

Italy, Disciplinary chamber of the Supreme Judicial Council, n 31/2016, Judicial Council, 9 February 2016

Member State

 Italy

Topic

Freedom of expression

Sector

Freedom of Expression and Association; Disciplinary proceedings

Deciding Court Original Language

Sezione disciplinare del Consiglio Superiore della Magistratura

Deciding Court English translation

Disciplinary chamber of the Supreme Judicial Council

Registration N

31/2016

Date Decision

9 February 2016

ECLI (if available)

N/A

National Follow Up Of (when relevant)

No follow up

EU legal sources and CJEU jurisprudence

N/A

ECtHR Jurisprudence

Article 10 ECHR

Oberschlick v. Austria,

Jerusalem v. Austria,

Peruzzi v. Italy

Subject Matter

Disciplinary proceedings against a magistrate who, during a public event, made statements against another judge of his office capable to harm his honour and reputation

Legal issue(s)

Limitations to the freedom of expression of magistrates; balance between freedom of expression and the offence of defamation against another judge.

Request for expedited/PPU procedures

No

Interim Relief

No interim relief

National Law Sources

Article 1, 2 and 4 of Legislative Decree No. 109 of 2006; Article 5 of Legislative Decree No. 106 of 2006, Article 21 of the Italian Constitution

Facts of the case

During a public meeting held in October 2012, Mr. T.G., judge at the Court of Taranto made a series of statements, later reported by a newspaper, regarding the ongoing criminal case concerning the ILVA plant in Taranto and, in particular, the seizure orders issued by a magistrate of his own office and subject to his supervision. He claimed, inter alia, that the colleague magistrate took judicial measures out of “lack of balance” and a “strong mania of protagonism”, behind which lied personal interests, especially in the political career.

In 2014 the disciplinary section of the CSM found the judge T.G. guilty of the disciplinary offense under Articles 1(1) and 2(1)(d) of Legislative Decree n. 109/2006 – that is, serious misconduct towards the magistrates of his office in violation of the duties of fairness, discretion and balance – and sanctioned with admonition. He was instead acquitted of the disciplinary offense referred to in Article 4(1)(d) of Legislative Decree n 109/2006, namely, the offending the honour and reputation of another magistrate. In a nutshell, the disciplinary section had found that the facts amounted to the offense of serious misconduct against other magistrates but not to the offense of defamation against a colleague. However, the case was appealed before the Court of Cassation which quashed the decision and sent it back to the disciplinary section in a different composition. The Court of Cassation considered that the sanction of the admonition was too light and that there were flaws in the grounds of the judgment concerning the offence of defamation.

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

The disciplinary section reached a different solution from that of its first judgment and found inapplicable the exemption of the right to criticise, with the result that the conduct of judge T.G. amount to the crime of defamation and the related disciplinary offense under Articles 1(1), 2(1)(d) and 4(1)(d) of Legislative Decree Feb. 23, 2006, no. 109. The disciplinary section stressed that, even though Article 21 of the Italian Constitution and Article 10 ECHR are primarily aimed at guaranteeing the freedom of those expression that shock, shake or disturb, the limits to the right to criticize judicial institutions are much broader where the critique concerns criminal proceedings of public relevance.

The disciplinary section considered that the conduct of judge T.G. went beyond the limits of the right to criticize, especially since they were directed against a colleague from the same office. Although the right to criticize results in a subjective criticism, the latter must be based on a fact that corresponds to an at least reasonably putative truth in light of relevant sources or objective circumstances. Instead, the statements made by judge TG were completely detached from any technical evaluation and appeared the expression of personal disdain. Accordingly, such statements were likely to harm the honour and reputation of the colleague concerned. In this regard, the disciplinary section of the CSM found no contradiction between the above findings and the case law of the ECtHR. It referred to the judgments in *Oberschlick v. Austria*, *Jerusalem v. Austria*, and *Peruzzi v. Italy*. In those occasions, the ECtHR distinguished between statements of fact and value judgments, since the requirement to prove the truth can be fulfilled only by the former, but also stressed that even a value judgement must be supported by a sufficient factual basis without which it would be excessive.

Relation of the case to the EU Charter

The EU Charter was not invoked.

Relation between the EU Charter and ECHR

The disciplinary chamber of the CSM cited only Article 10 ECHR but not the Charter as EU law was not applicable to the case.

Use of Judicial Interaction technique(s)

Consistent interpretation with the ECHR

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The disciplinary section of the CSM does not engage in horizontal interaction, neither with other national judgments, nor with a foreign court.

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

The disciplinary chamber of the CSM referred to the case law of the Italian Court of Cassation concerning the limitations to the right to criticize (Court of Cassation, V criminal section, n. 3047/11 and Court of Cassation, III civil section n 617513/2011), on the fact that Article 21 of the Italian Constitution and Article 10 ECHR are primarily aimed at guaranteeing the freedom of those expression that shock, shake or disturb (Court of Cassation, V criminal section, n. 25138/2007); the protection of reputation of magistrates (Court of Cassation, V criminal section, n. 5638/2015),

the offence of defamation (Court of Cassation, V criminal section, n. 7715/2014 and n 47973/2014). Furthermore, the disciplinary chamber referred to the case law of the European Court of Human Rights regarding the protection of freedom of expression enshrined in Article 10 ECHR. First, it cited the ECtHR judgment in *Oberschlick v. Austria*, where a distinction was drawn between a statement of facts and value-judgments since only the existence of facts can be demonstrated, while the truth of value judgments is not susceptible of proof. Second, the disciplinary chamber referred to the ECtHR judgments in *Jerusalem v. Austria* and *Peruzzi v. Italy* where the ECtHR found that even in case of value judgments, the relevant statement must be based on a sufficient factual since even a value judgment without any factual basis to support it may be excessive.

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

The scope (presumably) pursued by the national court when using judicial interaction techniques was to find support in the case law of the ECtHR in order to strike the right balance between the freedom of expression and the offence of defamation.

Impact on Legislation / Policy

N/A

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

N/A

Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

The Disciplinary Chamber quoted the ECtHR judgment in *Oberschlick v. Austria*, *Jerusalem v. Austria*, and *Peruzzi v. Italy*. See point 6.3.

Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

N/A

Did the national court take into account national case law on fundamental rights?

The national court took into account the case law of the Court of Cassation on the right to criticize, freedom of expression of judges and the protection of reputation of magistrates. See point 6.3 above.

If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information

The judgment is the follow-up of an appeal before the Court of Cassation which had referred the case back to the disciplinary chamber in a different composition.

Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?

N/A

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

N/A

Connected national caselaw / templates

N/A

Other

N/A

[\(Link to\) full text](#)

Judgment is not publicly accessible online.

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

1. Disciplinary Chamber of the Supreme Judicial Council, judgment no. 163 of 24 October 2014
 2. Court of Cassation, United Chambers, judgment no. 17592 of 4 September 2015
 3. Disciplinary Chamber of the Supreme Judicial Council, judgment no. 31 of 9 February 2016
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