

EMÓD VERESS*

Reform of the Romanian Judiciary and the Cooperation and Verification Mechanism – Considering the Practice of the Romanian Constitutional Court

- **ABSTRACT:** *Romania, an EU Member State since 1 January 2007 was subject to a Mechanism for Cooperation and Verification following the rules set forth by the European Commission’s Decision 2006/928/EC. This specific rule of law mechanism covered the functioning of the judiciary and the fight against corruption. Any method by which a Member State is monitored based on vague, subjective, and imprecisely measurable criteria is likely to cause political friction and scientific disputes. In the case of Romanian justice reform, there were more than simply disputes. The Court of Justice of the European Union (CJEU) and Romanian Constitutional Court interpreted the situation differently. Beginning from an element of justice reform in Romania – the establishment of a special prosecutorial section to investigate crimes committed by judges and prosecutors – this study proposes to analyse these differences from a strictly scientific viewpoint, while raising some fundamental issues of European integration: the transfer of sovereignty, the concept of the rule of law, constitutional identity, and the competition of the Union’s regulatory power with that of Member States, as reflected by this fundamental disagreement between the CJEU and the Constitutional Court of Romania.*
- **KEYWORDS:** rule of law, judicial independence, trust in the judiciary, Commission Decision 2006/928/EC establishing a Mechanism for Cooperation and Verification, Constitutional Court of Romania

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1. The Mechanism for Cooperation and Verification – a brief overview

The ‘Mechanism for Cooperation and Verification’ (CVM) was a specific rule of law instrument designed for Romania and Bulgaria, which was repealed in 2023. Though no longer applicable, legal basis is still present in the primary legislation of the EU: the Treaty of Accession of the Republic of Bulgaria and Romania¹ (signed on 31 March 2005). In a general and vague formulation, the Treaty states in Article 37:

If Bulgaria or Romania fail to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative, adopt European regulations or decisions establishing appropriate measures.

Article 37 also still contains some criteria for the measures which could be instituted under the CVM: a) proportionality; b) measures which least disturb the functioning of the internal market shall be prioritised; c) such safeguard measures shall not be invoked as a means of arbitrary discrimination or disguised restrictions on trade between Member States; d) the measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the relevant commitment is implemented; e) the Commission may adapt the measures as appropriate in response to the progress made by the new Member State concerned in fulfilling its commitments.²

A fundamental question has been raised about the temporary nature of such measures. Primary EU law states that the Commission could, ‘until the end of a period of up to three years after accession,’ adopt the appropriate measures. Did this mean that the Commission had a three-year period to introduce the measure?

1 Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union. OJ L 157, 21.6.2005, p. 11–395.

2 Moreover, the Commission had to inform the Council in good time before revoking the European regulations and decisions establishing the safeguard measures, and it had to duly consider any observations of the Council in this respect.

Or, was the maximum duration of the measure (also) three years from the date of accession (1 January 2007)? The answer is provided by Article 37, which states that the measures ‘may however be applied beyond the period specified’ – that of the initial three years – ‘as long as the relevant commitments have not been fulfilled.’ Consequently, the Commission had three years to implement the measure, however, this could be maintained beyond the three-year period. This explains why the CVM remained active and in use until 8 October 2023³ for a “mere” 16 years after accession. However, this also means that the Commission considered for a long time that Romania had yet to fulfil the commitments it had undertaken one and a half decades ago. Finally, it also most certainly means that at the moment of accession Romania and Bulgaria ‘did not entirely fulfil the accession criteria.’⁴

Based on the analysed general legal text and on the commitments undertaken by Romania in the Annex IX to the Accession Treaty (related to the problems “not solved” during the negotiations),⁵ the CVM was introduced by means of Decision 2006/928/EC⁶ to address specific benchmarks in the areas of judicial reform and the fight against corruption.⁷ Therefore, the two interconnected fields where the Commission considered that further supervision was required were the judiciary and corruption. That this was a rule of law instrument, is clear from the preamble, which stated that ‘the European Union is founded on the rule of law.’ The area of freedom, security and justice and the internal market requires mutual confidence ‘that the administrative and judicial decisions and practices of all Member States fully respect the rule of law.’⁸ The primary rule of law criterion is the existence of an impartial, independent, and effective judicial and administrative system properly equipped, *inter alia*, to combat corruption.

The content of the former CVM may be summarised as follows: 1) Romania was to submit reports by 31 March each year and for the first time by 31 March 2007 to the Commission on the progress made in addressing each of the benchmarks provided in the Annex of Decision 2006/929/EC. 2) The Commission could,

3 See Commission Decision (EU) 2023/1786 of 15 September 2023 repealing Decision 2006/928/EC 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 C/2023/5653. OJ L 229, 18.9.2023, p. 94–96. In force from 8 October 2023.

4 Vassileva, 2020, p. 742 and also Carp, 2014, p. 6.

5 Further, Art. 39(2) of the ‘Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union’ provided that the date of accession can be postponed by one year until January 1, 2008, in the case of Romania (separately from Bulgaria), if Romania does not comply with the requirements of Annex IX.

6 Commission Decision 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 (notified under document number C(2006) 6569). OJ L 354, 14.12.2006, p. 56–57. See also the Commission Decision (EU) 2023/1786 of 15 September 2023 repealing Decision 2006/928/EC.

7 For Bulgaria, Decision 2006/929/EC.

8 Recital 1 and 2 of the Decision 2006/928/EC.

at any time, provide technical assistance through different activities, or gather and exchange information on the benchmarks. The Commission could, at any time, organise expert missions to Romania. Romanian authorities would provide the necessary support in this context.⁹ 3) The Commission would communicate to the European Parliament and the Council, its own comments and findings on Romania's report for the first time in June 2007. Thereafter, the Commission would report again, as and when required, at least every six months.¹⁰

Beginning in 2007, the Commission drafted two types of reports: a progress report and a technical report. For Romania, the last CVM report was published in 2022.¹¹

The articles of the CVM decisions did not contain a sanction mechanism, but the recitals of the preamble did.

If Romania should fail to address the benchmarks adequately, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Romanian judgements, and judicial decisions, such as European arrest warrants.¹²

Moreover, the decision would not preclude the adoption of safeguard measures, 'at any time.'¹³ The duration of the measures could be indefinite: these would only be repealed when all benchmarks had been satisfactorily fulfilled,¹⁴ therefore, it was up to the Commission to decide when to end the CVM, which it finally committed to doing on 15 September 2023.

Thus, a rule of law instrument, a mandatory tool of oversight and control, was enacted specifically for Romania and Bulgaria, with a targeted, focused scope of investigation. From a policy viewpoint, the CVM was 'a tool to maintain the reform momentum in the two countries and prevent reversal of the rule of law reforms enacted during the EU accession negotiations.'¹⁵ It can be perceived as an instrument of anticipated trust,¹⁶ essentially implying a favour that made accession to the EU possible for Romania and Bulgaria. Alternatively, it can be interpreted as undisguised mistrust (which continues even today in the form of non-admittance into the Schengen area of these two countries). The states which had acceded to

9 Art. 1.

10 Art. 2.

11 COM(2022) 664 final.

12 Recital 7.

13 Recital 8, in a formulation contrary to the primary EU law (see above the analysis of Art. 37 from the Accession Treaty).

14 Recital 9.

15 Vachudova and Spendzharova, 2012, p. 2.

16 The favour went both ways: Romania and Bulgaria opened their markets.

the EU in 2004 were not subjected to such a mechanism; unlike the 2004 accession states, Romania and Bulgaria were fast-tracked into the EU at the cost of having their sovereignty restricted by the intensive monitoring through the CVM.

Regarding its content, the CVM practically overlapped with the current Rule of Law reports introduced in 2020; the alignment of the two instruments appeared increasingly necessary. The solution was discontinuing the CVM and applying a new, less-discriminatory system for all Member States, which later occurred. Věra Jourová, Vice-President of the European Commission announced in July 2023 that the Commission intended to discontinue the CVM for Romania and Bulgaria in the autumn of 2023, however, the monitoring of progress in the field of justice would continue, now exclusively through the EU's Rule of Law Mechanism. Thus, the CVM, only apparently relegated to legal history lives on. Moreover, that the CVM is repealed (in name at least) does not also mean that the expectations it was meant to uphold have been met.¹⁷ Rather, this means that the Commission considers it unjustified to maintain a tool parallel to the new Rule of Law Mechanism. The transformation of the process itself does not preclude an assessment of the reform and state of the Romanian justice system under the new mechanism.

Decision 2006/928/EC contained the requirements raised in relation to Romania and provided a framework for monitoring: 1. Ensuring a more transparent and efficient judicial process, notably by enhancing the capacity and accountability of the Superior Council of Magistracy (SCM); reporting on and monitoring the impact of the new codes of civil and penal procedure. 2. Establishing, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities, and potential conflicts of interest and issuing mandatory decisions based on which dissuasive sanctions can be applied. 3. Building on progress already made, continuing to conduct professional, non-partisan investigations into allegations of high-level corruption. 4. Adopting further measures to prevent and fight against corruption, in particular within the local government.¹⁸ These benchmarks were interconnected. In its first 2007 CVM report, the Commission stated:¹⁹

17 See Recital (10) of Commission Decision (EU) 2023/1786: 'The evolution of the Union's rule of law landscape has given a new context for the Commission's cooperation with Romania. In particular, the annual Rule of Law cycle, launched by the Commission Communication of July 2019 on "Strengthening the rule of law within the Union" (10) and in the "Political Guidelines of President von der Leyen," provides an ongoing framework with a long-term perspective to accompany sustainable reform, with Romania as with other Member States. As part of that cycle, the Commission's annual Rule of Law Report, which since 2022 also includes recommendations to the Member States, stimulates a positive direction on rule of law issues, deepening dialogue and joint awareness and preventing challenges from emerging or deepening. It will enable the monitoring of the implementation of Romania's agreed reforms.'

18 The benchmarks for Bulgaria are different, adapted to the specificity of the country.

19 Key findings of the progress report on the Cooperation and Verification Mechanism with Bulgaria, MEMO/07/261, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_07_261.

[I]t is important to see these benchmarks as representing more than a checklist of individual actions that can be ticked off one by one. They are all interlinked. Progress on one has an impact on others. Each benchmark is a building block in the construction of an independent, impartial judicial and administrative system. Creating and sustaining such a system is a long term process. It involves fundamental changes of a systemic dimension. The benchmarks cannot therefore be taken in isolation. They need to be seen together as part of a broad reform of the judicial system and fight against corruption for which a long term political commitment is needed. Greater evidence of implementation on the ground is needed in order to demonstrate that change is irreversible.

The Romanian Government (Cabinet) issued its own Decision No. 1346/2007 on the approval of the Action Plan for the fulfilment of conditions set forth under the CVM, for progress made by Romania in the area of judicial reform and the fight against corruption.²⁰ This Action Plan included the Romanian side's commitment to programmatically reforming the judiciary. To achieve the objectives set out in the European Commission's monitoring reports and in the reports of the peer review missions conducted by experts from the Member States, areas where these reports indicated shortcomings were considered when drawing up the plan. Thus, the primary lines of action for the fulfilment of the first benchmark were the adoption of new codes of civil and criminal procedures, unification of case law, strengthening the institutional capacity of the SCM and making its members more accountable, increasing the transparency of the judicial process, improving human resources policy, and increasing the efficiency of the judicial system by improving infrastructure and court management. Romania took the CVM seriously; this was emphasised by the fact that a former Prosecutor General of the Anti-Corruption Prosecutor's Office, in his memoirs, stated, that the secret services had requested the wiretapping of certain individuals be authorised, 'on the grounds that the persons proposed to be monitored were making negative statements about Romania in the context of the EU verification mechanism, which would have had European repercussions.'²¹

Beginning in 2007, the CVM constituted an indicator of Romania's incessantly disputed judiciary reforms. In the following section, I specifically focus on how the CVM was interpreted in the practice of the Constitutional Court of Romania, as such an interpretation is paramount in predicting future outcomes in the context of the Rule of Law Mechanism.

20 Published in the Official Journal of Romania no. 765 of 12 November 2007.

21 Morar, 2022, p. 611.

2. The CVM tested by the Romanian Constitutional Court

The Constitutional Court dealt several times with the CVM in the context of Romanian judicial reform. Unfortunately, the analysis of the Romanian Constitutional Court's position is largely absent from academic discourse, although the problems raised are fundamental to European integration. A sharp scientific picture is not possible without a contrasting argument, therefore, I examined the problem by adopting a somewhat unorthodox approach, not from the perspective of the CJEU but from that of the Romanian Constitutional Court. I concentrated on specific cases involving both the CJEU and the Constitutional Court of Romania. The issue at hand is the establishment of the Section for Investigating Criminal Offences within the Judiciary (SIIJ as abbreviated in Romanian) in 2019, however, the analysis will be broader, tackling the essence of the CVM, transfer of sovereignty, and the rule of law as a concept. Many attempts to reform the judiciary have been assessed along political fault lines as being in accordance with or in violation of the rule of law principle.²²

The Constitutional Court was called upon to decide on the objection of the unconstitutionality of Articles 88¹–88⁹ of Act No. 304/2004 on judicial organisation (introduced by Act No. 207/2018, amending and supplementing Act No. 304/2004), and of Government Emergency Ordinance No. 90/2018 on some measures for the operationalisation of the SIIJ.²³ The case before a Court of Appeal, which led to the objection of unconstitutionality, concerned the annulment of Order No. 252/2018 on the organisation and operation of the SIIJ within the structure of the Public Prosecutor's Office of the High Court of Cassation and Justice (PÎCCJ), the suspension of the implementation of this administrative instrument until the final resolution of the case, and the referral to the Constitutional Court of the objection of unconstitutionality invoked. The SIIJ had been granted exclusive jurisdiction to prosecute offences committed by judges and prosecutors, including military judges and prosecutors, and members of the SCM. Government Emergency Ordinance No. 90/2018 was adopted in reaction to the fact that the competent authority – the SCM – had not finalised the procedure for the operationalisation of the SIIJ, and the Government (the Cabinet) had instituted a procedure derogating from the rules in force, on a provisional basis, aimed at the temporary appointment of the Chief Prosecutor, the Deputy Chief Prosecutor, and at least one-third of the SIIJ's prosecutors. The adoption of these measures aimed to make the SIIJ operational within the time limit set by the norms that established this separate prosecution body.

22 Tănăsescu, 2019, pp. 177–191; Moraru and Bercea, 2022, pp. 85–91; Dumbrava, 2021, pp. 437–452; Rizcallah and Leloup, 2021, pp. 389–395. For the fuzzy concept of the rule of law, see Himma, 2013, pp. 153–173; Fallon, 1997, pp. 1–56; Müller, 2015, pp. 141–160.

23 CC decision No. 390/2021.

Based on the objection of unconstitutionality, the authors referred to Opinion No. 934 of 13 July 2018 CPL-PI(2018)007, confirmed on 20 October 2018 in which the European Commission for Democracy through the Law of the Council of Europe (the Venice Commission) suggested reconsidering the establishment of a special section for the investigation of magistrates (judges and prosecutors are both included in this category under Romanian law). As an alternative, the simultaneous use of specialised prosecutors with effective procedural safeguards was proposed. The authors of the objection of unconstitutionality argued that the establishment of the SIIJ within the PÎCCJ may allow the redirection of dozens of cases of grand corruption, pending before the National Anticorruption Directorate. The creation of this section could also undermine the use of specialised prosecutors (for corruption, money laundering, influence peddling) and would not be proportionate to any possible aim.²⁴

The authors of the objection of unconstitutionality indicated that thousands of complaints against magistrates are registered every year in which a minimum investigation must be conducted. The only fifteen prosecutors in the new section would be overwhelmed by the workload. The jurisdiction of the SIIJ was proposed to be determined according to the persons under investigation, covering both magistrates and anyone else investigated along with them in these cases. In addition, prosecutors in this section would have to deal with any type of crime as long as it was committed by a person over whom the SIIJ had jurisdiction. The single body in Bucharest, where the prosecutors would work, would have meant that the magistrates under investigation would have to make a much greater effort than other categories of persons: travelling long distances for hearings during working hours, to another locality, and incurring excessive expenses, which could even impact the proper organisation of the defence of any magistrate being investigated. Moreover, the method of appointing the Chief Prosecutor and 14 other prosecutors, for whom the interview accounted for 60% of the total grades which could be awarded, would not provide sufficient guarantees for an impartial selection process, which is also likely to be reflected in the work of this section.

Further, the authors of the objection of unconstitutionality indicated that according to Article 11 of the Constitution, the performance of international obligations resulting from a treaty in force for the Romanian State is incumbent on all state authorities, including the Constitutional Court. In this respect, it was considered that the recommendations made by the Venice Commission are useful to the legislature in the parliamentary procedure for drafting or amending the legislative

24 However, in addition to the spectacular results of Romania's fight against corruption, this has raised several rule of law concerns. See, for example, Clark, 2016, pp. 3–27. It is noteworthy that the SIIJ was established to end the abusive criminal prosecutions, abusive interceptions and the blatant blackmail demonstrated by the National Anticorruption Directorate towards the judges who had to solve cases in which the Directorate was “interested.”

framework and the Constitutional Court in conducting a review of the conformity of the legislative act adopted by the Parliament with the fundamental law.

It is interesting that based on the grounds of their criticisms of unconstitutionality, the authors of the objection cited several paragraphs from the 2017 and 2018 CVM progress reports on Romania, and invoked the reasons of Constitutional Court Decision No. 2 of 11 January 2012 according to which ‘membership of the European Union imposes on the Romanian State the obligation to apply this mechanism and to follow up the recommendations established in this framework.’

The Court of Appeal of Pitesti – Second Civil, Administrative and Fiscal Chamber stated that, with regard to the establishment, by the legal provisions which are the subject of the criticisms of unconstitutionality, of the SIIJ, the CVM reports identified several vulnerabilities, and thus, several recommendations were made to remedy the shortcomings identified, including the immediate suspension of the implementation of the laws on the judiciary as modified, and the subsequent emergency ordinances, and the review of these regulations, considering the recommendations made under the CVM. Therefore, in the court’s view, the adoption of these legislative amendments was contrary to those recommendations considering the purpose of the CVM: to comply with the benchmarks guaranteeing the rule of law and accession to the European legal order. Consequently, this approach was considered an infringement of the constitutional provisions.

A fundamental criticism was that the establishment of the SIIJ affected the jurisdiction of the National Anticorruption Directorate in the sense of reducing its jurisdiction to investigate acts of corruption, and offences related to, or in connection with acts of corruption committed by judges, prosecutors, and members of the SCM, as well as those committed by other persons together with magistrates, a reduction of jurisdiction which, in the opinion of the authors of the objection of unconstitutionality, violated the recommendations of the European Commission contained in the CVM reports and, implicitly, the constitutional provisions on the primacy of European law. However, this complaint was already considered by the Constitutional Court in Decision No. 33/2018 (in the framework of *a priori* control before the promulgation of the new norms) and was established as unfounded. The Constitutional Court stated that ‘the legislator’s choice to establish a new prosecutorial structure – a section within the Public Prosecutor’s Office – corresponds to its constitutional power to legislate in the field of the organisation of the judicial system.’ The Court also found that the constitutional rules which provide for the priority of application of the provisions of the European Union’s founding treaties, as well as of other binding Community legislation, over contrary provisions of domestic law, do not have any bearing on the matter under review, ‘since no binding European act has been found to support the criticisms made.’

The Constitutional Court was previously called upon to rule separately on Government Emergency Ordinance No. 90/2018, which was criticised before the Constitutional Court (Decision No. 137/2019) during the adoption of the approving

act by Parliament. In this procedural framework, a request for a preliminary ruling was submitted, seeking recognition of the binding nature of the recommendations contained in the CVM Report of 13 November 2018, the immediate suspension of the implementation of the laws on the judiciary and the subsequent emergency ordinances, and the revision of the laws that established the SIIJ. Interestingly, the Constitutional Court dismissed this request as inadmissible, as the arguments proposed by the authors of the request for preliminary questions to the CJEU concerned the establishment of the SIIJ and were not related to the subject matter of the case in which the application was made, which concerned the review of the constitutionality of certain legal provisions relating to the operationalisation of this prosecutorial body and not to its establishment.

On this occasion, the Constitutional Court considered it necessary to determine the nature of the recommendations contained in the CVM reports drawn up pursuant to European Commission Decision 2006/928/EC of 13 December 2006. Analysing the content of the decision, the Court found that the instrument of European law contains a series of reference objectives (benchmarks) listed in its annex, outlining a series of general obligations for the Romanian State. However, the Court found that although binding on the Romanian State, Decision 2006/928/EC has no constitutional relevance since it neither bridges a gap in the national fundamental law nor develops a constitutional rule. Even less, could the constitutional relevance of the reports issued under the CVM be accepted. In this case, the documents did not fulfil the condition laid down in Article 148(2) of the Constitution, according to which only ‘the provisions of the Treaties establishing the European Union, as well as the other binding Community regulations have priority over contrary provisions in domestic laws, subject to the provisions of the Act of Accession.’ Thus, although they are documents adopted based on a decision, the reports contain mere recommendations, and it is well known that, by means of a recommendation, institutions make their views known and suggest courses of action without imposing any legal obligations on the addressee.

The Constitutional Court found that it is within the exclusive competence of the Member State to determine the organisation, functioning, and delimitation of powers between the various bodies of the prosecution authorities, since the fundamental law of the State – the Constitution – is the expression of the will of the people, which means that it cannot lose its binding force merely because of a discrepancy between its provisions and those of the EU norms, and accession to the EU cannot affect the supremacy of the Constitution over the entire domestic legal order.

Returning to Decision No. 390/2021, the primary subject of our analysis, in this frame it was also requested that the CJEU be asked to render a preliminary ruling on the following questions:

1. Must the [CVM] established by [Decision 2006/928] be regarded as an act of an institution of the Union, within the meaning of Article 267 TFEU, which is amenable to interpretation by the [Court]?
2. Do the terms, nature and duration of the [CVM] established by [Decision 2006/928] fall within the scope of the [Treaty of Accession]? Are the requirements set out in the reports drawn up in the context of that mechanism binding on the Romanian State?
3. Must Article 2 [TEU] be interpreted as meaning that the Member States are obliged to comply with the criteria of the rule of law, also requested in the reports drawn up in the context of the [CVM] established by [Decision 2006/928], in the event of the creation, as a matter of urgency, of a section of the prosecutor's office charged with the exclusive investigation of offences committed by members of the judiciary, which gives rise to particular concerns as regards the fight against corruption and may be used as an additional means of intimidating members of the judiciary and putting pressure on them?
4. Must the second subparagraph of Article 19(1) [TEU] be interpreted as meaning that the Member States are obliged to adopt the necessary measures to ensure effective legal protection in the fields covered by EU law through the removal of any risk of political influence on criminal proceedings before certain judges, [in] the event of the creation, as a matter of urgency, of a section of the prosecutor's office charged with the exclusive investigation of offences committed by members of the judiciary, which gives rise to particular concerns as regards the fight against corruption and may be used as an additional means of intimidating members of the judiciary and putting pressure on them?

The Court of Appeal of Pitesti referred the case to the Constitutional Court and also to the CJEU, which registered it under case number C-355/19. On 18 May 2021 the CJEU (Grand Chamber) delivered its judgement in Case C-355/19, joined with Cases C-83/19, C-127/19, C-195/19, C-291/19 and C-397/19²⁵ and stated the following:²⁶

1. Commission Decision 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, and the reports drawn up by the Commission on the basis of that decision, constitute acts of an EU

²⁵ Judgement of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19) ECLI:EU:C:2021:393.

²⁶ For a general analysis of the CJEU decision see Moraru and Bercea, 2022, pp. 82–113.

institution, which are amenable to interpretation by the Court under Article 267 TFEU.

2. Articles 2, 37 and 38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, read in conjunction with Articles 2 and 49 TEU, must be interpreted as meaning that as regards its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union. That decision is binding in its entirety on Romania, as long as it has not been repealed. The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.

3. The legislation governing the organisation of justice in Romania, such as that relating to the [...] establishment of a section of the Public Prosecutor's Office for the investigation of offences committed within the judicial system, falls within the scope of Decision 2006/928, with the result that it must comply with the requirements arising from EU law and, in particular, from the value of the rule of law, set out in Article 2 TEU.

[...]

5. Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, where the creation of such a section

- is not justified by objective and verifiable requirements relating to the sound administration of justice, and

- is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising

from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.

[...]

7. The principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU.

During the proceedings before the Constitutional Court, the representative of the Public Prosecutor's Office requested that the Constitutional Court consider the decision of the CJEU, which was seen as an element that could lead to a change in case law in terms of a finding that Decision 2006/928/EC had an impact on the review of constitutionality, and therefore, a violation of Article 148 of the Constitution.

However, the Constitutional Court, regarding the incidence of Decision 2006/928/EC, established that

[...] the Member States of the European Union have understood to place the *acquis communautaire* – the constituent treaties of the European Union and the regulations derived from them – in an intermediate position between the Constitution and other laws, when it comes to binding European legislative acts.²⁷

Analysing Decision 2006/928 of the European Commission considering Article 148(2) of the Fundamental Law, the Romanian Constitutional Court held that, 'by acceding to the legal order of the European Union, Romania accepted that, in the areas in which exclusive competence belongs to the European Union, [...] the implementation of the obligations arising therefrom is subject to the rules of the Union [...]' and that, 'by virtue of the compliance clause contained in the very text of Article 148 of the Constitution, Romania may not adopt a legislative act contrary to the obligations to which it has committed itself as a Member State.'

Simultaneously, the Court noted that 'all of the above certainly knows a constitutional limit, expressed in what the Court has called national constitutional identity.'²⁸ The Constitutional Court ruled that Decision 2006/928/EC, an act of European law binding on the Romanian State, is also devoid of constitutional

²⁷ See CC Decisions No. 148/2003 and 80/2014.

²⁸ CC Decision No. 104/2018.

relevance. The Court concluded that even if these acts and documents (Decision 2006/928/EC and the CVM reports) complied with the conditions of clarity, precision, and unequivocalness, they could not constitute rules which were within the level of constitutional relevance required for a constitutionality review to be conducted by reference to them. Since the cumulative conditions laid down in the settled case law of the Constitutional Court have not been met, the Court held that they could not provide a basis for possible infringement by the national law of the Constitution as the sole direct rule of reference in the context of constitutionality review.²⁹

The CJEU has ruled as follows: ‘Decision 2006/928 is addressed to all Member States, which includes Romania as from its accession. That decision is, therefore, binding in its entirety on that Member State as from its accession to the European Union.’ The Court also stated that the decision ‘imposes on Romania the obligation to address the benchmarks set out in its Annex and to report each year to the Commission, pursuant to the first paragraph of Article 1 thereof, on the progress made in that regard.’ In particular, the benchmarks, the CJEU considered:

[...] that they were defined, [...] on the basis of the deficiencies established by the Commission before Romania’s accession to the European Union in the areas of, inter alia, judicial reforms and the fight against corruption, and that they seek to ensure that that Member State complies with the value of the rule of law set out in Article 2 TEU, which is condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State.

The Court concluded in consequence:

Thus, as the Commission noted in particular, and as is apparent from recitals 4 and 6 of Decision 2006/928, the purpose of establishing the CVM and setting the benchmarks was to complete Romania’s accession to the European Union, in order to remedy the deficiencies identified by the Commission in those areas prior to that accession. It follows that the benchmarks are binding on Romania, with the result that it is subject to the specific obligation to address those benchmarks and to take appropriate measures to meet them as soon as possible. Similarly, Romania is required to refrain from implementing any measure which could jeopardise those benchmarks being met.³⁰ In this light, according to the Court, Decision 2006/928 (its legal nature, content and temporal effects) falls within the scope of the Treaty

29 CC Decision No. 137/2019.

30 Paras. 171, 172.

of Accession. The decision is binding in its entirety on Romania, as long as it has not been repealed. „The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.³¹

However, this does not solve the problem posed by the legal nature of reports. The CJEU also interpreted the effects of the reports issued by the commission and considered the following:

[...] true that the reports drawn up on the basis of Decision 2006/928 are, in accordance with the first paragraph of Article 2 of that decision, not addressed to Romania but to the Parliament and the Council. Furthermore, although those reports include an analysis of the situation in Romania and formulate requirements with regard to that Member State, the conclusions set out therein address ‘recommendations’ to Romania on the basis of those requirements. [...] The reports are intended to analyse and evaluate Romania’s progress in the light of the benchmarks which Romania must address. As regards, in particular, the recommendations in those reports, they are, as the Commission also observed, formulated with a view to those benchmarks being met and in order to guide that Member State’s reforms in that connection.³²

Consequently,

[...] in order to comply with the benchmarks set out in the Annex to Decision 2006/928, Romania must take due account of the requirements and recommendations formulated in the reports drawn up by the Commission under that decision. In particular, Romania cannot adopt or maintain measures in the areas covered by the benchmarks which could jeopardise the result prescribed by those requirements and recommendations. Where the Commission expresses doubts, in such a report, as to whether a national measure is compatible

31 Para. 178.

32 Paras. 174, 175.

with one of the benchmarks, it is for Romania to cooperate in good faith with the Commission with a view to overcoming the difficulties encountered with regard to meeting the benchmarks, while at the same time fully complying with those benchmarks and the provisions of the Treaties.³³

Therefore, according to the Constitutional Court of Romania, the CJEU found that these are acts of the European Commission addressed to the European Parliament and the European Council and not to Romania; they formulate requirements with regard to Romania, the conclusions contained in them addressing “recommendations,” which the State will consider by virtue of the principle of loyal cooperation.

These recommendations arise from doubts expressed by the European Commission regarding the compatibility of a national measure with one of the benchmarks,³⁴ and the report provides an obligation to cooperate. Thus, the Constitutional Court considered that the CJEU did not deem the reports drawn up by the Commission pursuant to Decision 2006/928 to be binding.

The fact that Romania,

[...] is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports

provided for in Point 2 of the operative part of the Decision of 18 May 2021 means that the Romanian State, through its competent authorities, is obliged to cooperate institutionally with the European Commission and adopt measures compatible with the objectives referred to in Decision 2006/928. The Constitutional Court also held that the CJEU did not find that the general obligation for loyal cooperation had not been fulfilled.

From the perspective of constitutional review, the Constitutional Court found that the CJEU’s judgement did not introduce any new elements with regard to the legal effects of Decision 2006/928 and the CVM reports drawn up by the Commission on its basis, establishing, as the Romanian Constitutional Court had previously done, the binding nature of Decision 2006/928 and the nature of a recommendation for the CVM reports.

Therefore, the Constitutional Court upheld its previous case law and found that the only act which, by virtue of its binding nature, could have constituted

33 Para. 177.

34 Para. 177.

a norm subject to review of constitutionality by reference to Article 148 of the Constitution – Decision 2006/928 – by virtue of the provisions and objectives it imposes, has no constitutional relevance, since it neither bridges a gap in the Fundamental Law nor develops its rules by establishing a higher standard of protection (only human rights protection may derogate ‘upwards’ from the standards of the Romanian Constitution).³⁵

3. The rule of law “test”

■ 3.1. Overview

The regulation governing the organisation of justice in Romania, such as those relating to the establishment of a section of the Public Prosecutor’s Office for the investigation of offences committed within the judicial system, ‘falls within the scope of Decision 2006/928, with the result that it must comply with the requirements arising from EU law and, in particular, from the value of the rule of law, set out in Article 2 of the TEU.’³⁶

Explaining these requirements, the CJEU ruled that Decision 2006/928 must be interpreted as meaning that it is

[...] precluding national legislation providing for the creation of a specialised section of the Public Prosecutor’s Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, where the creation of such a section is not justified by objective and verifiable requirements relating to the sound administration of justice, and is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.³⁷

Thus, to comply with the general requirements arising from EU law, the judgement of the CJEU found that the regulations governing the establishment of the SIIJ must: (i) be justified by objective and verifiable imperatives relating to the proper administration of justice, (ii) be accompanied by specific safeguards to eliminate

³⁵ According to Art. 20(2) of the Fundamental Law.

³⁶ Para. 3 of the operative part of the ruling.

³⁷ Para. 5 of the operative part of the ruling.

any risk to the independence of judges and prosecutors, and (iii) in the investigation procedure, judges and prosecutors must enjoy the right to an effective remedy and to a fair trial, the presumption of innocence and the rights of defence. The three issues on which the CJEU has ruled derive from EU law and, in particular, from the value of the rule of law as stated in Article 2 of the TEU. The focus of the following analysis is to compare the conflicting arguments proposed by the CJEU and the Constitutional Court.

■ **3.2. The measure must be justified by objective and verifiable requirements relating to the proper administration of justice**

According to the CJEU,

In the present case, first, although the Supreme Council of the Judiciary argued before the Court that the creation of the SIIJ was justified by the need to protect judges and prosecutors from arbitrary criminal complaints, it is clear from the file that the explanatory memorandum to the law in question does not reveal any justification in terms of requirements relating to the sound administration of justice, which it is, however, for the referring courts to ascertain taking into account all the relevant factors.³⁸

However, the Constitutional Court ascertained that the establishment of the SIIJ at the level of the highest national prosecutor's office was aimed at creating a specialised body with a specific object of investigation and constituted a legal guarantee of the principle of independence of the judiciary. It cannot be held that the regulation is not based on an objective and rational criterion and represents a discriminatory measure, since the establishment of specialised prosecutorial bodies in areas of jurisdiction *ratione materiae* (the National Anticorruption Directorate or the Directorate for the Investigation of Organised Crime and Terrorism) or *ratione personae* (personal) jurisdiction (SIIJ) is an expression of the legislature's choice, which, depending on the need to prevent and combat certain criminal phenomena, determines whether it is appropriate to regulate them. Therefore, although the explanatory memorandum accompanying the law establishing the SIIJ did not mention the 'objective and verifiable imperatives' which required the adoption of this legislation, the Constitutional Court found that the law's normative content reveals aspects relating to the 'proper administration of justice': the creation of a specialised investigative body to ensure a uniform practice with regard to the prosecution of offences committed by magistrates, and the regulation of an appropriate form of protection for magistrates against pressure exerted on them by arbitrary complaints/denunciations.

³⁸ Para. 215.

■ **3.3. *The measure should be accompanied by specific safeguards to remove any risk to the independence of judges and prosecutors***

On this second point, the CJEU held that an autonomous body within the Public Prosecutor's Office such as the SIIJ

is capable of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire individuals', since it could 'be perceived as seeking to establish an instrument of pressure and intimidation with regard to those judges, and thus lead to an appearance of a lack of independence or impartiality on their part.³⁹

The conclusion was based on the four points made in paragraph 217 and 218 of the judgement.

1. 'The fact that a criminal complaint has been lodged with the SIIJ against a judge or prosecutor is sufficient for the SIIJ to institute proceedings', therefore 'according to the information provided by the referring courts, the system thus established allows complaints to be lodged unreasonably, inter alia, for the purposes of interfering in ongoing sensitive cases, in particular, complex and high-profile cases linked to high-level corruption or organised crime, since if such a complaint were lodged, the matter would automatically fall within the competence of the SIIJ.'

2. If 'the complaint is lodged in the context of an ongoing criminal investigation concerning a person other than a judge or prosecutor, with that investigation then being transferred to the SIIJ irrespective of the nature of the offence of which the judge or prosecutor is accused and the evidence relied on against him or her.'

3. 'If the ongoing investigation relates to an offence falling within the competence of another specialised section of the Public Prosecutor's Office, such as the National Anticorruption Directorate, the case is also transferred to the SIIJ when a judge or prosecutor is implicated.'

4. 'Finally, the SIIJ may appeal against decisions adopted before it was created or withdraw an appeal brought by the National Anticorruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism or the Prosecutor General before the higher courts.'

What the Constitutional Court criticised in essence is that, without analysing the aspects listed, the CJEU limited itself to noting that 'practical examples taken from the activities of the SIIJ', resulting from 'evidence submitted to the Court' (which is not mentioned in the judgement),

39 Para. 216.

[...] confirm that the risk [...] that that section is akin to an instrument of political pressure and exercises its powers to alter the course of certain criminal investigations or judicial proceedings concerning, inter alia, acts of high-level corruption in a manner which raises doubts as to its objectivity – has materialised, which it is for the referring courts to assess.⁴⁰

The CJEU further states that:

it is also for those [referring] courts to ascertain that the rules on the organisation and operation of the SIIJ and the rules on the appointment and withdrawal of prosecutors assigned to it are not such as to make the SIIJ open to external influences, having regard in particular to the amendments made to those rules by emergency ordinances derogating from the ordinary procedure provided for by national law.⁴¹

The CJEU held that the SIIJ could be perceived as an instrument of pressure and intimidation of judges, which could lead to an apparent lack of independence or impartiality of these judges.

The Constitutional Court analysed all the four aspects on which the conclusion of the CJEU was based and ascertained the following:

1. Regarding the fact that lodging a criminal complaint against a judge or prosecutor with the SIIJ is sufficient for it to open proceedings, the Court held that according to the provisions of Article 305(1) of the Romanian Code of Criminal Procedure, which is a general rule governing the initiation of criminal proceedings in Romania,

When the instrument of referral fulfils the conditions laid down by law, the criminal prosecution body shall order the initiation of criminal proceedings in respect of the act committed or the preparation of which was conducted, even if the perpetrator is indicated or known.

With regard to these legal provisions, the regulation of the *in rem* stage of the criminal proceedings is a guarantee of the fairness of the conduct of the criminal proceedings by ensuring that any criminal investigation is conducted in a procedural framework and that no person is charged in the absence of reasonable indications that he/she has committed an offence provided for by criminal law, as indicated by data or evidence adduced by judicial authorities. The Constitutional Court observed that the rule of criminal procedure provides that the public prosecutor is obliged, where the act of referral fulfils the conditions laid down by law,

40 Para. 219.

41 Para. 220.

to order the commencement of criminal proceedings so that the rule cannot be interpreted as leaving it to the discretion of the public prosecutor to initiate the investigation procedure, which is generally applicable irrespective of the status of the person against whom a criminal referral is made, irrespective of which prosecution body conducts the investigation.

2. The Constitutional Court held that the investigation of different categories of persons in the same SIIJ file could not in itself confirm the risk of political pressure. For example, the Romanian Code of Criminal Procedure provides the prosecution of persons without any special status by public prosecutors' offices or their trial by courts higher in rank than those which would have jurisdiction by subject matter when the same case also involves persons whose special status entails a particular jurisdiction. The rules which exceptionally extend the jurisdiction of certain judicial bodies are based on reasons for the proper administration of justice and consider the fact that prosecution by the same public prosecutor's office of all the participants is likely to ensure continuity, efficiency, and celerity of prosecution, thus avoiding the contradictory solutions which may arise if jurisdiction was divided between different prosecution bodies and thus ensuring that justice is done within a reasonable time and in a fair manner.

3. On the effects that the establishment of this section has on the jurisdiction of other prosecutorial bodies, in terms of reducing their jurisdiction to investigate offences committed by judges, prosecutors, and members of the SCM, and those committed by other persons alongside magistrates, the Court considered that the legislature's choice corresponds to its constitutional power to legislate in the field of the organisation of the judicial system. The fact that a pre-existing prosecution body loses part of its powers does not constitute a question of constitutionality, as long as the jurisdiction of that prosecution body is not constitutionally enshrined.⁴²

4. Concerning the possibility for the SIIJ to appeal against decisions taken prior to its establishment or to withdraw an appeal lodged by the National Anticorruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism or the general public prosecutor before the higher courts, which would result in the risk that the section may become an instrument of political pressure and intervene to change the course of certain criminal investigations or judicial proceedings, the Constitutional Court held that such a possibility was removed following a finding that Article 88¹(2) and Article 88⁸(1) (d) of Act No. 304/2004 breached the Constitution, by Decision No. 547 of 7 July 2020, a decision which the CJEU failed to observe. The legal provisions establishing the jurisdiction of the SIIJ prosecutors to exercise and withdraw appeals in cases falling within the jurisdiction of the section, including cases pending before the courts or definitively settled prior to its operationalisation, have ceased to apply, so that at the date of delivery

42 See CC decisions 33/2018 and 547/2020.

of the CJEU judgement of 18 May 2021 they were no longer apt to produce legal effects; therefore, the argument of the CJEU appears to be without factual and legal support.

■ **3.4. In investigative proceedings, judges and prosecutors should benefit from the right to an effective remedy and a fair trial, the presumption of innocence and the right of defence**

On the latter point, the CJEU held that

[...] the rules governing the organisation and operation of a specialised section of the Public Prosecutor's Office, such as the SIIJ, should be designed so as not to prevent the case of the judges and prosecutors concerned from being heard within a reasonable time. Subject to verification by the referring courts, it appears from the information provided by them that that might not be the case with the SIIIJ, in particular due to the combined effect of (i) the apparently significantly reduced number of prosecutors assigned to that section, who, moreover, have neither the necessary means nor expertise to conduct investigations into complex corruption cases and (ii) the excessive workload for those prosecutors resulting from the transfer of such cases from the sections competent to deal with them.⁴³

The Constitutional Court previously held in relation to the establishment of rules of jurisdiction according to the status of the person that such a rule

[...] does not restrict the right of persons to apply to the courts and to benefit from the procedural rights and guarantees established by law in a public trial conducted by an independent, impartial and legally established court within a reasonable time, conditions which are also ensured when cases are heard at first instance by the courts of appeal.⁴⁴

This solution is also applicable to the present situation.

With regard to the 'reasonable time', enshrined as a guarantee of the right to a fair trial in Article 21(2) of the Romanian Constitution, the Constitutional Court held that the new regulation does not provide for any derogation from the rules of ordinary law established by the Code of Criminal Procedure with regard to the procedure for conducting criminal proceedings, and therefore also with

43 Paras. 221, 222.

44 CC decision Nos. 33/2018 and 547/2020.

regard to procedural time limits, so that it cannot be argued that this would constitute the premise of a possible violation of the reasonable time for the resolution of cases.

As '[...] the combined effect of the apparently significantly reduced number of prosecutors assigned to that section, who, moreover, have neither the necessary means nor expertise to conduct investigations into complex corruption cases and the excessive workload',⁴⁵ the Constitutional Court held that, to operationalise the SIIJ, the legislator provided in Article II(10) of Government Emergency Ordinance No. 90/2018 that,

[...] within 5 calendar days of the entry into force of this Emergency Ordinance, the Prosecutor General of the High Court of Cassation and Justice shall provide the human and material resources necessary for its operation, including specialized auxiliary staff, officers and agents of the judicial police, specialists and other categories of personnel.

With regard to the number of prosecutors assigned to the section, Article 88²(3) of Act No. 304/2004 stated that 'the Section for the Investigation of Criminal Offences within the Judiciary shall operate with a number of 15 prosecutor posts' and Article 88²(4) provides for the possibility that the number of posts may be modified,

[...] depending on the volume of activity, by order of the Prosecutor General of the Prosecutor's Office of the High Court of Cassation and Justice at the request of the Chief Prosecutor with the assent of the Plenary of the Superior Council of Magistracy.

With regard to the experience required to conduct investigations in complex cases, the Court notes that the provisions of Article 88⁵ (3) of Act No. 304/2004 establish that among the conditions for participation in the competition for appointment to the SIIJ, prosecutors must have at least the rank of prosecutors of the Court of Appeal and at least 18 years of effective seniority in the position of prosecutor. Therefore, the Court found that the legal provisions governing the establishment of the SIIJ cannot constitute prerequisites for a breach of the constitutional guarantee laid down in Article 21(1) of the Romanian Constitution relating to the resolution of cases within a reasonable time.

For all the above reasons, the Constitutional Court found that the regulation providing for the establishment of the SIIJ is an option for the national legislature in accordance with the constitutional provisions.

45 Para. 222.

4. Critique of the CJEU by the Constitutional Court

The Constitutional Court observed that, although Article 267 of the TFEU does not empower the CJEU to apply the rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions, it being for the referring court to rule on these matters after it has made the necessary assessments (a point made, moreover, in Paragraph 201 of the judgement of 18 May 2021), the CJEU does not confine itself to ‘provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions,’ as it has established in its own case law (also referred to in Paragraph 201 of the judgement).⁴⁶

Thus, the CJEU notes that the ‘[...] explanatory memorandum to the law in question does not reveal any justification in terms of requirements relating to the sound administration of justice’ (Paragraph 215) and ‘[...] from the evidence submitted to the Court [...] that practical examples taken from the activities of the SIIJ confirm that the risk [...] that section is akin to an instrument of political pressure and exercises its powers to alter the course of certain criminal investigations or judicial proceedings’ (Paragraph 219), or establishes that it is clear from the information provided by the referring court that the regulations were not designed in such a way as to prevent the judges and prosecutors concerned from examining the case within a reasonable time (Paragraphs 221 and 222). However, according to the Constitutional Court, none of these findings constitute elements of interpretation of EU law, which may be of assistance in assessing the effects of one or other of its provisions, but of the application of the rules of EU law to a particular case.

The Constitutional Court also found that the CJEU, in declaring Decision 2006/928 binding, limited its effects from a twofold perspective: first, it established that the obligations arising from the decision are incumbent on the Romanian authorities competent to cooperate institutionally with the European Commission (Paragraph 177 of the judgement), and thus on the political institutions, Parliament, and the Romanian Government; and, second, that the obligations are exercised by virtue of the principle of loyal cooperation laid down in Article 4 of the TEU. From both perspectives, the obligations cannot be incumbent on the courts, bodies of the State which are not empowered to cooperate directly with a political institution of the EU (the European Commission).

Therefore, the Constitutional Court held that the application of Paragraph 7 of the operative part of the judgement of the CJEU, according to which a Romanian court is practically

⁴⁶ Judgements of 19 November 2019, *A. K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, para.132, and of 2 March 2021, *A. B. and Others* (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, para. 96.

[...] permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgement of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) of the TEU,

has no basis in the Romanian Constitution. Article 148 of the Constitution prioritises the application of European law over the contrary provisions of domestic law. However, the CVM reports, drawn up based on Decision 2006/928 by virtue of their content and effects, as laid down by the judgement of the CJEU on 18 May 2021 do not constitute rules of European law which the court must apply with priority, overriding a national rule. Therefore, a national court cannot be placed in the position of deciding to apply recommendations with priority to national law.

Finally, the Constitutional Court noted that the principle of the rule of law presupposes legal certainty, that is, the legitimate expectation of the addressees regarding the effects of the legal provisions in force and in the way they are applied, so that any subject of law can predictably determine its conduct. However, if some courts leave national provisions which they consider contrary to European law unapplied in their own motion, whereas others apply the same national rules and consider them to be in conformity with European law, the standard of foreseeability of the rule would be seriously undermined, which would lead to serious legal uncertainty and, implicitly, a breach of the principle of the rule of law.

Consequently, the Constitutional Court of Romania established the constitutionality of the special section to investigate criminal offences committed by judges and prosecutors.

5. The dissenting opinion (and divergent constitutional interpretation)

Two judges of the Constitutional Court considered that the establishment of the SIIJ infringed on Romania's Fundamental Law.⁴⁷ Practically, according to the dissenting opinion, the way in which the provisions allowing the establishment of a prosecutorial body exclusively for the investigation of offences committed by magistrates were adopted violated the constitutional provisions on the rule of law,⁴⁸ respect for the law and the supremacy of the Constitution,⁴⁹ on Romania's obligations as a Member State of the EU,⁵⁰ on equality before the law.⁵¹

47 Livia Doina Stanciu and Elena-Simina Tănăsescu. This dissenting opinion continues two similar opinions issued before, attached to CC decisions Nos. 33/2018 and 547/2020.

48 Art. 1(3) of the Constitution.

49 Art. 1(5) of the Constitution.

50 Art. 148(2) and (4) of the Constitution.

51 Art. 16(1) of the Constitution.

This dissenting opinion is also based on the CJEU's aforementioned decision. In the opinion of its authors, the question arises as to conformity with the European Union law of the regulations on the establishment and operation of the SIIJ which has exclusive jurisdiction to investigate offences committed by magistrates.

The CJEU held that Decision 2006/928/EC is binding in its entirety, including the annexes setting out benchmarks for the Romanian State. Moreover, as it is formulated in clear and precise terms and is not accompanied by any conditions, Decision 2006/928/EC has a direct effect. In addition, it is subject to the legal regime specific to EU law; that is, it has priority of application over the national law of the Member States and must have full effect; that is, it must prevent the adoption or application of national legislation which would be contrary to it. However, regarding the CVM reports, it is submitted that, based on the principle of loyal cooperation, Romania is obliged to adopt appropriate measures to achieve the benchmarks set out in the annexes to Decision 2006/928/EC and refrain from adopting or applying any measures which may jeopardise the achievement of those benchmarks. Although, under Article 5 of the TEU, the judicial organisation of the Member States is a matter for them to decide, under Article 4 of the TEU, the exercise of the Member States' own competences must be conducted in such a way as not to impede the achievement of the EU's competences and not to infringe on the values laid down in Article 2 of the TEU, on which the EU is founded, and among which the rule of law and the independence of the judiciary play a central role. Not only can Romania ignore the values laid down in Article 2 of the TEU, but it must also support the EU in fulfilling its objectives.

In the opinion of the authors of the dissenting opinion, the CJEU judgement of 18 May 2021 could have become an additional argument for Romanian constitutional jurisdiction to achieve a revival of its case law. Article 148 of the Romanian Constitution requires respect for the priority of EU law over contrary provisions of national law and obliges all public authorities in Romania, listing *expressis verbis* 'the Parliament, the President of Romania, the Government and the judicial authority' to guarantee the fulfilment of the obligations resulting from the Act of Accession and the priority of EU law over national law. The determination of the Romanian Constitution imposes on all public authorities in Romania the systematic priority of applying EU law over the contrary provisions of domestic law as a legal obligation at the national level. Priority of application means interpreting, as far as possible, national law in conformity with EU law and, as an alternative, removing national laws that are contrary to EU law. Removal from application may be conducted, *ex officio*, by both the courts and the administrative authorities when they have to apply national and European law simultaneously and find contradictions between the two. Contrarily, it does not have the effect of repealing or invalidating national law, since the public administration or courts do not adopt or repeal legal rules, but merely limit themselves to comparing the normative content of different legal systems and selecting the one which will apply

in the specific case. The repeal of national rules contrary to EU law can only be performed by the legislature; the invalidation of national rules contrary to EU law can be performed by a constitutional court. However, where the national legislator or constitutional judge cannot or does not act, Article 148 of the Constitution obliges national public authorities (including – or, more rather, *particularly* – the courts) to invariably prioritise the application of EU law.

Thus, the two dissenting judges considered that the legal rules establishing the special body of prosecution are unconstitutional, also because they are contrary to the relevant EU law, Decision 2006/928/EC, as a binding legal act in all its elements, which has priority over domestic law and has a direct effect and produces full effects in the Romanian legal system.

6. Assessment of the CVM and fundamental legal problems raised

The Romanian Parliament adopted Act No. 49/2022 on the abolition of the SIIJ and amended Act No. 135/2010 on the Code of Criminal Procedure. On 14 March 2022 this special body ceased to exist.⁵²

Nevertheless, the entire process is extremely instructive, raising questions about the functioning of the CVM, however, also highlighting the most fundamental and unresolved problems of European integration. The CVM was an instrument for Romania and Bulgaria; however, these core problems may arise in any other member state. For example, the relationship between EU law and constitutions or the relationship between the CJEU and Constitutional Courts. Therefore, the lessons go far beyond the problems at hand. As it was stated, '[...] despite this clearly phrased message, the effective application of the principles laid out in the AFJR judgement has been undermined by the Romanian Constitutional Court's defiant jurisprudence.'⁵³

We must consider the convincing elements of the Constitutional Court's position as well to have a broader picture. The transfer of sovereignty from a member state to the EU cannot occur through extensive interpretation of the European Court of Justice, and its framework must be defined with surgical precision. The Constitutional Court has reaffirmed that the determination of the organisation, functioning, and delimitation of jurisdiction between the different bodies of the prosecution authorities is a matter of the exclusive competence of the Member State. Moreover, it reiterated that the fundamental law of the State – the Constitution – is the expression of the will of the people, which means that it cannot lose its binding force merely because of a discrepancy between its provisions and those of EU law (or instruments, such as the CVM reports never

⁵² See also CC decisions Nos. 88/2022 and 89/2022.

⁵³ Moraru and Bercea, 2022, p. 83.

explicitly regulated as being binding), since the State's membership of the European Union cannot affect the supremacy of the national Constitution over the entire legal order.⁵⁴ Furthermore, by Decision No. 683/2012, the Constitutional Court indicated that '[...] the essence of the Union is the attribution by the Member States of competences – more and more in number – for the achievement of their common objectives, without prejudice, of course, to the national constitutional identity [...]' and that,

[...] in this line of thought, Member States retain the competences which are inherent to preserve their constitutional identity, and the transfer of competences and the rethinking, emphasis, or establishment of new guidelines within the framework of competences already transferred are within the constitutional margin of appreciation of the Member States.⁵⁵

In a recent decision by the CJEU, delivered on 7 September 2023 in case *C-216/21, Asociația 'Forumul Judecătorilor din România', YN v. Consiliul Superior al Magistraturii*⁵⁶ the CJEU has reaffirmed⁵⁷ its case law developed in the previous cases, discussed earlier. This reaffirmation occurred with full knowledge of the Romanian Constitutional Court's case law, which the reasons for this most recent decision continue to ignore.

An interesting aspect is the ideological conflict between the Constitutional Court and the CJEU. It is rather strange that the position of the Romanian Constitutional Court is not part of international academic discourse, or that it is summarised critically in a few sentences without examining it in-depth. However, as the CJEU's decision suggests, the situation is far from clear-cut in

54 There is a clear tension with the alternative interpretation, that the effectiveness of EU law cannot be weakened by unilateral acts such as a constitution in the EU which was created by multilateral agreement of states. The public international law argument can be used in defence of this argument, however, it cannot put aside the contrary argument. In their own logical order, both arguments are valid, so that opposing principles compete. We have to mention that the Romanian legal journal "Curierul Judiciar" devoted an entire issue to the problem of the relationship between EU law and national constitutions. On supremacy and sovereignty in the EU, see Ispas, 2022, pp. 377–382; on the principle of primacy of European Union law and the idea of constitutional identity promoted by the Constitutional Court of Romania, see Fábíán, 2022, pp. 383–389; on the supremacy of EU law and the relationship of this principle with the jurisprudence of the national courts of constitutional control, see Carp, 2022, pp. 397–400; on the developments of judicial control at the confluence of constitutional justice with the traditional courts of law system, see Safta, 2022, pp. 401–407.

55 The doctrine of constitutional identity is developed in Romania by Constitutional Court decisions 683/2012, 64/2015 or 104/2018.

56 Case C-216/21 *Asociația 'Forumul Judecătorilor din România', YN v. Consiliul Superior al Magistraturii* [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62021CJ0216>.

57 Paras. 54–56.

terms of European law, constitutional law, and (criminal or civil) procedural law. In some cases, the depth to which the CJEU wants to direct national courts or the organisation of the judicial branch of power appears excessive. In this sense, the Constitutional Court held that a court is empowered to examine the conformity of a provision 'of domestic law', that is, of national law, with the provisions of European law considering Article 148 of the Constitution and, if it finds that there is a contradiction, it has jurisdiction to apply the provisions of EU law in disputes concerning the subjective rights of citizens. In all cases, the Court finds that, by the concepts of 'internal laws' and 'domestic law', the Constitution refers exclusively to infra-constitutional legislation, the Fundamental Law preserving its hierarchically superior position by virtue of Article 11(1) of the Constitution. Accordingly, when it states that 'the provisions of the Treaties establishing the European Union and other binding Community legislation shall take precedence over contrary provisions of domestic law', Article 148 of the Constitution does not prioritise application of EU law over the Romanian Constitution, so that a national court is not empowered to examine the conformity of a provision of domestic law found to be constitutional under Article 148 of the Constitution with provisions of European law. The system of Romanian law constitutes all the legal rules adopted by the Romanian State which must be consistent with the principle of the supremacy of the Constitution and the principle of legality, which are at the heart of the requirements of the rule of law, principles enshrined in the Constitution, according to which '[i]n Romania, respect for the Constitution, its supremacy and the laws is mandatory [...]', the only legislative authority of the country being the Parliament, considering that the state is organised according to the principle of separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy.⁵⁸

We cannot underestimate the CVM in the Romanian judiciary's reform.⁵⁹ Romania's history clearly demonstrates the role of external factors in promoting reforms. The CVM can be analysed in this broader context. When local reform forces are not sufficiently strong, the role of external factors becomes even more important. Certainly, this has its disadvantages; such a process can be considered as a type of forced trajectory far from organic development. Alternatively, one can criticise the lack of depth in the local knowledge of external reform factors. Such processes are not positive by themselves; however, in the case of Romanian judicial reform, they should be assessed as positive. The CVM provided the impetus, information, accountability, and confrontation with failures to meet local reform demands.

58 These constitutional statements must be analysed in context, because there are areas in which – owing to the sovereignty transfer – the EU acquired exclusive powers through the Treaty of Lisbon, there are areas in which, based on the principle of subsidiarity, it does exercise shared powers.

59 For a broader analysis, see Tanasoiu and Racovita, 2012, pp. 243–263.

Moreover, it is interesting because, in my perspective, this is a perspective of expediency. I did not agree with the creation of the special section. Several elements of this reform are truly object to critique: the status of the SIIJ prosecutors, who appear to have enjoyed genuine immunity, was not clear; hierarchical control and judicial oversight were not functional and well designed; the exclusive material and territorial jurisdiction and the small number of prosecutors caused operational problems; the powers of appointment of the Chief Prosecutor of the SIIJ in relation to agents and judicial police officers was not permissible considering that the section did not have its own legal personality. However, the arguments proposed by the Constitutional Court are legitimate. The reasoning of the Constitutional Court should not be interpreted as defending this special section but as clarifying the limits of national legislative autonomy and constitutional identity.

It is not tolerable to leave national law at the mercy of the general principles of EU law because the rule of law requires legal certainty. When we continuously derive the content of specific norms from a norm with a limited level of precision (or imprecision), this sooner or later leads to conflicting interpretations. Under the pretext of enforcing EU law, the question is how far one can go about influencing solutions that are otherwise within the scope of non-transferred sovereignty (the judicial organisation of a member state) and are perceived to be in accordance with the rule of law concept. This problem is not limited to Romania or to the CVM.

Moreover, the concept of the rule of law can cover a wide range of realities, and standardisation is not necessarily appropriate. Clearly, there must be criteria for the rule of law. However, these criteria are not uniform. Moreover, what is not considered consistent with the rule of law in one state in a given legal and cultural context may be a perfectly functional norm in another Member State, leading to totally different practical effects.

The Constitutional Court has invoked the fact that Article 4(2) of the TEU itself expressly states that the Union shall respect ‘the equality of the Member States in relation to the Treaties’, ‘their national identities’ and ‘the essential functions of the State’. European law uses the concept of “national identity,” which is ‘inherent in the fundamental political and constitutional structures’ of the Member States, meaning that the process of constitutional integration within the EU is limited precisely by the fundamental political and constitutional structures of the Member States. The rule of law, which describes many different realities and cannot be reduced to definitions, does not lend itself to the setting of European standards. In individual cases, the existence or absence of the rule of law can be better grasped, however, the question of the conflict between the constitutional identity of a Member State and European law, whether real or created in a political context, will remain a crucial issue for a long time to come which requires complex scientific analysis.

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