

A New Episode in the Romanian Saga: The Primacy of EU Law Over National Constitutional Jurisprudence

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Analysis



Guido Bellenghi

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On 21 December 2021, the Grand Chamber of the Court of Justice rendered its [judgment](#) in *Euro Box Promotion and Others* ([joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19](#)). The ruling, dealing with the application of certain decisions of the Romanian Constitutional Court (‘RCC’) and the prevention of fraud and corruption, follows the [judgment](#) of May 2021 in *AFJR* ([joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 e C-397/19](#)), concerning a number of reforms of the Romanian judicial system.

Both judgments provide a judicial interpretation of the Cooperation and Verification Mechanism (‘CVM’) introduced by [Decision 2006/928/EC](#). The Decision, based on Articles 37 and 38 of the [Act of Accession of the Republic of Bulgaria and Romania](#), establishes a post-accession conditionality mechanism according to which Romania has undertaken to pursue certain ‘benchmarks’ relating to the respect of the rule of

law. The benchmarks refer to, *inter alia*, judicial independence and the fight against corruption.

In *Euro Box Promotion and Others*, the Court answered the questions referred to it by the Romanian High Court of Cassation and Justice (‘HCCJ’) and addressed several decisions of the RCC. These are namely (i) [Decision 685/2018](#), which had found five-judge criminal panels unlawfully composed where only four of the judges had been randomly selected, thereby undermining their independence and impartiality; (ii) [Decisions 51/2016](#) and [26/2019](#), which had declared the unconstitutionality of the participation of intelligence services in criminal investigations, causing the retroactive exclusion of evidence from criminal cases; (iii) [Decision 417/2019](#), which had declared void the judgments issued by the HCCJ in the formal absence of specialised anticorruption panels, even where the judges had been recognised as having the required specialisation; and (iv) [Decision](#)

[104/2018](#), which had rejected the primacy of EU law over the Romanian Constitution and denied that Decision 2006/928/EC could constitute a reference standard for constitutionality review.

The Court of Justice confirmed its own competence to intervene on Romanian judicial settings by reference to the construction used since *ASJP* ([C-64/16](#)). In brief, the referring court, as a body entitled to rule on questions concerning the application or interpretation of EU law, in accordance with the rule of law enshrined in Article 2 TEU, shall ensure effective judicial protection within the meaning of Article 19(1) TEU. To do so, judicial independence is essential, as confirmed by Article 47 of the [Charter](#) (paragraph 144).

Like in *AFJR*, the Court of Justice stressed the binding nature of Decision 2006/928/EC. Interestingly, although only decisions, and not soft law, are binding under Article 288 TFEU, the Court seems to attach a quasi-binding value to the Commission's reports and recommendations issued within the CVM framework, as it stated that Romania shall take them into due account when fulfilling its obligations (paragraphs 170-174).

According to the Court, the combined effect of the rules on limitation periods and the said decisions of the RCC, which force the HCCJ to reopen a series of adjudicated cases concerning high-level corruption, might cause a systemic risk of impunity (paragraph 198). Such a risk is incompatible with the CVM and the need to protect the financial interest of the Union (Article 325(1) TFEU) through effective and deterrent measures. It is not the first time that the Court

adopts an effect-based approach when assessing systemic risks for a judicial system. In fact, in *Commission v Poland* ([C-619/18](#)) the Court took into consideration the combined effect on judicial independency of a rule concerning judges' retirement age and special derogating powers conferred upon the President of the Republic.

The approach followed in the *Euro Box Promotion and Others* judgment differs from the method chosen by AG Bobek (on which see [B. Iancu](#)), who had analysed the cases in separate Opinions and reached partially different conclusions. More specifically, the AG had concluded in his Opinions in [C-375/19](#) and [C-379/19](#) that the RCC decisions concerning the lawful composition of criminal panels and the participation of the intelligence services in criminal investigations were *per se* compatible with EU law, as long as the RCC complied with the requirements of judicial independence. In fact, a closer look suggests that those decisions are in principle consistent with the pursuit of the goals set in the CVM. On the contrary, the RCC decision concerning the annulment of judgments due to the formal absence of specialised panels had been found problematic by the AG in his Opinion in [C-811/19](#).

In its judgment on these cases, the Court confirmed the structural independence of the RCC (paragraphs 235-236) and, in principle, the compatibility with EU law of the binding nature of its decisions (paragraph 242). However, the Court insisted on a precise limit: Ordinary judges shall disapply constitutional jurisprudence where its application would be contrary to EU law. In

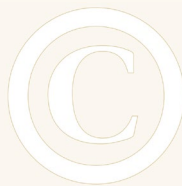
doing so, they shall not incur in any disciplinary responsibility, as they are abiding by the primacy of EU law, whose extent can be defined exclusively by the Court of Justice (paragraph 254).

Following the judgment of the Court of Justice in *Euro Box Promotion and Others*, the RCC issued a [press release](#) (see [B. Selejan-Gutan](#)) claiming the incompatibility between such an interpretation of EU law supremacy and the wording of [Article 147\(4\)](#) of the Romanian Constitution. To avoid drawing a hasty parallel with the recent [K 3/21 judgment](#) of the Polish Constitutional Court, some circumstances are worth noticing. First, a press release is an administrative and not a judicial instrument. Second, not only did the Romanian Ministry of Justice avoid backing the position of the RCC, but he also [confirmed](#) Romania's full commitment to the primacy of EU law and the rule of law.

Even though the case of Romania seems to show rather different characteristics when compared to the rule of law backsliding in Poland (and Hungary), the current positions of the Court of Justice and the RCC might appear nevertheless irreconcilable. Therefore, dialogue between courts (on the importance of which see [D. Gallo](#)), such as in the *Taricco saga* ([C-105/14](#) and [C-42/17](#), on which see [D. Gallo](#) and [G. Piccirilli](#)), is desirable in order to avoid the escalation of a potential constitutional conflict. Notably, the RCC had invoked dialogue between courts in its Decision 104/2018 (paragraph 83). To that end, the next occasion will be provided by the pending *RS* case ([C-430/21](#)): AG Collins

delivered his [Opinion](#) on 20 January 2022 and the judgment of the Court of Justice is expected soon.

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