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Energotehnica: Primacy and Effective Judicial Protection Beyond the Rule of Law Crisis

Case C-792/22, Parchetul de pe lângă Judecătoria Rupea and Others v. MG, Judgment of the Court (First Chamber) of 26 September 2024, ECLI:EU:C:2024:788.

by
Orlando Scarcello*

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Abstract

The *Energotehnica* judgment (C-792/22) reaffirms the primacy of EU law over national constitutional court rulings, explicitly declaring Romania's Constitutional Court decision on the binding force of administrative findings in criminal proceedings incompatible with EU law. The Court emphasized the right to effective judicial protection under Article 47 of the Charter, invalidating procedural practices excluding parties from critical administrative proceedings. Additionally, the judgment addressed whether Romanian judges could face disciplinary sanctions for disapplying national constitutional decisions to uphold EU law, confirming that such sanctions violate EU principles. This ruling strengthens fair trial standards and judicial independence within the EU legal order.

Keywords

Primacy of EU Law, Effective Judicial Protection, Force of Res iudicata, Judicial Independence, Disciplinary Sanctions.

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1. Introduction

The decision of the First Chamber of the Court of Justice of the EU (ECJ) in the case C-792/22, *Energotehnica*, forcefully reasserts the primacy of European Union law (EU law) over national law, including decisions of national constitutional courts. Although this doctrine is not new, it is presented in this case with notable clarity, and importantly, outside the context in which primacy has often been recently asserted: the so-called rule of law crisis and the consubstantial attack on the independence of the judiciary in some Member States.

Furthermore, the judgment establishes a duty under Article 47 of the Charter of Fundamental Rights of the EU (the Charter) to ensure the participation of all parties in preliminary proceedings that will carry the force of *res iudicata* in subsequent criminal trials and connected civil actions at the national level, even when a recent judgment by the national constitutional court stands in opposition. Consequently, this judgment adds yet another tile to the evolving mosaic for the right to an effective remedy and fair trial under EU law.

This case note will recount the main facts of the case, present the questions raised by the referring court, and examine the main arguments of the Advocate General and the Court of Justice. In the final section, I will analyze the judgment, limiting the analysis to the reassertion of the principle of primacy and its significance in establishing uniform standards for effective judicial protection across the Union, a sort of EU due process doctrine in the making. I will also address the shifting context in which this assertion is made: the increasing frequency of open conflicts over primacy has partly normalized direct reactions from constitutional courts whose case law has been set aside by the Court of Justice.

A few concluding remarks will close the case note.

2. Facts of the case and preliminary references

On 5 September 2017, a fatal accident occurred in Brasov, Romania, involving an electrician employed by Energotehnica who was changing a light fixture on a low-voltage pylon. The Brașov Regional Labour Inspectorate (ITM) investigated, concluding the incident was a work-related fatality. ITM fined Energotehnica for conducting the operation without interrupting power, using unauthorized personnel, and failing to properly train the workers.

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Energotehnica sought annulment of the ITM's inquiry report and brought an action before the regional administrative court (Tribunalul Sibiu). On 10 February 2021, the administrative court partially annulled ITM's report in favour of Energotehnica. The Tribunalul held that the operation was conducted outside working hours and that no evidence was given that the victim had been given verbal instructions by his superior at Energotehnica. Crucially, only two colleagues of the victim were heard as witnesses, and the administrative proceedings only involved Energotehnica and the ITM. In June 2021, the Court of Appeal (Curtea de Apel Alba Iulia) dismissed the action on procedural grounds. As a result, the administrative proceedings ended establishing that the event did not constitute an "accident at work".

Meanwhile, criminal charges were filed against MG, Energotehnica's chief electrician, for manslaughter and safety violations.[I] According to the indictment, MG instructed the victim to complete the task without proper safety measures, including cutting the power, and failed to provide protective equipment. In court, testimonies from eyewitnesses and relevant health and safety documents, including the inquiry report, were reviewed. The victim's spouse and children joined the proceedings as civil parties, seeking damages from MG and Energotehnica for the victim's death. Although Energotehnica faced no criminal investigation, it was considered a civilly liable party due to its duty under Romanian law to compensate for damages caused by the incident. The Court of First Instance of Rupea (Judecătoria Rupea) eventually acquitted MG in December 2021, stating that the evidence was insufficient to prove he gave explicit instructions and noting the accident occurred outside standard working hours, thus not qualifying as a workplace accident.

Both the Public Prosecutor and the victim's family appealed before the Curtea de Apel Braşov, arguing that witness statements and the inquiry report provided enough evidence that MG had given verbal instructions. The Court of Appeal of Braşov is also the referring court, and it presents the following legal conundrum to the ECJ. The determination made by the administrative courts that the accident does not qualify as a work accident is binding on the criminal court as *res iudicata*. Specifically, in 2021 the Romanian Constitutional Court declared Article 52(3) of the Criminal Procedure Code partly unconstitutional.[II] This article had given final judgments from non-criminal courts binding authority in criminal proceedings, except regarding the existence of the criminal offence. The court found the

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phrase "with the exception of the circumstances relating to the existence of the criminal offence" unconstitutional, reasoning that those preliminary questions in criminal cases, often involving non-criminal matters like the status or elements essential to an offence, must be resolved separately before addressing the core criminal issues.

As a result, according to the referring judge, the full force of *res iudicata* conferred by the Constitutional Court to the determinations of non-criminal courts in criminal proceedings prevented the ascertainment of a constituent element of the criminal offence, namely whether the event was an "accident at work". The acquittal of MG and dismissal of the civil action brought by the victim's family would inevitably follow from the Constitutional Court's decision.

However, the court of appeal doubted that this would be compatible with EU law. Specifically, the judge believed that this rigid interpretation of the notion of *res iudicata* would undermine the principle of the protection of workers and the principle of employer responsibility enshrined in Article 1(1) and (2) and Article 5(1) of Directive 89/391, read in the light of Article 31(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). Indeed, Directive 89/391, adopted under Article 118a of the EEC Treaty (now Article 153 TFEU), aims to improve the workers' health and safety, establishing general principles for preventing workplace risks, protecting health and safety, reducing risk factors, and preventing accidents. Additionally, it includes guidelines for informing, consulting, and training workers and their representatives, promoting balanced participation, and guiding the implementation of these principles.

As a result, the referring court halted the proceedings and submitted two preliminary questions to the Court of Justice. To begin with, the court posited with considerable detail the question of whether Article 1(1) and (2) and Article 5(1) of Directive 89/391, together with Article 31 of the Charter, should be interpreted to oppose a Member State's legislation which, as interpreted by the Member State's constitutional court, made final the administrative court's determination of a question preliminary to the criminal proceedings (specifically, whether the event was an accident at work). In case of a positive answer to the first question, the referring court then asked whether the principle of primacy of EU law precluded national legislation or practice which would allow disciplinary proceedings against judges who disapplied the case law of the domestic constitutional court to enforce the decision of the Court of Justice.

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3. The Opinion of the Advocate General

Upon the Court's request, Advocate General Ramos (AG Ramos) tackled only the first question in his Opinion. This focus already indicates where the Court perceived the crux of the matter to lie.

After examining the relevant facts and law of the case, the Opinion addresses the first question by analysing two key issues: the nature of the obligations established in the Directive and the compatibility of *res iudicata* in Romania with EU law.

First, the AG clarifies that the Directive in question, adopted under today's Article 153 of the Treaty on the Functioning of the EU (TFEU), aims to establish uniform conditions for workplace health and safety. Article 5 of the Directive also establishes a principle of employer responsibility for workplace accidents and a duty to protect workers. However, neither this Directive nor any other EU law provision, including Article 31 of the Charter, goes so far as to establish specific criteria to define a workplace accident, determine applicable penalties, or set out rules for compensation.[III]

Second, the AG considers whether the procedural rule giving administrative court decisions the binding force of *res iudicata* in criminal proceedings aligns with the obligation to provide effective remedies for workers in cases of workplace accidents. According to the AG, procedural autonomy grants Member States the authority to determine the internal force of *res iudicata* and to establish rules coordinating criminal and administrative proceedings. However, this autonomy must always ensure equal remedies for rights deriving from both national and EU law (principle of equality) and must not render the exercise of rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness). From this perspective, it is the fact that the participation of all parties in the administrative proceedings is not ensured that must be evaluated. As a result, although free to establish the procedural remedies as they see fit, the Member States must in any case guarantee the right to an effective remedy, today enshrined in article 47 of the Charter.[IV]

Thus, although the Member States have freedom in setting procedural remedies, they are bound to respect the right to an effective remedy, now enshrined in Article 47 of the Charter.

The question then arises: does the binding effect of *res iudicata* limit access to an effective remedy to such an extent that it conflicts with the Directive when interpreted in light of Article 47 of the Charter?[V] The AG suggests that while the precedence of a non-criminal

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court's determination in criminal proceedings does not inherently violate EU law, it may do so if the non-criminal proceedings lack fair trial standards. In this regard, the administrative proceedings before the Tribunalul Sibiu (first instance) and the Curtea de Apel Alba Iulia (appeal) indeed appear deficient, as they involved only Energotehnica and the Labour Inspectorate, excluding both the prosecutor and civil parties. The inability of these parties to be heard and submit new evidence in a proceeding that would ultimately influence both the criminal trial and related civil actions conflicts with Article 47 of the Charter. The Member States may indeed establish mechanisms to coordinate criminal trials with preliminary determinations by other courts to prevent conflicts of *res iudicatae* and maintain legal certainty. However, they cannot achieve this outcome at the expense of the right to an effective judicial remedy.

4. The Judgment of the Court

The First Chamber of the Court of Justice builds upon the Advocate General's reasoning with only minor variations. Drawing on the preliminary reference mechanism's role in clarifying EU law, the Court explicitly reformulates the first question posed by the referring judge, interpreting Articles 1 and 5 of Directive 89/391 in light of Article 47 of the Charter rather than Article 31. The First Chamber thus aligns with the AG's view that it is the compatibility of the ex post judicial remedies with EU law that is under examination, rather than the implementation of substantive law.[VI]

The Court also agrees that the Directive establishes only a general duty to ensure safety in the workplace without defining sanctions for violations, and Article 31 of the Charter likewise does not specify such measures.[VII]

However, the Court emphasizes that the remedies left to the procedural autonomy of Member States must respect the right to an effective judicial remedy and a fair trial as set out in Article 47. This encompasses the right of relevant parties to be heard.[VIII]

Unlike the AG, the Court refrains from stating explicitly that "it is not inconceivable that the victim's family do not enjoy the right to effective judicial protection [that they are] deprived of access to a tribunal" in this case.[IX] Instead, it establishes only the abstract incompatibility between a mechanism that excludes parties from judicial access and EU law, leaving the specific determination to the referring court.[X]

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What the Court does not shy away from, however, is the second question posited by the referring court, one which the AG had not been asked to address. This question concerns whether the primacy of EU law precludes holding ordinary judges disciplinarily responsible for implementing EU law as interpreted by the Court of Justice, even when this requires disregarding case law from the national constitutional court. This question is understandably politically sensitive, as it asks whether EU law prevents domestic disciplinary action against judges who prioritize EU law over a national court's highest legal determinations. Legally, however, the question is more straightforward, and the Court confident enough to request that the AG ignore it. As clarified in the following paragraph, the Court's stance was informed by arguments from four recent landmark judgments concerning Romania, specifically, *Asociația 'Forumul Judecătorilor din România* (*AFJR*), *Eurobox*, *RS*, and *Lin* which had already settled the issue in question.[XI]

Energotehnica was about further consolidating this established case law. And consolidated it was in the few final paragraphs of the judgment: drawing heavily on *RS*, the Court of Justice reaffirmed that interpretations of EU law established via the preliminary reference must prevail over conflicting national judgments, including those of the highest national courts. Established internal case law must be changed accordingly if so need be, and disciplinary liability of the referring judges, although admissible in principle, cannot not be tolerated for merely applying EU law as interpreted by the Court of Justice. In this case, the Court of Justice readily accepted that the primacy of EU law might necessitate the disapplication of a decision of the national constitutional court, specifically decision 102/2021 on Article 52(3) of the Criminal Code. Among the various issues discussed in *Energotehnica*, this was a straightforward one for the Court.[XII]

5. Analysis: Primacy and Effective Judicial Protection Beyond the Rule of Law Crisis

Of all the aspects of potential interest in *Energotehnica*, I would like to focus on how it relates to previous cases on the primacy of EU law over the organisation of the judiciary in Romania. As we have seen, the case has clarified how a legal mechanism giving the full value of *res iudicata* to judicial decisions in criminal proceedings, including the determination of the civil liability of victims or their successors, would be incompatible with EU law if the former

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were carried out without the adequate involvement of all relevant parties. This would probably require either a reform of the existing Romanian judicial procedures to ensure the full participation of the parties in the preliminary proceedings, or the establishment of exceptions to the value of *res iudicata*, a full value which, however, has just been clarified by the Constitutional Court. However, as explained above, this rather delicate issue was in fact resolved with relative ease in *Energotehnica*. The question is, of course, how exactly this came about.

As previously anticipated, the answer is that *Energotehnica* could comfortably build on earlier and more recent cases that have clarified the absolute primacy of EU law over national constitutional law (von Bogdandy-Schill 2011: 1417; Claes 2015: 179-180), at least from the EU's perspective, and that these cases, the aforementioned *AFJR, Eurobox*, *RS*, and *Lin* have explicitly affirmed that EU law takes precedence over the national interpretation of an internal rule. To be sure, the supremacy of EU law has always been directed at the interpretation of national supreme courts, even constitutional courts. *Costa v. Enel* was initially an indirect rebuttal of the Italian Constitutional Court's view that the *lex posterior derogat priori* rule also applied to supranational law (Arena 2019: 1023-1026). The *Simmenthal* mandate was also a response to the same Constitutional Court's view that national judges should seek national annulment of inconsistent EU law rather than directly disapply it (Phelan 2019 171-184). The fact that primacy can also be invoked against the interpretation of a national constitutional court is therefore nothing new.

It would be dull formalism to equate the two couples of cases, though. *Costa* and *Simmenthal* belong to the founding era of EU law, an era characterised by far less incisive competences and political salience, and consequently by an almost proverbial "benign neglect" (Stein 1981 75). For a variety of reasons that cannot be summarized here, the Member States allowed this transformation to happen (Rasmussen 2014: 161-162; Fritz: 685-697; Weiler 1991: 2410-2431; Isiksel 2016: 86-94). Since the Treaty of Maastricht, and with the birth of a more intrusive Union in place of the more limited Communities, political and judicial contestation in the Member States has never completely ceased and has even intensified in recent years. The watchful peace of the Seventies and Eighties has been followed by an era in which open conflict between national supreme courts and the Court of Justice is a reality. It is no coincidence that between 2012 and 2020 three *ultra vires* declarations were issued in the Czech Republic, Denmark and Germany (Scarcello 2023: 115-

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135). It would therefore be all too easy, but analytically inadequate, to treat these cases as simply more of the same reaffirmation of a doctrine that already existed. Perhaps the legal argument had already been made, but the context in which it was made has changed dramatically.

The stakes became even higher as the rule of law crisis grew. In particular, in some Member States, governments convinced of the need to exercise tight control over the courts came to power and implemented far-reaching reforms that undermined the independence of several national judges (Pech-Scheppele 2017; Sadurski 2019; Drinóczi-Bień-Kacała 2021). There was (and still is) a backlash against measures considered to be incompatible with the values of the EU and, in particular, with the ideal of the rule of law. The case law of the Court of Justice since the *Portuguese judges* case is particularly relevant here as it clarified that some of these reforms of the judiciary, an area firmly in the hands of the Member States, could still be deemed incompatible with EU law.[XIII] Specifically, the Court asserted that the principle of effective judicial protection, as reaffirmed in the Member States' obligation to provide effective remedies under article 19(1) TEU read in the light of article 47 of the Charter, also requires the independence of national courts.

At that point, it was not just a matter of unease with the institutions' apparently nonchalant interpretation of the EU's powers, as manifested, for example, in the German Constitutional Court's criticism of the European Central Bank's PSPP programme in 2020,[XIV] but rather a disingenuous use of the already developed techniques of resistance to primacy to shield the judicial reforms against Luxembourg. With Pandora's box already opened, captured judges like the Polish Constitutional Tribunal could use the same arguments as in other *ultra vires* cases to challenge the primacy of EU law.[XV] The two contexts are not the same, of course, but on the surface the arguments were similar enough that Warsaw could simply claim that it was doing what Karlsruhe and others had done: defending the authority of the national constitution and of the national constitutional court against the trespass of the Court of Justice.

Although the case of Romania has been one of relative friendliness to EU law (Vrabie 2022 668-674) and although the attempted reforms of the judiciary have never matched the persistence and effectiveness of those achieved in other Member States, it is true that between 2017 and 2019 Romania has also seen proposals that can only be seen as a serious weakening of judicial independence: the dismissal of the Chief Prosecutor of the National

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Anti-Corruption Directorate, the creation of a new and much-criticised Special Prosecutor's Office for the Investigation of Judges and Prosecutors (SIOJ), the appointment of a new head of the Judicial Inspectorate to take disciplinary action against judges, the reform of the civil liability of judges, and a more general subordination of prosecutors to the Ministry of Justice (Curt 2022: 50-53; Moraru-Bercea 2022: 4-10).

AFJR was the result of a series of preliminary references from several Romanian courts concerning the compatibility with EU law of the appointment of the new Chief Inspector, the establishment and functioning of the SIOJ, and the new civil liability regime for judges. It also challenged the interpretation given to these reforms by the Constitutional Court (Moraru-Bercea 2022: 11-13), and pushed the Court of Justice, by then fully engaged in an ongoing conflict with captured judges and independence-undermining reforms, to state the incompatibility of (part of) these reforms with EU law as well as to reaffirm the primacy of EU law over the case law of national constitutional courts.[XVI] The Romanian Constitutional Court responded with decision 390/2021, stating that the Court of Justice's judgment exceeded its powers by giving national judges specific instructions to apply in the case at hand, and violated Romania's constitutional identity by interfering in the organisation of the country's judiciary. As a result, it instructed its judges not to apply *AFJR*.[XVII]

Some Romanian judges were instead held responsible for implementing *AFJR*, and the case was referred back to Luxembourg. In the *Eurobox*, *RS*, and *Lin* cases, the Court of Justice reaffirmed the primacy of EU law over the case law of national constitutional and in general high courts and declared the disciplinary measures taken against the referring judges illegal under EU law, specifically against judicial independence as an essential requirement of the principle of effective judicial protection (itself enshrined in article 19 TEU interpreted in the light of article 47 of the Charter).[XVIII] *Energotehnica* is a dwarf standing on the shoulders of these giants.

One can then understand why the referring court explicitly asked not only whether the primacy of EU law also applied to the case law of the Constitutional Court, but also whether disciplinary measures were compatible with EU law. The second question in particular is revealing: no judge would ask it if there were no painfully close precedents to worry about. The Italian Court of Cassation, for example, did not ask a similar question when it sought to have the Constitutional Court's interpretation of the national Basic Law declared incompatible with EU law in the *Randstad* case (Scarcello 2022).[XIX] However, the Romanian

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context called for caution, and the referring court was cautious, pre-emptively requesting that disciplinary measures for recognising the primacy of EU law over decision 102/2021 of the Romanian Constitutional Court be declared precluded.[XX] In *Lin* too the referring court, again the Court of Appeal of Brașov as in the present case, had cautiously requested to rule out the possibility of disciplinary measures.[XXI]

It is also understandable that the First Chamber's response to these questions was almost perfunctory, so much so that the Advocate General was not even asked for his opinion on the matter. The question had already been settled, not only at the dawn of supranational law in *Costa* or *Simmenthal*, but far more to the point in *AFJR, Eurobox*, *RS*, and *Lin*.

If anything, *Energotehnica*'s interest lies in the fact that it is not a rule of law case, it is not a frontal attack on institutions entrusted with stating the content of the law, i.e. *iurisdictio* by the governing institutions, i.e. *gubernaculum* (McIlwain 1947; Palombella 2009). One can certainly question the wisdom of giving the full force of *res iudicata* to decisions of courts with limited acceptance of the *audiatur et altera parte* principle, but there is little evidence that this has undermined the independence of those courts. It is a far more mundane question of the adjustments to national judicial systems needed to ensure the effectiveness of EU law. Although with phases of more or less pronounced deference towards national procedural law, such requests for adaptation have been around since *Rewe* and *Comet* case in the Seventies and have been a pillar of the Court's jurisprudence ever since.[XXII] Indeed, the duty to set aside the relevant national provisions on *res iudicata* to endure the primacy and *effet utile* of EU law had been clarified already in *Lucchini*.[XXIII]

Two questions therefore arise.

The first concerns the possible reaction of the Romanian Constitutional Court after *Energotehnica*. Although, as I have just said, the judgment concerns a relatively mundane and innocuous issue, the force of *res iudicata* in criminal proceedings, and could be tolerated with relative ease, the tense context of the post-rule of law crisis that I have just mentioned makes it possible to imagine that the accumulated tensions could lead to a counter-reaction. After *Eurobox*, the Romanian Constitutional Court felt the need to point out that the acceptance of absolute primacy would only be possible in Romania after a constitutional reform.[XXIV] This may not have been the most extreme of the reactions available, but it did publicly demonstrate the national court's unease with the overruling of its jurisprudence in

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Luxemburg. Although this point is, of course, mere speculation at the moment, the path to renewed hostility and perhaps an *ultra vires* declaration remains open.[XXV]

The second issue to be addressed is the impact of *Energotehnica* on the EU right to an effective judicial remedy. The requirement of national adaptations to ensure effective judicial protection of EU rights is, as already mentioned, nothing new in EU law. Since *Rewe* and especially the later *Johnston* case, it has been part of the everyday life of supranational law.[XXVI] On the other hand, the development of the rule of law jurisprudence since the *Portuguese judges* has further strengthened the importance of this prerogative under EU law. The result is that, by adding to the "ordinary" cases those dealing with attacks on the independence of the judiciary, effective judicial protection, as now codified in Article 47 of the Charter, has significantly enhanced its prominence under EU law. The latest report of the Fundamental Rights Agency, for example, clearly states that "the evidence in this chapter confirms that the right to a fair trial and to a remedy remains one of the most frequently invoked Charter rights".[XXVII] It thus remains one of the most cited provisions of the Charter (Gentile-Menzione 2022: 27–28). The lack of an autonomous system of administrative enforcement of EU law, what might be called the EU executive federalism (Schütze 2021: 347) forces the EU to rely on courts, the only actors who wear the double-hat of national and EU institutions, both in cases of ordinary, physiological contrasts between EU and national law, and in more pronounced and "pathological" contexts where judicial independence is under threat.[XXVIII] *Energotehnica* belongs to the former yet lies in the shadow of the latter.

Little by little, a sort of European "due process" is emerging, adding the progeny of *Portuguese judges* to that of *Rewe*. *Energotehnica* adds to this by emphasising the importance of the right to be heard in determining the judicial character of domestic proceedings in the eyes of EU law.

6. Conclusions

Energotehnica adds one more piece to the complex mosaic of procedural rights in the EU today, namely the right of the parties to be heard in administrative proceedings prior to criminal proceedings and the related civil action. The first question posed by the referring court is thus reformulated to read the relevant source of secondary law, Directive 89/331, in the light of Article 47 of the Charter rather than Article 31. In addition, the judgment clarifies

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that Directive 89/331 establishes only the principle of the employer's duty to ensure the safety of workers at work, leaving it to the Member States to determine the appropriate legal mechanisms and sanctions.

Perhaps most importantly, the case builds on previous jurisprudence developed in the context of the rule of law crisis to reaffirm the primacy of EU law over the judgments of national constitutional courts and the prohibition under EU law to punish judges who apply the interpretation of EU law established by the Court of Justice following the preliminary reference procedure.

As a result, the Romanian authorities will now have to face the problem of the force of administrative procedures in criminal proceedings. According to the national Constitutional Court, this force should have the full value of *res iudicata*, but under EU law it could only be so if the right of the parties to participate in the administrative procedure is guaranteed. The national follow-up may consist in a reform of the existing administrative procedure to allow for participation or in the judicial disapplication of the existing administrative procedural law. In the latter case, which is much quicker, the stage is set for the disapplication of another constitutional ruling. In this era of open constitutional conflict, the following reaction in Bucharest might be harsh.

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* Assistant Professor of Public Law, NOVA School of Law. Email: orlando.scarcello@novalaw.unl.pt. I would like to thank Serena Menzione and the anonymous reviewer for their comments. The usual disclaimer applies.

[I] Punishable according to articles 192 and 350 of the Romanian Criminal Code respectively.

[II] Romanian Constitutional Court decision no. 102/2021 of 17 February 2021.

[III] ECJ C-792/22 Opinion of AG Ramos, Parchetul de pe lângă Judecătoria Rupea and Others v. MG ECLI:EU:C:2024:302 at paras. 36-41.

[IV] "[W]hich constitutes a reaffirmation of the principle of effective judicial protection". See ibid at para. 45. The use of article 47 as a reaffirmation or embodiment of the principle of effective judicial protection followed immediately Lisbon's binding value of the Charter (Menzione 2023: 71–72).

[VV] Notably, by focusing not on the right to a safe working environment per se, but rather on the effectiveness of an ex post judicial remedy, the AG de facto reformulates the first preliminary question: it is not in the light of article 31 of the Charter that the Directive must be read, but rather in that of article 47. Romanian law might lack an effective judicial enforcement of the obligations established in the Directive rather than the transposition of its substantive provisions. As we will see, the Court will follow this suggestion.

[VI] ECJ C-792/22 Parchetul de pe lângă Judecătoria Rupea and Others v. MG ECLI:EU:C:2024:788 at paras. 40-43.

[VII] Ibid at paras. 44-50.

[VIII] Ibid at paras. 51-55.

[IX] Opinion of AG Ramos at para. 52.

[X] C-792/22, Parchetul at para. 58.

[XI] ECJ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 Asociația 'Forumul Judecătorilor din România ECLI:EU:C:2021:393; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 Euro Box Promotion and Others ECLI:EU:C:2021:1034; C-430/21 RS (Effet des arrêts d'une cour

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constitutionnelle) ECLI:EU:C:2022:99; C-107/23 PPU, Lin EU:C:2023:606.
[XII] C-792/22, Parchetul at para. 60-67.
[XIII] See inter alia ECJ C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas ECLI:EU:C:2018:117 at paras 29-37; C-284/16 Slowakische Republik v Achmea BV ECLI:EU:C:2018:158 at paras 32-33; C-216/18 PPU LM ECLI:EU:C:2018:586 at para 53; C-619/18 European Commission v Republic of Poland ECLI:EU:C:2019:531 at paras 54 and 57; C-824/18 A.B. and Others v Krajowa Rada Sądownictwa and Others (A.B.) ECLI:EU:C:2021:153 at paras 115 and 143-146; C-896/19 Repubblika v Il-Prim Ministru (Repubblika) ECLI:EU:C:2021:311 at paras 47-65; C-156/21 Hungary v European Parliament and Council of the European Union at paras 160-162.
[XIV] BVerfG, 2 BvR 859/15.
[XV] Ref. K-3/21, assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union.
[XVI] See AFJR at paras. 242-252.
[XVII] Romanian Constitutional Court, decision No. 390 of 8 June 2021 at paras. 71-78.
[XVIII] Euro Box Promotion and Others at paras. 250-262; RS at paras. 53-72 and 79-87, Lin at paras. 126-137.
[XIX] See Cass., Sez. Un., 18 Sept. 2020, n. 19598.
[XX] That disciplinary actions against judges cannot be taken when they are merely applying EU law as implemented by the Court of Justice had been well established in the midst of the rule of law crisis. See C 558/18 e C-563/18 Miasto Łowicz and Prokurator Generalny EU:C:2020:234 at para. 59; C-564/19 IS EU:C:2021:949 at para. 91.
[XXI] See Lin, third question at para. 44.
[XXII] ECJ C-33/76 Rewe v. Landwirtschaftskammer Saarland ECLI:EU:C:1976:188; C-45/76 Comet BV v. Produktschap voor Siergewassen ECLI:EU:C:1976:191. See the reconstruction of this foundational era in Menzione (n 4) 59–71.
[XXIII] ECJ C-119/05 Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA ECLI:EU:C:2007:434.
[XXIV] 'Comunicat de presa – Curtea Constituțională a României' (23 December 2021) <https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/>.
[XXV] The argument would likely be that, once more, the Court of Justice has adjudicated on a topic, the organization of a country's judiciary, which lies outside the scope of EU law. It would resemble the arguments used by the Polish government and Constitutional Tribunal in 2021 in the (in)famous case K-3/21.
[XXVI] ECJ C-222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary ECLI:EU:C:1986:206 at paras 13-21.
[XXVII] 'Fundamental Rights Report 2024' (European Union Agency for Fundamental Rights 2024) 120.
[XXVIII] Administrative authorities are technically under an obligation to apply directly effective EU norms over national conflicting ones as well. See C-103/88 Fratelli Costanzo ECLI:EU:C:1989:256. However, there is little evidence that this obligation is actually enforced. See de Witte (2021: 195-196).

References

- Arena Amedeo, 2019, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL' in *European Journal of International Law* 30: 1017.
- Bogdandy Armin and Schill Stephan, 2011, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' in *Common Market Law Review* 48: 1417.
- Claes Monica, 2015, 'The Primacy of EU Law in European and National Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law*, Oxford University Press, Oxford.
- Curt Cynthia Carmen, 2022, 'Romanian Commitment to Independence of Justice and Anticorruption Reforms under CVM and Rule of Law Incentives. Some Considerations on Case-Law of the Constitutional Court' in *Transylvanian Review of Administrative Sciences* 18: 48.
- de Witte Bruno, 2021 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, Oxford University Press, Oxford.
- Drinóczi Timea and Bień-Kacała Agnieszka, 2021, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*, Routledge, Abingdon.
- Fritz Vera, 2015, 'The First Member State Rebellion? The European Court of Justice and the Negotiations of the "Luxembourg Protocol" of 1971: The ECJ and the Luxembourg Protocol of 1971' in *European Law Journal* 21: 680.

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- Gentile Giulia and Menzione Serena, 2022, 'Article 47 of the EU Charter and Effective Judicial Protection, Volume 1Searching for the Pieces of the EU Justice Puzzle: Articles 47, 48, 49 and 50 of the EU Charter of Fundamental Rights' in Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective*, Hart Publishing, Oxford.
- Isiksel Turkuler, 2016, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*, Oxford University Press, Oxford.
- McIlwain Charles, 1947, *Constitutionalism: Ancient and Modern*, Liberty Fund, Ithaca.
- Menzione Serena, 2023, 'Article 19 TEU as the Cement of the EU Shared Judicial Space: An Analysis of the CJEU's Case-Law', KU Leuven Faculteit Rechtsgeleerdheid, Leuven.
- Moraru Madalina and Bercea Raluca, 2022, '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* 18: 82.
- Palombella Gianluigi, 2009, 'The Rule of Law and Its Core' in Jan Klabbers and Gianluigi Palombella (eds), *Relocating the Rule of Law*, Hart Publishing, Oxford.
- Pech Laurent and Scheppele Kim Lane, 2017, 'Illiberalism Within: Rule of Law Backsliding in the EU' in *Cambridge Yearbook of European Legal Studies* 19: 3.
- Phelan William, 2019, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period*, Cambridge University Press, Cambridge.
- Rasmussen Morten, 2014, 'Revolutionizing European Law: A History of the Van Gend En Loos Judgment' in *International Journal of Constitutional Law* 12, 136.
- Sadurski Wojciech, 2019, *Poland's Constitutional Breakdown*, Oxford University Press, Oxford.
- Scarcello Orlando, 2022, 'Effective Judicial Protection and Procedural Autonomy beyond Rule of Law Judgments: Randstad Italia' in *Common Market Law Review* 59: 1445.
- Scarcello Orlando, 2023, *Radical Constitutional Pluralism in Europe*, Routledge, Abindgon.
- Schütze Robert, 2021, *European Union Law*, Oxford University Press, Oxford.
- Stein Eric, 1981, 'Lawyers, Judges, and the Making of a Transnational Constitution' in *American Journal of International Law* 75: 1.
- Vrabie Mihaela, 2022, 'Romania' in Stefan Griller, Lina Papadopoulou and Roman Puff (eds), *National Constitutions and EU Integration*, Hart Publishing, Oxford.
- Weiler Joseph, 1991, 'The Transformation of Europe' in 10 *Yale Law Journal* 100, 2403.

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