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country report

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ECJ ruling on Romania. Failed „Judicial Reform“ of the PSD led former Governments

European Court of Justice rules: there is a significant need to improve the Romanian judicial laws amended between 2017-2019 by governments of the PSD.

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On May 18, 2021, in a long-awaited judgment, the ECJ ruled on the legal nature of the Cooperation and Verification Mechanism (also referred to as the "Mechanism for the cooperation and verification of Romania's progress" - henceforth: CVM) and the EU Commission's progress reports, and their binding effect for the Romanian courts. In addition, the ECJ commented on various legal changes concerning the institutional design of the judiciary in Romania, introduced by the judicial reform in 2017-2019 and heavily criticized by the public. However, a clear distinction must be made here between the phase of PSD-led governments, during which these "reforms" were decided, and that of the governments led by the EPP member party PNL. The PNL has been in government since October 2019 and rejects the PSD "reforms", currently reversing them in the parliamentary process.

The context of the ruling

Since Romania and Bulgaria had not yet met European legal standards in the areas of judicial reforms and the fight against corruption when they joined the EU on January 1, 2007, it was decided to establish the "Mechanism for Cooperation and Verification of Romania's Progress." In regular progress reports, the EU Commission analyzes developments in the rule of law in Romania and makes recommendations to the Romanian authorities on implementing the measures from the CVM. Their aim is to improve the rule of law structures in Romania.

The ECJ ruling of May 18, 2021,¹ was based on several cases against judges and prosecutors, primarily for abuse of office, as well as the material liability action against a judge following a legal error. In addition to the individual cases, the Forum of Judges of Romania and the Movement for the Protection of the Status of Prosecutors also directly went against the decisions from the

controversial judicial reforms. These so-called "reforms" are essentially legacy issues from the nearly three-year period of several governments led by the Romanian Social Democratic Party, PSD.

In preliminary ruling procedures, several Romanian courts asked the ECJ to rule on the extent to which the CVM procedure and the Commission's recommendations and reports issued through the CVM procedure were legally binding. In addition, the submitting courts asked the ECJ to rule on the compatibility with Union law of some of the amendments introduced by the reforms of the so-called "Judiciary Laws" in 2017-2019. The changes submitted to the ruling of the ECJ were pertaining to the organization of the Judicial Inspectorate, the establishment of a special department within the Prosecutor's Office, and the personal liability of judges.²

In its above-mentioned decision of May 2021, the ECJ primarily addresses the extent to which the

Romanian regulations comply with the "rule of law" referred to in the European Treaties, specifically in Article 2 TEU. According to the ECJ, the rule of law includes the right to effective judicial protection under the second subparagraph of Article 19(1) TEU and the fundamental right to a fair trial under Article 47(2) Charter of Fundamental Rights of the European Union (CFR).

A particularly important element of these rights is the guarantee of independent courts. When pressure is exerted on the judiciary and political influence is exerted by the legislative or executive branches, the independence of the courts, namely their objectivity and impartiality, is no longer guaranteed.

The binding nature of the Decision establishing the CVM procedure and of the progress reports based on it

In its ruling, the ECJ points out that the CVM procedure established by Decision 2006/928/EC and the progress reports based on it qualify as acts of an institution of the European Union within the meaning of Article 288 (4) TEU. In view of the provisions of the Accession Treaty of Romania to the European Union (Article 4 (3) of the Accession Treaty), the decision on the CVM procedure is applicable to Romania, although it was adopted before Romania's accession to the EU. According to the ECJ, in the absence of an effective implementation of anti-corruption and judicial reforms, the CVM procedure is required. A lowering of the rule-of-law standards in the Member States enshrined in Article 2 TEU and Article 19 TEU is not permissible, the ECJ emphasizes.

Finally, the ECJ states that the decision on the CVM procedure is based on Art. 37 and Art. 38 of the Act of Accession, which forms an integral part of the Accession Treaty, and is therefore legally binding. The CVM procedure, which is to be classified as a binding decision within the meaning of Article 288 (4) TEU, can therefore only be repealed after the requirements related to the rule of law for effectively combating corruption and reforming the judiciary have been met.

Moreover, according to the principle of loyal cooperation enshrined in Article 4(3) TEU, the

Commission's progress reports must be "duly taken into account" by Romania, the ECJ stipulates. Consequently, Romania has the obligation not only to refrain from adopting or maintaining measures that are contrary to the recommendations, but also, if the Commission expresses doubts about the compatibility of national measures with the benchmarks from the CVM procedure, to remedy these shortcomings. However, unlike the CVM procedure, these progress reports would not have a binding effect.

Provisional filling of management positions in the judicial inspectorate

Although the Superior Magistrate Council (henceforth: CSM), which is considered the guarantor of judicial independence, is responsible under the Romanian Constitution for appointing the Chief Inspector and the Deputy Chief Inspector, the Emergency Decree No. 77/2018, adopted in the course of the judicial reform, gave the possibility to fill the management positions of the Judicial Inspectorate on an ad interim basis, without the CSM exercising its discretion and, consequently, without a proper appointment procedure .

On the question referred to the ECJ concerning the organization of the Judicial Inspectorate, the Forum of Judges of Romania argued that Chief Inspector Lucian Netejoru, who was in charge of disciplinary investigations as well as disciplinary actions regarding judges and prosecutors, did not have the power to represent the Judicial Inspectorate in the context of a defense statement, because his mandate had expired. The ECJ concludes that this possible provisional extension of the mandate, disregarding the ordinary appointment procedure of the (deputy) chief inspectors entrusted with great influence, constitutes an "instrument for exerting pressure on the activity of [the] judges and prosecutors" or "for exercising political control over that activity". This change in the law was contrary to the rule of law principle enshrined in EU law.

Special prosecution department for proceedings against judges and public prosecutors

The referred question dealing with the establishment within the Public Prosecutor's Office of the specialized department for the investigation of crimes committed by judges and prosecutors (henceforth: SIJ), resulted from various court cases in Romania.

As a result of the actions brought by the Forum of Judges of Romania and the Movement for the Protection of the Status of Prosecutors against decisions of the CSM and the Prosecutor General, which dealt with the establishment of the SIJ per se and its ways of operation, as well as with the appointment and dismissal of prosecutors within that institution, the referring courts requested a ruling from the ECJ on the compatibility of those provisions with Union law. This question of the SIJ's compliance with Union law was similarly raised by the competent courts in proceedings against several prosecutors and judges for abuse of office and membership in a criminal organization.

With its decision, the ECJ declares that no objective and verifiable requirement for the orderly administration of justice is apparent in the establishment of the SIJ. In particular, it disagrees with the Romanian CSM, which considers the establishment of the SIJ to be justified by the need to protect judges and prosecutors from arbitrary criminal charges.

Moreover, the ECJ is highly critical of the wide-ranging competence of the special department and sees in its establishment the danger of an "instrument for exerting political pressure".

The ECJ attributes this view, on the one hand, to the fact that the SIJ is responsible for such cases even if, in addition to the proceedings against a judge or public prosecutor, an action for the same offense is also conducted against a person not belonging to the judiciary. Second, the ECJ points out that jurisdiction is transferred to the SIJ from an originally competent body such as the National Anti-Corruption Agency (DNA) when a judge or prosecutor is an accused. Lastly, the ECJ objects both to the SIJ's right to take legal action against decisions of the specialized Prosecutor's Offices for combatting corruption

(DNA) resp. organized crime (DIICOT) or the General Prosecutor's Office made before the establishment of the SIJ, and to be able to revoke them. Having this exclusive jurisdiction, and an "autonomous structure", the special department within the Public Prosecutor's Office could, according to the ECJ, have a particular impact on the "complex and mediatized" high-level corruption cases or cases in organized crime, in that by abusively filing charges, jurisdiction is specifically directed to the SIJ. The consequence is that the relevant judges can be put under pressure and intimidated, which is incompatible with the principle of independence of the courts under EU law.

The ECJ also criticizes that due to the very small number of only 15 prosecutors in the SIJ, the lack of expertise in complex corruption cases and the workload associated with the transfer of responsibilities to the SIJ, it cannot be guaranteed that cases against judges and prosecutors will be heard within a reasonable time. The rights to a fair trial and defense set forth in European Union law under Article 47 and Article 48 of the CFR cannot be exercised through these modalities.

Consequently, the establishment of the special department in the Public Prosecutor's Office with exclusive jurisdiction in its current form constitutes a violation of the principles of the rule of law and is thus contrary to Union law. However, the final legal assessment of the ECJ ruling rests with the Romanian courts, which must determine whether the changes brought about by the "judiciary laws" result in the existence of external influence.

Personal liability for miscarriages of justice

In its decision of May 18, 2021, the ECJ also addresses a referred question on an aspect of substantive law concerning the liability for miscarriages of justice and changed by the Romanian judicial reform. The subject matter was a citizen's action for damages against the Romanian state after an unlawful criminal conviction for tax evasion as well as unlawful detention and deprivation of liberty measures. The ECJ first pointed out that a distinction must

be made between the liability of the state and the personal liability of judges for a miscarriage of justice. The state's pecuniary liability for judicial decisions in the case of miscarriages of justice is possible; the abstract formulation of the term "miscarriage of justice" did not violate the principle of judicial independence, since an indeterminate legal concept had to be substantiated by national case law.

According to Romanian law, judges can be held personally liable for a miscarriage of justice by way of an action for recourse. This recognition of the principle of personal liability for judges is subject to the "danger of interference with judicial independence" arising from Article 2 TEU and the second subparagraph of Article 19(1) TEU, since judicial decision-making could be influenced by it, the ECJ said.

Therefore, this liability must also be "limited to exceptional cases and must be based on objective and verifiable criteria" within the framework of an "orderly administration of justice" without "any external pressure." It is true that it is not necessary to grant absolute immunity to judges in order to respect the principle of independence. However, the "serious individual fault" of a judge for personal liability would have to be established. Accordingly, the ECJ considers the Romanian rule, according to which the miscarriage of justice established in the liability proceedings against the state is considered binding in the recourse proceedings against the respective judge, without giving the judge the opportunity to be heard, to be contrary to Union law. In this way, it cannot be ensured that political pressure on the judicial activity and the preservation of the rights of defense from Art. 47 CFR is excluded. In this context, the ECJ is also critical of the Romanian national provision that the Ministry of Public Finance has a broad discretionary power to the extent that it alone examines the conditions and circumstances for bringing an action for recourse.

Primacy of Union Law

Finally, the ECJ again expressly points out that the Romanian courts to observe the principle of the primacy of Union law. The Romanian Constitutional Court had ruled, among other things, that the regulations from the CVM

proceedings in particular could not take precedence over national constitutional law. According to the established case law of the ECJ, an elementary principle is to ensure the optimal effectiveness of Union law (the so-called "effet utile"), so that Union law enjoys primacy of application over the national law of a Member State. The courts must therefore not apply a provision that they consider to be contrary to national Union law. Above all this pertains also to the norms of the Constitution as interpreted by the Constitutional Court.

Current draft laws on the recent judicial reform

Against this background, the Romanian government had requested an expert opinion on the matter of the judicial reform from the Venice Commission. The subject of the opinion were two draft laws (henceforth: the draft laws)³ on the abolition of the special department for crimes committed by judges and prosecutors (SIJ), and the return of powers to the DNA. From the outset, it can be argued that the two bills passed by the government and the Chamber of Deputies would only partially cover the lowering of the rule of law standards caused during the PSD government. In terms of content, the draft laws differ only to a limited extent. They address only two of the above-mentioned problem areas: the abolition of the Special Prosecutor's Office and the role of the Supreme Magistrate's Council (CSM) in criminal cases brought against judges and prosecutors. The justification for the draft law passed by the new government led by the National Liberal Party contains considerations that are in part consistent with the ECJ ruling issued in the meanwhile. In this respect, it can already be established that the new government is not continuing the confrontational course of several social democratic-led predecessor governments.

Some key elements are briefly outlined below:

1) The abolition of the special prosecutor's office SIJ. Both draft laws explicitly state that the SIJ is to be completely abolished. From the outset, it can be argued that this part of the solution is in

line with the ECJ ruling, whereby the Court had unequivocally pointed out the shortcomings of the SIJ.

This however does not solve the problem of cases or charges against judges and prosecutors that have been taken over or brought by the special prosecutor's office. Some of them could be described as rather problematic. Both draft laws propose a balanced solution, namely the following transitional arrangements: Within five days of the law's effective date, all cases handled by the SIJ would be transferred to other departments of the prosecutor's office that would otherwise have the jurisdiction. This would also affect cases already pending before the courts. The completed (partial) proceedings would continue to have a binding effect after the entry into force of one of the draft laws. Criminal case dismissals and indictments that were not reviewed by a superior prosecutor would be reviewed by the General Prosecutor's Office at the Supreme Court (henceforth PG-SC) after the entry into force of one of the draft laws (mainly the DNA would be tasked with this). This could show the intention of partial redress and corrections of possible mishandling by the SIJ. In addition, the law empowers the PG-SC to review and, if necessary, withdraw appeals filed by the SIJ, e.g., for infringements of the right to a fair trial.

The rest of the files are to be transferred to the DNA and DIICOT. Thus, DNA and DIICOT will see the powers to prosecute corruption offenses - which they held until 2018 - reinstated.

2) Judicial "superimmunity." The draft law approved by the Chamber of Deputies further strengthens the judicial immunity. Romanian law already currently stipulates that corruption offenses committed by judges and prosecutors can only be investigated after the CSM authorizes it. However, the draft law goes one step further, and additionally requires that judges and prosecutors may also be indicted only after a (second) decision of the respective CSM department (for judges or for prosecutors). Basically this means that it would introduce a kind of double-checking of criminal proceedings initiated against judges and prosecutors.

This solution (also called "superimmunity") has recently been subject to some criticism in Romania, especially with regard to the role of the CSM. E.g., if the relevant CSM department denies an indictment, no legal remedy is provided to enable the judicial challenge of such denial. This could lead to a certain weakening of investigative authorities (especially DNA and DIICOT). Attempts are being made to address these concerns by prohibiting the Minister of Justice, the Prosecutor General, and the President of the Supreme Court from voting on the charges against a judge or prosecutor in such proceedings. In addition, the respective CSM department would not be allowed to comment on the merits of the case or the evidence in such proceedings, so that a dismissal of the case would only be allowed on formal/procedural grounds.

3) Other changes in the law. Since January 20, 2020, the Romanian government has been dealing with a new reform of the so-called judicial laws, which should ensure the implementation of the CVM recommendations given by the EU Commission. Among other things, it is planned to strengthen the independence of the public prosecutor's office by requiring a CSM opinion on the appointment of high-ranking prosecutors. Moreover, the role of the head of state in the appointment of such prosecutors should also be strengthened. In contrast to the current law, the head of state would be allowed to reject a candidate to head one of the prosecutors' offices more than once. The CSM would be given the role of submitting a list of possible candidates to the Ministry of Justice. Another proposal relates to increasing the quota of first instance representatives before the CSM.

These proposals would bring Romanian judicial legislation closer to the CVM recommendations. Nevertheless, this is only a momentary snapshot, as the legislative process has not yet been completed.

Conclusions

The ECJ ruling of 18.05.2021 sharply criticizes the changes in the Romanian judiciary performed in 2017-2019 by several PSD-ALDE governments. The fact that these aspects are being rolled back in the parliamentary process as late as 2021, is essentially due to the fact that the PNL under Prime Minister Florin Citu, together with its coalition partners, only holds a majority in both chambers of the Romanian Parliament since December 2020.

The independence of the judiciary, as an essential feature of the value of the rule of law enshrined in the European treaties, was infringed by the judicial reforms adopted in 2017-2019. This has now also been impressively proven by the decision of the highest court of the European Union. Due to the political pressure and the thus generated intimidation of judges, the neutrality of the judiciary is no longer guaranteed. In light of this ECJ decision, Romania is advised to swiftly abolish the "special department within the public prosecutor's office for the investigation of crimes committed by judges and public prosecutors", as well as to shape the regulations on the interim management of the judicial inspectorate and the personal liability of judges according to the principles of the rule of law.

In particular, the ECJ unequivocally reminds the Romanian Constitutional Court to comply with the Union law requirements from the CVM proceedings concerning the establishment of rule-of-law structures and to review its case law on the critical position regarding the CVM proceedings. As expected, this should also change the case law of Romanian courts in the sense that they must take into account the CVM recommendations and the consequences of non-compliance.

Nevertheless, some questions also remain open after the ECJ decision. In the case of the abolition of the SIJ, the question remains of what will happen to the cases pending before it. The Romanian legislator faces the challenge of whether the dissolution of this special department means that the proceedings are to be considered null and void and/or whether

these proceedings are to be assigned to other law enforcement institutions. In addition, the recommendations from the EU Commission's 2018 CVM report,⁴ which have not yet been implemented, should be taken into account in Romania, despite the lack of a judicial assessment by the ECJ. Among others, they concern intelligence regulations, ensuring the independence of the prosecution and the judiciary, in particular of the DNA and the ANI (National Integrity Agency). The legal regulations governing the appointment and dismissal of judges need to be reexamined. The legislative changes in the judiciary that are being planned or have been adopted so far are a step in the right direction, but they deal only with some of the issues that still need to be addressed. A more comprehensive approach is needed to complete the CVM process.

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¹ ECJ ruling C-83/19 (Grand Chamber):

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=6391941>

² On the background to the judicial reforms: Romanian Judiciary before the ECJ. Hartmut Rank, Christoph Popa, KAS country report, 23.03.21:

<https://www.kas.de/de/laenderberichte/detail/-/content/rumaenische-justiz-vor-dem-eugh>

³ Venice Commission, 1036/2021 - Romania - Opinion on the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary:

<https://www.venice.coe.int/webforms/documents/?opinion=1036&year=all>

⁴ Report from the Commission to the European Parliament and the Council on Romania's progress under the Cooperation and Verification Mechanism, 13.11.2018:

https://ec.europa.eu/info/sites/default/files/progress-report-romania-2018-com-2018-com2018-851_de.pdf

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