



PRESS RELEASE No 34/23

Luxembourg, 16 February 2023

Advocate General's Opinion in Case C-216/21 | Asociația "Forumul Judecătorilor din România"

Advocate General Emiliou: a procedure for promotion of judges based on an assessment of their work and conduct by a board composed of the President and judges of the relevant higher court is compatible with EU law

However, even where the members of that board are themselves independent, the criteria applied should be sufficiently objective, relevant and verifiable and the body should be obliged to state reasons

In 2019, the Section for Judges of the Consiliul Superior al Magistraturii (the Superior Council of Magistracy, Romania; 'the SCM') approved a national regulation reforming the promotion procedure applicable to judges of lower courts in Romania. The Asociația "Forumul Judecătorilor din România" and YN, seek the partial annulment of that decision before the Court of Appeal of Ploiești, Romania.

They claim that the promotion procedure applicable to judges of lower national courts is conducted by the Presidents and members of the courts of appeal in which available positions are to be filled and rests on subjective and discretionary criteria, rather than on an objective assessment of the candidates based only on their performance in a written exam.

The Court of Appeal of Ploiești enquires as to the compatibility of such a reform with the principle of judicial independence.

In his Opinion delivered today, Advocate General Emiliou concludes that **a procedure for promotion of judges based on an assessment of their work and conduct by a board composed of the President and judges of the relevant higher court that are also in charge of reviewing the judgments delivered by those judges on appeal and of carrying out periodic assessments of their work is compatible with EU law¹. However, even where the members of that board are independent, the criteria applied by them should be sufficiently objective, relevant and verifiable and the body should be obliged to state reasons.**

The Advocate General notes that the promotion procedure for judges serving in lower courts in Romania is structured in two steps. The first step is based on a written competition designed to test both the theoretical knowledge and the practical skills of the candidates. Successful candidates are then promoted to a higher professional grade but continue, in effect, to hold the same office. The second step, called 'effective promotion', enables candidates who have already been promoted 'on-the-spot' and who possess the required professional grade to be effectively assigned to a regional court or court of appeal.

The Asociația "Forumul Judecătorilor din România" and YN seek to challenge the modalities of the second step of

¹The principle of judicial independence, which is enshrined in Article 47 of the Charter and the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU

that procedure, during which the selection board must evaluate the candidates' work and conduct over the last three years preceding their participation in that second step. Two aspects of that procedure appear to be particularly problematic to them: how the members of the selection board who participate in the 'effective promotion' procedure are designated and the composition of that board, and the criteria applied by the members of the selection board in order to decide which candidates shall be promoted.

Concerning the designation of the members of the selection board and its composition, the Advocate General considers that the elements put forward in the main proceedings cannot, in and of themselves, give rise to reasonable doubt in the minds of individuals as to the imperviousness of candidates to the 'effective promotion' procedure to external factors.

Issues of judicial independence are not confined to situations implicating other branches of power or third parties, but may arise within the judicial system itself, wherever there is a risk that judges could be improperly influenced by their colleagues. However, there must be an indication that such a concentration of power could actually cause external intervention or pressure liable to impair the independent judgment of judges of lower courts and to influence their decisions.

Because members of the courts of appeal of the Member States are themselves required, under EU law, to comply with the principle of judicial independence and be free from external influence or pressure, they are, in principle, in a good position to evaluate the candidates' work and determine who among them deserve a promotion. **However, what is decisive from the perspective of judicial independence is not so much the question of who conducts a promotion procedure, but rather whether the criteria applied by the body in charge of conducting such a procedure are sufficiently clear, objective and verifiable, and whether the body is obliged to state reasons.**

It is for the referring court to verify whether the criteria applied are likely to give rise to reasonable doubt in the minds of individuals as to the independence of the judges of lower courts concerned by that procedure. This happens, in particular, when the modalities surrounding a particular procedure or the criteria applied when conducting that procedure are not prescribed by law (and, thus, are not verifiable), are vague or irrelevant or allow speculation about the influence of political or other forces (for example, when the criteria applied are not sufficiently objective).

In the present case, it appears that the criteria for the evaluation of the candidates' work are openly listed and are, thus, verifiable. Furthermore, they are all relevant for the purposes of forming a view as to the candidates' judicial activity and merit.

The Advocate General also notes that the sources of information and evidence upon which the members of the selection board must base their decision in relation to each candidate are rather numerous and diverse. That contributes to making the overall 'effective promotion' procedure appear to be based a priori on an objective, rather than discretionary, assessment.

Those elements, along with the fact that the board in charge of conducting the promotion procedure must draft a reasoned report indicating the marks awarded for the criteria applied, as well as the overall mark obtained by the candidate at the close of the procedure, – which the candidate is entitled to challenge –, confirm the absence of a real risk of 'undue discretion' giving rise to a reasonable doubt in the minds of individuals as to the independence of the judges concerned.

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 disputes which

have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union 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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