

Romania, CJEU, C-397/19, AX v Statul Român – Ministerul Finanțelor Publice, ordinary – Grand Chamber, preliminary ruling, 18 May 2021

Member State

 Romania

Topic

Accountability – Judicial independence - civil liability of magistrates (judges and prosecutors) - Rule of law

Deciding Court Original Language

Tribunalul București (C-397/19)

Deciding Court English translation

Bucharest Tribunal and CJEU

Registration N

C-397/19

Observation: the case forms part of a cluster of cases involving preliminary references by several Romanian courts on similar and/or connected topics. The Court issued a single preliminary ruling judgment after having joined six cases in which Romanian courts submitted preliminary questions: C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19

Date Decision

18th May, 2021

ECLI (if available)

EU:C:2021:393

National Follow Up Of (when relevant)

No.

EU legal sources and CJEU jurisprudence

Primary EU sources:

- Article 2 TEU;
- Article 4(3) TEU;
- Article 9 TEU
- Article 19(1) TEU;
- Article 47 of the Charter of Fundamental Rights of the European Union;
- Article 67(1) TFEU
- Article 267 TFEU.

Secondary EU sources:

- Commission Decision 2006/928/EC of 13 December 2006 establishing the Cooperation and Verification Mechanism regarding the progress of Romania in reaching certain specific reference objectives in the areas of judicial reform and anticorruption (CVM);
- Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism of 25 January 2017;
- Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism of 13 November 2018.

ECJ Case-law:

- Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117;
- Judgment of 15 July 1964, *Costa v ENEL*, 6/64, EU:C:1964:66.

Subject Matter

Rule of law – Judicial independence – Commission Decision 2006/928/EC establishing a Mechanism for Cooperation and Verification (MCV) –

Nature and effects of the MCV and of the reports established by the Commission on its basis - Article 47 CFREU – Article 19(1) TEU – Patrimonial liability of the state and personal liability of judges for judicial errors

Legal issue(s)

1. Legal issues: threats to the rule of law, judicial independence, the erosion of trust in the judiciary, personal liability of magistrates for judicial errors

2. Legal profession: prosecutors, judges
 3. The case concerns issues related to the status and legal force of the Commission reports concerning the MCV, as well as issues related to the compatibility of national legislation concerning the personal liability of magistrates for judicial errors with primary EU law and the principle of judicial independence.
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Request for expedited/PPU procedures

Yes. Requests for expedited procedures were submitted by the national court in this case and in several other joined cases, but they were denied by the CJEU. The Court found that the sensitive and complex character of the matters raised by the joined cases could not be adequately addressed by the applying the expedited procedure. This was due to the fact that the questions referred concerned aspects regarding the wide-scale judicial reform and anti-corruption measures adopted by Romania upon its accession to the European Union.

However, given the particular nature of the questions raised, the president of the Court decided, in accordance with the provisions of Article 53(3) of the Rules of Procedure, to give priority to the six joined cases.

Interim Relief

No requests for interim relief, none granted.

National Law Sources

- The Romanian Constitution – Articles 115(4), 132(1), 133(1)
 - Law no. 317/2004 – Articles 65, 67
 - Emergency Ordinance no. 77/2018 – Articles I, II
 - Law no. 207/2018 – Articles I(45), III
 - Emergency Ordinance no. 90/2018 – Articles I, II
 - Emergency Ordinance no. 92/2018
 - Emergency Ordinance no. 7/2019
 - Emergency Ordinance no. 12/2019
 - Law no. 303/2004 - Article 96(3)
 - Criminal Procedure Code – Articles 539(2) and 541(2)-(3)
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Facts of the case

AX lodged an application with the Bucharest Tribunal, requesting, based on the provisions of

national legislation, that the Romanian State be obliged to pay compensation for the material and moral damage resulting from a criminal conviction and from several measures limiting and restricting his liberty. AX had been convicted by the Bucharest Tribunal to four years imprisonment, with a suspended execution of sentence, for tax evasion. He had also been imposed complementary sanctions, as well as an obligation to repay RON 1,642,970 as civil damages, with a lien on all his present and future property. AX had also been placed under arrest or house arrest.

The Bucharest Court of Appeal subsequently found that he had not committed the crime of which he had been convicted and lifted the lien concerning his assets.

The national judge considered that the case raised issues regarding judicial independence and accountability and formulated a request for preliminary ruling under 7 questions.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

Admissibility:

Objections concerning the admissibility of the preliminary questions were raised in respect of several of the six joined cases. In what case C-397/19 is concerned, the Court found all requests to be admissible, with the exception of the seventh question raised.

Merits:

The CJEU judgment offers clarifications on the following aspects raised by the Romanian courts:

1. Whether the MCV Decision 2006/928 and the Commission reports constitute acts of the EU institutions, which the Court may interpret based on Article 267 TFEU

The Court indicates that Decision 2006/928 is an act adopted by the European Commission based on the Accession Agreement and is a decision in the sense of Article 288(4) TFEU. The Commission reports based on the MCV are also acts adopted by an EU institution. Consequently, both the MCV Decision and the Commission reports are subject to interpretation by the Court under Article 267 TFEU, irrespective of their legal effects.

2. Whether the MCV Decision 2006/928 falls under the scope of application of the Accession Agreement and, if the answer is in the affirmative, what are the legal consequences deriving therefrom for Romania – more precisely, whether and to what extent the requirements and recommendations contained in the Commission reports based on the MCV Decision are

The Court reiterates that the MCV Decision is based on the Accession Act (Articles 37 and 38) and the Accession Agreement and that the EU institutions were expressly abilitated to adopt, prior to accession, the measures necessary under the Accession Agreement, which include those in Articles 37 and 38 of the Accession Act. Consequently, from the perspective of its legal nature, content and legal effects, the MCV Decision falls under the scope of application of the Accession Agreement and it continues to produce legal effects as long as it has not been repealed.

In what the legal effects of the MCV Decision are concerned, the Court recalls that under Article 288 TFEU, decisions are binding in all their elements for their addressees. As the MCV Decision is addressed to Romania, it imposes upon the latter an obligation to reach the reference objectives in its annex and to present to the Commission a yearly progress report. The reference objectives are binding for Romania, as the latter incurs a specific obligation to take adequate measures in order to achieve them, as well as to refrain from taking any measures that might compromise such objectives. To this end, Romania should pay due regard, in accordance with the principle of sincere cooperation under Article 4(3) TEU, to the recommendations comprised in the Commission's reports based on the MCV Decision.

3. Whether the rules governing the organization of the Romanian judicial system fall under the scope of application of the MCV Decision

Under the questions raised in cases C-127/19 and C-195/19, such rules concern in particular the setting up of the SIOJ and the appointment of the prosecutors operating within the SIOJ. The Court states that, as already observed in AG Bobek's Opinion, the setting up of the SIOJ falls under the first, third and fourth reference objectives included in the annex to the MCV Decision.

Consequently, the Court finds that the rules governing the organization of the Romanian judiciary fall under the scope of application of the MCV Decision and therefore, they must be in accordance with EU law and in particular with the values of the rule of law, pursuant to Article 2 TEU.

4. Whether rules such as the Romanian ones concerning interim appointments to the management of the Judicial Inspection (Inspectia Judiciara) are compatible with EU law

The Court makes a few observations concerning the circumstances that might generate legitimate doubts as to use of the Judicial Inspection as an instrument of pressure on the activity of judges and/or prosecutors or of political control. Thus, it indicates that such doubts may exist when the national rules have the effect, even temporarily, of allowing the government of the Member State to make appointments to the management of the body tasked with disciplinary investigations and with exercising disciplinary actions against judges and prosecutors, in violation of the ordinary

appointment procedure under national law.

The CJEU however emphasizes that it is for the referring courts to verify, in light of the factual circumstances of the case and of the relevant national legal provisions, whether such legitimate doubts were generated by the particular use of the functions and attributions of the Judicial Inspection.

5. Whether national rules such as the Romanian ones concerning the setting up of the SIOJ are compatible with EU law

The Court indicates that Articles 2 and 19(1)(2) TEU, as well as the MCV Decision, must be interpreted as precluding national legislation setting up, within the Public Prosecutor's Office, of a specialized section with exclusive competence to investigate offences committed by judges and prosecutors, if there are no imperative, objective and verifiable reasons connected to the sound administration of justice for the setting up of such section. Additionally, specific safeguards must be in place to ensure, on the one hand, that any risk that this section might be used as an instrument of political control over judges and prosecutors be eliminated and, on the other hand, to ensure that such competences may be used in respect of judges and prosecutors only in full observance of the requirements under Articles 47 and 48 of the Charter of Fundamental Rights of the EU.

6. The interpretation of the principle of supremacy of EU law in relation to a Constitutional Court decision according to which EU law (especially the MCV Decision) may not prevail over national constitutional law

The Court recalls that the principle of supremacy of EU law affirms the prevalence of EU law over the national law of the Member States and imposes upon all entities of the Member States an obligation to give full effect to EU rules. Furthermore, the effects of the supremacy of EU law are binding for all the organs of a Member State, with the national provisions concerning the allocation of judicial powers, including at the constitutional level, making no exception to this rule.

In what the MCV Decision is concerned and in respect of its effects as discussed by the Romanian Constitutional Court, the CJEU underscores that the decision imposes upon Romania the obligation to attain, as soon as possible, the reference objectives indicated therein. As such objectives are formulated in clear and precise language and not subject to any conditions, the Court clarifies that they enjoy direct effect. Furthermore, as Article 19(1)(2) TEU imposes upon Member states a clear and precise obligation of result concerning the independence of the judiciary, the Court indicates that the referring court must guarantee the full effect of this provision. Consequently, in the case of a proven violation of Article 19(1)(2) TEU or of the MCV Decision, the principle of supremacy imposes upon the national court the obligation to disapply the relevant national provisions, irrespective of their legislative or constitutional character.

7. The compatibility with EU law of the Romanian legal regime of patrimonial liability of the state and of personal liability of judges for judicial errors

Under this question, the Court begins by drawing a distinction between the national rules governing the liability of the state for damage resulting from judicial errors and the legal regime of personal liability of magistrates for such judicial errors, within an action for redress.

In what the state's liability is concerned, the Court reiterates that, similar to cases in which the responsibility of the state may be engaged for judicial decisions contrary to EU law, the possibility offered by national law to engage the state's liability for judicial errors is not in principle problematic and does not raise specific threats to judicial independence.

On the other hand, in what the personal liability of judges is concerned, in regards to a judicial error, its legal regime pertains to the national organization of justice and falls within the competence of the Member states. However, in exercising such powers, Member states must observe Union law and ensure that the system of personal liability of judges be in accordance with the requirements of independence, effective judicial protection and more specifically, the criteria of article 19 TEU.

The existence of a principle of personal liability of judges for judicial errors entails a risk of interference with their independence, as it can influence the decision-making of those entrusted to adjudicate. Consequently, the Court underscores that such personal liability of judges for judicial errors should be limited to exceptional cases and framed under objective and verifiable criteria concerning the sound administration of justice. Additionally, such procedures should be accompanied by adequate guarantees to ensure that any risk of external pressure on the content of judicial decisions is avoided, so as to prevent any legitimate doubt in the perception of the public.

According to the Court, several safeguards should be in place at national level for this type of procedures:

- clear and precise norms defining the types of behaviour for which the personal liability of judges may be engaged, to protect their independence and avoid risks of pressure;
- the liability of judges for damage caused during the exercise of their functions should be engaged only in exceptional circumstances, in which their serious individual guilt has been duly established;
- the national rules in such cases must comprise adequate guarantees and ensure that such procedures cannot be transformed in instruments of pressure on the judicial activity;
- the authorities investigating such cases should meet the requirements of objectivity and impartiality and conduct their investigations in observance of these principles;
- the rights provided under Article 47 of the Charter, particularly the right to defense of the judge, must be fully complied with and the organ deciding upon the personal liability of the judge must be a court.

In line with the previous observations, the ECJ concludes that unless adequate safeguards and guarantees of the types indicated above are in place at national level, such procedures concerning the personal liability of judges are contrary to EU law.

Relation of the case to the EU Charter

The EU Charter was invoked by the Court when discussing the guarantees of the procedure for engaging the personal liability of judges.

The Court relied on the provisions of the Charter as a binding parameter. It indicated that, among others, the rules concerning the investigation of offences committed by judges or prosecutors should include specific safeguards to ensure, on the one hand, that any risk that this section might be used as an instrument of political control over judges and prosecutors be eliminated and, on the other hand, to ensure that such competences may be used in respect of judges and prosecutors only in full observance of the requirements under Articles 47 and 48 of the Charter of Fundamental Rights of the EU.

Relation between the EU Charter and ECHR

Not applicable.

Use of Judicial Interaction technique(s)

- Preliminary reference;
 - Consistent interpretation;
 - Disapplication of national law in favour of EU law.
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Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Not applicable.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

Not applicable.

Strategic use of judicial interaction technique (purpose aimed by the national court)

National courts likely relied on judicial interaction techniques in order to solve an existing or perceived institutional conflict, as well as to solve conflicts of norms.

Impact on Legislation / Policy

Not applicable, given the recent character of the CJEU preliminary ruling. However, the judgment is likely to trigger changes in the legislative framework, as some amendments to legislation (for instance, the closing of the SIOJ) are already under debate in Parliament.

Notes on the national implementation of the preliminary ruling by the referring court

Not applicable, given the recent character of the CJEU judgment under analysis.

Impact on national case law from the same Member State or other Member States

Not applicable.

Connected national caselaw / templates

Other preliminary references were submitted by Romanian courts in connection to similar topics. The ECJ joined all six cases and pronounced the judgment under analysis in the current fiche.

(Link to) full text

<https://curia.europa.eu/juris/document/document.jsf?docid=241381&mode=req&pageIndex=1&dir=&occ=fi>

Author

History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. Request for preliminary ruling in Case C-397/19 – 22.05.2019:
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=217081&pageIndex=0&doclang=E>
 2. Advocate General Bobek's Opinion in joined cases – 23.09.2020: curia.europa.eu
 3. Preliminary ruling - Judgment of the Court – 18.05.2021:
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=F>
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