The Effects of the Judgment of the Grand Chamber of the Court of Justice of the European Union in Case C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19. The Obligation of the Decisions of the Romanian Constitutional Court and the Supremacy of EU Law

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Abstract: The supremacy of the Constitution is therefore compatible with the application systems that give application preference to regulations from legislation other than national law, as long as the Constitution itself established this provision, which happens exactly with the provision provided in art. 93, which allows the transfer of powers resulting from the Constitution in favor of an international institution thus constitutionally empowered to regulate matters previously reserved for domestic powers and their application.

Keywords: *supremacy of law, primacy of law, supremacy of the Constitution.*

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1. Introduction. The Relationship between the National Legal Order and the EU Legal Order

Supremacy and **primacy** of law are categories that have developed in a distinct order.

The first, in the application of the regulations in force; the latter in that of regulatory procedures. Supremacy is expressed in the higher hierarchy of a regulation and is therefore a source of validity of lower regulations, leading to the subsequent nullity of the latter if they contravene the provisions imposed imperatively in the first. "The primacy, however, is not necessarily based on hierarchy, but rather on the distinction between the scope of the various regulations, mainly valid, of which, however, one or more of them have the ability to replace others by virtue of the application. their preferential or predominant reasons for various reasons. In principle, any supremacy implies primacy (which leads to its occasional equivalence), unless the same supreme rule has established".

In short, the Constitution accepted, by virtue of art. 93, the primacy of Union legislation in the field of application inherent in this law.

Therefore, what can be drawn from this is that:

- **supremacy** is analyzed in a vertical ratio, from source to derivative, in which the derivative that does not conform to the source is struck by nullity;
- the **primacy** is analyzed in a horizontal report, in which both regulations are on the same level, and their application is made in a system of prioritization according to the source from which they come and according to the rules established according to the primary source.

2. Supremacy of the Romanian Constitution

In order to determine the way in which Romania has chosen to relate to the international order established by the treaties it signs and in which it undertakes to respect certain obligations in exchange for the rights it enjoys, we must analyze art. 11, art. 20 and art. 148 and observe the differences between them.

In the unlikely event that, in the subsequent dynamics of European Union law, that law is considered irreconcilable with the Spanish Constitution, the hypothetical excesses of European law over the European Constitution itself will not be remedied by the usual means further established as a last resort. the preservation of the sovereignty of the Spanish people and the supreme supremacy of the Constitution could lead the Court to address the issues that would arise in

such a case. In the current circumstances, those issues are considered non-existent by the appropriate constitutional procedures (...).

The **Romanian Constitution retains its status as the primary source of legal order in Romania**, and the way in which it intends to relate to the treaties it concludes is as follows:

a) with regard to human rights treaties, the highest guarantees for fundamental human rights shall be given precedence, wherever they are enshrined in the Constitution, in special treaties or in the constitutive treaties of the EU;

b) with regard to the founding treaties, priority is given to either the national (Romanian) or the Union (European) legislator, depending on the competences, exclusive or shared, that have been granted to the EU in certain regulatory areas, but taking into account always keep in mind that the primary source that determines the prevalence is the Romanian Constitution itself, which, as we will see, has an influence on the competence of the two courts, namely the JRC or the CJEU.

Only by revising the Constitution, as an expression of national sovereignty, can a treaty be ratified which would contain provisions contrary to the Constitution. It is the Constitution that guarantees the execution of treaty obligations so that this is the primary act that gives rise to future relations between states and only within the limits set by the Constitution and, in the alternative, by the treaties, of course. Also, according to art. 147 para. 3 reported to 146 lit. b of the Constitution, the CCR has as its attribution the pronouncement before ratification on the constitutionality of treaties or other international agreements, at the notification of one of the presidents of the two Chambers, of a number of at least 50 deputies or at least 25 senators.

Art. 148 regulates the special situation of the constitutive treaties of the EU (TEU and TFEU), of the acts of revision of the constitutive treaties, but also of the EU law. It is specified that they have priority over the contrary provisions of the “domestic laws” and in compliance with the provisions of the Act of Accession. “Internal laws” refer to infra-constitutional legislation, ie what is under the Romanian Constitution in the legal order (national law). It is also stipulated that the obligations in the Act of Accession, as well as in the treaties and subsequent acts adopted pursuant to them, are fulfilled by the Parliament, the Government and the judiciary, as an expression of loyal cooperation between Romania and the EU.

This way of interpretation was ruled even by the Constitutional Court of Romania, which ruled by Decision no. 80 / 16.02.2014 (Constitutional Court of Romania, 2003) (published in the Official Gazette no. 246 / 07.04.2014) on the supremacy of the Romanian Constitution together with the analysis of the

constitutionality of the legislative proposal regarding the revision of the Constitution, with reference to the interpretation of disp. art. 148 on integration into the European Union which had the following form proposed for para. 2:

“Romania ensures the observance, within the national legal order, of the law of the European Union, according to the obligations assumed by the act of accession and by the other treaties signed within the Union”.

As can be deduced, **Romania wanted in 2014 to no longer provide that the constituent treaties "have priority over the contrary provisions of domestic law"**, but possibly even to the Romanian Constitution, by using the expression "within the national legal order" (The national legal order also includes the Constitution, as opposed to the expression of domestic laws), which would have threatened Romania's own national identity (Uscov, 2021).

3. Decisions of the RCC are Generally Binding

The Constitutional Court of Romania formulated in 2014 the following principles, which remain valid even today precisely considering the fact that the decisions of the RCC are generally binding, according to art. 147 of the Romanian Constitution:

“450. Regarding the amendment of par. (2) in art. 148, the Court finds that this is unconstitutional for the reasons to be set out”.

“451. By judgment of 9 March 1978 of the Court of Justice of the European Communities (now the European Union) in Case C-106/77, it was held that 'under the principle of the rule of law, the effect, in their dealings with the national law of the Member States, by the mere fact of their entry into force, the ipso jure inapplicability of any provision contrary to existing national law, but also - by the fact that those provisions are an integral part, in the legal order applicable in the territory of each Member State - to prevent the valid adoption of new national laws, in so far as they are incompatible with Community rules”.

It should be noted that, at that time, neither the EU nor the Romanian magistrates' associations noticed that that CCR decision would jeopardize Romania's EU membership status, as they did after the CCR communiqué of 23.12.2021.

Furthermore, it is necessary to verify the national will expressed in the considerations of the guarantor of the supremacy of the fundamental law, (i.e.) in the CCR Decision no. 148 / 16.04.2003 (Constitutional Court of Romania, 2003) (published in the Official Gazette no. 317 / 12.05.2003) regarding the

constitutionality of the legislative proposal for the revision of the Romanian Constitution prior to Romania's accession to the EU:

“At the same time, the Court observes that, in order to integrate this European conception into the Romanian Constitution, it is necessary to complete the provisions of art. 11 with a new paragraph, the purpose of which is expressly provided in the legislative proposal for revision that, “If a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification may take place only after the revision of the Constitution.” In order to ensure an operational character for this constitutional provision, it is proposed to introduce another provision, contained in art. 144 lit. a ^ 1), according to which the Constitutional Court “ruled on the constitutionality of treaties or other international agreements, at the notification of one of the presidents of the two Chambers, of a number of at least 50 deputies or at least 25 senators”.

This view is consistent with that expressed by specialists in constitutional law, who argued even more that “in the domestic legal order the legal act by which Romania joins the European Union has legal force inferior to the Constitution and constitutional laws, but superior to organic laws and” (Constantinescu et al., 2004).

4. Opinion of RCC Regarding CJEU Judgment of 21.12.2021

In connection with the RCC Communiqué of 23.12.2021 (European Commission for Democracy through Law, 2014) on the need to revise the Constitution in order to implement the CJEU Judgment of 21.12.2021, in 2012, the Constitutional Court of Lithuania had to rule on the supremacy of the national Constitution over international treaties, that is, the way forward when it is subsequently observed that the provisions of a treaty, as interpreted by an international court established by its provisions, namely the European Court of Human Rights, are in conflict with the provisions of the Constitution.

In this case, the same issue arose as in the case of Romania today, not only in relation to the ECJC's interpretation of the TFEU, but also in the ECtHR's interpretation of the ECHR, in order to determine the effect of an ECHR decision on the Lithuanian Constitution. and the practice of the Lithuanian Constitutional Court when it essentially changes the highest-ranking regulation, the fundamental law.

The latter Court ruled in principle that only by revising the Constitution could the ECHR decision be implemented, as set out in the 2014 Venice

Commission report entitled “Cooperation of the Constitutional Courts in Europe - Current Situation and Prospects” (European Court of Justice, 1978).

It should be noted that, in contradiction with the Lithuanian Constitution, it seems, according to art. 20 of the Romanian Constitution, the only treaties that prevail over the Romanian Constitution so that even the constitutional provisions must be interpreted in their light, are the international treaties on human rights. Therefore, in the case of ECHR decisions against Romania, it is not necessary to revise the Constitution in order to give precedence to their provisions, unlike any other treaty, including the EU's founding treaties, where it is necessary to revise the Constitution.

Relevant paragraphs of the 2012 Constitutional Court ruling of Lithuania:

“During the implementation of the international obligations of the Republic in domestic law, the principle of superiority of the Constitution enshrined in Article 7.1 of the Constitution must be taken into account”.

5. The Treaty of Lisbon is a Rule of International Law, not a Rule of European Law

The Treaty of Lisbon “(amending the Treaty on European Union - TEU (also known as the Maastricht Treaty) and the Treaty establishing the European Economic Community (also known as the Treaty of Rome), renamed the Treaty on the Functioning of the Union European Union - TFEU) is the first treaty signed by Romania as a member of the EU”.

It is a rule of international law, not a rule of European law, and European primary law is thus represented by subsequent acts (unconventional law) of a binding nature (the rules adopted in their execution, usually by the European Commission, constitute European secondary law). Just as national law is a derivative of the Romanian Constitution, being adopted by the national authorities provided for in it, so EU law is a derivative of the Treaty of Lisbon, being adopted by the EU institutions provided for therein.

In the content of art. 4 para. 2 TEU, we can deduce the essence of the relationship between European Union law and national constitutions: “The Union respects the equality of Member States in relation to the Treaties, as well as their national identity, inherent in their fundamental political and constitutional structures, including local and regional autonomy. It respects the essential functions of the State and, in particular, those whose purpose is to ensure its territorial

integrity, maintain law and order and defend national security. In particular, national security remains the sole responsibility of each Member State".

The principles on which the EU is based "are set out in the first articles of the Treaty on European Union, and it is important to point out that, in accordance with art. 5 para. 1 of the TEU, the delimitation of EU competences is governed by the principle of conferral, so that any competence not conferred on the EU by treaties belongs to the Member States (Article 4 (1) TEU) and the exercise of these competences is governed by the principles of subsidiarity and proportionality".

A number of declarations annexed to the Final Act of the Intergovernmental Conference adopting the Treaty of Lisbon signed on 13 December 2007 were adopted, including:

- Declaration no. 17 applicable to all Member States refers to supremacy and provides for the following:

"It is clear from the case-law of the Court that the supremacy of Community law is a fundamental principle of Community law. According to the Court, this principle is inherent in the specific nature of the European Community. At the time of the first judgment in that case-law (judgment of 15 July 1964 in Case 6/64 Costa v ENEL (1)), supremacy was not mentioned in the Treaty. The situation has not changed today. The fact that the principle of supremacy will not be included in the future treaty will in no way change the existence of the principle and the case law of the Court of Justice".

Judgment of 15.07.1964 in Case 6/46 - Costa / Enel (European Court of Justice, 1964), mentioned in Declaration no. 17 above, sets out not the supremacy, but the principle of the primacy of European (Community / Union) law over unconstitutional law (national law), not over the very constitution of a Member State, and this is reflected in the following paragraphs:

"Whereas this integration of the provisions of Community sources into the law of each Member State and, more generally, the letter and spirit of the Treaty have as a corollary the impossibility of States to make it prevail against an accepted legal order by them on the basis of reciprocity, a subsequent unilateral measure which cannot thus be opposed to it" (European Court of Justice, 1964).

6. Jurisdiction Competences According to EU Treaties. The Effect of CCR Decisions

Analyzing this case, the only connection with the Constitution is the impossibility of adopting a law to revise the Constitution after accession and

contrary to the provisions of the Treaty, while the Constitution itself in force at the time of ratification of the Treaty is considered fully in line with its provisions.

Romania, in application of art. 11 para. 3 of the Constitution, did not consider it necessary to revise its own Constitution in order to ratify the Treaty of Lisbon because it did not identify constitutional provisions that would contradict those of the Treaty of Lisbon.

The legal order and the competence to control its observance, following it in detail and explaining in the following:

a) exclusive competence - when we talk about these areas, the control competence belongs to the EU and the Lisbon Treaty takes precedence precisely because the fundamental law established the allocation of EU competences, respectively ceded (without ceding definitively) part of the exercise of its sovereignty (not of its own sovereignty);

b) shared competence - when discussing these areas, we must first examine the source of the regulation, the Lisbon Treaty or the Romanian Constitution, according to the principle of subsidiarity (I will detail below, on shared competence in the field of security, freedom and justice).

Jurisdiction belongs as follows:

- CJEU, which gives only a binding interpretation of the EU legal order, but without being able to directly invalidate national law, but only obliges the Member State to respect the EU legal order and, implicitly, its decisions, under financial penalties (infringement procedure);

- RCC within the control of the constitutionality of the national law by reference to art. 148 of the Romanian Constitution, being able to directly invalidate the national law (finding unconstitutionality), insofar as it contradicts the EU legal order;

- as well as an atypical control carried out by the 'first Union judge', who is the national judge of the courts of common law, who cannot directly invalidate national law but may not apply it, in so far as it is contrary to the EU legal order. It will be subject, as appropriate, to judgments of the CJEU in the interpretation of the EU legal order affecting national law, as well as to JRC decisions exercising constitutional control over national law, as well as control of EU human rights law or decisions finds that the EU has violated its powers (see below).

Interesting in this context is the judgment of 17.12.1970 (European Court of Justice, 1970) in Case C-11/70 (Internationale Handelsgesellschaft mbH), in which the Court of Justice of the European Communities ruled as follows:

“Recourse to legal rules or concepts of national law to judge the validity of measures adopted by the institutions of the Community would have a negative effect on the uniformity and effectiveness of Community law. The validity of such measures can be assessed only in the light of Community law. In fact, the law deriving from the Treaty, an independent source of law, cannot, by its very nature, be exceeded by the rules of national law, regardless of classification, without being deprived of its character as Community law and without the very legal basis of the Community. Therefore, the validity or effect of a Community measure in a Member State cannot be affected by claims that it is contrary to either the fundamental rights enshrined in that State's constitution or the principles of a national constitutional structure”.

What is emphasized here is that, in the areas of exclusive or shared competence of the EU, the Constitutional Courts of the Member States cannot invalidate a rule of EU law by reference to the notions of national order, but only by reference to the notions of the constitutive treaties. EU. This is debatable in the context of fundamental human rights, as shown below.

c) fundamental human rights - when these are called into question, control is exercised in relation to the primary source, the Romanian Constitution, which establishes the prevalence of the Constitution, the Lisbon Treaty or other human rights treaties according to the one that sets a higher standard. and their competence in this matter belongs to the JRC, which will interpret them according to the jurisprudence of the ECtHR, or even the ECtHR, which could invalidate EU law;

d) ultra vires - when the competences are violated by the EU, respectively the principle of attribution, CCR can intervene to restore the legal order by referring to the provisions of the Romanian Constitution, invalidating the EU law. By the Judgments of the CJEU of 18.05.2021 and 21.12.2021, Romania is not in the situation of Germany (but in a more privileged position due to shared competence), where according to the Decision of the German Constitutional Court of 05.05.2020 (here) regarding the Procurement Program in the public sector (PSPP), it has ruled in an area that falls within the exclusive competence of the EU, even if all this Court has done has been to ensure that the powers assigned to the EU are not exceeded (ultra vires).

Of course, the effect of CCR decisions which would determine whether EU law violates fundamental human rights or the principle of attribution has been violated would lead to one of the following conclusions:

- it is necessary to revise the Constitution, with the verification of the limits of the revision provided in art. 152 of the Romanian Constitution, or

- it is necessary to amend the Treaty of Lisbon or to amend / repeal EU law because that provision may not be applicable in one State and in all other Member States (all or nothing), or

- withdrawal from the EU is needed.

In any case, we can conclude without a doubt that no act can be adopted in the legal order of the EU or a decision of the CJEU should be pronounced to question the obligation of the decisions of the Constitutional Court of Romania provided in art. 147 para. 4 of the Constitution because neither the EU nor Romania took into account at the time of accession that this provision of the Constitution becomes totally inapplicable in relation to the EU, and the revision of the Constitution in this regard would violate the limits established according to art. 152 of the Constitution for the same reasons for which it was not possible to accept the revision of the Constitution in the sense of granting full precedence of the EU legal order over the national legal order (read CCR Decision No. 80 / 16.02.2014, above quoted).

The issues of judicial review of the legal order are not so much in terms of exclusive jurisdiction, but rather in terms of shared jurisdiction.

In the case of Romania, as in the case of the other member states, according to “art. 4 para. 2 lit. j TFEU, the area of freedom, security and justice is an area in which the EU exercises a shared competence, which means, in accordance with disp. art. 2 of the same Treaty, that “the Union and the Member States may legislate and adopt legally binding acts in this field. Member States shall exercise their powers to the extent that the Union has not exercised its powers. Member States shall again exercise their powers to the extent that the Union has decided to cease exercising them”.

Also, for the chapters “Judicial cooperation in criminal matters” and “Police cooperation”, “National Parliaments shall ensure compliance with the principle of subsidiarity with regard to proposals and legislative initiatives set out in Chapters 4 and 5, in accordance with the Protocol on the application of the principles of subsidiarity” and proportionality” (Article 69 TFEU).

In accordance with disp. art. 5 para. 3 TEU, “in accordance with the principle of subsidiarity, in areas not falling within its exclusive competence, the Union shall intervene only if and to the extent that the objectives of the envisaged action cannot be satisfactorily achieved by the Member States either centrally or regionally. and locally, but due to the size and effects of the planned action, they can be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity in accordance with the Protocol on the application of the

principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure laid down in that Protocol”

The sole article of Protocol no. Article 25 on the exercise of shared competences (annexed to the Treaty of Lisbon) provides that, “as regards Article 2 (2) of the Treaty on the Functioning of the European Union concerning shared competences, where the Union pursues an action in that field, the scope of the exercise of its powers shall include only those elements which are governed by that act of the Union and therefore does not cover the whole field”.

7. Conclusions

The CJEU judgment of 18.05.2021 (European Court of Justice, 2021a) is not new in terms of legal order, and can be interpreted as a mere reiteration of the Simmenthal judgment, which gives the national judge the right to apply EU law directly without waiting to first rule on the issue of the JRC in finding that the provision of national law contrary to EU law is unconstitutional, as well as the provision in principle that no constitutional law, ie a law revising the Constitution, subsequent to becoming an EU member, can be contrary to the EU legal order.

Instead, the CJEU judgment of 21.12.2021 (European Court of Justice, 2021b) seems to extend the supremacy of the EU legal order, including by reference to the Romanian Constitution, stating that “the principle of the supremacy of Union law must be interpreted as opposing a national regulation or practice according to which courts common law are governed by the decisions of the national constitutional court and may not, for this reason and at the risk of disciplinary misconduct, leave that case-law is contrary to the second subparagraph of Article 19 (1) TEU or Article 325 (1) TFEU or Decision 2006/928”.

Therefore, regardless of the previous ruling of the JRC, in the view of the CJEU, the common law court may decide to the contrary if it considers that the JRC's decision:

a) is contrary to art. 19 para. Article 2 (1) TEU, ie the decision of the JRC does not take into account a judgment of the CJEU in the interpretation and application of the Treaty of Lisbon

b) or is contrary to art. 325 para. 1 TFEU, ie the decision of the JRC would aim at reducing efforts to combat fraud and any other illegal activity detrimental to the financial interests of the Union.

c) or which is contrary to the MCV Decision

The worrying issues in this judgment are that legal uncertainty can arise in any of the Member States (Constitutional Court of Romania, 2021b), in the sense that, regardless of what a constitutional court decides on a national rule, that decision can be enforced by some common law courts, and not others, as well as the fact that it violates the jurisdiction of the constitutional courts, although this is established by the fundamental law.

Thus, the CJEU places itself in power over any constitutional court of the Member States, but does not stop there, but also places the courts of common law over any constitutional court of the Member States, giving a real blow to the democratic rule of law, which is she assumes she should defend him.

Or, MCV Decision (2006/928 / EC) is no longer applicable at this time in Romania because the safeguard clause mechanism has disappeared which could only be activated within 3 years post-accession so that this consideration of the CJEU Judgment of 21.12.2021 has no legal basis except at most in the context in which we would accept that there was no judgment issued by the CJEU declaring this act to be no longer applicable after 01.01.2010 because, until now, no such request was notified to the CJEU.

To the extent that it assesses national constitutional law, then the RCC may subsequently be seized with a plea of unconstitutionality which would take into account the official interpretation provided for in a judgment of the CJEU in the meantime.

To the extent that it considers national law to be unconstitutional, then that rule disappears from the national legal order from the date of publication of the CCR decision in the Official Gazette, and the CJEU cannot reactivate national law (even if not directly, but by giving guidance to the courts). common law) because it would thus become a true national legislator. Nor can the CJEU establish that that rule was in line with EU law and that, in its absence, the EU legal order (or EU law, as we have seen the differences in the situation of shared competence) would be undermined, so that under the threat of infringement, the national legislature to adopt it again. If it considers that national rules are not sufficient to protect its own financial interests, then the EU is in a position to adopt them through its institutions, in accordance with art. 352 acts of the Union to fulfill this goal. As in the case of the constitutional courts, the CJEU cannot replace the European Parliament or the national parliament for regulatory omissions.

This is the only way to report jurisdiction between the CCR and the CJEU because the CJEU is not a higher court of cassation of CCR decisions, much less national courts of common law, and if the CCR can analyze the constitutionality of

national law by referring to disp. art. 148 of the Constitution, which refer to the EU legal order, including by interpreting the Treaty of Lisbon according to the judgments of the CJEU, the CJEU does not have the power to analyze the constitutionality of national law and, moreover, to reactivate it under the rule of EU law.

The judgment in the Euro Box case, in paragraphs 244-263 subject to our analysis, does not have as its purpose or effect the removal, in general, of the binding nature of the decisions of the Romanian Constitutional Court and does not seem to encourage the national judge exclusively on his own basis. interpretations of EU law, and especially when the issue of law is new, to be able to remove from application any decision of the constitutional court (or any other binding decision). To give effect to EU law by applying the principle of its supremacy appears, in the light of the CJEU in the judgment we are analyzing, closely linked to the dialogue of the national court with the CJEU - the only court competent to ensure the uniform interpretation of Union law. Nor should it be overlooked that the removal from application of a decision of the national constitutional court could take place in the event that the referring court considers that this is the only possible way of complying with obligations under directly applicable provisions of European Union law. It should be noted that the CJEU (re) states in its Euro Box judgment its exclusive competence in the interpretation of EU law and, of course, its role in the unitary interpretation of EU law, an interpretation which would be more difficult for any national judge (Florescu, 2021).

In conclusion, once the RCC has ruled that national law is unconstitutional, both the recitals and the solution of that decision are generally binding erga omnes, both for ordinary courts, which cannot invoke their inapplicability without risking a sanction, but also for the CJEU. . And once the RCC has ruled on the constitutionality of national law, both the recitals and the solution to that decision have effect between the parties.

The binding legal force of the CCR decisions for the national courts of common law derives from art. 1 para. 5 The Romanian Constitution which stipulates that “in Romania, observance of the Constitution, its supremacy and the laws is mandatory”.

Otherwise, including the non-application of a sanction to the national judge who disregards the generally binding JRC decisions, ie by creating a real impunity in favor of national judges, the very rule of law, the basis of European democracies, which involves the responsibility of the three powers, is irreparably affected. for the observance of the legal order.

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