

**Romania, Court of Justice of the European Union, C-291/19, SO v TP and Others, appeal, 18th May, 2021**

Member State

 Romania

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Topic

Accountability

Judicial independence;

Rule of law;

Trust in the judiciary.

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Deciding Court Original Language

Curtea de Apel Braşov

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Deciding Court English translation

Braşov Court of Appeal

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Registration N

C-291/19

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.

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Date Decision

18th May, 2021

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ECLI (if available)

EU:C:2020:746

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## EU legal sources and CJEU jurisprudence

### **Primary EU sources:**

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

### **Secondary EU sources:**

- Commission Decision 2006/928/EC of 13 December 2006 establishing the Cooperation and Verification Mechanism (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 Juizes Portugueses, C-64/16, EU:C:2018:117;
- Judgment of the Court of Justice of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586;
- Judgment of 13 June 2017, Florescu and Others, C-258/14, EU:C:2017:448.

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### Subject Matter

Criminal Accountability of magistrates - 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

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### Legal issue(s)

1. Legal issues: does a specific mechanism of criminal liability of magistrates comply with the rule of law and judicial independence standards.

2. Legal profession: prosecutors (particularly) and other magistrates (generally)
  
3. The case concerns issues related to judicial independence and trust in the judiciary as a result of the creation, structure and functioning of the Section for Investigation of Offences in the Judiciary (“SIOJ”), which was set up by means of amendments to Law no. 304/2004 on the organisation of the judiciary.

In the context of the rules governing the structure and functioning of the SIOJ, the national court also raises questions concerning the general threats posed by the national legislation to the rule of law and to the independence of the judiciary, as well as the compatibility of such legislation with the general principles of the EU legal order, such as primacy and disapplication of national law contrary to EU law.

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#### Request for expedited/PPU procedures

No request for expedited/PPU procedures.

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#### Interim Relief

No request for interim relief, none granted.

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#### National Law Sources

National law sources:

- Criminal Code (“Codul Penal”) – articles 175; 297
  - Criminal Procedure Code (“Codul de Procedur? Penal?”) – articles 339-341
  - Law no. 78/2000 on the prevention, investigation and punishment of acts of corruption (“Legea nr. 78/2000 privind prevenirea, investigarea ?i sanc?ionarea faptelor de corup?ie”) – article 132
  - Law no. 304/2004 on the organisation of the judiciary (“Legea nr. 304/2004 privind organizarea judiciar?”) – articles 881-8811
  - Government Emergency Ordinance no. 7/2019, inter alia amending and supplementing Law no. 304/2004 (“Ordonan?a de urgen?? a Guvernului nr. 7/2019”)
  - Government Emergency Ordinance no. 90/2018, on the operationalisation of the SIIJ (“Ordonan?a de urgen?? a Guvernului nr. 90/2018” privind unele m?suri pentru opera?ionalizarea SIIJ)
  - Decision no. 3 of 26 February 2019 of the High Court of Cassation and Justice on the settlement of issues of law (“Decizia nr. 3 din 26 februarie 2019 a Înaltei Cur?i de Casa?ie ?i Justi?ie pentru dezlegarea unor chestiuni de drept”)
  - Decisions no. 1519/2011 and 2/2012 of the Constitutional Court (“Deciziile nr. 1519/2011 ?i 2/2012 ale Cur?ii Constitu?ionale”)
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## Facts of the case

SO filed criminal complaints against four prosecutors and an attorney, alleging that they had committed abuse of office and trading in influence, either by refusing without justification to examine some of his requests for information or to make available to him various documents contained in a criminal file, or by exceeding their statutory powers and adopting acts unlawfully and without justification. Subsequently, SO filed a criminal complaint against two judges, claiming that they were part of a criminal organisation and that they had found against him in various sets of proceedings.

The investigations were closed on grounds that no offences had been committed. SO filed a complaint against that decision of the prosecutor handling the case with the hierarchically superior prosecutor, who dismissed it as unfounded. SO lodged a subsequent complaint against the prosecutor's decision to Curtea de Apel Braşov (Braşov Court of Appeal).

The Brasov Court of Appeal raised the following preliminary questions:

(1) Must the [CVM], established by [Decision 2006/928], be regarded as an act of an institution of the Union, within the meaning of Article 267 TFEU, and therefore amenable to interpretation by [the Court]?

(2) Are the requirements set out in the reports drawn up under that mechanism binding on Romania, in particular (but not only) as regards the need to make legislative amendments which comply with the conclusions of the [CVM] and with the recommendations made by the Venice Commission and the [GRECO]?

(3) Must Article 2, in conjunction with Article 4(3) TEU, be interpreted as meaning that the obligation on Romania to comply with the requirements laid down in the reports prepared in accordance with the [CVM], established by [Decision 2006/928], forms part of the Member State's obligation to comply with the principles of the rule of law?

(4) Does the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU and in Article 47 of [the Charter], as interpreted by the case-law of the [Court] (judgment of 27 February 2018, Associação Sindical dos Juizes Portugueses, C-64/16, EU:C:2018:117), preclude the establishment of [the SIIJ], within the prosecutor's office attached to the Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice), in the light of the rules governing the appointment and removal of prosecutors as members of [the SIIJ], the rules governing the exercise of functions within that section and the way in which competence is established, in connection with the limited number of positions in [the SIIJ]?

(5) Does [the second paragraph of] Article 47 of the [Charter] relating to the right to a fair trial by means of a hearing within a reasonable time, preclude the establishment of the [SIIJ] within the prosecutor's office attached to the Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice), in the light of the rules governing the exercise of functions within [the SIIJ] and the way in which competence is established, in connection with the limited number of positions in [the SIIJ]?

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## 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 joined cases. In what case C-291/19 is concerned, the Court found all requests to be admissible.

### Merits:

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

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 binding for Romania

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 organisation 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

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#### Relation of the case to the EU Charter

The EU Charter was invoked in the questions concerning the setting up and the functioning of the SIOJ. More specifically, the referring courts raised doubts in respect of the observance, under the procedures in place for the SIOJ, of the guarantees provided by Articles 47 and 48 of the Charter.

In answering these questions, 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.

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## Relation between the EU Charter and ECHR

Not applicable.

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## 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.

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

The referring courts rely on, and engage with previous case-law of the ECJ in their preliminary references - Judgment of 27 February 2018, Associação Sindical dos Juizes Portugueses, C-64/16, EU:C:2018:117 and Judgment of 15 July 1964, Costa v ENEL, 6/64, EU:C:1964:66 etc. Such references are used in relation to questions concerning judicial independence and the principle of supremacy of EU law.

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## 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.

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## 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.

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## 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.

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

Not applicable.

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## Connected national caselaw / templates

Five other preliminary references were submitted by Romanian courts in connection to similar topics (C-83/19, C-127/19, C-195/19, C-355/19 and C-397/19). The ECJ joined all six cases and

pronounced the judgment under analysis in the current fiche.

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(Link to) full text

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

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Author

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

1. Request for preliminary ruling in Case C-291/19 – 09.04.2019:  
<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=219853&pageIndex=0&doclang=EN&mode=re>
  2. Advocate General Bobek's Opinion in joined cases – 23.09.2020:  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=231502&pageIndex=0&doclang=E>
  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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