PRIMACY OF EU LAW – CONSTITUTIONAL PRINCIPLE AND ITS LIMITS IN ROMANIA*

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Abstract

Several recent rulings by the Court of Justice of the European Union, the Romanian Constitutional Court and the High Court of Cassation and Justice raise the issue of the supremacy/primacy of European Union law over national law, especially with regard to criminal or constitutional provisions. If the European court affirms the primacy of Union law over any national rules, including those of constitutional origin, under certain conditions, the Romanian constitutional court nuances this primacy, recognizing it only partially and only in terms of domestic law and not in respect to constitutional provisions. On the other hand, the supreme court, in two recent decisions, applied the European provisions, leaving unapplied the decisions of the Romanian Constitutional Court, generating the impression of an apparent conflict between European law and national law. In the following we will analyse the appearance or reality of this conflict, but also possible solutions.

Keywords: *primacy/supremacy of EU law, ECJ case law, Romanian Constitutional Court case law, Romanian supreme court case law*

Introduction

The principle of the primacy of European Union law over national law, including criminal law, has been analysed both in European[1] and national doctrine[2], and also in

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[1] Francesco Vigano, *Supremacy of EU Law vs. (Constitutional) National Identity,* EuCLR, vol. 7, 2/2017, pp. 103-122; Sharifullah Dorani, *The Supremacy of EU Law over National Law: The ECJ's Perspectives*, Political Reflection vol. VI, 1/2020, pp. 15-21, Sharifullah Dorani, *The Primacy of EU Law over French Law: EU Law Takes Precedence over National Law?*, Political Reflection vol. VII, 2/2021, pp. 48-56, Sharifullah Dorani, *EU LAW vs UK LAW The Primacy of EU Law over National Law: Great Britain's Response*, Political Reflection vol. VI, 3/2020, pp. 25-39, Sharifullah Dorani, *The Supremacy of EU Law over German Law: EU Law vs National Law*, Political Reflection vol. VII, 1/2021, pp. 44-55, Simon Röß, *The Conflict Between European Law and National Constitutional Law Using the Example of the European Arrest Warrant*, European Public Law, vol. 25, 1/2019, pp. 25-41, Ioannis Dimitrakopoulos*, Conflicts between EU law and National*

judicial practice[3]. With regard to the relationship with the Member States, problems have arisen in Spain, Italy, France, the United Kingdom, Poland or Germany as to the absolute, relative, or lack of primacy of European Union law over national law, in particular in respect to provisions of a constitutional nature.

In general, in the Member States of the European Union, the primacy of Union law is recognized, but some constitutional courts reserve the right to submit to their own constitutional review Union normative acts, including their interpretation given by the Court of Justice of the European Union, if they consider that the latter acted *ultra vires*, in breach of its powers, in particular with regard to respect for fundamental rights.

Several recent decisions handed down by the Court of Justice of the European Union, the Romanian Constitutional Court and the Romanian High Court of Cassation and Justice raise the thorny issue of the primacy of European Union law over Romanian national law, especially with regard to criminal or constitutional provisions. If the European court affirms the primacy of Union law over any national norms, including those of constitutional origin, under certain conditions, the Romanian constitutional court nuances this primacy, recognizing it partially and only in terms of domestic laws and not relating to constitutional provisions. On the other hand, the supreme court, in two recent decisions[4], applied the European provisions, leaving unapplied the decisions of the Romanian Constitutional Court, generating the impression of an apparent conflict between European law and national law.

The practical implications of this dispute are obvious[5], given the recent decisions of the Constitutional Court in the matter of specialized panels[6], or in the matter of

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Constitutional Law in the Field of Fundamental Rights, https://www.ejtn.eu/PageFiles/17318/DIMITRAKOPOULOS%20Conflicts%20between%20EU%20law%20and%20National%20Constitutional%20Law.pdf.

[2] Dragoş Alin Călin, *Monism, dualism sau pluralism juridic? Receptarea dreptului Uniunii Europene în ordinea juridică a statelor membre*, Revista Română de Drept European (Comunitar) nr. 3/2014, Liana Iacob, *Aplicarea jurisprudenței constituționale în materia prescripției răspunderii penale în cauze având ca obiect infracțiuni îndreptate împotriva intereselor financiare ale Uniunii Europene*, www.juridice.ro, Antuanela Stancă – *Oul sau găina – CCR sau UE*, www.juridice.ro, Silvia Uscov, *Pandora Files. CCR poate declara neconstituționalitatea tratatelor constitutive ale UE în interpretarea lor dată de CJUE*, www.juridice.ro, Horațiu Dumbravă, *Miza unui comunicat de presă al CCR. Angajează statul român într-o dispută cu instituțiile decizionale ale UE*, www.juridice.ro, Dragoș Pârgaru, *Prescripție, quo vadis? Gânduri în legătură cu prescripția răspunderii penale în urma Deciziei nr. 358/2022 a Curții Constituționale*, Forum Juridic nr. 1/2022, pp. 44-55.

[3] I will analyse in the following, in summary, both the point of view of the European Court of Justice (ECJ) and the opinion of the national Constitutional Court (CCR).

[4] HCCJ, Decision no. 41/2022, file no. 3089/1/2018, www.iccj.ro; HCCJ, Decision no. 45/2022, file no. 105/1/2019, www.iccj.ro.

[5] For those not familiarised with Romanian law, the practical implications are the possibility of barring prosecution if the decisions of the Constitutional Court are applied versus the possibility of conviction if said decisions are disapplied due to the ECJ decisions.

[6] CCR, Decision no. 658/2018, published in the Official Gazette no. 1021 from 29 November 2018 and Decision no. 417/2019, published in the Official Gazette no. 825 from 10 October 2019.

prescription[7]. Given the fact that in the recent literature the issue of conflict between the decisions adopted by the Court of Justice of the European Union and those adopted by the Constitutional Court of Romania has been raised, in view of the recent decisions of the Constitutional Court, the obvious question whether these decisions can be removed from application by national courts in the light of the application of European Union law directly and as a matter of priority, invoking in this regard recent decisions of the Court of Justice of the European Union in cases concerning Romania, is put to the table.

I will further analyse whether at this moment it is possible to apply the law of the European Union and leave without effects the decisions of the Constitutional Court of Romania.

The principle of the primacy of European Union law – the position of the European court

The principle of the primacy of European Union law over national law (including rules of a criminal nature) is not regulated in the Constitutive Treaties or secondary legislation of the European Union. The only attempt to codify this principle failed, with the European Constitution being rejected by referendum in 2005-2007[8].

Instead, the principle of the primacy of European Union law is a constant in the judicial practice of the Court of Justice of the European Union. This principle was affirmed by the court immediately after the establishment of the European Communities[9], stating that this legal construction is different from that of an international organization, that it is created by the partial waiver by Member States of their sovereignty for the creation of this original body, and that for the proper functioning of the latter, it is necessary for Community (Union) law to have uniform application and interpretation throughout the territory of the Communities (Union). This can be achieved by its direct application, when the Union normative act establishes unconditional and sufficiently clear and precise norms, in the absence of a national regulation, but also by removing from the application of the national norm, if it exists and is contrary to the European norm, and the direct application of the latter.

[7] CCR, Decision no. 297/2018, published in the Official Gazette no. 518 from 25 June 2018 and Decision no. 358/2022, published in the Official Gazette no. 565 from 9 June 2022.

[8] According to art. 10 of the draft European Constitution, the Constitution and the law adopted by the institutions of the Union in the exercise of the powers conferred upon it shall take precedence over the law of the Member States. Member States shall take all appropriate measures, general or special, to ensure fulfilment of the obligations arising out of the Constitution or resulting from acts of the institutions of the Union.

[9] ECJ, Decision from 15 July 1964, *Costa v. Enel*, C-6/64, ECLI:EU:C:1964:66.

Thus, according to settled case-law of the Court, the principle of the primacy of European Union law enshrines the precedence of European Union law over the law of the Member States. This principle therefore requires all entities in the Member States to give full effect to different Union rules, since the law of the Member States cannot affect the effect recognized on those different rules in the territory of those Member States[10].

Indeed, under the principle of the primacy of European Union law, invoking by a Member State of provisions of national law, whether of a constitutional nature or not, cannot affect the unity and effectiveness of European Union law. Thus, according to settled case-law, the effects associated with the principle of the rule of law are imposed on all the bodies of a Member State, without, in particular, internal provisions relating to the allocation of judicial powers, including constitutional ones, being able to prevent this[11].

In two recent cases[12], the Court of Justice of the European Union ruled on the relationship between Union law and Romanian national law, including constitutional law.

Thus, with regard to the direct and prior application of European Union law by omitting constitutional provisions or decisions of the Constitutional Court, the European Court has recently stated that "*the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to EU provisions*"[13].

However, this primacy comes with limitations. The European Court states that, in the event that the referring court concludes that the application of the case law of the Constitutional Court[14], in conjunction with the implementation of **national provisions on limitation** and in particular the **absolute limitation period** provided for in Article 155 (4) of the Romanian Criminal Code **entails a systemic risk of impunity** for acts constituting serious fraud prejudicing the financial interests of the Union or corruption in general, the penalties provided for by national law to combat such offenses could

[10] ECJ, Decision from 6 October 2020, *La Quadrature du Net and others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, par. 214 and the case law cited there.

[11] See in this respect ECJ, Decision from 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, par. 59, Decision from 2 March 2021, A. B. and others, C-824/18, EU:C:2021:153, par. 148 and the case law cited there.

[12] ECJ, Decision from 22 February 2022, C-430/21, *RS*, ECLI:EU:C:2022:99, par 68-78, Decision from 21 December 2021, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, C-824/18, ECLI:EU:C:2021:1034, par. 162-263.

[13] See in this respect ECJ, Decision from 21 December 2021, cited supra, footnote 12, par. 263.

[14] CCR, Decision no. 685/2018 and Decision no. 417/2019, cited supra, footnote 6.

not be regarded as effective and dissuasive, which would be incompatible with Art. 325 (1) TFEU in conjunction with Article 2 of the Treaty, the PIF Convention and Decision no. 2006/928. At the same time, however, the European Court of Justice has stated that, in so far as the criminal proceedings at issue in the main proceedings constitute an application of European Union law within the meaning of Art. 51 (1) of the Charter, the referring court must also ensure that **the fundamental rights guaranteed by the Charter** to the persons concerned in the main proceedings, in particular those guaranteed in **Art. 47** thereof, are respected. In the criminal field, the observance of these rights must be guaranteed not only during the criminal investigation phase, from the moment the person concerned is charged, but also in criminal proceedings and in the execution of sentences[15].

The principle of the primacy of the law of the European Union – the position of the Romanian constitutional court

Romanian law is one of the few, if not the only legal system in the European Union that offers a constitutional rank to the principle of the primacy of European Union law. Thus, according to Art. 148 par. (2) of the Romanian Constitution, as a result of accession, **the provisions of the constitutive treaties** of the European Union, as well as **the other binding Community regulations**, **have priority over the contrary provisions of domestic law**, in compliance with the provisions of the Act of Accession.

However, the interpretation offered by the Romanian Constitutional Court to these provisions is different from that of the European court, shown above. Thus, the Constitutional Court of Romania recognizes to a limited extent the supremacy of European Union law and does not recognize the supremacy of the European court. Appreciating the possibility of a reference for a preliminary ruling by the constitutional court, it states that "*it remains for the Constitutional Court to apply in the constitutionality review the decisions of the Court of Justice of the European Union or the formulation by itself of questions for the purpose of determining 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 hierarchies between these courts*"[16].

The Romanian Constitutional Court emphasizes the principle of conferring competences and acting within the limits of the conferred competences:

"By the acts of transfer of powers to the structures of the European Union, they do not acquire, by endowment, a 'supercompetence', their own sovereignty. In

[15] ECJ, Decision from 21 December 2021, cited supra, footnote 12, par. 203-204.
[16] CCR, Decision no. 104/2018, published in the Official Gazette no. 446 from 29 May 2018, par. 83.

reality, the Member States of the European Union have decided to jointly exercise certain competences, which traditionally belong to the field of national sovereignty. It has become clear that in the current era of globalization of humanity issues, interstate developments and interindividual communication on a global scale, the concept of national sovereignty may no longer be conceived as absolute and indivisible, without the risk of unacceptable isolation"[17].

At the same time, the Constitutional Court shows that Union law can be an **intermediary/interposed norm** in the analysis of constitutional review, if it ensures, guarantees and develops the constitutional provisions on fundamental rights, in other words, to the extent that their level of protection is at least the level of constitutional norms in the field of human rights[18]. Also, the use of a norm of European law within the constitutionality control as an interposed norm to the referenced one implies, based on Art. 148 par. (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule should be **sufficiently clear, precise and unequivocal** in itself or its meaning should have been clearly, precisely and unequivocally established by the Court of Justice of the European Union and, on the other hand, the norm must be limited 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 constitutional review[19].

In interpreting the nature of the interposed norm of European law, the Constitutional Court states that it is **superior to domestic laws** and must be applied with priority over them. At the same time, however, the Constitutional Court **distinguishes between domestic laws and constitutional norms**, affirming the primacy of the latter. In this way, **the union law is found in the middle, above the internal laws, but under the constitutional norms**, hence the character of interposed norm: "The Constitution provides in the sense that the provisions of the constitutive treaties of the European Union as well as the other obligatory community norms have primacy over the contrary provisions of the domestic laws, in compliance with the provisions of the Act of Accession. However, in connection with the notion of "domestic law", the Court made a distinction between the Constitution and other laws. Also, the same distinction is made at the level of the Fundamental Law by art. 20 para. (2) the final thesis which provides in the sense of the priority application of international regulations, unless the **Constitution or domestic laws** contain more favourable provisions, and Art. 11 par. (3) which states 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"[20].

[17] CCR, Decision no. 148/2003, published in the Official Gazette no. 317 from 12 May 2003.
[18] CCR, Decision no. 64/2015, published in the Official Gazette no. 286 from 28 April 2015, par. 30.
[19] CCR, Decision no. 104/2018, cited supra, footnote 16, par. 82.
[20] CCR, Decision no. 80/2014, published in the Official Gazette no. 246 from 7 April 2014, par. 450, Decision no. 104/2018, cited supra, footnote 16, par. 91.

The Constitutional Court is much clearer and more direct in a recent decision that clarifies, from a constitutional perspective, the relationship between Union law and Romanian national law, in response to the rulings of the European court on the supremacy of Union law, including national norms of constitutional rank:

”By interpreting the principle of the 'primacy of European Union law' in the sense that it precludes a rule of constitutional status of a Member State, as interpreted by its constitutional court, according to which a lower court is not authorized to leave unenforceable ex officio a national provision which it considers contrary to Union law, the Constitutional Court reaffirms that **the establishment of the organization, functioning and delimitation of powers between the various structures of criminal prosecution bodies falls within the exclusive competence** of the Member State... the essence of the Union is the **conferral** by member states of competences – more and more in number – for the achievement of their common objectives, of course, **without**, in the end, **prejudicing**, by this transfer of competences, **the national constitutional identity**" and that.

"On this line of thinking, Member States **retain competences that are inherent in order to preserve their constitutional identit**y, and the transfer of powers, as well as the rethinking, emphasis or setting of new guidelines within the competences already assigned, fall within the constitutional margin of appreciation of the Member States. The accession clause to the European Union contains in the alternative a clause of conformity with EU law, according to which all national bodies of the state are in principle obliged to implement and apply EU law. This is also valid for the Constitutional Court, which ensures, by virtue of Art. 148 of the Constitution, the priority of applying European law. But this priority of application must not be perceived in the sense of removing or disregarding the national constitutional identity, enshrined in Art. 11 par. (3) in conjunction with Art. 152 of the Fundamental Law, as a guarantee of a fundamental identity nucleus of the Romanian Constitution and which must not be relativized in the process of European integration. By virtue of this constitutional identity, **the Constitutional Court is empowered to ensure the supremacy of the Fundamental Law** on the territory of Romania. According to the compliance clause contained in the text of Art. 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations to which it has committed itself as a member state, but the ones shown above know of course a constitutional limit, based on the concept of "national constitutional identity"[21].

In short, the Romanian Constitutional Court shows that in principle there is an obligation to comply with Union law, by virtue of the principle of loyal cooperation, but that Union law is not superior to the Constitution (being a rule between domestic law and constitutional law), and in case of conflict regarding the national constitutional identity, the constitutional court is empowered to ensure the primacy of the Constitution.

[21] CCR, Decision no. 390/2021, published in the Official Gazette no. 612 from 22 June 2021, par. 79-81.

The European court's reply was not long in coming. It states that, under Art. 4 (2) TEU, the ECJ may be called upon to verify whether an obligation under European Union law does not infringe the national identity of a Member State. By contrast, that provision has **neither the object nor the effect of authorizing a constitutional court of a Member State to disregard the obligations arising**, inter alia, **from** Art. 4 (2) and (3) and Art. 19 (1) the second paragraph of the **TEU**, which is incumbent on it, to remove the application of a rule of European Union law on the ground that that rule infringes the national identity of the Member State concerned, as defined by the national constitutional court. If a constitutional court of a Member State considers that a provision of secondary law of the Union, as interpreted by the ECJ, infringes the obligation to respect the national identity of that Member State, that constitutional court must suspend the trial and refer the matter to the European Court, with a reference for a preliminary ruling under Art. 267 TFEU to assess the validity of that provision in the light of Art. 4 (2) TEU, the Court having sole jurisdiction to declare an act of the Union invalid[22].

1. Limitations of the principle of the primacy of Union law over national law

Beyond this dialogue of principle on the primacy of European Union law and its limits in Romanian national law, the question arises whether, in the light of recent decisions of the Constitutional Court, the premises for violation of European law and the obligation of national courts to leave unenforceable the decisions of the Constitutional Court in the application of European law, are created in Romania.

I believe that this is not possible at this time, for several reasons, even if we only look at the decisions of the European court, without referring to the arguments of the Romanian Constitutional Court.

Firstly, the European court does not provide a blank check to national courts in the analysis of the principle of the primacy of European Union law. Thus, a national court **will not be able to compare national law with European law in any situation or circumstance**, nor will it be able to decide whether to leave national law, including constitutional law, unenforced, by applying Union law as a matter of priority, without complying with certain conditions.

A fundamental condition is the declaration of the incompatibility of national law with Union law by the European court: it must be a **proven breach** of European Union law[23]. However, this cannot result from a simple analysis of the national court, but requires **a decision of the European court following a reference for this purpose**: "*the principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court*

[22] ECJ, Decision from 22 February 2022, cited supra, footnote 12, par. 69-71.
[23] See in this respect ECJ, Decision from 2 March 2021, cited supra, footnote 11, par. 150.

of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, ***in the light of a judgment of the Court****, to be contrary to that decision*"[24] or to Union law.

However, the only decision in this regard in criminal matters concerns the field of serious fraud affecting the financial interests of the European Union and corruption offenses, and **cannot be extended to other categories of offenses** (which, moreover, may or may not be considered rules for implementing certain Union criminal law provisions)[25].

This is also shown by the considerations of the Constitutional Court in the most recent decision: **ordinary courts cannot, on their own responsibility, develop the law by analogy**. Also, according to the jurisprudence of the European Court of Human Rights and of the Constitutional Court, based on Art. 7 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 23 par. (12) of the Romanian Constitutional Law, which enshrines the principle of legality of incrimination and punishment (*nullum crimen, nulla poena sine lege*), **criminal law must not be interpreted and applied extensively to the detriment of the accused, for example, by analogy**[26]**.** *A fortiori*, a decision of the European court cannot be interpreted and applied extensively to the detriment of the accused, especially by analogy.

Even in matters restrictively delimited by the European court (serious fraud affecting the financial interests of the European Union or corruption offenses), national rules can only be left unenforceable in the event of a **systemic risk of impunity**. Even then, the national rule may be applied to the detriment of the European rule **if the fundamental rights guaranteed** by the Charter to the persons concerned in the main proceedings **are jeopardized**, in particular those guaranteed in Art. 47 thereof.

In the criminal field, the observance of these rights must be guaranteed not only during the criminal investigation phase, from the moment the person concerned is charged, but also in criminal proceedings and in the execution of sentences. Moreover, this position of the European court reiterates a conditionality imposed since December 2017 following a referral of the Italian Constitutional Court on the uncertainty created by the disapplying of Italian national criminal law establishing the special prescription: European legislation on the protection of European Union financial interests should be applied as a matter of priority in accordance with national law if

[24] See in this respect ECJ, Decision from 18 May 2021, Joint Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația „Forumul Judecătorilor din România" versus Inspecția Judiciară and others***,** ECLI:EU:C:2021:393, par. 252.

[25] ECJ, Decision from 21 December 2021, cited supra, footnote 12, par. 203.

[26] CCR, Decision no. 358/2022, published in the Official Gazette no. 565 from 9 June 2022. In the same respect, F. Streteanu, D. Nițu, *Drept penal. Partea generală*, vol. I, Ed. Universul Juridic, București, 2014, pp. 42-48, M. Hotca, *Manual de drept penal. Partea generală*, Ed. Universul Juridic, București, 2017, p. 80, N. Neagu, *Drept penal, partea generală*, ediția a II-a, București, 2021, p. 60.

effective and dissuasive criminal sanctions are prevented in a considerable number of cases of serious fraud affecting the financial interests of the European Union or providing for shorter limitation periods for cases of serious fraud affecting such interests, **unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation** imposing conditions of criminal liability stricter than those in force at the time the infringement was committed[27].

However, it is obvious that the retroactive application of a stricter legislation (in the matter of prescription, OUG no. 71/2022[28]) is prohibited according to the constitutional and even European provisions (Art. 49 CDFUE)[29]. Also, the application of the provisions regarding the special prescription by analogy to the detriment of the defendant, perpetuating the illegal and unconstitutional practice from 2018 until now determines a serious violation of the principle of legality, which cannot be excused by a potential and hypothetical "systemic impunity". Likewise, the non-application of the decisions of the Constitutional Court on the independence of the judiciary (decisions on specialized panels or the random composition of panels) falls within the main objectives imposed by the European Union on Romania, for accession to the Schengen Area, as stated by the European court: *"on the other hand, the observance by a Member State of the values enshrined in Art. 2 TEU is a condition for the benefit of all the rights deriving from the application of the Treaties in respect of that Member State. Therefore, a Member State cannot amend its legislation in such a way as to cause a regression in the protection of the rule of law, a value which is embodied, inter alia, in Article 19 TEU.* ***Member States are therefore obliged to ensure that any regression in relation to this value of their legislation on the organization of justice is avoided, with a view to adopting rules which would undermine the independence of judges***"[30]. In this sense, the decisions of the Constitutional Court serve to strengthen and objectify the independence of the judiciary, contributing to the achievement of

[27] ECJ, Decision from 5 December 2017, C-42/17, *MAS and MB*, ECLI:EU:C:2017:936, par. 62.

[28] According to OUG no. 71/2022, Article 155 of Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 510 of 24 July 2009, as subsequently amended and supplemented, paragraph 1 shall be amended to read as follows:

"(1) The course of the term of prescription of the criminal liability shall be interrupted by the fulfilment of any procedural act in question which, according to the law, must be communicated to the suspect or defendant".

[29] According to art. 49 para. (1) of the Charter of Fundamental Rights of the European Union, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

[30] ECJ, Decision from 18 May 2021, cited supra, footnote 24, par. 51, Decision from 21 December 2021, cited supra, footnote 12, par. 162.

European desideratum in this matter; therefore, these decisions are not able to create a "systemic risk of impunity". On the other hand, the 5 individual cases in Romania in which the decisions of the CJEU can be applied (which have not yet been sent for retrial, being suspended pending the decision) are far from creating such a risk.

Last but not least, the level of legal culture of a rule of law system is given by the balance between the interest of the state in prosecuting the perpetrators and the observance of the fundamental rights of the accused person. One cannot proceed to a systemic conviction in violation of fundamental rights in order to justify "a systemic risk of impunity" and at the same time argue that the foundations of the rule of law are substantiated.

In other words, another principle of law must be respected: *nemo auditur propriam turpitudinem allegans*. In relation to natural and legal persons, recipients of criminal rules, the state, which is lost in a war of powers (legislative, executive and judicial, mediated by the constitutional court), created a legislative vacuum for 4 years related to prescription, which the judicial authority tried to fulfil by analogy. Regarding the specialized or randomly composed panels, it was a conflict of a constitutional nature between the state powers (legislative and judicial). The state is responsible for resolving the criminal legal relationship of conflict. The state is represented before the citizens both by the executive power and by the legislative or judicial power. These are public authorities. For the litigant, whether he is an accused person (perpetrator) or an injured person, the state authorities have failed miserably in creating a coherent and predictable system, and the same authorities, after several years of illegal and abusive application of repealed provisions, or non-application of clear legal provisions, could not plead their own fault for creating a potential "systemic risk of impunity" and could not apply the Union provision directly against a natural or legal person, provided that they have not taken the necessary measures for fair implementation of the Union provisions. Moreover, even the European Court of Justice has stated in a decision that a Member State which has not implemented the measures required by Union law within the prescribed periods cannot rely, against natural persons, on its own failure to fulfil its obligations assumed under said law[31].

A last argument in favour of not applying the ECJ decision, by leaving the CCR decisions unapplied, has already been brought in the literature: Romanian prescription legislation is already in line with European legislation, general limitation deadlines for the protection of the European Union's financial interests and corruption offences being double the minimum statute of limitations imposed by European law. However, systemic problems under Romanian law, which do not allow solving a case of fraud affecting the financial interests of the European Union within a reasonable period of 8 or 10 years from the date of the deed, cannot be imputed to the defendant, as long

[31] ECJ, Decision from 5 April 1979, C-148/78, *Ratti*, ECLI:EU:C:1979:110, par. 22.

as European law requires a minimum term of 5 years. If the case cannot be solved in this interval, the problem lies in the Romanian system that regulates the duration of the criminal trial, and if solving the case is possible in this timeframe, there is no systemic risk of impunity.

We can conclude that, after the application by analogy for four years of non-existent legal provisions, or the non-application of clear and predictable legal provisions, what can be achieved in the coming years, by the proper application of criminal law and the decision of the Constitutional Court will not generate a systemic risk of impunity, but a minimal "risk" of restoring confidence in the predictability of the law and its application with respect for fundamental rights, an essential condition of a true rule of law.

2. Conclusions

If we analyse in principle, the decisions of the CJEU and the decisions of the CCR, we do not notice any conflict. Both courts uphold the rule of law, the independence of the judiciary and respect for the fundamental rights of the suspect or defendant. The (apparent) divergence of opinion exists when applying these principles in individual cases.

A first question that arises is whether the factual situation with which the European court was notified reflects the Romanian legal reality. Is there really a systemic risk of impunity through the application of the decisions of the Constitutional Court, how was this risk established, what does it consist of? Let us not forget that the European court is bound by the factual situation described by the referring court, which is responsible for what it describes. Personally, I believe that fundamental principles of the rule of law and cooperation between the three courts that give the general direction of law enforcement in Romania (ECJ, CCR, HCCJ) should not be blown up just for the sake of satisfying someone*'s* pride.

Secondly, if the principle of loyal cooperation, invoked by both the European Court and the Romanian Constitutional Court, is indeed applied, we again see that there is an apparent conflict, not a real conflict. As long as at the level of principle both courts hold the same view, the different individual result they reach can be attributed to this lack of cooperation, consisting in an exaggeration on both sides[32].

[32] For example, the European court "forgets" to apply art. 19 TFEU which supports (according to its own interpretation) the independence of the judiciary in its analysis of the Decisions of the Constitutional Court which refer precisely to the independence of the judiciary (decisions on specialized panels and randomly appointed panels). You cannot invoke arguments relating to the fulfillment of the objectives of accession to the Schengen area (including the avoidance of regression of national legislation on the independence of judges) to request the non-application of "national standards" resulting from decisions of the constitutional court referring exactly to insuring an impartial and objective justice. On the other hand, the Constitutional Court declares the ICCJ panels as unspecialized to judge on the merits of corruption offenses in the absence of papers stating the specialized nature of the court (formal criteria), provided that

Thirdly, such a line of argument is dangerous in Romanian law regarding the application of binding decisions of unconstitutionality or interpretation. The argument of the primacy of Union law can turn like a boomerang even against the supreme court, when it pronounces decisions in appeals in the interest of the law or preliminary rulings for the resolution of legal issues, which are mandatory for lower courts. What prevents these lower courts, or even Supreme Court panels, from ruling contrary to binding decisions of the supreme court, if they find that said decisions violate binding provisions of European Union law?

Last but not least, a court which upholds the non-application of fundamental rights (the right to defence, the right to a fair trial) by invoking a systematic risk of impunity affecting the financial interests of the Union may have the problem of subsequently overturning of this decision, in a possible action before the European Court of Human Rights.

I believe that the solution to this apparent crisis lies in the very judgments of the courts: loyal cooperation, applied constructively.

the same panels can easily judge appeals in corruption cases (which are analysing the same problems as the first instance) or cassation appeals in the same matter.