DECISION No 390
of 8 June 2021

regarding the exception of unconstitutionality of the provisions of Articles 88^1 - 88^9 of Law No 304/2004 on judicial organization, and of the Government Emergency Ordinance No 90/2018 on measures to operationalise the Section for the investigation of offences in the Judiciary

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1. **As grounds for the exception of unconstitutionality**, with regard the provisions of Articles 88^1 - 88^9 of Law No 304/2004, the authors refer to Opinion No 934 of 13 July 2018, CPL-PI(2018)007, confirmed on 20 October 2018, by which the European Commission for Democracy through Law of the Europe's Council (Venice Commission) suggested reconsidering the establishment of a special Section for the investigation of magistrates (as an alternative, it was proposed to use certain specialized prosecutors, simultaneously with effective procedural safeguards). They maintain that the establishment of the Section for the investigation of offences in the Judiciary *(S.I.O.J.)* within the Prosecutor's Office attached to the High Court of Cassation and Justice *(H.C.C.J.)* allows the redirection of dozens of high corruption dossiers, which are pending before the National Anti-Corruption Directorate *(N.A.D.)*, by simply lodging fictious complaints against a magistrate, merely abolishing a signification portion of the NAD's activity. The setting up of this section also undermines the use of specialized prosecutors [corruption, money laundry, influence peddling etc.], not being a proportionate measure for any possible purpose.

2. The authors of the exception show that fictitious complaints against magistrates are made annually, in which a minimum investigation must be carried

out. These complaints are currently investigated by more than 150 prosecutors within 19 prosecutor's offices (P.C.A., P.H.C.C.J., D.I.I.C.O.T. and N.A.D). It is obvious that those 15 prosecutors within the new section overwhelmed by the workflow. Limiting the number of prosecutors to 15 is, by law, contrary even to the role of the Public Ministry, the legislator creating a particularly souple structure in relation to the assigned competencies and to the importance of the cases that it investigates, and weakens the proper functioning and even the functional independence of S.I.O.J. The power of S.I.O.J. is personal, targeting both the magistrates and other persons investigated with them in those cases. Moreover, the prosecutors of this section will have to deal with any type of offence, as long as it is committed by a person having the capacity mentioned by law. The establishment of a sole section in the Municipality of Bucharest, where the 15 prosecutors will carry on their activity involves forcing the investigated magistrates to make a much greater effort than other categories of people: traveling long distances to hearings during the working hours, to another locality, incurring excessive expenses, aspects likely to affect the very good organization of the defence by the respective magistrate. In addition, the way in which the chief prosecutor is appointed, but also the other 14 prosecutors, for which the interview has a weight of 60%, does not present sufficient guarantees for a selection process carried out in an impartial manner, which is likely to be also reflected in the carrying out of the activity of this section.

3. On the other hand, the authors of the exception state that the provisions contained in the legislation establish rules derogating from Law No 303/2004 as concerns the statute of prosecutors, in terms of the appointment of the section chief prosecutor, of delegating the secondment of prosecutor to this section.

4. Moreover, the authors considers that Article 88^1 generate an overlap of competencies of the existing structures with the new competencies attributed to S.I.O.J., which can generate a series of real difficulties in the good functioning of the activity of these entities. Thus, the new section will take over some of the attributions of N.A.D. and of D.I.I.C.O.T. This takeover of the activity will also have a direct effect on the quality of the criminal investigation activity, given that the prosecutors of both structures of the P.H.C.C.J. are specialized prosecutors.

5. Finally, the authors of the exception of unconstitutionality show that, according to Article 11 of the Constitution, the execution of international obligations resulting from a treaty in force for the Romanian State rests with all State authorities, including the Constitutional Court. The recommendations made by the Venice Commission are not only useful to the legislator, in the parliamentary procedure of drafting or amending the legislative framework, but also to the Constitutional Court, when conducting a check on the compliance of the normative act adopted by the Parliament with the Basic law, taking into account the provisions of Article 11 (1) of the Constitution.

6. As concerns the Government Emergency Ordinance No 90/2018, the authors of the exception state that it infringes the provisions of Article 1 (3) and (5), of Article 133 (1) and of Article 134 (4) of the Constitution, not being issued with the approval of the Superior Council of Magistracy *(S.C.M.)*. The authority of approving normative acts by interested public institutions is not purely formal and must not be understood in that the simple request of the approval (by adopting the normative act immediately after the request) is enough for the constitutional request to be accomplished. The lack of sanctioning such a behaviour means accepting the derisory nature of the procedure for approving normative acts,

respectively the possibility to promote, in reality, normative acts (under the possible pretext of urgency) without any of the approvals stipulated by law. Moreover, by ignoring the provisions of Article 1 (3) and (5) of the Constitution the provisions of Article 133 (1) and of Article 134 (4) of the Constitution have been infringed, in that the non-approval of the law criticised for unconstitutionality equals to an infringement of the constitutional role of the S.C.M. of guarantor of the independence of justice.

7. Although in Law No 207/2018 amending and completing Law No 304/2004 on judicial organization a separation of the careers of judges and prosecutors is called for, the authors of the exception state that the act of appointing, continuing the activity and revoking prosecutors with execution functions within the S.I.O.J. infringe this principle. Thus, the prosecutors within the section are selected by the representatives of the Section for judges within the S.C.M., which represents an obvious legislative inconsistency, able to infringe Article 1 (5) of the Constitution. Moreover, the exclusion of some members of the S.C.M. from participating in the competition committee C.S.M., judges or prosecutors, which did not function at a jurisdiction of at least a court of appeal degree or, as appropriate, at a prosecutor's office of at least a prosecutor's office attached to a court of appeal degree, is contrary to the provisions of Article 16 of the Constitution, because the benefits of the professional degree obtained under the law are denied.

8. As grounds for the criticisms of unconstitutionality, the authors of the exception also mention a series of paragraphs from the „Commission's Report to the European Parliament and Council on progress in Romania under the Co-operation and Verification Mechanism of 25 January 2017", the „European

Commission's Report within the C.V.M. published on 13 November 2018", the „European Union Council's Conclusions on the Co-operation and Verification Mechanism of 12 December 2018" and, invoking the recitals of the Constitutional Court's Decision No 2 of 11 January 2012, according to which „the European Union's membership imposes on the Romanian State the obligation to apply this mechanism and to follow the recommendations established in this framework", allege the violation of the provisions of Article 148 (4) of the Constitution.

THE COURT,

examining the referral interlocutory decision, the report drawn up by the judge-rapporteur, the present party's statements, the prosecutor's conclusions, the criticised legal provisions, related to the Constitution's provisions, as well as Law No 47/1992, notes that:

9. The matter has been legally brought before the Constitutional Court and it is competent, according to the provisions of Article 146 d) of the Constitution, as well as of Article 1 (2), of Articles 2, 3, 10 and 29 of Law No 47/1992, to resolve the exception of unconstitutionality.

10. **The object of the exception of unconstitutionality** concerns the provisions of Articles 88^1-88^9 of Law No 304/2004 on judicial organization, republished in the Official Gazette of Romania, Part I, No 827 of 13 September 2005, as subsequently amended and completed, as well as the Government Emergency Ordinance No 90/2018 on measures to operationalise the Section for the investigation of offences in the Judiciary, published in the Official Gazette of Romania, Part I, No 862 of 10 October 2018, as a whole. The provisions of Articles 88^1-88^9 of Law No 304/2004 have been introduced by Law No 207/2018

amending and completing Law No 304/2004 on judicial organization, published in the Official Gazette of Romania, Part I, No 636 of 20 July 2018, are contained in Section 2^1, named *the Section for the investigation of offences in the Judiciary*, and regulate the establishment and operation, within the P.H.C.C.J., of the S.I.O.J. which has the exclusive competence to perform the criminal prosecution for the offences committed by judges and prosecutors, inclusively the military judges and prosecutor and those who are members of the S.C.M. The Government Emergency Ordinance No 90/2018 regulated a derogating procedure from Articles 88^3-88^5 of Law No 304/2004, for the provisional appointment of the chief prosecutor, of the deputy chief prosecutor and of at least one third of the section's prosecutors, which allowed to operationalise the Section within the time-limit established by law.

11. The authors of the exception of unconstitutionality are of the opinion that the criticised legal provisions are contrary to the constitutional provisions contained in Article 1 (3) and (5), Article 11, Article 16, Article 133 (1), Article 134 (4) and Article 148 (2) and (4).

12. Examining the **development of the normative framework concerning the S.I.O.J.**, the Court notes that this section was established by *Law No 207/2018* amending and completing Law No 304/2004 on judicial organization, published in the Official Gazette of Romania, Part I, No 636 of 20 July 2018. According to Article III (1) of the law, the section was to become operational within 3 months from the date of entry into force of the law, respectively on 23 October 2018.

13. Prior to the promulgation of the law, objections of unconstitutionality were formulated, which were resolved by *the Constitutional Court's Decision No*

33 of 23 January 2018, published in the Official Gazette of Romania, Part I, No 146 of 15 February 2018. By the solution given by the Court, several criticisms were admitted and some legal provisions were found unconstitutional.

14. As regards the criticism reported in Article 148 (2) and (4) of the Constitution, on the effects that the establishment of this section has on the competence of the N.A.D., in the sense of its diminishing with regard to the investigation of corruption offences, of the assimilated offences and in direct connection with them, committed by judges, prosecutors, respectively by members of the S.C.M., as well as of those committed by other persons along with magistrates, diminution of competence which, according to the authors of the referral, infringes the „European Commission's recommendations contained in the C.V.M. Reports" and, thus, the invoked constitutional provisions, the Court found it ungrounded. The Court pointed out that „with regard to the competence of the ordinary legislator to regulate the norms on the structure of the law courts, sections and specialised panels within them or the composition of the judicial panels, namely the fact that their establishment falls within the legislator's margin of appreciation, by virtue of the constitutional provisions contained in Article 126 (1) and (4), all the mentioned arguments are fully applicable in the case of prosecutor's offices operating attached to law courts, under the law, according to Article 131 (3) of the Constitution. Therefore, the option of the legislator to establish a new prosecutor's office structure – section within the Prosecutor's Office attached to the H.C.C.J. – corresponds to his constitutional regulatory competence in the field of the organisation of the judicial system." With regard to the invoking of the provisions of Article 148 (2) and (4) of the Constitution, which provide the priority for the application of the provisions of the constituent treaties

of the European Union, as well as of the other Community regulations which are mandatory in relation to the contrary provisions of national law, the Court found that these constitutional rules did not have an impact on the matter subject to review, "as no mandatory European act is revealed to support the criticisms formulated".

15. Following the decision of the Constitutional Court, pursuant to Article 147 (2) of the Constitution, the Law amending and completing Law No 304/2004 was sent to the Parliament in view of the re-examination of the provisions declared unconstitutional and to bring them into line with the constitutional court's decision. The law resulting from the re-examination was subject to a new constitutionality review resolved by the *Constitutional Court's Decision No 250 of 19 April 2018*, published in the Official Gazette of Romania, Part I, No 378 of 3 May 2018. The solution pronounced by the Court rejected the criticisms and found the constitutionality of the provisions of the Law amending and completing Law No 304/2004, which was promulgated and entered into force.

16. On 10 October 2018, given that the competent authority – S.M. – failed to complete the procedure to operationalise the Section for the investigation of offences in the Judiciary, the Government adopted *the Emergency Ordinance No 90/2018* whereby it ordered a procedure derogating from the legal norms in force, but provisionally, with the purpose of the temporary/provisional appointment of the chief prosecutor, the deputy chief prosecutor and of at least one third of the section's prosecutors. The adoption of these measures aimed at operationalising the section within the time-limit established by law by which the prosecutor's office structure had been established.

17. The Government Emergency Ordinance No 90/2018 was criticised at the Constitutional Court, through the approval law adopted by the Parliament, by *Decision No 137 of 13 March 2019*, published in the Official Gazette of Romania, Part I, No 295 of 17 April 17 2019, the Court finding the constitutionality of those normative acts in relation to the criticisms formulated. In this procedural framework, a request for a preliminary ruling was lodged at the Court of Justice of the European Union (C.J.E.U.), which aimed at recognising the binding nature of the recommendations contained in the C.V.M. Report of 13 November 2018, namely the immediate suspension of the implementation of the laws of justice and of the subsequent emergency ordinances and the revision of the laws of justice, which established the Section for the Investigation of offences in the Judiciary. The Court rejected the application as inadmissible, since the arguments presented by the authors of the request for a preliminary ruling to the C.J.E.U. concerned the establishment of the Section for the investigation of offences in the Judiciary, which were not related to the object of the case in which the request was formulated, concerning the constitutionality review of legal provisions relating to the operationalisation of this prosecutor's office structure, and not to its establishment.

18. With regard to the criticisms concerning the violation of Article 148 (2) and (4) of the Constitution, starting from what has been ruled about the incidence of the European Union's mandatory acts within the review of constitutionality [using some European law rules within the review of constitutionality as a rule interposed to the reference one involves, pursuant to Article 148 (2) and (4) of the Constitution of Romania, a cumulative conditionality: (i) the rule must be sufficiently clear, precise and unequivocal in

itself or its meaning must have been clearly, precisely and unequivocally established by the Court of Justice of the European Union and (ii) the rule must be limited to a certain level of constitutional relevance] and given that the act invoked as a rule interposed to the reference one was the Report of 13 November 2018, drawn up within the C.V.M., the Court appreciated as necessary to establish the nature of the recommendations contained the C.V.M. Reports, drawn up in the application of the European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, published in the Official Journal of the European Union, series L, No 354 of 14 December 2006.

19. On the one hand, the Court held that, in addition to the constituent treaties of the European Union, the mandatory acts of European law are the regulations (legislative act to be applied in its entirety in all Member States), the directives (legislative act setting out an objective to be achieved by all Member States, each of which has the freedom to decide on the modalities for achieving the established objective) and the decisions (directly applicable and mandatory legislative act for all those addressed; its recipients may be Member States or even companies).

20. On the other hand, the Court held that the C.V.M. was established pursuant to Decision 2006/928/EC, which was based on Articles 37 and 38 of the Protocol concerning the Conditions and for admission of the Republic of Bulgaria and Romania to the European Union, which empower the Commission to take the necessary measures in the event of an imminent risk of disruption to the functioning of the internal market as a result of the non-compliance, by Romania,

of the assumed arrangements, respectively in the event of an imminent risk concerning the occurrence of serious deficiencies in Romania as regards the transposition, the stage of application or assurance of compliance of the acts adopted pursuant to Title VI of the Treaty on European Union (*T.E.U.*) or of the acts adopted pursuant to Title IV of the Treating establishing the European Commission.

21. Analysing the content of the decision, the Court found that the act of European law contained a number of benchmarks, listed in the Annex hereto, outlining a series of obligations of a general nature to the Romanian State. However, the Court found that, although mandatory for the Romanian State, Decision 2006/928/EC had no constitutional relevance, as it neither fills a gap of the National Fundamental Law nor it develops a constitutional rule, being limited to the existing rules. Even less the constitutional relevance of the reports issued within the C.V.M. may be retained. In this case, the issued acts do not meet the condition laid down in Article 148 (2) of the Constitution, according to which only *"the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act".* Thus, although they are acts adopted on the basis of a decision, the reports contain only provisions of a recommendation nature, or it is known that through a recommendation the institutions make their opinion known and suggest directions for action, but without imposing any legal obligation to the addressees of the recommendation.

22. Finally, the Court found that it fell within the exclusive competence of the Member State to determine the organisation, functioning and delimitation of

competences between the different structures of criminal prosecution authorities, since the Basic Law of the State – the Constitution is the expression of the will of the people, which means that it cannot lose its binding force simply by the existence of a discrepancy between its own provisions and European provisions, and the accession to the European Union cannot affect the supremacy of the Constitution over the entire legal order.

23. For these arguments, *the Court rejected the criticisms of unconstitutionality based on the violation of the provisions of Article 148 (2) and (4) of the Basic Law*.

24. Subsequently, the provisions of Article 88^1-88^9 (Section 2^1 – *the Section for the for the investigation of offences in the Judiciary*) of Law No 304/2004 have been amended by *the Government Emergency Ordinance No 7/2019*, published in the Official Gazette of Romania, Part I, No 137 of 20 February 2019. As for these amendments, by *Decision No 547 of 7 July 2020*, published in the Official Gazette of Romania, Part I, No 753 of 19 August 2020, the Court maintained its previous case-law and rejected certain criticisms of unconstitutionality, but it upheld the exception of unconstitutionality and found the unconstitutionality of the provisions of Article 88^1 (6), which stipulated that by the words „the hierarchically superior prosecutor" in the case of the offences under the competence of the Section for the investigation of offences in the Judiciary it is meant the chief prosecutor of the Section, inclusively in the case of the solutions given before its operationalisation, and of Article 88^8 (1) d), which stipulated, among the S.I.O.J. attributions, the exercise and the removal of the legal remedies in the cases under the competence of the Section, inclusively in the cases pending before the law courts or definitively resolved prior to its

operationalisation, establishing that they are contrary to the constitutional provisions contained in Article 1 (3) on the rule of law, Article 1 (5) referring to the clarity and predictability of the rule, as well as in Article 131 (1) and Article 132 (1) referring to the principle of legality and of the hierarchical control by virtue of which the Public Ministry operates.

25. Regarding the **procedural framework in which this exception of unconstitutionality was invoked**, the Court holds that the Association "Forumul Judecătorilor din România", the Association "Mișcarea pentru apărarea statutului procurorilor" and Bogdan Ciprian Pîrlog, plaintiffs in the Case File No 45/46/2019 of the Court of Appeal Pitești – II Civil Section, of administrative and fiscal litigation which has as object the annulment of Order No 252/2018 on the organisation and operation within the P.H.C.C.J. of the S.I.O.J. and the suspension of the execution of this administrative act until the final resolution of the case, have requested to bring before the Constitutional Court the exception of unconstitutionality of the provisions of Articles 88^1-88^9 of Law No 304/2004 and of the Government Emergency Ordinance No 90/2018 and to bring before the Court of Justice of the European Union (C.J.E.U.) the reference for a preliminary ruling, regarding the Following questions:

„1. Is the Co-operation and Verification Mechanism (C.V.M.), established according to Decision 2006/928/EC of the European Commission of 13 December 2006, to be considered an act adopted by an institution of the European Union, within the meaning of Article 267 TFEU, which may be subject to interpretation by the Court of Justice of the European Union?

2. Are the content, character and temporal extent of the Co-operation and Verification Mechanism (C.V.M.), established according to Decision 2006/928/EC

of the European Commission of 13 December 2006, to be limited to the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania at Luxembourg on 25 April 2005? Are the requirements formulated in the reports drawn up within this Mechanism binding for the Romanian State?

3. Is Article 2 of the Treaty on European Union to be interpreted within the meaning of the Members States' obligation to comply with the rule of law criteria, that have been also solicited in the reports within the Co-operation and Verification Mechanism (C.V.M.), established according to Decision 2006/928/EC of the European Commission of 13 December 2006, in the event of the urgent establishment of a prosecutor's office for investigating only the offences committed by magistrates, which raises particular concern about the fight against corruption and can be used as an additional instrument of intimidation of magistrate and of exerting pressure on them?

4. Is Article 19 (1) second paragraph of the Treaty on European Union to be interpreted within the meaning of the Members States' obligation to establish the necessary measures for an effective legal protection in areas covered by the Union law, respectively removing any risk related to the political influence on the criminal investigation of judges, the case of the urgent establishment of a prosecutor's office for investigating only the offences committed by magistrates, which raises particular concern about the fight against corruption and can be used as an additional instrument of intimidation of magistrate and of exerting pressure on them?"

26. On 29 March 2019, the Court of Appeal Pitești – II Civil Section, of fiscal and administrative litigation, brought before the Constitutional Court the

exception which forms the object of this case, as well as before the Court of Justice of the European Union, which registered Case C-355/19.

27. On 18 May 2021, the C.J.E.U. (Grand Chamber) delivered this judgment by which it solved Case C-355/19, joint to Cases C-83/19, C-127/19, C-195/19, C-291/19 and C-397/19, and declared that: *„1. The Commission Decision 2006/928/CE of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, as well as the reports drawn up by the European Commission on the basis on this decision constitute acts adopted by an institution of the Union, which may be interpreted by the Court under Article 267 TFEU.*

2. Articles 2, 37 and 38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded, read in conjunction with Articles 2 and 49 TEU, are to be interpreted in that Decision 2006/928, as regards its legal nature, its content and effects over time, falls within the scope of the Treaty between the European Union's Member States and the Republic of Bulgaria and Romania concerning the accession of the Republic of Bulgaria and Romania to the European Union. This decision is mandatory in all its elements for Romania as long as it has been not abrogated. The benchmarks set out in the Annex thereto are intended to ensure the compliance by that Member State with the value of the rule of law set out in Article 2 TEU and are binding for that Member State, in that this Member State is required to take the appropriate measures to achieve those objectives, taking due account, in accordance with the principle of fair cooperation set out in Article 4 (3) TEU, of the reports drawn up by the

Commission on the basis of Decision 2006/928, in particular the recommendations set out in the mentioned reports.

3. The regulations governing the organisation of justice in Romania, such as those relating to [...] the establishment within the Public Ministry of a Section for the investigation of offences in the Judiciary, fall within the scope of Decision 2006/928, so that they must comply with the requirements arising from the Union law and in particular from the value of the rule of law laid down in Article 2 TEU. [...]

5. Article 2 and Article 19 (1) second paragraph of the TEU, as well as Decision 2006/928 are to be interpreted as opposing a national regulation which stipulates the establishment within the Public Ministry of a specialised section having the exclusive competence to investigate offences committed by judges and prosecutors without the establishment of such a section being justified by objective and verifiable imperatives relating to the proper administration of justice and being accompanied by specific safeguards enabling, on the one hand, to remove any risk for such a section to be used as an instrument of political control of the activity of the respective judges and prosecutors, likely to impair their independence and, on the other hand, to ensure that the respective competence may be exercised upon them in full compliance with the requirements arising from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union. […]

7. The principle of primacy of the Union law must be interpreted as opposing a constitutional regulation of a Member State, as interpreted by its constitutional court, according to which a lower court is not authorised to leave unapplied a national provision falling within the scope of Decision 2006/928 and which it

considers, in the light of a judgment of the Court, as being contrary to this decision or to Article 19 (1) second paragraph TEU."

28. Given that at the hearing of 20 May 2021, at the Constitutional Court's public debate on the invoked exception of unconstitutionality, the P.H.C.C.J. – the general prosecutor of Romania, as party to the case file, as well as the sitting prosecutor have solicited the Court, in its analysis of constitutionality, to take into consideration the *Judgment of 18 May 2021, given by the C.J.E.U. in Case C-355/19, considered as an element that may establish a legal redress* in terms of finding the incidence of Decision 2006/928/EC in the review of constitutionality and, thus, of the violation of Article 148 of the Constitution, the Court is to analyse the formulated request.

29. The Court notes in advance that in **its case-law concerning the incidence of Decision 2006/928/EC in the review of constitutionality**, referring to the meaning of the provisions of Article 148 (2) of the Basic Law, the constitutional court showed that they aimed at „implementing the community law in the national space and establishing the rule for the priority application of the community law over the contrary provisions from the national laws, in compliance with the provisions of the act of accession" and that „[...] the European Union Members States understood to place the community acquis — the constituent treaties of the European Union and the regulations derived therefrom — on an intermediary position between the Constitution and the other laws, when it is about mandatory European normative acts". At the same time, the Court noted that the respective provisions represented a particular application of the provisions of Article 11 (2) of the Constitution, according to which "*Treaties ratified by Parliament, according to the law, are part of national law*" (see Decision No 148

of 16 April 2003, published in the Official Gazette of Romania, Part I, No 317 of 12 May 2003, and Decision No 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, No 246 of 7 April 2014).

30. With regard to the rules of law of the Union falling within the scope of Article 148 of the Constitution, the Court held that „the use of a rule of European law within the framework of the constitutionality review as a rule interposed to that of reference involves, pursuant to Article 148 (2) and (4) of the Constitution of Romania, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unequivocal by itself or its meaning must have been clearly, precisely and unequivocally established by the Court of Justice of the European Union and, on the other hand, the rule should be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution – the sole direct reference rule within the constitutionality review." (Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, No 286 of 28 April 2015, or by Decision No 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, No 487 of 8 July 2011). In such an hypothesis the approach of the Constitutional Court is distinct from the simple application and interpretation of the law, competence that belongs to law courts and administrative authorities, or from any issues related to the legislative policy promoted by the Parliament or the Government, as appropriate.

31. Analysing Decision 2006/928 of the European Commission in the light of the provisions of Article 148 (4) of the Basic Law, the Court held that, „adhering to the legal order of the European Union, Romania accepted that, in

areas where the exclusive competence belongs to the European Union, [...], the implementation of the obligations resulting therefrom is subject to the Union rules [...]" and that, „by virtue of the compliance clause contained in the text of Article 148 of the Constitution, Romania cannot adopted a normative act contrary to the obligations it assumed as Member State". At the same time, the Court noted that „all the above mentioned know a constitutional limit, expressed in what the Court qualified as « national constitutional identity »", and that „the meaning of Decision 2006/928/EC of the European Commission of 13 December 2006 [...], act adopted prior to Romania's accession to the European Union, has been not clarified by the Court of Justice of the European Union as concerns the content, character and temporal extent and whether they fall within the scope of the provisions of the Accession Treaty, [...] which is part of the national normative order, so that Decision 2006/928/CE cannot constitute a reference rule within the review of constitutionality in the light of Article 148 of the Constitution" (Decision No 104 of 6 March 2018, published in the Official Gazette of Romania, Part I, No 446 of 29 May 2018).

32. Moreover, the Court held that Decision 2006/928/EC, act of European law, mandatory for the Romanian State, also lacks constitutional relevance. The Court concluded that, even if these acts (Decision 2006/928/EC and the C.V.M. reports) complied with the conditions of clarity, precision and unequivocal, their meaning being established by the C.J.EU., those acts do not constitute rules that are limited to the level of constitutional relevance necessary for the performance of the review of constitutionality in relation to them. Not being met the cumulative conditionality established in the settled case-law of the constitutional court, the Court held that they cannot substantiate a possible infringement by the national

law of the Constitution, as sole direct reference rule within the constitutionality review (Decision No 137 of 13 March 2019).

33. By Judgment of 18 May 2021, given in the joint cases C- 83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, C.J.U.E. (Great Chamber) it ruled upon the ***legal effects of Decision 2006/928 and of the C.V.M. reports drawn up based on it.***

34. Thus, as concerns ***Decision 2006/928***, the C.J.E.U. established that it „has a binding nature in all its elements for this Member State from the date of its accession to the Union", imposing to Romania „the obligation to reach the benchmarks provided in the annex hereto and to submit to the Commission, every year, pursuant to Article 1 (1), a report on the progress made in this respect" (paragraphs 167 and 168). As for the benchmarks, they „pursue to ensure the compliance by this Member State of the value of the *rule of law* stipulated by Article 2 TEU, condition to benefit of all the rights resulting from the application of the treaties for the mentioned Member State" (paragraph 169), C.J.E.U. concluding: „Therefore, as the Commission in particular pointed out and as it results from recitals (4) and (6) of Decision 2006/928, the establishment of the C.V.M. and the establishment of the benchmarks *aimed at finalizing Romania's accession to the Union*, in order to remedy the deficiencies found by the Commission prior to this accession in those areas [...], *have a binding nature for Romania*, so that this Member State is subject to the specific obligation to reach those objectives and to take the appropriate measures for their achievement as soon as possible. The mentioned Member State has also the obligation to refrain from implementing any measure that might jeopardise the achievement of the same objectives" (paragraphs 171 and 172).

35. In conclusion, C.J.E.U. held that Decision 2006/928 „is mandatory in all its elements for Romania as long as it was not abrogated. The benchmarks provided in the annex hereto aim at ensuring the compliance by this Member State of the value of the rule of law stipulated by Article 2 TEU and have a binding nature for that Member State, in that the latter is obliged to take the appropriate measures for reaching those objectives" (paragraph 178).

36. As for the ***reports drawn up by the Commission according to Decision 2006/928***, C.J.E.U. noted that they „*are addressed, pursuant to Article 2 (1), not to Romania, but to the Parliament or to the Council. Moreover, although these reports contain an analysis of the situation in Romania and formulate requirements for this Member States, the conclusions contained herein address «recommendations» to the that Member State* based on these requirements.[...] Regarding in particular the recommendations contained in these reports, they are formulated, as the Commission also indicated, in view of reaching those objectives and to guide the reform of that Member State in this regard" (paragraphs 174 and 175). „Romania must take due account of the requirements and recommendations formulated in the reports drawn up by the Commission according to this decision", and „in the event the *Commission expresses in such a report doubts referring to the compatibility of a national measure with one of the benchmarks, it is for Romania to collaborate in good faith with this institution to overcome*, in full compliance with these benchmarks and the treaties' provisions, *the encountered difficulties* regarding the achievement of the mentioned benchmarks" (paragraph 177).

37. Therefore, pursuant to the *principle of loyal cooperation* stipulated by Article 4 (3) of TEU, the State „will take due account of the reports drawn up by

the Commission based on Decision 2006/928, especially by the recommendations formulated in the mentioned reports" (paragraph 178). As regards the principle of loyal cooperation, enshrined in Article 4 (3) of TEU, C.J.E.U. showed that, according to a settled case-law, „the Member States are obliged to take all the necessary measures in order to guarantee the applicability and efficacity of the Union's law, and to eliminate the illicit consequences of an infringement of this law and that such an obligation falls within the competence of each authority of the respective Member State [see to this effect Judgment of 17 December 2020, Commission/Slovenia (ECB Archives), C-316/19, EU:C:2020:1030, points 119 and 124, as well as the quoted case-law]" (paragraph 176).

38. **Having examined those held in the Judgement of 18 May 2021 in those respects, the Constitutional Court finds** that the CJEU stated that Decision 2006/928 "falls within the scope of the Treaty of Accession and continues to produce its effects as long as it has not been repealed" and "is binding in its entirety". As regards the reports drawn up by the Commission on the basis of Decision 2006/928, the CJEU stated that "in order to determine whether an EU act produces binding legal effects, it is necessary to examine its substance and to assess its effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act" (paragraph 173). The CJEU has therefore found that these are acts of the European Commission are not addressed to Romania but to the Parliament and the Council, and formulate requirements with regard to Romania, while conclusions set out therein address 'recommendations' to Romania, which the State will take into account by virtue of the principle of sincere cooperation. The CJEU explains how the

'recommendations' in the CVM reports arise, stating in paragraph 177 of the judgement that they are formulated as a result of 'doubts' expressed by the Commission as to the compatibility of a national measure with one of the benchmarks. In the same paragraph, the Court states that, if such a recommendation is made, it is for Romania to cooperate in good faith with the Commission "with a view to overcoming the difficulties encountered with regard to meeting the benchmarks". In other words, the CJEU *does not find the binding nature of the reports drawn up by the Commission pursuant to Decision 2006/928, but gives the Romanian authorities the task of collaborating with an institution of the European Union (the Commission), in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU.* The fact that the State "*is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports*", as held in point 2 of the operative part of the Judgement of 18 May 2021, means that the Romanian State, through its competent authorities, is obliged to collaborate institutionally with the European Commission and to adopt measures compatible with the objectives set out in Decision 2006/928.

39. In that regard, the CJEU referred to its case-law, according to which it follows from the principle of sincere cooperation "that the Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law and to eliminate the unlawful consequences of a breach of that law, and that such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned" (paragraph 176).

40. The Constitutional Court finds that the CJEU has not found a breach of the general duty of sincere cooperation laid down in Article 4(3) TEU. Nor, moreover, could it have found it since, in its case-law, it has consistently held that "a failure to fulfil the general obligation of sincere cooperation following from Article 4(3) TEU is distinct from a failure to fulfil the specific obligations in which that general obligation manifests itself. Therefore, an infringement of that general obligation may be found only in so far as it covers *conduct distinct from that which constitutes the infringement of those specific obligations*" (see, to that effect, judgments of 30 May 2006, Commission v Ireland, C-459/03, EU:C:2006:345, paragraphs 169 to 171; of 17 December 2020, Commission v Slovenia (ECB Archives), C- 316/19, EU:C:2020:1030, paragraph 121). By imposing an obligation on the Romanian State, through its competent authorities, to collaborate institutionally with the European Commission and to adopt measures compatible with the objectives set out in Decision 2006/928, the CJEU has not found any distinct conduct on the part of any body of the State which, within the framework of its powers, would infringe the general obligation of sincere cooperation.

41. From the perspective of the review of constitutionality, the judgment of the Court of Justice of the European Union does not represent a novelty either with regard to the legal effects of Decision 2006/928 and of the CVM reports drawn up by the Commission on the basis of that decision, in the meaning that, as previously established by the Romanian Constitutional Court, Decision 2006/928 is binding in nature and the CVM reports represent mere recommendations, or with regard to the content of Decision 2006/928, stating that Romania has the task

of collaborating in good faith with the European Commission "with a view to overcoming the difficulties encountered with regard to meeting the benchmarks".

42. The Court ***has therefore maintained its previous case-law and found that the only act which, by virtue of its binding nature, could have constituted an interposed rule for the review of constitutionality carried out in the light of Article 148 of the Constitution — Decision 2006/928 — by its provisions and objectives, has no constitutional relevance, since it does not fill a gap in the Basic Law or lay down a higher standard of protection than the constitutional rules in force***.

43. With regard to the **legislation governing the organisation of justice in Romania, such as those relating to the establishment of a section of the Public Prosecutor's Office for the investigation of offences committed within the judicial system**, the CJEU held, relying on its own case-law, that the organisation of justice, including the organisation of the Public Prosecutor's Office, in the Member States falls within the competence of those Member States which must comply with EU law. The ECJ held that the respective legislation "falls within the scope of Decision 2006/928, with the result that it must comply with the requirements arising from EU law and, in particular, from the value of the rule of law, set out in Article 2 TEU". By explaining these requirements, the CJEU found that Article 2 TEU (on the principle of the rule of law), Article 19 (1), second subparagraph, TEU (on remedies necessary to ensure effective judicial protection in the areas covered by Union law), as well as Decision 2006/928, must be interpreted as "precluding national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, where

the creation of such a section is not justified by objective and verifiable requirements relating to the sound administration of justice, and is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 (Right to an effective remedy and to a fair trial, A/N) and 48 (Presumption of innocence and right of defence, A/N) of the Charter [of Fundamental Rights of the European Union]."

44. In other words, in order to comply with EU law, ***the judgment of the CJEU of 18 May 2021*** *states that the rules governing the establishment of a section within the Public Prosecutor's Office for the investigation of offences committed within the judicial system must*: **(i)** be justified by objective and verifiable requirements relating to the sound administration of justice, **(ii)** be accompanied by specific safeguards that remove any risk to the independence of judges and prosecutors and **(iii)** ensure that, in the investigation procedure, judges and prosecutors enjoy the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence.

45. On the first point, the CJEU held that "although the Supreme Council of the Judiciary argued before the Court that the creation of the SIOJ was justified by the need to protect judges and prosecutors from arbitrary criminal complaints, it is clear from the file that the explanatory memorandum to the law in question does not reveal any justification in terms of requirements relating to the sound administration of justice". The CJEU stated that this issue "is, however, for the

referring courts to ascertain taking into account all the relevant factors" (paragraph 215).

46. On the second point, the CJEU held that an autonomous structure within the Public Prosecutor's Office such as the SIOJ "is capable of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire individuals", whereas it "could [...] be perceived as seeking to establish an instrument of pressure and intimidation with regard to those judges, and thus lead to an appearance of a lack of independence or impartiality on their part". The conclusion was based on four points set out in paragraphs 217 and 218 of the judgment: (i) "the fact that a criminal complaint has been lodged with the SIOJ against a judge or prosecutor is sufficient for the SIOJ to institute proceedings", so that "according to the information provided by the referring courts, the system thus established allows complaints to be lodged unreasonably [...] since if such a complaint were lodged, the matter would automatically fall within the competence of the SIOJ", (ii) where „the complaint is lodged in the context of an ongoing criminal investigation concerning a person other than a judge or prosecutor, with that investigation then being transferred to the SIOJ", (iii) „if the ongoing investigation relates to an offence falling within the competence of another specialised section of the Public Prosecutor's Office, such as the NAD", the case is transferred to the SIOJ, and (iv) „the SIOJ may appeal against decisions adopted before it was created or withdraw an appeal brought by the NAD, the DIICOT or the Prosecutor General before the higher courts". Without analysing the issues listed, the CJEU merely noted that " practical examples taken from the activities of the SIOJ", apparent from "the evidence submitted to the Court" (not mentioned in the judgment), "*confirm that the risk* referred to in paragraph 216 above –

namely, *that that section is akin to an instrument of political pressure* and exercises its powers to alter the course of certain criminal investigations or judicial proceedings concerning, inter alia, acts of high-level corruption [...] – has materialised [...]" (paragraph 219). The CJEU states that "it is also for those courts to ascertain that the rules on the organisation and operation of the SIOJ and the rules on the appointment and withdrawal of prosecutors assigned to it are not such as to make the SIOJ open to external influences, having regard in particular to the amendments made to those rules by emergency ordinances derogating from the ordinary procedure provided for by national law" (paragraph 220).

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

48. Having regard to the three points on which the ECJ has ruled, which stem from EU law and, in particular, from the value of the rule of law laid down in Article 2 TEU, **the Constitutional Court is to examine to what extent the principle of the rule of law, which is expressly enshrined in national law in**

Article 1 (3) of the Romanian Constitution, is affected by the rules governing the establishment of the SIOJ.

49. On the first point - absence of objective and verifiable requirements relating to the sound administration of justice justifying the creation of the SIOJ. — the Court reiterates its case-law on the establishment of that structure for the investigation of offences exclusively for the professional category of magistrates (see Decision No 33 of 23 January 2018 and Decision No 547 of 7 July 2020, cited above). Noting that the establishment of the SIOJ at the level of the highest national prosecutor's office is intended to create a specialised structure with a specific purpose of investigation and constitutes a legal guarantee of the principle of the independence of the judiciary, in terms of its individual component, the independence of the judge, the Court notes that it "is thus ensured an adequate protection of magistrates against the pressure exerted on them, against abuses committed by arbitrary referrals/reports, as well as n uniform practice, at the level of that prosecution structure, with regard to the conduct of criminal prosecution of offences committed by magistrates". It cannot be held that the legislation is not based on an objective and rational criterion and constitutes a discriminatory measure, since the establishment of specialised structures within public prosecutor's offices as to areas of competence related to subject matter (NAD or DICOT) or competence related to the person (SIOJ) is an expression of the legislator's choice, who, depending on the need to prevent and combat certain criminal phenomena, decides whether their regulation is appropriate. The Court notes that, in the light of constitutional values and principles, it is for the ordinary legislator to adopt rules giving substance to the Basic Law. The Court refers to Decision No 20 of 2 February 2000, published in the Official Gazette of Romania,

Part I, No 72 of 18 February 2000, in which it held that the constitutional provisions according to which judges are independent and subject only to the law "are not declaratory in nature but constitute constitutional rules binding on Parliament, the task of which is to legislate for the establishment of appropriate mechanisms for ensuring effective judicial independence, without which the existence of the rule of law, as provided for in Article 1 (3) of the Constitution, is inconceivable". The Court notes that, in the constitutional and legal context in force, establishing the power of the Prosecutor's Office attached to the High Court of Cassation and Justice [PHCCJ] to carry out prosecution in case of offences committed by "judges and prosecutors, including military judges and prosecutors, and those who are members of the Supreme Council of the Judiciary [CSM]", the provisions complained of supplement the competence of PHCCJ to carry out prosecution in case of offences committed by judges of trial courts, tribunals, military tribunals, courts of appeal and the Military Court of Appeal and public prosecutors of prosecutor's offices attached to those courts.

50. Thus, even though, in the statement of reasons accompanying the law establishing SIOJ did not mention the "objective and verifiable requirements" leading the adoption of that legislation, ***the Constitutional Court finds that the legislative content of the law reveal the aspects concerning the 'sound administration of justice': on the one hand, the creation of a specialised investigative structure to ensure a uniform practice in the conduct of prosecutions for offences committed by magistrates and, on the other hand, the provision of an appropriate form of protection for magistrates against the pressure exerted on them by arbitrary referrals/reports***

51. Similarly, as regards the derogatory nature of the legislation (from the point of view of the appointment of the chief prosecutor, or of delegation or secondment of prosecutors in that section) from the principle of separation of careers enshrined in the provisions of Law No 303/2004 relating to the status of public prosecutors, ***the Court states that the legislator's choice to regulate in the legislative measure establishing the new public prosecutor's office structure those rules of law which are specific in nature does not affect the constitutionality of the latter law, since the principle relied on is not enshrined in the Constitution, and all other elements relating to the status of prosecutors remain fully applicable to the SIOJ prosecutors***. Thus, as regards the way in which the institution of the Chief Prosecutor of the SIOJ is regulated in terms of compliance with the principle of hierarchical control, since the SIOJ is a specialised structure within PHCCJ, the Court has already held that the chief prosecutor of that section is hierarchically subordinated to the Prosecutor General of the PHCCJ.

52. As regards *the second point*, on which the CJEU has held that the SIOJ *could be perceived as seeking to establish an instrument of pressure and intimidation with regard to those judges, and thus lead to an appearance of a lack of independence or impartiality on their part*, the Constitutional Court will examine the four points on which the CJEU's conclusion was based.

53. (i) As regards "the fact that a criminal complaint has been lodged with the SIOJ against a judge or prosecutor is sufficient for the SIOJ to institute proceedings", the Court finds that, according to Article 305 (1) of the Code of Criminal Procedure, a general rule on the initiation of criminal proceedings in Romania, "*When the document instituting the proceedings meets the conditions*

laid down by law, the criminal prosecution body shall order the initiation of criminal proceedings in respect of the offence committed or planned to be committed, even if the offender is indicated or known". As regards those legal provisions, the Court has held, in its settled case-law, that the rules governing the stage of criminal proceedings *in rem* are a guarantee of the fairness of the conduct of the criminal investigation by ensuring that any criminal investigation is carried out in a procedural context and that no person is charged without reasonable indications that he or she has committed an offence provided for by criminal law, resulting from data or evidence adduced by the judicial bodies. In that regard, ***the Court observes that the criminal procedural rule provides that, where the document instituting proceedings meets the conditions laid down by law, the prosecutor is required to order the initiation of criminal proceedings, so that the rule cannot be interpreted as leaving to the discretion of the prosecutor the initiation of investigative proceedings, and it is of general application regardless of the status of the person against whom criminal proceedings are brought and irrespective of the investigative body***.

54. (ii) The Court finds that the investigation of various categories of persons in the same file by SIOJ cannot, in itself, confirm that the risk of political pressure materialises. The Romanian Code of Criminal Procedure provides, for example, for the prosecution and trial of persons without any special status by the public prosecutor's offices, and, respectively, by the higher courts, competent according to the subject matter, where persons whose special status attracts a particular jurisdiction are involved in the same case. ***The rules on the prorogation of the jurisdiction of a judicial body, which exceptionally extend the competence of judicial bodies, are based on reasons of sound administration of justice and***

take into account the fact that the conduct of criminal proceedings by the same prosecutor's office in respect of all participants is such as to ensure the continuity, efficiency and speed of the prosecution activity, thereby avoiding contradictory solutions which could arise if the power to prosecute were to be divided between different prosecution structures, being a prerequisite for the performance of the judicial act within a reasonable time and in a fair manner.

55. (iii) As regards the effects which the creation of that section has on the competence of other structures of the public prosecutor's offices, in the sense of diminishing such competence as regards the investigation of offences committed by judges, prosecutors and members of the Supreme Council of the Judiciary, as well as those committed by other persons next to magistrates, the Court considers that ***the legislator's choice is consistent with its constitutional power to legislate in the area of the organisation of the judiciary and it is not a question of constitutionality that a pre-existing public prosecutor's office structure loses part of its legal powers, as long as that structure of the prosecutor's office is not enshrined in the Constitution*** (see Decision No 33 of 23 January 2018 and Decision No 547 of 7 July 2020).

56. (iv) With regard to the possibility for SIOJ to appeal against decisions adopted before it was created or withdraw an appeal brought by the NAD, the DIICOT or the Prosecutor General before the higher courts, which would lead to "the risk [...] that that section is akin to an instrument of political pressure and exercises its powers to alter the course of certain criminal investigations [...] has materialised", ***the Constitutional Court holds that such a possibility was ruled out following a finding as to the unconstitutionality of Article 88 sup. 1 (6) and***

Article 88 sup. 8 (1) (d) of Law Np 304/2004, by Decision No 547 of 7 July 2020, decision that does not seem to be taken into account by the CJEU.

57. In that decision, based on the assumption that, with the creation of the SIOJ and the determination of its competence based to the status of the person in the prosecution activity, the Court held that the legislator has established the functional competence of that structure of the public prosecutor's office with regard to the exercise and withdrawal of appeals in cases falling within the jurisdiction of the section, and thus a competence relating to the judicial activity of the Public Ministry, the Court found that, by conferring competence on the promotion or withdrawal of appeals in cases falling within the jurisdiction of the SIOJ, including in cases pending before the courts, or settled by a final decision prior to its operationalisation under Government Emergency Ordinance No 90/2018, the legislator did not carry out the correlative modification of the legal provisions in force relating to the Public Ministry's competence of judicial representation before the judicial authorities. The Court referred to what was held in its case-law (Decision No 345 of 18 April 2006, published in the Official Gazette of Romania, Part I, No 415 of 15 June 2006), according to which "the application of the principle of hierarchical supervision ensures that all prosecutors in the Public Ministry system perform their duties of representing the interests of the entire society, that is to say, the performance of the functions of public authority by the latter, without discrimination and without partiality. In accordance with that principle, the Public Ministry is conceived as a pyramid system, in which the law enforcement measures adopted by the hierarchically superior prosecutor are binding on the public prosecutors in his or her subordination, which gives a substantive substance to the principle of the hierarchical exercise of supervision

within that public authority" and held that the judicial activities related to the participation of the public prosecutor in court hearings are rigorously laid down by law. However, by the manner of regulation of the SIOJ's competence to promote and withdraw appeals, it appears that that section, in assessing the legality and validity of the judgment delivered, implicitly exercised a control over the activity of the public prosecutor dealing with the case, whereas there was no legal basis for the hierarchical super-ordination of the chief-prosecutor of the SIOJ in respect of prosecutors in the other PHCCJ sections, namely prosecutors of the Public Prosecutor's Office attached to the court vested with the settlement of the case.

58. The Court also held that, although the status of the SIOJ is that of a section within the PHCCJ, the criticised legal provisions conferred on SIOJ a special status which prevailed over the other structures of the PHCCJ (NAD, DIICOT, the Judicial Section) and, at the same time, a supra-ordinated position in the hierarchy of the Public Ministry, in breach of Article 132 of the Constitution, which enshrines the principle of hierarchical control within that public authority, ignoring the principles of legality and impartiality, embodied in the principle of the freedom of conclusions which the prosecutor may draw in the case in which he or she ensured the representation of the general interests of the society.

59. Finally, in view of the current legislative framework within which the prosecutors of SIOJ exercise their powers, the Court held that the provisions of Article 88 sup. 8 (1) (d) of Law No 304/2004 on the promotion and withdrawal of appeals in cases falling within their powers of prosecution were not correlated to the other provisions of the law on judicial organisation, and did not meet the quality requirements of the rule, as developed in the case-law of the Constitutional Court relating to Article 1 (5) of the Constitution. Thus, on the one hand, the

prosecutors of SIOJ did not also ensure participation in court hearings in cases falling within its jurisdiction, activity carried out by prosecutors of the Judicial Section of the PHCCJ or by prosecutors of the public prosecutor's office attached to the court hearing the case, and, on the other hand, the rules in question could also be interpreted as meaning that, together with the prosecutors participating in court hearings, belonging to other structures of the public prosecutor's offices, SIOJ becomes a holder of this competence, which could give rise to non-unitary practices or to positive conflicts of competence, situations which the legislator failed to regulate.

60. *The Court* therefore *found that the provisions of Article 88 sup. 8 (1) (d) of Law No 304/2004 on judicial organisation, as amended by Article 14 (6) of Government Emergency Ordinance No 7/2019, contravene the constitutional provisions contained in Article 1 (3) on the rule of law, Article 1 (5) on compliance with the law and the supremacy of the Constitution, as well as Articles 131 (1) and 132 (1) with reference to the principle of legality and hierarchical control under which the Public Ministry operates*.

61. Moreover, having examined Article 88 sup. 1 (6) of Law No 304/2004, in Decision No 547 of 7 July 2020, the Court noted that the legislator expressly stated that in the case of offences falling within the jurisdiction of the section, irrespective of the intermediate hierarchies existing within the section, only the chief prosecutor of the section is a 'hierarchically superior prosecutor' within the meaning of the criminal law. The Court found that with regard to the phrase 'including in case of decisions issued before its operationalisation', the text is ambiguous and confusing, since the rule defines the concept by reference to 'decisions issued', which is not only devoid of legal logic, but also gives rise to

confusion as to the way in which the powers of the superior prosecutor are exercised, since the hierarchical order cannot be based on the decisions issued in certain cases, but on a predetermined structure, which operates, in accordance with Article 132 (1) of the Constitution, according to the principles of legality, impartiality and hierarchical control. Furthermore, in view of the time when the decisions are issued, decisions by reference to which the chief prosecutor of the section exercises his or her capacity of hierarchically superior prosecutor, the rule becomes manifestly transitional in nature by regulating the situation of cases taken over by SIOJ from other prosecution structures, in breach of the principle of hierarchical control, in that it establishes within the competence of the chief prosecutor of the SIOJ the control over the activity of prosecutors outside that section.

62. *The Court therefore found that the provisions of Article 88 sup. 1 (6) of Law No 304/2004 on judicial organisation, as amended by Article 14 (4) of Government Emergency Ordinance No 7/2019, were unconstitutional*.

63. ***Having regard to the those rules by the Constitutional Court in Decision No 547 of 7 July 2020, including in the light of the constitutional provisions contained in Article 1 (3) on the rule of law, the legal provisions establishing the competence of the prosecutors of the SIOJ to exercise and withdraw appeals in cases falling within the jurisdiction of the section, including in cases pending before the courts or settled by a final decision before its entry into operation, ceased to be applicable, with the result that on the date of delivery of the judgment of 18 May 2021 by the CJEU. they were no longer capable of producing the legal effects retained in the act of the CJEU, and the arguments of the European court appears to lack factual and legal support***.

64. On *the third point*, namely that, in the context of the investigation procedure, judges and prosecutors must enjoy the right to an effective remedy and to a fair trial, the presumption of innocence and the right of the defence, the ECJ held that the rules governing the organisation and functioning of the SIOJ "should be designed so as not to prevent the case of the judges and prosecutors concerned from being heard within a reasonable time".

65. With regard to the establishment of rules of jurisdiction on the basis of the individual's status, the Constitutional Court finds that it "does not restrict the right of individuals to have recourse to the courts and to enjoy the procedural rights and guarantees established by law, in the context of a public trial, tried by an independent, impartial court and established by law, within a reasonable time, conditions which are also ensured when cases are heard at first instance by the courts of appeal" (see Decision No 33 of 23 January 2018 and Decision No 547 of 7 July 2020).

66. With regard to the 'reasonable time', enshrined as a guarantee of the right to a fair trial in Article 21 (3) of the Romanian Constitution, *the Constitutional Court notes that the new legislation does not provide for any derogation from the ordinary rules of law established by the Code of Criminal Procedure as regards the procedure for conducting criminal proceedings, and therefore procedural time limits*, so that it cannot be argued that this would constitute the premiss of a possible breach of the reasonable time limit for adjudicating cases.

67. As regards the "combined effect of [...] the apparently significantly reduced number of prosecutors assigned to that section, who, moreover, have neither the necessary means nor expertise to conduct investigations into complex

corruption cases and [...] the excessive workload", the Court notes that, in order to operationalise the SIOJ, the legislator has provided, in Article II (10) of Government Emergency Ordinance No 90/2018, that "*within 5 calendar days of the entry into force of this Emergency Ordinance, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice shall provide the human and material resources necessary for its operation, including specialised auxiliary staff, judicial police officers and officers, specialists and other staff*". With regard to the number of prosecutors assigned to the section, Article 88 sup. 2 (3) of Law No 304/2004 provides that "*The Section for the investigation of offences committed within the judicial system shall operate with a number of 15 prosecutor positions*" and *paragraph (4) provides that the number of position may be amended, "in accordance with the workload, by order of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, at the request of the Chief Prosecutor of the Section, with the assent of the Plenum of the Supreme Council of the Judiciary"*. With regard to the "expertise to conduct investigations into complex corruption cases", the Court notes that the provisions of Article 88 sup. 5 (3) provide, among the conditions for participation in the competition for appointment to the SIOJ, that prosecutors must have at least the degree of prosecutor within a prosecutor's office attached to the court of appeal and have at least 18 years' effective seniority in the position of prosecutor. The Court therefore finds that the legal provisions governing the establishment of the SIOJ cannot in themselves constitute grounds for infringing the constitutional guarantee provided for in Article 21 (3) of the Romanian Constitution, relating to the resolution of cases within a reasonable time.

68. On the other hand, *the Court cannot ignore the fact that the period which elapsed from the date of the operationalisation of the SIOJ (October-November 2018) until the date of referral to the Court of Justice of the European Union for a preliminary ruling (29 March 2019) is less than 6 months. In that context, the 'information provided' to the CJEU by the referring court from which it was apparent that the rules governing the organisation and functioning of that section were not designed in such a way as to comply with the examination of the case of the judges and prosecutors concerned within a reasonable period of time, 'information' which formed the basis for the decision of the European court, appear as debatable.*

69. For all the arguments set out above, ***the Constitutional Court finds that the legislation providing for the creation of SIOJ constitutes a choice by the national legislator, in accordance with the constitutional provisions contained in Article 1 (3) on the rule of law and in Article 21 (1) and (3) on free access to justice, the right to a fair trial and the resolution of cases within a reasonable time and, therefore, in accordance with the provisions of Articles 2 and 19 (1) TEU***.

70. Finally, as regards the issue common to all three perspectives from which the CJEU has interpreted EU law, namely that it is for the referring court to ascertain whether the rules relating to the organisation and functioning of the SIOJ and those relating to the appointment and dismissal of prosecutors assigned to that section correspond to the requirements laid down in the judgment of the CJEU, the Constitutional Court will provide a number of clarifications.

71. As a preliminary point, the Court observes that, ***although Article 267 TFEU does not empower the CJEU to apply rules of EU law to a particular***

case, but only to rule on the interpretation of the Treaties and of acts of EU institutions, where it is for the referring court to rule on those points after making the necessary assessments (which, moreover, was held in paragraph 201 of the judgment of 18 May 2021), *the CJEU does not only "provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions", as established in its own case-law* (also invoked in paragraph 201 of the judgement) Thus, the CJEU notes that "the explanatory memorandum to the law in question does not reveal any justification in terms of requirements relating to the sound administration of justice" (paragraph 215), "it is apparent from the evidence submitted to the Court [...] that practical examples taken from the activities of the SIOJ confirm that the risk [...] that that section is akin to an instrument of political pressure and exercises its powers to alter the course of certain criminal investigations or judicial proceedings [...] has materialised" (paragraph 219), it is not apparent from the information provided by the referring court that the rules were not designed so as not to prevent the case of the judges and prosecutors concerned from being heard within a reasonable time (paragraphs 221 and 222). *However, all those findings do not represent "an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions", but an application of the rules of EU law to a particular case.*

72. As regards the interpretation of the principle of 'primacy of EU law' as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision which it considers to be contrary to EU law, the Constitutional Court

reaffirms that the determination of the method of organisation, operation and delimitation of competences between the different structures of criminal prosecution bodies does not fall within the exclusive competence of the Member State and reiterates those stated in *Decision No 80 of 16 February 2016*, paragraph 456, according to which the Basic Law of the State - *the Constitution is the expression of the will of the people, which means that it cannot lose its binding force only by the existence of a discrepancy between its provisions and those of the European Union, since the State's membership of the European Union cannot affect the primacy of the national constitution over the entire legal order*. Similarly, by Decision No 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, No 479 of 12 July 2012, the Constitutional Court stated that "of the essence of the European Union is the allocation by the Member States of competences — increasing in number — with a view to achieving their common objectives, admittedly without prejudice, ultimately, by that transfer of powers, to national constitutional identity" and that, "on that line of thought, the Member States retain powers which are inherent for the preservation of their constitutional identity, and the transfer of powers, as well as the rethinking, enhancement or establishment of new guidelines in the context of the competences already transferred fall within the scope of the constitutional discretion of the Member States".

73. In this context, the Court notes that the relationship between national law and international law is established in the Romanian Constitution in Articles 11 and 20. The following principles emerge from a combined reading of the two constitutional rules: (i) the commitment of the Romanian State to perform in full and in good faith its obligations under the Treaties to which it is a party; (ii) by

ratification of international acts or treaties by the Romanian Parliament, these become national rules of domestic law; (iii) ***primacy of the Romanian Constitution over international law***: Romania can only ratify an international treaty containing provisions contrary to the Constitution after prior revision of the national Basic Law; (iv) interpretation and application of the constitutional provisions on citizens' rights and freedoms shall be carried out in accordance with the Universal Declaration of Human Rights, the covenants and the other treaties to which Romania is a party; (v) in the field of human rights, the conflict between an international treaty to which Romania is a party and national law is only resolved in favour of the international treaty if it contains more favourable rules.

74. The relationship between national law and European Union law is regulated separately under Article 148 (2) and (4), according to which: *"(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations* ***shall take precedence over the opposite provisions of the national laws****, in compliance with the provisions of the accession act. […] (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented."* Thus, the accession clause to the European Union contains, in the alternative, a clause of conformity with EU law, according to which all national bodies of the State are, in principle, obliged to implement and apply EU law. This also applies to the Constitutional Court, which, by virtue of Article 148 of the Constitution, gives priority to the application of European law. ***However, this priority of application must not be perceived as removing or disregarding the national constitutional identity***, as enshrined in Article 11 (3), read in

conjunction with Article 152 of the Basic Law, i.e. a guarantee of a substantive identity core of the Romanian Constitution and which must not be relativised in the process of European integration. By virtue of that constitutional identity, the Constitutional Court is empowered to ensure the primacy of the Basic Law in Romania (see, *mutatis mutandis*, judgment of 30 June 2009, 2 BvE 2/08 etc., delivered by the Federal Constitutional Court of the Federal Republic of Germany). According to the conformity clause contained in Article 148 of the Constitution itself, Romania cannot adopt a legislative act contrary to the obligations to which it has committed itself as a Member State (see Decision No 887 of 15 December 2015, published in Official Gazette of Romania, Part I, No 191 of 15 March 2016, paragraph 75), but the above are indeed subject to a constitutional limit based on the concept of 'national constitutional identity' (see Decision No 683 of 27 June 2012, published in Official Gazette of Romania, Part I, No 479, No 286 of 12 July 2012, or Decision No 64 of 24 February 2015, published in Official Gazette of Romania, Part I, No 286 of 28 April 2015, Decision No 104 of 6 March 2018, published in Official Gazette of Romania, Part I, No 446 of 29 May 2018, paragraph 81).

75. On the other hand, Article 4 (2) TEU itself, expressly stating that the Union shall respect the 'equality of the Member States before the Treaties', their 'national identities' and the 'essential State functions', uses the concept of 'national identity', which is 'inherent in their fundamental structures, political and constitutional', and which means that the process of constitutional integration within the EU is limited precisely to the fundamental structures, political and constitutional, of the Member States.

76. The Court notes that a court has the power to examine the conformity of a provision "*of the national laws"*, therefore belonging to the domestic law, with provisions of EU law in the light of Article 148 of the Constitution and, should it find it contrary to EU law, it ***has the power to apply, as a matter of priority, provisions of EU law in disputes concerning the subjective rights of citizens***. ***In all cases, the Court finds that, by the concepts of 'national laws' and 'domestic law', the Constitution refers exclusively to infra-constitutional legislation***, since the Basic Law retains its hierarchically superior position by virtue or Article (11) (3) of the Basic Law. Thus, when it provides that *"the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws",* ***Article 148 of the Constitution does not give EU law priority over the Romanian Constitution, so that a national court does not have the power to examine the conformity of a provision of national law, found to be constitutional in the light of Article 148 of the Constitution, with the provisions of EU law.*** The Romanian system of law consists of all the legal rules adopted by the Romanian State and which must be consistent with the principle of the primacy of the Constitution and the principle of legality, which lie at the heart of the requirements of the rule of law, principles enshrined in Article 1 (5) of the Constitution, according to which "In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory", the only legislative authority of the country being the Parliament, given that the State is organised in accordance with the principle of separation and balance of powers — legislative, executive and legislative — in the framework of constitutional democracy. Constitutional democracy, in a State governed by the rule of law, is not an abstraction, but a

reality of a system in which the primacy of the Constitution limits the sovereignty of the legislator, who, in the process of creating legal rules and adopting legislative acts, must take account of a number of principles of constitutional status (see Decision No 104 of 6 March 2018, published in the Official Gazette of Romania, Part I, No 446 of 29 May 2018, paragraph 73).

77. The Court finds that **the CJEU, in declaring Decision 2006/928 to be binding, has limited its effects from a twofold perspective**: on the one hand, it has established that the obligations resulting from the Decision are a matter for the Romanian authorities competent to cooperate institutionally with the European Commission (paragraph 177 of the judgment), and thus for the political institutions, the Romanian Parliament and the Government of Romania, and, secondly, that the obligations are to be exercised in accordance with the principle of sincere cooperation laid down in Article 4 TEU. ***From both perspectives, the obligations cannot be binding on the courts, i.e. State bodies which are not empowered to collaborate with a political institution of the European Union***.

78. The Court therefore finds that the application of point 7 of the operative part of the judgment, according to which a court "is [...] permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU", has no basis in the Romanian Constitution, since, as previously stated, Article 148 of the Constitution enshrines the ***primacy of EU law*** over conflicting provisions of national laws. ***The CVM reports, drawn up on the basis of Decision 2006/928, by their content and effects, as established by the judgment of the CJEU of 18 May 2021, do not constitute rules of EU law, which the court should apply as a***

matter of priority, removing the national rule. Therefore, the national judge cannot be asked to decide that recommendations should be applied as a matter of priority to the detriment of national law, since the CVM reports do not establish legal rules and are therefore not likely to conflict with national law. This conclusion is all the truer where the national legislation has been declared to be in conformity with the Constitution by the national constitutional court in the light of the provisions of Article 148 of the Constitution.

79. Last but not least, the Court notes that the ***principle of the rule of law entails legal certainty***, that is to say, the legitimate expectation on the part of the addressees as to the effects of the legal provisions in force and the way in which they are applied, so that any subject of law may predictably determine his or her conduct. In so far as some courts disapply of their own motion the provisions of national law which they consider to be contrary to European law, whereas others apply the same national rules, considering them to be consistent with European law, the standard of foreseeability of the rule would be seriously undermined, which would give rise to serious legal uncertainty and, consequently, would lead to the infringement of the principle of the rule of law.

80. In conclusion, since the judgment of 18 May 2021 delivered by CJUE in Case C-355/19 cannot be regarded as a factor capable of determining a case-law reversal from the point of view of application of Decision 2006/928/EC in the review of constitutionality and, therefore, the infringement of Article 148 of the Constitution, the Constitutional Court is going to dismiss, as unfounded, the exception of unconstitutionality of the provisions of Article 88 sup. 1 (1)-(5), Article 88 sup. 2- Article 88 sup. 7, Article 88 sup. 8 (1) (a) to (c) and (e) and Article 88 (2), as well as of Article 88 sup. 9 of Law No 304/2004.

81. Given that, pursuant to Article 29 (3) of Law No 47/1992, *"legal provisions whose unconstitutionality has been found by prior decision of the Constitutional Court cannot form the object of an exception"* and taking into account that Decision No 547 of 7 July 2020, above-mentioned, was published in the Official Gazette of Romania, Part I, after referral to the Constitutional Court in the present case, the Court finds that the exception of unconstitutionality of the provisions of Article 88 sup. 1 (6) and Article 88 sup. 8 (1) (d) of Law No 304/2004 has become inadmissible.

82. With regard to Government Emergency Ordinance No 90/2018 on certain measures for the operationalisation of the Section for the investigation of offences committed within the judicial system, having examined the complaint of unconstitutionality, the Court notes that the legislative act laid down a procedure derogating from Articles 88 sup.3 to 88 sup. 5 of Law No 304/2004, which allowed the operationalisation of that section within the deadline set by the law. In view of the temporary nature of the legislation, which concerned the provisional appointment of the chief prosecutor, the deputy chief prosecutor and at least one third of the prosecutors of the section, the Court finds that the provisions of Government Emergency Ordinance No 90/2018 are unrelated to the settlement of the case in which the exception was raised, with the result that it is to be dismissed as inadmissible.

83. For the reasons set out above, pursuant to Articles 146 (d) and 147 (4) of the Constitution, as well as Articles 1-3, 11 (1) (A) (d) and 29 of Law No 47/1992, by a majority vote, with regard to the provisions of Article 88 sup. 1 (1) to (5), Articles 88 sup.2 to 88 sup. 7, Article 88 sup. 8 (1) (a) to (c) and (e) and Article 88 (2), as well as of Article 88 sup. 9 of Law No 304/2004, and

unanimously as regards Article 88 sup. 1 (6) and Article 88 sup. 8 (1) (d) of Law No 304/2004 and Government Emergency Ordinance No 90/2018,

THE CONSTITUTIONAL COURT

In the name of the law

Decides:

1. Dismisses, as unfounded, the exception of unconstitutionality raised by the Association "Forumul Judecătorilor din România", the Association "Mișcarea pentru apărarea statutului procurorilor" and Bogdan Ciprian Pîrlog in the Case File No 45/46/2019 al of the Pitești Court of Appeal - 2nd Civil, Administrative and Tax Litigations Division and finds that the provisions of Article 88 sup. 1 (1)-(5), Article 88 sup. 2 - 88 sup. 7, Article 88 sup. 8 (1) (a) to (c) and (e) and Article 88 (2), as well as Article 88 sup. 9 of Law No 304/2004 on judicial organisation are constitutional in relation to the criticism put forward.

2. Dismisses as inadmissible the exception of unconstitutionality of the provisions of Article 88 sup. 1 (6) and of Article 88 sup. 8 (1) (d) of Law No 304/2004 on judicial organisation, exception raised by the same authors in the same case file of the same court.

3. Dismisses, as inadmissible, the exception of unconstitutionality of Government Emergency Ordinance No 90/2018 on certain measures for the operationalisation of the Section for the investigation of offences committed within the judicial system, an exception raised by the same authors in the same case file of the same court.

Final and generally binding.

The decision shall be communicated to the Pitești Court of Appeal — 2nd Civil, Administrative and Tax Litigations Division and published in the Official Gazette of Romania, Part I.

Delivered at the hearing of 8 June 2021.