

Case C-291/19**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:**

9 April 2019

Referring court:

Curtea de Apel Braşov (Romania)

Date of the decision to refer:

28 March 2019

Appellant:

SO

Respondents:

TP and Others

Subject matter of the main proceedings

Complaint filed with the Curtea de Apel Braşov (Court of Appeal, Braşov), Criminal Division, by the appellant SO against the orders by which the public prosecutor handling the case and, respectively, the chief public prosecutor of the directorate within the public prosecutor's office attached to the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice) (PÎCCJ) — Direcţia Naţională Anticorupţie (National Anti-Corruption Directorate, 'the DNA') — Secţia de combatere a infracţiunilor asimilate infracţiunilor de corupţie ('Section for combating offences related to corruption offences'), ordered the file be closed and, respectively, upheld the decision to close the file on criminal complaints by which the appellant reported that offences had been committed by various prosecutors and judges and by lawyer.

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

Pursuant to Article 19(3)(b) TEU and Article 267 TFEU, the Curtea de Apel Braşov (Court of Appeal, Braşov) asks for an interpretation of Commission

Decision 2006/928/EC of 13 December 2006, Article 2 TEU, Article 4(3) TEU and the principle of judicial independence, enshrined in the second part of Article 19(1) TEU and in Article 47 of the Charter of Fundamental Rights of the European Union, and of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

Questions referred

1. Must the Cooperation and Verification Mechanism (CVM), established by European Commission Decision 2006/928/EC of 13 December 2006, 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?

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 Cooperation and Verification Mechanism (CVM) and with the recommendations made by the Venice Commission and the Council of Europe's Group of States against Corruption?

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 Cooperation and Verification Mechanism (CVM), established by Commission Decision 2006/928/EC of 13 December 2006, 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 of Fundamental Rights of the European Union, as interpreted by the case-law of the Court of Justice of the European Union (judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117), preclude the establishment of the section for the investigation of offences committed within the Judiciary, within the prosecutors office attached to the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), in the light of the rules governing the appointment/removal of prosecutors as members of that section, the rules governing the exercise of functions within that section and the way in which jurisdiction is established, in connection with the limited number of positions in that section?

5. Does [the second paragraph of] Article 47 of the Charter of Fundamental Rights of the European Union relating to the right to a fair trial by means of a hearing within a reasonable time, preclude the establishment of a section for investigating offences committed within the judiciary, within the prosecutor's office attached to the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), in the light of the rules governing the exercise of functions

within it and the way in which jurisdiction is established, in connection with the limited number of positions in that section?

Provisions of EU law relied on and the EU case-law relied on

Articles 2, 4(3) and 19(1) TEU

Articles 37 and 38 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

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

Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption

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, which, after making it clear that the steps taken to achieve the objectives of the Cooperation and Verification Mechanism ('the CVM') 'can only be fully assessed by looking at whether their intended effect is felt in practice, and whether they can be considered to be embedded in the legal and institutional framework of Romania and to be irreversible', adds that '[u]nderlying issues like questioning of judicial independence and the authority of court decisions, and sometimes specific attempts to reverse reforms, have inevitably slowed the pace of progress towards the objectives of the CVM'

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, point 3.1 'Benchmark One: Judicial independence and Judicial reform', in Chapter 3 'Assessment of progress on the fulfilment of the recommendations set out in the January 2017 report' and Chapter 4 'Conclusion'

Judgment of the Court of Justice of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), paragraphs 42 to 44

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), paragraph 48

Judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448).

Provisions of national law relied on

Articles 175 and 297 of the Codul penal (Criminal Code) and Articles 339, 340 and 341 of the Codul de procedură penală (Code of Criminal Procedure),

provisions the content of which is set out in the request for a preliminary ruling in Case C-195/19.

Legea nr. 78/2000 pentru prevenirea, descoperirea și sancționarea faptelor de corupție (Law No 78/2000 on the prevention, investigation and punishment of acts of corruption, ‘Law No 78/2000’), Article 13², under which, in the case of offences of abuse of office, where a civil servant has gained undue advantage for himself or others, the specific limit on the sentence is to be increased by a third.

Legea nr. 304/2004 privind organizarea judiciară (Law No 304/2004 on organisation of the judiciary, ‘Law No 304/2004’), Articles 88¹ to 88⁹, the provisions of which are set out in the request for a preliminary ruling in C-195/19, and Articles 88¹⁰ and 88¹¹ on the performance of duties within the Secția pentru investigarea infracțiunilor din justiție (Section for the Investigation of Offences in the Judiciary, ‘the SIIJ’), by deploying officials and police officers under the direct command and direct control of the Section’s public prosecutor and, respectively, installing in the directorate specialists in the field of processing and use of information in the fields of economics, finance, customs, IT and other fields; the final two articles were incorporated by Ordonanța de urgență a Guvernului nr. 12/2019 (Government Emergency Order No 12/2019).

Ordonanța de urgență a Guvernului nr. 7/2019 (Government Emergency Order 7/2019) which, inter alia, amends and supplements Legea nr. 304/2004. That order incorporates a new paragraph into Article 88¹, paragraph 6, under which, in the case of offences within the jurisdiction of the SIIJ, ‘hierarchically superior prosecutor’ is to mean the chief public prosecutor of the Section, including in the case of decisions adopted before the latter is operational. That order amends Article 88⁷, by providing for, in paragraph 1(d), a new power of the SIIJ, which consists in bringing or withdrawing actions in cases within the Section’s jurisdiction, including cases pending before the courts or settled definitively before it becomes operational.

Ordonanța de urgență a Guvernului nr. 90/2018 privind unele măsuri pentru operaționalizarea SIIJ (Government Emergency Order No 90/2018 on making the SIIJ operational), Articles I and II, provisions the content of which is set out in the request for a preliminary ruling in Case C-195/19.

Decision No 3 of 26 February 2019 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), given in proceedings relating to the settlement of issues of law, according to which, in interpreting the provisions of Article 88⁸(2) of Law No 304/2004, participation in hearings in cases within the jurisdiction of the SIIJ, in which a prosecution has been brought by the DNA, is to be assured by the public prosecutors within the judicial directorate of the public prosecutor’s office attached to the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) or public prosecutors within the public prosecutor’s office attached to the court hearing the case.

Decision Nos 1519/2011 and 2/2012 of the Curtea Constituțională (Constitutional Court, Romania), the relevant content of which is set out in the request for a preliminary ruling in Case C-195/19, and Decision No 104/2018 of the Curtea Constituțională, the relevant content of which, in particular paragraphs 88 and 90 thereof, is set out in the request for a preliminary ruling in Case C-195/19.

Brief outline of the facts and the main proceedings

- 1 By four criminal complaints filed in December 2015 and February 2016, SO reported that four prosecutors had committed the offence of abuse of office under Article 13² of Law No 78/2000 of the Codul penal, read in conjunction with Article 297(1) thereof, and that a lawyer, a member of the Brașov Bar, had committed the offence of trading in influence under Article 291(1) of the Codul penal. SO stated that those prosecutors had failed to perform various duties of their service, either by refusing without justification to examine some of his applications to provide him with 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.
- 2 Subsequently, SO filed a criminal complaint against two judges of the Judecătoria Brașov (Court of First Instance, Brașov) and the Tribunalul Brașov (Regional Court, Brașov), claiming that they are part of a criminal organisation and that they have found against him in various sets of proceedings.
- 3 After the investigations had been carried out in the case in question, the Parchetul de pe lângă Înalta Curte de Casație și Justiție - Direcția Națională Anticorupție - Secția de combatere a infracțiunilor asimilate infracțiunilor de corupție (The Public Prosecutor's Office attached to the High Court of Cassation and Justice (Romania) - National Anti-Corruption Directorate - Section for combating offences related to corruption offences), by order of 8 September 2017, ordered that the file be closed, stating that the acts concerned do not constitute offences under criminal law and were not committed negligently under criminal law and, as regards the offence of belonging to a criminal organisation, that no such offence had been committed.
- 4 SO filed a complaint against that decision of the prosecutor handling the case with the hierarchically superior prosecutor, the chief public prosecutor of the Section for combating offences related to corruption offences within the DNA, who, by order of 20 October 2017, dismissed it as unfounded.
- 5 Under those circumstances, SO applied to the court, filing a complaint against the decision to close the file which, after jurisdiction was declined, was registered with the referring court, the Curtea de Apel Brașov (Court of Appeal, Brașov), on 11 September 2018.

Succinct presentation of the reasons for the request for a preliminary ruling

- 6 The referring court states that, since the proceedings before the court entail the compulsory participation of a prosecutor in the hearings, a prosecutor of the DNA initially participated in the hearings and, following the entry into force of the amendments to Legea nr. 304/2004 and the issue by the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) of Decision No 3 of 26 February 2019, a prosecutor of the Public Prosecutor's Office attached to the Curtea de Apel Brașov participated in the hearing. If it were found that the complaint made by the appellant SO is well founded, the referring court would have to remit the case to the SIIJ for prosecution.
- 7 It therefore states that, since the continuation of the main proceedings involves the participation of the prosecutors of the SIIJ, it is necessary to establish whether or not EU law precludes national legislation which establishes such a special Section of the public prosecutor's office.
- 8 As regards the first question, which concerns the nature of the CVM, the referring court states that it was set up by Decision 2006/928/EC, pursuant to Articles 37 and 38 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.
- 9 In the light of those provisions, the Report from the Commission to the European Parliament and the Council of 25 January 2017, and the possibility of imposing sanctions in case of failure to fulfil the commitments entered into, and with reference to the judgment of the Court of Justice of 13 June 2017, *Florescu and Others*, in which the Court of Justice ruled that the Memorandum of Understanding between the European Community and Romania, concluded in Bucharest and Brussels on 23 June 2009, must be regarded as an act of an EU institution, within the meaning of Article 267 TFEU, which may be subject to interpretation by the Court of Justice, the referring court considers it necessary to clarify whether the CVM constitutes an act which may be subject to interpretation by the Court.
- 10 As regards the second question, the referring court, with reference to the Report from the Commission to the European Parliament and the Council of 13 November 2018, whose conclusion states '[t]o remedy the situation the following measures are recommended (...) [s]uspend immediately the implementation of the Justice laws and subsequent Emergency Ordinances [and] [r]evise the Justice laws taking fully into account the recommendations under the CVM and issued by the Venice Commission and GRECO', asks the Court of Justice to establish whether the measures expressly recommended in the reports drawn up under mechanism are binding in nature, which would allow the national court to declare that the provisions of national law establishing the SIIJ are suspended or have to be suspended, and whether that binding nature is strictly limited to the report's conclusion or whether the other observations in that report

are also of such nature, in particular those highlighting national measures contrary to the recommendations made by the Council of Europe's European Commission for Democracy through Law (Venice Commission) and the Group of States against Corruption (GRECO).

- 11 In this regard, the referring court states that the Report from the Commission of 13 November expressly indicates that one of the measures which has had a negative impact on the independence of the prosecutors and weakened trust in the judiciary is the creation of a special Directorate for the investigation of offences committed within the judiciary.
- 12 In that context, Venice Commission Opinion No 924 of 20 October 2018 states expressly that '[p]articular concerns are ... raised by ... the new [SIIJ]' and the Ad hoc Report on Romania adopted by GRECO between 19 and 23 March 2018, points 33 and 34, states, inter alia, that '[o]ne of the most controversial changes is the creation ... of a new Section for the Investigation of Offences in the Judiciary [which] considered by many as an anomaly in the current institutional set-up, in particular because (i) there have been no particular data or assessments demonstrating the existence of structural problems in the judiciary which would warrant such an initiative, (ii) of the way its management is appointed, and (iii) this section would have no investigators and adequate investigative tools at its disposal, unlike other specialist prosecution bodies. It has also been pointed out that this body would be immediately overburdened due to the ... arrangements providing for the immediate transfer of many cases from other prosecution services, whilst its small staff is not commensurate to dealing with them (15 in total according to draft legislation' and that '[m]ore importantly, there are also fears that this section could easily be misused to remove cases handled by the specialised prosecution offices or interfere in sensitive high-profile cases if complaints against a magistrate were lodged incidentally in that case as it would automatically fall under the competence of the new section.' That opinion recommends that the creation of the SIIJ be abandoned.
- 13 By the third and fourth question, the referring court seeks to establish, irrespective of the reply to the first two questions, whether the principles underlying the European legal order, which are enshrined in the Treaty on European Union, are to be interpreted as precluding those provisions of national law because of the danger that they pose to the rule of law and the independence of the judiciary, in the light of the content thereof and the analysis carried out under the CVM and within the framework of the Venice Commission and GRECO.
- 14 In that context, after recalling the provisions of Article 19(1) TEU and the judgments of the Court of Justice in *Associação Sindical dos Juizes Portugueses* (C-64/16), paragraphs 42 to 44, and *Minister for Justice and Equality* (deficiencies in the system of justice) (C-216/18), paragraph 48, the referring court reproduces some of the criticisms of the Venice Commission and GRECO on the amendments to Legea nr. 304/2004, which led to the establishment of the SIIJ.

- 15 One criticism concerns the structure of the SIIJ, which is made up of 15 prosecutors who have to process thousands of cases every year. Those cases were previously examined by more than 150 prosecutors from 19 sections of the prosecutor's office and it is clear that the 15 prosecutors will be overwhelmed by the volume of activities, which will impact on the quality of the prosecution.
- 16 A further criticism relates to the fact that the SIIJ is conceived as a single structure based in Bucharest, which means that the judges under investigation will have to make a greater effort, with increased costs, to attend the hearing, which could impact on their rights of defence.
- 17 There is also criticism of the procedure for appointing the chief public prosecutor and the other 14 prosecutors for whom the interview has a weighting of 60%, which does not provide sufficient guarantees for an impartial selection procedure.
- 18 Furthermore, it is not clear how the prosecutors of the SIIJ can themselves be effectively investigated for any crimes committed, in particular those committed in relation to their duties.
- 19 Criticism is also made of the amendments made by Government Emergency Order 7/2019, which were made without consultation with the Consiliul Superior al Magistraturii (High Council of the Judiciary). Therefore, the incorporation of paragraph 6 into Article 88¹ of Law No 304/2004 was perceived as a first step towards placing the directorate outside the authority of the general prosecutor's office until it is transformed *de facto* into a separate prosecutor's office.
- 20 Since the prosecution of a judge may lead to his suspension, the SIIJ could be perceived, in relation to the aspects under examination relating to its organisation and function, as an instrument of pressure capable of affecting the independence of the judiciary.
- 21 As regards the fifth question, the referring court sets out a number of circumstances which lead it to consider that there are sufficient doubts as regards the possibility that, within the SIIJ, prosecution activity is carried out which, together with the actions that will be carried at the trial stage, ensures that the case will be dealt with within a reasonable time.
- 22 Therefore, the fact that, on 5 March 2019, only six of the fifteen prosecutor posts were occupied, which constitutes an occupancy rate of 40%, well below that for other prosecutor's offices, the fact that, after the date on which the SIIJ became operational, 1 422 cases were registered with it — bearing in mind that it also has to deal with 795 general matters (complaints, applications, pleadings and various requests) —, and the fact that there is now a possibility that the SIIJ will also deal with other criminal case files in so far as criminal complaints are filed against magistrates in relation to those files, especially in sensitive cases with media impact, are elements giving to doubts on the part of the referring court as to the possibility of carrying out an effective investigation and ensuring that the case is dealt with within a reasonable time, which calls into question the compatibility of

the national legislation under examination with the requirements laid down in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

- 23 The national court refers to the other three requests for a preliminary ruling in Cases C-83/19, C-127/19 and C-195/19, which relate to issues which are, in part, similar to those in the present case.

WORKING DOCUMENT