Case C-547/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

15 July 2019

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

13 May 2019

Applicants:

CY

Asociația 'Forumul Judecătorilor din România'

Defendants:

Inspecția Judiciară

Consiliul Superior al Magistraturii

Înalta Curte de Casație și Justiție

Subject matter of the main proceedings

Actions brought by the Asociația Forumul Judecătorilor din România and by CY against the order of 28 March 2018 made by the Secția pentru judecători în materie disciplinară (Chamber for judges hearing disciplinary matters) of the Consiliul Superior al Magistraturii (Superior Council of Magistracy) ('the CSM') dismissing the application to intervene submitted by the Asociația Forumul Judecătorilor din România in support of CY, and action brought by CY against the judicial decision of 2 April 2018 of that disciplinary tribunal, which upheld the disciplinary action brought against her by the Inspecția Judiciară (the Judicial Inspection) and imposed on her the disciplinary penalty of exclusion from the judiciary

Subject matter and legal basis of the request for a preliminary ruling

An interpretation of Article 2 TEU, Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union is requested, pursuant to Article 267 TFEU

Question referred

Must Article 2 of the Treaty on European Union, Article 19(1) thereof and Article 47 of the Charter of Fundamental Rights of the European Union be interpreted as precluding the intervention of a constitutional court (a body which is not, under national law, a judicial institution) as regards the way in which a supreme court has interpreted and applied infra-constitutional legislation in the activity of establishing panels hearing cases?

Provisions of EU law relied on

Article 2 TEU and Article 19(1) TEU

Article 47 of the Charter of Fundamental Rights of the European Union

Provisions of national law relied on

Constituția României (Romanian Constitution), Title V, headed 'Curtea Constituțională' (Constitutional Court) (Articles 142 to 147) and Section 1 of Chapter VI, entitled 'Autoritatea judecătorească' (Judiciary), of Title III, headed 'Autoritățile publice' (Public authorities) (Articles 124 to 126)

Legea nr. 317/2004 privind Consiliul Superior al Magistraturii (Law No 317/2004 on the Superior Council of Magistracy), republished in the *Monitorul Oficial al României* (Official Gazette of Romania), Part I, No 628 of 1 September 2012, as subsequently amended and supplemented, Articles 1, 3 and 37 to 39, which provide that the CSM is to be the guarantor of judicial independence and lay down the structure and functions of the CSM

Legea nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 303/2004 on the rules governing judges and prosecutors), republished in the *Monitorul Oficial al României*, Part I, No 826 of 13 September 2005, as subsequently amended and supplemented,

– Article 98, which provides that judges and prosecutors are to be liable to disciplinary action for deviations from their duties and acts which compromise the reputation of the judiciary;

– Article 99(o), under which failure to comply with the provisions on the random allocation of cases constitutes a disciplinary offence;

– Article 100(e), which provides for exclusion from the judiciary as one of the disciplinary penalties which may be imposed on judges and prosecutors;

– Article 101, which provides that the penalties laid down in Article 100 are to be imposed by chambers of the CSM.

Legea nr. 304/2004 privind organizarea judiciară (Law No 304/2004 on judicial organisation), republished in the *Monitorul Oficial al României*, Part I, No 827 of 13 September 2005, as subsequently amended and supplemented,

– Article 29, which sets out the functions of the Colegiul de conducere (the Governing Council) of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) ('the ICCJ'), which include approving the Regulamentul privind organizarea și funcționarea administrativă (Regulation on organisation and administrative functioning);

– Articles 32 and 33, relating to five-judge panels, in their subsequent versions, analysed by the referring court in the section relating to the grounds for the reference.

Regulamentul privind organizarea și funcționarea administrativă a ICCJ (Regulation on the organisation and administrative functioning of the ICCJ), republished in the *Monitorul Oficial al României*, Part I, No 1076 of 30 November 2005, as subsequently amended and supplemented, Articles 28 and 29, relating to five-judge panels and the procedure for designating judges in that context

Decision No 685 of the Constitutional Court of Romania of 7 November 2018, published in the *Monitorul Oficial al României*, Part I, No 1021 of 29 November 2018

Succinct presentation of the facts and the main proceedings

1 By judicial decision of 2 April 2018, the Chamber for judges hearing disciplinary matters of the CSM upheld the disciplinary action brought by the Judicial Inspection against CY, a judge at the Curtea de Apel București (Court of Appeal, Bucharest), for having committing the disciplinary offence referred to in Article 99(o) of Law No 303/2004, and imposed on her the penalty of exclusion from the judiciary.

2 The disciplinary tribunal ruled that CY — who, at a hearing on 22 January 2016, when she was designated to take part in a hearing before a panel, even though the judicial investigation in the case under consideration had been initiated by the court conducting the proceedings since the hearing of 30 October 2015 (the defendants having been heard and the taking of evidence having been authorised), granted a further hearing, thus unlawfully deliberating on the case, ordering that further evidence be taken, the legal classification be changed, and additional

statements be taken from defendants and witnesses, granting a hearing of oral argument and, finally, giving a judgment at first instance — had committed the disciplinary offence referred to in Article 99(o) of Law No 303/2004, in that there had been serious infringements of the provisions relating to the random allocation of cases.

3 By order made on 28 March 2018, the disciplinary tribunal dismissed as inadmissible the application to intervene in support of CY submitted by the Asociația Forumul Judecătorilor din România on the grounds that no vested and current interest in bringing proceedings had been demonstrated.

4 The Asociația Forumul Judecătorilor din România and CY brought actions against the order of 28 March 2018, and CY brought an action against the judicial decision of 2 April 2018; those cases were joined by the referring court, the ICCJ.

5 Decision No 685 of the Constitutional Court of 7 November 2018 ('Decision No 685/2018') upheld the action brought by the Prime Minister of the Government of Romania and established the existence of a judicial conflict of a constitutional nature between the Parliament, on the one hand, and the ICCJ, on the other, created by the decisions of the Governing Council of the ICCJ, starting with Decision No 3/2014, according to which only four of the five members of the five-judge panels were designated by drawing lots, contrary to Article 32 of Law No 304/2004, as amended and supplemented by Legea nr. 255/2013 (Law No 255/2013). It was ordered that the ICCJ designate, as soon as possible, all the members of the five-judge panels by drawing lots.

6 Following that decision, on 9 November 2018 all the members of the five-judge panels for 2018 were designated by drawing lots, pursuant to Decision No 137 of the Governing Council of the ICCJ of 8 November 2018.

7 Following the publication, on 29 November 2018, of Decision No 685/2018, rules for 'ensuring compliance with the requirements laid down in [Decision No 685/2018]' were adopted by judicial decision No 1367 of the Chamber for judges of the CSM of 5 December 2018.

8 In order to comply with judicial decision No 1367 of the Chamber for judges of the CSM of 5 December 2018, the panel seised of the case, in the composition established by Decision No 137 of the Governing Council of the ICCJ of 8 November 2018, ordered, by order of 10 December 2018, that the case be removed from the register with a view to its random allocation to a panel, whose composition will be established, by drawing lots, in accordance with the rules approved by the CSM by means of that judicial decision.

9 On 13 December 2018 the drawing of lots for the designation of the members of the five-judge panels for 2018 took place at the seat of the ICCJ, pursuant to judicial decision No 1367 of the Chamber for judges of the CSM of 5 December 2018 and the file of the present case was allocated randomly to Five-Judge

Panel — Civil 3 — 2018 (the panel making the reference for a preliminary ruling).

10 In the joined cases, CY raised the following objections: the composition of the panels hearing cases was unlawful (considering that the file should have been remitted to a panel established for 2019); judicial decisions No 1367 of 5 December 2018 and No 1535 of 19 December 2018 of the Chamber for judges of the CSM were unlawful, as were Decisions No 2/2019, No 157/2018 and No 153/2018 of the Governing Council of the ICCJ; the representation of the Judicial Inspection was unlawful; and the provisions of Article 32 of Law No 304/2004 and Ordonanța Guvernului nr. 77/2018 (Government Order No 77/2018) were unconstitutional.

11 On 11 February 2019 CY added to the case file a request for a reference to be made to the Court of Justice for a preliminary ruling.

The essential arguments of the parties to the main proceedings

12 CY claims that the Constitutional Court exceeded its jurisdiction, infringing her right to a fair trial. If the Constitutional Court had not intervened in the activity of the supreme court, the principle of the continuity of the panel hearing the case would not have been infringed and the case would have been correctly assigned to one of the five-judge panels established, pursuant to Article 32 of Law No 304/2004, in 2019.

13 Furthermore, by Legea nr. 207/2018 (Law No 207/2018) amending Law No 304/2004, the national legislature established that panels seised of cases concerning the accountability of magistrates are to consist exclusively of judges specialised in that field. The participation of judges who have not acquired specialisation in the field of the accountability of magistrates constitutes an infringement of law, with the result that a tribunal is established which does not comply with the safeguards laid down by law.

14 Through a series of administrative decisions of the CSM it was decided, on the one hand, to establish three five-judge panels and, on the other, to continue the existence, including during 2019, of the panels determined by drawing lots on 13 December 2018, even though national law provides that, for the current year, the composition of five-judge panels will be established by drawing lots at the beginning of the year. The continuation of the activity of a panel hearing cases beyond the time limit laid down by law constitutes an infringement of Article 6(1) of the [European] Convention [on Human Rights] and, consequently, Article 47 of the Charter, with repercussions on Article 2 TEU.

15 By imposing certain conduct on the supreme court, the CSM, which is an administrative body, infringed the principles of the rule of law by compromising the independence and impartiality in the enforcement of justice which must always be observed by a court provided for by law.

Succinct presentation of the reasons for the reference

16 In the introduction to the grounds for the reference, the referring court sets out the development of the provisions of law relating to five-judge panels.

17 Five-judge panels were introduced for the first time in national legislation by Legea nr. 202/2010 (Law No 202/2010), which amended Articles 32 and 33 of Law No 304/2004. These panels hearing criminal and non-criminal matters were organised separately from the chambers of the ICCJ, performing the role of a review tribunal within the supreme court. The members of the panel were designated by the President of the ICCJ at the beginning of each year and the panel was chaired by the President of the ICCJ, the Vice-President or a president of a chamber.

18 By Decision No 24 of 25 November 2010, the Governing Council of the ICCJ laid down, by adapting the Regulation on the organisation and administrative functioning of the ICCJ, a rule under which the designation of the other four members of the five-judge panel, with the exception of the chair, is not to be carried out on a discretionary basis, but randomly by drawing lots.

19 Law No 255/2013 amended Article 32 of Law No 304/2004 on judicial organisation, establishing in law the rule on drawing lots for members of five-judge panels.

20 In the context of obvious discrepancies between Article 32(5) of Law No 304/2004, under which 'the five-judge panel shall be chaired by the President or by the Vice-President [of the ICCJ], where he forms part of the panel, under paragraph 4, by the president of the Criminal Chamber or by the eldest member, as appropriate', and Article 33(1) thereof, which provided that 'the President [of the ICCJ] or, in his absence, the Vice-President, shall chair the Combined Chambers, the five-judge panel, and any panel within the chambers, where he participates in the proceedings', the Governing Council of the ICCJ adopted Decision No 3 of 28 January 2014 amending and supplementing the Regulation on the organisation and administrative functioning of the ICCJ which established that *five-judge panels are to be chaired, as appropriate, by the President, the Vice-Presidents, the president of the Criminal Chamber or the eldest member*, and the drawing of lots, in the case of those panels, is to relate only to the other four members.

21 Law No 207/2018, which amended Article 32 of Law No 304/2004, maintained the rule under which the Governing Council of the ICCJ approves the number and composition of five-judge panels at the beginning of each year and removed the previous imprecisions by providing that the drawing of lots concerns all the members of a five-judge panel.

22 Following this legislative amendment, on 4 September 2018 the Governing Council of the ICCJ adopted Decision No 89/2018, stating that '*analysing the provisions of Article 32 of Law No 304/2004 […], regarding the activity of five-*

judge panels, it finds, by a majority, that the provisions of that new law constitute rules on organisation which are aimed at court formations with specific regulations, established "at the beginning of each year" and, in the absence of transitional rules, become applicable as from 1 January 2019'.

23 This is the context in which the Constitutional Court, which was seised by the Prime Minister of the Government of Romania on 2 October 2018, adopted Decision No 685/2018, in which it ruled, inter alia, that '*in the light of the unlawful conduct, in constitutional terms, of the* [ICCJ], *through the Governing Council, which is not such as to offer guarantees as to the proper restoration of the legal framework for the functioning of five-judge panels, it is incumbent on the Chamber for judges of the* [CSM], *on the basis of its constitutional and legal prerogatives […] to identify the solutions, on the level of principle, as regards the statutory composition of panels hearing cases and to ensure the implementation of those solutions*'.

24 Following that decision, the CSM adopted judicial decisions No 1367 of 5 December 2018 and No 1535 of 19 December 2018. Pursuant to those judicial decisions, the ICCJ drew lots for new panels hearing cases for 2018, and their activity also continued in 2019 even though no measure had been ordered by the end of 2018 in respect of the cases assigned, since the case-law of the supreme court in existence until then, according to which, where a panel hearing cases, in the composition established for a year, has not ordered any measure in a particular case by the end of the year, the composition of that panel is to be changed and the case is to be allocated to the judges chosen by the drawing of lots for the new calendar year, had been abandoned.

25 The referring court states that in the present case various problems arise as regards the compatibility of the Constitutional Court's intervention with Articles 2 and 19 TEU and Article 47 of the Charter.

26 A first problem is the status of the Constitutional Court and its position in the State authorities' architecture. The Constitutional Court is not a judicial institution since it does not form part of the judiciary and the political factor plays an important role in the appointment of its members since Article 142(3) of the Romanian Constitution provides that, of the nine members of the Constitutional Court, '*three judges shall be appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania*'. Therefore, within the body required to rule on the existence or otherwise of a constitutional conflict between the judiciary and the legislature, six members were appointed by the legislature, whilst the judiciary made no contribution to the establishment of the authority that resolved the conflict.

27 A second problem raised by the procedure for establishing whether or not there is a judicial conflict of a constitutional nature with the legislature relates to the persons who may initiate that procedure. Under Article 146(d) of the Romanian Constitution, the procedure is to be initiated only at the request of the President of

Romania, one of the presidents of the two houses, the Prime Minister or the President of the CSM.

28 Given the extremely fragile distinction between the unlawfulness of an act and a conflict of a constitutional nature with the legislature, the premises exist for creating, in relation to a limited category of legal entities, administrative actions or legal remedies which parallel those provided for within judicial institutions.

29 It could be argued that, in the present case, there are public authorities pursuing a public interest but, on the other hand, it should be noted that, with the exception of the President of the CSM, the other persons involved are bodies of a political nature. By combining this aspect with the political involvement in the designation of members of the Constitutional Court, the premises are created for exploiting this loophole to intervene in justice for political purposes or in the interests of politically influential persons. The referring court points out, in this context, that the Prime Minister's intervention, implemented by Decision No 685/2018, came at a time when the president of the Chamber of Deputies, who was also the president of the ruling party, was the defendant in criminal proceedings registered with a five-judge panel established to hear criminal cases.

30 A third problem concerns the distinction between the '*unlawfulness*' of an act or intervention and a '*conflict of a constitutional nature*' between the judiciary and the legislature. According to the case-law of the Constitutional Court, a '"judicial conflict of a constitutional nature", which is not defined by the Constitution or legislation, between the judiciary and the legislature' presupposes specific acts or actions by which one or more authorities assume powers, functions or competences which, under the Constitution, belong to other public authorities, or the omission of public authorities consisting in their declining jurisdiction or refusing to carry out certain acts which fall within their obligations.

31 The referring court considers the way in which these general considerations apply to a judicial conflict of a constitutional nature with the legislature to be problematic. As part of their judicial or administrative activities, judicial institutions are constantly called upon to interpret and apply the legislative acts adopted by the legislature. However, the lack of consistency between the interpretation provided by the courts and the will of the legislature forms the substance of the concept of 'unlawfulness'. A judicial decision contrary to the law is an unlawful decision and an administrative act contrary to the law is an unlawful act, and not the expression of a 'judicial conflict of a constitutional nature with the legislature'. The relief available in such cases is the use of legal remedies or, where appropriate, the bringing of an administrative action.

32 The Constitutional Court criticises the ICCJ for the fact that, both at the time of the adoption of Decision No 3/2014 and at the time of the adoption of Decision No 89/2018, the Governing Council assumed interpretative functions relating to judicial activity — functions belonging to panels hearing cases — and also that the interpretation of the law provided by the Governing Council was contrary to

the will of the legislature. In the view of the Constitutional Court, that action constitutes an abuse by the supreme court.

33 The referring court notes that, on the one hand, it is difficult to understand the assessment that the Governing Council assumed interpretative functions belonging to panels hearing cases. It is evident that, given that the Governing Council was, by law, involved in establishing five-judge panels, that task could not be carried out except on the basis of an interpretation of the relevant provisions of law. It was not possible to leave the interpretation of Article 32 of Law No 304/2004 to the discretion of panels hearing cases since, chronologically, it was necessary first to establish those panels, a task which fell to the Governing Council.

34 The Governing Council did not have, objectively, a choice as to whether or not to interpret the provisions of Article 32 of Law No 304/2004, but merely a choice between the various interpretations of that legislative text.

35 As regards the interpretation for which the Governing Council opted with respect to Decision No 3/2014, it is not possible to deny the imprecision of Article 32(5), in the version laid down in Law No 255/2013, a literal interpretation of which was not tenable since it would have created a different system for the situation of the President and Vice-President of the ICCJ, on the one hand, and the situation of the president of the Criminal Chamber and the eldest member, on the other. The fact that, in a context where the rule was not clear and required harmonisation of contradictory provisions, the supreme court, through the Governing Council, opted for a conservative interpretation, which favoured an interpretation of the law closer to the pre-existing legislative solution, cannot constitute a deliberate act of denying the will of the legislature.

36 Moreover, the Constitutional Court merely countered the interpretation given by the supreme court with its solution of harmonising the unclear provisions contained in the law, by extending also to the president of the Criminal Chamber the clarification which the legislature made only in respect of the President and Vice-President of the ICCJ.

37 After stating that the interpretation of Article 32 of Law No 304/2004, in the version in force after the adoption of Law No 207/2018, accepted by the Constitutional Court is not self-evident, the referring court emphasises that there is nothing which would give rise to the idea of a 'position of force' of the supreme court and 'systematic opposition' to the will of the legislature. The mere fact that, in a context in which the legislature has not intervened in 4 years to clarify its will, the supreme court has acted in line with the initial interpretation cannot be confused with a *systematic* denial of the will of the legislature.

38 The referring court makes these clarifications since the Constitutional Court based the distinction between unlawfulness and a conflict of a constitutional nature with the legislature on the assumption that there had been a deliberate and systematic breach of the will of the legislature. The Constitutional Court refers to 'a

systematic positioning of the [ICCJ] on basic assumptions contrary to the principle of the separation of the powers of the State'.

39 What is sought from the Court of Justice by means of the reference for a preliminary ruling is, first, an interpretation of the concept of the 'rule of law' underlying Article 2 TEU, with regard to Article 19 TEU and Article 47 of the Charter, by which it is ascertained whether, in a situation such as that in the present case, the activity of the supreme court of a Member State may be reviewed and sanctioned by means of the intervention of a body such as the Constitutional Court of Romania.

40 Furthermore, given that the Constitutional Court, although it is not part of the system of judicial institutions and does not have judicial functions, ordered the transfer of competences which, under the law, belonged to the ICCJ, from that judicial institution to the CSM, the referring court states that an arbitrary intervention by which a review of the lawfulness of the ICCJ's activity is carried out — a review which replaces lawful judicial procedures (administrative actions, procedural objections raised in legal actions, and so on) — may have a negative impact not only on judicial independence, but also on the foundations of the rule of law, depending on the meaning which the Court of Justice of the European Union attaches to that concept underlying Article 2 TEU.