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# country report

Rule of Law Programme South East Europe (Bucharest)



## Romania's judiciary before the ECJ

### An investigation into the so-called “judicial laws”, the legality of the Cooperation and Verification Mechanism (CVM), and rulings of the Romanian Constitutional Court

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Since joining the European Union, Romania has been in the process of evolving towards harmonization with the fundamental principles for which the EU stands. The European Commission has been supporting this process through the Cooperation and Control Mechanism (CVM) from the moment of the accession in 2007. As part of the monitoring, which was originally planned to be short-term but now lasted for almost a decade and a half, the European Commission reports annually on the progress of the member states Bulgaria and Romania with regard to the situation of the rule of law:

At the moment, several cases dealing with central aspects of the Romanian judicial system are pending before the Court of Justice of the European Union (ECJ). In addition to an assessment of the controversial judicial reforms in Romania in 2017-2019, the question of the extent to which the CVM recommendations of the EU Commission are binding is another subject of decisions to be expected shortly. The analysis of the cases pending before the Court of Justice in Luxembourg and the applications of the Advocate General already allows for a number of conclusions to be drawn.

Earlier CVM reports on Romania showed remarkable progress in fighting corruption and promoting the independence of the judiciary.<sup>1</sup> As a result of structural deterioration in the years 2017-2019 in the areas mentioned, not only did the positive developments in Romania stagnate, but even the praised progress was undone.<sup>2</sup>

The path that Romania found itself on until 2019 was considered by the European Commission to be ultimately backward, and led to a lot of criticism from abroad and protests in Romania itself. As a result of this development, Romanian courts felt compelled to ask the European Court of Justice (ECJ) in Luxembourg for preliminary rulings on several legal questions in order to find out its interpretation of European Union law. In essence,

the issues at stake concern the legal nature of the decisions and reports in the context of the CVM procedure, i.e. the question of whether these are binding. In addition, Romanian courts requested clarification as to the extent to which the so-called “judicial laws” violate European Union law. Several decisions of the Romanian Constitutional Court were also sent to the ECJ to check for their conformity with EU law.

#### Pending cases at a glance

There are currently several cases and questions relating to Romania pending before the European Court of Justice. Specifically, some of these cases concern the controversial judicial reform tabled

by a PSD-led government under then Prime Minister *Mihai Tudose* on August 23, 2017. This was not only followed by protests in Romania itself, but was also viewed critically in Brussels. In addition to the demonstrations in many Romanian cities, professional organizations also found the courage to criticize the measures. Individual judges suspended proceedings and opted to ask for a preliminary ruling. Above all, it becomes clear that the organization “Forum of Judges in Romania” has played a significant role in the movement towards a review of national regulations. The association is involved in three of the five related cases and, as its chairman Dragoş Călin expressed in an interview, is positively surprised by the courage and willingness of more judges and prosecutors to follow this movement and support it.<sup>3</sup>

At the core of the legal cases stands the question of the extent to which the so-called “judicial laws” and the resulting structural change are compatible with European Union law. Above all, the compatibility with the rule of law principles is questioned. Should the ECJ follow the applicant's point of view and find the reform of the so-called “judicial laws” to be contrary to EU law, this alone would mean progress for the development of the rule of law in Romania.

### **Assessment of the decisions and reports in the context of the CVM process**

Romanian courts sought the assistance of the ECJ mainly to clarify the legal nature of decisions and reports issued on the basis of the CVM procedure. Advocate General Michal Bobek proposed the following solution in his published Opinion: the adoption of such decisions and reports are actions of a body of the European Union. According to Art. 267 para. 1 lit. b TFEU, such an action is necessary to be able to apply for a preliminary ruling by the ECJ. The Advocate General answered this in the affirmative on the grounds that the decision based on the CVM procedure was a decision falling within the meaning of Art. 288 para. 4 TFEU and was issued on the basis of Articles 37 and 38 of the Act of Accession.<sup>4</sup> The legal effect of the CVM decisions and/or reports and their binding force for a member state was investigated as

well. In this matter, the Advocate General differentiated between the CVM decision and the CVM report, but found in both cases a binding effect for Romania.

The first decision is based on the wording of Art. 288 para. 4 TFEU, according to which decisions are fundamentally binding. In addition, a lack of binding force of CVM decisions would in fact amount to abandoning the core requirements of accession to the European Union.<sup>5</sup> With regard to the CVM reports, the Advocate General found that they were not an “act” within the meaning of Art. 288 para. 4 TFEU, but rather represented a legal act of its own kind.<sup>6</sup>

The binding effect for the member state stems from Art. 4 para. 3 TEU, i.e. the so-called “*effet utile*” principle. From it, the Advocate General derives a stronger obligation on the part of the member state in CVM proceedings to “loyally cooperate” with the European Commission. Above all, this obligation refers to the fact that the Commission reports must be adequately taken into consideration in the context of national judicial reforms and the adoption of laws and administrative measures.

The questions to be clarified in advance with regard to the legal nature of the acts and their binding nature in the context of CVM proceedings were thus answered: it has now been established that Union law applies and the questions fall within the jurisdiction of the ECJ.

### **Assessment of the national provisions in question**

According to the reports of the European Commission, Romania was on the right track until 2017 and arguably could have already ended the CVM proceedings by fulfilling the requirements and recommendations of the European Commission. The subsequent structural deterioration in the area of the independence of the judiciary and the fight against corruption caused the Commission to rethink. Analyzing the planned shape of the Romanian judicial reform, the EU Commission identified an increasing risk of political influence on decisions of the judiciary, although the member state should have prevented precisely

this development. The aim of the European Commission was to bring the independence of the judiciary and the fight against corruption to a level where a worsening becomes almost impossible and therefore a control by the European Union is no longer required. At first things looked good from this perspective, as the CVM report from January 2017 shows. Especially the negative fallout of several Romanian emergency decrees adopted in 2017 was tremendous, so it seemed impossible for the European Commission to end the CVM procedure. Specifically, the provisional appointment of a head of the Judicial Inspection and the creation of an independent department for investigating criminal offenses in the judiciary were met with criticism.

### **Provisional appointment of an interim head of the Judicial Inspection**

The appointment of the interim head of the judiciary inspection led to critical statements and raised concerns about the independence of the Romanian judiciary. The Judicial Inspection indeed made the partially understandable argument according to which the mandate of the previous management ended without the competent authority having initiated a new selection procedure and thus an extension of the previous mandate was mandatory. Nevertheless, the effects of the Emergency Decree No. 77/2018 showed a development contrary to the actually desired progress towards an independent judiciary. According to the Romanian Constitution, the Superior Council of Magistracy is responsible for appointing the head of the Judicial Inspection. The authority is seen as a guarantor of judicial independence, but was rather restricted in its constitutional rights by the Emergency Decree No. 77/2018. In effect, the Superior Council of Magistracy was deprived of the possibility of exercising discretion and an automatic extension of the mandate was made possible through a procedure other than the procedure under the law. This limitation of the constitutional rights of the Superior Council of Magistracy through an emergency decree not only violates the Romanian Constitution, but at the same time also infringes European Union law. European Union law basically requires to avoid legal acts that could result in political influence or political pressure on the

judiciary. This is the intention of Art. 19 para. 1 TEU and Art. 47 para. 2 of the Charter of Fundamental Rights of the European Union. From the point of view of the Advocate General, the aforementioned provisions conflict with the system created by Emergency Decree No. 77/2018, as it cannot guarantee the necessary safeguards. This becomes particularly clear from the fact that the emergency decree enables the government to extend an already expired mandate without the authority relevant under the Romanian Constitution being able to exercise its discretion in this matter.

This also clearly shows why the European Commission criticizes the judicial laws in the form envisaged at the time and, above all, the effects of the emergency decrees, viewing them as a step backwards in the development of Romania. The previous system and primarily the competence of the Superior Council of Magistracy guaranteed a procedure based on the rule of law. The Emergency Decree No. 77/2018 and the possibility of influencing the appointment of the management position run the risk of constitutional principles being undermined. In addition, the judicial system loses some of its independence and is subject to increasing political influence.

### **The department for the investigation of criminal offenses in the judiciary**

The majority of the legal questions currently submitted to the ECJ by Romanian courts concern the department for the investigation of criminal offenses in the judiciary (Romanian abbreviation: SIIJ), a new special department within the public prosecutor's office. When this department was established in 2018 it was met with strong criticism from the onset, as increasing political influence on the work of judges and prosecutors was feared.

In this case, the Venice Commission also touched on the impact on public perception: establishing a new institution would create the impression that the judicial system is extensively affected by crime and corruption, since otherwise a special department within the public prosecutor's office would not have been necessary. That this would put all sorts of offenses committed by judges on

par with corruption, organized crime and terrorism appears however disproportionate in the context.

Nevertheless, the aforementioned special department of the public prosecutor's office is covered with a justifying veil. It is undoubtedly possible to claim that an independent special department for offenses committed by judges and prosecutors would lead to a decrease in corruption within the judicial system. In addition, the high standards for working in this department may also lead to more legal certainty and independence. After all, to be accepted into the department at all, candidates must show 18 years of experience as a public prosecutor and pass a transparent procedure .

Nevertheless, it seems questionable whether it was actually justified to create a special department. Since the establishment of the special department, it has become clear that it is not fully functional. Above all, this is illustrated by the increasing number of cases in relation to the very limited number of prosecutors handling them. In addition, there is no adequate territorial structure, as the special department, in contrast to other departments of the public prosecutor's office, is only based in Bucharest, has no branches, and does not cover all of Romania. The fact that the special department has exclusive competence for cases involving judges and prosecutors speaks against a "authentic" reason (and thereby rather suggests a more likely weakening of the fight against corruption). The department retains responsibility even if another person (outside the judiciary) is prosecuted for the same offense as well. As a result of these regulations, fictitious complaints against judges or public prosecutors allow for targeted actions within the competence of the special department.

Thus, external actors have the opportunity to influence the responsibilities within the judiciary. This opens a wide door to outside influence. At a first glance, the establishment of such a special department within the public prosecutor's office would arguably raise no concerns, as it may significantly raise the inhibition threshold for criminal behaviour by judges and public prosecutors. However, the implementation uncovers rather

different aims. According to the previous regulations, the special department is not only an "omnipotent superstructure" supposed to control the behaviour of judges and public prosecutors, but also creates an actually fictitious immunity for public prosecutors working in this special department. This "vicious circle of responsibilities" allows the conclusion that the establishment of this department was not primarily motivated by fighting corruption, but rather by allowing political influence on rulings of the judiciary. It is revealing that immediately after its establishment, the special department initiated or resumed investigations against those judges and public prosecutors who had argued publicly against the structural change. In addition, magistrates, who at the moment of the adoption of the special department's legal framework were prosecuting members of the government, became a target as well.

Ultimately, these objective aspects persistently suggest the impression that the department is specifically investigating people who acted against the interests of the initiators. In our opinion, such a development contradicts the principles of the rule of law, above all because it builds up the pressure on other judges and public prosecutors holding different opinions. Due to these developments, it is impossible to continue to speak of an independent, upright judiciary.

Another aspect to be considered is that everyone has the right to a fair trial within an appropriate period of time. The rule of law is no longer upheld if the appropriate period cannot be met.

Above all, the case law of the European Court of Human Rights (ECHR) on Art. 6 para. 1 ECHR is to be considered. The concept of appropriateness, which is not clearly defined, must always be assessed under the particular circumstances of the individual case, but objective aspects must also be used. From an objective point of view, an aspect would already objectively speak against the rule of law if it actually precludes the possibility of complying with the appropriate time frame. In this context, the ECHR invokes the obligation of states to organize themselves in a way that enables the judiciary to meet the requirements of Art. 6 para. 1 ECHR.<sup>7</sup>

By setting up the special department, Romania has violated this principle and thus implemented a measure that contradicts the principles of the rule of law. The number of public prosecutors employed within the special department is so small, that it seems impossible to handle cases within reasonable time. This will inevitably lead to an inadequate length of the criminal proceedings. Arguably, it may therefore be established on the part of the member state that a faulty organization of the special department leads to a violation of Art. 6 para. 1 ECHR.

### Review of several decisions of the Romanian Constitutional Court<sup>8</sup>

In addition to the cases presented pertaining to the Romanian judicial reforms, three other cases from 2016, 2018 and 2019 are also pending in Luxembourg. They concern rulings of the Romanian Constitutional Court (rulings 51/2016, 685/2018 and 417/2019) and all of them aim to review the compatibility with European Union law. Specifically, the Romanian Constitutional Court decided on the question of whether the composition of some of the panels of the Supreme Court of Cassation and Justice (Înalta Curte de Casație și Justiție - ICCJ) was inadmissible. For a preliminary ruling, the ICCJ and the Tribunal in Bihor asked the ECJ to check whether the principles of judicial independence and rule of law as well as the protection of the financial interests of the EU are upheld.

#### Participation of domestic intelligence services in surveillance activities

In ruling 51/2016, the Constitutional Court declared the participation of domestic intelligence services in carrying out technical surveillance measures for the purpose of criminal investigations to be unconstitutional. The EU Advocate General suggested to the ECJ to rule that EU law does not conflict with the ruling of the national court, since European Union law does not standardize the prerequisites and requirements of such measures, but merely requires compliance with the principles of EU law. The Advocate General regards the influence of such constitutional

rulings on current or future corruption proceedings as a logical consequence that does not speak against the decision of the Constitutional Court.

#### Inadmissible composition of court panels

The Advocate General also considers the decision on the inadmissible composition of the ICCJ (685/2018) to be in conformity with Union law. The question of the composition lies within the responsibility of the member state. In addition, *Bobek* also sees the financial interests of the Union as not impaired by the decision of the Constitutional Court, since this decision does not result in any new legal remedies. Likewise, no anti-corruption measures would be undermined, which is why the ruling would not result in a violation of EU law. From the point of view of the Advocate General no suitable reasons would speak against the independence or impartiality of the Constitutional Court.

#### Expert panels for the fight against corruption

The ruling of the Romanian Constitutional Court in case 417/2019 related to the obligation of the Supreme Court of Cassation to set up expert panels to deal with corruption offenses when acting as court of first instance. According to the Constitutional Court, the Supreme Court of Cassation has not met this obligation. In the opinion of the Advocate General, the ECJ should find that this ruling of the Romanian Constitutional Court actually does violate EU law, specifically Article 325 para. 1 TFEU. He considers the decision of the Constitutional Court to be unlawful insofar the composition of the panels would be declared unlawful only due to the lack of specialization in corruption cases. As a result, numerous first-instance corruption cases dealt with between April 2003 and January 2019 would have to be reviewed and retried. Concerns arise with regard to the practical consequences of the decision: In the opinion of the Advocate General, the subsequent impunity in a large number of cases would represent a detriment to the financial interests of the EU. He therefore considers the Romanian ruling to be contrary to European Union law, since it undermines the member state's obligation to safeguard the financial interests of the EU, according to Art. 325 para. 1 TFEU.

## Outlook

The final rulings of the ECJ in these cases are still pending.

After the Romanian parliamentary elections at the end of 2020, there was renewed action in Romania towards EU-compliant judicial reforms. Considering not only the dispute over compliance with the rule of law in other EU member states, this step will not only please the European Commission. Ultimately, it will also be useful to Romania, as the intended end of the CVM mechanism, which has been in place since 2007, is now in sight.

To reach this goal, an optimistic and ambitious time schedule has been drawn up, stating that the draft laws should be presented as early as the end of April 2021.<sup>9</sup>

Concrete steps have already been initiated. In mid-February 2021, the Romanian Justice Minister *Stelian Ion* (a member of the Union for the Rescue of Romania, USR) sent a relevant draft law to the government. In 2020 this reform was unable to be implemented because the PNL-led minority governments had to seek majorities depending on individual situation and other questions became more urgent after the outbreak of the pandemic.

The draft law tabled by the Minister of Justice aims to abolish the department for special investigations within the judiciary. He explained this step with the wish to return to normality. The Minister also described the special department as an inefficient body that has completely failed to achieve its goal of holding accountable judges

who break the law. In addition, the special department only brought two cases to court each year. The Minister of Justice said he was very surprised at this.<sup>10</sup>

Nevertheless, it remains to be seen to what extent the current government will implement the requirements of the EU and whether the negative effects of the structural changes in Romania have not yet created other hidden problems in need of remedy. Ultimately, not only did the European Commission lose confidence in the stability of Romania's rule of law development, but the Romanian people also lost trust in the government and in the progress achieved in the fight against corruption at the highest level. It will take more than a law to restore the Romanian people's confidence in the judiciary.

The decisions of the ECJ can already pave the way for the first step. Due to the principle of the primacy of EU law, supranational rules and regulations must take precedence over national rules and regulations. In the concrete case, the collision of EU law principles with national regulations would mean that the EU regulations would have to be applied first. If Romania follows these decisions and uses them as a yardstick, it is likely that there will be legislative changes in the near future that comply with EU requirements and move the country further in the direction of a fully functioning constitutional state.

It remains to be seen how the ECJ will judge the cases presented here. Irrespective of this, it is to be welcomed that Parliament has now again taken up reforms of the Romanian judicial system in earnest.

- 1 [https://ec.europa.eu/info/files/progress-report-romania-2019-com-2019-393\\_de](https://ec.europa.eu/info/files/progress-report-romania-2019-com-2019-393_de).
- 2 [https://ec.europa.eu/info/files/progress-report-romania-2018-com-2018-851\\_en](https://ec.europa.eu/info/files/progress-report-romania-2018-com-2018-851_en).
- 3 <http://www.forumuljudecatorilor.ro/index.php/archives/4233> (in Romanian).
- 4 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=231501&pageIn-dex=0&do-clang=DE&mode=req&dir=&occ=first&part=1>, Rn. 125.
- 5 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=231501&pageIn-dex=0&do-clang=DE&mode=req&dir=&occ=first&part=1>, Rn. 153: Michal Bobek makes this clear by describing it as a license for abandoning to comply with the core requirements.
- 6 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=231501&pageIn-dex=0&do-clang=DE&mode=req&dir=&occ=first&part=1>, Rn. 159.
- 7 <http://hudoc.echr.coe.int/fre?i=001-57765>, Rn. 24.
- 8 Press Release No. 33/21, Court of Justice of the European Union, Luxembourg March 4, 2021.
- 9 <https://intellinews.com/romania-government-to-pursue-ambitious-timetable-for-justice-reforms-200994/?source=romania&fbclid=IwAR3mGoO6RzPYsXFnutreVekZUkjjqT-KEAvz45rDbjGH08EaHp>.
- 10 <https://www.nineoclock.ro/2021/02/12/justice-minister-sends-govt-bill-proposal-for-dismantling-sii/?fbclid=IwAR0XFzoU939A-15jdNbHgoo0xTGkwM7iDb4GLr2l6ukAQIAkwa-MiSE9Q60>.

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