

Romania, Olt Tribunal, C-83/19, Asocia?ia ‘Forumul Judec?torilor din Rom?nia’ v Inspec?ia Judiciar?, ordinary – first instance, 18th May, 2021

Romania, Pite?ti Court of Appeal, C-127/19, Asocia?ia „Forumul Judec?torilor din Rom?nia”, Asocia?ia „Mi?carea pentru Ap?rarea Statutului Procurorilor” v Consiliului Superior al Magistraturii, ordinary – first instance, 18th May, 2021

Romania, Bucharest Court of Appeal, C-195/19, PJ v QK, ordinary – first instance, 18th May, 2021

Member State

 Romania

Topic

Judicial independence – Rule of law – Trust in the judiciary

Deciding Court Original Language

Tribunalul Olt (C-83/19)

Curtea de Apel Pite?ti (C-127/19)

Curtea de Apel Bucure?ti (C-195/19)

Deciding Court English translation

Olt Tribunal

Pite?ti Court of Appeal

Bucharest Court of Appeal

Registration N

C-83/19

C-127/19

C-195/19

Observation: the three cases form 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

28 March 2019

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 Juizes 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

Legal issue(s)

1. Legal issues: threats to the rule of law, judicial independence and the erosion of trust in the judiciary
2. Legal profession: prosecutors, judges
3. The cases concern issues related to judicial independence and trust in the judiciary as a result of the creation, structure and functioning, within the Public Prosecutor's Office, of the Section for the Investigation of Offences committed within 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 courts also raise 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 on the compatibility of such legislation with the general principles of the EU legal order.

Request for expedited/PPU procedures

Yes. Requests for expedited procedures were submitted by the national courts in all three 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

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
-

Facts of the case

All three cases concern the nature and legal effects of the MCV, as well as of the Commission reports based on it. Such issues are raised in the context of the establishing and functioning of the Section for the Investigation of Offences committed within the Judiciary ('SIOJ') and, more generally, to the rule of law and the principle of judicial independence.

Case C-83/19: Litigation based on a request for disclosure of information of public interest submitted by Asociația 'Forumul Judecătorilor din România' to Inspecția judiciară.

Case C-127/19: Action for annulment of two decisions of the general assembly of the SCM: on rules (1) on the appointment and removal of prosecutors in management roles and (2) on the appointment, continuation of functions and removal of prosecutors with executive roles in the SIOJ.

Case C-195/19: Litigation based on a complaint for abuse of office formulated against a judge, where the complaint was referred to the SIOJ based on the latter's special competence.

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 cases C-83/19 and C-127/19 are concerned, the Court found

all requests to be admissible. In case C-195/19, the Court stated that “the first question, the second question, to the extent it concerns Article 2 TEU and the third question are admissible”.

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 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 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.

Relation of the case to the EU Charter

The EU Charter was invoked in the questions submitted in cases C-127/19 and C-195/19, 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.

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.
-

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)

The national court in Case C-195/19 refers to, and engages with, the decision and the reasoning of the Romanian Constitutional Court concerning the sphere of application of the principle of supremacy of EU law. The referring court indicates that under the recent case-law of the Constitutional Court, EU law (and particularly, Decision 2006/928) could not prevail over national constitutional law and it emphasizes that there is, in this context, a risk that the national constitutional law thus interpreted by the Constitutional Court prevent the application of the ECJ's judgment in case C-195/19.

Additionally, 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 Juízes Portugueses, C-64/16, EU:C:2018:117 and Judgment of 15 July 1964, Costa v ENEL, 6/64, EU:C:1964:66. Such references are used in relation to questions concerning judicial independence and the principle of supremacy of EU law.

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

Three other preliminary references were submitted by Romanian courts in connection to similar topics (C-291/19, C-355/19 and C-397/19). 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

Sorina Doroga, National Association of the Romanian Bars

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

1. Request for preliminary ruling in Case C-83/19 – 05.02.2019:
<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=219844&pageIndex=0&doclang=EN&mode=req>
 2. Request for preliminary ruling in Case C-127/19 – 18.02.2019:
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=214635&pageIndex=0&doclang=EN>
 3. Request for preliminary ruling in Case C-195/19 – 28.02.2019:
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=214624&pageIndex=0&doclang=EN>
 4. 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=EN>
 5. Preliminary ruling - Judgment of the Court – 18.05.2021:
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=EN>
-