconstitutional or that the rules on the composition of the court chamber were contrary to the Constitution. These decisions of the Constitutional Court had an effect on all the ongoing criminal proceedings, concerning corruption and maladministration, in the framework of which the references for preliminary ruling had been formulated.

The national courts addressed the CJEU, among others: "[m]ust the primacy of EU law be interpreted as permitting a national court to disapply a decision of the

50 Teodoroiu, Enache and Safta, 2019, pp. 45–46.

51 Judgment of the Court of Justice of the European Union in joined cases C-357/19, C-379/19, C-547/19, C-811/19, C-840/19. ECLI:EU:C:2021:1034. Available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=3754DC8DE20A524AC21797BCAAE42FFC?text=&docid=251504&pageIndex=0&doclang=HU&mode=lst&dir=&occ=first&part=1&cid=2486417> (Accessed: 09 June 2023).

constitutional court delivered in a case relating to a constitutional dispute, which is binding under national law?”<sup>52</sup>

With regard to this question, the CJEU, on the one hand, held that it has the exclusive jurisdiction to give interpretation of EU law and to clarify “the scope of the principle of the primacy of EU law.”<sup>53</sup> On the other hand, it underlined that:

*“in accordance with the principle of primacy, the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, [...] to give full effect to the requirements of EU law in the dispute brought before it by disapplying, as required, on its own authority, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect.”*<sup>54</sup>

In the light of this, the CJEU ruled – also in the light of its case law – that the primacy of EU law precludes any national rule or practice under which the decisions of constitutional courts are binding on national courts, and judges are obliged to apply them even against EU law in their jurisdiction, under the penalty of disciplinary sanctions.<sup>55</sup>

This judgment has been the subject of much criticism in the legal literature. On the one hand, it could easily lead to the conclusion that the decisions of the Constitutional Court are not to apply at all and that the CJEU, acting as a court of appeal, can overrule these decisions.<sup>56</sup> It can be presumed that the CJEU did not intend to promote this interpretation, but the possibility of interpreting the judgment in such a manner should have been explicitly excluded by a more precise and transparent reasoning.<sup>57</sup>

On the other hand, the CJEU did not adequately distinguish between the primacy of EU law over national constitutions and over the decisions of the constitutional courts, so it would have been useful to clarify this aspect in the judgment as well.<sup>58</sup>

As a response to this judgment, the Constitutional Court of Romania issued a press release on 23 December 2021. In this press release it sought to nuance the wording of the judgment. First of all, the Constitutional Court underlined that its decisions are binding under the provisions of the Constitution [Article 147 (4)]. On this basis, the *Euro Box Promotion* judgment

52 Ibid, Reasoning 111.

53 Ibid, Reasoning 254.

54 Ibid, Reasoning 252.

55 Ibid, Reasoning 264.

56 Carp, 2022, p. 399.

57 Ibid.

58 Ibid.

*"can only produce effects after the revision of the Constitution in force, which, however, cannot be done by operation of law, but only on the initiative of certain subjects of law, in compliance with the procedure and under the conditions laid down in the Romanian Constitution itself."*<sup>59</sup>

Regarding this reaction, a legitimate question may arise: what is the legal binding force of a press release, and to what extent can it be invoked? In line with the opinion expressed in the legal literature, I consider that this press release is not binding in itself.<sup>60</sup> At the same time, the arguments advanced in it may be invoked before the Constitutional Court in a future constitutional review. Moreover, in time the arguments set out in the press release may also appear as a matter of principle in the practice of the Constitutional Court. Therefore, this press release can also be interpreted as a general guideline.<sup>61</sup>

The need for cooperation between the EU institutions and national authorities – and more specifically between the CJEU and the constitutional courts of the member states – is also emphasised in the present judgment. It is beyond dispute that with this judgment the CJEU sought to limit the binding force of the decisions of national constitutional courts in cases where they contravene the principle of the primacy of EU law. However, in making this conclusion it did not take into account either the specific features of the public law systems of the member states, nor the constitutional role of the national constitutional courts.

### **3.3. The Question of the Primacy of EU Law Over the Decisions of National Constitutional Courts in Matters Relating to the Limitation Period**

In the summer of 2023, the Constitutional Court of Romania and the CJEU had another 'exchange of judgments', which once again focused on the primacy of EU law over the decisions of the national constitutional courts.

In 2022 the Constitutional Court of Romania ruled<sup>62</sup> on several exceptions of unconstitutionality. These exceptions challenged the constitutionality of the provisions of Section 155 (1) of the Criminal Code, according to which "[t]he running of the limitation period of criminal liability shall be interrupted by the performance of any procedural act in the case." The petitioners stated that, by a decision pronounced in

59 Press release of the Constitutional Court of Romania, 23 December 2021. Available at: <https://www.ccr.ro/en/press-release-23-december-2021/> (Accessed: 12 June 2023).

60 Carp, 2022, p. 399.

61 Ibid.

62 Decision No 358 of 2022 of the Constitutional Court of Romania. Published in the Official Gazette No 565/2022.

2018,<sup>63</sup> the Constitutional Court already admitted an exception of unconstitutionality and found that the legislative approach providing for the interruption of the course of the limitation period of criminal liability by performing “any procedural act in the case”, in the provisions of Section 155 (1) of the Criminal Code, is unconstitutional.<sup>64</sup> Nevertheless, these provisions were still enshrined in the Criminal Code and the legislator failed to amend them.

The Constitution Court of Romania held (already in its decision pronounced in 2018) that the provisions of Section 155 (1) of the Criminal Code lack predictability and, at the same time, are contrary to the principle of the legality, since the phrase “any procedural act” also refers to acts which are not communicated to the suspect, thus preventing them from knowing whether the running of the limitation period has been interrupted.<sup>65</sup>

The Constitutional Court found that the situation created by the passivity of the legislator represents a violation of the provisions of Article 1 (3) and (5) of the Constitution, which enshrines the character of the Romanian State as a state governed by the rule of law, as well as the supremacy of the Constitution.<sup>66</sup> In order to restore constitutionality, it is necessary for the legislature to clarify and detail the provisions relating to the interruption of the running of the limitation period for criminal liability.<sup>67</sup>

On the basis of the decisions of the Constitutional Court (and of the Decision No 67 of 2022 of the High Court of Cassation and Justice) a number of criminal proceedings have been declared time-barred, by the statute of limitations, and thus terminated. In some of these cases, the Braşov Court of Appeal rendered references for preliminary ruling to the CJEU, asking the court to examine how the situation arising from the decisions of the Constitutional Court relates to EU law.

One of these references for preliminary ruling was decided by the CJEU on 23 July 2023.<sup>68</sup> In this judgment, it essentially reiterated the principles set out in the *Euro Box Promotion* case but – partly because of the nature of the questions under examination – clarified them.

First of all, in the given judgment the CJEU held that the legal situation resulting from the application of the decisions of the Constitutional Court of Romania and of

63 Decision No 297 of 2018 of the Constitutional Court of Romania. Published in the Official Gazette No 518/2018.

64 Decision No 358 of 2022 of the Constitutional Court of Romania. Reasoning 13.

65 Ibid, Reasoning 42.

66 Ibid, Reasoning 75.

67 Ibid, Reasoning 76.

68 Judgment of the Court of Justice of the European Union in case C-107/23. ECLI:EU:C:2023:606. Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62023CJ0107> (Accessed: 26 July 2023).

the High Court of Cassation and Justice risks that serious frauds against the financial interests of the EU will remain unpunished.<sup>69</sup>

Moreover, on the basis of the principles set out in the *Euro Box Promotion* judgment, the court emphasised that national courts have the obligation to disapply national provisions that prevent the application of sanctions against offences in connection with fraud proceedings affecting the financial interests of the EU.<sup>70</sup>

On this basis, taking into account the relevant provisions of the founding treaties, the CJEU found that national courts are required to disapply the Decisions of the Constitutional Court of Romania (Decisions No 297 of 2018 and No 358 of 2022) as well as the Decision of the High Court of Cassation and Justice "in so far as those judgments have the effect that criminal liability is time-barred in a large number of cases of serious fraud affecting the financial interests of the European Union."<sup>71</sup>

However – as it was pointed out in the legal literature after the publication of the judgment – these arguments of the CJEU must be interpreted in the light of the judgment as a whole and as such are nothing more than an expression of the primacy of EU law.<sup>72</sup> Yet, in addition to these arguments, the CJEU also listed a number of other arguments, such as the fact, that "the Romanian Constitutional Court applied a national standard of protection of fundamental rights which supplements the protection against arbitrariness in criminal matters offered by EU law."<sup>73</sup>

Moreover, the Decision of the High Court of Cassation and Justice and the relevant decisions of the Constitutional Court of Romania were based on two separate principles. Whilst the later was based on "the principle that offences and penalties must be defined by law, as to its requirements relating to the foreseeability and precision of criminal law", the Decision of the High Court of Cassation and Justice was connected to the "principle of retroactive application of the more lenient criminal law (*lex mitior*)."<sup>74</sup> It is therefore important to distinguish between the Decision of the High Court of Cassation and Justice and the decisions of the Constitutional Court, and the CJEU took this aspect into consideration.

Considering all the arguments put forward, the CJEU gave a much more nuanced answer to the questions raised by Braşov Court of Appeal. The court considered that the referred EU law provisions (Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests) must be interpreted in a way that the national courts

69 Ibid, Reasoning 91.

70 Ibid, Reasoning 97.

71 Ibid, Reasoning 98.

72 Blendea and Toader, 2023.

73 Judgment of the Court of Justice of the European Union in case C-107/23. Reasoning 115.

74 Ibid, Reasoning 102.

*“are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if [...] a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period.”<sup>75</sup>*

However, on the other hand, national courts “are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) which makes it possible [...] to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity.”<sup>76</sup>

The answer to the third question raised by the Braşov Court of Appeal further nuances the situation, as the CJEU stated that the principle of primacy EU law precludes any domestic law under which the national courts of a member state are bound by decisions of the Constitutional Court and the High Court of Cassation and Justice, if that case law is contrary to the provisions of EU law.<sup>77</sup> This third response is essentially a repetition of the principles stated in the *Euro Box Promotion* judgment.

#### 4.

### Closing Remarks and Some Conclusions

It is a fact that, by acceding to the EU, Romania has transferred certain powers and competences and has given primacy to EU law over contrary provisions of national law (as it is reflected in Article 148 of the Romanian Constitution). However, as it can be observed from the cases presented above, there are significant divergences between the EU and national public authorities on the question of how far exactly the primacy of EU law can extend. Through its recent case law, the Constitutional Court of Romania joined the ranks of national constitutional courts that consider that the primacy of EU law should not infringe the constitutional identity of a member state. On the other hand, the CJEU, on the basis of the principles set out in its case

<sup>75</sup> Ibid, Reasoning 138.

<sup>76</sup> Ibid, Reasoning 138.

<sup>77</sup> Ibid, Reasoning 138.

law, intends to uphold the primacy of EU law even over the decisions of the national constitutional courts.

In order to solve these conflicts, several solutions have been proposed in the legal literature, such as: clarification and specification of EU and member state competences; the more pronounced role and application of the principle of subsidiarity and "strengthening the democratic function of the European Parliament."<sup>78</sup> At the same time, the most essential first step would be to promote sincere cooperation between EU and national institutions, to achieve a mutually respectful dialogue, in which both sides take into account the arguments and reservations of the other. As it has been stated in the legal literature:

*"each individual state, in particular through its constitutional case law, as well as through the case law of the Court of Justice of the European Union, can contribute separately and together through a sustained constitutional dialogue not only to the solution of specific disputes, but also to the development of the idea of national constitutional identity in relation to European constitutional identity."*<sup>79</sup>

78 Mathieu, 2021, pp. 142–144.

79 Varga, 2019b, p. 466.

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