



**Advocate General Collins: EU law precludes a national provision or practice according to which national courts have no jurisdiction to examine if a provision of national law, that a decision of the constitutional court of the Member State has found to be constitutional, is in conformity with EU law**

*It also precludes the initiation of disciplinary proceedings and the application of disciplinary penalties in respect of a judge arising from that examination*

RS was convicted on foot of criminal proceedings in Romania. On 1 April 2020, RS's wife lodged a criminal complaint, inter alia, against three members of the judiciary: a public prosecutor and two judges, accusing them of breaching RS's rights of the defence.

The application was registered before the Parchetul de pe lângă Înalta Curte de Casație și Justiție – Secția pentru Investigarea Infracțiunilor din Justiție (Section within the Public Prosecutor's Office for the investigation of offences committed within the judicial system) ('the SIIJ').

In its judgment of 18 May 2021 <sup>1</sup>, the Court of Justice held that national legislation providing for the creation of the SIIJ is contrary to EU law where its establishment is not justified by objective and verifiable requirements relating to the sound administration of justice and is not accompanied by specific guarantees identified by the Court.

In Decision No 390/2021, delivered on 8 June 2021, the Curtea Constituțională (Constitutional Court, Romania) observed that in previous rulings it had held that the aforesaid provisions were constitutional. It held that it saw no reason to depart from those rulings notwithstanding the judgment of the Court of Justice of 18 May 2021. Whilst Article 148(2) of the Romanian Constitution provides for the primacy of EU law over contrary provisions of national law, that principle cannot remove or negate national constitutional identity.

In those circumstances the Curtea de Apel Craiova (Court of Appeal of Craiova, Romania) made a reference to the Court of Justice in order to clarify, in essence, whether a national judge can be prevented from, and put at risk of exposure to disciplinary proceedings and penalties as a consequence of, examining the conformity with EU law of a provision of national law that the constitutional court of that Member State has found to be constitutional.

In today's opinion, Advocate General Collins observes that, in a case such as the present, the national court is bound by the Court's interpretation of the provisions at issue. If necessary, it must disregard the rulings of a higher court or even of a national constitutional court where it considers, having regard to the Court's interpretation, that those provisions are inconsistent with EU law.

In instances where a Member State invokes national identity in order to justify non-compliance with provisions of EU law, the Court will examine whether those provisions in fact pose a genuine and sufficiently serious threat to a fundamental interest of the society, or the fundamental structures, political and constitutional, of a Member State. That threshold is not met by vague, general and

<sup>1</sup> Judgment of 18 May 2021, Asociația "Forumul Judecătorilor din România", [C-83/19](#), [C-127/19](#), [C-195/19](#), [C-291/19](#), [C-355/19](#) and [C-397/19](#), see also [PR no 82/21](#).

abstract assertions. In any event, assertions of national identity must respect the common values referred to in Article 2 TEU and be founded upon the indivisible, universal values referred to in the second paragraph in the preamble to the Charter.

In that regard, the Advocate General observes that the tenor of the ruling of the Curtea Constituțională in Decision No 390/2021 is such as to raise serious doubts about that court's adherence to the essential principles of EU law as interpreted by the Court in its judgment of 18 May 2021.

It appears that, in accordance with Article 148(2) of the Romanian Constitution, as interpreted by the Curtea Constituțională (Constitutional Court) in Decision No 390/2021, national courts may not examine the conformity with EU law of a provision of national law that a decision of the Curtea Constituțională (Constitutional Court) has found to be constitutional. That rule effectively prevents the referring court from assessing whether the establishment and operation of the SIIJ complies with EU law and, where necessary and appropriate, in accordance with the indications given by the Court in its judgment of 18 May 2021, from disapplying the relevant provisions of national law in accordance with the principles of primacy of EU law and direct effect.

In that regard, the Advocate General recalls that national courts must ensure the full application of EU law in all Member States and provide remedies sufficient to ensure effective legal protection. The nature of the remedy depends on whether the EU act or measure has direct effect. Where that act or measure does not have direct effect, its binding character nevertheless places on national courts an obligation to interpret national law in conformity with EU law. In certain circumstances, a failure to comply with that obligation can ground an action for damages against the State.

Thus national courts called upon to rule on issues linked to the interpretation and application of EU law must be in a position to exercise their functions autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source. Amongst such prohibited external interventions or pressure are rulings of a national constitutional court, such as that of the Curtea Constituțională in Decision No 390/2021, which purports to prevent national courts from ensuring the full application of EU law and the judicial protection of the rights of individuals thereunder.

The Advocate General concludes that the Curtea Constituțională has, in Decision No 390/2021, **unlawfully arrogated competence to itself in breach of the second subparagraph of Article 19(1) TEU, in breach of the principle of primacy of EU law and in breach of the fundamental requirement of an independent judiciary.**

**The principle of the independence of the judiciary, read in conjunction with Article 2 TEU and Article 47 of the Charter, precludes a provision or a practice of national law according to which national courts have no jurisdiction to examine the conformity with EU law of a provision of national law that a decision of the constitutional court of the Member State has found to be constitutional . That same principle precludes the initiation of disciplinary proceedings and the application of disciplinary penalties in respect of a judge arising from that examination.**

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in the context of a dispute before them, to refer questions to the Court about the interpretation of EU law or the validity of an EU act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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