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Rule of Law in Romania and the Primacy of EU Law according to the CJEU Judgment of 21. Dec. 2021

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Preface

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A. Introduction

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".[1] This excerpt from Article 2 of the Treaty on European Union (hereinafter TEU) is of fundamental importance, as it enshrines the main values defended by the European Union (hereinafter EU). This rule of law has a fundamental value, as it imposes on all – rulers and ruled alike – the respect of the law, relying on several basic sub-principles such as democracy, separation of powers, governmental transparency and legal certainty. One of these principles is of fundamental independence with regard to the study of the judgment concerned: it is the guarantee of the existence of an impartial and independent judiciary. As a mandatory prerequisite for any state wishing to join the European Union,[2] non-compliance by Member States poses serious problems for the integrity of EU law, but also for its credibility at all levels (citizens, member states, third states, international organisations).

Alongside this main principle, the European Union also relies on a series of principles specific to its legal order – unique in the world. The most important amongst these is primacy. Although this principle was not expressly provided for in the founding treaties, it was identified very early on in the case law[3] of the Court of Justice of the European Union[4] (hereinafter CJEU). This principle plays a fundamental role, since it ensures the superiority of European Union law over the domestic law of the Member States and, thus, its overall effectiveness.

However, in recent years the fundamental values of the Union have increasingly been called into question; more and more Member States are questioning these values, which is as a sign of mistrust towards the EU as it is today. These Member States have invoked their national law to justify the inapplicability of certain provisions of union law by claiming that they are incompatible with existing national law.

In fact, there is a clear rejection of the (quasi-)absolute application of the principle of primacy as defined by the case law of the CJEU. The recent jurisprudence of the German, Polish, and Romanian Constitutional Courts are all examples of this rejection. This paper focuses on the Romanian judgement.

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[1] Article 2 TEU.
[2] Article 49 al. 1 TEU.
[3] CJEC, judgment of 15 July 1964, case C-6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66, Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy.
[4] Named Court of Justice of the European Communities (CJEC) until 1 December 2009, when the Lisbon Treaty enters into force.

The judgment in question is a reference for a preliminary ruling[5] by the CJEU made on 21 December 2021, concerning several cases[6] involving Romanian general courts and dealing with high-level corruption within the Romanian state. The alleged infringement by the Romanian Constitutional Court of two principles as important in EU law as the rule of law through the independence of the judiciary, on the one hand, and the principle of primacy, on the other hand, are at the heart of the judgment rendered by the Court. It reaffirms here in a very clear manner the importance of these principles that structure EU law, but not without a number of more than regrettable shortcomings that could undoubtedly lead to a multiplication of similar cases among the Member States.

It is therefore appropriate to question the content and scope of this decision, but to also place it in its legal context at the European level, looking in particular at the previous decisions (German and Polish judgements) between Member States who have breached the application of EU fundamental principles and their legal as well as political consequences within the EU.

It is then possible to wonder how the fundamental principles of the rule of law and primacy have been reaffirmed by the CJEU.

The first focus will be on the rule of law and the principle of primacy as fundamental but criticized principles of EU law. The firm but incomplete reaffirmation of these principles by the CJEU in its judgment of 21 December 2021, in a second step, will finally highlight the need to strengthen the respect of these principles within the EU in order to ensure the stability of the legal order and the respect of its fundamental values. This will be discussed in the context of a growing contestation against the EU's policies and decisions, but also of a crisis of the Rule of Law, characterized by a questioning of some democratic principles occurring in certain Member States.

[5]Article 267 TFEU.
[6]Joint cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.

B. The rule of law and primacy as fundamental but criticized principles

I. Principles conditioning the relevance and very existence of EU law

In assessing this decision, it is first important to question the profound nature of the EU. Its structure is indeed a supranational organisation, unique in the world, whose legal order is autonomous from that of its Member States, but which has integrated itself into the national legal system of each member state. This has led to the formation of important legal principles that are unique to it, such as primacy and mutual trust.

1. The rule of law as a condition for the respect of fundamental rights

The concept of the rule of law is fundamental in law, and more specifically in the EU. This notion is defined as the absence of arbitrariness within governing institutions.[7] Respect for the law by all is essentially ensured by a hierarchy between the different norms[8], with the lower norms having to respect the higher norms – the latter usually being (in modern political systems) the Constitution (This will play a fundamental role in further developments).

The rule of law is based on four pillars: the accountability of governmental authorities as well as private actor, a just law that should be clear, publicized, stable and uniformly applied ensuring fundamental rights and freedoms, an open government using fair, accessible, and efficient law-making proceedings and, finally, the guaranteed access to an impartial justice delivered by competent and independent magistrates9 – which is the most important aspect of this topic. This principle states that every citizen must have at his or her disposal a judicial system that is impartial and independent of his or her own hierarchy, on the one hand, and of other political powers (legislative, executive) on the other. It is a guarantee of the fundamental rights to a fair trial, but also to the legality of sentences.

[7] *Choi*, Rule of law: political philosophy, https://www.britannica.com/topic/rule-of-law, (last accessed on 21/05/2022).
[8] *Kelsen*, Pure theory of law, Chapter IV: The static aspect of law.
[9] *World Justice Project*, What is the Rule of Law?, 2008-2019, https://worldjusticeproject.org/about-us/overview/what-rule-law (last accessed on 21/05/2022).

Respect for the principle of the rule of law and its components has become a globally accepted norm in the formation of states that meet modern democratic standards. However, their literal observance alone is not sufficient to ensure respect for democratic principles, as an authoritarian form of government may well use legal means (at least in its own legal system) to adopt undemocratic legislation. Respect for fundamental rights is therefore an additional prerequisite, which has resulted in the almost universal signature of certain international texts or in the emergence of regional human rights protection systems.

Historically limited by doctrine to States, respect for the rule of law has gradually been imposed within international organisations that have proliferated since the Second World War. The EU, because of its legal specificities, constitutes a *sui generis* organisation. Indeed, scholars claim that *"It cannot be ruled out that, in thirty-* or forty-years' *time, Europe will form an* UPO – a sort of Unidentified Political Object – *but a whole which*, *once again*, *will be capable of providing each of our countries with the dimensional effect which will enable it to prosper internally and hold its ground externally*."[10] Therefore, the question arises in the EU about the application of principles that are generally considered to be state order.

The principle of the rule of law and its many components has had to be transposed within the European institutions, at the same time as its functioning has become more democratic (extension of the prerogatives of the parliament through the introduction of Direct Universal Suffrage11 in 1979 and the Ordinary Legislative Procedure[12], introduction of the European Citizens' Initiative). The rule of law thus figures prominently in the European treaties, since it is listed in Article 2 of the TEU as one of the fundamental values which the Union itself undertakes to respect, but also to ensure that its Member States respect them.

As regards the criteria for EU membership, there are three conditions[13]: to have the status of a state; being European; and respecting the values of Article 2 TEU. Respect for the fundamental values of democracy, transparency, judicial independence or respect for human rights is indeed one of the most important elements in a State's accession. Difficulties in meeting these criteria (which impose very high standards) can result in sometimes

[10]Quote in French: "on ne peut pas écarter que, dans trente ans, quarante ans l'Europe formera un OPNI – une sorte d'objet politique non identifié – mais un ensemble qui, encore une fois, soit capable d'apporter à chacun de nos pays l'effet de dimension qui lui permet de prospérer à l'intérieur et de tenir son rang à l'extérieur" Jacques Delors, intervention during the first Intergovernmental Conference (IGC) in Luxembourg, 9 September 1985, Bulletin of the European Communities n°9, September 1985.

[11]Article 14 al. 3 TUE.

[12]Articles 289 and 294 TFEU.

[13]Article 49 al.1 TEU.

interminable delays. While the rejection of some states[14] on these grounds seems perfectly legitimate under EU law, the challenge to these fundamental values by the behavior of Member States is a major problem, both politically and legally.

This is essentially what has emerged from the aforementioned judgements of German, Polish and, in particular, Romanian constitutional courts.

2. The primacy of EU law, guarantee of its effectiveness

It would be wrong to think that the functioning of the EU is based solely on the principles listed in Article 2 TEU. Indeed, its unique legal specificity has led to the autonomous development of a set of legal principles which, while specific to it are no less fundamental. The most important of these is the principle of primacy, which is not formally enshrined in the treaties.

The principle of primacy was first applied in the European institutions in a rather concrete way in the judgment "Humblet v. Belgian State" of 1960. In this judgement, which was part of a litigation procedure, the principle of the primacy of Community law (in this case in the context of the European Coal and Steel Community Treaty) over the domestic law of the Member States is clearly stated as follows[15]: *"In fact if the court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to community law, that Member state is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and from the Protocol which have the force of law in the Member States following their ratification and which take precedence over national law".*[16] The relative neglect of this case law is explained by the fact that it merely reaffirms the primacy of international law over domestic law, as it generally exists at the international level, even if this is not expressly provided for in the European treaties.[17] The "Costa v. E.N.E.L." judgment (1964), in addition to reaffirming the provisions of the "Humblet v. Belgian State"

[14] *Phinnemore/İçener*, Never mind Brexit scaremongering – Turkey is a long way from joining the EU, https://blogs.lse.ac.uk/europpblog/2016/05/14/never-mind-brexit-scaremongering-turkey-is-a-long-way-from-joining-the-eu/ (last accessed on 21/05/2022).
[15] *De Witte*, in Maihofer (Ed.), p.257, 258.
[16] CJEC, judgment of 16 December 1960, Case C-6/60, *Jean-E. Humblet v Belgian State*. ECLI:EU:C:1960:48, para. 569.
[17] *De Witte*, in Maihofer (Ed.), p. 257, 258.

judgment, adds that European law cannot be opposed to any provision of national law, which is a significant step forward in relation to recognised international case law.[18]

In “Costa v. E.N.E.L.”, an Italian national challenged the nationalisation measures for part of the Italian energy sector on the grounds that they violated several provisions of the 1957 Treaty of Rome. A request for a preliminary ruling was therefore made by the Italian judiciary to the CJEU, which subsequently established the absolute primacy of European law over the law of the Member States. In its judgment, the Court established the special nature of EU law, considering that, unlike other international law treaties, it had created its own legal system which was intended to be integrated into national legal systems.[19] The EU has a number of specific features, such as fixed institutions, its own legal capacity and personality, distinct from that of its Member States. This is the result of a delegation of competences by the Member States themselves, which means that they have limited their own prerogatives in the areas that have been transferred to the EU.[20] Since the Member States have accepted this situation of delegation of competence, they cannot allow an act adopted under the treaties to override the application of the Treaties. This confirms the absolute primacy of community law over national legal orders, since reservations are not possible.[21] The possibility for a Member State to oppose a national law measure to EU law would lead to the latter losing its community character and would call into question the legal foundations of the European Communities.[22] Invoking the specificity and originality of EU law allows the Court to define primacy from a European perspective and to distinguish it from primacy in international law. From the European perspective, primacy has direct applicability in the legal order of the Member States, i.e., a primacy of internal application, which is additional to the international primacy in which EU law is embedded.[23] In the In the aforementioned Costa v. Enel case, the Italian judge was forced to apply European law by disregarding a posterior national provision, although it should have take precedence according to the principle of lex posterior (which the Italian legal system follows).[24]

Despite this quasi-absolute aspect of the principle of primacy, it should be noted that there are provisions in the treaties which may appear as exceptions to the application of this principle.

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[18]Ibid.
[19]CJEC, judgment of 15 July 1964, case C-6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66, P. 1158.
[20]CJEC, judgment of 15 July 1964, case C-6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66, P. 1159.
[21]CJEC, judgment of 15 July 1964, case C-6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66, P. 1160.
[22]Ibid.
[23]De Witte, in Maihofer (Ed.), p.257, 282.
[24]De Witte, in Maihofer (Ed.), p.257, 265.

Article 53 of the Charter of Fundamental Rights, for example, states that the standards laid down in this Charter do not prevent Member States from defining higher standards of protection of fundamental rights. To fill the apparent legal gap in the application of primacy, the CJEU established the Melloni doctrine, which states that Article 53 of the Charter cannot be interpreted as an obstacle to the uniform application of EU law.[25] In other words, Member States are free to define higher standards of protection, but these cannot be invoked in the case of the application of a norm of Union law that would be contrary to it. This strong restriction on the application of Article 53 of the Charter thus allows the CJEU to ensure the application of primacy in the area of fundamental rights protection.

With regard to the application of Article 4 para. 2 TEU, which introduced the "identity clause", the situation is more complex. It provides that *"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government"*. This article, introduced by the Lisbon Treaty, is difficult to interpret, as the notions of "national identity" and "constitutional structure" are very vague and not clearly defined: the principle of proportionality takes on its full meaning here, and it is questionable to what extent the constitutional traditions of the Member States could be invoked against a provision of EU law. However, in its judgment in Taricco II, the CJEU implicitly stated that the interpretation of this article, in particular when assessing the violation of national or constitutional identities by a provision of EU law, falls within the exclusive competence of the Court.[26] On the other hand, the Melloni doctrine was reaffirmed, even if this position is subject to doctrinal controversy.[27] It is therefore understandable that the CJEU should give this article a very restrictive interpretation, since an overly broad assessment of this clause would lead to Member States increasingly invoking their Constitutions to oppose the application of EU law and would ultimately challenge and call into question the principle of primacy. This would strengthen the Melloni doctrine.

It appears then that primacy applies to all domestic law, including constitutional law. This detail is an important element in the analysis of the following cases, insofar as the challenge to primacy is made in each of these cases against a domestic measure of a constitutional nature.

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[25] ECJ [GC], judgment of 26 February 2013, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107, para. 56 – 60.

[26] *Di Francesco Maesa*, Effectiveness and Primacy of EU Law v. Higher National Protection of Fundamental Rights and National Identity: A Look through the Lens of the Taricco II Judgment, https://eucrim.eu/articles/effectiveness-and-primacy-eu-law-v-higher-national-protection-fundamental-rights/, (last accessed on 21/05/2022).

[27] Ibid.

Thus, it is this constitutional issue that has been highlighted in the German, Polish and Romanian judgements.

II. The recent challenge to primacy in several Member States

In recent years, there seems to be a noticeable movement within the EU, which has lead to the questioning of the main principles of EU law. This includes the rejection of the application of primacy by several Constitutional Courts, in particular with regard to constitutional provisions, but also a crisis in the rule of law, which manifests itself in greater or lesser violations of the fundamental principles of democracy at European Level.

The following two cases, involving the German and Polish constitutional courts, are the two best examples of this. These judgments raise a number of important questions and set a legal precedent that partly explains the circumstances and context of the CJEU judgment of 21 December 2021.

1. German case (judgment of the Federal Constitutional Court released on 5 May 2020)

On 5 May 2020, the German Federal Constitutional Court (Bundesverfassungsgericht) issued a ruling[28] that was a bombshell in European jurisprudence. For the first time, the Karlsruhe court recognised that an EU measure is outside its powers as conferred by the Member States and refused to apply a provision of EU law, thereby calling into question the principle of primacy. However, this judgment is not illogical in the light of the consistent case law of the German Constitutional Court regarding its reservations on absolute primacy as understood and defined by the case law.

As part of its efforts to combat inflation, the European Central Bank (hereinafter ECB) set up a programme called the Public Sector Asset Purchase Programme (PSPP),[29] aimed at buying public sector securities. After a reference for a preliminary ruling from the CJEU, the Court

[28]Federal Constitutional Court (BVerfG), judgment of 5 May 2020, Case C-859/15

[29]Decision (ECB) No 2015/774 of 4 March 2015 on a secondary market public sector asset purchase program, OJ L 121/20, 14/05/2015.

recalled in its Weiss judgment of 11 December 2018[30] that these repurchases were indeed within the ECB's field of competence.

However, the Federal Constitutional Court has always been sceptical about the absolute primacy of European law. To ensure the respect of constitutional fundamental rights,[31] it has developed the ultra vires control, i.e., to ensure that EU's measures fall within its sphere of competence and do not encroach on that of the German State. While the determination of the competences of the EU and the Member States is absolutely necessary, there is a conflict as to which entity is entitled to make this distinction. While the EU treaties (and in particular Article 267 TFEU) suggest that the CJEU ultimately has the sole power to make this distinction, the mechanism of ultra vires reviews suggests that the Federal Constitutional Court is perfectly entitled to do so,[32] which is contrary to the principle of primacy.

Until the present case, no provision of EU law had been qualified as ultra vires. This judgment is therefore a first, but it is perfectly in line with the reasoning that the Karlsruhe Court has been developing for several decades.

In its judgment of 5 May 2020, the Court for the first time qualified the PSPP as "ultra vires", and refused its application in Germany: *"The interpretation of the ECB's monetary policy mandate, as undertaken by the CJEU, encroaches upon the competences of the Member States for economic and fiscal policy matters. […] The CJEU thus acted ultra vires, which is why, in that respect, its Judgment has no binding force in Germany",*[33] requiring the CJEU to justify its action under the EU treaties by reinterpreting its application of the principle of proportionality.[34]

According to the Constitutional Court's argument, the establishment of ultra vires control is justified by the fact that the German people have democratically adhered to the European treaties, and that action by the Union outside the treaties would be de facto undemocratic. This case is unique in that the Karlsruhe Court defends the rule of law and its components against an interpretation of the European treaties by the ECB that it considers extensive and unjustified. Although the reasons given are understandable, it is certain that such action by the Constitutional Court is significant, in that it not only calls into question the principle of primacy, but also undermines the authority of the CJEU as the supreme judge of EU law. From a political

[30] ECJ, judgment of 11 December 2018, case C-493/17, *Heinrich Weiss and others.*, ECLI:EU:C:2018:1000

[31] The first 19 articles of the Fundamental Law (first section) contain an impressive list of the fundamental rights it guarantees (civil, political and social rights).

[32] *Petersen/Chatziathanasiou*, Primacy's twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law, 2021, p. 23.

[33] Federal Constitutional Court (BVerfG), judgment of 5 May 2020, Case C-859/15, p.163.

[34] Article 5 al. 1 TEU.

perspective, the questioning of the foundations of the European legal order by Germany, a heavyweight of the EU and a founding state, contributes to this weakening of the institutions and the authority of EU law.

If the creation of a control of the respect of fundamental rights[35] is morally justifiable, the application of the ultra vires control is in itself an infringement of the principle of primacy, since the Court reserves the right to declare inapplicable a provision of EU law that is outside its competence. The Constitutional Court argues that by restricting itself to a limited proportionality review, the CJEU did not do enough to ensure that the PSPP is compatible with the provisions of the treaties, in particular Article 123 TFEU (which prohibits the ECB or national banks from buying up debts from public institutions of the Member States) and Article 127 TFEU (concerning the qualification of the PSPP as a monetary policy of the Union, which would make it an exclusive competence of the Union within the meaning of Article 3 TEU).[36]

In response, the European Commission launched an infringement procedure against Germany[37] for failure to comply with EU law, as the PSPP programme was, according to the wording of the judgment of the Federal Constitutional Court, inoperative in Germany. While the initiation of this procedure can be seen as a show of firmness on the part of the CJEU, it is also an admission of failure, as it shows an inability to negotiate and major flaws in the judge-to-judge dialogue provided for in the Treaties to regulate the relationship between the CJEU and national courts.

2. Polish case (judgments of the Polish Constitutional Tribunal released on 14 July and 7 October 2021)

Polish cases, while having many similarities with the judgment of the German Federal Constitutional Court, is set in a very different context. Unlike Germany, Poland has been experiencing a major crisis in the rule of law[38] and respect for the principles and values of the

[35]The “Solange” reservation, developed in the 1970’s, instituting a constitutional review of EU law acts due to the lack of protection of fundamental rights at that time. After the adoption of a sufficient level of fundamental rights protection (Charter of Fundamental Rights), the Federal Constitutional Court refrains to review EU legal norms, but does not refrain from intervening if the standards of protection become inadequate in the future.

[36]*Petersen/Chatziathanasiou*, Primacy’s twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law, 2021, p. 13.

[37]Articles 258 to 260 TFEU.

[38] *Kotkamp*, On judicial independence, Poland slips furthest in global ranking, https://www.politico.eu/article/judicial-independence-poland-global-ranking/ (last accessed on 21/05/2022).

EU for many years. There is no denying the authoritarian drift of the current Polish government, which is reflected in a major distrust of its European partners. For example, Poland's highly critical behaviour during the 2015 migration crisis with regard to the reception and distribution of asylum seekers,[39] or the creation of “anti-LGBT zones” in certain regions or cities of the country[40] all of which are absolutely contrary to all principles of the rule of law and fundamental rights.

Since 2015, a vast reform of the Polish justice system has been undertaken by the government, and includes controversial measures (discretionary power of the President of the Republic of Poland regarding the appointment of Supreme Court judges, the possibility of introducing extraordinary appeals that can call into question final judgments that are several years old, etc.).[41] Thus, Poland has distinguished itself by a constant refusal to apply certain provisions of EU law, which calls into question its primacy.

The judgments concerned were both delivered by the Polish Constitutional Court on 14 July 2021 and 7 October 2021 respectively. The first judgment, delivered by a restricted panel of 5 judges, refuses the application in Poland of the interim measures[42] provided for in Article 279 TFEU. The Court considered them unconstitutional under the 1997 Polish Constitution. The second judgment is even more explosive: The Court recognises that the provisions of Article 19 para. 1 TEU, i.e., the union law guarantee that legal remedies are available to citizens to ensure respect for their rights under EU law,[43] is unconstitutional.

Although the situation is in some respects reminiscent of the German judgement discussed above, a comparison cannot be made for several reasons. The main reason is that the Polish Constitutional Court, unlike the Federal Constitutional Court, is not independent at all.[44] Indeed, the judicial reforms implemented since 2015 have methodically undone all guarantees of independence, to the point of contradicting the definition of a court legally established by law,[45] as defined in Article 47 of the EU Charter of Fundamental Rights.

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[39] *Cienski*, Why Poland doesn’t want refugees, https://www.politico.eu/article/politics-nationalism-and-religion-explain-why-poland-doesnt-want-refugees/ (last accessed on 21/05/2022)

[40] *Ash*, Inside Poland’s LGBT-free zones, https://www.bbc.com/news/stories-54191344 (last accessed on 21/05/2022).

[41] *Wefing*, Judicial reform Poland. Last stand for the rule of law?, https://www.zeit.de/politik/ausland/2021-08/judicial-reform-poland-abolition-separation-of-powers-rule-of-law-europe-eugh-english?tm_referrer=https%3A%2F%2Fwww.google.com%2F, (last accessed on 21/05/2022).

[42] “The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures” (art. 279 TFEU).

[43] Ibid.

[44] *Bárd/Bodnar*, in CEPS (Ed.), The end of an era: the Polish Constitutional Court’s judgment on the primacy of EU law and its effects on mutual trust, 2021, p. 3.

[45] Ibid.

The national legal opposition was rather weak. The defence counsel's objections were systematically rejected and only one judge of the Court issued a dissenting opinion. Despite opposition from several Polish lawyers,[46] the government relies on its popular legitimacy to implement the reforms.[47] Several judges who have refused to apply this judgment to ensure the primacy of EU law are already subject to administrative proceedings by the Polish judiciary.[48] Although the questioning of primacy is obvious here, these rulings, unlike the German judgement, call into question the rule of law and in particular, the independence of the judiciary. These judgments demonstrate a slow deterioration of respect for European principles in Poland. However, it is reasonable to wonder the impact these judgments will have on other European States (most notably Hungary) whose respect for the rule of law is regularly debated.[49]

These judgments also deal a very significant blow to the Area of Freedom, Security and Justice (hereinafter AFSJ), as the lack of guarantees of access to effective remedies and impartial justice in Poland risks undermining mutual trust[50] between Member States, and threatens, inter alia, the application and execution of European Arrest Warrants[51] involving Poland's judicial authority.

There is no political will on the part of the government to reverse such decisions; their binding nature is therefore imposed on all judges in the Polish judicial system.[52] Although these judgments do not in themselves express Poland's desire to leave the EU, they indirectly call into question Poland's participation in the European project.

In response, an infringement procedure was initiated against Poland on 22 December 2021 for breach of treaty obligations.[53] Part of the EU funds allocated to Poland were also frozen, in

[46] Committee of Legal Sciences of the Polish Academy of Sciences resolution on the Constitutional Tribunal's ruling of 7 October, https://ruleoflaw.pl/committee-of-legal-sciences-of-the-polish-academy-of-sciences-resolution-on-the-constitutional-tribunals-ruling-of-7-october/ (last accessed on 21/05/2022).

[47] *Szczerbiak*, Why is Poland's Law and Justice Party still so popular? https://blogs.lse.ac.uk/europpblog/2019/10/01/why-is-polands-law-and-justice-party-still-so-popular/ (last accessed on 21/05/2022).

[48] *Bárd/Bodnar*, in CEPS (Ed.), The end of an era: the Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust, 2021, p. 3.

[49] *Halmai*, Illiberal democracy and beyond in Hungary, https://verfassungsblog.de/illiberal-democracy-beyond-hungary-2/ (last accessed on 21/05/2022).

[50] *Bárd/Bodnar*, in CEPS (Ed.), The end of an era: the Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust, 2021, p. 4.

[51] Framework decision (Council), No 2002/584/JAI of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 18/07/2002.

[52] *Bárd/Bodnar*, in CEPS (Ed.), The end of an era: the Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust, 2021, p. 3.

[53] *European Commission*, Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070 (last accessed on 21/05/2022).

line with the principle of conditionality.[54] An appeal by Poland was rejected by the CJEU on 16 February 2022. Further developments are undoubtedly expected. The CJEU has much to lose by appearing weak on the issue of the rule of law and primacy, and the inflexibility of the Polish government does not bode well for relations with the EU institutions.

Beyond a clear rejection of the fundamental principles of the Union, these two judgments are the real signs of an unparalleled deterioration of the rule of law in Poland. In this respect, the situation differs from the German case, as the German Constitutional Court is particularly attached to the protection of fundamental rights, and it is in part these considerations that led it to adopt such a decision. However, these two cases originating from two Member States, although different in context, pose an unprecedented challenge to the "acquis communautaire"[55] and its fundamental principles, which include first and foremost primacy and respect for the rule of law.

C. The Romanian's case through the judgment of 21 December 2021

I. The jurisprudence of the Romanian Constitutional Court at the origin of the dispute

The judgment in question is a Grand Chamber judgment of the CJEU in response to a reference for a preliminary ruling from several Romanian courts. The cases in question are C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19. This judgment, like the German and Polish judgements discussed above, concerns the application and questioning by certain organs of the Romanian State of fundamental principles of Union law, which include, first and foremost, the principle of primacy and respect for the rule of law within the meaning of Article 2 TEU.

[54]Regulation (EU, Euratom), No 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union Budget, OJ LI 433/1, 22/12/2020, Art. 5.

[55]French wording used to designate the whole of EU law, as well as the rights and obligations arising from it vis-à-vis the Member States.

This case has its origins in the wide-ranging reform of the judiciary undertaken by the Romanian government in the context of Romania's accession to the EU.[56] Indeed, because of the major problems of high-level corruption within the Romanian political system, its accession to the EU was conditional on the establishment of a monitoring mechanism which, on the basis of regular reports, ensures that the necessary reforms are made to put in place an effective fight against corruption.[57] Since the preservation of the Union's financial interests is paramount, Member States must undertake to combat fraud and any illegal activity detrimental to the Union,[58] as provided for in particular in Articles 1 and 2 PFI Convention.[59]

The cases joined in this judgment are part of this fight against corruption. A number of important Romanian State figures (deputies, former ministers) are being prosecuted for acts related to VAT fraud, corruption or fraudulent award of European contracts before the High Court of Justice and Cassation, the highest court in the Romanian judicial system,[60] which has jurisdiction in matters of corruption, but also before several courts of appeal of the country.

However, in a series of judgments issued during the ongoing corruption proceedings, the Constitutional Court or Romania[61] questioned the continuation of several of these actions, ~~notably~~ in particular because of the existence of several procedural flaws. These are three in number: first, the failure to comply with Article 32 of Law no. 304/2004[62], which stipulates that the trial panels must be composed of five judges chosen by lot. However, it appears that, in practice, only four judges were chosen by lot. Second, the Constitutional Court highlighted the lack of specific qualifications of some of the judges appointed, whereas Article 29(1) of Law No 78/2000[63] requires judges dealing with corruption-related cases to be specialised in this field. Third, one of the cases shows that evidence of the corrupt practices of the individuals concerned was collected through the intervention of the Romanian intelligence service (Serviciul Român de Informații, SRI), which the Constitutional Court declared unconstitutional.

[56]Signature of the Accession Treaty of Romania and Bulgaria on 25 April 2005, accession effective on 1 January 2007.
[57]Decision (EC), No 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ L 354/56, 14/12/2006, Art. 1 + annexes.
[58]Art. 325 al. 1 TFEU.
[59]Convention on the protection of the European Communities' financial interests of 26 July 1995, OJ C 316/49, 27/11.1995, Art. 1 and 2.
[60]"Înalta Curte de Casație și Justiție", supreme court in the Romanian legal order (Art. 126 al. 1 of the Constitution of Romania)
[61]"Curtea Constituțională a României", Art. 142 to 147 of the Constitution of Romania.
[62]Law No 304/2004 of 28 June 2004 on the organisation of the judicial system, Official Monitor of Romania, 13/09/2005, Art. 32 al. 4.
[63]Law No 78/2000 of 18 May 2000 on the prevention, detection and punishment of acts of corruption, Official Monitor of Romania, 18/05/2000, Art. 29 al. 1.

Although, from a purely legal point of view, these decisions appear to be perfectly legal under the Romanian law, they nevertheless pose several legal problems. Indeed, the decisions of the Constitutional Court have the effect and mechanism of referring the cases concerned back to trial at first instance. As a result, some of these cases may never be tried or the sanctions never applied because the statute of limitations has been reached. There would therefore be a systemic risk of impunity (a term used on numerous occasions by the CJEU)[64] in these corruption cases, as there would be no deterrent sanctions as provided for in EU law, which would undermine Romania's objectives and obligations in the fight against corruption and the safeguarding of the Union's financial interests.[65]

The question of primacy thus arises, since the judgments of the Romanian Constitutional Court have the direct effect of rendering certain provisions of EU law (in this case the financial and anti-corruption provisions) ineffective. Romanian constitutional law therefore de facto takes precedence over EU law.

Moreover, the action of the Constitutional Tribunal legitimately raises the question of the independence of the judiciary. This Court has a special status in the Romanian political system, as it is not part of the legal order recognised by the country's constitution but is classified as a *"politico-judicial body"* by the referral courts.[66] Composed of members appointed by the other powers (President of the Republic, Government, President of the Chambers), its independence from a jurisdictional point of view is not guaranteed. The referring courts also considers that the Constitutional Court, by directly intervening in ongoing proceedings, exceeded its prerogatives as defined in Article 146 of the Romanian Constitution, which consists of verifying that the laws are in conformity with the Constitution. However, its intervention in these cases goes beyond this simple control, since it reserves the right to intervene in ongoing judicial proceedings by issuing de facto retroactive judgments that are binding on the lower courts.

The justification of the Constitutional Court, namely the settlement of an institutional conflict[67] (for which it has jurisdiction), is criticised by the referring courts, which consider that this conflict was created out of thin air by the Constitutional Court to justify its intervention.[68]

As a result, the referring courts have, pursuant to Article 267 TFEU, referred two major questions on the interpretation of EU law to the CJEU for a preliminary ruling. First, the

[64]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 56, 66, 102, 193, 198, 200, 203, 212, 213.
[65]Art. 325 al. 1 TFEU.
[66]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para.56 and 79.
[67]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 90.
[68]Ibid.

question of whether the intervention of the Constitutional Court, due to its political and jurisdictional status and the impact it has on the proceedings in progress, is really consistent with respect for the rule of law, and in particular, with the principle of the independence of the judiciary as defined in Articles 2 and 19 TFEU and Article 47 of the Charter. Second, these courts question whether the principle of primacy as enshrined in the jurisprudence of the CJEU[69] allows Romanian judges to overrule the judgments of the Constitutional Court in order to ensure the effectiveness and uniform application of EU law; in this case the provisions relating to the fight against corruption and the preservation of the Union's financial interests.

II. A strong but incomplete reaffirmation of the fundamental principles of EU law

Due to the importance of the issues raised in this dispute and the apparent infringement of the principles structuring EU law, a firm and decisive response from the CJEU was anticipated. Following the first challenges to the primacy of EU law in the judgements of the German Federal Constitutional Court, and the unequivocal condemnation of this principle, combied with a challenge to the main components of the rule of law by the Polish Constitutional Court, the questions raised by the courts in this case have indeed not been resolved. The issues raised by the referring Romanian courts are highly relevant, as they go to the heart of the matter, namely the position of constitutional courts in the legal order of the Member States and their interaction with EU law. Moreover, they allow the CJEU another shot at taking a position on these fundamental legal issues. The res judicata effect of the judgments of the CJEU is not only binding on the referring courts but also on all national courts of the Member States. It can therefore be concluded that this decision of the Court will not be limited to the Romanian courts, but will have a wide reach within the EU.

1. The independence of the judiciary as a founding principle of the rule of law in the EU

It can be said that the position of the CJEU in this case is commensurate with the stakes. The importance of judicial independence is seen as an essential prerequisite for ensuring

[69] CJEC, judgment of 15 July 1964, case C-6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66, Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy.

respect for the rule of law, as mentioned in Article 2 TEU. In practice, the methods introduced by the Court to monitor compliance with judicial independence clearly move in the direction of better respect for the principle of judicial independence. However, the Court's application of these criteria to the present case raises some questions, particularly as the CJEU does not consider clear violations of judicial independence as such.

The Court approaches the issue of judicial independence from two angles. First, it considers the status of the Romanian Constitutional Court. It is recalled that this Court is not part of the Romanian judicial order as defined by the Romanian Constitution, but is in fact a "politico-judicial"[70] body whose members are appointed by the President of the Republic as well as by the Presidents of the Chambers of Parliament.[71] Moreover, the same Court may be seized by these same persons in disputes relating to the existence of constitutional conflicts, which has happened in some of the cases in question. Furthermore, The CJEU furthermore recognises judicial independence as paramount, especially in cases related to high-level corruption, as in the present case, because of the high risk of political influence on the decisions made by Constitutional Court. The question of the status of the Romanian Constitutional Court is all the more important as many Constitutional Courts across the EU are similarly selected. The French Constitutional Council, for example, is composed of nine appointed members (three by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate), as well as former Presidents of the Republic who are members of the Council by right[72]The Portuguese Constitutional Court has thirteen members, ten of whom are elected by the National Assembly and the last three co-opted by it.[73] The same applies to the Spanish Constitutional Court, whose twelve members are proposed by the country's various legislative and executive bodies and are finally appointed by the king.[74] These examples show that, although the methods of appointing judges to Constitutional Courts differ from one Member State to another, interference in the appointment process by the executive and legislative powers is a constant. Therefore, one may wonder whether the composition of the Romanian Constitutional Court is echoed throughout the EU Member States, suggesting that such disputes may become more frequent in the future.

[70]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 56 and 79.
[71]Article 142 of the Constitution of Romania.
[72]Composition of the French "Conseil Constitutionnel", https://www.conseil-constitutionnel.fr/en (last accessed on 21/05/2022).
[73]Composition of the Portuguese "Tribunal Constitucional", https://www.tribunalconstitucional.pt/tc/en/tribunal-orgaoconst.html (last accessed on 21/05/2022).
[74]Composition of the Spanish "Tribunal Constitucional", https://www.tribunalconstitucional.es/es/tribunal/Composicion-Organizacion/composicion/Paginas/default.aspx (last accessed on 21/05/2022).

According to the Court's reasoning, the principle of independence of the judiciary implies that its functioning cannot allow litigants to doubt the impartiality of Romanian judicial bodies[75]: *"Those guarantees of independence and impartiality required under EU law presuppose rules that are such as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it".*[76] The CJEU clarifies its view of the independence of the judiciary in two distinct points: On the one hand, the exercise of judicial powers must be absolutely autonomous, i.e. independent of the judicial hierarchy, but also of the political influences emanating from the other constitutional bodies (legislative, executive), whether they are direct or indirect. In addition to this independence, which could be described as vertical, i.e. in relation to the hierarchy, it must also be exercised horizontally, i.e. the judges must be absolutely impartial in their decision-making, in particular by maintaining an equal distance from the parties and their respective interests, and by having no interests whatsoever in providing a precise solution to the case submitted before them.[77]

Several parties argued that the CJEU lacks jurisdiction to decide this case due to the EU's lack of competence in the field of judicial organisation. The Court here considers that, while such organisation does indeed fall within the competence of the individual Member State under their legislative and constitutional rules, an organisation that does not comply with the requirements contained in the Treaties duly ratified and accepted by the Member States would be contrary to EU law. This extensive view of the EU's competences, although in line with the Court's stated and repeated position, raises questions. Although the Court's vocation to ensure Member State's compliance with EU law inevitably leads to a very broad view of the elements covered by EU law, including those not explicitly covered by the treaties, this extensive practice inherently risks encountering national courts that may oppose this view, as has been studied in the context of the ultra vires reviews of the German Federal Constitutional Court.[78]

With regard to the binding force of the Romanian Constitutional Court's decisions on the country's courts, the CJEU considers that this binding ~~force~~ effect is in line with EU law, provided that it can be proven by concrete evidence that the court in question is truly impartial. However, it is the subsequent application of these criteria by the CJEU that raises questions.

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[75]*Moraru/Bercea*, The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia 'Forumul Judecătorilor din România, and their follow-up at the national level, in: European Constitutional Law Review, 26/04/2022, p. 1-32.

[76]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 225.

[77]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 224.

[78]Federal Constitutional Court (BVerfG), judgment of 5 May 2020, Case C-859/15.

The Court is satisfied with the provisions of the Romanian Constitution, which require impartiality and irremovability of constitutional judges.[79] This statement seems a bit frivolous, especially since the problem of corruption in the upper echelons of Romanian power should prompt the CJEU to carry out an even greater scrutiny to verify whether this independence and impartiality of the Constitutional Court actually exists. Its conclusion is therefore open to criticism, insofar as the Court considers that there is no sufficient evidence to create a legitimate doubt[80] as to the impartiality of the Constitutional Court. This position has important consequences, as it allows the judgments and decisions of the Constitutional Court to be binding on the lower courts, even though the conditions of impartiality do not seem to be as fulfilled as the CJEU would like to believe.

The question of referral to the Constitutional Court on grounds relating to the settlement of a dispute of a constitutional nature also seems to be underestimated, insofar as the referring courts warn against abuse of this procedure, authorised by the Constitution, to interpret laws with a view to their application by the country's courts. Such control is indeed not normally possible by virtue of the principle of separation of powers: *"in many cases, the Court acknowledged the existence of such a constitutional conflict where there were none and clearly acted ultra vires by ordering a certain conduct to an authority, in clear breach of its own independence".*[81] If the High Court of Cassation and Justice (HCCJ) is, in the Romanian constitution, the supreme judicial body, the disguised control of the Constitutional Court may suggest that the latter is unofficially at the top of this hierarchy, despite its politico-judicial status.

With regard to the independence of judges and, above all, the risk of sanctions in the event of non-application of the decisions of the Constitutional Court, the CJEU acts here as the protector of the independence of individual judges: *"The CJEU clarified that any disciplinary liability of national judges which would be triggered for failure to comply with such judgments is contrary to judicial independence".*[82] Indeed, it is clearly stated that judges cannot be disciplined by their hierarchy for simple errors in the interpretation of the law, but that there must be an existence of a manifest and gross professional misconduct in order to initiate such proceedings. The CJEU thus finds that a new control of the disciplinary regime for judges is needed to ensure that it is not misused for the purpose of intimidation in order to get rid of

[79] ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 235.

[80] ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 237.

[81] *Selejan-Gutan*, Who's afraid of the "Big Bad Court?, https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/ (last accessed on 21/05/2022).

[82] *Wahl*, CJEU Rules on Compatibility of Romanian Constitutional Court Decisions with Effective Prosecution PIF Crimes, https://eucrim.eu/news/cjeu-rules-on-compatibility-of-romanian-constitutional-court-decisions-with-effective-prosecution-pif-crimes/ (last accessed on 21/05/2022).

"undesirable" judges.[83] This firm stance on the independence of individual judges is to be welcomed, especially in view of the fact that, several Romanian judges have been subject to such sanctions in the main proceedings, in particular for their refusal to apply the judgments of the Constitutional Court in order to ensure compliance with the principle of primacy.

Finally, it seems relevant to question the legal basis of the judgments rendered by the Romanian Constitutional Court. The annulment of the judicial proceedings in the corruption cases concerned are linked to the appearance of procedural defects (non-specialisation of judges, failure to set up the judging panels). These elements formally constitute a definite violation of procedural rights, including the right to a fair trial and its components. This application of the standards of protection of fundamental rights by the Romanian courts is, however, confronted with the need to apply EU law. The application of the above-mentioned Melloni doctrine raises questions, as it implies that the CJEU considers that the standards contained in the Charter are respected in this case, whereas the procedural defects identified by the Constitutional Court could be considered as unacceptable infringements of Article 47 of the Charter. This stubbornness of the CJEU gives the impression that the prosecution of corruption cases in Romania at any cost and the absolute repression of corruption cases take precedence over a real respect for the fundamental rights in the context of the conduct of a trial.[84]

The CJEU acts as a true protector of judicial independence as a fundamental principle of the rule of law in the EU. The CJEU thus returns to the "politio-judicial" status of the Romanian Constitutional Court, insisting on the importance of its independence from other political bodies. It also brings a new approach to the establishment of this independence, defining it as an independence both from the judicial hierarchy and from the parties involved, with a view to impartiality, which is particularly important in cases related to corruption. Regarding the judicial composition, the absence of EU competence in this area does not exempt Member States from respecting the principles contained in the Treaties. The Court adopts an extensive view of the EU's competences here: *"Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the constitutional court are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as*

[83] *Selejan-Gutan*, Who's afraid of the "Big Bad Court?", https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/ (last accessed on 21/05/2022).

[84] *Iancu*, Goat, Cabbage and Wolf: Primacy in Romania, https://verfassungsblog.de/goat-cabbage-and-wolf/ (last accessed on 21/05/2022).

precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability".[85]

While this reasoning seems to be a welcome clarification, its application to the present case, and in particular the refusal to hear the arguments of the referring courts on the lack of independence of the Constitutional Court, is worrying as it leaves open the possibility of a multiplication of similar cases across the EU due to the similar composition and jurisdiction of the twenty-seven Constitutional Courts.[86]

2. An unequivocal reaffirmation of the principle of primacy

As far as the application of the principle of primacy is concerned, the position of the Court of Justice appears to be much firmer and in line with the case law established since the 1950s. Indeed, these developments relate to the application of Union law within the Member States, in particular with regard to the provisions of their national law. In addition, there is the recognititon of the binding nature of the various texts related to Romania's accession and the establishment of the control mechanisms that have resulted.[87] The reaffirmation, not only of the applicability of direct effect, but also of the obligatory nature of these texts makes it possible to justify the application of the principle of primacy with regard to the judgments delivered by the Romanian Constitutional Court. To support its reasoning, the Court gives a welcome reminder of its historical jurisprudence concerning the application of the principle of primacy. The creation of a uniform legal order, which on the one hand, is integrated into the legal order of the Member States and, on the other, is distinguished from it by its autonomy,[88] justifies the primacy given to the texts and case law of Union law over the national legal orders, as the Costa case law has shown. Consequently, if Union Law takes precedence, it is impossible to

[85]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 242.

[86]*Moraru/Bercea*, The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia 'Forumul Judecătorilor din România, and their follow-up at the national level, in: European Constitutional Law Review, 26/04/2022, p. 1-32.

[87]*Iancu*, Goat, Cabbage and Wolf: Primacy in Romania, https://verfassungsblog.de/goat-cabbage-and-wolf/ (last accessed on 21/05/2022).

[88] ECJ, judgment of 5 February 1963, Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1, para. 23.

oppose a contrary national legal act, even if it is subsequent to the European provisions concerned.[89]

The uniform application of Union law rightly appears to be of primary importance to the Court. The reasoning followed is that the equality of Member States before Union law can only be real and effective if the latter prevails over all acts of national law that are contrary to it: *"It must be added that Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect such equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature".* [90] This reasoning is particularly interesting because it draws a very important parallel between the desired equality between the Member States and the uniform application of its law, and thus indirectly the application of primacy, giving a significant legal force to this judgement, as the sovereign equality of the Member States[91] is a particularly important argument for them, and especially for small states or those whose accession to the EU is relatively recent, as is the case with Romania, for example.

Nevertheless, the Court's characterisation of the European Economic Community Treaty as a kind of Constitution of the Union is questionable. Indeed, the latter qualifies the EEC Treaty, an international treaty by nature, as a de facto "Constitutional Charter" of the Union: *"the Court thus found that the EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law, and that the essential characteristics of the Community legal order thus established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves".*[92] This statement seems clumsy in that the project of a real European Constitution[93] never materialised Since the French and Dutch electorate rejected the project proposed to them in a referendum in 2005. While it is perfectly justified to claim that any international organisation (a concept to which the EU is – at least partially – linked) is endowed with a founding act, the formal name of which may vary (Charter, Covenant, Treaty, etc.), it is clear that the notion of "Constitution" is quite exclusively linked to the notion of "State", and can hardly be applied to

[89] CJEC, judgment of 9 March 1978, case C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* , ECLI:EU:C:1978:49, p. 7.
[90] ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 249.
[91] Article 4 para. 2 TEU.
[92] ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 247.
[93] Treaty Establishing a Constitution for Europe (TCE), signed on 29 October 2004, rejected by referendums held on 29 May 2005 (France) and 1 June 2005 (the Netherlands).

supra-national entities or international organizations. However, the specific nature of the EU seems to make it inevitable to reconsider this exclusivity of the state even if the EU definitely cannot be qualified as a state, but has some specific attributes (autonomous legal order, integration organization, etc.) that allow it to be compared to a kind of state, which cannot be overlooked. Nevertheless, this unfortunate formulation by the CJEU, with regard to the qualification of the founding treaties may lead to tensions between Member States and may limit the (at least moral and political) impact of this judgment on the national legal orders.

In stating unequivocally that the principle of primacy applies to the entire national legal order, including provisions of a constitutional nature, the Court nevertheless omits from its reasoning a provision contained in Article 4 para. 2 TEU, which states that the EU must respect the constitutional and national traditions of the Member States (the above-mentioned identity clause). However, as recalled in the Taricco II case,[94] the CJEU alone has jurisdiction to define the application of this principle, in particular by balancing the provisions of national law invoked against the conflicting European provision. In fact, it seems impossible for this clause to be retained in this case, due to the absolutely fundamental aspect of the principles of primacy and respect for the rule of law, which naturally impose themselves on the constitutional considerations invoked by the Romanian Constitutional Court.

In applying the principle thus reaffirmed in practice, the CJEU emphasises the responsibility of national judges in this area. Under the provisions of the Treaties, and in particular Article 19 TEU, national judges have a duty to ensure, at their level and in accordance with their powers, that EU law is applied effectively. This duty is expressed in the possibility to interpret a national provision of law that is contrary to EU law in order to bring it in line with EU law, but also, if this is impossible, of disapplying it without waiting for the national legislator to withdraw or repeal the contested provision. With regard to references for preliminary rulings, the Court notes that the existence of a doubt on the part of the judge as to the application of the principle of primacy must be the subject of a reference for preliminary rulings for interpretation. In fact, while the judges are competent to ensure the application of EU law, the CJEU alone is competent to determine the scope and content of the principle of primacy.

However, this position may seem contradictory, as a reference for a preliminary ruling is only mandatory for courts at the top of the judicial hierarchy of the country when there is doubt as to the interpretation of EU law. The CJEU thus appears to make it 'de facto' obligatory for all courts to make such a reference, even though only the highest courts in each Member State are obliged to do so, as such a reference is optional for all lower courts. The Court's position

[94]ECJ [GC], judgment of 8 September 2015, Case C-105/14, Taricco and Others, ECLI:EU:C:2017:936.

here is intended to be extensive, but could come up against the reality of the Treaties and secondary legislation on the division of powers between the CJEU and national courts and, by extension, between the EU and its Member States. In practice, however, such a conflict seems unlikely, since the parties to a dispute always have the possibility of referring the matter to the supreme court, thus making a reference for a preliminary ruling compulsory, even if other reasons (in particular the length and cost of such a procedure) may limit its implementation.

The position of the CJEU regarding the application of disciplinary sanctions against judges who do not apply national law by the Romanian judicial administration is also very firm: It sets itself up as the protector of national judges against their hierarchy, through their possibility to initiate a preliminary ruling.[95] The Court takes note of the existence of disciplinary proceedings initiated against several Romanian judges by the country's Judicial Inspection for having rejected the application of judgments of the Constitutional Court, which are, binding on them, under the country's Constitution. The existence of such sanctions poses a major risk to the application of the principle of primacy, which is thus denied by the Romanian jurisdictional hierarchy, but also demonstrates the Court's commitment to defending the independence of judges vis-à-vis their hierarchy.

It is recalled that the answers given by the Court of Justice to a reference for a preliminary ruling must be followed by all national courts, not only the referring courts. In practice, one may wonder about the impact of this provision on the Romanian Constitutional Court, which, as mentioned above, is not part of the country's judicial system. The enforceability of the provisions of this judgment against the Constitutional Court is therefore disputed from a formal point of view, and will undoubtedly be challenged by it. The CJEU's desire to prevent the Romanian Constitutional Court from adopting future judgments that would result in the abandonment of prosecutions or at least to the inapplicability of sanctions against corruption cases will indeed be severely limited.

In this respect, the two fundamental concepts of this subject, namely the principle of primacy of EU law on the one hand, and the independence of the judiciary on the other, are by no means two completely different elements identified by the Court, but are deeply interrelated, since the protection of the independence of judges vis-à-vis their hierarchy is seen by the CJEU as a means of ensuring the proper application by the latter of supra-national principles, which here come into conflict with national law.

[95] *Moraru/Bercea*, The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia ‘Forumul Judecătorilor din România, and their follow-up at the national level, in: European Constitutional Law Review, 26/04/2022, p. 1-32.

In view of the above, it is therefore logical that the CJEU, in its reply to the question formulated by the referring courts, confirms 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 the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928".*[96]

D. A strong need to strengthen the fundamental principles to ensure the sustainability of the EU

In view of all the questions raised by recent national and European case law on the protection of the rule of law and the application of the principle of primacy, it is finally important to look at the follow-up to these cases, both at national and European level. Although these cases differ at many levels, with a very different political and legal context, they have in common that they are symptomatic of a certain malaise that is eating away at the European Union today. In the space of less than two years, the constitutional courts of several Member States have undermined fundamental principles that were thought to be definitively established, calling into question the very legal order of the EU. However, these jurisprudences did not emerge out of thin air, but rather are part of a global movement of rising Eurosceptic sentiment, which is accompanied by a return to grace of the state as a protective power for its citizens at the expense of the EU.

I. The immense risks of calling into question the founding principles of EU law

The recent jurisprudence of the German, Polish and Romanian Constitutional Courts is both very important for the European legal order and quite alarming. The questioning of principles established decades ago such as primacy or the rule of law is not insignificant in the current context. In all three countries, the Constitutional Court has reasserted itself as a key

[96]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 263.

player in the institutional game, expressing its distrust of the CJEU and its vision of the application of EU law in the Member States. These judgements show a real return to grace of the state as the protector of fundamental freedoms (in the German case) or national sovereignty (in the Polish case). Although less overtly critical of EU law and its application, the Romanian case is a perfect example of this trend, introducing a series of judgments that have the effect of greatly diminishing the effectiveness of EU law in the country.

It is therefore appropriate to question the reasons for such disinterest in the EU and its law. While there are many causes, it is clear that some European decisions have been strongly criticised by certain Member States. Examples that spring to mind are the management of the economic crisis[97] or the migratory crisis,[98] which has had a strong impact, particularly on certain southern European countries (Spain, Italy, Greece, etc.). The issue of national contributions to the EU budget[99] was one of the arguments that led to the victory of the *Yes* side in the 2016 British referendum that led to Brexit. However, it is clear that management at European level cannot always satisfy all the Member States, who are still too heterogeneous in many respect (economic, social, democratic). This is perhaps one of the biggest mistakes made by the EU, which was to enlarge before deepening integration between its members, raising many questions about its integration capacity.[100]

This question is particularly relevant today, in the context of the war in Ukraine, with, on the one hand, the political, financial and military support given by the EU to the Ukrainian government[101] and, on the other hand, the request for membership formulated on 28 February 2022 by President Zelensky.[102] Such a membership of a state at war, while unlikely in the short term, calls into question the EU's fundamental values, in particular the defence of democracy and human rights. All of the criticisms levelled at the EU have found a particular echo among

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[97] *Lépine*, L'Europe en Formation 4/2010, p.173, 185.

[98] EP and Council regulation No 604/2013 of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180/1, 29/06/2013.

[99] *Buchholz*, Which Countries are EU Contributors and Beneficiaries?, https://www.statista.com/chart/18794/net-contributors-to-eu-budget/ (last accessed on 21/05/2022).

[100] *European Commission*, Communication from the Commission to the European Parliament and the Council, Enlargement strategy and main challenges 2006 – 2007. Including annexed special report on the EU's capacity to integrate new members (COM 2006) 649.

[101] Council Decision (EC) No 2022/338/CSFP of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, OJ L 60/1, 28/02/2022, Art. 1 and 2.

[102] *Morcos*, Ukraine's Road to EU Membership, https://www.csis.org/analysis/ukraines-road-eu-membership (last accessed on 21/05/2022).

Eurosceptic parties across Europe, whose electoral scores are constantly rising (Marine le Pen, a far-right candidate, received more than 41% of the votes in the second round of the French presidential election of 2022,[103] Victor Orbán retained an absolute majority in the Hungarian parliamentary elections of 2022,[104] etc.). The major crisis of the rule of law in many countries should also be highlighted, as Europe is witnessing an authoritarian turn by several governments (notably in Poland and Hungary).

Such mistrust of the EU by citizens is necessarily accompanied by a return to grace of the state as a protective entity par excellence.[105] Thus, the German judgement highlights the proactivity and zeal of the Federal Constitutional Court in protecting fundamental rights and the strict attribution of competences to the EU. The Polish judgments, on the other hand, highlight a clear return to the notion of national sovereignty to the detriment of the competences transferred to the EU, but are also part of an unprecedented crisis of the rule of law in the country since its democratisation. The Romanian case is set in a very different context, in particular because of the special rules that still govern relations between the EU and Romania,[106] the application of which is at the heart of the case. Although the CJEU's position is not free of gaps and imprecisions, it strongly reaffirms the founding principles of EU law, namely primacy and the importance of judicial independence.

II. The importance of the judgment for the preservation of the European legal order

Finally, it seems appropriate to consider the possible consequences of the CJEU judgment of 21 December 2021. This judgement appears to be a scathing response by the CJEU to the case law of the Romanian Constitutional Court, and, in the wake of this, a very firm reaffirmation of the key principles of respect for the primacy of EU law, on the one hand,

[103] *Williamson*, France Election: Marine le Pen concedes election but still counts a win, https://www.bbc.com/news/world-europe-61218171 (last accessed on 21/05/2022).

[104] *Zeit Online*, Viktor Orban sichert sich fünfte Amtszeit, https://www.zeit.de/politik/ausland/2022-04/ungarn-wahl-2022-wahlsieger-viktor-orban-hochrechnung (last accessed on 21/05/2022).

[105] *Di Stasi*, The Enlargement of Competences of the European Union between State Sovereignty and the so-called European “Sovereignty”: Focus on the Limits of Applicability of the Charter of Fundamental Rights of the European Union, in: Revista Iberoamericana de Filosofía, Política y Humanidades (ed.), p.131, 154.

[106] Decision (EC), No 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ L 354/56, 14/12/2006, Art. 1 + annexes.

and the protection of the rule of law and the independence of the judiciary, on the other, with a particular attention on the status of national judges who are constrained in the exercise of their functions by opposing legal standards.[107] This judgment thus seems to put an end to the movement undertaken since 2020 by the German, Polish and Romanian constitutional courts.

Although the Court has merely reaffirmed consistent positions in its case law, this judgment is nevertheless likely to cause a stir in the national courts of the Member States. The unequivocal reaffirmation of the primacy of the European legal order over national law, including constitutional law, will undoubtedly cause controversy among the States concerned, which have in common that they have opposed their constitutional law to the application of EU law. With regard to the affirmation of the importance of the independence of the judiciary, in particular vis-à-vis the judicial hierarchy or the political and judicial bodies constituted by the constitutional courts, the reforms of the judiciary undertaken in many countries (Poland, Romania, but also Hungary)[108] will undoubtedly conflict with the principles set out in this judgment. Moreover, it should be noted that despite the principles established, the few shortcomings of this judgment (in particular the failure to recognise the lack of independence of the Romanian Constitutional Court in the present cases)[109] could create a loophole into which several similar cases involving Constitutional Courts could fall. This suggests that, although it dealt with such fundamental substantive issues as the main principles governing EU law, it is unlikely that this judgment has definitively concluded these issues.
In Romania, reactions were not long in coming. On 23 December 2021, only two days after the judgment was made, the Romanian Constitutional Court issued a press release[110] in which it rejected the CJEU's conclusions in this case outright. Firstly, it rejects any intention on its part to lead to impunity in corruption cases that have been annulled or suspended by the effect of its judgments. In addition to reiterating that its judgments are legally binding according to the country's constitution: *"We stress that, according to Article 147(4) of the Constitution, the decisions of the Constitutional Court are and remain generally binding.",*[111] a binding character that is recognised by the CJEU, the Constitutional Court goes much further by affirming that *"the conclusions of the CJEU that the effects of the principle of supremacy of EU law are*

[107]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 255.

[108] *Kazai/Kovacs*, The Last Days of the Independent Supreme Court of Hungary?, https://verfassungsblog.de/the-last-days-of-the-independent-supreme-court-of-hungary/ (last accessed on 21/05/2022).

[109]ECJ [GC], judgment of 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 234.

[110]Constitutional Court of Romania's press release, 23 December 2021, https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/ (last accessed on 21/05/2022).

[111]Quote in Romanian: "Subliniem faptul că, potrivit art.147 alin.(4) din Constituție, deciziile Curții Constituționale sunt și rămân general obligatorii".

imposed on all bodies of a Member State, without national provisions, including constitutional provisions, being able to prevent this, and that national courts are obliged to disapply, of their own motion, any national regulation or practice contrary to a provision of EU law, require a review of the Constitution in force. In practical terms, the effects of this judgment can only come into effect after the revision of the Constitution in force".[112]

Arguing that only a constitutional review, with the long and complex process involved, cane nable the full application of the reasoning adopted by the CJEU in domestic law, this communique expresses nothing more and nothing less than a refusal by the Constitutional Court to apply the provisions of the CJEU. This press release is also a warning to Romanian judges who would continue to give full effect to the principle of primacy[113] by overruling the judgments of the Constitutional Court. Although this is only a press release without any legal value or binding force,[114] it is clear that this strong position, if pursued, will be sanctioned by the CJEU. In the wake of the German or Polish cases, it is quite possible to imagine that an infringement procedure could be launched against Romania for not having met its European obligations.

E. Conclusion

The EU, because of its recognised political and legal originality, relies on major legal principles that ensure the effectiveness of its law and the respect of fundamental rights. This paper focuses on two major subjects. On the one hand, the independence and impartiality of the judiciary, as a component of the rule of law as defined in Article 2 of the TEU. On the other hand, the application of the principle of the primacy of EU law vis-à-vis the legal order of the Member States and, more particularly, law of a constitutional nature. The very early affirmation of the importance of these legal principles, namely the rule of law through the independence

[112]Quote in Romanian: "concluziile din Hotărârea CJUE potrivit cărora efectele principiului supremației dreptului UE se impun tuturor organelor unui stat membru, fără ca dispozițiile interne, inclusiv cele de ordin constituțional să poată împiedica acest lucru, și potrivit cărora instanțele naționale sunt ținute să lase neaplicate, din oficiu, orice reglementare sau practică națională contrară unei dispoziții a dreptului UE, presupun revizuirea Constituției în vigoare. În plan practic, efectele acestei Hotărâri se pot produce numai după revizuirea Constituției în vigoare".

[113]*Selejan-Gutan*, Who's Afraid of the "Big Bad Court?, https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/ (last accessed on 21/05/2022).

[114]Ibid.

of the judiciary[115] and the principle of primacy[116] has contributed to shaping EU law around values borrowed from those of the States, such as the protection of fundamental rights, democracy or, of course, the rule of law and its components, but also by establishing unique principles ensuring its effectiveness, such as the primacy over the law of the Member States. As pillars of European integration, these major principles have hardly ever been questioned by the Member States.

However, in recent years, there has been a noticeable movement of opposition or at least questioning of these principles on the part of certain States, particularly through the decisions of their respective Constitutional Courts The German Federal Constitutional Court, through a control mechanism (ultra vires) developed by its own case law, has for the first time questioned the application of a provision of EU law on the grounds of an alleged lack of competence, calling into question the quasi-absolute[117] primacy established since the Costa case law. The Polish Constitutional Court went further, stating that the Polish Constitution is contrary to certain main principles of EU law, calling into question the established application of primacy and the state of the rule of law in the country. The emergence of a similar situation in Romania has enabled the CJEU to respond to all recent challenges to these principles through a response to references for preliminary rulings submitted by Romanian courts.

It is the behaviour of the country's Constitutional Court that is being called into question, by using procedural flaws in criminal matters to annul or postpone several judgments for corruption, thus making it possible to achieve total impunity in some of these cases. Such impunity would be contrary to a number of provisions of EU law, including those concerning the preservation of its financial interests, and to certain commitments made by Romania upon its accession, the binding nature of which has once again been reaffirmed. The reaffirmation of the primacy of constitutional decisions and their binding character for national judges poses concrete and worrying risks for the preservation of their independence, on the one hand, but also for the effective and uniform application of the provisions of EU law in the country on the other.

In this judgment, the CJEU therefore had a duty to clarify and firmly counter such challenges, which appear completely unacceptable and unjustified. The reaffirmation of these principles is firm, with full legal support given to the judges who are subject to contradictory legal obligations

[115]Article 2 and 19 TEU, Article 47 Charter (about the rule of law, the independence of the judiciary and the relationship between national Courts and the CJEU).

[116] CJEC, judgment of 16 December 1960, Case C-6/60, *Jean-E. Humblet v Belgian State*. ECLI:EU:C:1960:48; CJEC, judgment of 15 July 1964, case C-6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66.

[117]Article 4 al. 2 TEU.

in their application of the principle of primacy and in the respect of their independence. However, the judgment raises several questions, particularly regarding the legal status of the country's Constitutional Court as the CJEU refuses to recognise its lack of independence, particularly with regard to the other political powers. This shortcoming is all the more worrying as similar situations are likely to be repeated in other Member States. At the same time, the principle of primacy is reaffirmed, and in particular its applicability especially in relation to national provisions of a constitutional nature, which, although not a fundamental novelty, is likely to create a stir in the Member States. The duty of judges to apply EU law, if necessary by setting aside contrary national provisions, and the possibility of referring to the Court for interpretation, is reaffirmed by an absolute rejection of the national sanctions against them if they do so.

This legal situation should be seen in the context of mistrust of the EU by a part of the citizens and the political class, which is reflected in the rise of Eurosceptic movements across Europe as well as in the return of the State as a safe haven, guarantor of national sovereignty. In this respect, the German, Polish and Romanian cases, although arising from very different political and legal contexts, do show a reassertion of national jurisdictions in the application of EU law, and sound like a mark of mistrust of the CJEU.

The CJEU’s decision, in the judgment of 21 December 2021, therefore provides a welcome clarification of the interpretation and application of the major European principles of primacy and the rule of law, even if certain regrettable shortcomings raise the risk of a legal follow-up. The Romanian Constitutional Court's categorical refusal to abide by this judgment is a good example of this, suggesting that more case law on this issue is to be expected in the coming years.

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