Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 21 December 2016[1]

Case C-258/14

Eugenia Florescu and Others
v
Casa Județeană de Pensii Sibiu,
Casa Națională de Pensii și alte Drepturi de Asigurări Sociale,
Ministerul Muncii, Familiei și Protecției Sociale,
Statul român,
Ministerul Finanțelor Publice(Request for a preliminary ruling

from the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania))

(Reference for a preliminary ruling — Principles of EU law — Social policy and equal treatment — Principles of legal certainty and primacy of EU law — National legislation permitting revision of final decisions in the event of a breach of the principle of primacy of EU law, but only in administrative proceedings (and not in other proceedings) — National legislation prohibiting the combining of a retirement pension and income from employment — Interpretation of that rule by the Romanian Constitutional Court capable of giving rise to discrimination between persons occupying posts the duration of which is prescribed in the Constitution and professional judges and law officers)

1. In the present case, the Court has been requested by the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania) to give a preliminary ruling on several questions concerning the compatibility with EU law of a national measure prohibiting the combining of the net pension in the public sector with income from other activities carried on in public institutions if the level of that pension exceeds the level of the national gross average salary on the basis of which the State social security budget was drawn up.

2. The referring court asks, in particular, whether the provisions of Directive 2000/78/EC[2] and Article 17 of the Charter of Fundamental Rights of the European Union[3] preclude such a measure.

1 — Original language: French.

2 — Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

3 — 'The Charter.'

3. Those questions will lead the Court to assess the nature of the Memorandum of Understanding between the European Community and Romania concluded in Bucharest and Brussels on 23 June 2009,[4] in order to determine whether that Memorandum of Understanding may be regarded as an act of the institutions for the purposes of Article 267 TFEU. Furthermore, those questions will provide the Court with the opportunity to consider whether the national measure at issue in the main proceedings may be regarded as the implementation of EU law for the purposes of Article 51(1) of the Charter.

4. In this Opinion I shall set out the reasons why in my view the Memorandum of Understanding must be regarded as an act of the EU institutions for the purposes of Article 267 TFEU and may thus be interpreted by the Court. I shall explain why I believe that the Memorandum of Understanding must be interpreted as meaning that it does not require the adoption of national legislation, such as that at issue in the main proceedings, which prohibits the combining of the net pension in the public sector with income from activities carried out in public institutions if the level of the pension exceeds the level of the average gross national salary on the basis of which the State social security budget was drawn up.

5. I shall also indicate why Article 17 of the Charter must be interpreted as not precluding such national legislation.

6. I shall then set out the reasons why in my view Article 2(2) of Directive 2000/78 must be interpreted as not being applicable to that national legislation.

7. Last, I shall propose that the Court rule that Article 47 of the Charter and the principles of equivalence and effectiveness must be interpreted as meaning that, in circumstances such as those of the main proceedings, they do not preclude a national court being unable to revise a final decision of a court or tribunal delivered in civil proceedings when that decision is incompatible with an interpretation of EU law upheld by the Court, even though such a possibility exists with respect to definitive judicial decisions incompatible with EU law delivered in administrative proceedings.

I – Legal context

A – *EU law*

1. Primary law

a) The Charter

8. Under the heading ‘Right to property’, Article 17(1) of the Charter provides:

‘Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.’

4 — ‘The Memorandum of Understanding’. It is available at the following internet address: http://ec.europa.eu/economy_finance/publications/publication15409_en.pdf (The remainder of this footnote is not relevant to the English version of the Opinion).

9. Article 51 of the Charter defines the field of application of the Charter in the following terms:

‘1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’

b) The EU Treaty

10. The first and second subparagraphs of Article 6(1) TEU provide as follows:

‘The Union recognises the rights, freedoms and principles set out in the [Charter] of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.’

c) The FEU Treaty

11. In the words of Article 143 TFEU:

‘1. Where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy, the Commission shall immediately investigate the position of the State in question and the action which, making use of all the means at its disposal, that State has taken or may take in accordance with the provisions of the Treaties. The Commission shall state what measures it recommends the State concerned to take.

If the action taken by a Member State with a derogation and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten, the Commission shall, after consulting the Economic and Financial Committee, recommend to the Council the granting of mutual assistance and appropriate methods therefor.

The Commission shall keep the Council regularly informed of the situation and of how it is developing.

2. The Council shall grant such mutual assistance; it shall adopt directives or decisions laying down the conditions and details of such assistance, which may take such forms as:

(a) a concerted approach to or within any other international organisations to which Member States with a derogation have recourse;

(b) measures needed to avoid deflection of trade where the Member State with a derogation which is in difficulties maintains or reintroduces quantitative restrictions against third countries;

(c) the granting of limited credits by other Member States, subject to their agreement.

3. If the mutual assistance recommended by the Commission is not granted by the Council or if the mutual assistance granted and the measures taken are insufficient, the Commission shall authorise the Member State with a derogation which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine.

Such authorisation may be revoked and such conditions and details may be changed by the Council.'

2. Secondary law

a) Regulation No 332/2002, Decision 2009/458/EC and Decision 2009/459/EC

12. Regulation No 332/2002 establishes the procedures applicable to the mutual assistance facility provided for in Article 143 TFEU.

13. Thus, Article 1 of that regulation provides:

'1. A Community medium-term financial assistance facility enabling loans to be granted to one or more Member States which are experiencing, or are seriously threatened with, difficulties in their balance of current payments or capital movements shall be established. Only Member States which have not adopted the euro may benefit from this Community facility.

The outstanding amount of loans to be granted to Member States under this facility shall be limited to EUR 50 billion in principal.

2. To this end, in accordance with a decision adopted by the Council pursuant to Article 3 and after consulting the Economic and Financial Committee, the Commission shall be empowered on behalf of the European Community to contract borrowings on the capital markets or with financial institutions.'

14. Article 3 of that regulation is worded as follows:

'1. The medium-term financial assistance facility may be implemented by the Council on the initiative of:

(a) the Commission, acting pursuant to Article 119 of the Treaty in agreement with the Member State seeking Community financing;

(b) a Member State experiencing, or seriously threatened with, difficulties as regards its balance of current payments or capital movements.

2. The Member State seeking medium-term financial assistance shall discuss with the Commission an assessment of its financial needs and submit a draft adjustment programme to the Commission and the Economic and Financial Committee. The Council, after examining the situation in the Member State concerned and the adjustment programme presented in support of its application, shall decide, as a rule during the same meeting:

(a) whether to grant a loan or appropriate financing facility, its amount and its average duration;

(b) the economic policy conditions attached to the medium-term financial assistance with a view to re-establishing or ensuring a sustainable balance of payments situation;

(c) the techniques for disbursing the loan or financing facility, the release or drawing-down of which shall, as a rule, be by successive instalments, the release of each instalment being subject to verification of the results achieved in implementing the programme in terms of the objectives set.'

15. Article 3a of Regulation No 332/2002 provides:

'The Commission and the Member State concerned shall conclude a Memorandum of Understanding setting out in detail the conditions laid down by the Council pursuant to Article 3. The Commission shall communicate the Memorandum of Understanding to the European Parliament and the Council.'

16. Under Article 1 of Decision 2009/458/EC,[5] the Community granted mutual assistance for Romania pursuant to Article 143 TFEU. Furthermore, by Decision 2009/459/EC,[6] the Community made available to Romania a medium-term loan amounting to a maximum of EUR 5 billion.[7]

17. Under Article 2(1) and (2):

'1. The assistance shall be managed by the Commission in a manner consistent with Romania's undertakings and recommendations by the Council, in particular the Country Specific Recommendations in the context of the implementation of the National Reform Programme as well as of the convergence programme.

2. The Commission shall agree with the authorities of Romania, after consulting the [Economic and Financial Committee ('the EFC')], the specific economic policy conditions attached to the financial assistance as laid down in Article 3(5) of that decision. Those conditions shall be laid down in a Memorandum of Understanding consistent with the undertakings and recommendations referred to in paragraph 1 …'

18. Following those decisions, the Memorandum of Understanding was concluded.

19. Point 5(d) of that Memorandum of Understanding, entitled 'Structural reform', contains recommendations relating to measures intended to improve the efficiency and effectiveness of public administration, enhancing the quality of the public administration in several areas, including with respect to decision-making structures, the division of responsibilities among institutions, the internal organisation of key ministries, the oversight and accountability for implementation and the adequacy of staffing levels and human resource management.

b) Directive 2000/78

20. According to Article 1 of Directive 2000/78, the purpose of that directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

21. Article 2(1) and (2) of that directive provides as follows:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

5 — Council Decision of 6 May 2009 granting mutual assistance for Romania (OJ 2009 L 150, p. 6).

6 — Council Decision of 6 May 2009 providing Community medium-term financial assistance for Romania (OJ 2009 L 150, p. 8).

7 — Article 1(1) of that decision.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(I) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary …'

B – *Romanian law*

22. Article 83 of Legea No 303/2004 privind statutul judecătorilor şi al procurorilor (Law No 303/2004 on the terms and conditions of judges and prosecutors) du 28 June 2004 (*Monitorul Oficial al României*, Part I, No 826, of 13 September 2005) allowed the post of judge to be combined with the role of teacher in higher education. In addition, that law provided that judges and prosecutors who have taken retirement may combine their retirement pension with the income from a professional activity, regardless of the level of that income.

23. On 5 November 2009 Legea No 329/2009 privind reorganizarea unor autorităţi şi instituţii publice, raţionalizarea cheltuielilor publice, susţinerea mediului de afaceri şi respectarea acordurilor-cadru cu Comisia Europeană şi Fondul Monetar Internaţional (*Monitorul Oficial al României*, Part I, No 761, of 9 November 2009 (Law No 329/2009 on the reorganisation of certain public authorities and institutions, on streamlining public spending, on supporting businesses and on complying with the framework agreements with the European Commission and the International Monetary Fund)) was adopted. [8]

24. Article 2 of that law provides that the measures which it introduces are of an exceptional nature and are intended to reduce the effects of the economic crisis and to fulfil the obligations arising under the Memorandum of Understanding concluded between Romania and the Commission and the stand-by agreement concluded between that Member State and the Commission and the International Monetary Fund ('the IMF').

25. That law, inter alia, imposed a reduction of salaries, a measure which was applied in university education. Under Article 3 of that law, the measures adopted in accordance with the Memorandum of Understanding were designed to overcome the financial crisis. They consist of the reduction of staff expenditure in the public administration, by reducing salaries and by reorganising or abolishing public authorities or institutions, following their regrouping by take-over, merger, separation or reduction of staff.

26. Articles 17 to 26 of Law No 329/2009 prohibit the combining of the net pension with income from activities carried out in public institutions if the level of the pension exceeds the level of the national gross average salary on the basis of which the State social security budget was drawn up.

8 — 'Law No 329/2009.'

27. More specifically, Article 17 of that law states that persons entitled to a pension who are enrolled in the public pension system or who are members of systems outside the public system, and who are in receipt of employment income or, as the case may be, income deemed to constitute employment income, in accordance with the law, from the exercise of an individual contract of employment, a service relationship or an appointed position, in accordance with the law, with a central or local public authority or institution, irrespective of the method of funding or level of subordination of that authority or institution, with an autonomous region, a national company, a national corporation or a commercial company whose capital is wholly or mainly owned by the State or an administrative or territorial entity, may combine their net pension with the income thus received if the level of their pension does not exceed the national gross average income on the basis of which the State social security budget was drawn up and which was approved by the Law on the State social security budget.

28. Article 18 of that Law provides that the pensioners referred to in Article 17 who engage in professional activities on the basis of an individual contract of employment, a service relationship or an instrument of appointment are to be required, within 15 days of the entry into force of the chapter containing that provision, to opt in writing either for payment of their pension to be suspended for the duration of that activity or for termination of the employment relationship, the service relationship or the instrument of appointment if the net pension paid to them is higher than the national gross average income.

29. Last, Article 20 of Law No 329/2009 provides that failure to comply with that obligation to opt for one of the alternatives within the prescribed period is to constitute a ground for automatic termination of the employment relationship established on the basis of the individual contract of employment or the instrument of appointment and of the service relationship.

30. Neither the Memorandum of Understanding nor Law No 329/2009 mentions the courts or the prosecutors' offices or retired judges or prosecutors.

31. According to Article 21 of Legea No 554/2004 contenciosului administrativ (Law No 554/2004 on administrative proceedings)[9] of 2 December 2004 ((*Monitorul Oficial al României*, Part I, No 1 154, of 7 December 2004)), the delivery of a final irrevocable judgment, in breach of the principle of the primacy of EU law laid down in Article 148(2) in conjunction with Article 20(2) of the Romanian Constitution, as republished, constitutes grounds for revision, in addition to those laid down in the Code of Civil Procedure.

II – The factual background

32. The applicants are all judges who, after taking up their judicial posts, were also appointed to teaching posts in the university law department, on succeeding in a competition. They therefore combined the post of judge or law officer and the post of university teacher.

33. In 2009 the applicants retired from their judicial posts and continued to teach at the university. Before 2009 that combining of a public service retirement pension and a post in the public service was permitted, irrespective of the level of income from that professional activity.

9 — 'Law No 554/2004.'

34. Since the entry into force of Law No 329/2009, the applicants can no longer combine their judicial pension with their university income when the level of that pension exceeds the national gross salary level on the basis of which the State social security budget was drawn up. The referring court explains that, on the date when that prohibition came into force, there were no more than 10 judges and prosecutors in the country in receipt of both a judge's pension and a university teacher's salary.

35. By judgment of 4 November 2009, la Curtea Constituțională (Constitutional Court, Romania) held that Law No 329/2009 was consistent with the Constitution.

36. The Casa Județeană de Pensii Sibiu (Pensions Office, Sibiu, Romania) decided on 28 December 2009 to suspend payment of the applicants' pensions.

37. By application of 1 March 2010, the applicants brought an action before the Tribunalul Sibiu (Tribunal, Sibiu, Romania), seeking, in particular, annulment of the decision of 28 December 2009. By judgment of 3 May 2012, that court dismissed the applicants' action.

38. The applicants lodged an appeal against that judgment before the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia), asking, once again, that a reference be made to the Court for interpretation of the relevant provisions. By judgment of 9 November 2012, la Curtea de Apel Alba Iulia, (Court of Appeal, Alba Iulia, Employment and Social Security Chamber, Romania) dismissed the appeal.

39. Before the referring court, the applicants seek revision of that judgment, in particular because, in their view, the court that gave that judgment did not state in it the reasons why it would not give direct effect to, and recognise the primacy of, the provisions of the FEU Treaty and why it would not apply the relevant case-law of the Court.

III – The questions for a preliminary ruling

40. The Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) May [the Memorandum of Understanding] be regarded as an act, decision or communication having legal force within the meaning defined by the Court (judgments of 3 February 1976, *Manghera and Others* (59/75, EU:C:1976:14), and of 20 March 1997, *France* v *Commission* (C-57/95, EU:C:1997:164)) and may it be interpreted by the Court?

(2) If the answer is in the affirmative, is [the Memorandum of Understanding] to be interpreted as allowing the European Commission to require, for the purposes of reducing the effects of the economic crisis by reducing staff costs, the adoption of a national law which withdraws a person's right to receive a contributory pension accrued over more than 30 years, which was legally established and received before that law came into force, on the ground that the person in question receives a salary for activity, carried out on the basis of an employment contract, other than the activity in respect of which he receives the pension?

(3) Is [the Memorandum of Understanding] to be interpreted as allowing the European Commission to require, for the purposes of reducing the effects of the economic crisis, the adoption of a national law which completely and indefinitely withdraws a person's right to receive a contributory pension accrued over more than 30 years, which was legally established and received before that law came into force, on the ground that the person in question receives a salary for activity, carried out on the basis of an employment contract, other than the activity in respect of which he receives the pension?

(4) On a proper construction of the Memorandum [of Understanding] as a whole, and specifically of section (d) of point 5 thereof, which concerns reforming and improving the efficiency of the public administration, was it lawful for the European Commission to require, for the purposes of reducing the effects of the economic crisis, the adoption of a national law which barred retired officials of the public institutions from receiving a salary in addition to the pension?

(5) Can Articles 17, 20, 21 and 47 of the Charter, Article 6 TEU, 110 TFEU, the principle of legal certainty derived from EU law and the case-law of the Court be interpreted as precluding a rule such as that set out in Article 21(2) of Law No 554/2004, which provides that, in the event of failure to observe the principle of the primacy of EU law, it is possible to revise decisions of national courts only in the context of administrative law proceedings and which does not allow decisions of national courts made in other areas (civil, criminal, commercial, and so on) to be revised in the event that such decisions are inconsistent with that principle?

(6) Does Article 6 TEU, in the version consolidated in 2010, preclude legislation of a Member State under which the payment of a professional judge's pension, established on the basis of contributions made by that judge over more than 30 years of judicial service, is to be conditional upon the termination of his employment contract to teach law at university level?

(7) Do Article 6 TEU, in the version consolidated in 2010, Article 17(1) of the Charter and the case-law of the Court preclude legislation which divests a pension holder of his right to receive a pension, even though that pension has been established on the basis of contributions made over more than 30 years, where judges have made and continue to make separate pension contributions in respect of their university teaching activities?

(8) Do Article 6 TEU, in the version consolidated in 2010, and Article 2(2)(b) of Directive 2000/78, concerning equal treatment of persons regardless of race and ethnic origin, and the case-law of the Court preclude the Constitutional Court of a Member State from delivering a judgment by which, in exercise of its jurisdiction to review the constitutionality of a law, it establishes that only persons appointed for a fixed term have the right to combine a pension with a salary, thereby denying that right to professional judges, who are barred from receiving their pension, established on the basis of personal contributions made over more than 30 years, because they have retained a position teaching law at university level?

(9) Do Article 6 TEU, in the version consolidated in 2010, and the case-law of the Court preclude legislation which indefinitely makes the payment of a judge's pension, established on the basis of contributions made over more than 30 years, conditional upon termination of university employment?

(10) Do Article 6 TEU, in the version consolidated in 2010, and the case-law of the Court preclude legislation which destroys the proper balance to be maintained between the protection of personal property, on the one hand, and general interest requirements, on the other, and which requires only one specific category of persons to lose their judicial pension by reason of the fact that they engage in university employment?'

IV – My analysis

41. I propose that, in order to provide the referring court with a helpful answer, the Court should reformulate the questions referred to it, as follows.

42. By its first question, the referring court asks whether the Memorandum of Understanding may be regarded as an act of an EU institution for the purposes of Article 267 TFEU and, if so, may be interpreted by the Court.

43. By its second to fourth questions, the referring court seeks, in essence, to ascertain whether, if the answer to the first question is in the affirmative, that Memorandum of Understanding may have the effect of requiring the adoption of national legislation, such as that at issue in the main proceedings, prohibiting the combining of the net pension in the public sector with income from activities carried on in public institutions if the level of the pension exceeds the State gross average salary on the basis of which the State social security budget was drawn up.

44. By its sixth, seventh, ninth and tenth questions, the referring court asks the Court, in essence, whether Article 6 TEU, and Articles 17, 20 and 21 of the Charter, are to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibits the combining of the net pension in the public sector with income from activities carried on in public institutions if the level of the pension exceeds a certain threshold.

45. By its eighth question, the referring court, as I understand it, asks the Court, in essence, to rule on whether Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which, for persons employed in the public sector, prohibits the combining of the net pension with income from activities carried on in public institutions if the level of the pension exceeds the level of the national gross average salary on the basis of which the State social security budget was drawn up, when that legislation does not apply to persons employed in the public sector who combine their pensions with income from the exercise of a mandate the duration of which is fixed in the Romanian Constitution.

46. Last, by its fifth question, the referring court asks, in essence, whether Article 47 of the Charter and the principles of equivalence and effectiveness are to be interpreted as meaning that they preclude national legislation which provides that, in the event of a breach of the principle of primacy of EU law, only decisions of courts or tribunals that have become final and irrevocable and were delivered in administrative proceedings are amenable to revision, but not decisions delivered in other areas, such as civil, criminal or commercial proceedings.

A – *First question, concerning the Court's jurisdiction to interpret the Memorandum of Understanding*

47. The first question submitted by the referring court seeks, in reality, to ascertain whether a Memorandum of Understanding, such as that at issue in the main proceedings, is an act of the EU institutions for the purposes of Article 267(b) TFEU and may thus be interpreted by the Court.

48. It will be recalled that that article provides that the Court is to have jurisdiction to give a preliminary ruling on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. The Court has held that that provision confers on it jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the [Union] *without exception*'.[10]

49. On that basis, there is no doubt, to my mind, that the Memorandum of Understanding is an act of the institutions. It was adopted on the basis of Article 143 TFEU, which confers on the EU the power to secure commitments to a Member State. Thus, that article provides that mutual assistance may be granted to a Member State in difficulties or which is seriously threatened with difficulties as regards its balance of payment, the Commission being the institution that recommends that mutual assistance and the Council approving such mutual assistance by adopting a decision.

10 — See judgments of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 8), and of 11 May 2006, *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312, paragraph 36). Emphasis added.

50. Thus Regulation No 332/2002 establishes the procedures applicable to the mutual assistance facility provided for in Article 143 TFEU. In particular, Article 1(2) of that regulation states that the Commission, in accordance with a decision adopted by the Council pursuant to Article 3 of that regulation and after consulting the Economic and Financial Committee, is to be empowered on behalf of the Community to contract borrowings on the capital markets or with financial institutions.

51. The first sentence of Article 3a of that regulation provides that the Commission and the Member State concerned are to conclude a Memorandum of Understanding setting out in detail the conditions laid down by the Council pursuant to Article 3 of that regulation. The Memorandum of Understanding concluded between the European Community and Romania was adopted precisely in accordance with that procedure, and the Council subsequently adopted two decisions in turn, the first granting mutual assistance to Romania pursuant to Article 143 TFEU[11] and the second making available to Romania a medium-term loan amounting to a maximum of EUR 5 billion.[12]

52. The Memorandum of Understanding therefore gives concrete form to an undertaking between the EU and a Member State on an economic programme, negotiated by those parties, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, subject to fulfilling that undertaking, to benefit from financial assistance from the EU.

53. Admittedly, as the Commission pointed out at the hearing, the Memorandum of Understanding does not produce binding legal effects. However, unlike the conditions of admissibility required for an action for annulment under Article 263 TFEU, the preliminary ruling procedure provided for in Article 267 TFEU does not require that the act that is to be interpreted be intended to produce legal effects. It is sufficient that the act in question is '[an act] of the institutions, bodies, offices or agencies of the Union'. In that regard, the Court has held that a reference for a preliminary ruling may also concern acts of the Union which have no binding force.[13]

54. Accordingly, the particular nature of the Memorandum of Understanding does not preclude its being interpreted by the Court in the context of a reference for a preliminary ruling.

55. I am therefore of the view that the Memorandum of Understanding must be regarded as an act of the EU institutions for the purposes of Article 267 TFEU and that the Court has jurisdiction to interpret it.

B – *The second to fourth questions, concerning the interpretation of the Memorandum of Understanding*

56. By these questions, the referring court seeks to ascertain whether the Memorandum of Understanding may have the effect of requiring the adoption of national legislation, such as that at issue in the main proceedings, which prohibits the combining of the net pension with income from activities carried out in public institutions if the level of the pension exceeds the level of the national gross average salary on the basis of which the State social security budget was drawn up.

11 — See Decision 2009/458.

12 — See Decision 2009/459.

13 — See judgments of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 8), and of 8 April 1992, *Wagner* (C-94/91, EU:C:1992:181, paragraphs 16 and 17).

57. As I mentioned in point 52 of this Opinion, the Memorandum of Understanding makes the grant of financial assistance from the Community subject to fulfilment of the economic undertakings given by Romania. The first paragraph of point 5 of that Memorandum of Understanding states, in that regard, that the disbursement of every instalment is to be made on the basis of the implementation of the economic programme of the Romanian Government. For every instalment, specific economic policy criteria were established; the details are provided in Annex I to that Memorandum of Understanding.

58. Next, the Memorandum of Understanding defines the general objectives of the economic programme drawn up by Romania. Although the Memorandum of Understanding provides that the pensions system must be reformed, and sets out certain specific measures such as increasing the retirement age or indexing public sector pensions to consumer prices,[14] it must be stated that there is no reference to any prohibition of the combining of the public service pension with income from activities carried out in public institutions.

59. As the Commission states in its written observations,[15] it is for the Romanian authorities to implement the measures which they deem appropriate and necessary in order to satisfy the general objectives defined in the Memorandum of Understanding.

60. It follows that the Memorandum of Understanding must be interpreted as meaning that it does not require the adoption of national legislation, such as that at issue in the main proceedings, which prohibits the combining of the net pension in the public sector with income from activities carried out in public institutions if the level of the pension exceeds the level of the national gross average salary on the basis of which the State social security budget was drawn up.

C – *The sixth, seventh, ninth and tenth questions, concerning the interpretation of Article 6 TEU and Articles 17, 20 and 21 of the Charter*

61. By its sixth, seventh, ninth and tenth questions, the referring court asks the Court, in essence, whether Article 6 TEU and Articles 17, 20 and 21 of the Charter must be interpreted as meaning that they preclude national legislation, such as that at issue in the main proceedings, which prohibits the combining of the net pension in the public sector with income from activities carried out in public institutions if the level of the pension exceeds a certain threshold.

62. In that regard, it is appropriate first of all to recall that, as regards the requirements flowing from the protection of fundamental rights, those requirements are binding on Member States whenever the latter are called upon to apply EU law.[16]

63. The fundamental rights guaranteed in the EU legal order are applicable in all situations governed by EU law, but not outside such situations. In this respect, the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of EU law. On the other hand, if such legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.[17]

14 — See the fourth subparagraph of point 5, section (b) of that Memorandum of Understanding.

15 — See paragraph 25 of the observations.

16 — See judgment of 11 October 2007, *Möllendorf and Möllendorf-Niehuus* (C-117/06, EU:C:2007:596, paragraph 78), and order of 7 March 2013, *Sindicato dos Bancários do Norte and Others* (C-128/12, not published, EU:C:2013:149, paragraph 10).

17 — See judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19). See also, for a more recent decision, judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630).

64. The whole question is therefore whether in this instance Law No 329/2009 constitutes the implementation of the Memorandum of Understanding for the purposes of Article 51(1) of the Charter and the case-law cited above.

1. The application of the Charter

65. Law No 329/2009 was adopted specifically in order to comply with Romania's commitments to the Commission, as set out in the Memorandum of Understanding; that is expressly stated in the actual wording of that Law, which is entitled 'Law on the reorganisation of certain public authorities and institutions, on streamlining public spending, on supporting businesses and on complying with the framework agreements with the [Commission] and the [IMF]'.

66. Article 2 of that Law is likewise unambiguous, as it states that the measures which it introduces are of an exceptional nature and are intended to reduce the effects of the economic crisis and to fulfil the obligations arising under the Memorandum of Understanding and the stand-by agreement concluded between Romania and the Commission and the IMF.

67. As we saw in points 49 to 52 of this Opinion, that Memorandum of Understanding gives concrete form to the procedure arising under Article 143 TFEU. On that basis, two Council Decisions were adopted, including Decision 2009/459, which provides that the disbursement of each further instalment of financial assistance is to be made when the implementation of the new economic programme of the Romanian Government, the conditions of which are laid down in that Memorandum of Understanding, is satisfactory. [18]

68. Among those conditions, I note that point 5, section (a) of the Memorandum of Understanding requires a reduction of the public sector wage bill, while the fourth subparagraph of point 5(b) states that, in order to improve the long-term sustainability of public finances, key parameters of the pension system are to be reformed.

69. It follows from the foregoing that Law No 329/2009 was adopted in order to implement those commitments given by Romania in the Memorandum of Understanding, which, as we have seen in points 49 to 52 of this Opinion, is part of EU law. The situation of the applicants in the main proceedings is therefore indeed governed by EU law.

70. It is irrelevant, in that regard, that the Memorandum of Understanding leaves a discretion to Romania to decide on the measures best able to ensure compliance with those commitments, such as the measure at issue in the main proceedings, which prohibits the combining of the net public sector pension with income from activities carried out in public institutions if the level of the pension exceeds a certain threshold. In my view, the objectives referred to in Article 3(5) of Decision 2009/459, and also in the Memorandum of Understanding, are sufficiently detailed and precise to constitute a specific rule of EU law in that respect, unlike mere recommendations adopted by the Council, on the basis of Article 126 TFEU, and addressed to Member States whose public deficit is considered excessive.

71. Consequently, I consider that Law No 329/2009 implements EU law within the meaning of Article 51(1) of the Charter and that the Charter is therefore applicable to the main proceedings.

18 — See Article 3(5) of that decision.

2. The infringement of Articles 17, 20 and 21 of the Charter

72. I must make clear at the outset that my analysis will relate only to Article 17 of the Charter. As regards Articles 20 and 21 of the Charter, the referring court merely mentions them in the question but does not explain how the national measure at issue in the main proceedings would infringe those articles.

73. According to Article 17 of the Charter, 'everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest'.

74. In order to determine the scope of the fundamental right to respect for property, it is necessary to take into account, in particular, Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which affirms that right.[19] In that regard, the European Court of Human Rights has had numerous occasions to rule on the right to a pension.

75. Thus, it has held that '[that article] does not create a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit — whether conditional or not on the prior payment of contributions — that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No 1 for persons satisfying its requirements'.[20]

76. Furthermore, according to the settled case-law of the European Court of Human Rights the right to a pension is not, as such, guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms[21] and Article 1 of Protocol No 1 cannot be interpreted as entitling a person to a pension of a particular amount.[22]

77. I see no reason to take a different stance in the present case before this Court. It is common ground that the right to a pension held by the applicants in the main proceedings arises from the contributions paid by the insured persons, in this instance judges or law officers. They acquired a property right in the pension established on the basis of their activity and the pension is therefore part of their economic rights. In addition, for three of the applicants, that right was transmitted to the heir of the deceased insured person. Accordingly, the right to a pension does indeed fall within the ambit of Article 17 of the Charter.

78. That provision envisages two forms of interference with the owner's right, namely outright deprivation of the right ('no one may be deprived of his or her possessions') or restriction of its use ('the use of property may be regulated by law').[23]

19 — See judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P et C-415/05 P, EU:C:2008:461, point 356).

20 — See European Court of Human Rights, 7 July 2011, *Stummer v. Austria* [GC], CE:ECHR:2011:0707JUD003745202, § 82.

21 — See European Court of Human Rights, 2 February 2006, *Buchheit and Meinberg v. Germany*, CE:ECHR:2006:0202DEC005146699, p. 10.

22 — See European Court of Human Rights, 12 October 2004, *Kjartan Ásmundsson v. Iceland*, CE:ECHR:2004:1012JUD006066900, § 39.

23 — See, to that effect, judgment of 13 December 1979, *Hauer* (44/79, EU:C:1979:290, paragraph 19).

79. In this instance, I think that the prohibition of the combining of the public sector pension with income from activities carried out in public institutions cannot be regarded as the outright deprivation of property, in so far as the 'owner' remains free to dispose of his possession, in this case the pension. A person in the situation of the applicants in the main proceedings must opt between receiving that pension and continuing his employment relationship. Such persons are in no way deprived of their pension.

80. On the other hand, there is no doubt that that prohibition introduced by Law No 329/2009 does restrict the use of the property, by temporarily restricting its enjoyment. Such a restriction is permissible, under Article 17 of the Charter, only if it is 'regulated by law in so far as is necessary for the general interest'. To my mind, that phrase reflects Article 52(1) of the Charter, which provides that 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations [of the exercise of those rights and those freedoms] may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

81. If the restriction of the right to property by the prohibition of the combining of the net pension in the public sector with income from an activity carried out in a public institution is indeed regulated by the Romanian law, it remains to be determined whether it is compatible with the essential content of the right to property, whether it is necessary and whether it meets an objective of general interest.

82. On that last point, it does not seem open to debate that the objective of reducing the effects of the economic crisis and meeting obligations resulting from the Memorandum of Understanding and the stand-by agreement concluded between Romania and the Commission and the IMF is an objective of general interest.

83. Nor do I think that Law No 329/2009 calls in question the actual guarantee of the right to property. As is clear from Article 2 thereof, that Law is exceptional in nature. It is not intended to be permanent. In addition, it does not call in question the very principle of the right to a pension, but limits the use of the pension in well-defined and limited circumstances, namely when the pension is combined with an activity carried out in public institutions and when the pension exceeds a certain threshold.

84. As for the necessity of the national provision in question, it seems to me that, in the very particular context of the economic crisis facing the Member States, the latter, and the EU institutions, are most certainly the best placed to determine what measures are capable of having the best possible impact in order to stabilise public spending. Thus, I believe that the Member States have a broad discretion in such matters. Moreover, I recall that the persons affected by the measure must opt between continuing to receive the pension and continuing to carry out an activity in a public institution only when their pension exceeds the level of the national average gross salary on the basis of which the State social security budget was drawn up. In addition, payment of the applicants' pension is suspended only temporarily, until the employment relationship comes to an end.

85. Nor are they deprived of any source of income, since they derive an income specifically from the professional activity carried out in a public institution.

86. Last, to my mind Law No 329/2009 does not place a disproportionate and excessive burden on the applicants in the main proceedings, since they can at any time opt to terminate their employment relationship and receive their pension again.

87. Consequently, in the light of all of those factors, I am of the view that Article 17 of the Charter must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which prohibits the combining of the net pension in the public sector with income from activities carried out in public institutions if the level of the pension exceeds a certain threshold.

D – *Eighth question, concerning the interpretation of Article 2(2)(b) of Directive 2000/78*

88. In the case giving rise to the judgment of 21 May 2015, *SCMD*,[24] the Court was asked to determine, in essence, whether Article 17 of Law No 329/2009, which provides that the employment relationship or the service relationship of public sector employees who are also in receipt of a retirement pension in excess of the gross average salary is to be automatically terminated where those employees have not opted to continue that employment relationship or service relationship within a prescribed period, gives rise to discrimination within the meaning of Article 2(2) and Article 3(1) of Directive 2000/78. The Court concluded that those provisions were not applicable to the national legislation at issue in that case.

89. The national legislation concerned in the case giving rise to the judgment in *SCMD*[25] also being the legislation called in question in the main proceedings, I see no reason to depart from the reasoning and the decision adopted by the Court in that case, a fortiori because the referring court in the present case — and, moreover, the applicants in the main proceedings — do not explain the link between that status of pensioner acquired by the judges involved in the present case and one of the grounds of discrimination referred to in Article 1 of Directive 2000/78.

90. In fact, it must be stated that the referring court merely cites a judgment of the Curtea Constituțională (Constitutional Court) of 4 November 2009, whereby that court found that Law No 329/2009 is in conformance with the Constitution, in so far as the provisions in Chapter IV of that Law, of which Articles 17 to 26 form part, do not concern persons occupying posts the duration of which is expressly fixed by the Constitution, thus confirming the constitutionality of that Law in the case of professional judges.

91. In that regard, it is appropriate to point out that, under Article 2(1) of that directive, the 'principle of equal treatment' is to mean that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive, which include age.[26]

92. As the Court observed in the case giving rise to the judgment in *SCMD*, the termination of the employment relationship or the service relationship is, in accordance with the national provisions at issue, imposed solely on persons employed in the public sector who are in receipt of a retirement pension of an amount higher than the national gross average salary and who have not opted, within a prescribed period, to continue the employment relationship or the service relationship.[27]

93. The difference in treatment is therefore based not on age but on the status as public sector employee and on the fact that the amount of the retirement pension which that employee receives is higher than the national gross average salary.[28]

24 — C-262/14, not published, EU:C:2015:336.

25 — Judgment of 21 May 2015 (C–262/14, not published, EU:C:2015:336.

26 — See judgment of 21 May 2015, *SCMD* (C-262/14, not published, EU:C:2015:336, paragraph 22).

27 — Judgment of 21 May 2015, *SCMD* (C-262/14, not published, EU:C:2015:336, paragraph 24).

28 — See, in that regard, judgment of 21 May 2015, *SCMD* (C-262/14, not published, EU:C:2015:336, paragraph 30).

94. Consequently, as the Court held in paragraph 31 of the judgment in *SCMD*, a situation such as that before the Court does not fall within the general framework established by Article 2(2) of Directive 2000/78 in order to combat certain forms of discrimination.

95. I therefore believe that that article must be interpreted as not applying to national legislation such as that at issue in the main proceedings, which, for persons employed in the public sector, prohibits the combining of the net pension with income from activities carried out in public institutions if the level of the pension exceeds the level of the national gross average salary on the basis of which the State social security budget was drawn up.

E – *Fifth question, concerning the right to an effective remedy and respect for the principles of equivalence and effectiveness*

96. By its fifth question, the referring court asks, in essence, whether Article 47 of the Charter and the principles of equivalence and effectiveness must be interpreted as precluding national legislation which provides that, in the event of a breach of the principle of primacy of EU law, only final and irrevocable judicial decisions delivered in actions of an administrative nature are amenable to revision and not decisions delivered in other areas, such as civil, criminal or commercial proceedings.

97. It will be recalled that in the main proceedings the referring court has been seised of an application for revision of a civil judgment delivered by the Curtea de Apel Alba Iulia, Secția pentru conflicte de muncă și asigurări sociale (Court of Appeal, Alba Iulia, Employment and Social Security Division), with the objective of challenging a decision concerning retirement.

98. It should be observed at the outset that the Court has already examined this question in the case giving rise to the judgment of 6 October 2015, *Târșia*.[29] In that case, the Court was asked by the Tribunalul Sibiu (Tribunal, Sibiu) whether EU law, and in particular the principles of equivalence and effectiveness, preclude a situation where there is no possibility for a national court to revise a final decision of a court or tribunal made in the course of civil proceedings when that decision is found to be incompatible with an interpretation of EU law upheld by the Court after the date on which that decision became final, although such a possibility does exist as regards final decisions of a court or tribunal that are incompatible with EU law and were delivered in the course of administrative proceedings.

99. In *Târșia* , as in the present case, the national provision called in question was Article 21 of Law No 554/2004 on administrative proceedings.

100. The Court held in paragraph 34 of that judgment that '[the principle of equivalence] requires equal treatment of claims based on a breach of national law and of similar claims based on a breach of EU law, not equivalence of national procedural rules applicable to different types of proceedings such as — in the dispute in the main proceedings — civil proceedings on the one hand and administrative proceedings on the other. Furthermore, that principle is not relevant to a situation which — as in the dispute in the main proceedings — concern two types of actions, both of which are based on a breach of EU law'. The Court therefore concluded that that principle did not preclude a national provision such as Article 21 of Law No 554/2004.

101. In addition, as regards the principle of effectiveness, the Court stated in paragraph 38 of that judgment that '[it] has, on several occasions, emphasised the importance of the principle of *res judicata* … Thus, it has been held that EU law does not require a judicial body automatically to go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after delivery of that judgment'.

29 — C-69/14, EU:C:2015:662.

102. The Court therefore concluded that the principle of effectiveness, too, did not preclude a national provision such as Article 21 of Law No 554/2004.

103. Last, the Court observed in paragraph 40 of the judgment in *Târșia* [30] that, 'according to settled case-law, by reason (inter alia) of the fact that an infringement, by [a final decision of a court or tribunal], of rights deriving from EU law cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order to obtain legal protection of their rights'.

104. Accordingly, for the same reasons as those on which the Court relied in the judgment in *Târșia* , I consider that Article 47 of the Charter and the principles of equivalence and effectiveness must be interpreted as not precluding a situation in which there is no possibility for a national court of revising a final decision of a court or tribunal delivered in the course of civil proceedings when that decision is found to be incompatible with an interpretation of EU law upheld by the Court, even though such a possibility exists with respect to final decisions of a court or tribunal incompatible with EU law delivered in the course of administrative proceedings.

V – Conclusion

105. In the light of all of the foregoing considerations, I propose that the Court should answer the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania) as follows:

(1) The Memorandum of Understanding between the European Community and Romania, concluded in Bucharest and Brussels on 23 June 2009, must be regarded as an act of the institutions of the Union for the purposes of Article 267 TFEU; the Court has jurisdiction to interpret it.

(2) That Memorandum of Understanding must be interpreted as meaning that it does not require the adoption of national legislation, such as that at issue in the main proceedings, which prohibits the combining of the net pension in the public sector with income from activities carried on in public institutions if the level of that pension exceeds the level of the national gross average salary on the basis of which the State social security budget was drawn up.

(3) Article 17 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits the combining of the net pension in the public sector with income from activities carried on in public institutions if the level of that pension exceeds a certain threshold.

(4) Article 2(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that it is not applicable to national legislation such as that at issue in the main proceedings which, for persons employed in the public sector, prohibits the combining of the net pension in the public sector with income from activities carried on in public institutions if the level of that pension exceeds the level of the national gross average salary on the basis of which the State social security budget was drawn up.

(5) Article 47 of the Charter of Fundamental Rights of the European Union, and the principles of equivalence and effectiveness, must be interpreted as not precluding, in circumstances such as those of the main proceedings, a national court being unable to revise a final decision of a court or tribunal delivered in civil proceedings, when that decision is found to be incompatible with an

30 — Judgment of 6 October 2015 (C–69/14, EU:C:2015:662).

interpretation of EU law upheld by the Court of Justice of the European Union, even though such a possibility exists with respect to final decisions of a court or tribunal incompatible with EU law delivered in the course of administrative proceedings.