A Tale of Primacy Part. II

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On 18 May 2021, the CJEU issued a judgment on several requests for preliminary rulings by Romanian national courts, regarding the impact of EU law on Romanian laws on the judiciary and the value of the Decision 2006/928 of the European Commission by reference to national law. In a previous post, we discussed the findings of the Luxembourg Court and the possible impact of the judgment on national courts and the respect of rule of law in Romania. In a hopeful tone, we were saying that this judgment could be a guide for national courts for applying the primacy of the EU law. These hopes, as feeble as they were, were shattered on 8 June 2021 with a decision by the Romanian Constitutional Court

The first application of the ECJ judgment occurred on 7 June, when the Pite#ti Court of Appeal – one of the national courts that addressed the preliminary requests to the ECJ – decided that, in accordance with the ECJ ruling, the Special Section for investigating criminal offences within the judiciary (SIIJ) is no longer competent to investigate a case brought before it and therefore declined to solve the case until a new prosecutor will be appointed to investigate it.

Only one day later, on 8 June 2021, the Romanian Constitutional Court (RCC) gave its decision on a referral of unconstitutionality of several articles from the Law on the judicial organization that pertain to the SIIJ. The Decision 390/2021 is a hallucinating succession of legal nonsense, in which the Constitutional Court literally renders the ECJ judgment devoid of any effect in respect of national courts and practically forbids the latter to apply EU law and disregard contrary provisions of the national legislation. What was the reasoning that led to such a conclusion?

The judgment

Firstly, despite the ECJ judgment suggesting the contrary, the Constitutional Court stated that the SIIJ meets the guarantees required by the said judgment and is in conformity with the constitutional provisions related to the rule of law and access to justice.

Secondly, the Constitutional Court acknowledged that the national judge is competent to disregard any provision of the domestic legislation that is contrary to EU law, by virtue of Article 148 of the Constitution. Nevertheless, the Court added that EU law has no primacy over the Constitution, “Article148 of the Constitution does not confer on Union law priority of application over the Constitution of Romania” (para. 83).

And here comes the logical, legal and constitutional nonsense that makes of this decision a surreal one: „a national court does not have the power to analyse the conformity of a disposition of internal law, *declared constitutional by virtue of Article*

148 of the Constitution [sic! My emphasis], with European law provisions"." In other words, according to the RCC, since only the Constitution is not above EU law: 1. any law that was declared constitutional by it acquires constitutional value, i.e. becomes a part of the Constitution and 2. the interpretation given at a particular moment by the RCC has the legal force of the constitutional text. Both conclusions are obviously wrong. The first one is contradicted precisely by the law on the organisation of the Constitutional Court, which, in Article 29 (3), sets forth indirectly that a law that was declared constitutional by the Court can be challenged again in the future (according to this text, only the dispositions that have been declared unconstitutional cannot be challenged again). The second one is outright nonsense.

Moreover, the Court accepts that, according to Article 148 of the Constitution, Romania cannot adopt a piece of legislation contrary to its obligations as a Member State of the EU but suggests that this prohibition would have "a constitutional limit based on the concept of national constitutional identity". The Court does not define, however, here or elsewhere, this concept that is repeated eight times in this decision.

Thirdly, the Court stated that, since the ECJ established in its judgment of 18 May, that the obligations resulted from Decision 2006/928 of the European Commission are imposed to all national authorities which are competent to collaborate at the institutional level with the European Commission (para. 177), only the political authorities have the duty to respect and apply this judgment and *not the courts* [sic! My emphasis].

Fourthly – and this is indeed the most outrageous part of the decision – the RCC held that the operative part of the ECJ judgment in which the European Court said that a national court is authorized to disregard a national law that is contrary to the realm of application of Decision 2006/928 "has no basis [sic!] in the Romanian Constitution because the Cooperation and Verification Mechanism (CVM) reports elaborated according to Decision 2006/928 (…) are not rules of European law that a national court can directly apply by disregarding a national norm. The national judge cannot be put in the situation of deciding to apply with priority some recommendations, to the detriment of a law declared constitutional by the Constitutional Court". Moreover, the RCC even declared that the ECJ ruled *ultra vires* (sic!) when empowering national judges to disapply national law contrary to EU law.

The RCC decision was adopted with a majority of 7 to 2. Two judges wrote a dissenting opinion, in which they drew attention to the fact that the ECJ judgment of 18 May 2021 could have become an additional argument for the Romanian Constitutional Court to achieve a change of approach in its case-law (especially by reference to Decision 137/2019, in which the RCC stated that the Commission's Decision 2006/928 has no legal relevance in Romania and refused any dialogue with the ECJ on the subject) regarding the application and value of the Decision 2006/928 on the CVM: "nevertheless, we consider that the change of approach should have happen even independently of the ECJ judgment, on the basis of an attentive examination of the disposition of the Romanian Constitution regarding the rule of law, the principle of legality and supremacy of the constitution, the principle of

equality before the law, as well as of those provisions which explain the obligations of Romania as a Member State of the European Union". To the majority's opinion that "only the political authorities have the duty to respect and apply this judgment and not the courts", the dissenting judges reminded that Article 148(4) of the Constitution binds all public authorities, expressly mentioned as such – Parliament, President, Government and the judicial authority – to guarantee the implementation of the obligations resulted from the act of accession and from the primacy of EU law over national law.

Consequences of the judgment

One of the expected outcomes of this RCC decision is to hinder the application by the national courts of the EU law, as indicated in the ECJ judgment, and as the Court of Appeal Pitesti has already done, in respect of the SIIJ. An instrument to achieve this goal will also be the disciplinary proceedings that can be brought against judges who will apply the ECJ judgment, on grounds of disregarding a decision of the Constitutional Court (Article 99 #) of the Law on the status of magistrates.

What will national judges do? Apply the EU law (and impliedly respect the rule of law conditionalities imposed by it) and expose themselves to disciplinary actions or quietly obey the RCC decision, as outrageous as may be? To date, there are already disciplinary proceedings opened by the Judicial Inspectorate against the judge from the Pite#ti Court of Appeal for directly applying the EU law and the ECJ judgment. Disciplinary proceedings have also been engaged against a judge from Oradea, who sent the C-291/19 application for preliminary ruling (one of the applications that led to the judgment of 18 May) and who was convicted to a disciplinary penalty of 25 percent off her salary for a three months period, which was confirmed by the HCCJ.

The European Commission and the Romanian Parliament

Ironically, on the same day as the RCC decision, the European Commission released the latest CVM report. The Commission reminds the benchmarks imposed to Romania at the moment when the CVM was established and assessed through the periodic reports: judicial independence, judicial reform, integrity and tackling high-level corruption. The Commission reminded also that the CVM will be brought to an end „when all the benchmarks applying to Romania are satisfactorily met". The June 2021 report refers to the ECJ Judgment of 18 May 2021 as an „important development which clarified the nature of the CVM and the obligations of Romania following from it. As regards the 2006 CVM decision, the Court explained that it is binding *in its entirety* on Romania as from the accession to the EU and obliges it to address the benchmarks set out in the annex to the decision, which are also binding. Those benchmarks (…) seek in particular to ensure that the Member State complies with the *values of the rule of law*". With particular regard to the SIIJ, whose creation had been strongly criticised by the Commission in the 2018 and 2019 reports, „with the recommendation that the amended laws be suspended and revised", the 2021

report starts by saying that the existence and functioning of the special section remains a serious concern, because „there were renewed instances of pressure from the SIIJ on magistrates (…), concerns that the choice of cases to be subject of criminal investigations lacks objectivity as well as examples of leaks to the media which can exert pressure on judges and prosecutors". By invoking once again the ECJ judgment of 18 May 2021, the Commission renewed its recommendation that, in line with the clear framework thereby provided by the Court of Justice, the judgment be „duly reflected in the new legislation to be adopted".

As stated before, the Parliament has now the task to cut the Gordian knot by changing the legislation in accordance with the CVM report. Currently, the draft law is pending adoption by the Senate (as a decisional chamber) and apparently, politicians wish to wait for the Venice Commission's requested opinion before making the next move.
