

# THE IMPACT, IMPLICATIONS AND LEGAL EFFECTS OF THE DECISION OF THE COURT OF JUSTICE OF 18 MAY 2021

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## Abstract

*The last few decades have created a global aspiration, a common goal, namely the rule of law. Organizations, governments, individuals have made and are taking numerous steps to support this ideal. Perhaps it was often the common theme that united and divided international relations. While in the constitutions of the communist era the rule of law was seen, although fictional, as an essential principle of socialist society, the Romanian Constitution of 1991 did not consider this concern essential.*

*The reconstruction and the continuous reform of the state and of the Romanian system, but also of the European integration imposed on Romania the consecration as a primordial principle, of the assurance of the rule of law. Under continuous monitoring since 2007, the Romanian judicial system has shown ups and downs noted annually by the CVM Reports.*

*The various political changes, the various approaches to the rule of law reforms have only supported some of the European authorities' concerns. Although other European countries have small shortcomings in this regard, Romania has remained with Bulgaria in the top of European concerns. Concerns raised both by some controversial rulings of the Constitutional Court and by some amendments to the legislation made without analyzing the impact on the Romanian justice system, considered by some to be quite shaky.*

**Keywords:** Rule of law, CVM, Constitution, judicial system, financial liability of the State.

## 1. Introduction

At a global level, by the 2005 World Summit Paper, the representatives of the States present, voted on the resolution that universal adherence to the rule of law and its implementation, both nationally and internationally, are required<sup>1</sup>. Subsequently, in 2006, the UN General Assembly adopted a resolution on the rule of law at the national and international levels and continued to do so in subsequent annual sessions. At the level of the European Union.

In taking up his term as President of the European Commission, President von der Leyen, in the Political Guidelines, emphasized the need to establish a European rule of law mechanism covering all Member States, having an objective annual reporting by the European Commission<sup>2</sup>.

Therefore, in July 2019, at the level of the European Commission in July 2019, an action plan<sup>3</sup> was adopted outlining the main guidelines of such a

mechanism<sup>4</sup>. The first annual report will be prepared in 2020<sup>5</sup>. The aim of the new European mechanism is nothing more than to be translated into a preventive instrument, enabling dialogue and common awareness on the problems facing the rule of law<sup>6</sup>.

Regarding Romania, it shall be noted that the constitutional principle provided for in art. 1 paragraph (3): "*Romania is a state of law, democratic and social, in which human dignity, citizens' rights and freedoms, free development of human personality, justice and political pluralism are supreme values, in the spirit of democratic traditions of the Romanian people and ideals of The revolution of December 1989, and they are guaranteed.*"<sup>7</sup>, establishes the principle of respect for the rule of law.

In the following, taking into account the provisions of the 2020 *Report on the rule of law - communication and the chapters directed to each country*<sup>8</sup>, we will try to identify the legal effects that the warnings of the European Court of Justice (CJEU),

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<sup>1</sup> Raoul Wallenberg Institute for Human Rights and Humanitarian Law and The Hague Institute for the Internationalization of Law 2012 "Rule of Law - A Guide for Politicians", Pro bono translation by Roxana Stoleru, with the support of the Romanian Embassy in Stockholm.

<sup>2</sup> [https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf), last access on 15.02.2022.

<sup>3</sup> Communication on strengthening the rule of law in the European Union, <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-euro>.

<sup>4</sup> COM (2019) 343 final, last access on 15.02.2022.

<sup>5</sup> As part of the major initiatives of the Commission's Work Program for 2020.

<sup>6</sup> European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report\\_ro](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report_ro), last access on 15.02.2022.

<sup>7</sup> The Constitution of Romania, [http://www.cdep.ro/pls/dic/site2015.page?den=act2\\_1&par1=1#11c0s0sba3](http://www.cdep.ro/pls/dic/site2015.page?den=act2_1&par1=1#11c0s0sba3), last access on 15.02.2022.

<sup>8</sup> Published on [https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en), last access on 15.02.2022.

the Court (Grand Chamber) of 18 May 2021<sup>9</sup> have on the Romanian judiciary system.

## 2. Content

It is already well known the moment when the Cooperation and Verification Mechanism (CVM) was set up, namely in 2007, the year of accession to the European Union. This measure, being a transitional measure, was used in order to simplify and facilitate the efforts that our country has had to make in the field of judicial reform and the fight against corruption<sup>10</sup>. The deadline by which this mechanism will end is conditioned by the satisfactory fulfillment of the reference objectives applicable to Romania<sup>11</sup>. Each year, the CVM Reports provided the European institutions with a clear picture of progress and allowed the European Commission to make recommendations. We must not forget the key moment of 2017, when the Commission carried out a comprehensive assessment of the progress made over the decades of monitoring and cooperation<sup>12</sup>.

Although the Commission highlighted in the CVM Reports year after year the progress that Romania has made, amid legislative changes and the effects of these changes, six requests for a preliminary ruling have been registered with the Court of Justice of the European Union (CJEU). It should be noted that these requests were made by the Romanian courts in litigation between legal or natural persons, on the one hand, and authorities or bodies, on the other.

Following these referrals, the Court of Justice connects the cases and issues the Decision of May 18, 2021, in related cases C-83/19, Association of the Romanian Judges Forum / Judicial Inspection, C-

127/19, Association of the Romanian Judges Forum "And the Association,, Movement for the Defense of the Statute of Prosecutors" / Superior Council of Magistracy and C-195/19, PJ / QK and in cases C-291/19, SO / TP and others, C355 / 19, the Association,, Forum of Romanian Judges "And the Association,, Movement for the Defense of the Statute of Prosecutors" and OL / Prosecutor's Office attached to the High Court of Cassation and Justice - Prosecutor General of Romania and C-397/19, AX / Romanian State - Ministry of Public Finance.

### 2.1. Context

After accession, the obligation of each member state of the EU, as in the case of Romania, was to apply the legal norms issued by the European Union. Based on European rules, we emphasize that the official interpretation of legal acts, adopted by EU bodies, is ensured by the Court of Justice of the European Union.

National courts have the possibility of directly applying European law, but in situations where there are doubts, according to art. 267 TFEU, they can send preliminary questions to request the interpretation of European rules<sup>13</sup>.

In the analysis of the CJEU Decision of May 18, 2021, it is essential to specify that the main disputes before the Court of Justice are closely related to the reforms that Romania has undertaken, especially in the field of justice and the fight against corruption, processes that are subject to monitoring. European Union since 2007, under the cooperation and verification mechanism established by Decision 2006/9281<sup>14</sup> on the occasion of Romania's accession to the Union ("CVM").

From the moment of the pre-accession process, during the negotiations, Romania undertook the reform

<sup>9</sup> Decision of the CJEU in related cases C-83/19, Association of the "Romanian Judges Forum" / Judicial Inspection, C-127/19, Association of the "Romanian Judges Forum" and the Association "Movement for the Defense of the Statute of Prosecutors" / Superior Council of Magistracy and C-195/19, PJ / QK and in cases C-291/19, SO / TP and others, C355 / 19, the Association "Romanian Judges Forum" and the Association "Movement for the Defense of the Statute of Prosecutors" and OL / Prosecutor's Office on to the High Court of Cassation and Justice - Prosecutor General of Romania and C-397/19, AX / Romanian State - Ministry of Public Finance.

<sup>10</sup> Following the conclusions of the Council of Ministers of 17 October 2006 (13339/06), the mechanism was established by Commission Decision of 13 December 2006 (C (2006) 6569).

<sup>11</sup> *Idem*, 10.

<sup>12</sup> REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Romania's progress under the Cooperation and Verification Mechanism, Brussels, 25.1.2017 COM (2017) 44 final-[https://ec.europa.eu/info/sites/default/files/com/2017-44\\_en\\_1.pdf](https://ec.europa.eu/info/sites/default/files/com/2017-44_en_1.pdf), last access on 15.02.2022.

<sup>13</sup> Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union - Treaty on European Union (consolidated version) - Treaty on the Functioning of the European Union (consolidated version) - Official Journal C 326, 26/10/2012 P. 0001 - 0390 art. 267 (ex: art. 234 TEC):

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) interpretation of treaties;

(b) the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union;

If such a matter is raised before a court of a Member State, that court may, if it considers that a decision in that regard is necessary for it to give judgment, to apply to the Court for a ruling, on this issue.

If such a matter is raised in a case pending before a national court whose decisions are not subject to appeal under national law, that court shall be required to refer the matter to the Court of Justice.

If such a matter is raised in a case pending before a national court concerning a person who is being held in custody, the Court shall give its decision as soon as possible".

<sup>14</sup> Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of the progress made by Romania in achieving certain specific benchmarks in the field of judicial reform and the fight against corruption, OJ 2006 354, p. 56, Special Edition, 11, vol. 51, p. 55.

and during 2004 adopted three laws, the so-called "laws of justice". The object of their regulation concerned: the status of judges and prosecutors, the judicial organization and the Superior Council of Magistracy, in order to determine the independence and efficiency of the judiciary.

In the Romanian spirit and as a result of the frequent political changes, in the period 2017-2019, the leading laws of the reform were amended by laws and emergency ordinances of the government adopted under the Romanian Constitution. The changes made and their effects are the subject of the main disputes before the CJEU. The plaintiffs in these disputes dispute the compatibility with EU law of the legislative changes made.

In their court actions, the applicants refer to certain opinions and reports prepared by the European Commission on Romania's progress under the CVM. The provisions that support their actions do nothing but invalidate the provisions adopted by Romania during the years 2017-2019, especially regarding the perspective of the objectives regarding the effectiveness of the fight against corruption and guaranteeing the independence of the judiciary.

The referring courts therefore emphasize the question of the nature and legal effects of the CVM. Moreover, these courts also refer issues relating to the scope of the Commission's reports under the CVM. In this matter, the national courts rule that the requirements formulated by these reports must be binding on Romania. Thus: "the content, legal nature and temporal scope of that mechanism should be considered to be limited to the Accession Treaty"<sup>15</sup>

The conflict arises, when there is a national jurisprudence, according to which the law of the Union would not prevail in conflict with the Romanian constitutional order, and "*Decision 2006/928 could not constitute a reference norm within a constitutionality control since this decision was adopted prior to Romania's accession to the Union, and the question whether its content, character and temporal scope fall within the scope of the Accession Treaty has not been the subject of any interpretation by the Court.*"<sup>16</sup> "

Moreover, the national jurisprudence seems to be contradicted by the fundamental law itself, art. 148, para. (2): "*As a result of accession, the provisions of the constitutive treaties of the European Union, as well as other binding Community regulations, have priority over the contrary provisions of domestic law, in compliance with the provisions of the Act of Accession.*"

## 2.2. The provisions of the decision and its implications

In its decision of 18 May 2021, the CJEU ruled on a number of issues, including those relating to the legal effects of Decision 2006/928 / EC, those relating to the legal force of Commission reports drawn up on the basis of that Decision. In fact, the Court of Justice also gave its point of view on the establishment of sections are special criminal prosecution that has exclusive competence for crimes committed by magistrates, on the patrimonial liability of the state and the personal liability of judges for judicial errors and on the principle of the supremacy of Union law.

The Grand Chamber of the CJEU has ruled on Decision 2006/928 / EC that this is an act of an EU body, which may be interpreted in accordance with Art. 267 of the TFEU. Moreover, with regard to the legal effects of this act, the CJEU establishes that it falls within the scope of the Accession Treaty, as this measure has binding force, in all its elements, for Romania, being a measure adopted under the Act of Accession. . With regard to the application in time, the Court rules that this legal act is binding from the date of accession to the EU. Regarding the content, this decision contains a series of reference objectives, mandatory for Romania. Objectives which, in the Court's view, are: "*to ensure that this Member State respects the value of the rule of law*"<sup>17</sup>.

Following the analysis of these acts, the Court establishes that: "*Romania has thus the obligation to take the appropriate measures in order to achieve the mentioned objectives and to refrain from implementing any measure that risks compromising the achievement of the same objectives*"<sup>18</sup>

While the Court clearly sets out the legal effects of the 2006/928 decision on the reports prepared by the Commission under this decision, the Court notes that they set out requirements in relation to Romania and make "recommendations" to that Member State in order to achieve the reference objectives. . In view of the principle of sincere cooperation, the Court's assessment is that the Member State should refrain from adopting or maintaining in force in the areas covered by the reference objectives measures which would remove progress in the reporting requirements and recommendations.

The second important point that we must emphasize is the existence of a review of the judiciary to ensure compliance with European Union law, which is an essential condition for the rule of law. The Court further emphasizes that Member States must ensure

<sup>15</sup> CJEU, Press Release no. 82/21 Luxembourg, 18 May 2021.

<sup>16</sup> Commission's Decision 2006/928/EC of 13 December 2016, *cit. supra*, note 14.

<sup>17</sup> CJEU, Press Release no. 82/21 Luxembourg, 18 May, 2021.

<sup>18</sup> *Ibidem*.

judicial protection of the fact that the courts are part of its system of remedies.

In fact, the Court notes the importance of preserving the independence of judges, who must be protected from external pressures. At the same time, the Court rules on the rules governing the disciplinary regime of judges, that independence presupposes the existence of a system of guarantees necessary to avoid political control.

Therefore, any regulation provided for in national law regarding the existence of a judicial body specializing in disciplinary actions and investigations of magistrates should not be an instrument of political control. Moreover, such a regulation is contrary to European principles. At the same time, the Court rules that the mere appointment, on a temporary basis, in breach of the ordinary appointment procedure provided for by national law, in the management functions of bodies for the purpose of the principle of independence and why not the rule of law.

In order to ensure such compatibility, in the Court's view, such a provision must be supported by imperative and at the same time verifiable objectives which are necessary for the proper administration of justice. The Member State must also ensure that such an institution is not used as a form of political control. The Court refers here to the observance in the work of such an institution of the requirements of the Charter of Fundamental Rights of the European Union ('the Charter').

In its analysis, the Court held that such a body did not have the effect of failing to comply with Romania's specific obligations under Decision 2006/928 in the field of the fight against corruption<sup>19</sup>. What is noteworthy is that the CJEU leaves it to the national courts to verify whether or not the regulations on the establishment and organization of such a section lead to outside influences. Moreover, it is also up to the national courts to verify whether the national regulations do not prevent the examination of the cases concerning the judges and prosecutors concerned within a reasonable time, according to the provisions of the charter.

A key point, brought to the Court's attention, is also the regulations regarding the patrimonial liability of the state and the personal liability of judges for judicial errors<sup>20</sup>. In such cases, the Court finds that such a provision is compatible with European Union law only in the case of restrictive provisions and based on objective, verifiable criteria. Thus, the rationale for

determining the recourse of a judge's personal liability for miscarriage of justice must be based on imperative, clear, verifiable objectives necessary for the proper administration of justice. In order to ensure that such provisions do not interfere with the content of decision, the Court rules that well-defined rules are needed to define the conduct likely to engage the personal liability of judges in order to ensure the independence of their mission and to avoid they are exposed to the risk that their personal liability may be incurred solely as a result of their decision.

A simple error of justice contained in a decision is not the only condition for incurring the liability of that judge. The Court's recommendations provide for an express determination of the arrangements for the personal liability of judges. Thus, national law must contain the necessary guarantees that all the necessary operations in such a case will not be instruments of pressure on the judicial activity. The Court rules that the authorities, which will conduct the investigation and any other procedural arrangements necessary in such a case, should act impartially and objectively, so as not to give rise to legitimate doubts. Clearly, the fundamental rights enshrined in the Charter<sup>21</sup> must be respected, from the right to defense, to being heard, and so on.

Although it was provided in the Romanian Constitution, as I mentioned in art. 148, para. (2), the principle of the supremacy of Union law in relation to national law, were also identified situations not covered by these provisions. Thus, we have in mind national regulations of a constitutional nature, which deprive a lower court of the right to leave unenforced, of its own motion, a national provision which falls within the scope of Decision 2006/928 and which is in conflict with European Union law. That is why the Court sheds light on this case, stressing that the effects of the principle of the supremacy of European Union law over national law are binding on all bodies and judicial institutions of a Member State, including those of the nature of the Constitutional Court. Moreover, the Court emphasizes that no rule of national law concerning the jurisdiction of the courts can preclude the application of that principle. In that decision, the Court emphasizes the need for national courts to give an interpretation of national law in accordance with the principles of European Union law.

What we must emphasize is the Court's approach to the alleged breach of the EU Treaty or Decision 2006/928, "*the principle of the rule of law of the*

<sup>19</sup> CJEU, Decision of 18 May 2021, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1239022>, last access on 15.02.2022.

<sup>20</sup> The doctrine has often analyzed the administrative-patrimonial responsibility of the state for judicial errors. For example, E.E. Stefan, *Legal Liability. Special look at liability in administrative law*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 196-201.

<sup>21</sup> Art. 46 et seq., TITLE VI, JUSTICE, CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2012 / C 326/02), <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=RO>.

*European Union requires the referring court to leave the provisions in question unenforceable, whether of legislative or constitutional origin*"<sup>22</sup>.

### 2.3. Internal interpretation of the decision

In response to the CJEU ruling, the Romanian Constitutional Court (hereinafter referred to as the CCR), the Constitutional Court, ruled that this ruling did not reveal any novelties regarding the legal effects of Decision 2006/928 / EC and the reports prepared by the Commission. Based on it. Moreover, in its communication, the court underlines the conclusion of the Ministry of Justice: *"In fulfilling these clear obligations, Romania must take due account of the requirements and recommendations formulated in the CVM reports, having the task of cooperating in good faith with overcome the difficulties encountered in achieving the "benchmarks", in full compliance with those objectives and the provisions of the Treaties*"<sup>23</sup>. It should be noted that the court of constitutional contentious, *"maintained its previous jurisprudence and found that the only act which, by virtue of its binding nature, could have constituted a norm interposed to the constitutionality control performed by reference to art.148 of the Constitution - Decision 2006 / 928 -, through the provisions and objectives it imposes, has no constitutional relevance, as it does not fill a gap in the Basic Law, nor does it establish a higher standard of protection than the constitutional norms in force*"<sup>24</sup>.

Regarding the organization and establishment of the SIIJ, the CCR made a summary of the requirements highlighted by the CJEU: justification by objective and verifiable imperatives related to the proper administration of justice, the existence of specific guarantees to remove any risk of prejudice to the independence of judges and prosecutors; During the investigation procedure, judges and prosecutors should enjoy the right to an effective remedy and to a fair trial, the presumption of innocence and the right to a fair

trial. Starting from the 3 aspects, CCR analyzed to what extent the rule of law would be affected by the rules governing the organization and SIIJ operation. The CCR assessment refers to the fact that *"these regulations represent an option of the national legislator and fulfill the guarantees stipulated in the CJEU decision, in accordance with the constitutional provisions contained in art. 1 para. (3) and in art. 21 para. (1) and (3) regarding the free access to justice, the right to a fair trial and the settlement of cases within a reasonable time and, Implicitly, in accordance with the provisions of art. 2<sup>25</sup> and art. 19 para. (1) TUE*<sup>26</sup>".

What we think is essential is the CCR's dissenting opinion on the jurisdiction of the courts with regard to the application and interpretation of European Union law. Thus, the CCR's interpretation of art. 148 of the Constitution proposes only infra-constitutional legislation. According to the CCR opinion: *"art. 148 not giving EU law priority to apply to the Romanian Constitution, so that a court does not have the power to analyze the conformity of a provision of "domestic law", found to be constitutional by a decision of the Constitutional Court, with the provisions of EU law by prism art. 148 of the Constitution*"<sup>27</sup>.

In the view of the Constitutional Court, the CJEU's assessment of the binding nature of Decision 2006/928 / EC has limited the effects of this decision, which is the responsibility of such collaboration. CCR considers that this collaboration according to art. 4, TEU, is more of a politico-administrative nature.

CCR emphasizes that the provision in the operative part of the CJEU ruling on the possibility for a court to *"CJEU, as being contrary to this decision or art. 19 para. (1) second paragraph TEU*<sup>28</sup> *"has no basis in the Romanian Constitution. Thus art. 148 of the Basic Law, states the principle of application of EU law to the contrary provisions of domestic law. Therefore, the reports drawn up on the basis of Decision 2006/928 / EU, by their content and effects, as established by the CJEU decision of 18.05.2021, do not constitute rules of*

<sup>22</sup> CJEU, Decision of 18 May 2021, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=1239022>, last access on 15.02.2022.

<sup>23</sup> Analysis of the CJEU Judgment, carried out by the Ministry of Justice, available: <https://www.just.ro/analiza-hotararii-cjue-din-18-mai-2021/>, last access on 15.02.2022.

<sup>24</sup> CCR, Press Release, June 8, 2021, available at <https://www.ccr.ro/wp-content/uploads/2021/06/Comunicat-de-presa-8-iunie-2021.pdf>, last access on 15.02.2022.

<sup>25</sup> Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union - Treaty on European Union (consolidated version) - Treaty on the Functioning of the European Union (consolidated version) - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference adopting the Treaty of Lisbon signed on 13 December 2007 - Correlation tables, Official Journal C 326, 26/10/2012 P. 0001 - 0390, Article 2: The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law, as well as respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

<sup>26</sup> CCR, Press Release, June 8, 2021, available at <https://www.ccr.ro/wp-content/uploads/2021/06/Comunicat-de-presa-8-iunie-2021.pdf>, last access on 15.02.2022.

<sup>27</sup> *Ibidem*.

<sup>28</sup> Treaty on European Union, art. 19, para. 1. Member States shall lay down the necessary remedies to ensure effective judicial protection in the areas covered by Union law. [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_1&format=PDF), last access on 15.02.2022.

European law which the court should apply as a matter of priority. Removing the national norm<sup>29</sup>. Starting from the idea that the reports in question contain only recommendations, they do not have a normative character, they have neither the value nor the potential risk of provoking a conflict with the internal norms. The CCR thus invalidates the possibility for the national judge to decide on the application of recommendations to the detriment of national rules.

In the opinion of the CCR, the Decision of 18.05.2021 of the CJEU cannot have the validity of an element that would determine a jurisprudential reversal in terms of ascertaining the incidence of Decision 2006/928 / EC in the constitutionality control and, implicitly, the violation of art. 148 of the Constitution<sup>30</sup>.

#### 2.4. Effects, implications

If we look at the arguments presented by the CCR, we see their judicious nature. In its opinion, the Constitutional Court does not invalidate the supremacy of EU law, it seems that it is formulated in line with the decisions by which it ensured the effectiveness of EU law. The result of a contrary opinion can only be a conflict between internal and European bodies, on the occasion of the application or non-application of the principle of the supremacy of European law.

Analyzing the two opinions, I can only argue that the establishment of the CVM and the content of the decision by which it was established, oblige Romania to pursue and meet the targets within the 4 reference themes of Decision no. 2006/928/EC. Both opinions, both of the CJEU and of the CCR, note that in the reports we find recommendations, the legal effect of which is obvious, as they are not binding, they do not require mandatory conduct. In our opinion, putting an equal mark between the reports drawn up under the CVM under Decision 2006/928/EU and an EU legislative act is an excessive statement. In support of

this statement, we must take into account the legislative technique, in the content of the report are not indicated as in a normative act the legal means to be followed.

We do not deny the mandatory nature, indirectly assigned as a result of the Act of Accession of the reports drawn up under Decision 2006/928 / EU, but we must point out that this recognition would create a new source of law, both in the national legal order and in the order national legal framework. To date, such acts have not been recognized as a source of law. Establishment of obligations Decision 2006/928 / EU by means of generating only the means through the Member State will address the shortcomings necessary for integration. It should be noted that the decision contains only one concrete obligation, namely the establishment of the National Integrity Agency<sup>31</sup>. The other obligations have an open content, being set the objectives of it is achieved, without mentioning the means. The European authorities leave to the discretion of the Member State the means used to achieve the benchmarks.

Regarding the limits of the applicability of EU law, we must refer to the principles enshrined in Article 5, TEU:<sup>32</sup>

- The principle of attribution of competences - EU competences are conferred by the EU Treaties, treaties ratified by all Member States;
- The principle of proportionality - EU actions are aimed only at achieving the objectives of EU treaties;
- The principle of subsidiarity - in areas where both the governments of the Member States and the EU can act, the EU only intervenes when its actions are more effective than those of the Member State.

According to the provisions of art. 4 para. (3) TFEU, in the area of freedom, security and justice, the competence of the EU is not an exclusive one, but a shared one. In light of the provisions of art. 4 para. (2) TEU regarding the observance of the essential functions of the states, regarding the internal judicial organization, the EU has not legislated. Therefore, in

<sup>29</sup> CCR, PRESS RELEASE, June 8, 2021, available at <https://www.ccr.ro/wp-content/uploads/2021/06/Comunicat-de-presa-8-iunie-2021.pdf>. last access on 15.02.2022.

<sup>30</sup> *Ibidem*.

<sup>31</sup> EC Decision of 13 December 2006 establishing a mechanism for cooperation and verification of the progress made by Romania in achieving certain specific benchmarks in the field of judicial reform and the fight against corruption (notified under document number C (2006) 6569 ] (2006/928 / EC-<https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32006D0928&from=RO>, last access on 15.02.2022.

<sup>32</sup> Treaty on European Union, art. 5 (ex: art. 5 TEC)

1. The delimitation of Union competences shall be governed by the principle of conferral. The exercise of these powers is governed by the principles of subsidiarity and proportionality.

2. The Union shall, in accordance with the principle of conferral, act only within the limits of the powers conferred upon it by the Member States in the Treaties to achieve the objectives set out in those Treaties. Any competence not conferred on the Union by the Treaties shall lie with the Member States.

3. In accordance with the principle of subsidiarity, the Union shall intervene in areas which are not within its exclusive competence only if and to the extent that the objectives of the envisaged action cannot be satisfactorily achieved by the Member States, either at central or regional level. but due to the size and effects of the planned action, they can be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure laid down in that Protocol.

4. In accordance with the principle of proportionality, Union action shall not go beyond what is necessary in order to achieve the objectives of the Treaties. The Union institutions shall apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality.

the light of art. 2 para. (2) TFEU, Romania has the capacity and competence to organize its judiciary, obviously without violating democratic principles.

With the claim of a democratic state, Romania must consolidate its rule of law even if there were no recommendations in the reports.

Regarding the three elements regarding the establishment and functioning of the SIIJ, on which the CJEU considered that the internal bodies are the ones empowered to verify compliance with Union law, the Constitutional Court statement does not provide enough relevant information. Instead, the Ministry of Justice considers that the CJEU's assessment definitively puts *an end to the public debate that the abolition of the SIIJ should be accompanied by certain guarantees and sharply removes the argument that the mere existence of the SIIJ the independence of the judge, respectively that: " in this way, an adequate protection of the magistrates is ensured against the pressures exerted on them, against the abuses committed through arbitrary notifications / denunciations "*<sup>33</sup>.

Therefore, the main legal effect of the CJEU Decision of 18 May 2021 is the abolition of the Section for the Investigation of Crimes in Justice (SIIJ), its existence being according to the EU Report on the Rule of Law, the chapter on Romania, a crucial element in undermining the independence of justice<sup>34</sup>. Because the implementation of these measures regarding the functioning and organization of the SIIJ confirmed the concerns expressed since the 2018-2019 CVM Reports, concerns *that were at the forefront related to the pressures to which judges and prosecutors are exposed, as well as the independence, efficiency and the quality of justice*<sup>35</sup>. In these successive reports, the Commission recommended to Romania the revision of the legislative framework governing the jurisdictional system taking into account the recommendations of the MCV, but also those formulated by the Venice Commission and GRECO.

Although the 2021 Report on the Rule of Law, the situation of the rule of law in the European Union, the low activity of this body and the proposals to amend the laws of justice are mentioned, until the date of this

study, SIIJ is operational. We must continue to argue that, as regards the rule of law, the mere existence of that body is a matter for the European Commission: *"there are still serious concerns about its functioning."*<sup>36</sup>.

Moreover, in its opinion of 5 July 2021, the Venice Commission appreciates Romania's intention to amend the legislative framework governing the field of justice. The Venice Commission especially appreciates the proposed changes in the sense of abolishing the SIIJ and the proposed changes in order to restore the competence of the specialized prosecutor's offices (DNA, DIICOT).

We must also note what the Venice Commission is amending, *namely that these amendments introduce a new type of inviolability for judges and prosecutors in an extremely sensitive area (criminal prosecution), which goes far beyond functional immunity and that criminal proceedings which do not fall within the scope of functional immunity should not fall within the jurisdiction of the CVM, but should be referred directly to the courts without first being examined by the CVM*<sup>37</sup>.

Therefore, it remains to be seen what progress will be made in 2022 and how the Romanian authorities will take into account the CJEU Decisions of 18 May 2021, the CVM recommendations and the warnings of the Venice Commission and GRECO.

In view of the provisions of the CJEU decision of 18 May 2021 and the latest proposed amendments concerning the civil liability of judges and prosecutors, I consider it essential that these amendments adequately reflect the recommendations of international bodies and take into account relevant European standards.

In fact, the Romanian state assumed in 2021 that the legislative changes, related to the justice sector, will be operated as a result of analyzing the requirements of the CVM Report of the European Commission, the GRECO reports and the opinions *"Commission of Venice. In this regard, the 2021 Report on the Rule of Law notes that the stated aim of the draft laws is to remedy the negative effects of the changes in the period 2017-2019 and to propose solutions to many of the*

<sup>33</sup> Analysis of the CJEU Decision, carried out by the Ministry of Justice, available: <https://www.just.ro/analiza-hotararii-cjue-din-18-mai-2021>.

<sup>34</sup> For an analysis of the principle of independence of the judiciary, see E.E. Ștefan, *Reflections on the principle of independence of justice*, in Proceedings of the Challenges of the Knowledge Society Conference (CKS) 2013, pp. 671-676, available online at [http://cks.univnt.ro/cks\\_2013/CKS\\_2013\\_Articole.html](http://cks.univnt.ro/cks_2013/CKS_2013_Articole.html), accessed on 15.02.2021.

<sup>35</sup> 2020 Report on the rule of law, Chapter on the situation of the rule of law in Romania accompanying the document, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, Report on the rule of law 2020 in the European Union, Brussels, 30.9.2020 SWD (2020) 322 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0322&from=EN>. last access on 15.02.2022.

<sup>36</sup> 2021, Report on the rule of law i Chapter on the situation of the rule of law in Romania accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2021 report on the rule of law page 5, available at: [https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_romania\\_ro.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_romania_ro.pdf).

<sup>37</sup> Opinion CDL-AD (2021) 019 of the Venice Commission, p. 14.

*problems identified in the MCV reports, in particular as regards on the abolition of the SIII, increasing the degree of professional independence of prosecutors by repealing legislative proposals as amended in 2018, civil liability of magistrates, restrictions on the freedom of expression of magistrates and procedures for dismissal and appointment of prosecutors to management positions”<sup>38</sup>*

Assuming that, in the event of a proven breach of the EU Treaty or the CVM Decision, the principle of the supremacy of European Union law presupposes that the referring court leaves the provisions in question inapplicable, regardless of the nature of the rule of a functional nature of the Romanian judicial system. The issue arises in the context in which we are dealing with the conflict between Union law and constitutional norms, because at European level we do not have uniformly regulated the hierarchy and competences of the constitutional courts. Here we are faced with different legal traditions, which are closely linked to domestic law and the rules of organization of the judicial system, the rules for the division of jurisdiction between state powers. The interference of the CJEU decision with the internal jurisdictional organization appears to be an interference with the sovereignty of the State.

Since there is no single European regulation, a European constitutional regulation, can we support the principle of the supremacy of European law and in conflict with the constitutional norm? Or would it be better to harmonize the constitutional norms with the provisions of European law? These are questions that the European Union and our country will probably answer in the next period.

From the perspective of domestic legislation, according to art. 147 para. (4) of the Constitution and art. 11 para. (3) of Law no. 47/1992 on the organization and functioning of the Constitutional Court, we must not forget that in the Romanian legal system, the decisions of the Constitutional Court are final and generally binding, a court does not have the possibility to censor decisions. Thus we must remember the revisions of art. 3 of Law no. 47/1992: “(1) *The attributions of the Constitutional Court are those established by the Constitution and by the present law.* (2) *In the exercise of its attributions, the Constitutional Court is the only one entitled to decide on its competence.* (3) *The competence of the Constitutional*

*Court, established according to para. (2), cannot be challenged by any public authority”<sup>39</sup>.*

According to the practice and provisions in the Romanian judicial system, the legislator does not offer the judge the opportunity to remove or create legal norms, according to his own understanding or according to his personal way of interpreting a recommendation of the European institutions, because such activity would involve interference with other bodies that according to the fundamental law have such prerogatives. We thus consider that there is a possibility of violating the principle of separation of powers in the state.

We emphasize that the possible resolution of this issue raised by the CJEU Decision of 18 May 2021, is given by the mobilization of the Romanian authorities, to urgently transpose the recommendations, the obligations deriving from EU law, regardless of the source, in national legislation Accession Treaty. Moreover, the vigilance of the authorities could lead to the avoidance of situations in which a national judge would have to rule in accordance with the decision of the CJEU decision in question.

### 3. Conclusions

As the 2021 CVM Report notes, the setback in meeting Romania's benchmarks in 2021 has been surpassed by the measures taken in 2021. The Commission's expectations are constant and include the Romanian authorities in operating the measures. and the changes to which they have committed themselves, in order to fully meet the outstanding objectives. The Commission's view, with which we agree, is that: *The decision of the Court of Justice of 18 May 2021 provides a clear framework and direction for the ongoing reforms to meet the benchmarks of the CVM in a satisfactory manner, with full respect for the rule of law and EU law in general.*<sup>40</sup> The new legislation to be adopted must take into account the framework provided by the CJEU Decision and remove any doubt.

Moreover, judging by our opinion, we consider it essential that the Romanian legislator makes changes to remove the conflict between the constitutional norm and European norms and to apply those amendments, which remove any doubt about the supremacy of Union law over domestic law. The JRC also does not deny the supremacy of European law, but its position on the

<sup>38</sup> 2021 Report on the rule of law , Chapter on the situation of the rule of law in Romania accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2021 report on the rule of law page 5, available at: [https://ec.europa.eu/info/sites/default/files/2021\\_rplr\\_country\\_chapter\\_romania\\_ro.pdf](https://ec.europa.eu/info/sites/default/files/2021_rplr_country_chapter_romania_ro.pdf).

<sup>39</sup> Law no. 47 of May 18, 1992 (\*\* republished \*\*) on the organization and functioning of the Constitutional Court, published in the Official Gazette of Romania no. 807 of December 3, 2010.

<sup>40</sup> REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Romania's progress in the cooperation and verification mechanism, Brussels, 8.6.2021, COM (2021) 370 final, available at [https://ec.europa.eu/info/sites/default/files/com2021370\\_en.pdf](https://ec.europa.eu/info/sites/default/files/com2021370_en.pdf).

conflict with the constitutional norm raises concerns at European level and especially at the level of monitoring the rule of law by European bodies and authorities.

In fact, the problem is more of a functional nature, a problem that can only be solved by the legislator in ensuring the necessary mechanisms. It is therefore within the competence of the Romanian

authorities and political bodies to resolve the case. Therefore, going through the analyzes carried out by the various European bodies, the reform of the Romanian jurisdictional system is far from being completed, and the responsibility lies with the Romanian authorities.

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