

# The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România*, and their follow-up at the national level

Madalina Moraru\* and Raluca Bercea\*\*

## INTRODUCTION

In the *Asociația 'Forumul Judecătorilor din România'* joined cases,<sup>1</sup> referred to throughout this case note as *AFJR*, the Court of Justice of the EU was asked to assess whether the reformed disciplinary, civil and criminal liability of magistrates introduced in Romania during 2017-2019 may affect the Romanian judiciary's capacity to adjudicate independently, and comply with the EU rule of law

\*Assistant Professor, Centre for Judicial Cooperation at the European University Institute, and Director of the Centre for Migration Studies, Faculty of Law, Masaryk University. This paper has received funding under the TRust, Independence, Impartiality and Accountability of judges and arbitrators safeguarding the rule of Law under the EU Charter (TRIAL) Project led by the Centre for Judicial Cooperation at the European University Institute. The Project was funded by the European Commission Directorate General for Justice and Consumers under Grant Agreement No. 853832. The content of the article represents the views of the authors and is their sole responsibility. The European Commission is not liable for any use that may be made of the information contained. The authors are grateful to Gabor Halmai, Nicole Lazzarini, Viorica Viță, the team members of the Judicial Studies Centre at Masaryk University, and the anonymous reviewers for their useful comments on previous versions of this article.

\*\*Prof.univ.dr., Law Faculty, West University of Timisoara.

<sup>1</sup>ECJ 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, ECLI:EU:C:2021:393.

*European Constitutional Law Review*, 18: 82–113, 2022

© The Author(s), 2022. Published by Cambridge University Press on behalf of European Constitutional Law Review. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

doi:10.1017/S1574019622000074

values. This judgment is of fundamental importance to the legal order of the EU as it analyses for the first time the legal nature and effects of key EU instruments used to ensure the accession of new member states to the EU and rule of law monitoring: the Cooperation and Verification Mechanism Decision (hereafter CVM Decision)<sup>2</sup> and the European Commission Reports monitoring Romania's progress on the rule of law under this Mechanism. The case brings an important contribution to the Court of Justice rule of law approach by, first, introducing the principle of *progression* towards achieving EU rule of law standards as set out in the CVM Decision and Commission Reports. Second, the Court of Justice sets out similar judicial independence parameters for all types of judicial liability regimes, beyond the disciplinary one which has repeatedly appeared in the Polish case law. The judgment will also be remembered as a strong restatement of the legally binding principle of primacy of EU law for constitutional courts.

Despite this clearly phrased message, the effective application of the principles laid out in the *AFJR* judgment has been undermined by the Romanian Constitutional Court's defiant jurisprudence.<sup>3</sup> This Court rejected the use of the principles developed by the Court of Justice in the *AFJR* judgment in its assessment of constitutionality review of the contested criminal liability regime of magistrates and prohibited ordinary courts from reaching a different outcome when carrying out their conformity review of the judicial criminal liability regime with EU law, as interpreted by the Court of Justice. Within the specific Romanian disciplinary liability regime of judges, non-compliance with the decisions of the Constitutional Court is considered a disciplinary offence.<sup>4</sup> Notably, following Decision No. 390/2021, Romanian judges face disciplinary investigations if they decide to disapply national provisions held to be constitutional on the basis of the *AFJR* judgment.<sup>5</sup> Therefore, the judicial conflict created by the Constitutional Court's Decision No. 390/2021 threatens the effective implementation of the Court of Justice judgment in the *AFJR* case and has a

<sup>2</sup>Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, [2006] OJ L 354/56. A similar instrument was used for Bulgaria's accession, *see* Decision 2006/929/EC [2006] OJ L 354/58. Although the CVM was not used for the accession of Croatia, it could still be used for rule of law monitoring in future accessions.

<sup>3</sup>In particular, *see* Romanian Constitutional Court, Decision No. 390 of 8 June 2021 published in the Official Gazette of Romania No. 612 of 22 June 2021.

<sup>4</sup>Since 2012 (and thus prior to the justice reform), disregarding a Constitutional Court ruling amounts to a disciplinary offence, according to Art. 99(§) of Law No. 303/2004.

<sup>5</sup>For an overview of the disciplinary actions, *see* D. Călin, 'Case C-817/21, Inspecția Judiciară', 18 January 2022, (<https://officialblogofunio.com/2022/01/18/case-c-817-21-inspectia-judiciara-compatibility-of-the-organization-of-an-authority-competent-to-carry-out-the-disciplinary-investigation-of-judges-which-is-under-the-total-control-of-a-single-pers/>), visited 29 March 2022.

chilling effect on the long-term judicial dialogue between Romanian ordinary courts and the Court of Justice of the EU.

The *AFJR* case is situated in the context of a growing number of references for preliminary rulings addressed by Romanian courts, ranging from first instance to supreme court, relating to legislative and executive changes affecting the entire justice system in Romania.<sup>6</sup> Between 2017 and 2019 the Romanian legislature amended on several occasions the key laws governing the organisation of the justice system.<sup>7</sup> These amendments have been widely criticised by the European Commission and the Council of Europe for undermining judicial independence and the rule of law;<sup>8</sup> nevertheless the majority of them have remained in force. The *AFJR* case is thus a direct reaction to the ineffectiveness of these varied rule of law monitoring mechanisms to reverse the following contested reforms: the Government's interim appointment of the Chief Inspector of the Judicial Inspectorate;<sup>9</sup> the creation of a section with exclusive competence to investigate criminal offences committed within the judicial system (SIOJ);<sup>10</sup> and new rules governing the civil liability of magistrates.<sup>11</sup> Given that the Romanian

<sup>6</sup>The second wave of rule of law referrals focused on the relation between the principle of primacy of EU law with the Romanian Constitutional Court's decisions in the field of fighting corruption: ECJ 21 December 2021, Joined Cases C-357/19, *Ministerul Public*; Case C-379/19, *DNA*; C-547/19, *CY and others*; Cases C-811/19 and C-840/19, *Ministerul Public*, ECLI:EU:C:2021:1034; Case C-926/19, *BR and Others*; Case C-929/19, *CD* (pending). The third wave of the rule of law referrals sought clarification on the Romanian Constitutional Court's power to limit the national courts' implementation of preliminary rulings assessing the conformity of the establishment of a new section for the investigation of criminal offences committed by magistrates with EU law requirements on judicial independence and rule of law: ECJ 22 February 2022, Case C-430/21, *RS*, ECLI:EU:C:2022:99; Case C-709/21, *MK* (pending); Case C-817/21, *Judicial Inspection* (pending). The fourth wave of rule of law referrals were on the conformity of a specific procedure for the promotion of judges to the supreme court with judicial independence and rule of law requirements: Case C-216/21, *AFJR* (pending).

<sup>7</sup>Laws Nos. 303/2004, 304/2004 and 317/2004. For a commentary, see the following section.

<sup>8</sup>From the European Commission see: Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism COM(2018) 851 final of 13 November 2018 (the CVM 2018 Report); Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2017) 44 final of 25 January 2017 (the CVM 2017 Report). From the Council of Europe bodies, see: GRECO ad hoc Report on Romania (Rule 34), adopted at its 79th Plenary Meeting on 23 March 2018 (2018/2) (the 2018 GRECO ad hoc Report); Venice Commission Opinion No. 924/2018 CDL-AD(2018)017; Venice Commission Opinion No. 950/2019 CDL-AD(2019)014; opinion of the Consultative Council of European Judges of 25 April 2019 (CCJE-BU(2019)4); and the opinion of the Consultative Council of European Prosecutors of 16 May 2019 (CCPE-BU(2019)3).

<sup>9</sup>At issue in Case C-83/19, *AFJR*, *supra* n. 1.

<sup>10</sup>At issue in Cases C-127/19, C-195/19, C-291/19 and C-355/19, *supra* n. 1.

<sup>11</sup>Case C-397/19, *supra* n. 1.

Constitutional Court had previously recognised the constitutionality of the most controversial of these reforms,<sup>12</sup> domestic courts have referred the question to the Court of Justice as a last resort for the protection of their judicial independence.

This case note starts by explaining the harmful reforms to the Romanian justice system, which have led, at the time of writing, to no less than 17 references for preliminary rulings.<sup>13</sup> It then sets out the main findings of the Court of Justice in the first wave of requests and identifies the added value of the Court's judgment to previous jurisprudence on judicial independence and rule of law. The article continues by examining the follow-up to the Court of Justice preliminary ruling at the national level, in particular the controversial decision of the Romanian Constitutional Court,<sup>14</sup> which has thus joined the ranks of defiant constitutional and supreme courts.<sup>15</sup> This case note argues that while the Constitutional Court has to a certain extent followed its established doctrine of limited recognition of the principle of primacy of EU law, an alarming change can be identified in the use of national constitutional identity – the elements of which are still undefined – as a shield against EU law.

#### THE NATIONAL BACKGROUND – THE REFORM OF THE JUSTICE SYSTEM IN ROMANIA AND THE ROLE OF THE CONSTITUTIONAL COURT

The 2017–2019 Romanian justice reform follows, to a certain extent, the Polish and Hungarian recipes for quick and widespread actions that undermine judicial independence, including: political capture of the highest positions in the judicial system hierarchy;<sup>16</sup> silencing of judicial criticism, with sanctions on judges and prosecutors for engaging in public debate on

<sup>12</sup>Notably, the establishment of the SIOJ. See 'The role of the Romanian Constitutional Court – upholding the justice reform' below.

<sup>13</sup>See the case law cited *supra* n. 1 and n. 6.

<sup>14</sup>In addition to Decision No. 390/2021, the Romanian Constitutional Court issued a press release on 23 December 2021 stressing that the CJEU preliminary ruling in the second wave of preliminary requests can only be given effect to after the Constitution has been revised. See (<https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/>), visited 29 March 2022.

<sup>15</sup>Notably: the Czech Constitutional Court Decision Pl. ÚS 5/12, following ECJ 22 June 2011, Case C-399/09, *Landtova*, ECLI:EU:C:2011:415; the Danish Supreme Court Decision in Case 15/2014, *Dansk Industri* (DI), following ECJ 19 April 2016, Case 441/14, *Dansk Industri v Rasmussen*, ECLI:EU:C:2016:278; the German Bundesverfassungsgericht, Order of the Second Senate of 29 April 2021 - 2 BvR 1651/15 (the so-called the *PSPP* case) following ECJ 11 December 2018, Case C-493/17, *Weiss and Others*; and more recently the Polish Constitutional Tribunal Judgment of 7 October 2021 in Case No. K 3/21.

<sup>16</sup>The management of: the Judicial Inspectorate, the SIOJ, and the Superior Council of the Magistracy.

legislative reforms;<sup>17</sup> an intense media campaign delegitimising the judiciary;<sup>18</sup> and quick justice reforms,<sup>19</sup> avoiding public debates.<sup>20</sup> However, the Romanian justice reform had several particularities. First, it had wider coverage, affecting the criminal law system and in particular rules on the fight against corruption. In fact, the reform limited prosecutorial and judicial anti-corruption powers, and stalled or ended criminal investigation in high corruption cases.<sup>21</sup> Second, the EU had a firmer grip on the organisation of the judicial system, compared to the Hungarian and Polish reforms,<sup>22</sup> due to the existence of the CVM Decision, which established a strict mechanism monitoring the effectiveness and accountability of the judiciary. Notably, the CVM Decision, adopted by the European Commission a few days before Romania's accession to the EU, made the accession possible despite persistent shortcomings related to judicial reforms and the fight against corruption in Romania. Although the Mechanism was set up as a transitional instrument to ensure delivery of reforms on four main rule of law objectives – transparency and efficiency of the judicial process, the fight against corruption in both local and national government, and establishing an integrity agency – it is still in force.<sup>23</sup>

<sup>17</sup>T. Drinóczi and A. Bień-Kacała, 'Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union' (Routledge & CRC Press 2020). In particular see ECtHR 5 May 2020, No. 3594/19, *Kövesi v Romania*, paras. 208 and 209, and E.S. Tănăsescu, 'Romania: From Constitutional Democracy to Constitutional Decay?', in V. Besirevic (ed.), *New Politics of Decisionism* (Eleven International Publishing 2019) p. 177-191.

<sup>18</sup>See the European Commission 2020 Rule of Law Report Country Chapter on the rule of law situation in Romania SWD/2020/322 final, p. 4. This defamation campaign was part of a broader media campaign entitled 'the parallel State', which had a dedicated national TV show ('Culisele Statului Paralel'). For similarities, see M. Jałoszewski, 'Kaczyński directly announced a purge among judges for the first time', *OKO.press*, 22 December 2020, (<http://themis-sedziowie.eu/materials-in-english/kaczynski-directly-announced-a-purge-among-judges-for-the-first-time-mariusz-jaloszewski-okopress-22-december-2020/>), visited 29 March 2022.

<sup>19</sup>E-S. Tănăsescu and B. Selejan-Gutan, 'A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania', *VerfBlog*, 6 February 2021, (<https://verfassungsblog.de/a-tale-of-primacy/>), visited 29 March 2022.

<sup>20</sup>See 'Repeated derogations from the ordinary procedure for reforming the justice system' below.

<sup>21</sup>This is more evident in the second wave of requests: C-379/19 and Joined Cases C-357/19 and C-547/19. See also Opinion of the European Commission for Democracy through Law on amendments to the Criminal Code and the Criminal Procedure Code CLD-AD(2018)21.

<sup>22</sup>For instance, the first Hungarian and Polish rule of law cases were first reviewed on the basis of the EU law principle of non-discrimination based on age as protected by Directive 2000/78. See ECJ 6 November 2012, Case C-286/12, *European Commission v Hungary*, ECLI:EU:C:2012:687.

<sup>23</sup>See the Annex to the CVM Decision, *supra* n. 2.

*Repeated derogations from the ordinary procedure for reforming the justice system*

The reform of the justice system started on the initiative of the Minister of Justice under a Social Democrat Government. It was a loose plan for amendments, lacking an impact assessment or a clear objective.<sup>24</sup> These amendments took the form of three Bills, generically called the laws ‘on justice’,<sup>25</sup> which were adopted by the Parliament using an accelerated procedure,<sup>26</sup> and which therefore involved little debate on key issues of broader public interest.<sup>27</sup> Such procedure was not motivated by domestic or European requirements – in fact the justice laws had been positively evaluated by the European Commission as potentially closing the CVM, which had been applicable in Romania for a decade.<sup>28</sup>

This accelerated legislative reform was further speeded up by the subsequent adoption of five Government Emergency Ordinances (nos. 77,<sup>29</sup> 90<sup>30</sup> and 92<sup>31</sup> in 2018 and nos. 7<sup>32</sup> and 12<sup>33</sup> in 2019) in a six-month period<sup>34</sup> substantially amending, *inter alia*, the judicial accountability regime.<sup>35</sup> According to the Constitution, Governmental Emergency Ordinances should only be used in ‘exceptional cases in which regulation cannot be postponed’<sup>36</sup> because prior approval by Parliament is not needed<sup>37</sup> and the Constitutional Court does not have the power to perform

<sup>24</sup>See the 2018 GRECO ad hoc Report on Romania, *supra* n. 8, fn 4.

<sup>25</sup>Law No. 207/2018 amending and supplementing Law No. 304/2004 on judicial organisation was published in the Official Journal of Romania, Part I, No. 636 on 20 July 2018; Law No. 234/2018 amending and supplementing law no. 317/2004 on the Superior Council of Magistracy was published in the Official Journal of Romania, Part I, No. 850 on 8 October 2018 and enforced three days after publication; Law No. 242/2018 amending and supplementing Law No. 303/2004 on the statute of judges and prosecutors was published in the Official Journal of Romania, Part I, No. 868 on 15 October 2018 and also enforced three days after publication.

<sup>26</sup>That is less than four months after the Minister of Justice made the reform proposal (August–December 2017).

<sup>27</sup>See 2018 CVM Report, *supra* n. 8.

<sup>28</sup>*Ibid.*, p. 3.

<sup>29</sup>Governmental Emergency Ordinance No. 77/2018 of September 2018 on *ad interim* nomination of the management team.

<sup>30</sup>Governmental Emergency Ordinance No. 90/2018 on measures to operationalise the department the investigation of offences committed by magistrates modified the law on judicial organisation (amended Law No. 304/2004).

<sup>31</sup>Governmental Emergency Ordinance No. 92/2018 of 16 October 2018.

<sup>32</sup>Governmental Emergency Ordinance No. 7/2019 of 19 February 2019.

<sup>33</sup>Governmental Emergency Ordinance No. 12/2019 of 7 March 2019.

<sup>34</sup>Between September 2018 and March 2019.

<sup>35</sup>For criticism of the Venice Commission Opinion No. 950/2019 on Emergency Ordinances GEO No. 7 and GEO No. 12 Amending the Laws of Justice (Romania) CDL-AD(2019)014.

<sup>36</sup>See also B. Selejan-Guțan, *The Constitution of Romania. A Contextual Analysis* (Hart Publishing 2016) p. 131-133.

<sup>37</sup>Directly by virtue of Art. 115 of the Romanian Constitution.

a preliminary check.<sup>38</sup> Despite their supposedly exceptional nature, this type of governmental act has become a common vehicle for reforming the Romanian justice system.<sup>39</sup>

The repeated use of Governmental Emergency Ordinances without parliamentary debate,<sup>40</sup> *ex ante* constitutional control or legislative approval<sup>41</sup> gave the impression that the aim was not a solid system of reforms with long-term goals, but a strategy to ensure that the extent of the changes and the level of political interference would go unnoticed.<sup>42</sup>

### *Indirect politicisation of the judicial inspectorate*

Disciplinary actions against magistrates (judges and prosecutors) are pursued in Romania by the Judicial Inspectorate, a body established in 2004 as part of the pre-accession justice reform, within the internal structure of the Superior Council of Magistracy.<sup>43</sup> The disciplinary actions started by the Judicial Inspectorate are then decided by the respective sections of the Council (judges or prosecutors), which can be appealed before the High Court of Cassation and Justice (the High Court).<sup>44</sup> As a result of the emergency reforms listed above, the Judicial Inspectorate was politically captured first, by concentrating in the hands of the Chief Inspector increased powers of appointment,<sup>45</sup> disciplinary investigation and sanctioning,<sup>46</sup> and second, by a government reinstatement into office of a previous Chief Inspector. Notably, the Government adopted an Emergency Ordinance to retroactively reinstate in office the Chief Inspector of the

<sup>38</sup>According to Art. 146(d) of the Romanian Constitution.

<sup>39</sup>See 2018 CVM Report, *supra* n. 8, p. 3. For additional criticism, see Venice Commission Opinion 950/2019, *supra* n. 8; and 2018 GRECO ad hoc Report.

<sup>40</sup>2018 CVM Report, *supra* n. 8, p. 9.

<sup>41</sup>These Governmental Emergency Ordinances touched on important judicial management issues: appointments of judicial inspection management positions, SIOJ (e.g. GEOs Nos. 90, 92, 77, *supra* nn. 29-31), and appointments to top prosecutorial offices (GEO No. 7, *supra* n. 35).

<sup>42</sup>See also the Opinion of AG Bobek in ECJ 23 September 2020, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *AFJR*, ECLI:EU:C:2020:746, point 255.

<sup>43</sup>See Art. 65 of Law 304/2004.

<sup>44</sup>For a wider analysis see B. Selejan-Guțan, 'Romania: Perils of a "Perfect Euro-Model" of Judicial Council', 19 *German Law Journal* (2018) p. 1707.

<sup>45</sup>The Chief Inspector could appoint the Chief Adjunct and other managerial inspectors, and decide on the main direction of inspection. See Art. 54 of Law No. 234/2018 and AG Opinion, *supra* n. 42, point 267.

<sup>46</sup>Regarding disciplinary investigatory powers, the Chief Inspector could start investigations *ex officio* and also following requests from political organs (e.g. the Ministry of Justice and other interested parties).



Judicial Inspectorate,<sup>47</sup> a politically convenient appointment for the ruling party given his track record of disciplinary investigations.<sup>48</sup> At first sight, this governmental act would appear to address a legislative gap on filling vacancies of management positions in the Judicial Inspectorate. However, the broad temporal application of the Ordinance to both the specific vacancy and to all future interim situations without following the regular appointment procedure tainted the legitimacy of the *ad interim* procedure.

Following his reinstatement in office, the Chief Inspector started a series of targeted disciplinary investigations against judges who were critical of the contested justice reform and the Romanian Constitutional Court jurisprudence supporting them.<sup>49</sup> Several of the disciplinary sanctions proposed by the Chief Inspector were upheld by the Superior Council of Magistracy.<sup>50</sup> Some of them were annulled by the High Court, while one removal from office was found by the ECtHR to violate the right of access to a court<sup>51</sup> and another to violate both the right to a fair trial and magistrates' freedom of expression.<sup>52</sup>

*Reforming the criminal liability of judges and prosecutors – establishment of a new institution, politically up for grabs*

Until the 2017 justice reform, the criminal liability of magistrates for corruption offences was investigated in much the same way as it was for the other professional categories, by the National Anti-Corruption Directorate, a specialised body that had been established in 2004 as a pre-condition for Romania's accession to the EU. In 2018, the Parliament decided to create a new special investigation section with exclusive competence to investigate criminal offences committed only by judges and prosecutors (SIOJ) which would initially include only 15 prosecutors, thus entailing a 90% reduction of the previous competent prosecutorial staff.<sup>53</sup>

The subsequent repeated use of Governmental Emergency Ordinances<sup>54</sup> to establish the SIOJ watered down the few initial independence guarantees of the SIOJ related to the appointment and selection procedure for its chief

<sup>47</sup>Emergency Ordinance No. 77/2018, *supra* n. 29.

<sup>48</sup>For a list of disciplinary investigations, see D. Călin, 'The Constitutional Court of Romania and the Rule of Law Standards' in *900 Days Of Uninterrupted Siege Upon The Romanian Magistracy: A Survival Guide* (Beck București 2020) p. 180 ff.

<sup>49</sup>See more in CVM Report 2018, *supra* n. 8, p. 5 (fn. 25).

<sup>50</sup>Călin, *supra* n. 48, p. 181-187.

<sup>51</sup>ECtHR 20 October 2020, No. 36889/18, *Camelia Bogdan v Romania*.

<sup>52</sup>ECtHR, *Kövesi v Romania*, *supra* n. 17.

<sup>53</sup>Law No. 207/2018, *supra* n. 25.

<sup>54</sup>Four subsequent Governmental Emergency Ordinances were adopted in five months: 90/2018, 92/2018, 7/2019, 12/2019 amended Law No. 207/2018, *supra* n. 25.



prosecutor and prosecutors,<sup>55</sup> and the impartiality of prosecutors involved in criminal investigations. It increased the powers of the SIOJ<sup>56</sup> to the detriment of the well-equipped National Anti-Corruption Directorate without ensuring adequate staffing. No justification was initially provided by the Government for the creation of the SIOJ. Only months later did the Government refer to protection of the judiciary from excessive complaints as a justifiable aim. This new criminal liability regime was sub-optimal for a number of reasons: it undermined public trust in the judiciary; stalled ongoing high level anti-corruption investigations;<sup>57</sup> and was largely ineffective due to its significantly understaffed structure.<sup>58</sup> Furthermore, the first appointed interim chief prosecutor and adjunct chief prosecutor were persons with special connections to the Government at the time.<sup>59</sup> European Commission and Council of Europe reports assessing the justice reform identified a high risk that the establishment and functioning of SIOJ would be perceived as politically motivated; they therefore recommended that the institution be eliminated or suspended.<sup>60</sup>

*Reforming the civil liability of judges and prosecutors – the increasing role of the Executive*

The justice reform affected the entire judicial accountability regime, including the civil liability procedure, unlike the Hungarian and Polish reforms. The main judicial independence issues raised by the reformed civil liability regime resulted from a combination of changes: the increased the role of the executive in starting civil liability actions, whose decision to initiate proceedings is based solely on its own evaluation, lacking concrete criteria, of a consultative report submitted by the Judicial Inspection, an institution whose own independence has been contested;

<sup>55</sup>Governmental Emergency Ordinance No. 7/2019 (Art. 54) eroded the powers of the Superior Council of Magistracy as regards the nomination of prosecutors in managing positions, empowering the President of Romania to carry out this task. In addition, Governmental Emergency Ordinance No. 90/2018 eased the competition rules to ensure a rapid increase in the number of prosecutorial staff in the section. These two Ordinances also eroded the role of prosecutors in the nomination procedures for the Superior Council of Magistracy.

<sup>56</sup>SIOJ acquired the power to re-route corruption cases from the National Anti-Corruption Directorate. See GEO No. 7/2019 adding Art. 88-8(1)(d) to Law No. 304.

<sup>57</sup>On the illegitimate use of the power to re-route cases from the National Anti-Corruption Directorate, see AG Opinion, *supra* n. 42, point 318; see also the famous *TELEDROM* case in the Venice Commission Opinion No. 950/2019, *supra* n. 8.

<sup>58</sup>In practice, the SIOJ has functioned with only five to six prosecutors in its three years of existence, and up to the end of 2021 it has issued five indictments.

<sup>59</sup>See AG Opinion, *supra* n. 42, point 317.

<sup>60</sup>2018 CVM Report, *supra* n. 8, p. 24; Venice Commission Opinion No. 950/2019, *supra* n. 8, point 40; and 2018 GRECO ad hoc Report on Romania, *supra* n. 8, point 34.

and the absence of adequate hearing rights of the judge under investigation during the establishment of the judicial error, thus raising issues regarding guarantees to rights of defence for judges.<sup>61</sup>

The European Commission,<sup>62</sup> the Venice Commission<sup>63</sup> and GRECO,<sup>64</sup> together with other member states and international partners,<sup>65</sup> all emphasised that the new liability scheme – in combination with the other changes in the judicial liability regime – could result in pressure on judges and prosecutors, and ultimately undermine the independence of the judiciary and the efficiency and quality of justice.

### *The role of the Romanian Constitutional Court – upholding the justice reform*

The Constitutional Court played a prominent role in the institutional conflict over the legality of the justice reform. Since 2018, the Court has delivered several controversial decisions, upholding some of the most heavily criticised governmental justice reforms, such as the establishment of the SIOJ.<sup>66</sup> Some of these Decisions have contradicted its previous jurisprudence on the legal effects of the CVM Decision and Commission reports.<sup>67</sup> Notably, the Constitutional Court jurisprudence in 2011 and 2012<sup>68</sup> recognised the CVM Decision and its benchmarks for the effectiveness of the justice system and the fight against corruption, together with the Commission reports, as legally binding and a standard for constitutionality review of some of the justice laws on the basis of the constitutional obligation to give expression to EU law obligations stemming from Article 148(4) of the Constitution.<sup>69</sup> The Constitutional Court changed its position in 2018,<sup>70</sup> when it found that the CVM Decision could not constitute a reference point for a constitutionality review of the justice reform, since that Decision was adopted before Romania's accession to the EU, and its legal nature

<sup>61</sup>For more, see *AJFR*, *supra* n. 1.

<sup>62</sup>See the 2018 and 2019 CVM Reports, *supra* n. 8.

<sup>63</sup>Venice Commission Opinion No. 924/2018, *supra* n. 8.

<sup>64</sup>2018 GRECO ad hoc Report on Romania, *supra* n. 8.

<sup>65</sup>Joint statement by Belgium, Canada, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Norway, Sweden, Switzerland and the United States of 29 June 2018 (see 2018 CVM Report, fn. 15, *supra* n. 8).

<sup>66</sup>See Decisions No. 33/2018 of 15 February 2018 and No. 104/2018 of 29 May 2018.

<sup>67</sup>Namely, Decision No. 148/2003 of 16 April 2003. For more, see V. Viță, 'The Romanian Constitutional Court and the Principle of Primacy: To Refer or Not to Refer?', 16 *German Law Journal* (2015) p. 1623 at p. 1627.

<sup>68</sup>See Decision No. 1519/2011 of 15 November 2011 and Decision No. 2/2012 of 11 January 2012.

<sup>69</sup>Decision No. 2/2012, para. 17.

<sup>70</sup>See Decision No. 33/2018 of 15 February 2018 and Decision No. 104/2018 of 29 May 2018.

and effects had not been interpreted by the Court of Justice. Furthermore the Constitutional Court found the CVM Decision to not fulfil the requirements of a directly effective and legally binding provision, but to be a mere 'recommendation'.<sup>71</sup>

This 2018 jurisprudential development represented a step backwards regarding the Romanian Constitutional Court's 2011–2012 Euro-friendly case law. It should be noted that the composition of the Romanian Constitutional Court in 2018 was completely different to that in 2011–2012. This change in the constitutional interpretation of the legal nature and effects of the CVM Decision and reports, coupled with the finding that the SIOJ conformed constitutionally, has re-fuelled the long standing 'rivalry' with ordinary courts.<sup>72</sup>

#### THE FACTS OF THE SIX JOINED CASES: THE PROMINENT ROLE OF THE JUDGES' AND PROSECUTORS' ASSOCIATIONS IN FRAMING THE REFERENCES FOR PRELIMINARY RULINGS

Inspired by the Court of Justice ruling in the *Portuguese judges* case,<sup>73</sup> from 2019 Romanian courts, prompted largely by national associations of judges and prosecutors,<sup>74</sup> addressed 17 preliminary questions to the Court of Justice. They requested an interpretation of the EU *acquis* on judicial independence and the rule of law in relation to the reformed judicial liability regime. The use of the preliminary reference procedure was understood by judges as a last resort to defend judicial independence after negotiation tools,<sup>75</sup> along with domestic<sup>76</sup> and European litigation before European Court of Human Rights,<sup>77</sup> proved insufficient.

<sup>71</sup>For a more detailed analysis see 'Unwarranted self-restraint of the Romanian Constitutional Court' below.

<sup>72</sup>Viță, *supra* n. 67, at p. 1627.

<sup>73</sup>ECJ 27 February 2018, Case C-64/17, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117 (the *Portuguese judges* case).

<sup>74</sup>Namely, the Asociația 'Forumul Judecătorilor din România' (Romanian Judges' Forum Association) and the Asociația 'Mișcarea pentru Apărarea Statutului Procurorilor' (the Movement for the Defence of Prosecutors' Status Association).

<sup>75</sup>The previous section showed that the reformed judicial liability mechanisms remained in force despite express requests from the European Commission and other international forums to suspend, eliminate or clarify them.

<sup>76</sup>The Romanian Constitutional Court upheld most of the contested reforms to the judicial liability system. See the previous sub-section.

<sup>77</sup>In the *Kövesi* and *Bogdan* cases, *supra* n. 17 and n. 51 respectively, the European Court of Human Rights found individual violations, tackling only the targeted disciplinary proceedings.

The first reference for a preliminary ruling<sup>78</sup> arose in a case lodged by the Romanian Judges' Forum Association (Judges' Association) against the Judicial Inspectorate for incomplete disclosure of information on disciplinary actions. As a preliminary issue, the applicant raised the lack of legal representation of the Chief Inspector, who had not been appointed according to the regular domestic procedure, i.e. following a public competition organised by the general assembly of the Superior Council of Magistracy, but was retroactively reinstated in office through a Governmental Emergency Ordinance.<sup>79</sup> The Judges' Association argued that the said Ordinance violated the 2018 CVM Commission Report and Articles 2 and 19(1)(2) TEU by undermining the independence of the judicial disciplinary regime.

Four other requests for preliminary rulings focused on one of the most controversial justice reforms – the establishment of the SIOJ. Two of the preliminary references arose in cases initiated by the Judges' and Prosecutors' Associations against decisions adopted by the Superior Council of Magistracy and the General Prosecutor of Romania establishing rules on the appointment and removal of prosecutors from the SIOJ<sup>80</sup> and on the operation of the SIOJ.<sup>81</sup> While these cases deal with the abstract institutional design of the SIOJ, the other two preliminary references show the concrete effects of the establishment of the SIOJ on corruption cases. Private parties lodged criminal complaints against judges and prosecutors who had convicted them for corruption-related offences.<sup>82</sup> The referring courts noted that if these criminal complaints were found admissible, the SIOJ would automatically gain prosecutorial powers that could hinder the fight against corruption due to deficiencies in specialised staff and concerns regarding the impartiality of SIOJ prosecutors. In Case C-195/19, the referring court also asked the Court of Justice to establish whether the decisions delivered by Romanian Constitutional Court in 2018, with regard to the constitutionality of the SIOJ establishment and rejecting the CVM Decision and Commission reports as constitutional review standards, violated the principle of primacy of EU law. Like the *Miasto Łowicz* case,<sup>83</sup> some of the referring judges had been subject to disciplinary actions opened by the Judicial Inspectorate led by the same Chief Inspector whose mandate was challenged in the first request for a preliminary ruling.<sup>84</sup> Since that first request did not suspend the mandate of the Chief Inspector, the aforementioned disciplinary actions raised impartiality issues.

<sup>78</sup>Case C-83/19, *supra* n. 1.

<sup>79</sup>Emergency Ordinance No. 77/2018, *supra* n. 29.

<sup>80</sup>Case C-127/19, *supra* n. 1.

<sup>81</sup>Case C-355/19, *supra* n. 1.

<sup>82</sup>See Cases C-195/19 and C-291/19, *supra* n. 1.

<sup>83</sup>ECJ 26 March 2020, Case C-558/18, *Miasto Łowicz*, ECLI:EU:C:2020:234.

<sup>84</sup>See 'Disciplinary actions against three Romanian magistrates' in Judges' Forum, retweeted by the Good Lobby Profs, 23 April 2021 (<http://www.forumuljudecatorilor.ro/index.php/archives/4409>), visited 29 March 2022.

The reformed judicial civil liability regime was also subject to one of the references for preliminary ruling raising,<sup>85</sup> whose admissibility was the most questionable of all six references.<sup>86</sup> The referring court had doubts that the wide definition of judicial error, the leading role and wide powers of a political institution – the Ministry of Public Finance – in triggering actions of indemnity against the judiciary, and the lack of sufficient fair trial guarantees for accused judges were consistent with the EU *acquis* on judicial independence (namely Articles 2 and 19(1)(2) TEU and Article 47 of the Charter) and with the CVM Decision and the 2018 CVM report.

#### THE COURT OF JUSTICE JUDGMENT IN THE *AFJR* CASE – GUIDELINES ON DESIGNING JUDICIAL LIABILITY REGIMES

The European Court of Justice held that all the preliminary questions related to the interpretation of the CVM were admissible. Although the organisation of justice in individual member states falls within their own competence, the member states are nonetheless required, when exercising that competence, to comply with their obligations deriving from EU law.<sup>87</sup> This is an important finding as regards admissibility, given the strong opposition formulated by the Superior Council of Magistracy which submitted consistent objections, both during the written and oral phase of the proceedings, that most of these questions should be dismissed as inadmissible as they do not fall within the jurisdiction of the Court of Justice, but within that of the Constitutional Court. The Superior Council of Magistracy also alleged that most of the questions were only hypothetical and did not directly impact on the resolution of the concrete issues pending before the referring courts.

In the *AFJR* case, the Court followed the approach it has consistently developed in previous rule of law case law, namely a realist interpretation of the EU *acquis* on judicial independence and rule of law, taking into account the overall legal-political context of the contested justice reforms and their practical functioning.<sup>88</sup> In the words of Advocate General Bobek, ‘the devil’ in the contested justice reforms in the *AFJR* case ‘is not in detail, but in the context’.<sup>89</sup> By joining together

<sup>85</sup>Case C-397/19, *supra* n. 1.

<sup>86</sup>See Opinion of AG Bobek in Case C-397/19, *AX v Statul Român – Ministerul Finanțelor Publice*, ECLI:EU:C:2020:747.

<sup>87</sup>Judgment, *supra* n. 1, para. 111.

<sup>88</sup>As applied in, for example, ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others*, ECLI:EU:C:2019:982; ECJ 2 March 2021, Case C-824/18, *A.B. and Others*, EU:C:2021:153.

<sup>89</sup>Opinion of AG Bobek, *supra* n. 42, point 274.

all six references for preliminary rulings contesting the different types of judicial liability regimes, the Court was able to connect the myriad reforms introduced within a short time span in order to assess the overall ‘health’ of judicial independence of national courts following the justice reform, which is of EU law concern,<sup>90</sup> and thus provide national courts with useful guidance in solving the alleged incompatibility between the contested justice reforms and EU law.

*The legal nature and effects of the CVM Decision and Reports*

The Court reached an obvious conclusion regarding the legal nature of the CVM Decision and Commission Reports, finding both to be EU legal acts falling within the Court’s jurisdiction under Article 267 TFEU. Notably, it found the CVM Decision to be a ‘decision’ within the meaning of Article 288 TFEU, adopted on the basis of Articles 37 and 38 of the Treaty of Accession. Although the Decision was adopted before Romania’s accession to the EU, it was found to also produce effects post-accession without a fixed time limit but until Romania is considered to have satisfactorily achieved the benchmarks regarding the independence and integrity of the justice system and the fight against corruption. Regarding the CVM Reports drafted by the Commission, the Court held that they should also be regarded as acts of EU law concluded on the basis of Article 2 of the CVM Decision.

Nevertheless, the Court differentiated between the CVM Decision and the Commission Reports regarding their legal effects at the domestic level. The CVM Decision was found to be legally binding on Romania in its entirety, including the benchmarks that are part of the Annex to the CVM Decision, on the basis of Article 288 TFEU jointly with Article 4 of the Decision.<sup>91</sup> The broad formulation of the benchmarks was found to not impair their direct effect,<sup>92</sup> which means that national authorities have both positive obligations to adopt appropriate measures to meet the benchmarks as soon as possible and negative obligations ‘to refrain from implementing any measure which could jeopardise those benchmarks being met’.<sup>93</sup>

On the other hand, the CVM Reports are *not enforceable* as freestanding legal obligations.<sup>94</sup> Nevertheless, they are not devoid of legal effects, as the principle of sincere cooperation as set out in Article 4(3) TEU requires national authorities to ensure consistent interpretation of national provisions with the recommendations included in the Reports. If the Commission expresses doubt in its CVM Report(s)

<sup>90</sup>Portuguese judges case, *supra* n. 73, paras. 41-43.

<sup>91</sup>Judgment, *supra* n. 1, para. 170.

<sup>92</sup>Ibid., *see* para. 170.

<sup>93</sup>Ibid., para. 172.

<sup>94</sup>AG Opinion, *supra* n. 42, point 166.

as to the compatibility of a national measure with one of the benchmarks, then the Romanian authorities are expected to sincerely cooperate with the Commission to overcome any issues that may arise.<sup>95</sup> Furthermore, the Reports can be used to give concrete meaning to the rule of law and judicial independence requirements under Article 19(1)(2) TEU, which is directly effective and can thus be used to disapply national legislation that does not fulfil EU law requirements on judicial independence.

### *The interim appointment of the Chief Inspector*

According to the European Court of Justice, EU law does not require uniform judicial organisation or homogenous judicial accountability models throughout Europe, and neither does it require total exclusion of the executive from decisions related to judicial organisation.<sup>96</sup> As long as member states comply with common parameters of judicial independence, diversity and executive involvement in judicial appointments *per se* are not prohibited. The Court of Justice extracted the judicial independence parameters from the external dimension of judicial independence and the doctrine of appearances.<sup>97</sup> It relied heavily on requirements it had formulated in previous Polish cases regarding the disciplinary liability of judges.<sup>98</sup> Notably, regarding external independence, the Court referred to the need to insulate the judiciary from any direct or indirect political influence, 'which is liable to have an effect on the decisions of the judges concerned'.<sup>99</sup> Concerning the doctrine of appearances, the Court of Justice referred to the obligation of member states to provide sufficient safeguards which should 'dispel any reasonable doubt in the minds of individuals as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it'.<sup>100</sup> Regarding the interplay between judicial independence and disciplinary liability, the Court recalled that domestic disciplinary regimes 'must provide necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions'.<sup>101</sup>

<sup>95</sup>See paras. 176 and 177.

<sup>96</sup>In line with the findings in ECJ 20 April 2021, C-896/19, *Republika*, ECLI:EU:C:2021:311. See also AG Opinion in C-397/19, point 10.

<sup>97</sup>Judgment, *supra* n. 1, paras. 195 and 196.

<sup>98</sup>ECJ 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586; ECJ 24 June 2019, Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531; ECJ 5 November 2019, Case C-192/18, *Commission v Poland (Independence of ordinary courts)*, EU:C:2019:924; *A.B. and Others*, *supra* n. 88.

<sup>99</sup>Judgment, *supra* n. 1, para. 197.

<sup>100</sup>*Ibid.*, para. 196.

<sup>101</sup>*Ibid.*, para. 198.



The Court then added two new requirements that disciplinary regimes should meet, based on recommendations made by the Advocate General. First, given that the mere prospect of opening a disciplinary investigation is 'liable to exert pressure on those who have the task of adjudicating in a dispute', the body competent to conduct investigations and bring disciplinary proceedings, *in casu* the Judicial Inspectorate, 'should act objectively and impartially in the performance of its duties and, to that end, be free from any external influence'.<sup>102</sup> Second, the procedures for appointment to management positions must be designed so that 'there can be no reasonable doubt that the powers and functions of that body will not be used as an instrument to exert pressure on, or political control over, judicial activity'.<sup>103</sup>

Regarding the *ad interim* appointment of the Chief Inspector through a Governmental Emergency Ordinance, the Court identified the use of an exceptional procedure – and disregard for the ordinary appointment procedure – to be problematic,<sup>104</sup> when taken in conjunction with the concentration of the wide powers of appointment and investigation in the hands of the Chief Inspector.<sup>105</sup> This particular use of a governmental act correlated with the wider procedural context of the excessive use of an exceptional procedure – emergency ordinances – to reform the justice system raised doubts about the neutrality of the impugned measure.<sup>106</sup> The Court concluded, in line with the Advocate General, that a seemingly neutral rule, aimed at filling a vacant management position which should ensure the functioning of the Judicial Inspectorate, can pose problems for judicial independence due to the elements of context and operation. In line with its limited competence under Article 267 TFEU, the Court only developed a two-pronged test of judicial independence, the concrete application of which was left to national courts: 1) whether the national legislation at issue in the main proceedings has the effect of conferring on the national government a direct power of appointment to those positions; 2) whether there can be 'reasonable doubts that the powers and functions of the Judicial Inspectorate might be used as an instrument to exert pressure on, or political control over, the activity of judges and prosecutors'.<sup>107</sup> Should the reply be affirmative, the Court clarified that the referring court is required to disapply the national legislation on the basis of Articles 2 and 19(1)(2) TEU and the CVM Decision.<sup>108</sup>

<sup>102</sup>Ibid., para. 199.

<sup>103</sup>Ibid., para. 200.

<sup>104</sup>Ibid., para. 205.

<sup>105</sup>Ibid., paras. 200 and 206.

<sup>106</sup>See also AG Opinion, *supra* n. 42, points 254-255.

<sup>107</sup>Judgment, *supra* n. 1, para. 206.

<sup>108</sup>Ibid., para. 207.

*Establishment of the SIOJ*

The Court developed a similar judicial independence test – based on the requirements of external independence and doctrine of appearances – that referring courts will have to apply when assessing the compatibility of the SIOJ with the EU law *acquis* on judicial independence, *in casu* Articles 2 and 19(1)(2) TEU, Article 47 EU Charter and the CVM Decision. In order to provide a useful reply to the referring court, the test is custom-made to the particular issues resulting from the creation and functioning of the SIOJ. In short, the Court of Justice was clear in its findings that the national provisions on the SIOJ will not pass the test of EU law conformity if the following conditions are not cumulatively met: first, the creation of the SIOJ is not justified by objective and verifiable reasons connected to the sound administration of justice for setting up this section; second, the creation of the SIOJ is not accompanied by specific guarantees preventing any risk that it might be used as an instrument of political control over judges and prosecutors; and third, the fair trial and effective remedies in Articles 47 and 48 of the Charter are not ensured in the operation of the SIOJ. While the Court of Justice left the final decision to the referring court to ascertain whether the rules on the SIOJ did or did not fulfil the aforementioned three-pronged test of judicial independence, it nevertheless provided useful guidance to the referring courts by indicating the concrete elements in the creation and functioning of the SIOJ which are capable of raising doubts regarding its external independence and fair trial guarantees.

First, the Court assessed whether the reason provided by politicians for the creation of the SIOJ – the protection of judges – was genuine or not. Since this objective was not provided in the explanatory memorandum of the legislative proposal that created the SIOJ but only by the Government after the publication of the law, the creation of the SIOJ was found to not have been justified in ‘a clear, unambiguous and accessible manner, so as not to undermine public confidence in the judiciary’.<sup>109</sup> The Advocate General added a few more pertinent observations. Namely, the creation of the SIOJ gave the impression of widespread criminality among the judiciary at such a level of severity that it required a special institution, which therefore contradicted the objective of ‘protecting the judiciary’ as defended by the Superior Council of Magistracy during the hearings.<sup>110</sup>

Second, the Court continued to assess the effects of the SIOJ’s powers on an institution which exercised overlapping criminal investigation powers – the National Anti-corruption Directorate, the activities of which were positively

<sup>109</sup>This is the more elaborated formulation by the Advocate General. See point 306, which was, however, endorsed by the CJEU in para. 215.

<sup>110</sup>AG Opinion, *supra* n. 42, point 293.

evaluated by the European Commission as fighting corruption.<sup>111</sup> Both the Court and the Advocate General found that the wide powers of the SIOJ and its exercise in practice had weakened the fight against high-level corruption.<sup>112</sup> Moreover, based on evidence in the 2019 CVM Report by the Commission, the Court concluded that the risk of the SIOJ becoming an instrument of political pressure had actually materialised.<sup>113</sup>

Third, the repeated involvement of the executive in the organisation and function of the SIOJ through several government emergency ordinances, derogating from the ordinary legislative procedure, was found by the Court of Justice to taint the legitimacy of the whole procedure. The Advocate General was more detailed in his assessment of the SIOJ; he emphasised that it was not only the repeated use of emergency ordinances by the Government to amend the institutional design of the SIOJ, but also their effect of weakening the guarantees initially provided in legislation, that tainted the legitimacy of the SIOJ.<sup>114</sup>

Ultimately, the Court of Justice also took into consideration the fact that the limited number of personnel in SIOJ, who would have to solve an increased number of cases compared to the National Anti-corruption Directorate,<sup>115</sup> would pose problems of conformity with the right to a fair trial in a reasonable period of time.<sup>116</sup> While the Court only based its finding on Articles 47 and 48 of the Charter, the Advocate General paid more attention to the judicial dialogue with the European Court of Human Rights by adding Article 6 ECHR and the relevant jurisprudence of the European Court of Human Rights on the right to a fair trial in a reasonable time to the EU law yardsticks on fair trial.<sup>117</sup>

### *The civil liability of judges*

Regarding the reformed civil liability procedure, the Court of Justice noted that the existence of the principle of judges' personal liability for judicial errors entails a risk of interference with their independence as it can influence the decision-making of those entrusted with adjudication. Consequently, the Court concluded

<sup>111</sup>See *supra* 'The national background...'

<sup>112</sup>Judgment, *supra* n. 1, para. 217, and AG Opinion, *supra* n. 42, point 304.

<sup>113</sup>Judgment, *supra* n. 1, para. 219. According to the 2019 CVM Report, the SIOJ 'launched investigations against judges and prosecutors who had opposed the current changes to the judicial system, as well as abrupt changes in the approach followed in pending cases, such as the withdrawal of appeals previously lodged by the DNA in high-level corruption cases' (p. 5).

<sup>114</sup>AG Opinion, *supra* n. 42, point 315.

<sup>115</sup>Due to the SIOJ's increased investigation competence: see the details in AG Opinion, *supra* n. 42, points 320-324.

<sup>116</sup>Judgment, *supra* n. 1, para. 222.

<sup>117</sup>AG Opinion, *supra* n. 42, point 329.

that this personal liability of judges for judicial errors should be limited to exceptional cases and framed with objective verifiable criteria concerning the sound administration of justice. Additionally, such procedures should be accompanied by adequate guarantees to ensure that any risk of external pressure on the content of judicial decisions is avoided so as to prevent any legitimate doubt in public perceptions. The Court devised a clear list of safeguards that should be in place at the national level for this type of procedure. First, the types of behaviour for which judges may be personally liable should be defined in clear and precise terms in order to protect their independence and avoid the risk of pressure.<sup>118</sup> Second, the liability of judges for damage caused during the exercise of their functions should only be invoked in exceptional circumstances in which their serious individual guilt has been duly established.<sup>119</sup> Third, national rules on such cases must contain adequate guarantees and ensure that such procedures cannot be transformed into instruments of pressure on judicial activity.<sup>120</sup> Fourth, authorities investigating such cases should meet the requirements of objectivity and impartiality and conduct their investigations in observance of these principles.<sup>121</sup> Finally, the rights provided in Article 47 of the Charter, particularly the right to defence of the judge accused during the proceeding establishing the judicial error, must be fully complied with, and the organ deciding on the personal liability of the judge must be a court.<sup>122</sup>

Nevertheless, concurring with the Advocate General, the Court found that the reformed definition of judicial error was not in itself capable of raising suspicion of external political pressure. Importantly, the Court also underlined that the guarantee of judicial independence does not mean an absolute immunity of judges for acts performed in the exercise of their judicial duties. The most problematic aspect of the impugned reform was the lack of adequate safeguards and guarantees of the right to fair trial of a judge indicted for judicial error. Notably, the indicted judge lacks a right to participate in the proceedings establishing judicial error, and the judgment in these proceedings empowers the Ministry of Public Finance, a political authority, to initiate an action of indemnity based solely on a consultative report issued by the Judicial Inspectorate.

### *The legal effects of the principle of primacy of EU law on the Romanian Constitutional Court*

The last question addressed by the European Court of Justice concerned the interpretation of the principle of primacy of EU law and its effects on the

<sup>118</sup>Judgment, *supra* n. 1, para. 235.

<sup>119</sup>*Ibid.*, para. 233.

<sup>120</sup>*Ibid.*, para. 235.

<sup>121</sup>*Ibid.*, para. 236.

<sup>122</sup>*Ibid.*, para. 237.

jurisprudence of the Romanian Constitutional Court. The Court of Justice stressed that the Constitutional Court, like other entities in the member states, has an obligation to give full effect to EU rules as they have been interpreted by the Court of Justice. Additionally, the Constitutional Court lacks the competence to limit the EU law mandate of domestic courts, whereby they should give full effect to Article 19(1)(2) TEU and the CVM Decision, which sometimes might require disapplication of the relevant national provisions, irrespective of their legislative or constitutional character, or their interpretation by the Constitutional Court.<sup>123</sup>

#### CRITICAL COMMENTARY – THE ADDED VALUE OF THE *AFJR* JUDGMENT TO CASE LAW ON THE RULE OF LAW

One of the notable contributions of the *AFJR* judgment to the previous jurisprudence on the rule of law is the development of the *principle of progression* towards achieving the EU rule of law standards. Although not expressly phrased in this way by the European Court of Justice, this principle can be deduced from the positive obligation imposed by the Court on Romania to achieve progress on two key rule of law benchmarks as set out by the CVM Decision: remedying deficiencies in the justice system and the fight against corruption.<sup>124</sup> In this way, the Court of Justice continues the dynamic approach of construing judicial independence, not just as prohibition on amending national legislation that would bring about a reduction in the protection of the rule of law, as introduced in the *Repubblika* judgment,<sup>125</sup> but also as a positive obligation requiring all the organs of a member state to adopt national provisions that would achieve the rule of law benchmarks set out by the CVM Decision along the lines of the Commission recommendations. In addition, the principle of progression would also require all the organs of a member state, including ordinary and constitutional courts, to remedy shortcomings in the rule of law protection by filling gaps or amending existing national provisions along the lines of the Commission's recommendations for achieving the rule of law benchmarks set out in the CVM Decision. The principle of progression towards achieving the EU law rule of law standards would clearly apply to those member states who are subject to the CVM, i.e. Romania and Bulgaria.<sup>126</sup>

However the *AFJR* judgment's added value goes beyond the development of a new rule of law principle – progression – with limited geographical applicability.

<sup>123</sup>Judgment, *supra* n. 1, para. 250.

<sup>124</sup>*Ibid.*, paras. 162 and 169-172, 178.

<sup>125</sup>*Repubblika*, *supra* n. 96, paras. 63-64.

<sup>126</sup>See *supra* 'The legal nature and effects of the CVM Decision and Reports'.

By using Articles 19(1)(2) and 2 TEU instead of Article 47 EU Charter as yardsticks for judicial independence review, the Court of Justice seems to say that variable geometry in the field of the rule of law is not acceptable,<sup>127</sup> as this would entail discriminatory consequences, whereby similar judicial organisational provisions would not violate the EU law standards on judicial independence, if the originating member state is not bound by the CVM. By rejecting the Advocate General's strong recommendation to use Article 47 EU Charter and the CVM Decision as the main yardsticks for judicial independence review,<sup>128</sup> the Court takes a clear stance that judicial independence issues of the type raised by the Romanian justice reform would have to comply with a similar judicial independence test under Articles 19(1)(2) and 2 TEU regardless of the member state at issue. Consequently, in the *AFJR* judgment, the Court of Justice is also consolidating its jurisprudence whereby Articles 19(1)(2) and 2 TEU are the main yardstick when referring courts have to carry out an assessment of the abstract legality of national legislation with judicial independence, whereas Article 47 EU Charter is reserved only for individual violations of judicial independence as part of the right to a fair trial and effective judicial remedy. *In casu*, individual judges' lack of access to an effective remedy during the civil liability proceedings, and the under-staffed SIOJ – which could result in unreasonable lengthy criminal liability investigation of individual judges – are such instantiations of potential violations of Article 47 EU Charter.

While the *AFJR* judgment develops new principles – progression towards the rule of law value and equality of rule of law and judicial independence standards across the EU – the judgment also reconfirms old *dicta*: the mandatory principle of primacy of EU law over all national provisions, including those of a constitutional nature; and the contextual approach of the Court when assessing the conformity of judicial organisational reforms with the EU *acquis* on judicial independence.<sup>129</sup> The principle of primacy of EU law over domestic constitutional provisions was affirmed five decades ago in the *Internationale Handelsgesellschaft* judgment,<sup>130</sup> and it has been restated as a principle that does not accept any derogation regardless of the nature of the domestic norm at issue and judicial

<sup>127</sup>Although, generally, variable geometry has been a long-established and accepted method for advancing the European integration project: see B. de Witte, 'Five Years after the Lisbon Treaty's Entry into Force: Variable Geometry Running Wild?', 22 *Maastricht Journal of European and Comparative Law* (2015) p. 3.

<sup>128</sup>AG Opinion, *supra* n. 42, points 212-225.

<sup>129</sup>The Court pointed out that it is the combined effect of the various factors examined under the three judicial liabilities within the specific national context of the wider judicial reform which is problematic from an EU law perspective: see para. 222 in particular.

<sup>130</sup>ECJ 17 December 1970, Case C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.

hierarchy occupied by the domestic court assessing a normative conflict.<sup>131</sup> The *AFJR* judgment makes no exception to this settled case law, with the Court of Justice reconfirming that constitutional courts are bound to fully respect the principle of primacy of EU law and cannot limit ordinary courts' mandate under EU law.<sup>132</sup> Nonetheless, the Romanian Constitutional Court imposed limits to the principle of primacy of EU law based on the national constitutional identity with a justification that reveals not only a misunderstanding of EU law, but also one of the very Constitution; this is commented on below.

Furthermore, in line with its previous case law,<sup>133</sup> the Court underlined that national judges cannot be exposed to disciplinary proceedings as a result of the fact that they are exercising their EU law mandate by submitting preliminary references or enforcing preliminary rulings, even if this would mean disapplication of national rules that were previously held constitutional by the Romanian Constitutional Court. The Court of Justice made it very clear that the start of such disciplinary proceedings is contrary to the imperative of judicial independence and the primacy of Union law.

#### THE NATIONAL FOLLOW-UP TO THE COURT OF JUSTICE'S PRELIMINARY RULING

At the national level, the Court of Justice's preliminary ruling has been differently applied by the Romanian Constitutional Court and various ordinary courts. Playing the constitutional identity card, the Romanian Constitutional Court failed to uphold the Court of Justice judgment, *inter alia*, by preventing national courts from disapplying the law on the SIOJ based on the CVM Decision and reports as interpreted by the Court of Justice.<sup>134</sup> This position raised concerns in the Commission, which the Romanian Constitutional Court answered unconvincingly.<sup>135</sup> In parallel, a three-judge section of the High Court of Justice and Cassation chose to follow the Romanian Constitutional Court decision and to

<sup>131</sup>Press Release No. 58/20, Luxembourg, 8 May 2020.

<sup>132</sup>ECJ 19 November 2009, Case C-314/08, *Filipiak*, ECLI:EU:C:2009:719, para. 81; ECJ 19 January 2010, Case C-555/07, *Küçükdeveci*, ECLI:EU:C:2010:21, para. 55; ECJ 7 June 2010, Joined Cases C-188/10 and C-189/10, *Melki*, ECLI:EU:C:2010:363.

<sup>133</sup>*Miasto Łowicz*, *supra* n. 83, paras. 52-54 and 57-58.

<sup>134</sup>Decision No. 390, *supra* n. 3. See A. Corre-Basset, 'Cour constitutionnelle de Roumanie, décision 390/2021 du 8 juin 2021 (supériorité du droit constitutionnel interne sur le droit de l'Union)', available at (<https://www.cairn.info/revue-titre-vii-2021-2-page-128.htm>), visited 29 March 2022.

<sup>135</sup>The Commission asked for clarification on 20 October 2021: see (<https://www.juridice.ro/755091/comisia-europeana-solicita-clarificari-romaniei-ref-decizia-nr-390-a-ccr-care-pune-sub-semnul-intrebarii-constatarile-cjue.html>), while the Romanian Constitutional Court published its response on 9 November 2021, available at (<https://www.ccr.ro/comunicat-de-presa-9-noiembrie-2021/>), both visited 29 March 2022. The main lines of this dialogue will be addressed below.



disapply the Court of Justice preliminary ruling,<sup>136</sup> and disciplinary proceedings were started against magistrates who had assessed the national law establishing the SIOJ as contrary to EU law based on the Court of Justice's judgment.<sup>137</sup> Given the specific national context, in which non-compliance with the Romanian Constitutional Court constitutes a disciplinary offence, ordinary courts again referred to the Court of Justice, seeking guidance in this new context of conflict.<sup>138</sup>

### *Unwarranted self-restraint of the Romanian Constitutional Court*

The follow-up Decision No. 390/2021 by the Romanian Constitutional Court solves a referral from a domestic court which raised an exception of unconstitutionality regarding the law establishing the SIOJ<sup>139</sup> while also asking for a referral of preliminary questions to the European Court of Justice. The Romanian Constitutional Court found that it had the competence to adjudicate yet rejected the exception as unfounded by an overwhelming majority.

Before developing its legal reasoning, the Romanian Constitutional Court referred to its previous relevant case law concerning the normative framework governing the SIOJ, in which it has constantly upheld the challenged national provisions as constitutionally conforming.<sup>140</sup> In several of these cases, a potential violation of Article 148(2) and (4) of the Romanian Constitution<sup>141</sup> by the law establishing the SIOJ was also raised, but it was consistently dismissed by the

<sup>136</sup>Romanian High Court of Cassation and Justice, Judgment of 8 September 2021 file no. 1916/1/2019.

<sup>137</sup>See 2021 CVM Report of the Commission, p. 16-17; and D. Călin, Case C-817/21, *Inspekția Judiciară, Union EU law journal blog*, 18 January 2022.

<sup>138</sup>See *RS*, *supra* n. 6.

<sup>139</sup>This exception was raised by the two Associations of judges, especially prosecutors, who have played a key role in the initiation of several preliminary references, and by an outspoken critique of the Justice Reform, prosecutor Bogdan Ciprian Pirlog. The domestic provisions challenged were Arts. 881-889 of Law No. 304/2004 on Judicial Organisation, and the Government Emergency Ordinance No. 90/2018 (*see supra* Repeated derogations from the ordinary procedure for reforming the justice system').

<sup>140</sup>(1) Decision No. 33 of 23 January 2018, by virtue of which several criticisms concerning Law No. 207/201 were admitted and some legal provisions were found unconstitutional (paras 19-21); (2) Decision No. 250 of 19 April 2018, which found several provisions in the Law amending and completing Law No. 304/2004 to be constitutional (para 22); (3) Decision No. 137 of 19 March 2019 on Government Emergency Ordinance No. 90/2018, which the Court found to be constitutional (para 24); (4) Decision No. 547 of 7 July 2020 on changes brought to the provisions in Arts. 881-889 of Law No. 304/2004, on which the Court maintained its previous case law while admitting the unconstitutionality of Art. 881(6) (para 31).

<sup>141</sup>This article provides priority of application of EU law over conflicting national legal provisions.

Romanian Constitutional Court.<sup>142</sup> In one of these cases the Romanian Constitutional Court was also requested to submit preliminary questions to the Court of Justice on the binding nature of recommendations contained in the 2018 CVM Report. The Romanian Constitutional Court dismissed the request as inadmissible, as it allegedly concerned the establishment of the SIOJ within the judiciary, whereas the subject matter of the main case related to the constitutionality review of legal provisions regarding the operationalisation of the SIOJ.<sup>143</sup>

Relevantly, in follow-up Decision No. 390, the Romanian Constitutional Court decided to ‘take into account the judgment’ delivered by the Court of Justice as an element that could trigger a change in its jurisprudence (*revirement jurisprudentiel*). If the CVM Decision were used as a parameter in a review of constitutionality, the Romanian Constitutional Court might have been brought to find a violation of Article 148 of the Constitution by the law establishing the SIOJ.<sup>144</sup> As anticipated, however, the Romanian Constitutional Court reached a conclusion opposite to that of the Grand Chamber, for several reasons.

First, although the Romanian Constitutional Court recognised the legally binding effect of the CVM Decision, it found that the EU instrument did not pass the twofold test for EU law provisions to be used as parameters for reviews of constitutionality.<sup>145</sup> Even though the objective requirement of this test – direct effect – has been established by the Court of Justice, the Constitutional Court held that neither the CVM Decision nor the Commission Reports meet the second, subjective, condition of the constitutional relevance of the EU law provisions invoked. In order to do this, the norm should either fill a gap in the constitutional text or establish a standard of protection superior to the national constitutional one.<sup>146</sup> In this line of argument, the Romanian Constitutional Court considered that it complies with the Court of Justice findings on the mandatory legal effect of the CVM Decision and its direct effect, while still denying its constitutional relevance. Keeping the CVM Decision outside the control of constitutionality, the Romanian Constitutional Court preserves its absolute powers over a Constitution kept in isolation from EU law. However, both the CVM Decision and the reports issued by the European Commission were qualified by Court of Justice as EU legal acts that are legally binding on all Romanian authorities.<sup>147</sup> Against this

<sup>142</sup>Decision No. 33 of 23 January 2018 and Decision No. 137 of 19 March 2019. See *supra* ‘The role of the Romanian Constitutional Court – upholding the justice reform’.

<sup>143</sup>Decision No. 33 of 23 January 2018, referred to in Decision No. 390, *supra* n. 3, at para. 24.

<sup>144</sup>Decision No. 390, *supra* n. 3, para. 35.

<sup>145</sup>On the development of this test and critiques of it, see Viță, *supra* n. 67.

<sup>146</sup>Decision No. 390, *supra* n. 3, paras 36–45, 48.

<sup>147</sup>See the distinctions made *supra* ‘The legal nature and effects of the CVM Decision and Reports’.

background, the Romanian Constitutional Court undoubtedly found itself not only in open breach of the imperative to acknowledge consistent interpretation of national legislation with the said EU acts but also in bad faith as to the fact that the whole mechanism put in place by the CVM reports was meant to (at least) preserve (if not uphold) the ‘standard of protection [of] the constitutional rules’. Indeed, the CVM Reports consistently backed up the national judiciary’s criticism of the justice reform as an attack on judicial independence and the rule of law. Furthermore, all the judicial liability procedures and institutions involved in the first wave of requests for preliminary rulings were found by the CVM Reports in 2018 and 2019 to be in breach of the principle of judicial independence and a step backwards for effective justice and the fight against corruption.<sup>148</sup> That such an EU law act ‘has no constitutional relevance’ is therefore hard to claim.

Second, the Romanian Constitutional Court emphasised the non-binding nature of the CVM Reports as recommendations which the state is to consider by virtue of the principle of sincere cooperation but that had no bearing in the case at hand. Moreover, the Constitutional Court considered that the Court of Justice did not find a violation of the obligation of sincere cooperation by Romania.<sup>149</sup> However, not only had the Grand Chamber judgment declared admissible the question regarding the CVM Reports (which unequivocally confirmed their relevance in the case at hand) but it also held that these acts triggered legal effects for Romania.<sup>150</sup> In other words, the Constitutional Court misunderstood the Court of Justice’s competence in preliminary reference procedures, in which *de plano* the Court of Justice cannot find a violation of EU law. The Constitutional Court also transgressed the Court of Justice’s clear finding that the CVM Reports should be used to give concrete meaning to the positive and negative obligations stemming from the CVM Decision, which is corroborated by Articles 2 and 19(1)(2) TEU.

Third, considering the criteria established by the Court of Justice, the Romanian Constitutional Court examined the extent to which the principle of the rule of law expressly enshrined in national law<sup>151</sup> was affected by the national provisions governing the establishment of the SIOJ. The Constitutional Court found that the relevant national law created a proper system for the ‘good administration of justice’. The Romanian Constitutional Court also dismissed the

<sup>148</sup>See *supra* ‘The national background . . .’.

<sup>149</sup>In setting the obligation for the Romanian state, through its competent authorities, to institutionally collaborate with the European Commission and to adopt measures compatible with the benchmarks mentioned in Decision 2006/928, the CJEU did not find any distinct conduct of any state organ that, in the exercise of its powers, was in breach of the general obligation of sincere cooperation’ (para. 47).

<sup>150</sup>See *supra* ‘The legal nature and effects of the CVM Decision and Reports’.

<sup>151</sup>Art. 1 para. (3) of the Romanian Constitution.

contention that the SIOJ could be perceived as an instrument of pressure and intimidation of judges which could lead to an apparent lack of independence or impartiality. It concluded that the establishment of the SIOJ, which fell within the national margin of discretion, guaranteed the rule of law, free access to justice and the right to a fair trial. For the Romanian Constitutional Court, this was tantamount to saying that the regulation concerning the SIOJ also complied with Articles 2 and 19 (1) TEU.<sup>152</sup>

### *Critical analysis*

The most inflexible part of the Constitutional Court's decision concerns the relationship between the national Constitution and EU law and, correspondingly, the relationship between the Constitutional Court, on the one hand, and the ordinary courts and the Court of Justice, on the other.<sup>153</sup> The Constitutional Court continued to apply its limited understanding of the principle of primacy of EU law by reconfirming its doctrine of the supremacy of the Constitution over EU law based on the 'constitutional identity' shield, which clearly is at odds with the established case law of the Court of Justice since the *Internationale Handelsgesellschaft* judgment.<sup>154</sup> The Romanian Constitutional Court criticised the *AFJR* judgment as an example of the Court of Justice overstepping its limited competence when applying EU law to a particular case. The Grand Chamber was argued to have exceeded itself in analysing the activity of the SIOJ and legally qualifying it, a task not granted by the mechanism in Article 267 TFEU. Nevertheless, the very mechanism set out in Article 267 TFEU excludes an interpretation *in abstracto* of the EU law and imperatively requires the national context of a particular case.<sup>155</sup>

Regarding the findings of the Court of Justice on the effects of the principle of primacy on ordinary courts and the Constitutional Court itself, the latter played the sovereignty card and 'reaffirms that the determination of the organisation, functioning and delimitation of powers between the various structures of the prosecution authorities is a matter for the exclusive competence of the Member State'.<sup>156</sup> Relying on Articles 11, 20 and 148 (2) and (4) of the Romanian Constitution, the Constitutional Court stressed that the priority of application of EU law should not be perceived in the sense of 'removing or disregarding the national constitutional identity,' a guarantee of a fundamental core identity

<sup>152</sup>Decision No. 390, *supra* n. 3, para. 76.

<sup>153</sup>*Ibid.*, paras. 78-87.

<sup>154</sup>*See supra* n. 127.

<sup>155</sup>In fact, the absence of a clear, precise and complete national context in the request for preliminary reference can be a ground for rejection, *see* Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01).

<sup>156</sup>Decision No. 390, *supra* n. 3, para. 79.

of the Romanian Constitution, which ‘must not be relativised in the process of European integration’. Moreover, expressly referring to the Lisbon judgment,<sup>157</sup> the Constitutional Court insisted that by virtue of the ‘constitutional identity’ it was empowered to ensure ‘the supremacy of the fundamental law throughout Romania’.<sup>158</sup> However, the Constitutional Court failed to consider that the ‘national constitutional identity’ as set out in Article 4(2) TEU will not be qualified as a *carte blanche* for allowing complete derogation from EU law principles such as primacy and direct effect. Instead, an EU law concept must comply with general EU law principles, such as the principle of sincere cooperation, which are absent from the Romanian Constitutional Court’s reasoning. Moreover, the Constitutional Court did not clarify what the scope and content of the ‘constitutional identity’ are. Did the highly controversial Romanian justice reforms represent the gist of the national constitutional identity that the Romanian Constitutional Court is so keen to preserve? Such an approach would raise concerns about whether such a constitutional body complies with the rule of law standards, given the numerous pertinent criticisms of the SIOJ’s compliance with the rule of law. Last, the Romanian Constitutional Court misinterpreted the Court of Justice judgment by stating that when declaring the CVM Decision to be legally binding, the Court did not consider national courts but only political institutions.<sup>159</sup>

The most problematic aspect of Decision No. 390/2021 is therefore the inaccurate interpretation of Article 148 of the Constitution, which was not drafted to allow for elective but for imperative priority of EU law.<sup>160</sup> However, the reading provided to it by the Romanian Constitutional Court forbids national courts from effectively enforcing EU law if it entails the disapplication of a national norm already declared to be in line with the Constitution.

### *The EU law loyal dissenting opinion*

The Romanian Constitutional Court decision defying the Court of Justice’s *AFJR* judgment was adopted by seven votes out of nine. The other two constitutional judges formulated a separate opinion in which they considered the impugned legal provisions on the SIOJ unconstitutional (also) on account of their incompatibility with the CVM Decision. Disagreeing with the majority, this opinion explicitly reaffirmed that the relation between the EU and Romanian

<sup>157</sup>BVerfG Judgment of 30 June 2009 2 BvE 2/08.

<sup>158</sup>*Ibid.*, para. 81.

<sup>159</sup>*Ibid.*, para. 8; however, this is a misinterpretation of para. 176 in the Court of Justice judgment.

<sup>160</sup>Relevantly, this article was introduced into the Romanian Constitution in 2003 with the very purpose of correctly integrating the national system in the EU.

constitutional law should be understood in accordance with the well-established case law of the Court of Justice and the undisputed general principles of EU law.

First, the minority opinion provided a different understanding of the principle of sincere cooperation, whereby Romania is obliged to adopt measures fulfilling the obligations resulting from the CVM Decision, including its Annexes, and to abstain from adopting or applying any measures that might risk compromising it. By virtue of consistency, the Reports drafted by the Commission based on the CVM Decision trigger the same obligations.

Second, contrary to the opinion of the majority of the panel, the minority opinion stated that the rule of law and the independence of the judiciary in Romania are relevant for and thus pertain to EU law. Such relevance would stem, for instance, from the need for uniform interpretation and implementation of EU law, from the requirement of effective judicial protection of European citizens' rights, from the principle of mutual trust between courts and the possibility to address preliminary questions to the Court of Justice without any interference.

In addition, the minority opinion noted that the Court of Justice had decided that the SIOJ was to be considered within the area of application of the CVM Decision, and therefore it must respect Article 2 of the TEU, including the rule of law requirement. At a general level, the dissenting opinion recalled that national courts are compelled, as far as possible, to give domestic law an interpretation that is consistent with the requirements of EU law and are therefore also authorised to disapply a national provision which, based on the Court of Justice's judgment, they consider contrary to that Decision or to Article 19(1) TEU.<sup>161</sup> In this opinion, the national case does not involve a contradiction between the Constitution of Romania and the normative content of Decision 2006/928/EC. On the contrary, it requires the Romanian Constitutional Court to analyse the conformity between several provisions of Law No. 304/2004 on judicial organisation and national reference norms with constitutional value concerning the rule of law, equality and legality. It also requires the national ordinary courts to check the conformity of Law No. 304/2004 with clear, unconditional and legally effective provisions concerning the rule of law and the independence of the judiciary of EU law.

In conclusion, the dissenting opinion found that the way the provisions were adopted, allowing for the establishment of a prosecuting structure exclusively for the investigation of crimes committed by magistrates, led to the breach of constitutional provisions of Article 1(3) of the Constitution concerning the rule of

<sup>161</sup>Therefore, according to the dissenting opinion regarding the establishment of the SIOJ, the priority of implementation of EU law flows both from its very characteristics and from the provisions of Art. 148 of the Constitution and it must be observed by any public authority, including national courts.

law, Article 1(5) concerning the observance of the law and the supremacy of the Constitution, and Article 148(2) and (4) concerning the obligations incumbent upon Romania as a member state of the EU. It also found that, through the establishment of a prosecuting structure exclusively for the investigation of crimes committed by magistrates, the constitutional provisions of Article 16(1) of the Constitution concerning equality before the law and of Article 148(2) and (4) concerning the obligations incumbent upon Romania as a member state of the EU were breached.

### *Critical analysis*

The dissenting opinion is valuable as it has the capacity to contrast the two parallel discourses triggered by the referrals made by the two professional associations. While the European Court of Justice correctly applied EU law basic principles, the majority of the Romanian Constitutional Court panel fully ignored the European context of the case. The dissenting opinion proved that the Romanian Constitutional Court acted *ultra vires* when, although not requested to by the ordinary court (which correctly sent the exception of unconstitutionality to the Constitutional Court and the preliminary questions to the Court of Justice), it started speculating on the Court of Justice's competence. On the other hand, the contrast between the Romanian Constitutional Court majority decision and the dissenting opinion reveals a missed opportunity for the Romanian Constitutional Court to change its approach to EU law, which is even more regrettable since the Romanian Constitution supports the systemic priority of the latter.<sup>162</sup>

### *The European Commission on the Romanian Constitutional Court decision and the Romanian Constitutional Court's response*

At the EU level, the follow-up Romanian Constitutional Court decision has raised serious concerns that it prevents the effective application of EU law in relation to the reformed judicial accountability mechanism. Therefore, the European Commission has requested the Romanian Government to provide clarification on this. In the Commission's view, the said decision does not give effect to the Court of Justice's findings in its *AFJR* judgment, as it prevents the national ordinary courts from fulfilling their EU law mandate to assess the compatibility with EU law of national provisions declared constitutional by the Romanian Constitutional Court. The Commission concluded that the Romanian Constitutional Court decision disregards the principle of primacy of EU law and the compulsory character of the Court of Justice's judgments for all member state authorities, including authorities

<sup>162</sup>According to Arts. 20 and 148 of the Romanian Constitution.



interpreting the guarantees of judicial independence laid down in Article 19(1)(2) TEU and Article 47 EU Charter. As such, the Romanian Constitutional Court decision violates the principle of sincere cooperation and has a negative impact on the effectiveness of the preliminary reference procedure.

Due to the Romanian disciplinary liability regime, in which failing to respect a Romanian Constitutional Court decision is considered a disciplinary offence, ordinary judges who give effect to the Court of Justice's judgment instead of the Romanian Constitutional Court Decision No. 390/2021 are exposed to disciplinary sanctions. The Commission notes the chilling effect of the mere existence of this sanctioning hypothesis on the enforcement of EU law and the menace that it represents for the independence of the judiciary.

The Romanian Constitutional Court's response is that Decision No. 390/2021 cannot be modified, and the laws on the SIOJ can only be amended by the Parliament. The Romanian Constitutional Court further insists on a clear separation between its own working tools and those of the Court of Justice (EU law versus the Romanian Constitution). In a dualistic logic, the Romanian Constitutional Court exacerbates the remark that its object of judicial activity and area of competence are distinct from those of the Court of Justice. Misinterpreting the Court of Justice's judgment in the *AFJR* case, the Romanian Constitutional Court reiterates that obligations resulting from the CVM Decision are not addressed to the ordinary courts or to the Romanian Constitutional Court itself but only to state bodies that are empowered to cooperate with the Commission.

Despite the Romanian Constitutional Court's outright challenge to the authority of EU law and Court of Justice jurisprudence, and the negative effect of its follow-up decision on the ordinary courts' EU law mandate, the European Commission has not yet started infringement proceedings against Romania, although it has proven that it can act expeditiously when there is political will.<sup>163</sup>

## CONCLUSION

The *AFJR* joined cases are a direct reaction to the justice system reform adopted by the Romanian Government in the period 2017–2019, which undermined judicial independence and the fight against corruption. The contested judicial liability reforms remain in force despite successive changing governments. Notwithstanding widespread international criticism, some of the most

<sup>163</sup>T. Nguyen, 'A Matter of Principle: The Commission's Decision to Bring an Infringement Procedure against Germany', *VerfBlog* 6 November 2021.

controversial justice reforms, such as the SIOJ,<sup>164</sup> continue to be in force, thanks to Romanian Constitutional Court jurisprudence holding that they conform to constitutional provisions. This specific jurisprudence of the Constitutional Court, in which the legally binding nature and direct effect of the CVM Decision and Commission Reports have also been denied, has triggered the first wave of Romanian references for preliminary rulings in the *AFJR* cases, as well as two additional waves of referrals from both ordinary and supreme courts.<sup>165</sup>

The Court of Justice judgment in the *AFJR* cases is of undeniable added value not just to the conceptualisation of the rule of law and judicial independence, but more broadly to EU legal order. The Court of Justice has clarified for the first time the legal nature, scope and effects of key EU instruments on rule of law monitoring. The CVM Decision, an instrument ensuring the accession of both Romania and Bulgaria, was held to be a legally binding Decision within the meaning of Article 288(4) TFEU, whose four benchmarks on rule of law protection are directly effective at the domestic level. The Commission Reports are also legally binding on the basis of Article 4(3) TEU, and although they are not directly effective and enforceable in a free-standing way, they should be taken into consideration when reforming the justice system in line with the CVM Decision and Articles 19(1)(2) and 2 TEU. Most importantly, the Court of Justice continued its dynamic approach to the conceptualisation of judicial independence started in the *Repubblika* case by establishing a new legally binding principle – *progression* towards achieving rule of law requirements as established by the benchmarks of the CVM Decision and detailed by the Commission Reports. While the principle of progression addresses primarily Romania and Bulgaria as CVM-bound member states, the use of Articles 19(1)(2) and 2 TEU as primary yardsticks for judicial independence review, instead of Article 47 of the EU Charter jointly with the CVM Decision, signals that the Court of Justice aims to ensure a common test for judicial independence, equally applicable throughout the EU, irrespective of whether the violations occur in the CVM-bound member states or any other state.

It cannot be denied that disciplinary proceedings against those judges who have disappplied the national provisions on the SIOJ based on the *AFJR* judgment<sup>166</sup> instead of following the Romanian Constitutional Court's Decision

<sup>164</sup>Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism COM(2021) 370 final of 8 June 2021.

<sup>165</sup>See *supra* n. 4.

<sup>166</sup>For these proceedings, see *supra* 'Indirect politicisation of the judicial inspectorate'.

390/2021 may have a chilling effect on the implementation of the *AFJR* judgment. For this reason, new requests for preliminary rulings have been made by Romanian national courts, asking the European Court of Justice for guidance on how to solve this jurisprudential conflict – a conflict that could have been avoided had the Romanian Constitutional Court respected in full Article 148 of the Constitution.<sup>167</sup> In this legal-political scenario, the intervention of the European Commission to ensure the effectiveness of the Court of Justice's judgments and Article 267 TFEU might also prove necessary.



<sup>167</sup> See *RS*, *supra* n. 6; see also pending cases: Case C-709/21, *MK* and Case C-817/21, *Judicial Inspection*.