# STUDII JURIDICE

# Ten requests for a Preliminary Ruling Filed by the Romanian Courts for Maintaining the Rule of Law, a Common Value of all the European Union Member States

***Dragoș Călin*[192]**
***Judge, Bucharest Court of Appeals***

**Abstract:**

*Similarly to the situation of the deterioration of the rule and law and of the judicial system reform in Poland, in relation to which the Court of Justice of the European Union has already delivered several solutions of principle or has other applications for a preliminary ruling pending*, *the Romanian courts have also referred to CJEU, on the interpretation of the European Union law in the context of legislative amendments or Romanian Constitutional Court decisions. The first solutions of the Court of Justice of the European Union are expected at the earliest in the winter of 2020, and may cause, vertically, the review of some legislative solutions, in line with the European Commission requirements, under the Cooperation and Verification Mechanism*, *not only in matters where the European court was referred to, but also on other issues, for example, the meritocratic promotion of judges and prosecutors during their career, especially in the High Court of Cassation and Justice.*

**Rezumat:**

*Similar situației deteriorării statului de drept și a reformei sistemului judiciar din Polonia, în raport de care deja Curtea de Justiție a Uniunii Europene a pronunțat mai multe soluții de principiu ori are pe rolul său de analizat alte cereri de decizie preliminară, și instanțele românești au procedat la sesizarea CJUE, cu privire la interpretarea*

[192] Co-President of the Romanian Judges Forum' Association; judge at the Bucharest Court of Appeals; PhD in Constitutional Law of the Faculty of Law within the University of Bucharest. Professional e-mail: dragos.calin@just.ro.

*dreptului Uniunii Europene în contextul unor modificări legislative sau unor decizii ale Curții Constituționale. Primele soluții ale Curții de Justiție a Uniunii Europene sunt așteptate cel mai devreme în iarna anului 2020, acestea putând determina, pe verticală, revizuirea unor soluții legislative, în acord cu cerințele Comisiei Europene, în cadrul Mecanismului de cooperare și verificare, nu doar în aspectele în care instanța europeană a fost sesizată, ci și cu privire la alte chestiuni, spre exemplu promovarea meritocratică a magistraților în cursul carierei, mai ales la Înalta Curte de Casație și Justiție.*

**Keywords**: preliminary reference, rule of law, Cooperation and Verification Mechanism, effective judicial protection in the fields covered by Union law

**1. Introduction**

During 2017-2018, in Romania, several amendments were adopted to the generic laws called "justice" laws, namely Law no.303/2004 regarding the status of judges and prosecutors, Law no.304/2004 regarding judicial organization and Law no. 317/ 2004 regarding the Superior Council of Magistracy.[193]

These legislative amendments were severely criticized, in their essential part (*the procedure for revoking the members of the Superior Council of Magistracy; the material liability of judges and prosecutors; the establishment of a separate special division for investigating offences committed by judges and prosecutors; the new obligation imposed on judges and prosecutors that limits their freedom of expression etc.*), by the European Commission for Democracy through Law of the Council of Europe (the Venice Commission), GRECO (The Group of States against Corruption), the Consultative Council of European Judges (CCJE), the Consultative Council of European Prosecutors (CCPE), the European Commission, the European Parliament, Romania's Superior Council of Magistracy, the High Court of Cassation and Justice, the Prosecutor's Office attached to the High Court of Cassation, the most important professional associations of Romanian judges and prosecutors (the Romanian Judges' Forum Association, the Initiative for Justice Association, the Movement for Defending the Status of Prosecutors Association), as well as by most Romanian judges and prosecutors, individually.[194]

Through the legislative reforms adopted, corroborated with the inability of the Superior Council of Magistracy to really guarantee the independence of the judiciary, as the judges and, in particular, the prosecutors have been subject to

[193] Some of these regulations were slightly revised or their implementation was postponed in 2018 and in 2019, respectively.

[194] See, for developments: **Dragoș Călin, Ionuț Militaru, Claudiu Drăgușin**, Aktuelle Gefahren für die Justiz in Rumänien, in *Betrifft JUSTIZ* no. 132 von Dezember 2017, p.217-219; **Dragoș Călin, Ionuț Militaru, Claudiu Drăgușin**, Romanian Judicial System. Organization, Current Issues and the Necessity to Evoid Regres, in *Tsukuba Journal of Law and Politics*, 75/2018, p.1-14; **Ingrid Heinlein**, Korruptionsbekämpfung in Rumänien am Ende? Was die Regierung Rumäniens unternimmt, um die Strafjustiz zu schwächen und von diesem Vorhaben abzulenken, in *Betrifft JUSTIZ* nr. 136 von Dezember 2018, p.189-192; **Dragoș Călin, Anca Codreanu**, The Situation Regarding the Romanian Judicial System at the end of 2018, in *Richterzeitung* nr.2/2019, https://richterzeitung.weblaw.ch/rzissues/2019/2.html [web page last accessed on 05.10.2019]; **Bianca Selejan Guțan**, The Taming of the Court – When Politics Overcome Law in the Romanian Constitutional Court, https://verfassungsblog.de/the-taming-of-the-court-when-politics-overcome-law-in-the-romanian-constitutional-court/ [web page last accessed on 05.10.2019].

continuous assaults, Romania has deviated from the requirements of the rule of law.

In the absence of a rapid legislative solution, given both the adamant resistance of the political power to all criticism from relevant international bodies, the unexplained reactions of some presidents of the Romanian Superior Council of Magistracy,[195] and the

[195] **For instance, the President of the Superior Council of Magistracy, Lia Savonea, declared, on 21 December 2018, that,** *"starting from the errors in the last report, it must be clear to us that* ***we cannot blindly follow these recommendations, like some holy relics,*** *and not comment and discuss them. Especially since they contain verifiable facts that contradict the provisions of laws and of the Criminal Procedure Code, in particular. They were obvious".* **[**see the web page http://www.ziare.com/stiri/magistrati/o-parte-din-membrii-csm-critica-recomandarile-CVM-lia-savonea-nu-putem-sa-le-ducem-asa-orbeste-ca-pe-sfintele-moaste-1543219, last accessed on 05.10.2019]. **This president of the Superior Council of Magistracy requested the High Court of Cassation and Justice to annul the application for preliminary ruling sent by the Pitești Court of Appeal in the case C-127/19, in a motion for change of venue, in the file no.71/1/2019, which is still pending. This fact, never before seen in the field of the cooperation between national courts and the CJEU, has determined several Romanian courts to refer to the Court of Justice of the European Union with similar references for preliminary ruling. Also, the Romanian Minister of Justice at that time, Tudorel Toader, declared as follows:** *"I tend to believe that the* ***report is political, has many interests, the report uses double standards*** *and relates to mobile, moving goals. (...) Why double standard? Because, for example, in 2012, there was a change to the laws of justice regarding the competences for disciplinary action. The measure was appreciated, it was related to judges, prosecutors, the minister of justice had more power than just to refer and it was good. Today, 6 years later, the minister has only the power to initiate the action to notify the Judicial Inspection, he does not take measures, reports are submitted only to prosecutors and, look, this is no longer good. The same thing cannot be good in 2012 and not good in 2018".* On the same occasion, **Tudorel Toader** said that "***the recommendations in the report are not mandatory for Romania***." (see the webpage https://www.digi24.ro/stiri/actualitate/justitie/tudorel-toader-acuzatii-pe-tema-raportului-CVM-are-iz-politic-1032416, last accessed on 05.10.2019). *"The Romanian legislator has this freedom to legislate.* ***No one can tell me that a recommendation prevails over a CCR decision. The semantics of the term indicates that the recommendation is not mandatory.*** *The European standards are mandatory. The irreversible process of enactment if mandatory. I don't want to answer to questions that are inappropriate. That is why I did not go public last night, because so many people take advantage of these flared moments to express their less documented opinions. Someone who has a legal education, but no coverage in what he was saying, said that the recommendations of the Venice Commission must be complied with as a matter of priority, referring to Article 148 of the Constitution, which says that the legal rules of treaties and conventions must be applied as a priority. You don't have to be a great lawyer. You don't even have to be a lawyer to understand that a commission of 3-5 experts comes from Brussels, they make this report and formulate some recommendations.* ***Don't imagine that 3-5 specialists come to Romania and their recommendation becomes stronger than the CCR decisions, they don't become legislators****. (…) We examine each recommendation. We give it the legal vocation it has.* ***Don't imagine that a recommendation can have a greater power than the national law. Yes, we take them into consideration, we evaluate them by this grid because I, personally, not as a minister, but as a lawyer, have great doubts that they would tell us in CVM to suspend the application of laws. This is a little too much*** *and exceeds the CVM process",* **Tudorel Toader** also declared. **Also, the President of the Senate of Romania, Călin Popescu-Tăriceanu**, specified that "***CVM is not our God on earth. It does not mean that, once drafted, the document is perfect, a letter of law, crystal clear.*** *In last year's report we saw many mistakes. (...) CVM was not designed to function sine die.* ***We have noticed that this mechanism is used as an instrument of control, pressure, not of verification."*** [see the web page https://www.hotnews.ro/stiri-politic-22774379-riceanu-C VM-nu-este-dumnezeul-nostru-satisfa-care-avut-eful-alde-citit-raportul-comisiei-vene.htm, last accessed on 05.10.2019]. **The Romanian Prime Minister, Viorica Dancilă, declared she was disappointed and revolted by the CVM report:** *"I have to say that I am* ***disappointed and revolted.*** *Disappointed because it is not correct as long as Romania's arguments are not taken into consideration.* ***I cannot accept under any circumstance the recommendation in which the European Commission requires us to suspend the appointment procedure.*** *Such a request would be a violation of the European Treaty. It is inadmissible that the revocation or appointment procedures be (...) a brutal intervention in matters exclusively related to Romania."* [see the web page http://www.ziare.com/vasilica-viorica-dancila/premier/dancila-e-dezamagita-si-revoltata-de-CVM-n u-mai-putem-accepta-ca-rom-anii-sa-fie-certati--care-e-rostul-intrebarilor-lui-frans-timmermans-1538127, last accessed on 05.10.2019].

**It is the obligation of the Member States to provide a predictable legislative framework, and not to change the rules of the game, according to the conjuncture interests.**

decisions of the Romanian Constitutional Court, which refused to take into account the opinions of the Venice Commission, under the argument of the control it performs exclusively by reference to national constitutional rules,[196] the remedy for these deviations from the rule of law was to refer to the Court of Justice of the European Union with successive applications for preliminary ruling, "the requirement of the independence of judges being related to the substance of the fundamental right to a fair trial, which has an essential importance as a guarantor of the protection of all rights conferred to litigants by the EU law and of maintaining the common values of the Member States provided by Article 2 TEU, in particular the value of the rule of law."[197]

We will present below the ten references for preliminary ruling in detail, insisting on the context and the purpose of formulating each of them.

### 2.1. Joined cases C-83/19, C-127/19 and C-195/19, *The Romanian Judges' Forum Association and others*

#### 2.1.1. Case C-83/19, *The Romanian Judges' Forum Association*

Chronologically, the first application for preliminary ruling was formulated by the Olt Regional Tribunal - Section II for Civil, Administrative and Fiscal Matters, in the file no. 2122/104/2018, by the ruling of 29 January 2019 (meanwhile, the file was moved to the Mehedinți Regional Tribunal, upon the request of the defendant Judicial Inspection, by the Craiova Court of Appeals).

The dispute concerns an application by which the applicant, the Romanian Judges' Forum Association requested, versus the defendant Judicial Inspection, to order the defendant to communicate public information regarding various statistics or judicial documents.

In this dispute, the statement of defense was signed by the Chief Inspector of the Judicial Inspection, whose expired term of office had actually just been extended *sine die*, under the provisions of the Government Emergency Ordinance no. 77/2018 for supplementing

[196] See, The Constitutional Court of Romania, Decision no.385 of 5 June 2018 regarding the exception of unconstitutionality of the Law for amending and supplementing Law no.317/2004 regarding the Superior Council of Magistracy, published in the Official Journal of Romania, Part I, no.488 of 13.06.2018 ("30. However, given the status of the constitutional legislative procedure of the Law for amending and supplementing Law no.317/2004 on the Superior Council of Magistracy, namely the fact that the parliamentary procedure for adopting the regulatory document has been completed and the Parliament adopted a law, which is subject to constitutionality review, the Court finds that, in terms of its powers and the control that it performs exclusively by reference to the constitutional rules, the opinion sent by the Venice Commission cannot be used in the constitutionality review. The recommendations made by the international forum could have been useful to the legislator, in the parliamentary procedure for drafting or amending the legislative framework, the Constitutional Court being empowered to carry out a review of the compliance of the regulatory document adopted by the Parliament with the Fundamental Law, and not to verify the opportunity of one legislative solution or another, aspects that fall within the discretion of the legislator, within its policy regarding the laws of justice.").

[197] See CJEU, *Judgment of 25 July 2018, Minister for Justice and Equality - Deficiencies in the system of justice*, C-216/18 PPU, EU:C:2018:586, paragraph 48.

Art. 67 of Law no. 317/2004 regarding the Superior Council of Magistracy.[198]

In the answer to the statement of defense, the applicant, the Romanian Judges' Forum Association, invoked the exception of the lack of proof of representative status of the signatory of the statement of defense, the chief inspector of the defendant Judicial Inspection, criticizing the basis of representation itself, in terms of the provisions of the Treaty on European Union, of the Treaty regarding the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005 and the Cooperation and Verification Mechanism (CVM), established according to Decision 2006/928/EC of the European Commission of 13 December 2006, submitting a request for preliminary ruling to the case file.

In order to be able to rule on the procedural exception of the *lack of proof of representative status*, the referring court indicated that it must clarify the status and legal power of the Reports issued by the European Commission under the Cooperation and Verification Mechanism (CVM). Also considering the contradictory decisions of the Romanian Constitutional Court regarding these issues, the court considered that it must find out, in the facts presented by the applicant, if:

*"The Cooperation and Verification Mechanism, established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, must be considered an act adopted by an institution of the European Union, within the meaning of Article 267 of TFEU, which may be subject to interpretation by the Court of Justice of the European Union.*

*The content, the nature and the temporal scope of the Cooperation and Verification Mechanism, established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, fall within the Treaty regarding the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005 and the requirements formulated in the reports drafted under this Mechanism are mandatory for the Romanian State.*

*Article 19, the second subparagraph of paragraph (1) of the Treaty on European Union must be interpreted as the obligation of the Member States to establish the necessary measures for an effective legal protection in the areas regulated by the EU law, namely guarantees of an independent disciplinary procedure for Romanian judges, removing any risk related to political influence on disciplinary procedures, such as the direct appointment by the Government of the Judicial Inspection management, even provisionally.*

*Article 2 of the Treaty on European Union must be interpreted as the obligation of the Member States to comply with the criteria of the rule of law, also requested in the reports within the Cooperation and Verification Mechanism, established according to the Decision*

[198] The preamble indicates that the Government Emergency Ordinance no. 77/2018 was adopted with *intuitu personae* effects - "*Taking into account the need for the interim to be ensured by persons who have proved their professional and managerial competence, who already carry out such positions, have a thorough knowledge of the activity of the Judicial Inspection and participated in a competition both at the time of the initial appointment, and at the time of the re-appointment for a new term of office, according to the law".* [See art. II of the Government Emergency Ordinance no. 77/2018:"– *The provisions of Art. 67 para. (7) of Law no. 317/ 2004 shall also apply to situations where the position of chief inspector or, as the case may be, of deputy chief inspector of the Judicial Inspection is vacant at the date of entry into force of this emergency ordinance*", a known aspect, obviously]

*2006/928/EC of the European Commission of 13 December 2006, in the case of procedures of direct appointment by the Government of the Judicial Inspection management, even provisionally."*

The court showed that the applicant justified its request by reference to the findings of the ***European Commission Report within CVM published on 13.11.2018:*** *"SCM has not launched a competition for the appointment of a new management of the Judicial Inspection, although the term of office of the management team expired at the end of August 2018. This determined the Government to approach the situation by adopting an emergency ordinance to appoint the current team ad interim. The argument invoked in this regard was that the law governing the organization of the competition was challenged in court (by the Judicial Inspection in 2016) and that, therefore, there was a legal vacuum. SCM has not been able to take measures to ensure that an adequate solution will be found for the timely organization of the competition. The fact that the Minister of Justice decided to intervene, by extending the terms of office of the current management, could be considered as intersecting with the competences of the SCM."*[199]

The referring court considered that the references of the applicant the Romanian Judges' Forum Association both to the acts and provisions of the primary legislation of the European Union and to the case law of the Romanian Constitutional Court were relevant. Emphasizing the fact that the constitutional court has deviated from the previous case law, upon the issuance of the Judgment no. 104 of 6 March 2018, in which it held that the legal force of the *Decision 2006/928/EC* weakens in comparison with the constitutional rule (according to par. 90 – *"The constitution is the expression of the will of the people, which means that it cannot lose its binding force only due to the existence of an inconsistency between its provisions and the EU provisions"),* also noting that the *Decision 2006/928/EC is "an act adopted prior to Romania's accession to the European Union, (which) has not been clarified by the Court of Justice of the European Union in terms of content, nature and temporal scope and whether these fall within the provisions of the Treaty of Accession, implicitly by Law no. 157/2005",* therefore it cannot be "*a reference norm within the review of constitutionality, in terms of Art. 148 of the Constitution*" (par. 88), emphasizing the nature of recommendation, represent reasons that determined the national court to formulate the request for preliminary ruling.

The judicial review of compliance with the EU's legal order is ensured, the applicant also said, as is clear from Article 19 (1) TEU, by the Court and the courts of the Member States. Moreover, the Union is a union of law in which the acts of its institutions are subject to the review of compliance, in particular with the Treaties, with the general principles of law and with the fundamental rights. Under Art.2 of the Treaty on European Union, "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member

[199] We specify that the chief inspector of the Judicial Inspection has, according to the law, the task of *ex officio* notification regarding any disciplinary offence committed by a magistrate, therefore, theoretically also in relation to the judges who were or were to be vested with the settlement of trials initiated by the Romanian Judges Forum' Association.

States in a society where pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.

The applicant recalled the Judgment of 27 February 2018, delivered in the Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018: 117, in which the CJEU ruled as follows:

"42. The guarantee of independence, which is inherent in the task of adjudication (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 49, of 14 June 2017, *Online Games and Others*, C-685/ 15, EU:C:2017:452, paragraph 60, and of 13 December 2017, *El Hassani*, C-403/ 16, EU:C:2017:960, paragraph 40), is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts.

43. The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the reference for a preliminary ruling mechanism under Article 267 TFEU, in that, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.

44. The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C: 2017:126, paragraph 37 and the case-law cited)."

The applicant considered that a legislative intervention by way of a Government Emergency Ordinance has the effect not to cover a purported "legislative gap", as shown in the preamble of the ordinance, but to amputate a responsibility of the Superior Council of Magistracy (CSM), by virtue of its constitutional role as a guarantor of the independence of justice, introducing in the legal circuit the possibility of exercising a management position for an indefinite period, by automatic extension, as an undifferentiated effect of the law, of an expired term of office, without any possibility for SCM to exercise the margin of appreciation that is the essence of its constitutional role. In this regard, the applicant referred to the case law of the Court of Justice of the European Union:

"The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defense, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary."[200]

[200] See CJEU, *Judgment of 25 July 2018, Minister for Justice and Equality - Deficiencies in the system of justice*, C-216/18 PPU, EU:C:2018: 586, paragraph 67.

Also, "the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded." (See CJEU, *Judgment of 25 July 2018, Minister for Justice and Equality - Deficiencies in the system of justice*, C-216/18 PPU, EU:C:2018:586, paragraph 48)[201]

The applicant concluded that, in accordance with relevant provisions, the extension by the Government of the terms of office of the current management of the Judicial Inspection infringes the powers of the Superior Council of Magistracy, in relation to the competences of the chief judicial inspectors, as well as the independence of judges, an essential condition for ensuring effective judicial protection.

In addition to the arguments presented, the referring court emphasized that the legislative act adopted by the Romanian Government did not contain sufficient elements of predictability since the legal provisions in question do not include any deadline until which the interim is provided, nor do they establish obligations in this regard for the Plenary of the Superior Council of Magistracy regarding the organization of the competition provided for in Art. 67 of Law no. 317/2004. Thus, the forum that has the constitutional duty of ensuring the independence of the judiciary is placed in the background, by blurring one of its fundamental powers. But the primary law

[201] According to the main ideas in the *Opinion no. 18 (2015) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the position of the judiciary and its relation with the other powers of the state in modern democracy*: "Judicial power is one of the three powers of state in a democracy. They are complementary, with no one power being supreme or dominating the others. In a democratic state, the three powers of the state function as a system of checks and balances, that holds each accountable in the interest of society as a whole. The principle of the separation of powers is in itself a guarantee of judicial independence. *The judiciary must be independent to fulfill its constitutional role in relation to the other powers of the state, society in general, and the parties to any particular dispute.* The constitutional legitimacy of individual judges who have security of tenure must not be undermined by legislative or executive measures brought about as a result of changes in political power. Also, *Opinion no. 10 (2007) of the Consultative Council of European Judges on the Council for the Judiciary at the service of society* brings important specifications regarding the powers of the independent executive and legislative authority in charge of selecting, appointing and promoting judges. It is shown that, "in order to maintain the independence of the judiciary, it is essential that the selection and promotion of judges be done *independently, preferably by the Council for the Judiciary, excluding the competence of the legislative or executive power.* Also, the *Opinion no. 1 (2001) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges* considers that "the critical matter for Member States is to put into full effect principles already developed and, after examining the standards contained, in particular, in Recommendation no. R (94)12 on the independence, efficiency and role of judges, it concluded as follows: (...) (9) The independence of any individual judge in the performance of his or her functions exists notwithstanding any internal court hierarchy (paragraph 64). (10) The use of statistical data and the court inspection systems shall not serve to prejudice the independence of judges (paragraphs 27 and 69)." Finally, Opinion no. 18 (2015) *of the Consultative Council of European Judges on "Position of the judiciary and its relation with the other powers of State in modern democracy"* established that "14. *Ministries of Justice must not exert influence on the administration of courts through directors of courts and judicial inspections in any way that might endanger judicial independence.* The presence of officials of the executive within the organizing bodies of courts and tribunals should be avoided. Such a presence can lead to interference in the judicial function, thus endangering judicial independence (paragraphs 48-49)."

of the European Union establishes that the fundamental value of the Union is the value of the rule of law, and the Court of Justice of the European Union has the power to interpret the treaties. As such, another reason that determined the court to formulate the request for preliminary ruling is to *clarify* whether the guarantee of an independent judicial system imposes on the Member States the obligation to establish the necessary measures for an effective legal protection in the areas regulated by the EU law, namely guarantees of an independent disciplinary procedure for Romanian judges, removing any risk related to political influence on disciplinary procedures, such as the direct appointment by the Government of the Judicial Inspection management, even provisionally. Closely connected, in relation to the data of the case, the particular obligation of the Member States to comply with the criteria of the rule of law, also requested in the reports within the Cooperation and Verification Mechanism, in the case of procedures of direct appointment by the Government of the Judicial Inspection management, even provisionally, is taken into account.

In case the Court of Justice of the European Union rules that the acts adopted by an institution of the European Union (in this case, the Cooperation and Verification Mechanism, established according to the Decision 2006/928/EC of the European Commission of 13 December 2006) are mandatory and together with the provisions of the aforementioned treaties (Treaty on the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005, Art. 2 and Art. 19 (1) of the Treaty on European Union) oppose the adoption of legal provisions such as those contained by the Government Emergency Ordinance no. 77/2018 for supplementing Art. 67 of Law no. 317/2004 regarding the Superior Council of Magistracy, taking into account the principle of the supremacy of the European Union law (which prevails over national law, being first ruled by the Court of Justice in the Case 6/64 Costa v./ENEL), the court should give effect to the European regulation, including in terms of Art. 148 par. (2) *(As a result of the accession, the provisions of the European Union founding treaties, as well as the other mandatory Community regulations, have priority over the contrary provisions of the domestic laws, subject to compliance with the provisions of the accession document)* and par. 4 *(The Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfilment of the obligations arising from the act of accession and the provisions of paragraph 2)* of the Constitution of Romania.

The immediate result, in the aforementioned assumption, will consist in the content of the basis of the representation of the defendant Judicial Inspection by judge N. (The defendant's Chief Inspector at the date of submitting the statement of defense) becoming void, by removing from the national law the provisions of the Government Emergency Ordinance no. 77/2018 for supplementing Art. 67 of Law no. 317/2004 regarding the Superior Council of Magistracy. This will translate, at procedural level, by the possibility of the court to rule on the exception of the *lack of proof of representative status* at the time of submitting the statement of defense, to admit this objection, with the consequence of ignoring the procedural act represented by the statement of defense and implicitly the evidence and the objection raised by the defendant. This measure will have an impact *on the exercise of the active role* of the court and the limits of this role (according to art. 22

par. 2 of the Civil Procedure Code), on the way of using *the right to defense*, on the *submission of evidence* and, finally, *on solving the case* in relation to all heads of claim; taking into account all assumptions, the solution can be either of total admission or partial admission of the application, or of rejecting the application, as inadmissible, of rejection, as devoid of object, or of rejection, as unfounded.

The fact that, after making the reference for a preliminary ruling, on 15 May 2019, judge N. was appointed in the Plenary of SCM as Chief Inspector of the Judicial Inspection for a new term of 3 years, under Law no. 317/2004, does not determine the loss of relevance of preliminary questions for the solution to be decided in the main dispute.

In interpreting the supposed hypothetical natural of the reference for a preliminary ruling, the principle of law *tempus regit actum,* which is fully applicable to the legal situation in this case, should be taken into account. Thus, until the date of appointment by SCM in the second term of office, Judge N. could not issue valid legal acts, as Chief Inspector, because the provisional appointment made directly by the Government violated the independence of justice, including under Art. 19 (2) and Art. 2 of TEU. The appointment for the second term of office did not have the effect of ratifying a so-called provisional term exercised under a direct appointment made by the Government. All legal acts issued during the provisional term of office remain subject to the legal provisions in force for that period, including GEO no. 77/2018. The fact that GEO no. 77/2018 is no longer applicable since the date of the SCM Plenary Decision of 15 May 2019 does not confer legal nature retroactively, including with regard to the independence of justice, to the acts issued during this period by the provisional chief inspector appointed by the government.[202] The SCM could not confirm an emergency ordinance issued by the Government, in contradiction with the provisions of the TEU, for this period, the person in question could not have the status of legal representative of the Judicial Inspection and all the documents issued by the same are void, therefore the statement of defense submitted to the file of reference for a preliminary ruling is null and thus all exception and defences raised in it must be removed.

In Romania, the Superior Council of Magistracy, as guarantor of the independence of justice, according to Art.133 paragraph (1) of the Constitution, has, under the Law no.317/2004, powers regarding the defense of judges and prosecutors against any act that could affect their independence or impartiality or could create suspicions thereto (Art.30), the career of judges and prosecutors (Art.35), the admission to magistracy, the evaluation, training and examinations of judges and prosecutors (Art.36), the organization and the functioning of courts and prosecutor's

[202] The procedural document of the statement of defense had to be submitted within a certain period stipulated by the Romanian Civil Procedure Code, as the statement of defense is the only document by which evidence and exceptions could be raised, but, at that time, the person signing the statement of defense, for whom the Civil Procedure Code stipulates numerous sanctions, could not prove the status of representative, under the conditions of national law, with reference to Art. 2 and 19 of TEU. In this situation, it was not possible to cover under Art. 82 of the Romanian Civil Procedure Code the lack of representative status, in the sense that the court was required to give a deadline for submitting the proof of status. What the applicant invoked was the lack of representative status in terms of the valid existence of a legal document legally appointing the person, as well as in terms of the nature of the appointment document, namely a document issued by the Government in violation of the TEU.

offices (Art. 37). Consequently, draft laws involving a Council opinion are those such as the legislation on the **status of judges and prosecutors** (which include provisions regarding the rights and duties of judges and prosecutors, incompatibilities and prohibitions, appointment, promotion, suspension and termination of the position as judge or prosecutor, delegation, secondment and transfer of judges and prosecutors, their liability, etc.), presently regulated by Law no.303/2004, **judicial organization** (courts – organization/competences/management, the Public Ministry – organization/competences/management, the organization and functioning of the National Institute of Magistracy, specialized auxiliary compartments within courts and prosecutor's offices, the budgets of the courts and prosecutor's offices etc.), presently regulated by Law no.304/2004, or the **organization and functioning of the Superior Council of Magistracy,** which is based on Law no. 317/2004 (see the *Decision no.63 of 8 February 2017 of the Constitutional Court*), **which also regulates the organization and functioning of the Judicial Inspection.**

By the Decision of the Romanian Superior Council of Magistracy Plenary no.940/11 October 2019, the draft law for approving the GEO no.77/2018 was rejected. It was held that "it is not appropriate to involve the Romanian Government in the appointment of persons who provide the interim in case the positions of chief inspector and deputy chief inspector of the Judicial Inspection are vacant", and this issue must be managed by the SCM, the guarantor of the independence of justice, since the specialized commission within SCM established that the latter had the power to delegate to these positions, both in the meeting of 9 July 2018, and in the meeting of 3 September 2018.[203]

The question arises, in this case, whether the Ministry of Justice and the Romanian Government, upon the ultimatum given by a person directly interested in the activity of the Judicial Inspection, who was also the president of one of the chambers of the Parliament of Romania, respectively the president of the main political party in the coalition government, following the regulation of interim by GEO no.77/2018 and by avoiding the duty of the Superior Council of Magistracy to delegate a provisional management, come to exercise influence on the administration of courts, at least apparently, in terms of how the judges of the case in which the Romanian Judges' Forum Association is a party perceive such a situation, given that one of the parties to the dispute is the Judicial Inspection itself and its chief inspector has the duty to notify ex officio any disciplinary misconduct committed by judges.

The guarantees related to the independence of judges, in relation to which disciplinary proceedings may constitute an interference in certain circumstances, must be complied with in any process, so that a procedural incident such as the one related to the status of representative of the Judicial Inspection justifies the review of the compliance of these guarantees *in limine litis* (as a preventive measure, to defend the right to a fair trial, given that the Judicial Inspection is a party to the trial itself), and the preliminary questions have precisely the purpose of obtaining the interpretation of the Court of Justice of the European Union regarding the necessary measures for effective legal protection in the areas

[203] See the web page http://old.csm1909.ro/csm/linkuri/06_11_2018__92956_ro.pdf [last accessed on 06.07.2019].

governed by the EU law, given that some of them were subject to the obligation to comply with the criteria of the rule of law, also required in the reports within the Cooperation and Verification Mechanism (CVM).

**2.1.2. Case C-127/19, *The Romanian Judges' Forum Association and the Movement for Defending the Status of Prosecutors Association***

By the ruling of 7 February 2019, delivered in the file no. 1156/46/2018, the Pitești Court of Appeal, Section II for Civil, Administrative and Fiscal Disputes[204] made a second request for a preliminary ruling, upon the request of the applicants, the Romanian Judges' Forum Association and the Movement for Defending the Status of Prosecutors Association, requesting the Court of Justice of the European Union to answer the following preliminary questions:

"*1. Should the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, be considered an act adopted by an institution of the European Union, within the meaning of Article 267 of TFEU, which may be subject to interpretation by the Court of Justice of the European Union?*

*2. Do the content, nature and temporal scope of the Cooperation and Verification Mechanism, established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, fall within the provisions of the Treaty regarding the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005? Are the requirements formulated in the reports drawn up under this Mechanism mandatory for the Romanian State?*

*3. Is Article 2 in conjunction with Art. 4 par. 3 of the Treaty on European Union must be interpreted in the sense that the obligation of the Member State to comply with the principle of the rule of law also includes the requirement that Romania complies with the requirements requested in the reports within the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006?*

*4. Does Art. 2 of the Treaty on European Union, in particular the need to respect the values of the rule of law, oppose a law establishing and organizing the Section for the Investigation of Criminal Offences in the Judiciary, within the Prosecutor's Office attached to the High Court of Cassation and Justice, by the possibility of indirectly exerting pressure on judges and prosecutors?*

*5. Does the principle of independence of judges, established by the second paragraph of Article 19 (1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union, as interpreted by the case law of the Court of Justice of the European Union (Grand Chamber, judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, ECLI:EU:C:018:117), oppose the establishment of the Section for the Investigation of Criminal Offences in the Judiciary, within the Prosecutor's Office attached to the High Court of Cassation and Justice, in relation to the way of appointing/dismissing prosecutors who are part of this Section, the way of exercising the activity within it, the way in which competence is established in relation with the small number of positions of this Section?"*

[204] The High Court of Cassation and Justice is to rule on the application for change of venue filed by the Superior Council of Magistracy.

The object of dispute concerns the request for annulment of the Superior Council of Magistracy Plenary Decisions no. 910/19.09.2018, for approving the Regulation on the appointment and dismissal of prosecutors with management positions within the Section for Investigating Crimes in Justice, and no.911/19.09.2018, for approving the Regulation on the appointment, continuation of activity and dismissal of prosecutors with executive positions within the Section for the Investigation of Criminal Offences in the Judiciary, issued based on Law no. 207/2018 for amending and supplementing Law no. 304/2004 regarding the judicial organization, published in the Official Journal of Romania, Part I, no. 636 of 20 July 2018, which entered into force three days after publication

According to Art. I par. 45 of this law, after Article 88, a new section was introduced, regulating the Section for the Investigation of Criminal Offences in the Judiciary, which comprises Art. $88^1$-$88^9$.

The applicants formulated two categories of criticism regarding the two administrative acts of normative nature. Thus, *on the one hand*, they showed that, by adopting them, the provisions of the Constitution of Romania are violated, referring to the obligation of the Romanian State to fulfil exactly and in good faith the obligations deriving from the treaties to which it is a party and which, according to the Constitution [Art. 11, Art. 148 par. (2)], are part of the domestic law, if ratified by the Parliament. Reference is made to the Cooperation and Verification Mechanism, which was established at the time of Romania's accession to the European Union, in 2007, in order to correct the deficiencies of the judicial system reform and to fight corruption. The commitments undertaken by Romania when joining the European Union include proving the sustainability and irreversibility of progress in the fight against corruption, which involves the institutional strengthening of DNA. The European Commission report under CVM, published on 13.11.2018, imposed 8 new recommendations on Romania, including the immediate suspension of the implementation of the laws of justice and the subsequent emergency ordinances and the revision of the laws of justice, by fully taking into account the recommendations formulated within the CVM, as well as the recommendations of the Venice Commission and GRECO. Thus, it was showed that Opinion no. 934 of 13 July 2018, CDL-PI(2018)007, the European Commission for Democracy through Law of the Council of Europe (the Venice Commission) suggested reconsidering the establishment of a special section for investigating judges and prosecutors (as an alternative, the use of specialized prosecutors was proposed, simultaneously with effective procedural safeguards), highlighting the aspects that could endanger the fight against corruption.

Also, the ad-hoc Report on Romania (Rule 34) adopted by the Group of States against Corruption (GRECO), at the 79th Plenary Meeting (Strasbourg, 19-23 March 2018), indicated that the Section seems "an *anomaly* in the current institutional structure, in particular due to (i) the fact that there were no specific data or evaluations demonstrating the existence of structural problems in justice that would justify such an initiative; (ii) because of how the management is appointed and (iii) the fact that this section would not have adequate investigators and investigative instruments, as opposed to other specialized criminal prosecution bodies. It was further claimed, citing the mentions in the aforementioned Report of the European Commission, that "the establishment, under the amended laws of justice, of the new section for the

investigation of criminal offences committed by judges and prosecutors, gives rise to particular concern with regard to the fight against corruption, as a new structure could be more vulnerable in terms of independence than has been the case until present with regard to DNA, given that it could be used as an additional tool to intimidate and pressure the magistrates. Moreover, being a department with general duties covering all categories of crimes committed by judges and prosecutors, it will also lack expertise in investigating specific corruption offenses, and the impact would be amplified if the investigation of all persons related to a case where a magistrate is involved would no longer be within the competence of DNA."[205]

In essence, the applicant associations have argued that the delivery of a preliminary ruling is necessary to clarify whether the CVM and the Report drawn up under it are acts adopted by an EU institution that may be subject to the Court's interpretation under Art. 267 TFEU and if their requirements are mandatory. The applicants also considered that an answer was necessary to establish whether the provisions of Art. 2 and Art. 19 par. (1) of the Treaty on European Union is interpreted in the sense of the obligation of the State, that, in the case of urgent establishment of a prosecutor's office section exclusively investigating the crimes committed by judges and prosecutors, to meet the criteria of the rule of law and to remove any risk regarding the prevention of the fight against corruption and the use of this section as a tool of pressure and intimidation on the judges and prosecutors.

The defendant, the Superior Council of Magistracy, issuer of the challenged regulatory administrative acts, made a point of view on 08.01.2019, considering that, on the one hand, it does not appear to be any doubt regarding the application or interpretation of any norm of the EU law, and, on the other hand, the requested interpretation is not useful and relevant to the resolution of the case. It has been argued that, in this case, the EU law is not applicable either directly or indirectly, and that the only aspects that the national court will analyse are whether the provisions of these regulatory acts with inferior legal force violate or not the provisions contained in regulatory acts with a higher legal force. In the defendant's opinion, the Cooperation and Verification Mechanism cannot be considered an act of an European Union institution, within the meaning of Art. 267 TFEU, which can be subject to the CJEU interpretation.

The referring court took into account the fact that the regulatory administrative documents challenged in the case are part of the secondary legislation and were adopted by the Superior Council of Magistracy on 19.09.2018, in order to implement the legislative amendments from 20.07.2018, in relation to which, in their recommendations, both GRECO and the Venice Commission, whose conclusions were also validated in the CVM Report, highlighted certain vulnerabilities regarding the establishment of a section for investigating judges and prosecutors, in several respects, in particular in terms of efficiently fighting corruption and concerns that this section could affect the independence of magistrates. To the extent that the CVM and the report prepared under this mechanism would give rise to the State's obligation for compliance, such an obligation would be

[205] *On the other hand*, the applicants also criticized certain provisions of the challenged regulatory acts, claiming the contradiction of particular provisions of these infralegal normative acts, with the normative acts of higher rank (the law, the Constitution, the EU Treaty).

incumbent not only on the State legislative authority, which adopts the primary legislation, but also on the administrative bodies (in this case, the Council Superior of the Magistracy, which adopts the secondary legislation), as well as the court.

Given the evolution of the Constitutional Court case law, as well as the fact that, as mentioned in Decision 104 of 6 March 2018 (paragraph 88), *the meaning of Decision 2006/928/EC of the European Commission of 13 December 2006 has not been decided by the Court of Justice of the European Union with regard to the content, nature and temporal scope and whether they fall within the provisions of the Treaty of Accession*, the referring court considered that the resolution of the dispute requires clarification of the nature and legal force of the mentioned acts.

The creation of the special Section for the investigation of criminal offences in the judiciary within the Prosecutor's Office attached to the High Court of Cassation and Justice allows the redirection of dozens of high corruption files, pending with the National Anticorruption Directorate (DNA), by simply formulating fictitious complaints against a judge or a prosecutor, simply removing a significant part of DNA's activity, which was constantly appreciated by the CVM Reports. Although by Decision no. 33/ 2018, the Romanian Constitutional Court rejected as unfounded the unconstitutionality criticisms regarding the effects that the establishment of this new prosecutor's office structure generates on the competences of other already existing structures, the regulation of norms regarding the prosecutor's status, the creation of a discriminatory regime, not based on objective and rational criteria, the regulation of the institution of the chief prosecutor of this section or the competence of the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice to solve conflicts of jurisdiction arising between the structures of the Public Ministry, however, the **Opinion no. 934 of 20 October 2018, CDL-PI(2018)007, the European Commission for Democracy through Law of the Council of Europe (the Venice Commission) suggested reconsidering the establishment of a special section for investigating judges and prosecutors (as an alternative, the use of specialized prosecutors was proposed, simultaneously with effective procedural safeguards)**

The commitments undertaken by Romania when joining the European Union include proving the sustainability and irreversibility of progress in the fight against corruption, which involves the institutional strengthening of National Anticorruption Directorate. The statement adopted by the General Assembly of the Network of European Partners Against Corruption and the European Contact-Point Network Against Corruption (EPAC/EACN), which took place on 20 November 2015, in Paris, shows that the phenomenon of corruption represents a serious threat to development and stability, has negative consequences at all governing levels, undermines public confidence in democracy and forces European decision-makers to strengthen the fight against corruption, in particular the introduction of an automatic cross-border exchange of financial information for investigating corruption deeds, accessible to law enforcement agencies/institutions, establishing an appropriate tool both at national and transnational level, to protect the threatened key witnesses and those who report corruption offenses and to intensify cooperation and exchange of information between anti-corruption authorities and the police surveillance

structures in Europe, using the new EPAC/EACN communication tool within the Europol Expert Platform. **Therefore, demonstrating the sustainability and irreversibility of progress in the fight against corruption does not imply the split of the specialized prosecutor's office, as long as its results are appreciated and encouraged by the European Commission, but its institutional strengthening.**

The measure establishing this section directly affects a structure with remarkable results (the National Anti-Corruption Directorate), recognized by the European Commission and other external partners. In the Report on the progress made by Romania under the Cooperation and Verification Mechanism of November 2017, the European Commission states that *"Overall, a positive assessment of progress under benchmark three (tackling high-level corruption) relies on an independent National Anti-Corruption Directorate to be in a position to perform its activities with all the tools at its disposal and maintain its track record".*[206] This report shows that the National Anti-Corruption Directorate has maintained its track record in the face of intense pressure. Moreover, the European Commission shows that *"were that pressure to start to harm the fight against corruption, the Commission may have to reassess this conclusion"*.

The Venice Commission established that "The use of special prosecutors in such cases (corruption, money laundering, trade of influence, etc.) has been successfully employed in many countries. The offences in question are specialized and can better be investigated and prosecuted by specialized staff. In addition, the investigation of such offences very often requires persons with special expertise in very particular areas. Provided that the special prosecutor is subject to appropriate judicial control, there are many benefits to and no general objections to such a system." *(CDL-AD (2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office in Montenegro, par.17, 18 and 23)*[207]. **Therefore, the creation of this section also undermines the use of specialized prosecutors (corruption, money laundering, trade of influence, etc.), and it is not proportionate measure for any possible purpose.**

Every year, there are thousands of fictitious complaints against judges and prosecutors, in which minimal investigations must be carried out. These complaints were investigated by more than 150 prosecutors from 19 prosecutor's offices. It is obvious that those 15 prosecutors from the new section will be outgrown by the workload.[208] Limiting the number of prosecutors to 15, by law, infringes even

[206] See the web page https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_ro [last accessed on 09.10.2019].

[207] See the web page http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)041-e [last accessed on 09.10.2019].

[208] The appointment of the Chief Prosecutor is decided by the SCM Plenary following a "*competition*" which consists of presenting a project before a commission made of 3 judges appointed by the Section for Judges and one prosecutor appointed by the Section for Prosecutors and the other 14 prosecutors are selected following a "*competition*" consisting of an interview before a commission made by the chief prosecutor of the section and 3 judges appointed by the Section for Judges and one prosecutor appointed by the Section for Prosecutors. Thus, the appointment of prosecutors, including in the position of leading the section, is entirely controlled by the Section for Judges, which is in contradiction to the alleged need to separate careers in the magistracy, one of the reasons for adopting this law. See, in detail, **B. Pîrlog**, *Main aspects seriously affecting the Romanian judicial system*, study available on the web page http://www.forumuljudecatorilor.ro/index.php/archives/3122 [last accessed on 09.10.2019].

the role of the Public Ministry, the legislator creating an extremely flexible structure in relation to the competences assigned and in relation to the importance of the cases they investigate and weakens the proper functioning and even the functional independence of the Section for the Investigation of Criminal Offences in the Judiciary. Given the large number of complaints against judges and prosecutors, in which the criminal investigation bodies have to carry out minimal investigations, even in the case of unfounded complaints, and the fact that these complaints are investigated by more than 150 prosecutors from 19 prosecutor's offices (the Prosecutor's Offices attached to the Courts of Appeal, the Prosecutor's Office attached to the High Courts of Cassation and Justice, DIICOT and DNA), it is obvious that the quality of the criminal prosecution activity of the prosecutors of prosecutors from the Section for the Investigation of Criminal Offences in the Judiciary and the constitutional role of the Public Ministry will be affected.

It was also shown that the competence of the Section for the Investigation of Criminal Offences in the Judiciary is also a personal one, targeting both magistrates and other persons investigated with them in the given cases. In addition, the prosecutors in this section will have to investigate any type of offence, as long as it is committed by a person having the capacity mentioned by the law. Locating the unique structure in Bucharest, where the 15 prosecutors will carry out their activity, requires a much greater effort for the investigated judges and prosecutors as compared to other categories of persons: traveling over long distances to hearings during working hours, to another locality, bearing excessive expenses, aspects that may affect even the proper organization of defense by the given judge or prosecutor. Moreover, the method of appointing the chief prosecutor, as well as the other 14 prosecutors for whom the interview accounts for 60%, does not provide sufficient guarantees for a selection process carried out impartially, which is likely to be also reflected in the activity of this section. Also, the manner of investigating prosecutors who are members of this special section in the case of committing crimes is unclear, as the competence actually belongs to the same structure, which will determine incompatibilities and possibly impunity, in certain factual situations.

It was also mentioned that "functional autonomy should not be confused with institutional autocracy, which implies the concentration of absolute power in the hands of one person or a small group of people. As a counterbalance to such risks for democracy, the principle of checks and balances has appeared, which entails that powers in a democratic system have approximately the same weight, respectively, that they are balanced in order to be able to limit each other, thus avoiding excess power - the abusive use of state power. From our point of view, such an assumption in the matter of criminal liability requires the avoidance of situations where a limited group of persons holds the absolute power to carry out criminal prosecution acts regardless of the crime committed by a person, competence given by the capacity of that person (in this case, as judge or prosecutor). This is because the jurisdiction rule applies inclusively to persons in the limited group, which can lead, in a certain undesirable context, to a *de facto, absolute criminal immunity* (for any type of crime), which the members of the limited group can provide for themselves. Such a system can also be a risk for democratic regimes in the undesirable hypothesis that the shaping of an institutional autocracy could allow for the provision of a *de facto, absolute*

*criminal immunity* (for any kind of crime) for any person who could commit criminal deeds and to whom the *rationae personae* jurisdiction rule applies (in this case, some magistrates - judges or prosecutors). Prior to the establishment of the Special Section for the Investigation of Criminal Offences in the Judiciary, no prosecutor had absolute jurisdiction in criminal matters, so as to investigate another magistrate, regardless of the crime committed. In other words, no prosecutor who was part of a prosecutor's office could provide *full de facto criminal immunity* to another prosecutor belonging to the same limited group (the prosecutor's office) and together they could also not provide *full de facto criminal immunity* to any other judge or prosecutor. The system of checks and balances allowed any prosecutor's office to carry out criminal prosecution according to their specific competence (for example, DNA regarding corruption, DIICOT regarding organized crime, non-specialized prosecutor's offices regarding criminal common law offenses, etc.), so that no prosecutor or judge could have the premises of a *de facto, total, absolute criminal immunity*, if they violated criminal law. The mentioned institutions had their own organization, they were organized territorially etc., so that the very close connections facilitated by the type of organization that could allow a deviation from the rules of democracy were excluded. However, by the way in which the special Section for the Investigation of criminal offences in the judiciary was designed, all crimes committed by a magistrate fall within the exclusive competence of this section, regardless of their nature or seriousness. This rule also applies in the hypothetical situation - obviously, undesirable in the future, but which cannot be excluded as reasoning in a criminological cognitive approach -, that the members of the Special Section, individually or together, may be in the situation of being investigated for any crime."

By the **Opinion no. 950 of 24 June 2019, the European Commission for Democracy in Law (Venice Commission) held that *"the reasons for the creation of the Special Section for the investigation of criminal offences in the judiciary, with loosely defined jurisdiction, remain unclear. Top prosecutors of this Section were appointed under a transitional scheme which de facto removed the prosecutors' wing of the Supreme Council of Magistracy (the SCM) from the decision-making process, which does not sit well with the institutional design of the SCM. It is uncertain to what extent the prosecutors of the Section and its Chief Prosecutor are under the full hierarchical control of the Prosecutor General. Since the Section would be unable to effectively deal with all cases within its competence, it risks being an obstacle to the fight against corruption and organised crime;".***[209] ("39. The Chief Prosecutor of the Section and a few top prosecutors were appointed in October 2018, under the transitional rules of GEO no. 90/2018. In the first months the Section functioned with only 5 prosecutors, including the Chief Prosecutor. Currently, the number of prosecutors in the Section is to be increased to 15. Since 2018 the Section received, according to the figures reported by the Section, over 1400 files, partly from the DNA (which had at the end of 2018 about 150 prosecutors), partly from other departments. In addition, over a thousand

[209] See the web page https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)014-e [last accessed on 06.10.2019].

of new files were opened by the Section itself. From the exchanges the rapporteurs had in Bucharest, it appears that the Section is still seriously understaffed. This required a massive secondment of police officers to the Section, ordered by GEO no. 12/2019. It is clear that the transferal of a large number of cases from the DNA to the new Section puts the criminal justice system under stress, and risks affecting the efficiency and the quality of the pending criminal investigations, especially in complex cases. 40. In addition to the administrative complications, the creation of the new Section raises difficult legal questions. First of all, as already noted in the October opinion, the jurisdiction of the new Section is defined very broadly. It includes all cases where a magistrate may be implicated, even in a secondary role. Complex cases involving organized crime and corruption sometimes involve dishonest magistrates. **Participants in the criminal proceedings may be tempted to obtain the transferal of the case to the Section by accusing a magistrate of some misbehaviour.** Such files will then be transferred to the Section, even if the evidence against the magistrate is weak at least, until the accusations are verified, and more evidence is obtained. Article 88-1 (5) allows the Prosecutor General to solve the conflict of jurisdiction between the Section and other departments, but it remains to be seen whether this safeguard will be efficient, and whether the Prosecutor General will have sufficient time and resources to study all borderline cases. In practice, the creation of the new Section may lead to the withdrawal of a number of "big" cases, involving high-level corruption and organized crime, from the jurisdiction of the DIT and the DIICOT and their transferal to the Section, which is problematic in itself and also because the new Section is not yet equipped to deal effectively with such an influx of complicated high-level corruption and organised crime cases. 41. Second, the position of the new Section within the hierarchy of the prosecution service is not clear. Under Article 132 (1) of the Constitution, "public prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice". It suggests that the prosecution service represents a hierarchical pyramid with the Prosecutor General (attached to the HCCJ) at the top of it. However, opinions on this matter differ. The Prosecutor General, when meeting the rapporteurs, confirmed that his supervisory power over the prosecutors working in the Section, conferred on him by the Criminal Procedure Code, remains unaffected. However, GEO no. 7/2019 points in a different direction: it indicates that a "hierarchically superior prosecutor" for the files investigated by the Section means the Chief Prosecutor of the Section (see the amendment to Article 88-1 of law no. 304), and not the Prosecutor General. In essence, GEO no. 7/2019 seems to depart, in this part, from the idea of "hierarchical control" within the prosecution system, enshrined in the Constitution. 42. Thirdly, Article 88-8 (1) (d), added to Law no. 304/2004, gives the Section the right to lodge and withdraw appeals in pending cases or in cases "which were the subject of a final decision before the Section became operational [under GEO no. 90/2018]." Article 88-1 (6) added that the appeals to the "hierarchically superior prosecutor" (i.e. to the Chief Prosecutor of the Section) may be lodged against decisions made prior to the creation of the Section. It means that, for example, a decision taken by a prosecutor of the DNA, while the case was still in the jurisdiction of the DNA, may now be appealed to the Chief Prosecutor

of the Section, who may annul this decision. Similarly, a prosecutor of the Section may withdraw an appeal lodged by his or her predecessor from the DNA or DIICOT. 43. **The overall direction of those changes is alarming. It is likely that the Section will receive (or already received) complex and high-profile cases related to corruption or organized crime. Prosecutors of the Section will be able to review the decisions taken by their predecessors in those cases.** It is unclear to what extent the prosecutors of the Section and its Chief Prosecutor are subject to the hierarchical control of the Prosecutor General. It may reinforce the belief held by some that the real reason behind the institutional reform is to change the course of criminal investigations in some high-profile cases. **44. The Venice Commission reiterates its recommendation to seriously reconsider the need of the creation of the special Section, its institutional design and the principles of its functioning**.")

**The Opinion of the Bureau of the Consultative Council of European Judges following a request by the Romanian Judges' Forum Association as regards the situation on the independence of the judiciary in Romania, CCJE-BU(2019)4, Strasbourg, 25 April 2019**, **and the Opinion of the Bureau of the Consultative Council of European Prosecutors following a request by the Romanian Movement for Defending the Status of Prosecutors on the independence of prosecutors in Romania, CCPE-BU(2019)3, Strasbourg, 16 May 2019**[210] "**recommends that the creation of a special section for the investigation of criminal offences committed by judges and prosecutors be abandoned".**

**2.1.3. Case C-195/19, *PJ***

By the judgment of 15 February 2019, delivered in the file no.36/2/2019, the Bucharest Court of Appeal, Criminal Section I, notified the Court of Justice of the European Union with the following preliminary questions:

*"1. Are the Cooperation and Verification Mechanism (CVM), established by Commission Decision 2006/928/EC of 13 December 2006, and the requirements laid down in the reports prepared in the context of that mechanism binding on Romania?*

*2. Are Art. 67 (1) TFEU, and both the first sentence of Art. 2 TEU and the first sentence of Art. 9 TEU preclude national legislation establishing a section of the prosecution office which has exclusive jurisdiction to investigate any type of offence committed by judges or prosecutors?*

*3. Does the principle of the primacy of European Law, as enshrined in the judgment of 15 July 1964, Costa, 6/64, EU:C:1964:66, and by subsequent settled case-law of the Court of Justice, preclude national legislation which allows a politico-judicial institution, such as the Romanian Constitutional Court, to infringe the aforementioned principle by means of decisions which are not open to appeal?"*

The subject matter of the dispute concerned the complaint filed in court against the solution of a prosecutor who ordered closing of the case because the deed of abuse imputed to an investigated judge did not exist. Domestic regulation involves the resolution of the complaint by a case prosecutor, and his solution can

[210] See the web pages https://www.coe.int/en/web/ccje/-/avis-du-bureau-du-ccje-concernant-l-independance-du-pouvoir-judiciaire-en-roumanie and https://www.coe.int/en/web/ccpe/-/opinion-of-the-bureau-of-the-ccpe-on-the-independence-of-prosecturos-in-romania [last accessed on 06.10.2019].

be challenged to the chief prosecutor of the prosecutor's office to which he belongs, who analyses it from all points of view and can take any legal measure, including invalidation of the lower prosecutor's solution. If the complainant is unsatisfied, they may file a complaint with the competent court.

In this case, given the applicability of Section 2 ind.1 regarding the Section for the investigation of criminal offenses the judiciary of Law no. 304/2004, amended and supplemented, the superior prosecutor who verified the legality and validity of the case prosecutor's order was part of this special prosecutor's office section, and in the case of admitting the complaint, both the case prosecutor and the superior prosecutor will be part of the same special section for investigating criminal offenses in the judiciary.

It has been assessed that it is the obligation of the court to verify whether or not the European Union law opposes domestic regulations establishing such a special section of the public prosecutor's office. Thus, in the national dispute, the issue of finding the nullity of all procedural documents drawn up by the Section for the investigation of criminal offenses in the judiciary in this case will be raised and will also be considered when establishing the future competent prosecutor's office section, in case of admission of the complaint.

Regarding the third question, it is shown that the need for its formulation is due to the inconsistent practice of the Romanian Constitutional Court and to the specific nature of the decisions of this political-jurisdictional body, which through an interpretation given by jurisprudence, ruled that the considerations of its judgments are also binding, regardless of the solution ordered by the operative part of the decisions, and in the absence of an answer, there is a serious risk that the ECJ ruling cannot be applied in national law.

As regards the first question, the referring court considered that the Cooperation and Verification Mechanism established in accordance with Decision 2006/928/EC of the European Commission of 13 December 2006 is mandatory for the Romanian State, because, otherwise, the benchmarks to which reference is made in its very title, namely the judicial reform and the fight against corruption, could be dispensable elements for both the Union and the Romanian State, a "fundamentally unacceptable" interpretation.

It is mentioned, with reference to the Special Section, that "such an institutional enclave in the national law architecture, far from any kind of effective hierarchical and also judicial control - in the case of closure solutions - formed of an extremely small number of prosecutors, who can give each other any closure solution and regardless of the factual or legal situation and no matter the abuse they might commit, starting from the premise that the courts cannot force them to sue a colleague member of this section, represents an artificial and non-transparent structure".

**Cases C-83/19, C-127/19 and C-195/19 were joined (*The Romanian Judges' Forum Association and others*), the priority settlement procedure being ordered by the President of the CJEU.**

**2.2. Case C-291/19, *SO***

The Brașov Court of Appeals, The Criminal Section, ordered referral to the Court of Justice of the European Union in the file no. 8676/2/2017, according to the judgment of 5 March 2019, with the following questions:

"*1. Is the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, to be considered an act adopted by an institution of the European*

*Union, within the meaning of Article 267 of TFEU, which may be subject to interpretation by the Court of Justice of the European Union?*

*2. Are the requirements formulated in the reports prepared under this Mechanism mandatory for the Romanian State, especially (but not only) regarding the need to make legislative amendments that are in accordance with the CVM conclusions, the recommendations made by the Venice Commission and the Council of Europe Group of States Against Corruption?*

*3. Is Article 2 in conjunction with Art. 4 par. 3 of the Treaty on European Union must be interpreted in the sense that the obligation of the Member State to comply with the principle of the rule of law also includes the requirement that Romania complies with the requirements requested in the reports within the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006?*

*4. Does the principle of independence of judges, established by the second paragraph of Article 19 (1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union, as interpreted by the case law of the Court of Justice of the European Union (Grand Chamber, judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, ECLI:EU:C: 2018:117), oppose the establishment of the Section for the Investigation of Criminal Offences in the Judiciary, within the Prosecutor's Office attached to the High Court of Cassation and Justice, in relation to the way of appointing/ dismissing prosecutors who are part of this Section, the way of exercising the activity within it, the way in which competence is established in relation with the small number of positions of this Section?*

*5. Are Art. 47 par. 2 of the Charter of Fundamental Rights of the European Union, regarding the right to a fair trial by hearing the case within a reasonable time, oppose the establishment of the Section for the Investigation of Criminal Offences in the Judiciary, within the Prosecutor's Office attached to the High Court of Cassation and Justice, in relation to the way of exercising the activity within it, the way in which competence is established in relation with the small number of positions of this Section?"*

The request for referral and the reasoning are similar to that of the Pitești Court of Appeals, in the case C-127/19 and only the subject matter of the dispute is different, in the present file regarding the complaint against the closure solution ordered by the order dated 08.09.2017, maintained by the order in the file 403/ II-2/2017, complaining that several prosecutors committed the criminal offence of abuse of office if the public official obtained for himself or for others an undue advantage, provided by Art. $13^2$ of Law no.78/2000 in relation to Art. 297 par. (1) of the Criminal Code, as well as that an attorney from the Brașov Bar committed the criminal offence of trade of influence, provided by Art. 291 par. (1) of the Criminal Code. After the complaint was registered with the Brașov Court of Appeals, a DNA prosecutor attended the court hearings. After the entry into force of the amendments to Law no. 304/2004 and the decision no. 3/26.02.2019 issued by the High Court of Cassation and Justice regarding the application of Art. $88^8$ par. 2 of Law no. 304/2004, the court hearing was attended by a prosecutor from the Prosecutor's Office attached to the Brașov Court of Appeals. Also, in case it finds that the complaint filed by the applicant is well founded, the court should refer the case to the Section for the investigation of criminal offences in the judiciary (SIIJ) for carrying out the criminal prosecution.

In these circumstances, taking into account that continuation of the proceedings subject of the case involves, both during the trial and during the criminal prosecution, participation of the SIIJ prosecutors, it appears necessary, according to the opinion of the court, to verify whether the European Union law opposes or not an internal regulation establishing such a special section of the prosecutor's office.

In addition to the Pitești Court of Appeals and the Bucharest Court of Appeals, the Brașov Court of Appeals requested the CJEU to analyse the compatibility of the existence of a structure similar to SIIJ also in terms of the provisions of Art. 47 par.2 of the Charter of Fundamental Rights of the European Union guaranteeing **the right to a fair trial, a right that includes resolving the case within a reasonable time.** The referring court showed that, according to the latest data published by the Superior Council of Magistracy, on 05.03.2019, out of the 15 prosecutor positions provided for the Special Section, only 6 were occupied (4 executive positions and 2 management positions), the employment rate being 40%. For comparison, according to the same source, within the DNA the employment rate of the positions is 73.33% and of the DIICOT is 90.85%.

13.2. In terms of the workload, according to the figures published in the Activity Report of the Prosecutor's Office attached to the High Court of Cassation and Justice for the year 2018,[211] after the date of commissioning, **1,422 cases** were registered with SIIJ, of which **180 new cases** (in less than 3 months of activity) **and 1,242 files** sent by the prosecutor's office units and structures in the country as follows: 867 cases, taken from the prosecutor's offices attached to the courts of appeal and the Criminal Investigation and Forensic Section; 346 cases, taken from the National Anticorruption Directorate; 29 cases, taken from the Directorate for Investigating Organized Crime and Terrorism. During the same period, namely 23 October - 31 December 2018, the prosecutors from the Section for the investigation of criminal offenses in the judiciary had to solve **795 general works** (complaints, applications, reports, various notifications etc.), of which 355 works were solved.

On the other hand, the possibility already analysed by GRECO regarding the creation of a legal framework by which this structure also takes over other criminal prosecution files to the extent that criminal complaints are filed against judges and prosecutors in relation to them, especially in sensitive and media-impact files, has become a reality.

In this regard, the referring court notes that, "from the information published in the media, it results that, since the end of 2018, SIIJ has requested, several times, from DNA, a criminal prosecution file investigating offenses of abuse of office committed against public interests, possibly in connection with obtaining European funds. In this file, both the prosecutor within SIIJ and the prosecutor within DNA declared their jurisdiction, so that the general prosecutor of Romania was notified. According to the press release issued by the Prosecutor's Office attached to the High Court of Cassation and Justice": *"Seeing the interest expressed by several journalists regarding the conflict of jurisdiction arising between the National Anticorruption Directorate - The Section for Fighting*

[211] Available on the website http://www.mpublic.ro/ro/content/raport-de-activitate [last accessed on 06.10.2019].

*Offenses Assimilated to Corruption Offenses and Section for Investigating Criminal Offences in the Judiciary, during the investigation of the file called in the media "the Tel Drum file", the Information and Public Relations Office within the Prosecutor's Office attached to the High Court of Cassation and Justice is authorized to inform the public as follows: By order no. 412/C/2019 of 12.03.2019, the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice ordered, under Art. 63 par. 1 and par. 4 of the Criminal Procedure Code, Art. 88 ind. 1 par. 5 of Law no. 304/2004 and Art. 1 par. 31 of the GEO no. 43/2002, the establishment of jurisdiction for solving file no. 986/P/2014 in favour of the National Anticorruption Directorate - Section for Combating Offences Assimilated to Corruption Offenses. The solution was delivered as a result of finding that the deeds that are the subject of criminal prosecution in the D.N.A. file no. 986/P/2014 have no connection with the* ***deeds reported anonymously in the S.I.I.J. file no. 1164/P/2018.****"*[212]

In relation to these conditions, the national court, which, in the present case, has the possibility to deliver a solution by which the criminal prosecution file is sent to the SIIJ for continuing the criminal prosecution, has doubts about carrying out an actual investigation in the case and performing a criminal prosecution that ensures the settlement of the case within a reasonable time. Although it is obvious that the exceeding of the reasonable time is analysed by reference to a multitude of invoices, the European Court of Human Rights referring, in its case-law, to the *circumstances of the case and the following criteria: the complexity of the business, the conduct of the applicant and of the relevant authorities, as well as the stake of the dispute for the interested party* (in this regard, for example, the decision of 27 June 2000, *Frylander v. France*, par. 43; the decision of 18 February 1999, *Laino v. Italy*, par. 18; the decision of 4 April 2006, *Maršálek v. Czech Republic*, par. 49; the decision of 13 July 2006, *Nichifor v. Romania (no. 1)*, par. 26), the referring court considered that there are sufficient doubts regarding the possibility that, within the SIIJ, a criminal investigation activity is carried out which, together with the acts to be performed in the trial phase, will ensure the settlement of the case within a reasonable time.

In this case, by the President of the CJEU ordered a priority settlement procedure.

### 2.3. Case C-355/19, *The Romanian Judges' Forum Association and Others*

The Pitești Court of Appeals, Section II for Civil, Administrative and Fiscal Matters, in the file no. 45/46/2019, by the ruling of 29 March 2019, referred to CJEU with the following preliminary questions:

*"1. Is the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, to be considered an act adopted by an institution of the European Union, within the meaning of Article 267 of TFEU, which may be subject to interpretation by the Court of Justice of the European Union?*

*2. The content, the nature and the temporal scope of the Cooperation and Verification Mechanism (CVM), established according to the Decision*

[212] See the web page http://www.mpublic.ro/ro/content/c_13-03-2019-15-03 [last accessed on 09.10.2019].

*2006/928/EC of the European Commission of 13 December 2006, fall within the Treaty regarding the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005? Are the requirements formulated in the reports drawn up under this Mechanism mandatory for the Romanian State?*

*3. Article 2 of the Treaty on European Union must be interpreted as the obligation of the Member States to comply with the criteria of the rule of law, also requested in the reports within the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, in the case of urgent establishment of a prosecutor's office section exclusively investigating criminal offences committed by judges and prosecutors, which gives rise to important concerns regarding the fight against corruption and can be used as an additional tool to intimidate magistrates and exercise pressure on them?*

*4. The second paragraph of Article 19 (1) of the Treaty on European Union must be interpreted as the obligation of the Member States to establish the necessary measures for effective legal protection in the areas regulated by the EU law, respectively by removing any risk related to political influence on the criminal investigation of judges, in the case of urgent establishment of a prosecutor's office section exclusively investigating criminal offences committed by judges and prosecutors, which gives rise to important concerns regarding the fight against corruption and can be used as an additional tool to intimidate magistrates and exercise pressure on them?"*

The reasoning and the subject matter of the dispute are similar to those in the preliminary referral registered in Case C-127/19, *The Romanian Judges' Forum Association and the Movement for Defending the Status of Prosecutors Association.*

### 2.4. Case C-357/19, *Euro Box Promotion*

By the ruling of 22 April 2019, delivered in the file no. 3089/1/2018, the High Court of Cassation and Justice, the Panel of 5 judges, made a reference for a preliminary ruling, requesting the CJEU to answer to the following questions:

*"1. Are Art. 19 par. (1) of the Treaty on European Union, Art. 325 par. (1) of the Treaty on the Functioning of the European Union, Art. 1 par. (1) points a) and b) and Art. 2 par. (1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests and the principle of legal certainty, to be interpreted as opposing the adoption of a decision by a body outside the judiciary, the Romanian Constitutional Court, which assesses the legality of forming court panels with the consequence of creating the necessary premises for admitting extraordinary remedies against final court decisions delivered within a period of time?*[213]

*2. Is Article 47 paragraph 2 of the Charter of Fundamental Rights of the European Union to be interpreted in the sense of opposing the finding by a body outside the judiciary of the lack of independence and impartiality of a panel including a judge with a management*

[213] See **Laurent Pech, Vlad Perju, Sébastien Platon**, How to Address Rule of Law Backsliding in Romania. The case for an infringement action based on Article 325 TFEU, a study available on the web page https://verfassungsblog.de/how-to-adress-rule-of-law-backsliding-in-romania/ [last accessed on 09.10.2019].

*position and who was not randomly appointed, but on the basis of a transparent rule, known and undisputed by the parties, a rule applicable in all the cases of such panel, the adopted decision being mandatory according to the national law?*

*3. Is the priority application of the EU law to be interpreted in the sense that it allows the national court to override the application of a decision of the constitutional court, delivered in a referral regarding a constitutional conflict, which is mandatory in national law?"*

As regards the subject matter of the dispute and the relevant facts, by successive applications, the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate, as well as the convicted persons A., B., D. and C., filed an appeal for annulment against Decision no. 93 delivered on 05.06.2018 by the Panel of 5 judges of the High Court of Cassation and Justice. The challengers invoked the fact that, after the conviction decision remained final, the Constitutional Court Decision no. 685/07.11.2018 was issued, which, by a majority of votes, admitted the referral to the Government of Romania, found the "*existence of a constitutional legal conflict between the Parliament and the High Court of Cassation and Justice, generated by the decisions of the Managing Board of the High Court of Cassation and Justice, starting with the decision no.3/2014, by which only 4 of the 5 members of the Panels of 5 judges were appointed by lot, contrary to the provisions of Art. 32 of Law no. 304/2004 regarding judicial organization."*

As such, they requested to be established that the decision of the Constitutional Court is mandatory and has effects on the challenged decision because the Panel of 5 judges which heard the appeal was not formed according to the law, in the interpretation given by the Constitutional Court, and, as such, it is required to admit the appeal for annulment, to cancel the decision and rehear the appeals.

The applications regarding the appeal for annulment were admitted in principle by successive decisions, as the court found that the conditions for admissibility were formally fulfilled, namely the challengers had the procedural capacity to use the extraordinary appeal, the appeal for annulment was filed within the time provided by law and is based on one of the cases provided expressly and restrictively by the applicable domestic provisions, namely the court of appeal was not formed according to the law. It was also ordered to suspend the execution of the sentences of imprisonment until the settlement on the merits of the appeal for annulment against B., D. and A., who were released.

It was held that the appeal panel that delivered the challenged decision included the president of the criminal section and 4 other judges appointed by drawing lots according to the administrative practice established by Art. 28 and 29 of the Regulation on the organization and administrative functioning of the High Court of Cassation and Justice, published in the Official Journal of Romania, undisputed and unanimously applied by the judicial practice of the panels of 5 judges. After the conviction remained final, the Constitutional Court adopted the decision invoked by the challengers, by which it established that the interpretation by the Managing Board of the High Court of Cassation and Justice of the primary norms included in Law no.304/2004 regarding judicial organization when adopting the Regulation on the organization and administrative functioning, is erroneous and led to the unlawful formation of all Panels of 5

judges starting with 1 February 2014. The same decision also ruled on the effects of the decision on the final judgments, in the sense of causing their absolute nullity, which can be invoked in the appropriate extraordinary appeal.

Through the preliminary questions referred, the referring court requested, in essence, to be established whether Art. 19 par. (1) of TEU, A. 325 par. (1) TFEU, Art. 1 par. (1) points a) and b) and Art. 2 par. (1) of the Convention on the protection of the European Communities' financial interests and the principle of legal certainty, read in consideration of the Charter, must be interpreted as opposing, in relation to the principle of effective criminal penalties in cases of serious fraud, the application by the national court of a decision made by an authority that is not part of the judicial system and which rules on the validity of an extraordinary appeal, in the sense that it requires the cancellation of judgments remaining final prior to its adoption and reconsiders the initial accusation by rehearing the appeal.

It was shown that, in the case law of the CJEU, it was established that "Art. 325 par. (1) of the TFEU requires the Member States to counter fraud and any other illegal activities affecting the financial interests of the Union through effective and deterring measures and whereas the EU's own resources include, inter alia, according to Art. 2 par. (1) point b) of the Decision 2007/436, revenue from the application of a uniform rate to the harmonized VAT assessment bases, determined according to Community rules, there is a direct relation between the collection of VAT revenue in compliance with the applicable EU law and the provision to the Union budget of the corresponding VAT resources, since any shortfall in the collection of the former may be at the origin of a reduction of the latter (decision *Akerberg Fransson*, C-617/10, EU:C:2013:105, decision of 5.12.2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, decision of 5.06.2018, *Kolev and others*, C-612/15). It was also held that, although the Member States have procedural and institutional autonomy to counter the violations of harmonized VAT rules, it is limited, in relation to the principle of proportionality and the principle of equivalence, whose application is not discussed in the case, and the principle of effectiveness, which requires that the penalties in question be effective and deterring (decision of 2.05.2018, *Scialdone*, C-574/15, EU:C:2018:295, decision of 08.09.2015, *Taricco and others*, C-105/14, EU:C:2015:555). The court ruled that it is first of all the obligation of the national legislator to take the necessary measures. It has the obligation, if applicable, to change its regulation and to guarantee that the procedural regime applicable to the prosecution of offenses affecting the financial interests of the European Union is not designed so as to present, for reasons inherent to it, a systemic risk of impunity for deeds that constitute such offenses, as well as to ensure the protection of the fundamental rights of the persons prosecuted. As regards national courts, the Court ruled that they have the duty to ensure the full effect of the obligations arising from Article 325 paragraph (1) of TFEU and to leave unapplied the domestic provisions, which, in a procedure concerning serious offenses in VAT matters, oppose the application of effective and deterring penalties to fight fraud affecting the European Union's financial interests. However, the obligation to guarantee an effective collection of the European Union resources does not exempt national courts from the requirement to respect the fundamental rights guaranteed by the Charter and the general principles of Union law, since criminal proceedings

opened for VAT offenses constitute an application of EU law, within the meaning of Article 51 paragraph (1) of the Charter. In the criminal field, these rights and these general principles must be complied with not only in criminal proceedings, but also during the criminal investigation, as of the time when the person in question is accused (judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017: 936, judgment of 5 June 2018, *Kolev and others*, C-612/15, EU:C:2018:392, and the judgment of 20 March 2018, *Di Puma and Zecca*, C-596/16 and C-597/16, EU:C:2018:192)."

The High Court of Cassation and Justice also mentioned that Article 19 of TEU materializes the value of the rule of law affirmed by Article 2 of TEU and entrusts the task of ensuring judicial control in the European Union's legal order not only with the Court, but also with the national courts, the Member States having the obligation to provide for a system of remedies and procedures that ensure effective judicial control in the areas governed by Union law. The principle of effective judicial protection of the rights conferred to litigants by the Union law referred to in Art. 19 par. (1) of TEU, is a general principle arising from the common constitutional traditions of Member States, which was enshrined in Art. 6 and Art. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and stated by Art. 47 of the Charter. Any Member State must ensure that the bodies which, as a "court", within the meaning defined by the European Union law, are part of its system of remedies in the fields governed by the EU law, meet the requirements of effective judicial protection, the preservation of the independence of such body being essential. The guarantee of independence, which is inherent in the court's mission, is required not only at the level of the Union, with regard to the judges and the advocates general of the Court, as provided by Art. 19 par. 2 of TEU, but also at the level of the Member States, with regard to the national courts (decision of 27.02.2018, *Associacao Sindical dos Juizes Portugueses*, EU:C:2018:117). The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgment of 19.09.2006, *Wilson* - C-506/04, EU:C: 2006:587 and judgment of 16.02.2017 *Margarit Panicello*, C-503/15, EU:C: 2017:126). The CJEU stated on several occasions the importance of the principle of judicial authority (*Köbler* judgment, C-224/01, EU:C:2003:513). Thus, it was held that the European Union law does not impose on a judicial body the obligation to review the decision issued, not even for taking into account the interpretation of a relevant provision of such right, adopted by the Court after the judicial body issued the decision that acquired res judicata force ((judgment *Impresa Pizzarotti*, C-213/13, EU:C: 2014:2067).

In the answer to the first question, the referring court found useful the interpretation of the phrase "***and any other illegal activities affecting the financial interests of the Union"*** in the provisions of Art. 325 par. 1 of TFEU in the sense of analysing the possibility of including the actual deeds of corruption, but also fraud committed in connection with carrying out public procurement, especially in the case where the pursued purpose was to obtain the reimbursement

of the amounts allocated fraudulently from European funds, even if they were not actually defrauded, in the context where such deeds constitute a particularly serious threat to the financial interests of the Union. Given the case law of the Court, but also the importance, both in the legal order of the Union and in the national legal order of the principle of legality, which requires that the law be predictable, precise and non-retroactive, through the second question, the referring court asks the Court to clarify whether the meaning of the notion of **court "*previously constituted by law"*** from Art. 47 par. 2 of the Charter, "opposes the interpretation given by the Romanian Constitutional Court regarding the unlawful court formation. The interpretation is necessary in order to allow the court to detect the existence of an impediment to the exclusion of the applicability of the decision on which the extraordinary appeal is based. Thus, in the case law of the Court, it was held that the competent national courts, when they must decide to leave unapplied the provisions of material criminal law, have the obligation to ensure that the fundamental rights of the accused persons who committed an offence are respected (judgment of 08.09.2015, *Taricco and others,* C-105/14, EU:C:2015:555) and that they are free to apply national standards for the protection of fundamental rights, provided that such application does not compromise the level of protection required by the charter, as it was interpreted by the Court or the supremacy, unity and effectiveness of EU law (judgment *Akerberg Fransson*, C-617/10, EU:C:2013:105, judgment of 5.12.2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936)."

By its third preliminary question, the referring court requested the Court of Justice of the European Union to provide clarification on the need to remove the application of the Constitutional Court's decision in order to ensure the full effect of EU law in the context in which its observance is mandatory for the court and its violation constitutes a disciplinary offense. In the previous case law of the Court, it was held that the national court has the obligation to ensure the full effect of EU law, removing, if necessary, ex officio, the application of any contrary provision of the national law and that any provision of the national legal order, any legislative, administrative or judicial practice that would deny the competent court this prerogative is incompatible with the requirements that are inherent to the very nature of EU law (judgment of 9.03.1978, *Simmenthal*, C-106/77; judgment of 22.06.2010, *Melki and Abdeli,* C- 188/10 and C-189/10).

The CJEU interpretation is considered necessary "in order to clarify whether the decision of the Constitutional Court, a judicial body outside the judiciary, having exclusive jurisdiction in ruling on constitutional conflicts and whose provisions are mandatory *erga omnes*, is part of the category of provisions that can and should be removed in order to ensure full effectiveness of the EU rules, especially in the context of the existence of a national rule that allows disciplinary penalties be applied to judges if they proceed to remove its effects. This clarification is indispensable because, in the absence of an answer, there is a serious risk that, regardless of the answer to the first two questions, the CJEU decision cannot be applied in national law. The referring court submits to the attention of the Court the interpretation that, in consideration of the importance of the principle of the independence of judges, an expansion of the relation with the European Union law also to cases where national law is exclusively applied should be justified when this principle is endangered by the effects of the decisions

of a judicial body, even the Constitutional Court".

In the opinion of the referring court (the High Court of Cassation and Justice), the principle of the independence of judges and the principle of legal certainty oppose the establishment of mandatory effects on the decisions remained final at the date of adopting the decision of the Constitutional Court, in the absence of serious reasons that question the observance of the right to a fair trial in the given cases. Thus, it is shown that the interpretation given by the Managing Board of the supreme court and transposed into the Regulation of administrative organization and functioning, undisputed and unanimously accepted by the judicial practice, is not a reasonable reason to justify such effects. In fact, the decision to refer to the Constitutional Court regarding the High Court of Cassation and Justice, a referral that resulted in Decision no. 685/2018, is mentioned in the Commission Report to the European Parliament and the Council on the progress made by Romania under the Mechanism Cooperation and Verification as one of the actions directed against the key judicial institutions with "*clear implications regarding the independence of the judicial system"*. In the opinion of the national court, the EU law opposes the mandatory effects of a decision of a judicial body, even the Constitutional Court, which removes the jurisdiction of the national court to assess the applicability of the principle of priority application.

**2.5. Case C-381/19, *Banca E***

The Cluj Court of Appeals, Civil Section II, by the judgment of 3 April 2019, delivered in the file no. 6449/328/2015, referred to the Court of Justice of the European Union with the following preliminary question:

*"In the context of the supremacy of EU law, are the principles of legal certainty and effectiveness to be interpreted as opposing that, in a dispute in the field of consumer rights protection, procedural rules should be amended after the court has been notified by the consumer, by a binding decision of the Constitutional Court, implemented by a law amending the Civil Procedure Code, by introducing a new remedy that can be used by the professional, with the consequence of extending the duration of the trial and increasing the costs for its completion?"*

In this case, as a result of a decision of the Constitutional Court, the complaining consumer was faced the introduction of a new remedy that can also be used by professionals, after the application is filed.

Thus, according to the initial provisions of Art. XVIII par. 2 of Law no. 2/2013, in force as at 09.12.2015, when the application was filed with the Turda First Instance Court, "in proceedings started as of the date of entry into force of this law and until 31 December 2015, the judgments delivered in the applications provided under Art. 94 par. 1 points a) - i) of the Civil Procedure Code, in those regarding civil navigation and activity in ports, labour and social security conflicts, in the matter of expropriation, in the claims for the compensation of damage caused by judicial errors, *as well as in other applications assessable in money, worth up to RON 1,000,000 inclusive,* are not subject to second appeal. Also, in these proceedings, the decisions delivered by the courts of appeal in cases where the law stipulates that the decisions of the court of first instance are only subject to appeal, are not subject to second appeal. "The deadline of 31 December 2015 was extended successively until 31 December 2016 (by GEO No. 62/2015) and 31 December 2018 (through GEO No. 95/2016).

Accordingly, at the time of notifying the court, the application filed by the consumer plaintiff would have been solved by a first instance judgment exclusively subject to appeal, a devolutive remedy for both legal and factual reasons. The decision delivered in appeal was final, excluding the exercise of the extraordinary remedy of second appeal in applications assessable in money, worth up to RON 1,000,000. The other assumptions for exemption from the exercise of second appeal were not applicable and are not relevant to this preliminary question.

By the Constitutional Court Decision no. 369/2017, the exception of unconstitutionality was admitted, establishing that the phrase "as well as in other applications assessable in money, worth up to RON 1,000,000 inclusive" contained in Art. XVIII par. (2) of Law no. 2/2013 is unconstitutional. According to Art. 147 par. (1) of the Constitution of Romania, starting from 20 July 2017, the provision regarding the phrase "as well as in other applications assessable in money, worth up to RON 1,000,000 inclusive" contained in Art. XVIII par. (2) of Law no. 2/2013 was suspended by law and ceased to have legal effects as of 3 September 2017, in the absence of a legislative amendment.

The concrete manner of application by the courts of the Constitutional Court Decision no. 369/30 May 2017 was subject to the analysis of the supreme court in the file no. 866/1/2018, and by Decision no. 52/2018, delivered by the High Court of Cassation and Justice, the Panel for the resolution of points of law, it was established that, in the interpretation and application of the provisions of Art. 27 of the Civil Procedure Code, with reference to Art. 147 par. (4) of the Constitution of Romania, the Constitutional Court Decision no. 369 of 30 May 2017 produces effects with regard to judgments delivered after it was published in the Official Journal of Romania, in disputes assessable in money, worth up to RON 1,000,000, initiated after the decision was published (20 July 2017).

However, this interpretation of Article 27 of the Civil Procedure Code, given by the High Court of Cassation and Justice, by Decision no. 52/2018, was in turn censored by the Constitutional Court. Thus, the Constitutional Court Decision no. 874/18 December 2018 admitted the exception of unconstitutionality of the interpretation given to the provisions of Art. 27 of the Civil Procedure Code, in relation to the effects of Decision no. 369/2017, made by the Decision of the High Court of Cassation and Justice no. 52/18 June 2018. The Constitutional Court ruled as binding by the mentioned decision and settled the jurisprudential dispute in the sense that "(...) all judgments delivered after this decision (no.369/30 May 2017) is published in the Official Journal of Romania, in the applications assessable in money are subject to second appeal, except those exempted according to the criterion of the matter, expressly provided in the theses included in Art. XVIII par. (2) of Law no. 2/2013, "*Regardless of the date of filing the application under the new Civil Procedure Code, the court decision regarding applications assessable in money worth up to RON 1,000,000 inclusive becomes subject to second appeal if it was delivered after the decision of the Constitutional Court was published* (20 July 2017*).*" (paragraph 58).

Accordingly, the Constitutional Court ruled on the admissibility of all second appeals filed against the appeal decisions delivered in disputes assessable in money *after 20.07.2017*, the date of publishing in the Official Journal the Constitutional Court Decision no. 369/2017, irrespective of the date of filing the application, prior or after the date of 20.07.2017, therefore also in the dispute

of the file in which the application was filed on 09.12.2015, being assessable in money but worth less than RON 1,000,000. Only disputes where the remedy of second appeal is excluded by reference to the subject matter of the case are excepted, an assumption that is not found in the specific case analysed.

This decision of the Constitutional Court required the legislator to intervene and clarify the situation of second appeals filed in disputes worth less than RON 1,000,000, pending before the courts prior to 20.07.2017, with regard to the Constitutional Court decisions. Specifically, by Art. III of Law no. 310/2018, Law no. 2/2013 was amended, in the sense that, according to Art. XVIII par. 2 the second thesis of this regulatory document, "*in trials started prior to 20 July 2017 inclusively and not solved by a judgment delivered prior to 19 July 2017 inclusively*, as well as in trials started as of 20 July 2017 and until 31 December 2018 inclusively, the judgments delivered in the applications provided by Art. 94 par. 1 points a) - i) of Law no. 134/2010 (the Civil Procedure Code), in those regarding civil navigation and activity in ports, labour and social security conflicts, in the matter of expropriation, as well as in the claims for the compensation of damage caused by judicial errors, are not subject to second appeal".

Accordingly, in the specific case analysed, the second appeal is admissible and can be filed by the professional, even if the application was initially filed to the Turda Court on 09.12.2015, because the appeal decision was delivered on 16.10.2017, after the reference date of 20.07.2017. Moreover, beyond the theoretical considerations, in the specific case analysed, the second appeal was actually declared on 07.12.2017 by the professional Banca Comercială Română S.A.

The Cluj Court of Appeal showed that the *principle of legal certainty*, outlined in a rich case law of the Court of Justice which is a source of law, is part of the acquis EU law and is applied with priority over the contrary provisions of national law, according to Article 148 par. (2) of the Constitution of Romania. It essentially expresses the fact that citizens must be protected against a danger that comes from the law, against an uncertainty created by the law or that it risks creating. The principle of legal certainty is correlated with another principle, developed in EU law, namely the *principle of the protection of legitimate expectations*. According to the case law of the Court of Justice of the European Union (for example, the cases *Facini Dori* - C-91/92, *FotoFrost v Hauptzollant LubeckOst* - 314/85), the principle of the protection of legitimate expectations requires that the legislation be clear and predictable, unitary and coherent. It also requires limiting the possibilities of amending the legal rules, the stability of the rules established by them. The importance of these rigors is all the more visible as the lack of predictability can produce negative consequences for individuals and undertakings (*Unibet International* judgment, C-49/16, paragraph 43).

In the opinion of the referring court, "the observance of the principle of legal certainty cannot be discussed in the context in which a litigant decides to refer to the court with a civil action, by shaping their entire strategy (as duration, hearings, procedural steps, costs etc.) depending on the 2 procedural stages clearly provided by the legislation at the beginning of the trial and towards the end of the entire procedure, is finds out with surprise that another previously unpredictable remedy has occurred and may be used by the professional who entirely or partly lost the dispute in the first instance as well as in appeal. In the

presence of this new remedy, the consumer who won the trial following the two initial procedural stages does not have a final decision, but a decision that becomes again subject to analysis, with all the consequences that follow: extension of the entire procedure, new costs and new steps, uncertainty with regard to the final outcome".

In the opinion of the Cluj Court of Appeals, this principle is infringed in the specific case analysed. On the one hand, the consumer plaintiff exercises a right conferred by the legal order of the European Union, because he/she requests the national court to cancel some abusive clauses in a bank loan agreement concluded with a professional. The aspects that the court must examine in order to verify the legality of the agreement were regulated at the level of EU law by Directive 93/13/EEC, transposed into national law by Law no.193/2000. On the other hand, regarding the difficulties faced by the consumer in achieving his rights, the court considers that the introduction, during the settlement of the dispute, of an additional remedy available to the professional, after a trial in the first instance and an appeal, a second appeal and a third level of jurisdiction, makes it extremely difficult to exercise the rights conferred by the legal order of the European Union and has an inhibitory effect for the consumer through due to the unpredictability of the change, the duration and the costs of the procedure.

Even if the analysed situation concerns a procedural aspect, there is a sufficiently strong connection with the European Union law because, on the one hand, the two principles whose interpretation is sought are defined by a constant and rich case law of the Court of Justice, being thus integrated into the legal order of the European Union. On the other hand, the court requests the interpretation of the two principles, the principle of legal certainty, respectively the principle of effectiveness, by direct reference to a dispute in the field of consumer protection, which is in its turn consistently regulated by successive rules of the European Union that were also taken over in national law by Law no. 193/2000 which transposed Directive 93/13 EEC.

**2.6. Case C-379/19, *DNA Prosecutor – Oradea Territorial Service***

By the ruling of 7 May 2019, delivered in the file no. 3507/111/2016, the Bihor Regional Tribunal, the Criminal Section, made a reference for a preliminary ruling, requesting the CJEU to answer to the following questions:

*"1. Are the Cooperation and Verification Mechanism (CVM), established by Commission Decision 2006/928/EC of 13 December 2006, and the requirements laid down in the reports prepared in the context of that mechanism binding on Romania?*

*2. Is Article 2 in conjunction with Art. 4 par. 3 of the Treaty on European Union to be interpreted in the sense that the obligation of the Member State to comply with the principle of the rule of law also includes the requirement that Romania complies with the requirements requested in the reports within the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, including with regard to the refrain from intervention of a constitutional court, a political-judicial institution, to interpret the law and to establish the concrete and mandatory way of applying it by the courts, the exclusive competence assigned to the judicial authority and to establish new legal rules, the exclusive competence assigned to the legislative authority? Does EU law require the removal of the*

*effects of such a decision delivered by a Constitutional Court? Does EU law oppose the existence of an internal rule governing disciplinary liability for the magistrate who removed from application the decision of the Constitutional Court, in the context of the question asked?*

*3. Does the principle of independence of judges, established by the second paragraph of Article 19 (1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union, as interpreted by the case law of the Court of Justice of the European Union (Grand Chamber, judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, ECLI:EU:C: 2018:117), oppose the substitution of their competences by the decisions of the Constitutional Court (Decisions no. 51 of 16 February 2016, Decision no.302 of 4 May 2017 and Decision no.26/ 16.01.2019), with the consequence of the lack of predictability of the criminal trial (retroactive application) and the impossibility of interpreting and applying the law to the specific cause? Does EU law oppose the existence of an internal rule governing disciplinary liability for the magistrate who removed from application the decision of the Constitutional Court, in the context of the question asked?"*

The criminal decision of 27.01.2017 delivered by the preliminary chamber judge of the Bihor Court rejected the requests and exceptions formulated by the defendants, established the legality of the criminal prosecution acts and the submission of evidence, as well as the regularity of the indictment of the National Anticorruption Directorate - Oradea Territorial Service and ordered the beginning of trial regarding the defendants for the corruption offences mentioned in the document instituting the proceedings. The rejected requests and the exceptions also included those regarding the exclusion of the reports on the reproduction of recording, as the preliminary chamber judge considered their submission as evidence was legal, with the express motivation that the applicability of the Constitutional Court Decision no.51/2016 cannot be assessed, since its effects are produced only for the future.

The defendants filed appeal against the criminal decision of 27.01.2017 delivered by the preliminary chamber judge of the Bihor Court and, by the criminal decision of 10.05.2017, the preliminary chamber judge of the Oradea Court of Appeals rejected the appeal filed by the defendants and maintained in full the decision of 27.01.2017, including as regards the solution regarding the request to exclude the reports on the reproduction of recording resulting from the implementation of surveillance warrants. In essence, during the appeal, the review court ruled that Decision no. 51/2016 of the Constitutional Court was inapplicable to the technical surveillance measures ordered in the case, which was published in the Official Journal, Part I, no.190/ 14.03.2016, producing effects, according to Art.147 paragraph (4) of the Constitution, only for the future. The preliminary chamber decision remained final, without excluding any means of evidence submitted during the criminal prosecution.

For the priority settlement of the request for exclusion of evidence, as formulated by the defendants, with reference to the reports recording the results of the technical surveillance activities, evidence submitted in the criminal investigation phase, ex officio, the court assessed that it is necessary to refer to the Court of Justice of the European Union.

The court's dilemma is "in relation to its role in making justice, considering that the Constitutional Court's interventions determine an abstract, direct and mandatory application of its resolutions,

without the possibility of an approach applied to the specific case". It is shown that, according to Art.146 of the Constitution, the Constitutional Court should have the role of verifying the conformity of laws with the fundamental law, and not the role of interpreting and applying laws, especially not the role of establishing legal rules that apply retroactively with the possible effect of destabilization and lack of predictability of the criminal trial. The national constitutional order provides, unequivocally and beyond any doubt, the duties of the three powers of the State, the legislative authority, the executive authority and the judicial authority, and the Constitutional Court, through the powers conferred by the Fundamental Law, has the essential role of ensuring a balance between them.

By Decision no. 51/2016, the Constitutional Court qualified the participation of the Romanian Intelligence Service in the activity of implementing the surveillance warrants as an act of criminal investigation, assigning to it an illegal involvement, inconsistent with the constitutional standards in the criminal trial, with the consequence of repealing the governing rule. The surveillance warrant, under the conditions of the law, provides the guarantees conferred by EU law, namely it is subject to censorship and is issued by a judge and only the implementation is carried out with the technical support of the Romanian Intelligence Service, which is the only national institution possessing an infrastructure capable of ensuring the proper execution of the technical surveillance warrants requested by all units of the Public Ministry and authorized by the judge, at least until the law was amended in the sense required by the CCR decision.

After publishing Decision no.51/2016, the article of law declared unconstitutional, namely Art.142 paragraph (1) of the Criminal Procedure Code, was amended by GEO no.6/2016, in the sense that, in addition to the prosecutor and the criminal investigation body, specialized police workers also have jurisdiction to execute the surveillance warrant. The legislator's intervention at a time interval considered to be reasonable and for the declared purpose, was justified to safeguard the rule considered unconstitutional, but also to provide the legal framework required for the fulfilment of the constitutional role by the Public Ministry.

By the Decision no. 302/2017, the Constitutional Court sanctioned the legislative omission of not including in the cases of absolute nullity, in addition to those expressly provided by the law, the material and personal lack of jurisdiction of the criminal prosecution body, which included the participation of the SRI in the execution of surveillance warrants. Specifically, the effect of this decision consisted in the introduction in the domestic legislation of the legal rule found to be omitted by the legislator, namely of a new cause of absolute nullity, a reason for nullity that can be invoked in *pending* cases, with the consequence of sanctioning the procedural acts or of submission of evidence, regardless of when they were performed, before or after the publication of the Constitutional Court Decision no. 302/2017.

Finally, by Decision no. 26/2019, the Constitutional Court established the existence of a legal constitutional conflict between the State authorities, requiring the courts to apply precisely and in conjunction the Decisions no. 51/2006 and no. 302/2017, with only one consequence established by the constitutional court, namely the exclusion of the means of evidence resulting from the execution of the surveillance warrants, making impossible a concrete analysis of the case by the court by taking into consideration

all procedural guarantees given to the parties by the national legislation, the ECHR standard and the CJEU case law. The referring court specified that, "by this decision, in essence, the Constitutional Court established an absolute presumption of damage to the procedural rights caused to any defendant in whose criminal case the involvement of the Romanian Intelligence Service in the criminal investigation phase was found, paradoxically, even when in a criminal case file there is no procedural document or means of evidence endorsed by or bearing the signature of the SRI, in any case, an act that is available to the court when delivering a decision".

The Bihor Regional Tribunal mentioned that the corroborated effect of the three Constitutional Court decisions would require the court, after finding as unique element the participation of the Romanian Intelligence Service (or its territorial structure) in the execution of the surveillance warrants, to sanction by absolute nullity the evidentiary procedures carried out on the basis of rules presumed constitutional at the date of their execution and to exclude the resulting means of evidence, in this case, the wiretapping, even if there are still legal rules in force in the national law that are able to condition the resolution of such a request on the completion of the preliminary chamber phase and even if the constitutional rules themselves give effect to the decisions of the Constitutional Court only for future.

In the case, *an identical request formulated by the defendants received a final resolution (the request was rejected) in the procedural phase of the preliminary chamber.* The subsequent intervention of the Constitutional Court Decision no.26/ 2019 requires the court, in the opinion of the Bihor Court, *to reopen the discussion on such a request, in violation of the principle of legal certainty, including with regard to the non-retroactivity of the criminal procedural law.*

The referring court understands that the very countries which have undertaken the obligation to fight corruption have taken into account the specific nature of these offences, have given the possibility of their investigation by special investigative methods, carried out within a legal framework capable to guarantee the procedural rights of the parties involved and the fair nature of the criminal trial, as a whole.

The referring court shows that the Constitutional Court's concern to guarantee directly and abstractly, by the effect of its decisions, the procedural rights of the parties in a criminal trial, appears to be excessive also in relation to the mechanisms available to the Romanian State. Thus, starting with 1 August 2018, Protocol no. 16 to the European Convention on Human Rights entered into force, which allows the European Court of Human Rights to issue advisory opinions on the interpretation of the Convention. Romania signed the Protocol on 14 October 2014 but has not ratified it.

Applying all these principles contained in the case law of the Court of Justice of the European Union to the specific case analysed, the referring court considered that, even if the analysed situation concerns a procedural aspect but which also has substantial features, as the incidental application also refers to fundamental rights, there is a sufficiently strong connection with the European Union law, determined primarily by the way of exercising its own jurisdiction in carrying out the act of justice, in relation to the principles of the rule of law and the independence of judges, by the qualification and the mandatory nature of the CVM. The national court considers it is prevented from exercising the constitutional and European role of

carrying out justice, becoming an abstract executor through which, the Constitutional Court decisions are applied directly, in an applied and particular manner.

The Bihor Regional Tribunal also holds that the rule of law is a common denominator of modern European constitutional traditions. In many situations, national courts invoke it in support of the interpretation of the national law or use it as a source to develop principles that can be fully raised before a court, but in order to apply it specifically to the cause referred to court, the referring court needs the dialogue with the CJEU in the requested sense, in order to have the possibility to analyse whether it is necessary or not to retain the effects of the Constitutional Court decisions, without the case judge being subject to disciplinary sanction, as expressly provided in the law on the statute of judges and prosecutors.

The referring court considers that its powers have been substituted by the Constitutional Court, by taking into account the separate opinions of the constitutional judges as well (presented in the CCR Decisions no. 51/2016 and no. 26/2019), but in order to solve the case with or without retaining the effects of the constitutional court judgments, it requires the CJEU's answer, otherwise the freedom of decision is affected by a sufficiently serious cause external to the act of justice, namely the disciplinary sanction of the magistrate. In this context, the referring court informed the CJEU that, in the case referred to the court, following the preliminary referral, the national judge was already in the stage of disciplinary investigation, because he did not apply the Constitutional Court decisions immediately.

**2.7. Case C-397/19, *Romanian State – Ministry of Public Finance***

By the ruling of 8 May 2019, delivered in the file no. 30/3/2019, the Bucharest Tribunal, the Civil Section III, made a reference for a preliminary ruling, requesting the CJEU to answer to the following questions:

*"1. Is the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, to be considered an act adopted by an institution of the European Union, within the meaning of Article 267 of TFEU, which may be subject to interpretation by the Court of Justice of the European Union?*

*2. Is the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006, integral part of, interpreted and applied by reference to the Treaty regarding the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005? Are the requirements formulated in the reports prepared under this Mechanism mandatory for the Romanian State and, if the answer to this question is affirmative, has the national court responsible for applying, within its jurisdiction, the provisions of European Union law the obligation to ensure the application of these rules, if necessary by refusing, ex officio, the application of the national law provisions contrary to the requirements formulated in the reports prepared in applying this Mechanism?*

*3. Is Article 2 in conjunction with Art. 4 par. 3 of the Treaty on European Union must be interpreted in the sense that the obligation of the Member State to comply with the principle of the rule of law also includes the requirement that Romania complies with the requirements requested in the reports within the Cooperation and Verification Mechanism (CVM), established according to the Decision 2006/928/EC of the European Commission of 13 December 2006?*

*4. Is Article 2 in conjunction with Art. 4 par. 3 of the Treaty on European Union, in particular the need to respect the values of the rule of law, opposed to a national legislation, such as the provision of Art.96 paragraph 3 point a) of Law no.303/2004 on the statute of judges and prosecutors, which defines judicial error in a lapidary and abstract manner as the carrying out of procedural acts with the obvious violation of the legal provisions of material and procedural law, without circumstantial evidence on the nature of the violated legal provisions, the application of these provisions in the trial ratione materiae and ratione temporis, the modality, the deadline and the procedure for establishing the violation of the legal rules, the competent body to find the violation of these legal provisions, creating the possibility of indirectly exerting pressure on the judges and prosecutors?*

*5. Is Article 2 in conjunction with Art. 4 par. 3 of the Treaty on European Union, in particular the need to respect the values of the rule of law, opposed to a national legislation, such as the provision of Art.96 paragraph 3 point b) of Law no. 303/2004 on the statute of judges and prosecutors, which defines judicial error as the delivery of a final judgment obviously contrary to the law or the factual situation resulting from the evidence submitted in the case, without stating the procedure for finding the contradiction and without defining in concreto the meaning of this contradiction of the court judgment with the applicable legal provisions and the state of fact, creating the possibility of blocking the interpretation of the law and of the evidence by the magistrate (judge and prosecutor)?*

*6. Is Article 2 in conjunction with Art. 4 par. 3 of the Treaty on European Union, in particular the need to respect the values of the rule of law, opposed to a national law, as the provision of Art. 96 paragraph 3 of the Law no. 303/2004 on the statute of judges and prosecutors, triggering the patrimonial civil liability of the magistrate (judge or prosecutor) to the State, exclusively on the basis of the State's own assessment and, possibly, based on the advisory report of the Judicial Inspection, regarding the magistrate's intention or serious negligence in relation to the material error, without the magistrate having the possibility to fully exercise the right to defense, creating the possibility of triggering and finalizing, arbitrarily, the magistrate's material liability to the State?*

*7. Does Art. 2 of the Treaty on European Union, in particular the need to respect the values of the rule of law, oppose a national law, such as the provisions of Art. 539 par.2 final thesis, in conjunction with Art.541 par.2 and par.3 of the Criminal Procedure Code, by which, sine die and implicitly, an extraordinary remedy becomes available to the defendant, sui generis, against a final judgment regarding the lawfulness of the preventive arrest measure, in the case of the defendant's acquittal on the merits, a remedy that is tried exclusively before the civil court, in case the illegal nature of the preventive arrest was found by the decision of the criminal court, infringing the principle of predictability and accessibility of legal rule, of the specialization of the judge and of the legal certainty?"*

The reference for a preliminary ruling was made in a file in which the applicant requested, versus the Romanian State defendant, represented by the Ministry of Public Finance, to order the defendant to pay the amount of EUR 50,000, as material damage, as well as the amount of EUR 1000.000, representing moral damages for the compensation of the damage caused as a result of the accusation for the offence of tax evasion, provided by Art.9 letter c) of Law no. 241/2005. In the reasoning, the applicant showed that, on 13.06.2017, by the criminal decision no.1212 issued by the Bucharest Tribunal he was sentenced to 4 years imprisonment, suspended under supervision of the execution of the

sentence, for committing the offense of tax evasion in continuous form, being applied both a complementary sentence, and an accessory one. From 21.01.2015 until 21.10.2015, the applicant was taken into custody, under preventive detention and placed under house arrest. In the appeal procedure, the Bucharest Court of Appeal - the Criminal Section II found that the applicant did not commit the offense with which he was charged and cancelled the measure of the precautionary seizure on his assets.

The referring court showed that, in order to be able to rule on the application, considering that the applicant requested the court to declare as illegal the preventive measures ordered and subsequently extended by the first criminal court and maintained by the criminal court for judicial review, given that, by the decision delivered in the appeal procedure filed against the sentence of conviction in the first instance, the Bucharest Court of Appeal - the Criminal Section II ordered acquittal of the applicant in the civil case, not ruling on the legality or illegality of the preventive measures taken with regard to the present applicant, the civil court, vested with action for claims against the State for the alleged judicial error committed by the criminal courts, must clarify the status and legal force of the Reports issued by the European Commission under the Cooperation and Verification Mechanism (CVM), as well as whether the primary legislation of the European Union opposes national legislation, such as the one in question, which could affect the independence of judges and prosecutors.

The Bucharest Tribunal held that, by the way of regulating the procedure for awarding compensation for damage caused by judicial errors, materialized in a first stage that is exclusively between the damaged party and the State, the magistrate is excluded from the court procedure, which is likely to affect inadmissibly the adversarial principle and the principle of the right to defense of the magistrate, given that in this procedure the legal question of the existence of the judicial error is settled. In the second stage of the material error procedure, that of determining whether the material error was to commit the material error with bad faith or serious negligence, the arbitrary nature of the legal form established by Art.96 paragraph 3 of Law no.303/2004 on the status of judges and prosecutors emerges evidently from establishing the magistrate's liability exclusively at the discretion of the Romanian State, the magistrate having a limited possibility to combat its findings or of the judicial inspector, an aspect that may affect not only the independence of judges, but even transgress the principle of legal certainty, as a basic pillar of the supremacy of law, the foundation and premise of the rule of law.

The Romanian legislator has not fulfilled its obligation set by the Constitutional Court to identify and regulate such violations of the rules of material or procedural law that are confined to the notion of judicial error, within the meaning of the recitals of Decision no. 252/2018, but maintained a general definition, as a matter of principle, of the judicial error, referring to other regulations needed to complete this definition.[214]

[214] The Constitutional Court of Romania, by the mandatory Decision no.45/2018, gave an extremely broad meaning to judicial error ["In words, the judicial error should not be regarded only as the delivery of a wrong judgment, contrary to reality, but also in terms of conducting the procedure (lack of speed, unjustified delays, late drafting of the judgment). This last component is important for the way of conducting the court proceedings, which in itself can cause irreparable damage; therefore, even if a party successfully uses/defends its subjective right submitted to judgment, it may suffer damage more important than even the gain obtained from winning the trial (for example, an excessive lengthening of the procedure duration").

Even if, following the alignment of the law with the Decision no. 45/2018, the legislator has regulated a procedure by which the action for recovery is not triggered automatically - mentioning that the action for recovery is triggered after the submission of an advisory report of the Judicial Inspection and after the Ministry of Public Finance's "own assessment" - the omission of regulating by law a clear procedure for carrying out this "own assessment" is likely to create unpredictability in the applying the rule. This is also highlighted in the ***Opinion of the Venice Commission on the amendments to Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on judicial organization and Law no. 317/2004 on the Superior Council of Magistracy***, *CDL-AD(2018)017*, which shows that there are no criteria for carrying out the own evaluation of the Ministry of Public Finance, a central public administration body, and that such an institution outside the judicial system does not represent the best solution regarding its inclusion in this procedure, as it cannot have a role in assessing the existence or causes of judicial errors. These could be determined by the disciplinary procedure.

By the ***Follow-up report regarding the Ad hoc Report on Romania*** (Rule 34) adopted at its 83rd Plenary Meeting (Strasbourg, 17-21 June 2019), GRECO is of the opinion that "personal liability upon judges and prosecutors relating to the exercise of their functions is, in itself, questionable as it may have a chilling effect on their independence from the executive, e.g. it could be used as a means for undue influence over the judiciary, if it is not accompanied by sufficient safeguards. Judicial errors should preferably be dealt with by appeal before a higher instance, or as a disciplinary matter to be handled within the judiciary itself, depending on the character of the error. (...) Romania is one of few member states where the law provides for far reaching personal liability upon judges and prosecutors for errors during their function, even after retirement. In such a situation, there must be clear safeguards in place, as has been stated by several other Council of Europe bodies (Venice Commission, CCJE and CCPE)." (par.50)

**The Opinion of the Bureau of the Consultative Council of European Judges following a request by the Romanian Judges' Forum Association as regards the situation on the independence of the judiciary in Romania, CCJE-BU(2019)4, Strasbourg, 25 April 2019**, and **the Opinion of the Bureau of the Consultative Council of European Prosecutors following a request by the Romanian Movement for Defending the Status of Prosecutors on the independence of prosecutors in Romania, CCPE-BU(2019)3, Strasbourg, 16 May 2019**[215] "*recommends that the new definition of judicial error be supplemented by clearly stating that judges and prosecutors are not liable unless bad faith or gross negligence on their part have been previously established through due process. The CCJE Bureau would like to further recommend considering only bad faith – and not gross negligence - as a possible ground for liability for judicial errors. to abandon entirely the establishment of a separate prosecutor office structure for the investigation of offences committed by judges and prosecutors".*

[215] See the web pages https://www.coe.int/en/web/ccje/-/avis-du-bureau-du-ccje-concernant-l-independance-du-pouvoir-judiciaire-en-roumanie and https://www.coe.int/en/web/ccpe/-/opinion-of-the-bureau-of-the-ccpe-on-t he-independence-of-prosecturos-in-romania [last accessed on 06.10.2019].

In this case, by the President of the CJEU ordered a priority settlement procedure.

**2.8. Case C-547/19, The Romanian Judges' Forum Association**

By the ruling of 13 May 2019, delivered in the file no. 927/1/2018, the High Court of Cassation and Justice, the Panel of 5 judges, made a reference for a preliminary ruling, requesting the CJEU to answer to the following questions:

*"Article 2 of the Treaty on European Union, Article 19 (1) of the same Treaty and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as opposing the intervention of a constitutional court (a body which is not a court of law, according to national law) regarding the way in which the supreme court interpreted and applied the infraconstitutional legislation in the activity of formation of courts?"*

The appellant invoked in the case the exception of the illegal formation of the court, challenging the compatibility of the Constitutional Court's intervention in its formation, and pointed out that, by Decision no.685 of 7 November 2018 on the request to resolve the constitutional legal conflict between The Parliament of Romania, on the one hand, and the High Court of Cassation and Justice, on the other, the Romanian Constitutional Court admitted the referral made by the Prime Minister of the Government of Romania and found the "existence of a constitutional legal conflict between the Parliament, on the one hand, and the High Court of Cassation and Justice, on the other hand, generated by the decisions of the Managing Board of the High Court of Cassation and Justice, starting with the decision no.3/2014, by which only 4 of the 5 members of the Panels of 5 judges were appointed by lot, contrary to the provisions of Art. 32 of Law no. 304/2004 regarding judicial organization, as amended and supplemented by Law no.255/2013.

The Constitutional Court ordered the High Court of Cassation and Justice to proceed immediately to the appointment by lot of all the members of the Panels of 5 judges, in compliance with Art. 32 of the Law no. 304/2004 on judicial organization, as amended and supplemented by Law no. 207/2018.

As the decision is final and binding, the composition of the court panel that hears the present appeal was changed, performing a new draw of lots, which is likely to affect its continuity and even the organization of the High Court of Cassation and Justice.

In the reasoning, the Romanian Constitutional Court held, among others:

*"125. In these circumstances, it can be seen that* ***the act of the Managing Board, an administrative body of collegial nature, is an administrative act, regardless of whether it is an act generated to amend/supplement/ repeal the Regulation or an act adopted in its application.*** *According to Art.2 paragraph (1) letter c) of the Law no.554/2004 on administrative disputes, published in the Official Journal of Romania, Part I, no.154 of 7 December 2004, the administrative act is defined as the unilateral act of individual or regulatory nature, issued by a public authority, under a public power system, in order to organize the enforcement of the law or the actual enforcement of the law, which gives rise, changes or extinguishes legal relations. At a first glance, it could be argued that there is a conflict of administrative law, in the sense that a public authority, in the exercise of its administrative duties, issues a unilateral act of regulatory nature with the violation of the law, and the review of its legality rests with the administrative court. Therefore, the question of the Managing Board of the High Court of Cassation and*

*Justice exceeding its competence derived from Art.29 par. (1) letter a) first thesis of Law no.304/2004 and Art.19 letter j) of the Regulation, in relation to Art.32 and 33 of Law no.304/2004 arises.* ***Given that the act thus adopted is an administrative one, its content cannot concern the application and interpretation of the procedural law; however, the way of appointing the members of the Panel of 5 judges depends on the application of the procedural rules.*** *Thus, the Constitutional Court must establish, on the one hand, the procedure for finding the exceeding of jurisdiction or rather the lack of congruence between the content of the adopted act and the legal basis invoked, and, on the other hand, the authority to be vested with its settlement. (...)*

*128. The court holds that it is not just the use of a deficient regulatory basis in adopting the Managing Board decisions or a simple regulatory error of appreciation on the content of the law, as the adopted acts not only do not concern the administrative competence of the Managing Board, in order to be considered simple violations of the law, but* ***they express, in reality, an opinion of the supreme court on the act adopted by the Parliament, which may have consequences on the correct assessment both of the principle of separation and balance of State powers, and of the constitutional right to a fair trial, in terms of the objective impartiality of the supreme court.*** *(...)*

*132. Developing its case law, outlined by Decision No. 108/2014, the Court observes that in that case it established that its intervention "becomes legitimate whenever the public authorities and institutions mentioned in Title III of the Constitution ignore or undertake constitutional powers likely to create blockages* ***that cannot be removed in any other way****. This is the essence of a constitutional legal conflict". When the Court determined that its intervention was subsidiary, it took into account the fact that the public authorities involved in the given "dispute" could find other punctual solutions to return to legality,* ***which means that the dispute thus referred to court did not reach, by its implications, a constitutional relevance****. However, in the present case, the constitutional relevance is given by the legal paradigm developed at the level of the* ***High Court of Cassation and Justice and supported by the absence of an institutional self-regulatory mechanism, since, even by the point of view expressed****, the supreme court proposes that the litigant himself, and not the public authorities, uses the mechanisms provided by law to correct the potential slippage of a public authority.*

*133. Therefore, the Court finds that the rule is that, to the extent that there are mechanisms by which public authorities can self-regulate by their direct and immediate action, the role of the Constitutional Court becomes subsidiary. However, in the absence of such mechanisms, insofar as the mission of regulating the constitutional system rests exclusively with the litigant, who is thus placed in a position to fight for the guarantee of his rights or freedoms against an unconstitutional but institutionalized legal paradigm,* ***the role of the Constitutional Court becomes a major and essential one for removing the constitutional blockade resulting from limiting the role of the Parliament in the architecture of the Constitution****. (...)*

*143.* ***In the case referred to the Constitutional Court, the position of the High Court of Cassation and Justice in relation to the Parliament, expressed by a series of administrative acts affecting the judicial act that directly concerns the application of justice, is brought into discussion. The***

***two challenged administrative acts [Decision no. 3/2014 and Decision no. 89/2018] transgress the limits of the regulatory administrative act regarding the organization of the application of law, which results in the assumption of a judicial function by the administrative bodies of the supreme court.*** *In fact, in this regard, even the High Court of Cassation and Justice, in the opinion submitted to the file, shows that "the constitutional role of the High Court of Cassation and Justice to apply justice and to ensure the consistent interpretation and application of the law* ***is not achieved through the Managing Board*** *- an entity with strictly administrative powers to organize the activity of the supreme court, but through the court panels". It also shows that "****the powers to approve the regulation on the organization and administrative functioning of the supreme court*** *are powers of the managing board arising from the law, and not on the basis of constitutional prerogatives. In addition, these powers* ***are not a form of exercising the constitutional powers of the High Court of Cassation and Justice,*** *namely those of applying justice and ensuring a consistent interpretation and application of the law". From these submissions, it follows that* ***it was not the Managing Board which had to provide an interpretation of these rules of an obvious procedural nature*** *(even if they are contained in Law no.304/2004 on judicial organization) and which concerned the legal formation of the Panel of 5 judges,* ***but the court panel itself****. In fact, in this regard, in the opinion of the High Court of Cassation and Justice, it is stated that "The High Court did not refuse to apply the law (...), but simply interpreted the contradictory provisions of articles regulating the formation of the panels of 5 judges". An interpretation that, however, was given by the Managing Board, an entity with strictly administrative duties, with the obvious violation/exceeding of its legal powers, which interfered with the constitutional judicial powers of the High Court of Cassation and Justice.*

*144. In the opinion of the High Court of Cassation and Justice, it is shown that the decision of the Board only respects the law, "not refusing to apply a legal rule in the activity of making justice, which would exceed the powers provided by Art.126 of the Constitution, but adopting measures to organize the activity of the High Court of Cassation and Justice, namely the formation of the Panels of 5 judges according to the modified legal texts, complying with the temporal element indicated in paragraph (1) of Art.32 of Law no.304/2004". However, in the same opinion, it is emphasized that "The problem in question is, however, generated by the way in which the* ***Managing Board of the supreme court interpreted and applied the law****, in adopting its decisions establishing the Panels of 5 judges". Thus, even the High Court of Cassation and Justice recognizes that, in reality, the Decision no.89/2018 did not concern simple organizational measures, but the interpretation and application of the law regarding the legal formation of a court panel.*

*145.* ***Basically, by its own decisions, the Managing Board of the High Court of Cassation and Justice assigned to itself powers that belong to the court panel, in interpreting legal texts of an obvious procedural nature, subrogating the court panel. Since the Managing Board assigned to itself this jurisdictional function belonging to the Panels of 5 judges, the Court will determine whether and to what extent the Managing Board also made an erroneous interpretation of the law, namely of Art. 32 of Law no.304/2004.*** *(...)*

*175.* ***In conclusion, the Court finds that the High Court of Cassation and Justice, by the Decisions no. 3/2014 and no. 89/2018 of the Managing Board, amended, by means an administrative act, a law adopted by the Parliament, which shows an opposition to the legislative policy. It results that, in these circumstances, the Managing Board of the High Court of Cassation and Justice conferred to itself a competence that was related to the judicial function of the supreme court, a function that is carried out through the court panels, the only ones entitled to decide on their legal formation. Thus, the Managing Board of the High Court of Cassation and Justice, by its administrative practice, influenced unduly the judicial practice of the Panels if 5 judges, regarding the aspect of their legal formation, since the Panels of 5 judges tacitly acquiesced to an illegal formation, violating themselves the Law no. 304/ 2004, starting from February 1st and until present.*** *(...)*

*177. Transposing this consideration at the level of the organization of the court panels, the Court holds that the courts, as regulated by the Constitution and the Law no.304/2004, perform their function of making justice through the judges organized in court panels. In order that the organization of the judiciary does not become random in itself and to prevent the occurrence of arbitrary elements, the constituent legislator established that the* ***court procedure is established by law, and with special regard to the High Court of Cassation and Justice, it has established that both its formation and the functioning rules are established by organic law.*** *Thus, when the constitutional legislator refers to the formation of the supreme court - an autonomous notion used by the Constitution - it does not consider the total number of judges,* ***but the organization and composition of the sections, the joined sections, the court panels that perform its judicial function.*** *Thus, the Court finds that the constitutional legislator has given great importance to ordering the action of the judicial power both at the level of the supreme court and at the level of the other lower courts. This constitutional construction has led to the legal qualification of the issues related to the formation of the court, as procedural rules of public order.* ***For this reason, the violation of the legal provisions regarding the formation of the court panel expresses a public order requirement, the violation of which results in the absolute nullity of the acts delivered by it.*** *(...)*

*196. The first category of cases is represented by those already pending before the Panels of 5 judges, on which the Court has not been notified, but it finds that a uniform and consistent approach of all the existing procedural aspects is necessary. Regarding these, the Court finds that 4 members of the Panels of 5 judges (as well as all alternate members) were appointed randomly, by drawing lots, while the fifth member was not appointed randomly, but by successive decisions of the managing board since 2014 until present, he was introduced as a member of right of the panel, which he also chaired. In relation to these aspects, the case law of the European Court of Human Rights requires to take into account the principle of continuity of the court panel, in view of the requirements of the rule of immediateness arising from Art. 6 par. 1 of the Convention [see Judgment of 5 February 2014, delivered in the case Cutean versus Romania, par. 60, 61, or Judgment of 7 March 2017, delivered in the case Cerovšek and Božiènik versus Slovenia, par. 43], but it cannot be regarded separately from the legal obligation to ensure the random*

*formation of the given court, so that, taking into account these two principles/rules that apply together, the High Court of Cassation and Justice* ***must immediately ensure the formation of the new court panels by drawing lots for all their five members and not only the place of the one considered to be a member as of right. Also, the draw will be performed from all judges in office of the section/ sections in question.*** *Equally, given the constitutionally punishable conduct of the High Court of Cassation and Justice, through the Managing Board, which is not likely to provide guarantees on the correct restoration of the legal framework for the functioning of the Panels of 5 judges, the Superior Council of Magistracy - Section for Judges, based on its constitutional and legal prerogatives [Art. 133 par. (1) and Art. 134 par. (4) of the Constitution, as well as Art. 1 par. (1) of Law no. 317/2004 regarding the Superior Council of Magistracy], has the obligation to identify the solutions of principle regarding the legal formation of the court panels and to ensure their implementation. (...)*

*198. Because both in criminal and extra-criminal matters, the sanction for the unlawful formation of the court panel is the unconditional and, therefore, absolute nullity of the acts performed by such a court, and taking into account that its decisions produce effects only for the future, according to Art.147 paragraph (4) of the Constitution, the Court holds that this decision applies* ***from the date of its publication, both to pending cases****, namely the cases on trial, and in completed cases insofar as the litigants are still within the period of exercising the appropriate extraordinary remedies,* ***and to future situations****."*

The solution delivered by the Constitutional Court, a body placed outside the Romanian judicial system, was considered by the appellant likely to violate the independence of the judges of the High Court of Cassation and Justice, causing disregard of the rules of the rule of law.

As noted in the separate Opinion signed by the Constitutional Court judge Livia Doina Stanciu, the panels of 5 judges, as judicial formations carrying out their activity in the High Court of Cassation and Justice, were established in 2010, by an amendment brought to the Law no.304/2004 by the provisions of Art. III par. 5 of Law no.202/2010 on measures to accelerate the resolution of trials.[216]

[216] In the form of the initial regulation of the Panels of 5 judges, their formation - in the sense of appointing the judges who are part of these panels - was a prerogative of the President of the Supreme Court or, in his/her absence, of the Vice President of this court, the law actually giving him/her total freedom in choosing the way to materialize this prerogative. The High Court of Cassation and Justice - as argued in the opinion submitted to the Constitutional Court - regarding the Panels of 5 judges, adopted, by the Managing Board Decision no. 24 of 25 November 2010 for amending and supplementing the Regulation on the organization and the administrative functioning of the High Court of Cassation and Justice, published in the Official Journal, Part I, no. 819 of 8 December 2010, the rule of appointing the judges of the Panels of 5 judges by drawing lots. Moreover, the supreme court was the initiator of adopting the rule of drawing lots for the judges forming the Panels of 5 and, thus, the one that gave the meaning of "drawing lots" to the notion of "appointment" contained in the text of Art. 32 of Law no. 304/2004 regarding judicial organization. The supreme court also argued that, after Law no. 255/2013 was published in the Official Journal, Part I, no. 515 of 24 August 2013 - a law amending Law no. 304/2004 - the Managing Board of the supreme court has dealt with serious problems of interpretation and application of the provisions of Art. 32 and Art. 33 of Law no.304/ 2004 regarding judicial organization, because these provisions did not corroborate with each other or with other texts of the law and contained inaccurate regulations, so it had to take organizational measures in order to make the two texts of law functional and applicable and to remove the blockage of the judicial activity of the Panels of 5 judges.

If the legal rule were clear and precise, it would not have been necessary to take such measures. The legislator's fault of legislating confusedly cannot be imputed now to the High Court, which was required to implement unclear and contradictory rules.

Thus, although Art. 19 par.(2) of Law no.304/2004 stipulated, in unambiguous terms, that 4 panels of 5 judges operated within the High Court of Cassation and Justice - two in criminal matters and two in civil matters - Article 32, through the amended form of paragraphs (1), (2) and (4), required the formation of an unlimited number of court panels in criminal matters and only two in non-criminal matters, although the activity of the supreme court is overwhelmingly non-criminal. A new and inexplicable thing introduced by the amendments in Art.32 referred to the fact that only the president of the Criminal Section had the power to propose to the Managing Board the number and formation of the Panels of 5 judges, including in civil matters, although there were 4 sections at the level of the supreme court (the Civil Section, the Commercial Section - presently the Civil Section II -, the Administrative and Tax Litigation Section and the Criminal Section), each section being led by a section president.

In addition, the president of the Criminal Section, according to Art. 32 paragraph (5), appeared to be the leader as of right of all the Panels of 5 judges, including in civil matters, which infringed the principle of the specialization of judges, which is all the more inexplicable as the presidents of the civil sections were excluded, completely and without any justification, from the leadership of the Panels of 5 judges in civil matters, and the president and the vice-presidents of the Court would have continued to run the panels, only if they had been chosen by drawing lots; according to the same regulation, it seemed that the oldest (the oldest member of the court, in the absence of any other specification) should also not be appointed by drawing lots, being also the leader as of right of the Panels of 5 judges. The principle of the specialization of judges was also infringed with regard to the oldest member, because, having the title to run as of right all panels of 5 judges, the oldest criminal judge could run panels of 5 judges in civil matters and vice versa, the oldest civil judge could run Panels of 5 judges in criminal matters.

Moreover, Art. 32 seemed to include the president and vice presidents in the draw and it was in total contradiction with the provisions of Art. 33 which were categorical in stipulating that the president of the court and, in his/her absence, the vice-presidents, lead as of right the Panels of 5 judges.[217]

The High Court of Cassation and Justice also argued that the very Prime Minister of the Government, through the relevant ministry, namely the Ministry of Justice, offered, at least in 2017, the same interpretation. Thus, as it results from the official website of the Ministry of Justice, according to the draft Law for amending and supplementing Law no.303/2004 on the statute of judges and prosecutors,

[217] The supreme court further argued that: in these circumstances, the Managing Board, finding that the provisions of Art.32 of Law no.304/2004, as amended by Law no.255/2013, were in total contradiction with the provisions of Art. 33 of the same law, that the provisions of Art.33 made void the provisions of Art.32, and the provisions of Art.32 made void the provisions of Art.33 of Law no.304/2004, had to take those organizational measures – presently challenged by the author of the referral - able to fulfill the two contradictory articles (Art.32 and Art.33) of Law no.304/2004, so that they can make sense, be applicable and not block the judicial activity of the Panels of 5 judges; the High Court of Cassation and Justice was not the only one that offered this interpretation to the text of Art.32 of Law no.304/2004.

Law no.304/2004 regarding judicial organization and Law no.317/2004 regarding the Superior Council of Magistracy, submitted for approval by the Minister of Justice to the Superior Council of Magistracy, on 30 August 2017, the legislative amendment related to Article 32 paragraph (5) of Law no.304/2004 proposed the following content: *"The panel of 5 judges is chaired by the president of the High Court of Cassation and Justice, one of the two vice-presidents or one of the section presidents."* According to the Explanatory Memorandum accompanying this legislative project, the initiator exclusively envisaged "*the regulation, in the sense of clarification, of some aspects regarding the organization and functioning of the High Court of Cassation and Justice*".

However, - the supreme court argues - this is the clearest proof that the interpretation made by the supreme court was not singular, but was embraced even by the authority that currently accuses it of wilful violation of the meaning of the law text in question.

The president of the supreme court also showed, in the speech given in the public meeting for solving the constitutional legal conflict, that during the parliamentary debates regarding the proposals to amend Art.32 of Law no.304/2004, ended with adopting Law no.207/2018, the members of the legislative body emphasized that the novelty brought by Art.32, as amended, consisted of the fact that the president and the vice president of the supreme court would no longer be part of the panels of 5 judges unless they are drawn to lots.

Only by the amendments brought by Law no. 207/2018 published in the Official Journal, Part I, no. 636 of 20.07.2018, the texts became clearer, following the introduction in the text of Art. 32 of paragraph (6), according to which "*if neither of them (the President of the High Court of Cassation and Justice, one of the 2 vice-presidents or the section presidents) has been appointed to be part of the panels of 5 judges, the panel shall be chaired, by rotation, by each judge, in the order of their seniority in magistracy*."

Decision no. 89 of 4 September 2018 of the Managing Board of the High Court of Cassation and Justice is issued in the exercise of its powers, provided by the Regulation on the organization and administrative functioning of the High Court of Cassation and Justice.

Under Art. 28 par. (1) of Law no. 304/2004 regarding judicial organization, republished, as amended and supplemented, "*the leadership of the High Court of Cassation and Justice is exercised by the president, 2 vice-presidents and the managing board."*

According to Art.29 of the same regulatory document, "*The Managing Board of the High Court of Cassation and Justice has the following duties: [...] f) exercises other powers provided for in the Regulation on the organization and administrative functioning of the High Court of Cassation and Justice. [...] (3) The Managing Board of the High Court of Cassation and Justice shall meet quarterly or whenever necessary, convened by the president of the High Court of Cassation and Justice, one of the vice-presidents or at the request of at least 3 of its members. [...]"*

Consequently, the Decision no. 89 of 4 September 2018 of the Managing Board of the High Court of Cassation and Justice, which established, with a majority, that "*the provisions of Art. 32 of Law no.304/2004 regarding judicial organization, as amended and supplemented by Law no.207/2018, regarding the activity of the Panels of 5 Judges, are organizational rules concerning court formations with specific regulations, formed at the beginning of each year and, in the absence of transitional rule, become*

*applicable as of 1 January 2019"* is undoubtedly a document issued in the exercise of its duties, provided by law.

The managing board of the High Court of Cassation and Justice, in issuing this decision, did not assume powers, duties or competences, which, according to the Constitution, belong to the Parliament of Romania, did not decline jurisdiction and did not refuse to perform certain acts that fall under its obligations.

The courts, including those in criminal matters, have the power to solve the exceptions raised by the concerned persons regarding the illegal formation of the court panel, and incidentally, also the issue of the legality of an administrative act.

The administrative acts of regulatory or individual nature cannot be subject to the review of constitutionality, neither by way of an exception of unconstitutionality, nor by the indirect way of the constitutional legal conflict. In the Decision no. 366 of 25 June 2014, published in the Official Journal of Romania, Part I, no. 644 of 2 September 2014, the Constitutional Court stated that these acts are "reviewed, in terms of legality *lato sensu*, by the administrative courts".

An opposite interpretation opens the way to refer to the Constitutional Court with requests for implicit verification of the legality of any administrative act (of individual or regulatory nature), on the ground of an alleged constitutional legal conflict between its issuer and the legislative authority, in the sense that the given act violated a legal provision, simply invoking that the omission to comply with the provisions of Art. 1 par. (5) "lies directly in the text of the Constitution": "*In Romania, it is mandatory to respect the Constitution, its supremacy and the laws*".

The Strasbourg Court pointed out that, if at least half of the members who form a "court" - including the person who presides over it, who have the right to vote - are judges, there is a strong indication of impartiality (the case *Le Compte*, *Van Leuven and De Meyere v. Belgium,* 23 June 1981, par. 58; case *Oleksandr Volkov v. Ukraine*, application no. 21722/11, 9 January 2013, par. 109).

However, in relation to this standard retained in European case law, a court formed entirely of 5 judges of the High Court of Cassation and Justice cannot be considered to lack impartiality if "only" 4 of them (majority) are appointed by drawing lots, assuming that this factual assumption is correct (an aspect on which we do not have enough data). Therefore, the alleged imminence of an "avalanche" of convictions at the European Court of Human Rights is at least questionable, in the absence of such a concrete precedent that could be invoked with binding effect.

In the judgment delivered on 15 September 2015, in the case *Tsanova-Gecheva v. Bulgaria*, no.43800/12, the European Court of Human Rights held the following:

*"106. The applicant further claims that the independence and impartiality requirements provided for in Article 6 of the Convention were not met by the Supreme Administrative Court. Having found that Article 6 was applicable to the procedure in question, the Court reiterates that, in order to determine whether a court can be considered "independent", within the meaning of Article 6 paragraph 1, the manner of appointment and the term of office of its members, the existence of protection against external pressures and whether or not there is an appearance of independence should be considered, in particular. (Findlay v. United Kingdom, 25 February 1997, par.73, Oleksandr Volkov v. Ukraine, no. 21722/11, par.103). Impartiality is defined by the lack of prejudice or bias. According to the Court's constant case-law, when the impartiality of a tribunal for the purposes of Article 6, par.1 of the Convention, is determined*

*based on a subjective approach, in which regard is had to the personal conviction and behaviour of a particular judge - in other words, if the judge has proved personal prejudice or bias in a given case, as well as by an objective approach, in which it is verified whether the court in itself, including by its formation, among other things, has sufficient guarantees to exclude any legitimate doubt in relation to its impartiality (see, Wettstein v. Switzerland, no. 33958/96, par. 42, Oleksandr Volkov v. Ukraine, no. 21722/ 11, par.104).* (…)

*108. As regards the panel of five judges, the applicant complains about the manner of appointing its members, among the judges of the Supreme Administrative Court, which was not carried out in a transparent and random manner. The Court notes that the applicant does not question the subjective impartiality of any member of the panel. As regards objective impartiality, the Court recalls that, according to its case-law, it is not its duty to examine, in principle, the validity of the reasons for which a particular case was assigned to a particular judge or court, but it still must ensure that such assignment is compatible with the requirements of independence and impartiality. It is the duty of the member states of the Convention to ensure the proper administration of justice and several factors need to be considered for the distribution of court files (**Bochan v. Ukraine**, no. 7577/02, par.71, 3 May 2007; **Moiseiev v. Russia**, no. 62936/00, par.176, 9 October 2008). **In this case, the Court finds that the parties do not agree on the question whether or not the Judge Rapporteur of the five-judge panel was appointed randomly, according to the law. However, even assuming that his appointment in the panel was not made randomly, in the absence of other evidence of the lack of impartiality of the judges who form the panel, it does not follow that violation of the requirements of Article 6 of the Convention occurred in this respect.*** (…) *Therefore, it was found that, in the case, Art.6 of the Convention was not infringed."*

**The appellant considered that the presumption of impartiality of the judges who are part of the Panel of 5 judges of the High Court of Cassation and Justice could not be removed by the mere fact that they also held leading positions.** Even when also holding a leading position, the judge who is part of the Panel of 5 judges of the High Court of Cassation and Justice has the same obligations as the other judges who do not hold leading positions and is bound, like all other judges, by the independence and impartiality requirements. Thus, the criticism regarding the violation of the impartiality of the judge being part of the panel of 5 judges of the High Court of Cassation and Justice, and who also holds the position of president or vice-president of the court, is unfounded. On the contrary, according to the conditions established by the law, the appointment of a judge in a leading position - both at the High Court of Cassation and Justice, as well as at the other courts - requires, on the one hand, a very good professional training, in relation to the level of the court, as well as the fact that the judge has proved to be particularly demanding in fulfilling the professional duties, and on the other hand, to assume the responsibility of performing the leading function, both conditions thus forming an integrated set of requirements outlining the status of that position (see, in this respect, Law no.303/ 2004 on the statute of judges and prosecutors, republished, art. 48-56), so that, the fact that a judge also holds the position of president of the High Court of Cassation and Justice or vice-president

of this court does not lead *de plano* to the conclusion that he/she lacks impartiality. A court formed entirely of 5 judges of the High Court of Cassation and Justice cannot be considered to lack impartiality if "only" 4 of them (majority) are appointed by drawing lots, assuming that this factual assumption is correct.

In a similar situation, by the judgment delivered on 15 September 2015, in the case *Tsanova-Gecheva v. Bulgaria*, no.43800/12, the European Court of Human Rights established that Art. 6 of the Convention was not infringed, for the following reasons: *"In this case, the Court finds that the parties do not agree on the question whether or not the Judge Rapporteur of the five-judge panel was appointed randomly, according to the law. However, even assuming that his appointment in the panel was not made randomly, in the absence of other evidence of the lack of impartiality of the judges who form the panel, it does not follow that violation of the requirements of Article 6 of the Convention occurred in this respect."*

The referring court showed that "it leaves to the CJEU's appreciation the relevance of the fact that the Prime Minister's action, finalized with the Decision no. 658/2018 of the Constitutional Court, occurred in a moment when the President of the Chamber of Deputies, who was also president of the governing party, was recorded as defendant in a criminal case pending before a panel of 5 judges in criminal matters". It also specified that there is no definition of the notion of "constitutional legal conflict", either in the Constitution or in the infraconstitutional legislation, but only general considerations developed in the case law of the Constitutional Court. A court decision that is contrary to the law is an illegal decision, and an administrative act that is contrary to the law is an illegal act, and not the expression of a constitutional legal conflict with the legislative power, the remedies being either the filing of appeals or the introduction of an administrative action.

The High Court of Cassation and Justice notes that "it is, on the one hand, difficult to understand the assessment that the Managing Board assumed interpretative powers that belonged to the court panels. It is evident that, since the Managing Board had, by law, powers to form the panels of 5 judges, this could be achieved only on the basis of an interpretation of the given legal provisions. It was not possible for the interpretation of Art.32 of Law no. 304/2004 to be left to the courts, since, in chronological order, it was first necessary to form these panels, a task that was the responsibility of the Managing Board" (par. 84). The Managing Board did not objectively have the option of interpreting or not the provisions of art.32 of Law no.304/2004, in the various forms it had over time, but only the choice between different interpretations of this text of law.

The referring court referred to the fact that the constitutional body only opposed the interpretation of the High Court of Cassation and Justice, offering its own and distinct interpretation of a vague text of law (Art. 32 paragraph 5 of Law no. 304/2004), whose *ad litteram* interpretation was not sustainable, because it would have created a differentiated regime between the situation of the president and of the vice president of the court, on the one hand, and the situation of the oldest member, on the other, the supreme court opting for a conservative interpretation, which privileged the meaning of the law closest to the pre-existing legislative solution, without meaning a deliberate act of denying the will of the legislator. It argues the absence of any element leading to the idea of an "attitude of force" of the supreme court, of "systematic opposition' to the will of the

legislator which did not intervene in any way for four years to clarify its will (if it was similar to the Constitutional Court) and remove the inaccuracies in the law, which the High Court of Cassation and Justice openly opposes.

In the opinion of the referring court, the CJEU is not in a position to censor the analysis made by the Romanian Constitutional Court, but neither to refer absolutely to it, being able to make an interpretation of the notion of *"rule of law",* which is used by Art.2 of the TEU, in relation to Art. 19 of the TEU and to Art. 47 of the Charter, in order to establish whether, in a situation like the one in this case, the activity of the supreme court of a Member State can be controlled and sanctioned by the intervention of a body such as the Romanian Constitutional Court, which is not included in the system the courts and has no judicial powers. The arbitrary intervention of this body, in order to verify the activity of the High Court of Cassation and Justice, is considered by the referring court as having a negative impact not only on the independence of justice, but also on the foundations of the rule of law, in the interpretation given by CJEU Art.2 of the TEU.

**3. Conclusions**

Similarly to the situation of the deterioration of the rule and law and of the judicial system reform in Poland, in relation to which the Court of Justice of the European Union has already delivered several solutions of principle or has other applications for a preliminary ruling pending (for example, cases C-522/18, C-537/18, C-668/18, C-824/18, C-558/18, C-563/18, C-623/18, C-619/18 and C-192/18), the Romanian courts have also referred to CJEU, on the interpretation of the European Union law in the context of legislative amendments or Constitutional Court decisions [*interpretation of the content, nature and temporal scope of the Cooperation and Verification Mechanism; the obligation of the Member States to establish the necessary measures for an effective legal protection in the areas regulated by the Union law, namely guarantees of an independent disciplinary procedure for Romanian judges, removing any risk related to political influence on disciplinary procedures, such as the direct appointment by the Government of the Judicial Inspection management, even provisionally, or the establishment and organization of the Section for Investigating Criminal Offences in the Judiciary, within the Prosecutor's Office attached to the High Court of Cassation and Justice, thorough the possibility of indirectly exerting pressure on the judges and prosecutors; the interpretation of the principles of legal certainty and effectiveness in the sense that they oppose that, in a dispute in the field of consumer rights protection, the procedural rules be amended after the court was notified by the consumer, by a mandatory Constitutional Court decision, implemented by the legislator by a law amending the Civil Procedure Code, by introducing a new remedy that can be used by the professional, with the consequence of extending the duration of the trial and increasing the costs for its completion; the interpretation of Art. 19 par. (1) of the Treaty on European Union, Art. 325 par. (1) of the Treaty on the Functioning of the European Union, Art. 1 par. (1) points a) and b) and Art. 2 par. (1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests and the principle of legal certainty, in the sense that they oppose the adoption of a decision by a body outside the judiciary, the Romanian Constitutional Court, which assesses the legality of forming court panels with the consequence of creating the necessary*

*premises for admitting extraordinary remedies against final court decisions delivered within a period of time; the interpretation of Art. 47 par. 2 of the Charter of Fundamental Rights of the European Union in the sense of opposing the finding by a body outside the judiciary of the lack of independence and impartiality of a panel including a judge with a management position and who was not randomly appointed, but on the basis of a transparent rule, known and undisputed by the parties, a rule applicable in all the cases of such panel, the adopted decision being mandatory according to the national law; the interpretation of Art. 2 in conjunction with Art. 4 par. 3 of the Treaty on European Union in the sense that the obligation of the Member State to comply with the principles of the rule of law also includes the requirement that Romania complies with the requirements requested in the reports within the Cooperation and Verification Mechanism, including with regard to the refrain from intervention of a constitutional court, a political-judicial institution, to interpret the law and to establish the concrete and mandatory way of applying it by the courts, the exclusive competence assigned to the judicial authority and to establish new legal rules, the exclusive competence being assigned to the legislative authority; interpretation of the principle of the independence of judges, in relation to national rules defining judicial error as the delivery of a final judgment obviously contrary to the law or the factual situation resulting from the evidence submitted in the case, without stating the procedure for finding the contradiction and without defining in concreto the meaning of this contradiction of the court judgment with the applicable legal provisions and the state of fact, creating the possibility of blocking the interpretation of the law and of the evidence by the judge and prosecutor or triggering the patrimonial civil liability of the magistrate to the State, exclusively on the basis of the State's own assessment and, possibly, based on the advisory report of the Inspection, regarding the magistrate's intention or serious negligence in relation to the material error, without the magistrate having the possibility to fully exercise the right to defense, creating the possibility of triggering and finalizing, arbitrarily, the magistrate's material liability to the State; the interpretation of Art.2 of the Treaty on European Union, Art.19 par.(1) of the same Treaty and Art. 47 of the Charter of Fundamental Rights of the European Union must be interpreted as opposing the intervention of a constitutional court (a body which is not a court of law, according to national law) regarding the way in which the supreme court interpreted and applied the infraconstitutional legislation in the activity of formation of courts*].

The first solutions of the Court of Justice of the European Union are expected at the earliest in the autumn of 2019, and may cause, vertically, the review of some legislative solutions, in line with the European Commission requirements, under the Cooperation and Verification Mechanism, not only in matters where the European court was referred to, but also on other issues, for example, the meritocratic promotion of judges and prosecutors during their career, especially in the High Court of Cassation and Justice.

Also, the judgments of the Court of Justice of the European Union will bring a recalibration of the role and position of the Romanian Constitutional Court, in relation to the courts, especially the High Court of Cassation and Justice, by analysing, in terms of the rule of law, the possibility of intervening in their administrative activity, as well as in the judicial procedure, established by the legislator.

**The Cooperation and Verification Mechanism (CVM)** was established at the time of Romania's accession to the European Union, in order to correct the deficiencies of the judicial system reform and to fight corruption. Since then, the CVM reports are trying to contribute to guiding the efforts of the Romanian authorities through specific recommendations and by evaluating the progress made. As underlined by the Council,[218] repeatedly, **CVM will end when all four benchmarks applying to Romania are satisfactorily met.** The benchmarks were defined at the time of accession and cover issues essential to the working of Member States - judicial independence and efficiency, integrity and the fight against corruption. In 2006, the Council issued a clear mandate to the Commission to ensure that Romania and Bulgaria will meet the CVM benchmarks. In the ***Conclusions on the Cooperation and Verification Mechanism***, as adopted on 12 December 2018, *"2. The Council reiterates its adherence to the values and principles of the EU, including the rule of law and the independence of the judiciary. In this context, the Council recalls the need for progress made under the Mechanism needs to be irreversible, so that Bulgaria and Romania satisfactorily fulfil their respective benchmarks and meet the ultimate objectives. This would ensure the proper functioning of EU policies and institutions so that all citizens can benefit fully from the opportunities offered by membership of the Union. To that end, convincing track records, effective implementation, and broad, sustained and unequivocal political support for reforms continue to be of critical importance. (...) 6. Recalling the significant positive performance of Romania under the Mechanism in previous years, the Council stresses the absolute importance of safeguarding and further consolidating the progress already achieved. The Council notes that the Commission's report highlights a number of serious concerns and negative steps which have called into question the irreversibility and sustainability of reforms In order to pave the way for a successful conclusion of the Mechanism for Romania in the near future, the negative steps and the concerns set out in the report need to be fully and decisively addressed, including through the adherence to the recommendations of the Council of Europe Venice Commission and GRECO, and the* ***fulfilment of all the key recommendations set out by the Commission.*** *7. Romania* ***needs*** *to restore the positive momentum on reforms and take prompt action, notably on the additional key recommendations set out by the Commission related to the independence of the judiciary and judicial reform, to the fight against corruption at all levels, as well as on other integrity issues highlighted in the report. (...) 8.* ***The Council continues to expect Bulgaria and Romania to fully meet all their respective remaining key recommendations*** *set out in the Commission reports, the fulfilment of which will lead to the provisional closing of individual benchmarks, except if developments in the respective countries clearly put in question or reverse the course of progress..(...)"*[219]

**Therefore, the recommendations issued by the Commission (called key recommendations) are not perceived as optional for the Council, but on the contrary, they are imperative.**

[218] See, for example, the web page http://data.consilium.europa.eu/doc/document/ST-7118-2016-INIT/ro/pdf [last accessed on 09.10.2019].

[219] See http://data.consilium.europa.eu/doc/document/ST-15187-2018-INIT/ro/pdf [last accessed on 09.10.2019].

Initially, the Romanian Constitutional Court considered that, by ***the status of member of the European Union, the Romanian State has the obligation to apply this mechanism and to implement the recommendations established within the CVM, in accordance with the provisions of Art. 148 par. (4) of the Constitution, according to which "the Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfilment of the obligations arising from the acts of accession and the provisions of paragraph (2)".*** (see **Decision no. 2 of 11 January 2012** on the exception of unconstitutionality of the provisions of the Law for amending and supplementing Law no. 303/2004 on the status of judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy)[220] Subsequently, **Decision no.104 of 6 March 2018** deviated from the indicated case law, as the Romanian Constitutional Court established that "(...) ***the meaning of the Decision 2006/928/EC of the European Commission of 13 December 2006****, establishing a Cooperation and Verification Mechanism of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption,* ***an act adopted prior to Romania's accession to the European Union, was not interpreted by the Court of Justice of the European Union in terms of the content, nature and temporal scope and whether they fall within the provisions of the Treaty of Accession, implicitly by*** *Law no.157/ 2005, which is part of the domestic legal order,* ***so that Decision 2006/928/EC cannot constitute a reference norm within the constitutional review under Art.148 of the Constitution."***

**In the case law of the European Court of Human Rights, the reports issued by the European Commission under the Cooperation and Verification Mechanism are considered to be "relevant international law texts"** (see, for example, the judgment of 15 September 2015 in ***Tsanova-Gecheva v. Bulgaria***, no.43800/12). **In its turn, the Venice Commission frequently cites the reports issued under this Mechanism, seen as having legal effects not at all optional, by the terms used in the opinions** (see, for example, ***Opinion no. 924/2018*** *on changing the laws of justice in Romania,* ***Opinion no 501/2008*** *on the adoption of a new law regarding the normative acts in Bulgaria* or ***Opinion no.563/2009*** *on the draft law on confiscation in favour of the State of illegally acquired assets from Bulgaria).* Par. 7 of ***Opinion no.563/2009***, stipulates as follows: "*Upon accession to the European Union (EU), the fight against corruption and organized crime was identified as one of the areas where a set of specific measures was required by the EU within the framework of the post-Accession cooperation and progress measurement procedure. Under the Cooperation and Verification Mechanism set up by the EU Commission,* ***Bulgaria is required to*** *("est notamment tenue de") implement a strategy to fight organized crime, focusing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals.* Also, par. 9 of ***Opinion no. 591/2010*** on the draft law amending the law on judicial power and the draft law amending the Criminal Procedure Code of Bulgaria shows that *"(...) the explanatory memoranda to the draft laws explain that* ***these were prepared by the Bulgarian authorities as a response to the problems in the fight against organised crime and corruption in their country, raised by the reports of the***

[220] Published in the Official Journal of Romania, Part I, no.131 of 23 February 2012.

***European Commission under the Cooperation and Verification Mechanism."***

Even if the thesis of the mandatory legal effects for Romania of CVM and of the consecutive reports issued under it were not accepted, the Decision 2006/928/EC, in conjunction with the ***principle of sincere cooperation***, deriving from Art. 4 par. (3) of the Treaty on European Union, impose on Romania a series of specific obligations under the Cooperation and Verification Mechanism, the benchmarks implementing the very conditions established in the Accession Treaty, in accordance with the European Union values and principles established by Art. 2, 6 and 19 par.(1) of the Treaty on European Union and by Art. 47 of the Charter, therefore, **including Romania's obligation to take into account the recommendations made by the Commission in the CVM reports when adopting legislative or administrative measures in the fields covered by the benchmarks established in the annex of the CVM Decision**, a corollary of the principle of the rule of law (Art. 2 TFEU) and of the principle of independence of justice (Art. 19 TEU).

At the same time, all these factual circumstances raise the issue of predictability and legal certainty of EU law, the Romanian state accepting the MCV and its reports and conforming to them for more than 10 years. The effects of EU law must "be clear and predictable, the purpose of this requirement being to it ensures that the legal relations governed remain predictable".[221] Therefore, it is the obligation of the Member States to provide a predictable legislative framework, and not to change the rules of the game, according to the conjuncture interests.

In such an extremely probable situation, the Romanian Constitutional Court could not ignore anymore the recommendations made by the European Commission under the CVM, according to the principle of loyal cooperation, namely Art. 4 par. (3) of the Treaty on European Union, by analogy with the case of the directives, where, at the level of the constitutional courts of the Member States of the European Union, under common law, it was admitted that a constitutional court can review the validity of a national provision transposing a rule of European Union law.[222] Therefore, we are witnessing a frequent constitutional review of the internal rules for transposing directives, as the constitutional courts of the Member States of the European Union start from the premise of the mandatory nature of the directive for each Member State, which exercises its discretion as regards the form and the means of transposition. At the same time, the texts of the directives are often invoked in the reasons of the constitutional courts of the Member States of the European Union, for explaining some institutions of law or the context of adopting rules.[223]

Therefore, in the case of specific obligations under the Cooperation and Verification Mechanism as well, in relation to the conditions established by the Accession Treaty, in accordance with the European Union values and principles [Art.2, 6 and 19 par.(1) of the Treaty on European Union and Art.47 of the Charter], their disregard when adopting legislative or administrative measures in the areas covered by the benchmarks established in the annex to the CVM Decision will result in violation of the national constitutional provisions.

---

[221] See **T. Tridimas**, The general principles of EU Law, Oxford EC Law Library, 2006, p.244

[222] See, for details, **M. Bobek**, The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts, in Revista Română de Drept European, issue no.1/2012, p.55.

[223] See **D. Călin**, The Dialogue between Constitutional Courts and the Court of Justice of the European Union, Editura Universitară Publishing House, Bucharest, 2018, p.127 et seq.