ERA Forum (2021) 22:437–452
https://doi.org/10.1007/s12027-021-00682-6

ARTICLE

The rule of law and the EU's response mechanisms in case of violation: a Romanian Case Study

Horatius Dumbrava[1,2]

Accepted: 2 August 2021 / Published online: 20 September 2021
© The Author(s) 2021

Abstract
The judgment of the European Court of Justice of 18 May 2021 obliges Romania to review the judicial reform of 2017 – 2019. Otherwise the European Commission may activate the safeguard mechanisms provided by Arts. 37 and 38 of the Treaty of Accession of Romania to the European Union.

The jurisprudence of the Court of Justice in all preliminary rulings relating to this Romanian judicial reform will have effects and will be an essential benchmark regarding the mechanisms established by the European Commission for all Member States relating to the rule of law - namely, the Rule of Law Mechanism and Regulation no. 2020/2092.

Keywords Primacy of EU law · Rule of Law mechanism · Judicial reform and the independence of judges

1 Introduction

The enlargement of the EU with new Member States from Eastern and Central Europe (2004, 2007, 2013) was preconfigured by essential changes to the founding treaties of the EU by the Treaty of Amsterdam.[1]

[1] Treaty of Amsterdam [1997] OJ 97/C 340/1.

✉ H. Dumbrava
dumbravahoratiu@yahoo.com

[1] Judge, Court of Appeal Targu Mures, Targu Mures, Romania

[2] Trainer in Ethics for judges and prosecutors, National Institute of Magistracy, Bucharest, Romania

Additionally, the political criteria adopted by the European Council in Copenhagen in 1993[2] can be taken into account. According to these criteria, 'membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities'.

Concerns about the enlargement process that emerged soon after 1989, related to the fact that potential new members could either, once admitted, fail to adhere to the principles of democracy, rule of law, fundamental rights, or, once they were allowed, abandon these values and thus undermine the entire EU[3] from within.

At the time of the enlargement process, another amendment provided in the Treaty of Amsterdam of principles concerning human rights, democracy and the rule of law, the Council could suspend certain rights deriving from the application of this Treaty to the Member State in question', including the voting rights of the representative of the government of that Member State in the Council, if the Council found 'a serious and persistent breach by a Member state'.[4]

In contrast to the wave of accessions in 2004, Romanian's accession to the EU included (as in the case of Bulgaria) a mechanism for monitoring the progress that Romania had to achieve according to the Commission Decision of 13 December 2006 (henceforth, the Decision)[5] - the cooperation and verification mechanism (or 'CVM').

It has been demonstrated that simply meeting the Copenhagen political criteria at the time of accession does not guarantee that, after a State joins, the rule of law will not backslide. On the contrary, it appears that insufficient attention has been given by the EU institutions to the possibility that some new EU Member States may no longer fully respect the founding values of the Treaties and that, in fact, the notion of adherence to EU values does not reflect the reality of what is happening.[6]

An issue that was widely debated in the context of the crisis of democracy and the rule of law in some EU states - until the adoption of Regulation 2020/2029 by the European Parliament and the Council - related to the inherent limitations on the means the European Court of Justice had to hand in order to find a systematic violation of the rule of law. It was mentioned that 'the Court's assessment is limited to the object of the proceedings and may only cover individual cases and not overall political developments'.[7] However, optimistic opinions were also expressed, especially in relation to the rule of law problems in Poland, where the Commission initiated infringement procedures in combination with a request for interim measures.[8]

[2] European Council. (1993)(European Council in Copenhagen) Conclusions of the Presidency: 21–22 June 1993, SN 180/1/93 REV 1, p. 13; see also 'Agenda 2000 For a Stronger and Wider Union', COM(97) 2000, Brussels, 15.07.1997.

[3] *Scheppele/Kochenov/Grabowska – Moroz* [4], p. 24 – 25.

[4] See *Craig/de Búrca* [2], p. 14.

[5] Commission Decision 2006/928/EC, 13 December 2006, establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, [2006] OJ L 354/56/14 December 2006.

[6] *Pech/Kochenov* [3], p. 1.

[7] *Schneider* [5], p. 10.

[8] *Van Elsuwege/Gremmelprez* [6], p. 32.

This debate has led to the conclusion on the part of many authors, that mechanisms need to be put at the disposal of the EU institutions (the Commission, the Parliament and the Council) which, on the one hand, would be able to identify rule of law backsliding and/or offer analysis of ongoing problematic developments, and, on the other hand, would set up instruments of prevention and sanction regarding the protection of the EU in the event of serious and/or generalised deficiencies concerning the rule of law in the Member States.[9]

In this context, the Commission announced in 2019, in a Communication, a set of tools designed to prevent backsliding on the rule of law.[10] Regulation 2020/2029 was also published on 16 December, referring to the criteria that the Commission and the Council must take into account in the case of breaches of the rule of law of a Member State.[11] It is to be anticipated at the time of writing that the jurisprudence of the European Court of Justice will be rendered even clearer, in terms of the founding values of the TEU (see Art. 2 thereof), including the rule of law, with the resolution of *Poland v Parliament and Council*, a case in which Poland requested the European Court of Justice to rule on the annulment of Regulation 2020/2092.[12]

2 Cases regarding the rule of law in Romania before European Court of Justice

Under the auspices of a new political regime in Bucharest, a 'judicial reform' was launched in the years 2017-2019 – a judicial reform which shook the foundations of a judicial system that had set out on a path that had seemed irreversible.[13]

In the case of Romania, although information has been published by recognised institutions, including GRECO[14] and the Venice Commission[15] on serious breaches of the principles of the rule of law by the public authorities (the Romanian Parliament,

[9] See *Sheppele/Kochenov/Grabowska – Moroz* [5], p. 10; also, *Pech/Kochenov* [3], p. 5.

[10] European Commission – *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Strengthening the Rule of Law within the Union. A blueprint for action*, Brussels, 17 July 2019, COM(2019) 343, p. 12.

[11] Regulation 2020/2092 of the European Parliament and of the Council, 16 December 2020, OJ L 433 I/1.

[12] Case C-157/21, *Poland v European Parliament and Council of the European Union* [2021]: https://curia.europa.eu/juris/document/document.jsf?text=&docid=240048&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3228644.

[13] See the report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, Brussels, 25.1.2017, COM(2017): https://ec.europa.eu/info/sites/default/files/com-2017-44_en_1.pdf. This report noted 'a track record pointing to strong progress and growing irreversibility of the reforms under the CVM'.

[14] Group of States against Corruption, *Ad hoc* report of 2018 on Romania, adopted by GRECO at its 79th Plenary Meeting, Strasbourg, 19 – 23 March 2018: https://rm.coe.int/ad-hoc-report-on-romania-rule-34-adopted-by-greco-at-its-79th-plenary-/16807b7717.

[15] European Commission for Democracy through Law (Venice Commission): *Romania preliminary opinion on draft amendments* to Romanian judiciary laws, Opinion No. 924/2018, 13 July 2018, CDL-PI(2018)007, paras. 11, 96 and 156: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2018)007-e.

the Government, the Superior Council of Magistracy and the Judicial Inspection) in years 2017-2019, the Commission did not use the infringement procedure under Art. 258 TFEU or rely on the provisions on interim measures (Art. 279 TFEU). This must be seen in connection with the fact that the practical efficiency of the Cooperation and Verification Mechanism and its reports has been almost non-existent, in the absence of concrete retaliatory measures that the Commission can take having been.[16]

Several preliminary references[17] have been made to the European Court of Justice by multiple Romanian courts regarding the cases that they have to decide, and in which they have found that there are issues concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU (see Art. 267 para. 1, 2 and 3 TFEU). All of these cases are related to the so-called 'judicial reform' of 2017-2019.[18]

It should also be noted that most of the above-mentioned cases involve a similar content (with only small differences) as regards the questions in respect of which the referring courts in Romania have requested preliminary rulings.

The first ruling of the European Court of Justice was delivered on 18 May 2021 in respect of the first group of cases.[19] These rulings are to be analysed in the context of the EU benchmarks mentioned above and the jurisprudence of the European Court of Justice regarding the rule of law.

It is foreseeable that the findings of the European Court of Justice in the other four groups of cases, on which (at the time of writing) it will rule in the near future, will be identical to those arrived at in the judgment of 18 May 2021.

The preliminary references can be summarised,[20] on the one hand, as involving preliminary issues, and on the other, as 'merits of the cases' that national courts have to decide upon - respectively, issues relating to the provisions and measures of national law applicable in these cases, and whether these provisions are compatible with the implementation of EU law. For the sake of the ease of reading this article, I have inserted, where appropriate, conclusions provided by the Advocate General appointed in all these cases, Advocate General Michal Bobek:

[16] *Pech/Kochenov* [3], p. 8: 'the CVM suffers from a lack of relevance, effectiveness, and enforceability'.

[17] Joined cases C-83/19, C-127/ and C-195/19, Case C-291/19 and Case 355/19, Judgment of 18 May 2021, ECLI:EU:C:2021:393; Case 397/19, ECLI:EU:C:2020:747 (Opinion of the Advocate General); Case 379/19, ECLI:EU:C:2021:174 (Opinion of the Advocate General); Joined cases C-357/19 and C-547/19, ECLI:EU:C:2021:170 (Opinion of the Advocate General); Joined cases C-811/19 and C-840/19, ECLI:EU:C:2021:175 (Opinion of the Advocate General);

[18] See in this regard para. 1 of the Opinion of Advocate General Bobek, 23.09.2020 delivered for Joined Cases C-83/19, C-127/19 and C-195/19.

[19] See the press release of the European Court of Justice regarding the rules in the Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210082en.pdf and the judgment of the European Court of Justice (grand chamber, French language): https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=4507323.

[20] See Opinion of Advocate General Bobek delivered in the Joined Cases C-83/19, C-127/ and C-195/19, ECLI:EU:C:2020:746, paras. 1-4.

2.1 Preliminary aspects, regarding the interpretation of the Treaties and the validity and interpretations of acts of the institutions

2.1.1 If the Treaty concerning the accession of Romania to EU could be a proper legal basis for analysing the CVM Decision and the cooperation and verification mechanism reports and recommendations

The Treaty concerning the Accession of Romania to the EU was mentioned, as such, in the preliminary references in most of the cases in which preliminary rulings were requested.[21]

It must be noted that the Accession Treaty is an integral part of the founding Treaties, acting as an amendment to those Treaties.

There can be no other interpretation since Art. 49(2) TEU refers clearly to '(...) *the adjustments to the Treaties* on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State (…)'.

Insofar as the European Court of Justice decides on the applicability of the Accession Treaty as a primary source of EU law, it should allow analysis of the prevention and sanction mechanism under Arts. 37 and 38 of the Treaty.

Regarding this mechanism, the European Court of Justice in the judgment of 18 May 2021 is very clear when it states that the Commission can apply 'the safeguard mechanisms / safeguard clauses' provided for in these texts, upon the reasoned request of a Member State or on its own initiative, beyond the period of three years from the date of entry into force the Accession Treaty. The measures which the Commission may take are not detailed in the Treaty of Accession, but it is stated that 'these measures may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between (...) Romania and any other Member State or Member States, without prejudice to the continuation of close judicial cooperation.' (See Article 38 para. 1 of the Treaty).[22]

2.1.2 Can the CVM Decision and the cooperation and verification mechanism reports and recommendations be considered parts of report acts of the EU?

Commission Decision 2006/928/EC of 13 December 2006 was adopted in the period preceding Romania's accession to the EU and in the context of concern on the part of many EU Member States' that Romania does not share the EU's founding values - democracy, the rule of law and fundamental rights – insofar as concerns the judiciary and the fight against corruption.

Paragraph 1 of Decision 2006/928/EC leaves no room for interpretation: the EU is governed by the rule of law, a principle common to all Member States. Paragraphs

[21] See, for instance, the second request addressed to the European Court of Justice in the preliminary reference sent by the Olt Tribunal in the Case C-83/19: 'do the terms, nature and duration of the CVM (…), come within the scope of application of the Treaty concerning the accession of the Romania to the EU (…)?', p. 2.

[22] See para. 164, joined cases C-83/19, C-127/ and C-195/19, Case C-291/19 and Case 355/19, Judgment of 18 May 2021, ECLI:EU:C:2021:33, *Asociația Forumul Judecătorilor din România and Others*.

2 and 3 give consistency and concreteness to this principle: the area of freedom, security and justice, as well as the internal market established by the EU's founding treaties, are based on the mutual conviction that administrative and judicial decisions and practices in all of the Member States indubitably respect the rule of law. This condition implies the existence, in all Member States, of an impartial, independent and efficient judicial and administrative system, endowed with sufficient means, *inter alia*, to fight corruption.

The Decision includes in the Annex four benchmarks relating to progress recorded by the Romanian judicial system and in the fight against corruption.

A first observation: Decision 2006/928 links the efficiency of the judiciary, as well as the positive results of the fight against corruption, to the ability of the national institutions of Romania to apply the measures adopted in order to establish the internal market and the area of freedom, security and justice.

A second observation: the Decision, which establishes the monitoring of Romania, will be abrogated when all the benchmarks have been reached, even if these objectives would be modified during the implementation of the mechanism (paragraph 9).

A third observation: according to Art. 2 of the CVM Decision, the Commission must report at least every six months its own comments and findings regarding the fourth benchmarks. The first report was published in June 2007, and the last report in October 2021. Until 2014, two reports were published each year. Since 2015, only one annual report has been published. Each report issued by the Commission contains, in addition to the expert's notes and findings, recommendations.

A fourth observation: according to Art. 4, this Decision is addressed to all Member States. In other words, the nature of this decision is binding not only on Romania, but on all Member States, which means that any Member State that considers that EU values, including the rule of law, are violated by Romania's failure to comply with the Decision, including the benchmarks provided in the Annex, may forward a request to the EU institutions to apply measures, and even to the European Court of Justice through the path provided by Art. 259 TFEU. Although it has, it seems, an individual effect on Romania, nevertheless that effect is a general one, since the prevention mechanisms established by the Decision, insofar as concerns the sanctions provided for by Art. 37, 38 of the Accession Treaty, can be activated not only by the Commission, but also by the other Member States, and the provisions of the four benchmarks have a general character.[23]

One last observation: the decision issued by the European Court of Justice on 18 May 2021, on the CVM Decision and on the reports drawn up by the Commission is of paramount jurisprudential importance with regard to the new EU mechanisms meant for the observance of the rule of law: the rule of law mechanism established in 2019, the first reports on the rule of law for each Member State being published in September 2020; and Regulation no. 2020/2092 on a general regime of conditionality for the protection of the Union budget.

Thus, on the one hand, it can easily be determined that the Cooperation and Verification Mechanism, with its reports and recommendations for Romania, has striking similarities with the rule of law mechanism established in 2019, with its annual

[23]Regarding the distinction between the generic nature and the individualised nature of a decision see *Craig/de Búrca* [2], pp. 108 – 109.

reports and recommendations. Therefore, the European Court of Justice's conclusions on the Cooperation and Verification Mechanism will serve as clear points of reference for a Member State's non-compliance with the rule of law, and for non-implementation of the recommendations contained in the reports adopted by the Commission and approved by Parliament and Council.

On the other hand, the jurisprudence of the European Court of Justice on the Romanian Cooperation and Verification Mechanism will be able to constitute for Romania, together with the Commission report on the Rule of Law, grounds on which to trigger the prevention and sanction mechanism provided for by Regulation no. 2020/2092; and will also have a deterrent effect for other EU Member States that seriously and systematically violate the rule of law.

Therefore, in this context, the question which the European Court of Justice has to resolve in relation to the Cooperation and Verification Mechanism, and on which it also ruled in its decision of 18 May 2021, has several components:

1. Do Decision 2006/928 and the reports drawn up by the Commission on the basis of that decision constitute acts of an EU institution?
2. Does the content, nature and duration of the Cooperation and Verification Mechanism fall within the scope of the Treaty of Accession?
3. What are the effects of the CVM Decision and of its reports and recommendations?
4. To what extent are the reports and recommendations drawn up by the Commission on the basis of that Decision binding on Romania?

With regard to the first and second parts of this question, the European Court of Justice has established that:

– Decision 2006/928 and the reports constitute acts of an EU institution, which are amenable to interpretation under Art. 267 TFEU (see para. 151 of the judgment of the European Court of Justice in the Joined Cases – *Asociația Forumul Judecătorilor din România and Others*, C 83/19, C 127/19, C 195/19, C 291/19 and C 355/19, EU:C:2020:746);
– regarding to its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty of Accession and continues to have its effects as long as it has not been repealed (see para. 165 of the same judgment).

Regarding the effects of the CVM Decision - the third part of the question - the European Court of Justice has ruled, according to Art. 288 of TFEU, that the decision has been binding in its entirety on Romania from the moment of its accession to the EU, and obliges it to address the benchmarks, which are also binding, set out in the Annex to that decision (see paras. 167 and 168 of the judgment).

In order to reach its conclusions in this respect, the European Court of Justice noted that by adopting the Decision, the following points were taken into account: first, that observance of the values of Art. 2 TEU - including the rule of law - was a precondition for Romania's accession to the EU (see para. 161), and, post-accession, that the compliance of a Member State with the values of Art. 2 TEU represents a condition for benefitting from all the rights derived from the application of the Treaties in regard to that Member State.

As regards the legal effects of the reports drawn up by the Commission on the basis of Decision 2006/928 and the recommendations within these reports – the last part of the question - the European Court of Justice clearly states that Romania must respect the requirements and recommendations made in the reports prepared by the Commission. If Romania does not adopt or maintain measures in the fields covered by the benchmarks, it would risk compromising the result which they prescribe. And if the Commission, in such a report, expresses doubts as to the compatibility of a national measure with one of the benchmarks, it is expected of Romania that it will work conscientiously with the Commission, in accordance with the principle of sincere cooperation, in order to overcome any issues that may arise, in full compliance with these benchmarks and the provisions of the EU Treaties (see paras. 176 and 177 of the judgment).

Although Art. 288 TFEU provides that these requirements and recommendations have no binding force, not having legal force *per se*, and thus do not have direct effect,[24] 'it does not provide them with immunity from the judicial process'.[25] This implies that, in the mandatory application of Decision 2006/928 and its benchmarks, national authorities must implement these recommendations. Additionally, another consequence of the first ruling of the European Court of Justice delivered on 18 May 2021 is that, as has happened with the preliminary references analysed in this article, national courts could make a reference to the European Court of Justice concerning the interpretation or validity of such measures, according to EU law.

2.1.3 On whether Art. 325 (1) TFEU could be a proper basis for analysing the effect of some decisions of the Romanian Constitutional Court (the primacy of EU law)

In essence, the referring courts in these cases asked whether Art. 325(1) TFEU, together with the principle of judicial independence, enshrined in Art. 19(1) para. 2 TEU and in Art. 47 of the Charter, preclude the adoption of a decision by the Romanian Constitutional Court, which signals a failure on the part of the national supreme court to comply with its legal obligation to establish specialist panels to deal at first instance with corruption offences. Constitutional Court decision 685/2018 will lead referring courts to retrial the corruption cases associated with the management of EU funds already adjudicated upon.

The cases in which these questions were raised to the European Court of Justice are at the time of writing all pending before the High Court of Cassation and Justice of Romania (the ICCJ), several of them being criminal cases in which criminal convictions were ordered against defendants for offences affecting the financial interests of the EU. Subsequently, the Romanian Constitutional Court, in judgment No. 685/7 of November 2018, found that there was a legal dispute of a constitutional nature between the Parliament, on the one hand, and the High Court, on the other, regarding the obligation for the latter to establish special panels to deal with corruption cases.

Following Constitutional Court decision 685/2018, the applicants brought appeals or extraordinary actions for annulment, seeking to have their cases re-examined.

[24] See the opinion of General Advocate Bobek in the Joined cases C-83/19, C-127/ and C-195/19, Case C-291/19 and Case C-355/19; Case C-379/19, para. 166

[25] *Craig/de Búrca* [2], p. 109.

Meanwhile, the execution of the terms of imprisonment was suspended, and, pending the delivery of judgment in these cases, the applicants were released from prison.

The referring courts considered that it would be useful to interpret the phrase 'and any other illegal activities affecting the financial interests of the Union' in Article 325(1) TFEU, in order to examine whether it was possible to include within that phrase acts of corruption and also fraud committed in the course of public procurement, in particular when the aim pursued was to obtain the reimbursement of sums which had been fraudulently allocated from European funds, in a context in which such facts constituted a particularly serious threat to the European Union's financial interests.

Even if Regulation 2020/2092 was adopted after the alleged perpetration of corruption and fraud offences in cases in which the references were raised, prosecution and conviction in the first and last instance of applicants in connection with obtaining sums allocated from European funds, these provisions[26] are nothing more than the expression of the jurisprudence of the European Court of Justice in that regard. Thus, it is for the competent national courts to give full effect to the obligations under Art. 325 (1) and (2) TFEU,[27] and for this reason, in the cases in which these preliminary references were generated, the answer could only be positive: Art. 325 (1) has full effect and all national authorities, including national courts, are bound to take the necessary measures for this purpose.

2.2 Matters concerning the application of national legislation and measures, insofar as the legislative provisions requested to be clarified fall within the scope of EU law (Art. 51 (1))

All the preliminary references before the European Court of Justice have had in common the proper functioning of the Romanian judicial system, the independence and impartiality of courts and judges, as well as the ability of Romanian national authorities to fight corruption, given that they were affected by the 'judicial reform' of 2017 - 2019.

2.2.1 Interim appointment of the management of the Judicial Inspection

According to Art. 67 of Romanian Law No 317/2004 regarding the Superior Council of Magistracy, the chief inspector and deputy chief inspector are to be appointed by the general assembly of the Superior Council of Magistracy from among judicial inspectors in office, following a competition between candidates for this position.

By an Emergency Ordinance (No 77/2018), Government supplemented Art. 67, inserting new paragraphs which provided that when the position of chief inspector

[26] See Art. 4(2)(e) of Regulation 2020/2092: both the prevention and the sanction of fraud, which includes corruption offences as well, take into account not only the implementation of the Union budget or the protection of the financial interests of the Union, but also the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities.

[27] Case C-42/17, *M.A.S.* and *M.B.*, judgment of the Court of 5 December 2019, ECLI:EU:C:2017:936, para. 39. Case C-310/16, *Dzivev and others*, judgment of the Court of 17 January 2019, ECLI:EU:C:2019:30, paras. 29 and 31.

became vacant as a result of expiry of the mandate, the chief inspector (...) whose mandate has expired would act as substitute until the date on which that position was filled on the terms laid down by the legislation. The Ordinance stated that the new provisions applied to situations in which the position of chief inspector of the Judicial Inspection was vacant on the date on which the Emergency Ordinance came into force.

The chief inspector of the Judicial Inspection was appointed beginning on 1 September 2015 and their mandate expired at 1 September 2018. The Emergency Ordinance was adopted on 5 September 2018. In his capacity as an interim chief inspector of Judicial Inspection, he represents the Judicial Inspection and, pursuant to Emergency Ordinance, they signed, *inter alia*, the defence as the representative of the Judicial Inspection before the Olt Tribunal (the Regional Court, Olt, Romania) in an action brought by the applicant Asociația 'Forumul Judecătorilor din România' against the Judicial Inspection.

The applicant claimed that, by extending the mandates of the management of the Judicial Inspection by executive act, the Government had encroached on the constitutional power of the Superior Council of Magistracy.[28]

In its judgment of 18 May 2021, the European Court of Justice found that 'the requirement of independence means that the necessary guarantees must be provided to prevent that regime being used as a system of political control of the content of judicial decisions'.[29]

The premise from which the European Court of Justice began, in this regard, was that it is important that judges be protected from external interference or pressure that could jeopardise their independence. Particularly, regulations governing the disciplinary regime, according to the European Court of Justice in this judgment, especially national legislation, cannot give rise to doubts in the minds of individuals that the powers of a judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors might be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.[30]

The European Court of Justice concluded that Article 2 and Article 19(1), second subparagraph, TEU, and Decision 2006/928, must be interpreted as precluding national legislation of the kind adopted by the government of Romania. This ruling is likely to give rise to legitimate doubts regarding the use of the prerogatives and functions of this body as an instrument of pressure on the activity of judges and prosecutors, or political control over their activity.

[28] See the opinion of Advocate General Bobek in Joined cases C-83/19, C-127/ and C-195/19, Case C-291/19 and Case C-355/19; Case C-379/19, *Asociația Forumul Judecătorilor din România and Others*, paras. 35 – 40.

[29] See the press release of the European Court of Justice No 82/21, Luxembourg, 18 May 2021: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210082en.pdf.

[30] Judgment of the European Court of Justice, 18 May 2021, in joined cases C-83/19, C-127/ and C-195/19, Case C-291/19 and Case C-355/19; Case C-379/19, paras. 35 – 40, paras. 196 – 200.

2.2.2 Section for the investigation of Offences committed within the Judiciary

Law 207/2018, amending and supplementing Law No 304/2004 on the organisation of the judiciary, established the creation of a division within the General Prosecution Office (the SIOJ) for the Investigation of Offenses committed by judges and prosecutors. The orders for reference by the referring courts [31] raised the establishment and operation of the SIOJ.

The new prosecution division created by Law 207/2018, with exclusive jurisdiction concerning offences committed by the members of the judiciary, was harshly criticised by the professional associations of judges and prosecutors. As noted by the Venice Commission in Opinion No. 924/2018, fears existed 'that the new structure would serve as an (additional) instrument to intimidate and put pressure on judges and prosecutors – especially if coupled with other new measures envisaged in their respect, such as the new provisions on magistrates' material liability'.[32] On the other hand, as the Advocate General suggested, the creation of the SIOJ, in reality, led to a weakening of the fight against high-level corruption, and there was a risk that the SIOJ would be perceived as a body the establishment and functioning of which were politically motivated.[33]

In its judgment of 18 May 2021, the European Court of Justice summarised the arguments presented (see paras. 212 and 213 of the judgment), in the sense that the principle of independence of judges requires the elaboration of rules to remove, in the perception of the litigants, any legitimate doubt as to the possible subversion of their independence by influences.

The European Court of Justice concluded[34] that

> "(…) in order to be compatible with EU law, such legislation must, first, be justified by objective and verifiable requirements relating to the sound administration of justice and, secondly, ensure that the section cannot be used as an instrument of political control over the activity of those judges and prosecutors and that the section exercises its competence in compliance with the requirements of the Charter. If it fails to fulfil those requirements, that legislation could be perceived as seeking to establish an instrument of pressure and intimidation with regard to judges, which would prejudice the trust of individuals in justice."

The Court added that the national legislation at issue could not have the effect of disregarding Romania's specific obligations under Decision 2006/928 in the area of the fight against corruption.[35]

[31] Case C-127/19; Case C-291/19 and Case C-355/19.

[32] See footnote 16 above.

[33] See the opinion of Advocate General Bobek cited before, paras. 304-305.

[34] Judgment of the European Court of Justice, 18 May 2021, in joined cases C-83/19, C-127/ and C-195/19 Case C-291/19 and Case C-355/19; Case C-379/19, see Press Release No. 82/21, Luxemburg, 18 May 2021 (https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210082en.pdf).

[35] Also, see the press release of the European Court of Justice, 18 May 2021, cited before.

2.2.3 Application of EU law and decisions of the Romanian Constitutional Court

In another question in the above-mentioned cases,[36] the referring courts requested the European Court of Justice to clarify whether the meaning of the concept of 'previously established by law' in Article 47(2) of the Charter precluded the interpretation which had been provided by the Constitutional Court concerning the unlawful nature of the judicial body's composition.

The referring court in one of the cases[37] seeks to analyse decision of the national constitutional court, which declare the involvement of domestic intelligence services in the carrying out of technical surveillance measures for the purposes of acts of criminal investigation were unconstitutional. Romanian Constitutional Court insisted in this decision on the exclusion of such evidence from criminal proceedings, incompatible with EU law.

It has not been easy for some Member States to accept the primacy of EU law in relation to the principle of sovereignty of Member States, their national law, including constitutional law, given the debates, including jurisprudential, in many EU Member States. At national level, several constitutional courts have been confronted with arguments that EU law or national law implementing EU law infringes constitutional fundamental principles.[38]

In this context, the Romanian Constitutional Court considered that the constitutional right to a fair trial had been infringed by the High Court of Cassation and Justice of Romania, due to the apparent lack of specialisation requirements for judges (for corruption offences), contrary to the provisions of Article 32 of Law No. 304/2004. On the other hand, Romania, in its Constitution, had an explicit provision for the primacy of EU law over national legislation.[39]

A first issue, which the referring courts identified, related to the fact that in their view, the Constitutional Court was on 'the outside of the national judicial system'. In this sense, the composition and status, the competence and practice of the Romanian Constitutional Court showed that this body did not belong to the judicial system, because the judges of the Constitutional Court would then lack independence and impartiality.

In this respect, in the recent jurisprudence of the European Court of Justice, it has been emphasised that it is necessary to ensure that the substantive conditions and procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts in the minds of individuals regarding judges' independence and/or impartiality. In this sense, it has been shown that involvement in appointing members of the judiciary of an independent body responsible for, *inter*

[36] Joined Cases C-811/19 and C-840/19; Joined Cases C-357/19 and C-547/19.

[37] Case C-379/19, *DNA – Serviciul Teritorial Oradea v KI, LJ, IG, JH*.

[38] *Claes* [1], p. 193 – 194.

[39] Art. 148(2) of Romanian Constitution: '(. . .), the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.'

alia, assessing candidates for judicial office, and for giving an opinion to the legislative or executive power, ensured these requirements.[40]

It is true that in the process of appointing judges at the Romanian Constitutional Court, there was no such independent body. On this subject, the opinion of Advocate General Bobek regarding independence and impartiality with regard to the composition or competencies of the Romanian Constitutional Court was that the Constitutional Court satisfied the requirements 'of being an independent court within the autonomous EU law understanding of that notion'.[41]

Returning to the essential question,[42] namely the primacy of EU law, it should be noted that the primacy of EU law has no formal basis in the EU Treaties,[43] having been removed from the Lisbon Treaty and relegated to Declaration 17 (annexed to the Treaty) in which it was confirmed by the Conference that the primacy of EU law applies under the conditions laid down by the case law of the European Court of Justice. As a result, primacy was developed by the European Court of Justice based on its concept of the 'new legal order': national courts are required to give immediate effect to EU law, of whatever rank, and according to the judgment of the European Court of Justice of 18 May 2021 in the Joined Cases – *Asociația Forumul Judecătorilor din România and Others*, this includes constitutional courts.

The referring court in this case stated that this question was linked to recent case law of the Constitutional Court, according to which Union law, in particular Decision 2006/928, can not prevail over national constitutional law.[44]

The principle of supremacy of EU law requires all entities in the Member States to give full effect to Union regulations, since the law of the Member States cannot affect the impact of those regulations on the territory of those Member States. As such, any national court seised within its jurisdiction has, as a Member State body, the obligation to set aside any national provision that sits contrary to a provision of EU law which has effect in the dispute before it,[45] including the decisions of a constitutional court of a Member State.

The ruling of the European Court of Justice, provided in the judgment of 18 May 2021 in the Joined Cases – *Asociația Forumul Judecătorilor din România and Others*, was that the principle of the primacy of EU law, according to Art. 19(1) para. 2 of TEU and Decision 2006/928, precludes national legislation of constitutional status, which deprives a lower court of the right to disapply of its own motion a national

[40] Case C-896/19, *Repubblika*, judgment of the Court of 20 April 2021, EU:C:2021:311, para. 57 and the second conclusion of the judgment.

[41] Joined Cases C-811/19 and C-840/19, para. 136.

[42] Case C-195/19, ECLI:EU:C:2021:393.

[43] See *Claes* [1], p. 201; *Craig/de Búrca* [2], p. 267.

[44] Joined cases C-83/19, C-127/ and C-195/19, Case C-291/19 and Case 355/19, Judgment of 18 May 2021, ECLI:EU:C:2021:33, *Asociația Forumul Judecătorilor din România and Others*, paras. 243.

[45] See case law cited by the European Court of Justice: judgment of the European Court of Justice, 6 October 2020, *La Quadrature Du Net and others*, Cases C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paras. 214-215.

provision falling within the scope of Decision 2006/928 and which is contrary to EU law.[46]

2.2.4 Disciplinary liability

In some cases,[47] the referring courts requested the Court to clarify whether it was necessary to disapply a decision of the Constitutional Court in order give full effect to EU law, in a situation in which the observance of EU law was mandatory for courts and its infringement constituted a disciplinary offence.

One of the referring courts asked the European Court of Justice [48] whether EU law precluded a provision of national law which governed the disciplinary liability of a judge who disapplied a decision of the Constitutional Court, in the context of a case where a request for a preliminary ruling had been submitted to the European Court of Justice. In contrast with the above joint cases (C-357/19, *Euro Box Promotion and Others* and C-547/19, *Asociația Forumul Judecătorilor din România*), according to a letter sent by the judge who referred to the European Court of Justice, it appears that a preliminary disciplinary investigation had been initiated by the Judicial Inspection against the referring judge. The investigation appears to have been motivated by the content of the order for reference in the case, in which the Inspection considered that the referring judge adopted a critical position towards the case-law of the Constitutional Court, questioning its jurisdiction and the binding character of its rulings.

In recent jurisprudence, the European Court of Justice had indicated in one case - even if it did not find that the independence of the judiciary had been affected by temporary reductions in the salaries of judges - that '(...) every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection'.[49]

The European Court of Justice concluded that the independence of national courts and of the European Court of Justice itself might be subjected to its control. In this sense, since national courts and the European Court of Justice are interconnected in an EU judicial system, Art. 19 (1) of the TEU may cover the institutional dimension of domestic judicial independence. Moreover, this genuinely new doctrine of the Court, coming after the Commission's unsuccessful attempts to resolve authoritarian developments in Poland, paved the way for the European Court of Justice to consider seriously threats to the independence of the judiciary in some Member States.[50]

In an *obiter dictum* in another case, although it declared preliminary references made inadmissible, the European Court of Justice stated very clearly that to 'expose national judges to disciplinary proceedings as a result of the fact that they had submitted a reference to the Court for a preliminary ruling [cannot] be permitted'.[51]

[46] Joined cases C-83/19, C-127/ and C-195/19, Case C-291/19 and Case 355/19, Judgment of 18 May 2021, ECLI:EU:C:2021:33, *Asociația Forumul Judecătorilor din România and Others*, para. 252.

[47] Joined Cases C-357/19 and C-547/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:170.

[48] Case C-379/19, *DNA – Serviciul Teritorial Oradea v KI, LJ, IG, JH*, ECLI:EU:C:2021:174.

[49] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, [2018] EU:C:2018:117, paras. 36-37.

[50] *Schneider* [5], p. 12.

[51] Ibid., p. 22; Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, [2020] EU:C:2020:234, paras. 57-58.

In the context of those *obiter dictum*, the conclusion of Advocate General Bobek's Opinion in Case C-379/19 is logical: Art. 267 TFEU, as well as the principle of judicial independence enshrined in the second subparagraph of Art. 19(1) TEU and in Art. 47 of the Charter, preclude disciplinary proceedings being initiated against a judge merely for having submitted a request for a preliminary ruling to the Court whereby that judge questions the case-law of the national constitutional court and raises the possibility of that case-law being disapplied.[52]

Regarding 'judicial error' and liability for damages suffered by the litigants as a result of such errors, in its judgment of 18 May 2021 in Case C-397/19, *Asociația Forumul Judecătorilor din România and Others*,[53] the European Court of Justice emphasised that requirements arising from the rule of law, in particular the guarantee of the independence of judges, do not preclude the Member States from providing for state liability for judicial errors where judgments containing such errors are contrary to EU law. As such, to the extent that the state is responsible for judicial errors and not the judge personally, the European Court of Justice stated that it does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in this respect.[54]

However, with regard to the personal liability of judges resulting from a miscarriage of justice, the assumption of such liability entails a risk of interference with the independence of judges as it may influence the decision-making of those who have the duty to judge. That is why the European Court of Justice emphasised that the personal liability of the judge must be limited to exceptional cases and met by objective and verifiable criteria, even if the European Court of Justice recognises that the guarantee of independence does not require granting judges absolute immunity from acts adopted in the exercise of their judicial functions.[55]

On the other hand, the national regulation in Romania, adopted during the judicial reform of 2017-2019, provides that there is a possibility that, in the procedure for engaging the material and personal liability of a judge, the existence of a judicial error could be definitively found in the action in which the defendant is the Ministry of Finance, without the judge being notified of the existence of the procedure, and, as such, without being heard.[56]

In Case C-379/19, *Serviciul Teritorial Oradea v KI, LJ, IG, JH*, the European Court of Justice concluded that, although Art. 2 and Art. 19 (1) para. 2 of TEU do not preclude a national regulation which governs the patrimonial liability of the State and the personal liability of judges for damages caused by a judicial error, and which defines such an error in abstract terms. However the provisions of a national regulation, as set out above, must be interpreted '(...) in the sense that they oppose such a

[52] Opinion of Advocate General Bobek delivered in the Case C-379/19, ECLI:EU:C:2021:174,paras. 95-96.

[53] Joined cases C-83/19, C-127/ and C-195/19, Case C-291/19 and Case C-355/19; Case C-397/19, ECLI:EU:C:2021:393, para. 225.

[54] See case C-224/01, *Gerhard Köbler v Republik Österreich*, judgment of the Court, 30 September 2003, ECLI:EU:C:2003:513, para. 42.

[55] Joined cases C-83/19, C-127/ and C-195/19, Case C-291/19 and Case C-355/19; Case C-397/19, ECLI:EU:C:2021:393, paras. 332 – 334.

[56] Ibid., paras. 239, 240.

regulation when it provides that the finding of the existence of a judicial error, carried out in the context of the procedure for engaging the patrimonial liability of the State and without having heard the judge concerned.'

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit http://creativecommons.org/licenses/by/4.0/.

References

1. Claes, M.: The primacy of EU law in European and national law. In: Arnull, A., Chalmers, D. (eds.) The Oxford Handbook of European Union Law. Oxford University Press, Oxford (2015)
2. Craig, P., de Búrca, G.: EU LAW. Text, Cases, and Materials, 6th edn. Oxford University Press, Oxford (2015)
3. Pech, L., Kochenov, D.V.: Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and what to avoid, RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, June 2019 – European Commission. Available at: https://reconnect-europe.eu/wp-content/uploads/2019/06/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf
4. Scheppele, K.L., Kochenov, D.V., Grabowksa– Moroz, B.: EU values are law, after all: enforcing EU values through systemic infringement actions by the European Commission and the Member States of the European Union. Yearb. Eur. Law **39**, 3–121 (2020). https://doi.org/10.1093/yel/yeaa012
5. Schneider, L.: Responses by the CJEU to the European crisis of democracy and the rule of law. re:constitution Working Papers, Forum Transregionale Studien 2/2020. Available at: https://www.reconstitution.eu/fileadmin/pdf/Forum/Publikationen/Working_Papers/SCHNEIDER_rec_WP_2_2020.pdf
6. Van Elsuwege, P., Gremmelprez, F.: Protecting the rule of law in the EU legal order: a constitutional role for the Court of Justice. Eur. Const. Law Rev. **16**(1), 8–32 (2020). https://doi.org/10.1017/S1574019620000085

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.