Court of Justice of the European Union
PRESS RELEASE No 114/20
Luxembourg, 23 September 2020

Advocate General's Opinions in Joined Cases C-83/19 Asociaţia « Forumul Judecătorilor Din România » v Inspecţia Judiciară, C-127/19 Asociaţia « Forumul Judecătorilor Din România » and Asociaţia Mişcarea Pentru Apărarea Statutului Procurorilor v Consiliul Superior al Magistraturii and C-195/19 PJ v QK and in Cases C-291/19 SO v TP and others, C-355/19 Asociaţia « Forumul Judecătorilor din România » and Asociaţia « Mişcarea Pentru Apărarea Statutului Procurorilor » and OLv Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie - Procurorul General al României and C-397/19 AX v Statul Român - Ministerul Finanţelor Publice

Press and Information

According to Advocate General Bobek, the interim appointment of the Chief Judicial Inspector and the national provisions on the establishment of a specific prosecution section with exclusive jurisdiction for offences committed by members of the judiciary are contrary to EU law

EU law does not preclude national provisions on State liability for judicial error and on the recovery action initiated by the State against the judge concerned in cases of bad faith or gross negligence, provided that those procedures offer sufficient guarantees

With the purpose of improving the independence and effectiveness of the judiciary and within the framework of negotiations for its accession to the EU, Romania adopted the so-called Justice Laws[1]. By Decision 2006/928/EC, the Commission established the 'Mechanism for Cooperation and Verification' ('the MCV'), in the framework of which it periodically reports Romania's progress with regard to the independence and efficient functioning of the judiciary. Between September 2018 and March 2019, the Romanian Government adopted five emergency ordinances, which amended and added new provisions to the Justice Laws. Some of these modifications have been evaluated negatively in the 2018 and 2019 MCV reports. (C-83/19: 1, 250 – 252; C-397/19: 3)

Against this background, several Romanian Courts have referred questions to the Court of Justice asking the Court to establish the nature, legal value and effects of the MCV and of the periodic reports adopted on its basis. The Court is also asked to ascertain whether the recommendations contained in the Commission's reports are binding on Romanian authorities (C-83/19: 2, 3, 120; C-397/19: 3,17)

In addition, three institutional aspects of this reform are concerned: the interim appointment of the head of the Judicial Inspection, the creation of a specific section within the Public Prosecutor's Office responsible for the investigation of offences committed within the judiciary, as well as changes in provisions on material liability of judges. The Court is asked to establish their compatibility with the principles of the rule of law, effective judicial protection, judicial independence, enshrined in a number of provisions of EU law[2]. (C-83/19: 1, 4, 252; C-397/19: 2, 3)

In today's Opinion, Advocate General Michal Bobek proposes, in the first place, that the Court rule that **the Decision establishing the 'Mechanism for Cooperation and Verification' is an act of an EU institution, was validly adopted on the basis of the Treaty of Accession and is legally binding on Romania. However, the periodic reports established by the Commission on its**

[1] Law No 303/2004 on the Statute of Judges and Prosecutors; Law No 304/2004 on the judicial organisation and Law No 317/2004 on the Superior Council of Magistracy;
[2] In particular to Article 2 TEU; the second subparagraph of Article 19(1) TEU; and the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter');

basis are not legally binding, but they are to be duly taken into consideration by that Member State. (C-83/19: 334)

The Advocate General reminds, first of all, that the MCV Decision is a decision in the sense of the fourth paragraph of Article 288 TFEU[3] that has been adopted by the Commission on the basis of the Act of Accession and that is binding in its entirety for its addressees. According to Article 4 of the MCV Decision, its addressees are the Member States. Even if at the moment of its adoption, Romania was not yet a Member State, the binding character of the EU acts adopted before accession follows from Article 2 of the Act of Accession that states that from the date of accession, the acts adopted by the institutions before accession are binding on Romania. The consequences of non-compliance, beyond the possibilities to declare and sanction a potential infringement through the ordinary means of EU law, may also lead to important effects on the participation of Romania in the internal market and on the area of freedom, security and justice. (C-83/19: 125, 126, 129, 145, 155)

However, the Advocate General Bobek notes that the reports issued by the Commission are not binding and national judges cannot rely on the recommendations contained in MCV reports in order to set aside the application of provisions of national legislation that they deem contrary to such recommendations. Romania can design its national institutions and procedures as it sees fit, but it needs to demonstrate how those contribute to achieving the benchmarks contained in the MCV Decision. (C-83/19: 164, 165, 168)

After clarifying the nature and legal effects of the MCV, Advocate General Bobek concludes that the applicability of the Charter, including Article 47 thereof, is triggered by the MCV Decision. Even though Article 19(1) TEU would also be applicable, the Advocate General explains, with some cautious suggestions, why basing the assessment of these cases exclusively on Article 19(1) TEU might not necessarily be the best approach. (C-83/19: 185).

After clarifying the yardsticks and the nature of the assessment arising from the applicable EU law provisions, Advocate General Michal Bobek proposes**, in the second place**, **that the Court rule that EU law[4] precludes national provisions whereby the government adopts, by derogation from the legal rules normally applicable, a system for the interim appointment of the management positions of the body in charge of carrying out disciplinary investigations within the judiciary, the practical effect of which is the reinstatement in office of a person whose mandate has already expired.** (C-83/19: 226, 334)

The Advocate General reminds that EU law[5] does not impose a specific model regarding the organisation of the disciplinary systems for members of the judiciary. However, the requirement of independence means that the rules governing it must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. (C-83/19: 265)

The Advocate General observes that the Judicial Inspection has a crucial role within the disciplinary procedure carrying out the preliminary investigation. A body in charge of initiating disciplinary procedures should at least demonstrate some degree of operational and investigative independence. (C-83/19: 267, 269)

In that regard, he notes that the interim appointment of the management of the Judicial Inspection ushered in by an emergency ordinance, without consulting the body that is normally to be consulted on such an appointment, is not simply designed to ensure continuity in office, but its practical effect is to reinstate into office a person whose mandate has already expired, through a procedure other than the one designed by law. This system is liable to instill doubts as to the interest of the Romanian Government in appointing a given person to the lead position of the body in charge of disciplinary investigations against members of the judiciary. As a result, such a system

[3] According to which a decision shall be binding in its entirety and a decision which specifies those to whom it is addressed shall be binding only on them.
[4] Second paragraph of Article 47 of the Charter, and the second subparagraph of Article 19(1) TEU
[5] Second paragraph of Article 47 of the Charter, and the second subparagraph of Article 19(1) TEU

does not seem to contain guarantees suitable to dispel reasonable doubt as to the neutrality and the imperviousness of judicial bodies to external factors. (C-83/19: 275, 276, 278)

Advocate General Bobek proposes**, in the third place**, **that the Court rule that EU law[6] precludes the establishment of a specific prosecution section with exclusive jurisdiction for offences committed by members of the judiciary, if the creation of such a section is not justified by genuine and sufficiently weighty reasons and if it is not accompanied by sufficient guarantees to dispel any risk of political influence on its functioning and composition.** (C-83/19: 334)

The Advocate General notes that the creation of the Section for the Investigation of Offences Committed within the Judiciary (SIOJ) needs to correspond to a particularly weighty, transparent and genuine justification. Once that criterion is met, it is furthermore imperative that the composition, organisation and functioning of such a section complies with guarantees suitable to avoid the risk of external pressure on the judiciary. Finally, the specific circumstances surrounding the creation of the SIOJ, as well as the account of the way in which that body has exercised its functions, are also of relevance in discerning the relevant context. (C-83/19: 291)

In that regard, the Advocate General considers that it can hardly be stated that the creation of the SIOJ has been justified in a clear, unambiguous and accessible manner. Moreover, the regulation of the SIOJ does not offer sufficient guarantees to dispel any risk of political influence on its functioning and composition. National courts must be entitled to take into account objective elements concerning the circumstances in which the SIOJ was established, as well as its practical functioning, as factors capable of confirming or rebutting the risks of political influence. The confirmation of such risk is liable to instill legitimate doubts as to the imperviousness of judges, since it compromises the impression of the neutrality of judges with respect to the interest before them, in particular, when cases of corruption are involved. Furthermore, EU law also precludes the establishment of a prosecutorial section, which insufficiently equipped with prosecutors, in the light of its caseload, so that its operative functioning will certainly result in an unreasonable length of criminal proceedings, including those against judges. (C-83/19: 306, 315, 319, 331)

Advocate General Bobek proposes**, in the fourth place**, **that the Court rule that EU law[7] neither precludes national provisions on State liability for judicial error, nor the existence of the possibility of the State to subsequently launch a recovery action for civil liability against the judge concerned in cases of bad faith or gross negligence. However, those procedures must offer sufficient guarantees to ensure that members of the judiciary are not subjected to direct or indirect pressure liable to affect their decisions.** It is for the national court to assess whether those conditions are satisfied. (C-397/19: 132)

The Advocate General notes that in the national law[8], State liability for judicial error is admitted as a result of procedural acts, as well as for the content of final judicial decisions including the interpretation of the law and the assessment of evidence. The definition of judicial error is characterised by three elements: (i) the procedural act has been performed in *clear breach* of provisions of substantive or procedural law, or the final judgment is *manifestly contrary* to the law or inconsistent with the factual situation established by the evidence taken in the course of the proceedings; (ii) such procedural act or final judgment entails a *serious infringement* of the rights, freedoms or legitimate interests of an individual; and (iii) it causes harm that it has *not been possible to remedy* by means of an ordinary or extraordinary appeal. (C-397/19: 78-81)

According to the Advocate General, such a definition of judicial error is not prone to create a risk of indirect pressure on the judiciary. First, EU law does not preclude that the State can be held liable for the damages caused by the judiciary in the exercise of its functions. Second, only manifest errors seem to qualify as judicial errors under the definition. (C-397/19: 83, 84, 85)

---

[6] Second paragraph of Article 47 of the Charter, and the second subparagraph of Article 19(1) TEU

[7] Second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union and the second subparagraph of Article 19(1) TEU

[8] Law No 303/2004 on the Statute of Judges and Prosecutors

However, whatever regime of liability, the principle of judicial independence requires that the rules regarding the civil liability of judges through the possibility of the State to directly recover damages paid to the infringed persons must ensure that judges are protected against pressure liable to impair their independent judgement and to influence their decisions. It is for the national court to assess, in the light of all the relevant factors before it, whether those conditions are satisfied by the pertinent national rules, and in their practical application. (C-397/19: 94, 100, 101, 132)

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.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355