

**Romania – Court of Justice of the European Union (First Chamber) Case C-216/21 of 7 September 2023, ECLI:EU:C:2023:628 (request for a preliminary ruling from the Curtea de Apel Ploiești - Romania) – Asociația ‘Forumul Judecătorilor din România’ and YN v Consiliul Superior al Magistraturii**

Member State

 Romania

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Topic

Rule of law, independence of the judiciary

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Sector

Disciplinary proceedings; Judicial Ethics

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Deciding Court Original Language

Court of Justice of the European Union

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Deciding Court English translation

Court of Justice of the European Union

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Registration N

C-216/21

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Date Decision

07.09.2023

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ECLI (if available)

ECLI:EU:C:2023:628

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National Follow Up Of (when relevant)

The national case is not the direct follow-up of a CJEU or ECtHR decision.

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EU legal sources and CJEU jurisprudence

Article 2, 3, 4(2) and (3) of the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union (OJ 2005 L 157, p. 11) ('the Treaty of Accession'), which was signed on 25 April 2005 and entered into force on 1 January 2007; Article 37 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 (OJ 2005 L 157, p. 203)

Judgment of 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034  
C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 ?i C-397/19, EU:C:2021:393,  
Judgment of 29 March 2022, Getin Noble Bank, C-132/20, EU:C:2022:235,  
Judgments of 20 April 2021, Repubblika, C-896/19, EU:C:2021:311, paragraphs 63 and 64, and of 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034,  
Judgment of 18 May 2021, Asocia?ia 'Forumul Judec?torilor din România' and Others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393,  
Judgment of 11 May 2023, Inspec?ia Judiciar?, C-817/21, EU:C:2023:391

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#### ECtHR Jurisprudence

The ECHR jurisprudence was not referred to in this case.

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#### Subject Matter

rule of law – independence of the judiciary – primacy of EU law - national legislation altering the scheme for the promotion of judges – disciplinary proceedings

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#### Legal issue(s)

The CJEU judgment refers to the conformity of a specific, newly adopted, national procedure for the promotion of judges to the supreme court with judicial independence and rule of law requirements, which was raised before a national court of Romania by a judges' association.

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#### Request for expedited/PPU procedures

YES

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#### Interim Relief

No

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#### National Law Sources

Article 43 of Law No 303/2004 on the rules governing judges and public prosecutors of 28 June 2004 (Romania's Official Gazette, Part I, No 826 of 13 September 2005), in the version prior to the entry into force, on 18 October 2018, of Legea nr. 242/2018 (Law No 242/2018) of 12 October 2018 (Monitorul Oficial al României, Part I, No 868 of 15 October 2018); Law no. 242/2018 amending Articles 43 to 46 of Law no. 303/2004 and inserting Articles 43 ind. 1 to 46 ind. 3; Article 463(2) and Article 106(f) of Law No 303/2004, as amended

The Regulation on the organisation and conduct of competitions for the promotion of judges, approved by SCM

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### Facts of the case

In 2019, the Superior Council of Magistracy (SCM) of Romania approved a national reform regarding the procedure for the promotion of Romanian judges to higher courts. The 'Forum of Judges of Romania' Association and a private individual contested that reform before the Court of Appeal Ploieşti (Romania). The request has been made in proceedings between the Forum of Judges of Romania' Association and YN, on the one hand, and the Superior Council of Magistracy, Romania, on the other, concerning the lawfulness of Decision No 1348 of 17 September 2019 of the Section for Judges of the SCM approving the Regulation on the organisation and conduct of competitions for the promotion of judges ('Decision No 1348').

The applicants in the main proceedings argue that replacing the old written exams with an assessment, by (i) the president and (ii) members of the higher court concerned, of candidates' work and conduct makes the promotion scheme subjective and discretionary. The applicants also argued that, by granting predominant power to the presidents of the courts of appeal, this new procedure would lead to the emergence of hierarchical subordination attitudes towards judges from higher courts who are called upon to evaluate the activity of judges applying for promotion.

The Court of Appeal, Ploieşti questioned the Court of Justice as to the compatibility of such a reform with the principle of the independence of judges, by asking the following questions:

1. Must the Cooperation and Verification Mechanism (CVM), established by Commission Decision 2006/928/EC of 13 December 2006, (1) 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 of Justice of the European Union? Do the terms, nature and duration of the CVM established by Commission Decision 2006/928/EC of 13 December 2006 fall within the scope of the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005? Are the requirements laid down in the reports prepared in accordance with the CVM binding on the Romanian State?

2. Can the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights, as well as in the case-law of the Court of Justice of the European Union, with reference to Article 2 TEU, be interpreted as also applying to procedures for the promotion of judges in office?

3. Is that principle infringed by the introduction of a system for promotion to a higher court which is based solely on a brief assessment of activities and conduct that is carried out by a board composed of the President of the court responsible for judicial review and of the judges of that court which, in addition to the periodic assessment of judges, separately carries out both assessments of judges for promotion purposes and the judicial review of judgments delivered by those judges?

4. Is the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights, as well as in the case-law of the Court of Justice of the European Union, with reference to Article 2 TEU, infringed if the Romanian State undermines the foreseeability and legal certainty of EU law by accepting the CVM and reports prepared in accordance with that mechanism and adhering to

them for more than 10 years and then, with no forewarning, changing the procedure for the promotion of judges to executive positions, contrary to CVM recommendations?

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

The Court ruled that a piece of national legislation relating to the scheme for the promotion of judges is required to ensure compliance with the principle of the independence of judges. In that context, the Court also ruled that EU law does not preclude, in principle, the promotion of judges to a higher court being based on an assessment, by a board composed of (i) the president and (ii) members of that higher court, of their work and conduct. However, the substantive conditions and procedural rules governing the adoption of decisions relating to promotion must be such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the independence and the impartiality of the judges concerned, once they have been promoted.

The Court also noted that the procedure for the promotion of judges serving in the lower courts in Romania consists of two stages. The first stage, which enables a judge to be promoted 'on the spot' without a change of post, is based on a written competitive procedure designed to assess both the theoretical knowledge and the practical skills of candidates. The second stage, known as 'effective promotion', enables candidates who have already been promoted 'on the spot' to be effectively assigned to a higher court.

It is only in the context of that second stage that the assessment is to be carried out by a board composed, at the level of each court of appeal, of (i) the president of that court and (ii) four of its members, who are to be appointed by the Section for Judges of the SCM.

Even if the reform of the second stage is, according to the Ploieşti Court of Appeal, likely to lead to power being concentrated in the hands of certain members of the assessment board and, in particular, its president, it nevertheless cannot be regarded as being, as such, incompatible with EU law.

The Court deemed that it is for the national court, namely the Ploieşti Court of Appeal in our case, to ascertain whether that concentration of power, taken in isolation or combined with other factors, is likely to determine that, in practice, the persons influence the decisions of the judges concerned, and thus create a lack of independence or an appearance of partiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals. According to the Court, the case file does not contain any materials capable of establishing that that potential concentration of power could, in itself, confer, in practice, such an ability to influence; nor does it point to any other factor which could, combined with that concentration of power, produce effects which would be such as to give rise to doubts, in the minds of individuals, as to the independence of the judges who have been promoted.

Regarding the substantive conditions governing the adoption of decisions relating to effective promotion and, in particular, the assessment of candidates' work and conduct, that assessment is to be based on criteria which appear to be relevant for the purpose of assessing the professional merits of those candidates. Those criteria seem to be the subject of objective assessments based on verifiable information.

As for the procedural rules governing the adoption of those decisions, they also do not appear to be such as to jeopardise the independence of the judges who have been promoted. Indeed, the assessment board must provide reasons for its findings and the candidate concerned may contest those findings before the Section for Judges of the SCM.

Considering the above, the CJEU, after establishing its jurisdiction to rule and the admissibility of the questions, deemed that the guarantees of independence and impartiality imposed based on EU law postulate the existence of some norms, especially regarding the composition of the court, which would allow any removal of legitimate doubt regarding external elements or its neutrality,

including interventions related to their promotion.

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### Relation of the case to the EU Charter

The EU Charter was invoked as part of the preliminary question no. 2 (Can the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights, as well as in the case-law of the Court of Justice of the European Union, with reference to Article 2 TEU, be interpreted as also applying to procedures for the promotion of judges in office?) and question no. 4 (Is the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights, as well as in the case-law of the Court of Justice of the European Union, with reference to Article 2 TEU, infringed if the Romanian State undermines the foreseeability and legal certainty of EU law by accepting the CVM and reports prepared in accordance with that mechanism and adhering to them for more than 10 years and then, with no forewarning, changing the procedure for the promotion of judges to executive positions, contrary to CVM recommendations?)

The EU Charter was referred to considering the relevance of its text to the matters being decided. The EU Charter was used as a legally binding parameter.

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### Relation between the EU Charter and ECHR

The ECHR was not referred to in this case.

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### Use of Judicial Interaction technique(s)

preliminary reference

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

Apart from invoking the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, as being a general principle of EU law stemming from the constitutional traditions common to the Member States, the CJEU did not make a constitutionality review and did not engage with an assessment of other national judgements, since the matter of the case did not impose such an analysis.

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

Considering the specifics of this case, in which the analysis was to be performed in respect to a recent amendment of national legislation, the national court did not make an assessment of other national courts or of European supranational courts' case law.

References were made to the settled CJEU case law.

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

The referring court used the preliminary ruling mechanism as a strategic litigation tool, in order to draw attention to the illicit nature of the new national amendments of the Law no. 303/2004 regarding the promotion of magistrates, which would be likely to affect their independence (see par. 78: "Furthermore, the referring court notes that the new procedure is likely to lead to power being concentrated in the hands of certain members of that assessment board, and, in particular,

the presidents of the courts of appeal, which is likely to give those members decisive influence over the outcome of the procedure for effective promotion. This could be the case if, inter alia, those members are shown to be combining several duties likely to affect the professional life and career of candidates for promotion, for example by being responsible for both the periodic assessment of their work and the review, on appeal, of the judgments delivered by them”). The scope pursued by the national court when using judicial interaction techniques was, most likely, to preserve the independence of the judiciary and to grant primacy of EU law at the national level, so that to avoid that a new national legal disposition hinders the independence of the judiciary.

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### Impact on Legislation / Policy

The legislative framework has been substantially amended after the CJEU Judgement. Law no. 303/2004 has been repealed and replaced with Law no. 303/2022, where certain provisions were amended, as a reaction prompted also by the decision of the CJEU. Additionally, by Decision no. 1434/2023, issued by the defendant Superior Council of Magistracy – Section for Judges, the Regulation from 27.04.2023 regarding the competition for the promotion of judges was adopted, published in the Official Gazette no. 376 from 03.05.2023, currently in force.

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

N/A.

The national referring court, Curtea de Apel Ploiesti, rejected the application of Asociatia “Forumul Judecatorilor din Romania” as lacking object. This decision was issued, considering that the administrative act challenged, namely, the initial Regulation regarding the competition for the promotion of judges, was repealed by the end of the national trial no. 714/42/2019 and a new Regulation from 27.04.2023 regarding the competition for the promotion of judges was adopted, published in the Official Gazette no. 376 from 03.05.2023.

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### 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?

Since the national referring court issued a solution based on the procedural incident of the lack of object considering that the Regulation which was subject to its analysis was already repealed, the national court did not quote case law of the CJEU/ECtHR in its motivation. Due to the same grounds, the national court did not quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports and did not take into account national case law on fundamental rights.

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

N/A

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

N/A

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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

Pursuant to national procedural law, the judgment of the national court subsequent to the CJEU judgment was final.

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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?

Pursuant to national procedural law, the judgment of the national court subsequent to the CJEU judgment was final.

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

The CJEU preliminary ruling did not represent a change of approach with respect to previous case law prompted by the decision of the CJEU, since it went in line with the previous decisions generated by the rule of law referrals triggered in Romania by the Asocia?ia ‘Forumul Judec?torilor din România’.

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Connected national caselaw / templates

N/A

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Other

N/A

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(Link to) full text

<https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62021CA0216>

<https://curia.europa.eu/juris/document/document.jsfdocid=279147&mode=req&pageIndex=1&dir=&occ=first>

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

N/A

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