Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 23 September 2020[1]

Joined Cases C-83/19, C-127/19 and C-195/19

Asociația 'Forumul Judecătorilor din România'
v
Inspecția Judiciară
(Request for a preliminary ruling from the Tribunalul Mehedinți (Regional Court, Mehedinți, Romania))
and
Asociația 'Forumul Judecătorilor din România',
Asociația 'Mişcarea pentru Apărarea Statutului Procurorilor'
v
Consiliul Superior al Magistraturii
(Request for a preliminary ruling from the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania))
and
PJ
v
QK
(Request for a preliminary ruling from the Curtea de Apel București (Court of Appeal, Bucharest, Romania))
Case C-291/19
SO
v
TP and Others
(Request for a preliminary ruling from the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania))
Case C-355/19
Asociația 'Forumul Judecătorilor din România',
Asociația 'Mişcarea pentru Apărarea Statutului Procurorilor',
OL
v
Parchetul de pe lângă Înalta Curte de Casație și Justiție — Procurorul General al României

(Request for a preliminary ruling from the Curtea de Apel Pitești (Court of Appeal, Pitești, Romania))

(Reference for a preliminary ruling – Treaty of Accession of the Republic of Bulgaria and Romania to the European Union – Commission Decision 2006/928/EC establishing a Mechanism for Cooperation and Verification (MCV) – Nature and legal effects of the MCV and of the reports established by the Commission on its basis – Interim appointment of the management of the Judicial Inspection – National rules on the establishment and organisation of a section within the Public Prosecutor's Office

1 Original language: English.

for the investigation of offences committed within the judiciary – Article 47 of the Charter of Fundamental Rights of the European Union – Second subparagraph of Article 19(1) TEU – Rule of law – Judicial independence)

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I. Introduction

1. The present cases concern two institutional aspects of the Romanian judicial system that have recently been amended through the reform of the so-called 'Justice Laws'[2] in that Member State. In essence, the five requests for a preliminary ruling examined together in this Opinion concern, on the one hand, the interim appointment of the head of the Inspecția Judiciară (Judicial Inspection, Romania) and, on the other, the creation of a section within the Public Prosecutor's Office, responsible for the investigation of offences committed within the judiciary.[3]

2 Legea nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 303/2004 on the rules governing judges and prosecutors), republished in Monitorul Oficial No 826 of 13 September 2005 ('Law No 303/2004'); Legea nr. 304/2004 privind organizarea judiciară (Law No 304/2004 on the judicial organisation), Monitorul Oficial No 827 of 13 September 2005 ('Law No 304/2004') and Legea nr. 317/2004 privind Consiliul Superior al Magistraturii (Law No 317/2004 on the Superior Council of Magistracy), Monitorul Oficial No 628 of 1 September 2012 ('Law No 317/2004').

3 There is another parallel request for a preliminary ruling in Case C-397/19. It concerns changes to the national system of civil liability of judges. In that case, I deliver a separate Opinion on the same day as in the present cases.

2. There are, however, two preliminary issues that are common to all those cases, which must be addressed at the outset. First, what is the legal nature and effects of the 'Mechanism for Cooperation and Verification' ('the MCV'),[4] established by Commission Decision 2006/928/EC?[5]

3. On the basis of the MCV, the European Commission issues periodic reports. In its report published in 2018,[6] the Commission identified several problematic aspects relating to the recent reforms in the Romanian judicial system which form the subject matter of the present reference for a preliminary ruling. Against that background, the referring courts sought clarification on the legal status of the MCV and the Commission's reports, in particular in order to ascertain whether the recommendations contained in the Commission's reports are binding on the Romanian authorities.

4. Furthermore, while querying the compatibility of the national legislative changes with the principles of the rule of law, effective judicial protection, and the independence of the judiciary, the questions referred point to a number of provisions of primary law, in particular to Article 2 TEU; the second subparagraph of Article 19(1) TEU; and the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). The second preliminary issue in need of clarification is therefore which of these provisions are applicable in the present cases, in the particular post-accession context of Romania within which the MCV remains applicable.

II. Legal framework

A. EU law

1. Primary law

5. In accordance with Article 4(3) of the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union ('the Treaty of Accession'),[7] the institutions of the Union may adopt before accession, inter alia, the measures referred to in Articles 37 and 38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania ('the Act of Accession').[8]

6. Article 2 of the Act of Accession provides that, from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession are to be binding on Romania and are to apply under the conditions laid down in the Treaties and the Act of Accession.

7. Article 37 of the Act of Accession states that: 'If Bulgaria or Romania has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach the Commission may, until the end of a period of up to three years after accession, upon motivated request of a Member State or on its own initiative, take appropriate measures.

4 Besides the 'MCV', in view of the number of acronyms used throughout this Opinion, I find it useful to list those most frequently employed already here for the ease of reference: the Direcția Națională Anticorupție (National Anti-corruption Directorate, Romania; 'the DNA'); the Consiliul Superior al Magistraturii (Superior Council of Magistracy, Romania; 'the SCM'); and the Secția pentru investigarea infracțiunilor din justiție (Section for the Investigation of Offences committed within the Judiciary, Romania; 'the SIOJ').

5 Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56) ('the MCV Decision').

6 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism COM(2018) 851 final of 13 November 2018 ('the MCV Report of 2018'), accompanied by the Commission Staff Working Document — Romania: Technical Report SWD(2018) 551 final ('the MCV Technical Report of 2018').

7 OJ 2005 L 157, p. 11.

8 OJ 2005 L 157, p. 203.

Measures shall be proportional and priority shall be given to measures which least disturb the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms. Such safeguard measures shall not be invoked as a means of arbitrary discrimination or a disguised restriction on trade between Member States. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and the measures adopted shall enter into force as of the first day of accession unless they provide for a later date. The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the relevant commitment is implemented. They may however be applied beyond the period specified in the first paragraph as long as the relevant commitments have not been fulfilled. In response to progress made by the new Member State concerned in fulfilling its commitments, the Commission may adapt the measures as appropriate. The Commission shall inform the Council in good time before revoking the safeguard measures, and it shall take duly into account any observations of the Council in this respect.'

8. Article 38 of the Act of Accession states: 'If there are serious shortcomings or any imminent risks of such shortcomings in Bulgaria or Romania in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the EU Treaty and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the EC Treaty, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative and after consulting the Member States, take appropriate measures and specify the conditions and modalities under which these measures are put into effect.

These measures may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria or Romania and any other Member State or Member States, without prejudice to the continuation of close judicial cooperation. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and the measures adopted shall enter into force as of the first day of accession unless they provide for a later date. The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the shortcomings are remedied. They may however be applied beyond the period specified in the first paragraph as long as these shortcomings persist. In response to progress made by the new Member State concerned in rectifying the identified shortcomings, the Commission may adapt the measures as appropriate after consulting the Member States. The Commission shall inform the Council in good time before revoking the safeguard measures, and it shall take duly into account any observations of the Council in this respect.'

2. The MCV Decision

9. The MCV Decision was adopted, according to its recital 5, on the basis of Articles 37 and 38 of the Act of Accession.

10. According to recital 6 of the MCV Decision, 'the remaining issues in the accountability and efficiency of the judicial system and law enforcement bodies warrant the establishment of a mechanism for cooperation and verification of the progress of Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption'.

11. Article 1 of the MCV Decision states that Romania is to report to the Commission every year on the progress made in addressing each of the benchmarks provided for in the annex to that decision. In accordance with Article 2, the Commission will communicate to the European Parliament and the Council its comments and findings on Romania's report for the first time in June 2007, and thereafter, as and when required and at least every six months. Article 3 provides that the MCV Decision 'shall enter into force only subject to and on the date of the entry into force of the Treaty of Accession'. Pursuant to Article 4, the MCV Decision is addressed to all Member States.

12. The Annex to the MCV Decision contains 'the benchmarks to be addressed by Romania, referred to in Article 1'. The first, third and fourth benchmarks established therein are, respectively: to 'ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. …'; 'building on progress already made, [to] continue to conduct professional, non-partisan investigations into allegations of high-level corruption'; and to 'take further measures to prevent and fight against corruption, in particular within the local government'.

B. Romanian law

1. The Romanian Constitution

13. Article 115(4) of the Constituția României (Romanian Constitution) provides that 'the Government can adopt emergency ordinances only in exceptional cases, the regulation of which cannot be postponed, and ha[s] the obligation to give the reasons for their emergency status within their contents'.

14. Under Article 133(1) of the Romanian Constitution, 'the Superior Council of Magistracy is the guarantor of judicial independence'.

15. Article 132(1) of the Romania Constitution states that 'public prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice'.

2. Provisions relating to the Judicial Inspection

(a) Law No 317/2004

16. According to Article 65 of Law No 317/2004 on the SCM:

'(1) The Judicial Inspection shall be established as a body having legal personality within the [SCM], with its seat in Bucharest, through the reorganisation of the Judicial Inspectorate.

(2) The Judicial Inspection shall be headed by a chief inspector, assisted by a deputy chief inspector, both of whom shall be appointed following a competition organised by the [SCM].

(3) The Judicial Inspection shall act in line with the principle of operational independence, performing, through Judicial Inspectors appointed under the conditions laid down by law, analysis, verification and control tasks in specific fields of activity.'

17. According to Article 67 of Law No 317/2004:

'1. The chief inspector and deputy chief inspector shall be appointed by the general assembly of the [SCM] from among judicial inspectors in office, following a competition consisting in the submission of a project relating to the exercise of the powers specific to the management position in question, and in a written test of knowledge in the field of management, communication, human resources and the candidate's ability to make decisions and take responsibility and resilience to stress, and also a psychological test.

2. The competition will be organised by the [SCM], in accordance with the rules approved by decision of the general assembly of the [SCM], published in the *Monitorul Oficial al României*, part I.

3. The competitions for the positions of chief inspector and deputy chief inspector will be announced at least three months before they are held.

4. The mandate of the chief inspector and of the deputy chief inspector will be for a period of three years and may be renewed once, in accordance with the provisions of Article 67(1).

5. The chief inspector and the deputy chief inspector may be removed from office by the general assembly of the [SCM], where they fail to perform their management duties or perform them inappropriately. The removal from office will be decided upon on the basis of the annual audit report referred to in Article 68.

6. A removal decision taken by the general assembly of the [SCM] may be appealed, within 15 days from service of the decision, to the administrative and tax chamber of the Înalta Curte de Casație și Justiție [(High Court of Cassation and Justice, Romania)]. The appeal will suspend enforcement of the decision of the [SCM]. A decision taken on appeal shall be irrevocable.'

(b) Emergency Ordinance No 77/2018

18. Article I of Government Emergency Ordinance No 77/2018 supplementing Article 67 of Law No 317/2004 on the SCM ('Emergency Ordinance No 77/2018'),[9] inserted two new paragraphs after Article 67(6) of Law No 317/2004:

'7. Where the position of chief inspector or deputy chief inspector, as applicable, of the Judicial Inspection becomes vacant as a result of expiry of the mandate, the chief inspector or deputy chief inspector, as applicable, whose mandate has expired will act as substitute until the date on which that position is filled on the terms laid down by the legislation.

8. Where the mandate of the chief inspector ends for a reason other than expiry of the mandate, the deputy chief inspector will act as substitute until the date on which that position is filled on the terms laid down by the legislation. Where the mandate of the deputy chief inspector ends for a reason other than expiry of the mandate, a judicial inspector appointed by the chief inspector will act as substitute until the date on which that position is filled on the terms laid down by the legislation.'

19. Pursuant to Article II of Emergency Ordinance No 77/2018, Article 67(7) of Law No 317/2004 'will also apply to situations in which the position of chief inspector or of deputy chief inspector, as applicable, of the Judicial Inspection is vacant on the date on which this emergency ordinance comes into force'.

9 Ordonanța de Urgență a Guvernului nr. 77/2018, din 5 septembrie 2018, pentru completarea art. 67 din Legea nr. 317/2004 privind Consiliul Superior al Magistraturii (Monitorul Oficial No 767 of 5 September 2018). Several provisions of Law No 317/2004, including Articles 65 and 67, were further modified by Legea nr. 234/2018 pentru modificarea și completarea Legii nr. 317/2004 privind CSM, (Law No 234/2018 for the amendment and completion of Law No 317/2004 on the SCM, Monitorul Oficial No 850 of 8 October 2018).

3. Provisions relating to the Section for the Investigation of Offences committed within the Judiciary

(a) Law No 207/2018

20. By Article I(45) of Law No 207/2018 amending and supplementing Law No 304/2004 on the organisation of the judiciary ('Law No 207/2018'),[10] a new section governing the Section for the Investigation of Offences committed within the Judiciary ('the SIOJ') and containing Articles 88^1 to 88^9 was inserted after Article 88 of Law No 304/2004.

21. Article 88^1 of Law No 304/2004, as amended, reads as follows:

'1. The [SIOJ] shall be established within the Parchetul de pe lângă Înalta Curte de Casație și Justiție [(Prosecutor's Office attached to the High Court of Cassation and Justice)]. That section shall have exclusive jurisdiction in relation to criminal proceedings in respect of offences committed by judges and prosecutors, including military judges and prosecutors and those who are members of the [SCM].

2. The [SIOJ] shall retain jurisdiction in relation to criminal proceedings where other persons are prosecuted in addition to those referred to in paragraph 1.

…

4. The [SIOJ] shall be headed by a chief prosecutor of the section, assisted by a deputy chief prosecutor, appointed to those roles by the general assembly of the [SCM], subject to the conditions laid down in this Law.

5. The Prosecutor General of the Parchetul de pe lângă Înalta Curte de Casație și Justiție [(Prosecutor's Office attached to the High Court of Cassation and Justice)] shall settle conflicts of jurisdiction between the [SIOJ] and the other structures or units of the Public Prosecutor's Office.

…'

22. According to Article 88^2 of Law No 304/2004, as amended:

'1. The [SIOJ] shall conduct its activities in accordance with the principles of legality, impartiality and hierarchical control.

2. The delegation or secondment of prosecutors to the [SIOJ] shall be prohibited.

3. The [SIOJ] shall conduct its activities with a maximum of 15 prosecutors.

4. The number of positions in the [SIOJ] may be adjusted, depending on the volume of activity, by order of the Prosecutor General of the Parchetul de pe lângă Înalta Curte de Casație și Justiție [(Prosecutor's Office attached to the High Court of Cassation and Justice)], at the request of the chief prosecutor of the section, with the assent of the general assembly of the [SCM].'

23. Articles 88^3 and 88^4 of Law No 304/2004, as amended, regulate, respectively the procedure of appointment of the chief and deputy prosecutors of the SIOJ, including the composition of the selection board of the chief prosecutor and the requirements for participation in the competition. In particular, the first paragraph of Article 88^3 states that 'the chief prosecutor of the [SIOJ] shall be

10 Legea nr. 207/2018 pentru modificarea și completarea Legii nr. 304/2004 privind organizarea judiciară (Monitorul Oficial, part I, No 636 of 20 July 2018).

appointed to his role by the general assembly of the [SCM], following a competition consisting in the submission of a project relating to the performance of tasks specific to the management position in question, which is intended to evaluate the candidate's management skills, effective management of resources, ability to make decisions and assume responsibilities, communication skills and resilience to stress, as well as his integrity, his activity as a prosecutor and his relationship with values specific to that profession, such as judicial independence and respect for fundamental rights and freedoms'. Furthermore, according to Article 88^3(7), 'the removal of the chief prosecutor of the [SIOJ] from his position shall be decided by the general assembly of the [SCM] where he fails to perform the duties specific to his role or where he has been the subject of disciplinary action during the past three years, at the proposal of the board provided for in paragraph 2'. Pursuant to Article 88^3(8), 'the chief prosecutor of the [SIOJ] shall be appointed to his role for a three-year term, renewable only once'.

24. Article 88^5 of Law No 304/2004, as amended, regulates the selection procedure of the prosecutors of the SIOJ and the rules for the competition, which includes an interview before the general assembly of the SCM, and an evaluation of the candidates' activities. In accordance with paragraph 1, the prosecutors are appointed by the general assembly of the SCM following a competition, for a three-year term, with the option of renewal for a total maximum term of nine years. In line with paragraph 3, in order to be able to apply for that competition, prosecutors must satisfy the following cumulative conditions: '(a) they have not been the subject of disciplinary action during the past three years; (b) they are of at least the grade required to work in a prosecutor's office attached to a court of appeal; (c) their actual length of service in the role of prosecutor is at least 18 years; (d) they have received appropriate professional training; (e) their moral conduct is beyond reproach'.

25. Article 88^8(1) establishes that the powers of the SIOJ include the power: (a) to institute criminal proceedings in respect of offences falling within its jurisdiction; (b) to refer matters to courts relating to the offences provided for in point (a); (c) to establish and update the database on offences falling within its jurisdiction; and (d) to exercise other powers conferred on it by law. According to Article 88^8(2), 'the hearings in cases falling within the jurisdiction of the section shall be attended by prosecutors of the judicial section of the Parchetul de pe lângă Înalta Curte de Casație și Justiție [(Prosecutor's Office attached to the High Court of Cassation and Justice)] or by prosecutors of the prosecutor's office attached to the court before which the case is brought'.

26. Article III of Law No 207/2018 provides that:

'(1) The [SIOJ] shall commence its activities within three months of the date on which this Law enters into force.

(2) Cases falling within the jurisdiction of the [SIOJ] which are pending before any division of the prosecutor's office and not resolved prior to the date on which the section becomes operational shall be referred to that section to be settled once it is operational.'

(b) *Emergency Ordinance No 90/2018*

27. Government Emergency Ordinance No 90/2018 on the measures relating to the rules governing the operation of the [SIOJ] ('Emergency Ordinance No 90/2018'),[11] was adopted in order to make the SIOJ operational by the deadline established under Article III(1) of Law No 207/2018. According to its preamble, given that, on the date of its adoption, the SCM had not completed the procedure to render

11 Ordonanța de urgență a guvernului nr. 90/2018 privind unele măsuri pentru operaționalizarea Secției pentru investigarea infracțiunilor din justiție (Monitorul Oficial No 862 of 10 October 2018).

the SIOJ operational, the government deemed it necessary to adopt urgent legislative measures laying down a simple procedure, by way of derogation from the new Articles 88^3 to 88^5 of Law No 304/2004, for the provisional appointment of the chief prosecutor, the deputy chief prosecutor and at least one third of the prosecutors of the section.

28. Article I of Emergency Ordinance No 90/2018 modifies Article 88^2(3) of Law No 304/2004 as follows: 'The [SIOJ] shall conduct its activities with 15 prosecutor positions.'

29. Article II of Emergency Ordinance No 90/2018 establishes a procedure derogating from Articles 88^3 to 88^5 of Law No 304/2004, for the purpose of the provisional appointment of the chief prosecutor and at least one third of the prosecutors of the SIOJ. In particular, according to paragraph 1 of that provision, prior to the completion of the competitions organised for the purpose of appointments to the position of chief prosecutor of the SIOJ and to the executive positions of prosecutor of that section, the functions of the chief prosecutor and at least one third of the executive roles of prosecutor are to be carried out provisionally by prosecutors who satisfy the conditions laid down by law for appointment to those positions, selected by the board responsible for organising the competition set up in accordance with Article 88^3(2) of Law No 304/2004. According to paragraph 2, the candidates are to be selected by the board responsible for organising that competition, which is to conduct its activities in the presence of at least three members, in accordance with a procedure which is to take place within five calendar days from the date on which it is triggered by the President of the SCM. Pursuant to paragraph 11: 'With effect from the date on which the [SIOJ] becomes operational, that section shall take over the cases coming within its jurisdiction pending before the Direcția Națională Anticorupție [(National Anti-corruption Directorate, Romania; 'the DNA')] and other divisions of the prosecution office, as well as the files of the cases relating to the offences provided for in Article 88^1(1) of Law No 304/2004, republished, as subsequently amended and supplemented, which were closed prior to the date on which that section became operational.'

(c) Emergency Ordinance No 92/2018

30. Government Emergency Ordinance No 92 of 15 October 2018 amending and supplementing certain normative acts in the field of justice ('Emergency Ordinance No 92/2018'),[12] amended, inter alia, Law No 304/2004 by introducing a new paragraph 5 to Article 88^2, indicating that the prosecutors of the SIOJ have the status of seconded prosecutors for the duration of their services in that section. Article 88^5(5) is modified by providing that the interview within the selection procedure of the prosecutors of the SIOJ takes place before the selection board, and not before the general assembly of the SCM.

(d) Emergency Ordinance No 7/2019

31. Government Emergency Ordinance No 7 of 20 February 2019 laying down certain temporary measures regarding the competition for admission to the Institutul Național al Magistraturii [(National Institute of Magistracy, Romania)], the initial training of judges and prosecutors, the graduation exam of the National Institute of Magistracy, the internship and the capacity exam of trainee judges and prosecutors, and amending and supplementing Law No 303/2004, Law No 304/2004 and Law No 317/2004,[13] inter alia, amends and supplements Law No 304/2004. It adds a new paragraph 6 into its Article 88^1, according to which, when the Codul de procedură penală

12 Ordonanța de urgență nr. 92 din 15 octombrie 2018 pentru modificarea și completarea unor acte normative în domeniul justiției (Monitorul Oficial No 874 of 16 October 2018).

13 Ordonanța de urgență nr. 7/2019 din 20 februarie 2019 privind unele măsuri temporare referitoare la concursul de admitere la Institutul Național al Magistraturii, formarea profesională inițială a judecătorilor și procurorilor, examenul de absolvire a Institutului Național al Magistraturii, stagiul și examenul de capacitate al judecătorilor și procurorilor stagiari, precum și pentru modificarea și completarea Legii nr. 303/2004 privind statutul judecătorilor și procurorilor, Legii nr. 304/2004 privind organizarea judiciară și Legii nr. 317/2004 privind Consiliul Superior al Magistraturii (Monitorul Oficial No 137 of 20 February 2019).

(Criminal Procedure Code) or any other special law refers to the 'hierarchically superior prosecutor' in cases relating to offences within the jurisdiction of the SIOJ, that expression is to be understood as referring to the chief public prosecutor of the SIOJ, including decisions adopted before that section became operational.

32. It also introduced, after paragraph 11 of Article 88^5, two new paragraphs (11^1) and (11^2), which modify the appointment procedure laid down in that provision. According to paragraph (11^1), the members of the selection board mentioned in Article 88^5 retain their vote in the general assembly of the SCM. Paragraph (11^2) provides that the selection boards provided for in Articles 88^3 and 88^5 respectively carry out their activity lawfully if at least three of their members are present.

33. That ordinance also amends Article 88^8, by providing for, in paragraph 1(d), a new power of the SIOJ, which consists in bringing or withdrawing actions in cases within the section's jurisdiction, including cases pending before the courts or settled definitively before it becomes operational.

(e) Emergency Ordinance No 12/2019

34. Government Emergency Ordinance No 12 of 5 March 2019 amending and supplementing certain normative acts in the field of justice ('Emergency Ordinance No 12/2019'),[14] modified Law No 303/2004 on the status of judges and prosecutors, introduced Articles 88^{10} and 88^{11} in Law No 304/2004. Articles 88^{10} provides for the secondment of judiciary police officers to the SIOJ, at the request of the chief prosecutor of this section, by decision of the Minister of the Interior. The duration of such secondments may be up to three years, renewable for the same period.

III. Facts, national proceedings and the questions referred

A. Case C-83/19

35. On 27 August 2018, the Asociația 'Forumul Judecătorilor din România' (Romanian Association of Judges Forum, 'the Association of Judges Forum' or 'the applicant') submitted a request for disclosure of information of public interest to the Judicial Inspection ('the defendant'). The requested information related to the activity of the Judicial Inspection during the period from 2014 to 2018. It concerned specifically statistical information about the cases dealt with by that body, the origin and result of disciplinary actions, as well as information concerning the conclusion of a protocol between the Serviciul Român de Informații (Romanian Intelligence Service) and the Judicial Inspection and the participation of that service in the investigations.

36. On 24 September 2018, considering that the defendant's reply responded only partially to that request, the applicant brought an action against the defendant before the Tribunalul Olt (Regional Court, Olt, Romania). The applicant sought that the defendant be ordered to disclose certain information that had been the subject matter of the request of 27 August 2018.

37. In its defence, lodged on 26 October 2018, the defendant maintained that the applicant's rights as an individual had not been infringed and that the action should be dismissed as unfounded. That defence was signed by Judge Lucian Netejoru.

14 Ordonanța de urgență nr.12 din 5 martie 2019 pentru modificarea și completarea unor acte normative în domeniul justiției (Monitorul Oficial No 185 of 7 March 2019).

38. Mr Netejoru was appointed Chief Inspector of the Judicial Inspection by decision No 702/2015 of 30 June 2015 of the general assembly of the SCM, with a mandate of three years (from 1 September 2015 to 1 September 2018). At the time of the lodging of the defence in the main proceedings, Mr Netejoru was acting in the capacity of interim chief inspector on the basis of Emergency Ordinance No 77/2018, adopted on 5 September 2018.

39. In its reply, the applicant submitted an objection alleging that it had not been proven that the signatory of the defence, Mr Netejoru, has powers of representation for the defendant for two reasons. First, no administrative act has been adopted by the authority competent to appoint the chief inspector of the Judicial Inspection, the general assembly of the SCM, attesting that the statutory requirements to act in that office *ad interim* have been complied with.

40. Second, the provisions of Emergency Ordinance No 77/2018 are unconstitutional. The applicant claimed that, by extending the mandates of the management of the Judicial Inspection by means of Emergency Ordinance No 77/2018, the government has encroached on the constitutional powers of the SCM. The applicant based its objection on the findings of the MCV Commission Report of 2018, according to which 'the fact that the Minister of Justice decided to intervene, prolonging the mandates of the incumbent, could be seen to cut across the powers of the SCM' and claims that Emergency Ordinance No 77/2018 infringes the guarantee of independence enshrined in the second subparagraph of Article 19(1) TEU. The applicant contended that, if it is established that the MCV, and the second subparagraph of Article 19(1) TEU, impose binding obligations on Romania and that it has failed to comply with such obligations, this will mean that Mr. Netejoru has no right to act as legal representative, thereby causing the defence produced in the case file (including the pleadings in defence, adduced evidence and objections) to be struck out.

41. The defendant submitted that Decision No 702/2015 of the SCM, appointing Mr Netejoru as chief inspector, appears on the Judicial Inspection's website. Furthermore, the defendant invoked Emergency Ordinance No 77/2018. On that basis, the defendant claimed that the applicant's objection should be rejected as unfounded.

42. In those circumstances, the Tribunalul Olt (Regional Court, Olt, Romania) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the [MCV], established by [the MCV Decision], be considered to be an act of an institution of the European Union, within the meaning of Article 267 TFEU, interpretation by [the Court]?

(2) Do the terms, nature and duration of the [MCV], established by [the MCV Decision], come within the scope of application of the [Treaty of Accession]? Are the requirements laid down in the reports prepared in the context of that mechanism binding on Romania?

(3) Must the second subparagraph of Article 19(1) [TEU] be interpreted as meaning that it obliges the Member States to take the measures necessary to ensure effective legal protection in the fields covered by EU law, that is to say, guarantees of an independent disciplinary procedure for Romanian judges, by eliminating all risks of political influence over the conduct of those procedures, such as direct Government appointment of the management of the Inspecția Judiciară (Judicial Inspection, Romania), even on a provisional basis?

(4) Must Article 2 [TEU] be interpreted as meaning that the Member States are obliged to comply with the rule of law criteria, also required in the reports prepared in the context of the [MCV], established by [the MCV Decision], in the case of procedures whereby the Government directly appoints the management of the Inspecția Judiciară (Judicial Inspection, Romania), even on a provisional basis?'

B. Case C-127/19

43. The applicants in the present case are the Association of Judges Forum and the Asociația 'Mișcarea pentru Apărarea Statutului Procurorilor' (the Association 'Movement for the Defence of the Status of Prosecutors'). On 13 December 2018, the applicants brought an action before the Curtea de Apel Pitești (Court of Appeal, Pitești, Romania), seeking the annulment of two decisions of the general assembly of the SCM: Decision No 910/19.09.2018, approving the rules on the appointment and removal of prosecutors in management roles in the SIOJ [15] and Decision No 911/19.09.2018 approving the rules on the appointment, continuation of functions and removal of prosecutors with executive roles in the SIOJ. [16]

44. Those decisions were adopted on the basis of Law No 207/2018. Article 1(45) of that law inserted Articles 88^1 to 88^9 after Article 88 of Law No 304/2004, creating and establishing the functioning of the SIOJ. According to the new Article 88^5(12) 'the procedures for the appointment to, continued performance of and removal from the management and executive roles in the section shall be detailed in rules approved by the general assembly of the [SCM]'. The two decisions, the annulment of which is sought in the present case, were approved on the basis of that provision.

45. The applicants claimed that those two administrative decisions are unconstitutional by reference to the provision of the Romanian Constitution according to which that Member State is obliged to fulfil its obligations under the Treaties to which it is a party (Article 11 and Article 148(2) of the Romanian Constitution). The applicants also claimed that certain provisions of the contested legislative acts are contrary to higher-ranking acts including the law, the Constitution and the TFEU. The applicants also made reference to the MCV. They take the view that the creation of the SIOJ directly affects the competences of the DNA, an entity that has achieved significant results under the MCV, according to the reports of the Commission. The creation of the SIOJ means that dozens of high-profile corruption cases pending before the DNA may be referred to the SIOJ simply through the introduction of fictitious complaints against a member of the judiciary, triggering the outright abolition of a significant part of the activity of the DNA.

46. By judgment No 33 of 23 January 2018, the Curtea Constituțională a României (Romanian Constitutional Court) examined the provisions of Law No 207/2018 in the context of the prior review of constitutionality. It ruled that the complaints concerning the effects of the creation of the SIOJ on the competences of the DNA were unfounded and that there were no binding acts of EU law capable of supporting the complaints of unconstitutionality based on Article 148(2) and (4) of the Constitution.

47. The referring court observes that the establishment of the SIOJ has been criticised in reports by the Group of States against Corruption (GRECO) and the European Commission for Democracy through Law ('the Venice Commission'). The Commission has referred to those reports in connection with its MCV reports. The referring court states that since the MCV and the reports prepared in its context give rise to an obligation of compliance on the part of the State, such an obligation is not only borne by the legislative authority of the State, but also borne by the administrative authorities, in the present case, the SCM, which adopts the secondary implementing legislation, and by the courts.

15 Consiliului Superior al Magistraturii, CSM nr. 910/2018 din 19 septembrie 2018 pentru aprobarea Regulamentului privind numirea și revocarea procurorilor cu funcții de conducere din cadrul Secției pentru investigarea infracțiunilor din justiție (Monitorul Oficial No 812 of 21 September 2018).

16 Consiliului Superior al Magistraturii, CSM nr. 911/2018 din 19 septembrie 2018 pentru aprobarea Regulamentului privind numirea, continuarea activității și revocarea procurorilor cu funcții de execuție din cadrul Secției pentru investigarea infracțiunilor din justiție (Monitorul Oficial No 812 of 21 September 2018).

48. Furthermore, the referring court notes that the Curtea Constituțională (Constitutional Court) declared in its judgment No 104 of 6 March 2018, that the meaning of the MCV Decision has not been interpreted by the Court 'as regards its content, nature and duration, or as regards whether those aspects fall within the scope of application of the Treaty of Accession'. Therefore, it takes the view that the resolution of the dispute requires clarification as to the nature and legal force of those acts.

49. In those circumstances, the Curtea de Apel Pitești (Court of Appeal, Pitești, Romania) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the [MCV], established by [the MCV Decision] be regarded as an act of an institution of the Union, within the meaning of Article 267 TFEU, and therefore amenable to interpretation by [the Court]?

(2) Do the terms, nature and duration of the [MCV], established by [the MCV Decision], fall within the scope of the [Treaty of Accession]? Are the requirements laid down in the reports prepared in accordance with that mechanism binding on Romania?

(3) Must Article 2, in conjunction with Article 4(3) TEU be interpreted as meaning that the obligation on Romania to comply with the requirements laid down in the reports prepared in accordance with the [MCV], established by [the MCV Decision] forms part of the Member State's obligation to comply with the principles of the rule of law?

(4) Does Article 2 TEU, and more specifically the obligation to comply with the values of the rule of law, preclude legislation which establishes and organises the [SIOJ], within the Parchetul de pe lângă Înalta Curte de Casație și Justiție [(Prosecutor's Office attached to the High Court of Cassation and Justice)], because of the possibility of indirect pressure being exerted on members of the judiciary?

(5) Does the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU and in Article 47 of [the Charter], as interpreted by the case-law of [the Court] (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117), preclude the establishment of the [SIOJ], within the Parchetul de pe lângă Înalta Curte de Casație și Justiție [(Prosecutor's Office attached to the High Court of Cassation and Justice)], in the light of the rules governing the appointment/removal of prosecutors as members of that section, the rules governing the exercise of functions within that section and the way in which jurisdiction is established, in connection with the limited number of positions in that section?'

C. Case C-195/19

50. The applicant, PJ, brought proceedings in relation to a tax dispute, which the defendant, who was a judge in that case, dismissed as unfounded. The applicant believed that the defendant has not fulfilled his legal obligation to state the reasons for his decision within the statutory 30-day period, thereby preventing the injured party from seeking legal remedies. The applicant therefore introduced a criminal complaint with the Parchetul de pe lângă Curtea de Apel București (Prosecutor's Office attached to the Court of Appeal, Bucharest, Romania), requesting that the defendant be held criminally liable for the offence of abuse of office.

51. The prosecutor assigned to the case from the Parchetul de pe lângă Curtea de Apel București (Prosecutor's Office attached to the Court of Appeal, Bucharest), decided to bring criminal proceedings, which were subsequently closed on the ground that the abuse of which the judge was accused was found not to exist. The applicant lodged a complaint against that decision to terminate proceedings with the higher-ranking prosecutor.

52. After the entry into force of Law No 207/2018, pursuant to Article III of that law and in accordance with the new Article 88[1] of Law No 304/2004, the Parchetul de pe lângă Curtea de Apel București (Prosecutor's Office attached to the Court of Appeal, Bucharest), referred the complaint to the SIOJ, since it concerned a member of the judiciary. The deputy chief prosecutor of the SIOJ also dismissed the complaint as unfounded. The applicant brought an action before the Curtea de Apel București (Court of Appeal, Bucharest) (the referring court) against the original order of the Prosecutor's Office attached to that court, as confirmed by the order of the deputy chief prosecutor of the SIOJ.

53. The referring court explains that it may either dismiss the action or uphold it. In the latter case, its decision will have the effect of setting aside the orders made by the prosecutors and referring the case back to the prosecutor. In accordance with Section 2[1] of Law No 304/2004, the higher-ranking prosecutor who examined the legality and the merits of the order made by the prosecutor assigned to the case was a member of the SIOJ. Therefore, if the action is upheld, both the prosecutor assigned to the case and the higher-ranking prosecutor will be members of the same special SIOJ.

54. In those circumstances, the referring court finds itself obliged to examine whether EU law precludes national legislation establishing the SIOJ. The national court recalls that the Commission's MCV Report of 2018 made a recommendation to 'suspend immediately the implementation of the Justice Laws and subsequent emergency ordinances' and to 'revise the Justice Laws taking fully into account the recommendations under the [MCV] and issued by the Venice Commission and GRECO'.

55. The national court notes that if Article 67(1) TFEU, the first sentence of Article 2 TEU and the first sentence of Article 9 TEU were found to preclude the national legislation at issue, it would be required to declare all procedural acts drawn up by the SIOJ in the main proceedings to be null and void. The referring court will also need to take account of the answer of the Court when appointing the division of the competent prosecutor's office, in the event that the action is upheld.

56. In those circumstances, the Curtea de Apel București (Court of Appeal, Bucharest) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the [MCV], established by [the MCV Decision], and the requirements laid down in the reports prepared in the context of that mechanism binding on Romania?

(2) Do Article 67(1) TFEU and both the first sentence of Article 2 TEU and the first sentence of Article 9 TEU preclude national legislation establishing a section of the prosecution office which has exclusive jurisdiction to investigate any type of offence committed by judges or prosecutors?

(3) Does the principle of the primacy of European law, as enshrined in the judgment of 15 July 1964, *Costa*, 6/64, EU:C:1964:66, and by subsequent settled case-law of the [Court], preclude national legislation which allows a politico-judicial institution, such as the Curtea Constituțională a României (Romanian Constitutional Court), to infringe the aforementioned principle by means of decisions which are not open to appeal?'

D. Case C-291/19

57. By four criminal complaints filed in December 2015 and February 2016, SO, the applicant, reported that four prosecutors had committed the offence of abuse of office, and that a lawyer, a member of the Brașov Bar, had committed the offence of trading in influence. Subsequently, the applicant filed a criminal complaint against two judges of the Judecătoria Brașov (Court of First Instance, Brașov, Romania) and the Tribunalul Brașov (Regional Court, Brașov, Romania), claiming that they were part of a criminal organisation and that they have found against him in various sets of proceedings.

58. By order of 8 September 2017, the Section for combating offences relating to corruption offences within the DNA ordered that the file be closed.

59. The applicant filed a complaint against the order of 8 September 2017 with the hierarchically superior prosecutor, the chief public prosecutor of the Section for combating offences relating to corruption offences within the DNA. The latter dismissed that complaint by order of 20 October 2017 as unfounded.

60. On 11 September 2018, the applicant filed a complaint against the original order, as confirmed the order of 20 October 2017 before the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania), the referring court.

61. Since the proceedings before it require a prosecutor to participate in the hearings, the referring court states that a prosecutor of the DNA did initially participate in the hearings. Following the entry into force of the amendments to Law No 304/2004 and judgment No 3 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) of 26 February 2019, the DNA prosecutor was replaced at the hearing by a prosecutor from the Parchetul de pe lângă Curtea de Apel Brașov (Prosecutor's Office attached to the Court of Appeal, Brașov, Romania).

62. The referring court explains that the continuation of the main proceedings involves the participation of the prosecutors of the SIOJ. It also states that, if it were found that the complaint made by the applicant is well founded, it would have to send the case to the SIOJ for prosecution. In those circumstances, the referring court considers that it is necessary to establish whether EU law precludes national legislation establishing the SIOJ, having regard to the Commission's MCV Report of 2018. More specifically, in case the Court were to consider that the MCV reports are binding, the national court wishes to know the scope of that obligation and whether it covers only the conclusions of such reports or whether the national court also needs to take into account the findings of the report, including those coming from the documents of the Venice Commission and the GRECO.

63. For those reasons, the Curtea de Apel Brașov (Court of Appeal, Brașov) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the [MCV], established by [the MCV Decision], be regarded as an act of an institution of the Union, within the meaning of Article 267 TFEU, and therefore amenable to interpretation by [the Court]?

(2) Are the requirements set out in the reports drawn up under that mechanism binding on Romania, in particular (but not only) as regards the need to make legislative amendments which comply with the conclusions of the [MCV] and with the recommendations made by the Venice Commission and the [GRECO]?

(3) Must Article 2, in conjunction with Article 4(3), TEU be interpreted as meaning that the obligation on Romania to comply with the requirements laid down in the reports prepared in accordance with the [MCV], established by [the MCV Decision], forms part of the Member State's obligation to comply with the principles of the rule of law?

(4) Does the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU and in Article 47 of [the Charter], as interpreted by the case-law of [the Court] (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117), preclude the establishment of [the SIOJ], within the Parchetul de pe lângă Înalta Curte de Casație și Justiție [(Prosecutor's Office attached to the High Court of Cassation and Justice)], in the light of the rules governing the appointment/removal of prosecutors as members of that section, the rules governing the exercise of functions within that section and the way in which jurisdiction is established, in connection with the limited number of positions in that section?

(5) Does [the second paragraph of] Article 47 of [the Charter] relating to the right to a fair trial by means of a hearing within a reasonable time, preclude the establishment of [the SIOJ] within the Parchetul de pe lângă Înalta Curte de Casație și Justiție [(Prosecutor's Office attached to the High Court of Cassation and Justice)], in the light of the rules governing the exercise of functions within it and the way in which jurisdiction is established, in connection with the limited number of positions in that section?'

E. Case C-355/19

64. The applicants in this case are the Association of Judges Forum, the the Association 'Movement for the Defence of the Status of Prosecutors' and OL, a physical person ('the applicants').

65. On 23 January 2019, the applicants brought before the Curtea de Apel Pitești (Court of Appeal, Pitești), an action for annulment of Order No 252 of 23 October 2018, issued by the Parchetul de pe lângă Înalta Curte de Casație şi Justiție — Procurorul General al României (Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice; 'the defendant').[17] That order concerns the organisation and functioning of the SIOJ. It was issued on the basis of Law No 207/2018, which established the SIOJ, pursuant to Article II (10) and (11) of Emergency Ordinance No 90/2018.

66. The applicants, first, claimed that that order is unconstitutional by reference to the provision of the Romanian Constitution according to which that Member State is obliged to fulfil its obligations under the Treaties to which it is a party (Article 11 and Article 148(2) of the Romanian Constitution). Second, they criticised the text of the order on the ground that some of its provisions are contrary to certain higher-ranking legislative acts (the law, the Constitution, the Treaty on European Union). More specifically, the applicants claimed that that order does not take account of the recommendations set out by the Commission in the reports drawn up in the context of the MCV.

67. In those circumstances, and following a reasoning similar to that put forward by the referring court in Case C-127/19, the Curtea de Apel Pitești (Court of Appeal, Pitești) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the [MCV] established by [the MCV Decision] be regarded as an act of an institution of the Union, within the meaning of Article 267 TFEU, which is amenable to interpretation by [the Court]?

(2) Do the terms, nature and duration of the [MCV] established by [the MCV Decision] fall within the scope of the [Treaty of Accession]? Are the requirements set out in the reports drawn up in the context of that mechanism binding on the Romanian State?

(3) Must Article 2 [TEU] be interpreted as meaning that the Member States are obliged to comply with the criteria of the rule of law, also requested in the reports drawn up in the context of the [MCV] established by [the MCV Decision], in the event of the creation, as a matter of urgency, of a section of the prosecutor's office charged with the exclusive investigation of offences committed by members of the judiciary, which gives rise to particular concerns as regards the fight against corruption and may be used as an additional means of intimidating members of the judiciary and putting pressure on them?

(4) Must the second subparagraph of Article 19(1) [TEU] be interpreted as meaning that the Member States are obliged to adopt the necessary measures to ensure effective legal protection in the fields covered by EU law through the removal of any risk of political influence on criminal proceedings

17 Ordinul procurorului general al Parchetului de pe lângă Înalta Curte de Casație și Justiție nr. 252 din 23 octombrie 2018 privind organizarea și funcționarea în cadrul Parchetului de pe lângă Înalta Curte de Casație și Justiție a Secției pentru investigarea infracțiunilor din justiție.

before certain judges, [in] the event of the creation, as a matter of urgency, of a section of the prosecutor's office charged with the exclusive investigation of offences committed by members of the judiciary, which gives rise to particular concerns as regards the fight against corruption and may be used as an additional means of intimidating members of the judiciary and putting pressure on them?'

F. The procedure before the Court

68. Cases C-83/19, C-127/19 and C-195/19 were joined by decision of the President of the Court of 21 March 2019. That decision rejected the request of the referring courts in those cases to subject them to the expedited procedure pursuant to Article 105(1) of the Rules of Procedure of the Court of Justice, but accorded all three cases priority treatment pursuant to Article 53(3) of the Rules of Procedure.

69. By letters of 11 and 20 February 2019, the applicants in Cases C-83/19 and C-127/19 respectively requested the adoption of interim measures under Article 279 TFEU and Article 160(2) and (7) of the Rules of Procedure. The Court replied that it lacked jurisdiction for the adoption of such measures in preliminary ruling proceedings.

70. Following the decision of 8 February 2019 of the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania), the Tribunalul Olt transferred the main proceedings in Case C-83/19, by order of 12 February 2019, to the Tribunalul Mehedinți (Regional Court, Mehedinți, Romania). The Tribunalul Olt (Regional Court, Olt) nonetheless informed the Court that all the acts of procedure, including the preliminary reference, have been maintained. Following the decision of 10 June 2020 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), the Curtea de Apel Pitești (Court of Appeal, Pitești) transferred the main proceedings in Case C-127/19 to the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania). The Court de Apel Pitești (Court of Appeal, Pitești) informed the Court that all the acts of procedure have been maintained.

71. The application of the expedited procedure was also requested by the referring court in Case C-355/19. It was rejected by decision of the President of the Court of 27 June 2019. Priority treatment was accorded in that case as well as in Case C-291/19 by decision of the President of the Court of 18 September 2019.

72. Written submissions have been made in Cases C-83/19, C-127/19 and C-195/19 by the Judicial Inspection; the Governments of Belgium, the Netherlands, Poland and Romania, as well as by the Commission. The Swedish Government has submitted written observations in Cases C-83/19 and C-127/19. The SCM and the Association 'Movement for the Defence of the Status of Prosecutors' have submitted written observations in Case C-127/19.

73. In Case C-291/19, written submissions have been presented by the Governments of the Netherlands, Poland, Romania and Sweden, as well as by the Commission.

74. In Case C-355/19, the Association of Judges Forum, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice ('the Prosecutor General'), the Governments of the Netherlands, Poland, Romania and Sweden, as well as the Commission have presented written submissions.

75. A joint hearing was held on 20 and 21 January 2020 in which the following interested parties presented oral argument: the Association of Judges Forum, the Association 'Movement for the Defence of the Status of Prosecutors', the Superior Council of Magistracy (SCM), OL, the Prosecutor General, the Governments of Belgium, Denmark, the Netherlands, Romania and Sweden, and the Commission.

IV. Analysis

76. This Opinion is structured as follows. I shall start by examining the objections of inadmissibility raised in the different cases before the Court (A). Next, I shall set out the applicable EU legal framework and the yardsticks against which the analysis in the present cases ought to be carried out (B). Finally, I shall carry out the assessment of the national provisions at issue (C).

A. Admissibility of the questions referred

77. Various interested parties, having presented observations in the various cases, have argued that the Court should not give a reply to some or all of the questions referred for a preliminary ruling in the present cases. The main 'themes' raised with regard to the different cases could essentially be 'regrouped' as covering objections relating to the lack of competence of the Union in the fields covered by the questions referred, in particular, (i) the internal organisation of the justice systems; (ii) the lack of jurisdiction of the Court to interpret the MCV Decision; (iii) the lack of relevance of the responses to be given by the Court for the purposes of resolving the cases before the referring courts; and (iv) the fact that some of the questions referred have become devoid of purpose.

78. All those objections have been put forward as objections to the admissibility of the questions referred. However, it appears to me that the arguments relating (i) to the lack of EU competence in the field of judicial organisation of the Member States, and (ii) to the legal nature of the MCV concern, in reality, the assessment of the jurisdiction of the Court.

79. Moreover, those elements of jurisdiction largely overlap with the material analysis of those provisions. Whether the national provisions at issue in the present cases, concerned with the organisation of the judiciary, fall within the scope of EU law, is inextricably linked to the answers to be given to the questions referred, which relate specifically to the scope, requirements and effects of Article 2 and Article 19(1) TEU as well as Article 47 of the Charter.[18] As the Court has noted in *A.K. and Others* with regard to similar arguments, those questions concern the interpretation of the provisions at issue and, for that reason, they fall within the jurisdiction of the Court under Article 267 TFEU.[19]

80. For those reasons, I shall deal with both of these objections to the jurisdiction of the Court below in Section B of this Opinion, in which I will set out the provisions which are in fact applicable in the present cases and the type of examination required. In this section, Section A of this Opinion, I shall address only what appear, in fact, to be objections of inadmissibility, raised by various parties with regard to the individual questions raised in each of the cases.

81. I note that the Romanian Government submitted in its written observations that the questions referred were, for the most part, inadmissible in all the cases before the Court.[20] However, at the hearing, the position of that government changed considerably, which I understand was due to the fact that following the subsequent change in the government at national level, the policy of the new government also changed.[21]

18 See, to that effect, judgments of 7 March 2017, *X and X* (C-638/16 PPU, EU:C:2017:173, paragraph 37), and of 26 September 2018, *Belastingdienst* v *Toeslagen (Suspensory effect of the appeal)* (C-175/17, EU:C:2018:776, paragraph 24).

19 Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 74).

20 Specifically questions 1 and 2 in Case C-83/19; questions 1 to 3 in Case C-127/19; question 1 in Case C-195/19; questions 1 to 3 in Case C-291/19; questions 1, 2 and 4 in Case C-355/19.

21 See also below, points 144, 263, 284 and 285 of this Opinion.

82. However, the Romanian Government did not expressly withdraw its written submissions at the hearing and the arguments made therein concerning admissibility. Therefore, I consider that the Court remains obliged to reply to the arguments raised by the Romanian Government in its written submissions regarding admissibility.

83. As a joint prelude to the individual cases in this section, it is useful to recall that, in accordance with settled case-law, it is solely for the national court, which assumes responsibility for the judicial decision in the main proceedings, to determine both the need for a preliminary ruling and the relevance of the questions referred. The Court is in principle bound to give a ruling whenever the questions concern the interpretation of EU law provisions. Questions referred for a preliminary ruling enjoy a presumption of relevance. As such, the Court refuses to give a ruling only in limited circumstances, for instance, where the requirements of Article 94 of the Rules of Procedure are not satisfied or where it is obvious that the interpretation of EU law concerned bears no relation to the facts, or where the questions are hypothetical.[22] It is in the light of those principles that I shall assess the objections relating to admissibility in the present cases.

1. C-83/19

84. Two sets of objections have been raised against the admissibility of this case. The first relates to the lack of necessity or relevance of the questions for the main proceedings. The second relates to the claim that the case has lost its object.

85. First, the Judicial Inspection has argued that the questions raised in Case C-83/19 are not relevant for the adjudication of the main proceedings. That argument was also put forward, with regard to the first and second questions, by the Romanian Government in its written observations, in addition to pointing out that the referring court had not explained the reasons why it considered the reference for a preliminary ruling to be necessary.

86. Second, the Commission has submitted that the main proceedings have lost their object and therefore the questions are no longer relevant. It maintains that, on 15 May 2019, Mr Netejoru was appointed by the plenary assembly of the SCM as Chief Inspector of the Judicial Inspection for a new three-year mandate, on the basis of the provisions of Law No 317/2004. The Commission considers that the questions referred have therefore lost their relevance. The *ex post* appointment of the same person, following a legally organised competition, will bring to an end to any interference in the independence of the judiciary by the executive power.

87. Regarding his lack of capacity to represent the Judicial Inspection before the 15 May 2019, including the date of the submissions made by Mr Netejoru on behalf of the Judicial Inspection, the Commission considers that the situation could be remedied through Article 82(1) of the Codul de procedură civilă al României (Romanian Code of Civil Procedure). That provision states that 'where the court finds that it has not been proven that the person who has acted on behalf of a party has powers of representation, the court will grant a short period to remedy the situation …'. As a consequence, the questions referred for a preliminary ruling are hypothetical and should be dismissed as inadmissible.

88. In my view, none of the objections of inadmissibility are convincing.

22 See, for example, judgment of 25 July 2018, *Confédération paysanne and Others* (C-528/16, EU:C:2018:583, paragraphs 72 and 73 and the case-law cited), or of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraph 35).

89. First, the referring court has explained the relevance of the questions referred for the purposes of the main proceedings. According to the order for reference, the national court must rule as a *preliminary matter*, pursuant to national procedural provisions, on the procedural objections that may render the hearing of evidence or the examination of substance redundant.[23] At this stage, the main proceedings are halted precisely because of that procedural objection, based on the fact that Mr Netejoru, who, in his capacity as Chief Inspector, pursuant to Emergency Ordinance No 77/2018, signed the defence as representative of the Judicial Inspection, lacked the relevant representation powers.

90. It is rather clear what sort of 'domino effect' any response that may be given by the Court could have on the national proceedings. If the preliminary objection were to be upheld by the referring court, that would lead to excluding the pleading of the defence and, by implication, the evidence and objections pleaded therein. That decision would clearly have repercussions on the adjudication in the main action in the national proceedings, concerning the application of the Association of Judges Forum seeking an order requiring the disclosure of certain information by the Judicial Inspection.

91. I acknowledge that the content of the questions referred raised in this case is indeed somewhat remote from the main subject matter of the main proceedings, which remains the action concerning the request for information. Moreover, to open up substantively within such a main action the whole issue of a potentially problematic appointment of the chief inspector may appear somewhat contrived.

92. However, the dispute, for which the opinion of this Court is sought, is the preliminary issue concerning Mr Netejoru's quality of representation, raised as an incident in the main proceedings. The fact that those proceedings concern a preliminary matter does not mean a lack of relevance and, therefore, the inadmissibility of the reference for preliminary ruling. Indeed, the Court, in assessing whether a question referred is necessary to enable a referring court to 'give judgment' within the meaning of the second paragraph of Article 267 TFEU, has adopted a broad interpretation of that concept. It notably encompasses 'the whole of the procedure leading to the judgment of the referring court, in order that the Court of Justice is able to interpret all procedural provisions of European Union law that the referring court is required to apply in order to give judgment'.[24] That interpretation has made it possible for procedural questions regarding the entire process of creating the judgment to be regarded as admissible, including all issues relating to the responsibility for the costs of proceedings, or taking of evidence.[25] Moreover, in the past, the Court has shown itself to be traditionally rather generous in not examining too closely the substantive proximity of the issues raised with regard to main proceedings.[26]

23 Article 248 of Lege nr. 134/2010 privind Codul de procedură civilă (Law No 134/2010 establishing the Civil Procedure Code), republished in Monitorul Oficial No 247 of 10 April 2015.

24 Judgment of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85, paragraph 42).

25 Ibid., paragraphs 35 to 45. See also, on the different constellations in which questions relating to issues such as allocation of costs may be admissible, my Opinion in *Pegaso and Sistemi di Sicurezza* (C-521/18, EU:C:2020:306, point 58 et seq.).

26 For a recent example, in the already quoted judgment of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraphs 31 to 39), the national proceedings which gave rise to the questions referred concerned, as to its substance, criminal proceedings for wilful destruction of property. Within that context, the Court assessed a number of rather complex issues on the validity of Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, and the authorisation of glyphosate, which could also be seen as somewhat substantively remote from the actual issues before the national court.

93. Second, the objection raised by the Commission must also be dismissed. Admittedly, according to established case-law, the preliminary ruling procedure presupposes that a dispute *is pending* before the national court.[27] This means that, if the object of the dispute has disappeared, thereby making the questions raised hypothetical or unrelated to an actual dispute, the Court is to decide that there is no need to give a ruling on the request for a preliminary ruling.[28]

94. However, in the present case, there is nothing in the file before this Court to indicate that either the preliminary objection in the main proceedings, or the main proceedings themselves, have lost their object. There is no confirmation that the subsequent lawful appointment of Mr Netejoru to the position of chief inspector would have any effect on the validity of the acts of representation carried out before that appointment.

95. While valuing the assistance of the Commission in identifying the potentially applicable national law on the matter, it is not for the Court to interpret such provisions. Moreover, from the order for reference, it appears that the referring court considers itself obliged to rule on the procedural objection submitted by the applicant, and that it must assess the legality of the representation of the Judicial Inspection *at the time when the defence was lodged*.[29] From that point of view, the correctness of which is only for the national court(s) to ascertain, the fact that a given person was appointed to the same position *after that point in time* may not have the effect of remedying the previous lack of powers of representation.

96. In the light of the previous considerations, I am of the view that the questions referred in Case C-83/19 are indeed admissible.

2. C-127/19 and C-355/19

97. In Case C-127/19 the Romanian Government submitted in its written observations that the first, second and third questions, concerned with the legal nature and effects of the MCV Decision, have no connection with the subject matter of the main proceedings. Similarly, but raising a general objection to the admissibility of all the questions referred in Case C-127/19, the SCM maintained that the questions raised by the referring court do not concern the interpretation of EU law, but instead ask the Court to apply EU law to the case at issue and seek a consultative opinion on national provisions. At the hearing, the SCM added that the questions are irrelevant for the subject matter of the main proceedings, which concerns the legality of the two administrative acts adopted by the SCM and not the law establishing the SIOJ. Since the referring court does not have jurisdiction regarding the analysis of the national law, which is a matter pending before the Curtea Constituțională a României (Romanian Constitutional Court), in its view, the questions must be declared inadmissible.

98. In Case C-355/19, the Romanian Government submitted in its written observations that the referring court has not shown the relevance of the first, second and fourth questions for the purposes of the main proceedings.

99. Case C-127/19 is concerned with the annulment of Decisions No 910 and No 911 of the general assembly of the SCM of 19 September 2018. The referring court explains that those acts were adopted with a view to implementing the amendments introduced by Law No 207/2018, and that those acts aim therefore at facilitating the functioning of the SIOJ. In that context, the referring court

27 See, for example, judgment of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 31).

28 See, for example, orders of 10 January 2019, *Mahmood and Others* (C-169/18, EU:C:2019:5, paragraphs 25 and 26); of 2 May 2019, *Faggiano* (C-524/16, not published, EU:C:2019:399, paragraphs 23 and 24); and of 1 October 2019, *YX (Forwarding of a judgment to the Member State of nationality of the sentenced person)* (C-495/18, EU:C:2019:808, paragraphs 23 to 26).

29 The national court explains that, in accordance with Article 208(2) of the Romanian Code of Civil Procedure, 'where no defence has been lodged within the time limit laid down by the legislation, the defendant will forfeit its right to submit evidence and objections, with the exception of public order pleas, subject to any contrary provision of the legislation'.

considers it necessary to clarify the interpretation of the MCV, Article 2, Article 4(3) and the second subparagraph of Article 19(1) TEU, and Article 47 of the Charter with a view to ruling on the compatibility of those provisions with the establishment of the SIOJ by Law No 207/2018. That law constitutes the legal basis for the acts, the annulment of which is sought in the main proceedings.

100. Those explanations show that there is a clear functional link between the acts at issue in the main proceedings and Law No 207/2018 establishing the SIOJ. A finding that the establishment of the SIOJ is incompatible with EU law will have an inevitable impact on the assessment of the administrative acts that are at issue in the main proceedings. Put simply, if the basis is found to be incompatible, so too will the subsequent acts implementing that basis.

101. This clearly shows, to my mind, the relevance of the questions referred raised in Case C-127/19 for the purposes of the action for annulment before the referring court in the main proceedings. The objections of inadmissibility raised in this case are therefore to be dismissed.

102. In a similar vein, Case C-355/19 concerns the annulment of an administrative act adopted with a view to implementing the amendments introduced by Law No 207/2018 and to facilitating the functioning of the SIOJ. In that context, the referring court considers it necessary to clarify the interpretation of the MCV, Article 2, Article 4(3) and Article 19(1) TEU and Article 47 of the Charter with a view to ruling on the compatibility of those provisions with the establishment of the SIOJ by Law No 207/2018, which is at the origin of the adoption of the acts, the annulment of which is sought in the main proceedings.

103. These questions are admissible for the same reasons as those in the Case C-127/19: it is again the implementation logic. If in fact the basis, namely the establishment of the SIOJ by Law No 207/2018, were to be declared incompatible, the same fate would befall the administrative act at issue in the main proceedings adopted for its implementation.

104. As a result, the first, second and fourth questions in Case C-355/19 are also admissible.

3. C-195/19 and C-291/19

105. In its written submissions, the Romanian Government contested the admissibility of the first question in Case C-195/19 and the first, second, and third questions in Case C-291/19. In the view of that government, those questions concerning the legal nature of the MCV Decision and the reports of the Commission are not relevant for the purposes of the main proceedings in those cases.

106. Case C-195/19 concerns an ongoing case where the criminal liability of a judge is at issue. The referring court explains that, if the action is upheld, both the prosecutor assigned to the case and the higher-ranking prosecutor supervising that prosecutor will be members of the same special SIOJ. It is in that context that the referring court finds itself obliged to examine whether EU law precludes national legislation establishing the SIOJ. It is for that purpose it enquires about the compatibility of that national legislation with the MCV and, in the second question in Case C-195/19, also with Article 2 TEU. The national court notes that, if it were found that EU law precludes the national legislation establishing the SIOJ, then such a finding would lead it to annul all the procedural acts drawn up by the SIOJ in the main proceedings. The referring court would also need to take account of the answer of the Court when appointing the division of the competent prosecutor's office, in the event that the action is upheld.

107. These reasons show clearly the relevance of the first and second questions in Case C-195/19 for the main proceedings, in as much as the second question concerns Article 2 TEU.

108. With regard to the admissibility of the first, second and third questions in Case C-291/19, the referring court has justified the relevance of the questions referred in that case by the fact that the continuation of the main proceedings involves the participation of the prosecutors of the SIOJ. It is therefore necessary to establish whether or not EU law precludes national legislation establishing the SIOJ. If the referring court were to find that the complaint made by the applicant is well founded, the referring court would have to send the case to the SIOJ for prosecution.

109. In the light of those clarifications, for the same reasons just given in connection to question one and partially question two in Case C-195/19, I consider that the first, second and third questions in Case C-291/19 are also admissible.

110. I do, however, agree with the Romanian Government that the second question in Case C-195/19, in so far at it refers to Article 9 TEU and Article 67(1) TFEU, as well as the third question in that case, must be declared inadmissible. With regard to the third question in Case C-195/19, the Romanian Government submitted that a question asking whether the principle of primacy precludes national legislation allowing the Curtea Constituțională (Constitutional Court) to disregard that principle by means of decisions which are not open to appeal has a 'theoretical and general' character and, as such, has no connection with the subject matter of the main proceedings.

111. With regard to the second question in Case C-195/19, the order for reference does not contain any explanation showing how specifically Article 9 TEU (proclaiming the principle of equality of citizens of the Union), and Article 67(1) TFEU (stating that the Union shall constitute an area of freedom, security and justice), could be relevant for the case at hand. In as far as it invokes those provisions, that question does not comply with the requirements set out in Article 94 of the Rules of Procedure. Indeed, according to settled case-law, it is essential that the national court gives, at the very least, some explanation of the reasons for the choice of the EU law provisions which it seeks to have interpreted and some explanation of the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it.[30]

112. The third question in Case C-195/19 suffers, from my point of view, from the same defect, while adding another one of its own. First, that question, as the Romanian Government correctly pointed out, is also far from complying with the requirements of Article 94 of the Rules of Procedure. That question asks, in substance, whether the principle of primacy precludes national legislation which allows the Curtea Constituțională (Constitutional Court), in essence, to disregard that principle by means of decisions which are not open to appeal. However, the order for reference does not at any point mention the specific provisions or why they are problematic. The referring court has simply quoted some excerpts of judgments of the Curtea Constituțională (Constitutional Court) in which that court takes a position on the MCV in various cases, without providing any context or explanation on whether those judgments concern any national provisions connected to the main proceedings.

113. Second, as formulated, that question also contains an (indeed not entirely flattering) implicit evaluation of the case-law of the Curtea Constituțională (Constitutional Court), inviting the Court to endorse a certain reading of that case-law in various unrelated proceedings from which very little information is (selectively) made available, and in so doing, question the institutional authority of a higher national court. That is, however, certainly not the role of this Court in the preliminary ruling procedure.[31]

30 See, for example, judgment of 10 March 2016, *Safe Interenvíos* (C-235/14, EU:C:2016:154, paragraph 115), or order of 12 May 2016, *Security Service and Others* (C-692/15 to C-694/15, EU:C:2016:344, paragraph 20).

31 See, in a similar vein with regard to similarly worded questions from a national court, my Opinion in *Hochtief Solutions Magyarországi Fióktelepe* (C-620/17, EU:C:2019:340, points 36 and 50).

114. As a result, I consider that the second question referred in Case C-195/19, in so far at it refers to Article 9 TEU and Article 67(1) TFEU, as well as the third question referred in the same case, are inadmissible.

4. Interim conclusion on admissibility

115. I consider that the second preliminary question in Case C-195/19, to the extent that it refers to Article 9 TEU and Article 67(1) TFEU, and the third preliminary question in that case, must be declared inadmissible. The rest of the questions referred raised by the present five cases are, to my mind, admissible.

116. However, for the sake of clarity, I would regroup all the questions posed by the present cases into issues concerning applicable law which, once settled, will provide the framework for the two substantive elements addressed by the present cases.

117. First, the referring courts in the present cases have formulated their questions with regard to a number of acts of EU law. On the one hand, there are questions concerning the nature, legal value and effects of the MCV,[32] and whether the national rules at issue fall within the scope of that mechanism.[33] On the other hand, the questions also relate to the interpretation of Article 47 of the Charter, as well as to the second subparagraph of Article 19(1) TEU and to Article 2 and Article 4(3) TEU.[34]

118. Second, those questions concerning the appropriate legislative framework of analysis are raised with the view to obtaining an interpretation of EU law which will enable the national courts to assess the compatibility of the national provisions at issue, concerning the interim appointment of the management of the Judicial Inspection[35] and the establishment of the SIOJ,[36] with those EU rules.

119. In the rest of this Opinion, I shall therefore first examine the relevant EU law provisions (the MCV Decision, Article 47 of the Charter, and Article 2 and Article 19(1) TEU) and the yardsticks that they establish for the purposes of the present cases (B). I will then apply the requirements stemming from those provisions, in the context of the national provisions at issue, in order to provide assistance to the referring courts on the substantive issues pending before them (C).

B. Relevant EU law and yardsticks

1. The MCV

120. The various orders for reference in all the cases examined in this Opinion have raised several questions concerning the nature, legal value and effects of the MCV Decision and of the reports adopted on its basis.

32 Questions 1 and 2 in Cases C-83/19, C-127/19, C-291/19 and C-355/19 as well as question 1 in Case C-195/19.

33 In my view, this is what the referring courts are asking in question 4 in Case C-83/19 as well as in question 3 in Cases C-127/19, C-291/19 and C-355/19. The referring courts ask, in essence, whether Member States are obliged to comply with the rule of law criteria under Article 2 TEU and whether those requirements, also imposed by the MCV Decision and the MCV reports, should be interpreted as precluding the national measures at issue. See below, points 121 and 173 of this Opinion.

34 Question 3 in Case C-83/19; questions 4 and 5 in Case C-127/19; question 2 in Case C-195/19, in as much as it is concerned with Article 2 TEU; questions 4 and 5 in Case C-291/19 and question 4 in Case C-355/19.

35 Question 3 in Case C-83/19.

36 Questions 4 and 5 in Cases C-127/19 and C-291/19; question 2 in Case C-195/19; and question 4 in Case C-355/19.

121. First, are the MCV Decision and the Commission's reports adopted on its basis acts of EU institutions for the purposes of Article 267 TFEU and may the Court interpret them?[37] Second, do the content, nature and duration of the MCV fall within the scope of the Treaty of Accession?[38] Third, the referring courts wish to know whether the requirements laid down by the MCV[39] and by the Commission's reports in the context of the MCV are binding.[40] Fourth, it is also asked whether Article 2 TEU must be interpreted, in conjunction with Article 4(3) TEU, as meaning that the obligation of Romania to comply with the requirements laid down in the MCV reports forms part of the obligation to comply with the rule of law,[41] and whether that obligation covers the temporary appointment of the management of the Judicial Inspection,[42] and the establishment of the SIOJ.[43]

122. I will address all of those questions in turn as follows. First, I shall start by confirming that the MCV Decision and the reports adopted by the Commission on its basis are indeed acts of the European Union (a). Second, I will examine whether the Treaty of Accession constitutes the proper legal basis of the MCV Decision (b). Third, I will turn to the issue of legal value and effects of the MCV and of the Commission's reports adopted within its framework (c). Fourth, I will conclude this section by examining whether the national measures at issue in the present cases fall within the scope of the MCV (d).

(a) Are the MCV Decision and the MCV reports acts of the European Union?

123. All the interested parties, having presented observations on this point,[44] with the exception of the SCM, agree that that question is to be answered in the affirmative. The SCM submitted in its written observations that the MCV Decision was an instrument of cooperation of the Commission and not a legislative act that could be subject to the jurisdiction of the Court under Article 267 TFEU. However, at the hearing, that body stated that the MCV Decision is a binding act, even though the recommendations it contains are not binding.

124. In my view, there is no doubt that, notwithstanding the question of the potentially binding character of the MCV Decision and the reports adopted on its basis, both are acts of EU law and that the Court has jurisdiction to interpret them within the framework of the preliminary ruling procedure under Article 267 TFEU.

125. First, the MCV Decision is a decision for the purposes of the fourth paragraph of Article 288 TFEU. It was adopted by the Commission on the basis of Articles 37 and 38 of the Act of Accession. I fail to see how it could not, therefore, be an 'act of the institutions' for the purposes of Article 267 TFEU.

37 Question 1 in Cases C-83/19, C-127/19, C-291/19 and C-355/19.

38 First part of question 2 in Cases C-83/19; C-127/19 and C-355/19.

39 Question 1 in Case C-195/19.

40 Second part of question 2 in Cases C-83/19; C-127/19; C-355/19 as well as question 1 in Case C-195/19 and question 2 in Case C-291/19.

41 Question 3 in Cases C-127/19 and C-291/19.

42 Question 4 in Case C-83/19.

43 Question 3 in Case C-355/19.

44 The Association 'Movement for the Defence of the Status of Prosecutors', the Association of Judges Forum, the Prosecutor General, the Commission as well as the Governments of Belgium, the Netherlands, Romania and Sweden.

126. Second, the same is true of the reports adopted by the Commission on the basis of the MCV Decision. Again, leaving aside the issue of their (non-)binding nature, which is a different question, Article 267 TFEU confers on the Court jurisdiction to give preliminary rulings on the validity and interpretation of *all acts of the EU institutions without exception*.[45] The jurisdiction of the Court is therefore not limited to those acts having binding effects,[46] as has been confirmed by the various occasions in which the Court ruled on the interpretation of recommendations or other, atypical soft-law acts in preliminary rulings.[47]

127. As a result, the first question in Cases C-83/19, C-127/19, C-291/19 and C-355/19 should be answered that the MCV Decision, as well as the reports established by the Commission on that basis, are acts of an EU institution within the meaning of Article 267 TFEU and, therefore, amenable to interpretation by the Court under that provision.

(b) Is the Treaty of Accession a proper legal basis?

128. Several of the questions referred ask whether the 'terms, nature and duration' of the MCV fall 'within the scope of the Treaty of Accession'.[48] To my mind, these questions essentially seek clarification as to whether the MCV Decision, in its current nature, scope, and form, could validly have been based on the Treaty of Accession. Thus formulated, the question of interpretation comes rather close to a non-acknowledged challenge to the validity of an EU law act.[49]

129. On the basis of the arguments made in the course of these proceedings, I see no reason why the current MCV Decision could not have been adopted on the basis of the Treaty of Accession and the Act of Accession of Romania and Bulgaria. That is so with regard to its formal legal basis (1), its content and objectives (2) and its duration (3).

(1) Formal legal basis

130. As regards its *formal legal basis*, the MCV Decision was adopted as a safeguard measure on the basis of Articles 37 and 38 of the Act of Accession. Article 4(3) of the Treaty of Accession empowers EU institutions to adopt the measures provided for, amongst others, in Articles 37 and 38 of the Act of Accession, before the accession of the Member States concerned. According to those provisions, known as 'safeguard clauses', those measures enter into force only subject to and on the date of the entry into force of the Treaty of Accession. Article 2(2) of the Treaty of Accession states that the provisions of that act form an integral part of that treaty.

(2) Content and objectives

131. From the point of view of the content of the measures that may be taken on the basis of Articles 37 and 38 of the Act of Accession, those provisions empower the Commission to adopt, at the request of a Member State or on its own initiative, respectively, 'appropriate measures' in two situations.

45 See, for example, judgments of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 8), and of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 30).

46 Judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821, paragraph 35 and the case-law cited).

47 For example, judgments of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 9 and the case-law cited), recently confirmed in the judgment of 20 February 2018, *Belgium* v *Commission* (C-16/16 P, EU:C:2018:79, paragraph 44).

48 First part of question 2 in Cases C-83/19; C-127/19 and C-355/19.

49 The other option, should the Court not wish to endorse that interpretation of the first sentence of question 2 in Cases C-83/19, C-127/19 and C-355/19, would be to reformulate that question as only asking whether or not the requirements laid down in the MCV and in the reports adopted on its basis are binding on Romania. In view of the purpose of those questions, that appears in fact to be the primary concern of the referring courts.

132. First, Article 37, the 'internal market safeguard clause', may be triggered if Romania fails to implement the commitments undertaken in the accession negotiations, thus causing a serious breach of the functioning of the internal market or an imminent risk thereof. Second, Article 38 may be triggered if there are serious shortcomings or any imminent risks of such shortcomings in the transposition, state of implementation, or the application of the instruments of cooperation and decisions relating to mutual recognition in the area of freedom, security and justice. [50]

133. An examination of the objectives and content of the MCV Decision shows that it can easily be subsumed under the type of measures foreseen by Articles 37 and 38 of the Act of Accession.

134. Regarding the *objectives* of the MCV Decision, its recital 4 refers to the shortcomings justifying recourse to the safeguard measures of Articles 37 and 38 of the Act of Accession. Whilst noting the efforts made to complete Romania's preparation for EU membership, that recital reveals that the Commission identified in its Report of 26 September 2006 [51] 'remaining issues' concerning, in particular, the accountability and efficiency of the judicial system and law enforcement bodies. Further progress was deemed necessary in order to ensure their capacity 'to implement and apply the measures adopted to establish the internal market and the area of freedom, security and justice'. After recalling in recital 5 that the measures in Articles 37 and 38 of the Act of Accession could be taken in case of 'imminent risks', the Commission considered such risks to be present. Recital 6 thus explains that the 'remaining issues' concerned with accountability and efficiency of the judicial and law enforcement system warrant the establishment of the MCV in order to assess the progress of Romania in addressing specific benchmarks in the field of judicial reform and the fight against corruption.

135. The reason underlying the MCV is thus based on the existence of imminent risks for the functioning of the internal market and the area of freedom, security and justice due to the shortcomings found in the judicial system and in the fight against corruption in Romania. That objective seems to be fully in line with Articles 37 and 38 of the Act of Accession.

136. Second, from the point of view of the *content* of the measures that may be taken on the basis of those provisions, it appears from the wording of both Articles 37 and 38 of the Act of Accession that the term 'measures' is sufficiently broad so as to encompass an act such as the MCV Decision. Neither of the provisions contain an exhaustive list of the kind of measures that may be taken on their basis. The only measure expressly mentioned is the suspension of mutual recognition under Article 38 of the Act of Accession. Thus, Articles 37 and 38 of the Act of Accession simply set negative limits with which the measures must comply — the measures must respect the principle of proportionality and must not be discriminatory.

137. If both Articles 37 and 38 of the Act of Accession can legitimately be used to (ultimately) suspend mutual recognition or certain elements of the internal market, and neither contain any closed list of the type of measures which may be adopted on their basis, then there is not only one measure possible, but rather a scale of measures. In other words, if it is possible to suspend, then it must also be possible, in the name of proportionality expressly inscribed in that provision, to, *a fortiori*, simply establish a much lighter and in that sense much more proportionate measure of a cooperation and verification. The fact that additional and more restrictive measures implementing Articles 37 and 38 can be taken does not detract from the fact that already less stringent measures, such as the MCV, can be adopted on the basis of those provisions, and in accordance with the proportionality principle.

50 Both of these provisions are reproduced above in points 7 and 8 of this Opinion.

51 Communication from the Commission: Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania (COM(2006) 549 final). That report already contemplated the establishment of the MCV.

(3) Duration of the MCV

138. Articles 37 and 38 of the Act of Accession contain the same temporal limitations. First, both provisions state that the measures may be taken, in principle, until the end of a period of up to three years after accession. However, both provisions also establish (i) that the safeguard clauses may be invoked *even before accession* on the basis of the monitoring findings and that the measures adopted are to enter into force as of the first day of accession unless they provide for a later date, and (ii) that the measures may be applied beyond the period of three years as long as those shortcomings persist. Despite the possibility to maintain the measures for an undetermined period of time, both Articles 37 and 38 of the Act of Accession indicate expressly (iii) that the measures are not to be maintained any longer than is strictly necessary and, in any case, are to be lifted when the relevant commitment is implemented.

139. Again, no argument was put forward in the course of these proceedings to suggest that the MCV Decision did not comply with those requirements. First, it was adopted several days before accession, on 13 December 2006, on the basis of the findings of Report of 26 September 2006, as noted in recital 4 of the MCV Decision (i). Second, the measures have been maintained for a longer period than the three-year period following accession based on the finding that the shortcomings that led to the adoption of the MCV Decision continued to persist (ii). Third, recital 9 notes that the decision is to be repealed when all the benchmarks have been satisfactorily fulfilled. In that regard it is noteworthy that, the lifting of the MCV was provided for in the Report of 2017, and was brought to a halt only after the negative findings in the Report of 13 November 2018, to which the present cases relate (iii).

140. I think that the analysis under this heading should stop here. There is naturally the underlying, deeper issue of proportionality, which surfaces occasionally within arguments on the extent to which it is appropriate and/or necessary to maintain what was intended to be a temporal post-accession system 13 years later and counting. However, that particular can of worms can be safely left untouched in the context of the present proceedings, where none of the parties suggested that the material conditions for the ongoing applicability of the MCV Decision, set out in the previous two points, would no longer be satisfied.

(4) Interim conclusion

141. The consideration of the first part of the second question raised in Cases C-83/19, C-127/19 and C-355/19 has not disclosed any factor liable to cast doubt on the fact that the MCV Decision, in its current form, was validly adopted and can be maintained on the basis of the Treaty of Accession.

(c) The legal effects of the MCV

142. A further question posed by the referring courts in the present cases is whether the MCV Decision (1) and the reports of the Commission adopted on its basis (2) are binding on Romania.

(1) The legal effects of the MCV Decision

143. The Governments of Belgium and the Netherlands have argued that the MCV Decision is binding in all its elements. Similarly, the Swedish Government in its written observations, as well as the Association of Judges Forum and the Prosecutor General at the hearing, submit that the MCV Decision and its annex benchmarks are legally binding on Romania.

144. The Romanian Government submitted in its written observations that the only obligation imposed on Romania by the MCV Decision was that of periodically reporting to the Commission on the progress made with regard to the benchmarks of the annex to that decision. That government changed its position at the hearing, and submitted that the annex benchmarks of the MCV Decision give specific expression to the conditions of the Treaty of Accession, in accordance with the values and principles of Articles 2 and 19 TEU.

145. The MCV Decision is a decision for the purposes of the fourth paragraph of Article 288 TFEU. As that provision establishes, decisions are *binding in their entirety for their addressees*. In accordance with Article 4 of the MCV Decision, its addressees are the Member States. At the moment of its adoption, Romania was indeed not yet a member, but in that specific context, the binding character of the EU acts adopted before accession follows (also) from Article 2 of the Act of Accession: 'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

146. Thus, the MCV Decision is clearly binding. The real issue is rather exactly *what* obligations are imposed on Romania by the MCV Decision.

147. The unequivocally worded legal obligation imposed on Romania is contained in Article 1 of the MCV Decision: 'Romania shall by 31 March of each year … report to the Commission on the progress made in addressing each of the benchmarks provided for in the Annex.' There is, therefore, an *obligation of reporting*.

148. However, the obligations imposed on Romania on the basis of Article 1 of the MCV Decision certainly do not stop at sending in annual reports by a given deadline. Indeed, the obligation imposed by Article 1 is not merely to report, but *to report progress made in addressing each of the benchmarks* listed in the Annex to the MCV Decision. Thus, Article 1 of the MCV Decision also sets out the *obligation to attain* the objectives laid out in the benchmarks contained in the annex to that decision. Moreover, the second paragraph of Article 1, which entitles the Commission to provide technical assistance through different activities or gather and exchange information on the benchmarks and to organise expert missions to Romania for this purpose, also states that the Romanian authorities are to give the necessary support in this context.

149. To *report progress made* thus requires that certain efforts be developed in in a certain direction. The logic of that provision would hardly be satisfied by mechanically reporting annually that things are pretty much the same. Within such a context, I would not put too much weight on the textual argument drawn from the Annex to the MCV Decision. Indeed, in some linguistic versions the annex refers, in a somewhat vague way, to the 'benchmarks to be *addressed* by Romania'.[52] On the other hand, a number of other linguistic versions contain language clearly indicative of an obligation to *attain*.[53]

150. Furthermore, the binding nature of the obligation to gradually comply with the benchmarks listed in the Annex to the MCV Decision is clearly emphasised by the position of the MCV Decision in the *context* of the obligations emanating from the Treaty of Accession. The MCV Decision made accession possible despite the persistent serious concerns on core shortcomings relating to judicial reform and the fight against corruption in Romania. It cannot thus come as a surprise that the MCV Decision

52 As is the case for example with the English version, as well as the Czech, Latvian, Lithuanian, Maltese, Dutch or Slovak versions.

53 For example, Bulgarian, Spanish, Danish, German, Estonian, French, Italian, Hungarian, Polish, Portuguese, Romanian, Slovenian, Finnish or Swedish.

entails a specific obligation on the part of Romania to achieve the objectives laid down in the benchmarks contained in the annex. Far from being intended as a mere recommendation, the MCV Decision was adopted on the basis of Articles 37 and 38 of the Act of Accession as a safeguard measure, which was essential to allow accession by 1 January 2007.

151. In general, the benchmarks of the MCV are linked to and specify the requirement of the rule of law of Article 2 TEU, to which Article 49 TEU makes reference as a precondition for accession. According to Article 49 TEU, only States which respect the values of Article 2 TEU and which are committed to promoting them may apply to become a member of the European Union. The preamble to the MCV Decision emphasises the central role of the rule of law for the Union and, in particular, for the area of freedom, security and justice, and the implied need for all the Member States to have an impartial and independent judicial and administrative system equipped to fight against corruption. [54]

152. The role of the MCV in the accession process was crucial within that context. Concerns about the justice system and the fight against corruption persisted during the negotiations preceding accession, and were expressly mentioned in Annex IX to the Act of Accession under the list of specific commitments undertaken, and requirements accepted, by Romania at the conclusion of the accession negotiations on 14 December 2004. [55] Pursuant to Article 39(2) of the Act of Accession, non-compliance with such commitments could have led the Council to postpone the date of accession by one year. As the Belgian Government noted, the benchmarks reflect the commitments undertaken by Romania in the negotiations for accession, as illustrated by Annex IX to the Act of Accession. It can therefore be considered, as the Danish Government submitted at the hearing, that the MCV was an essential condition in the framework of the signature of the Treaty of Accession by all the Member States, keeping in mind that there were still significant shortcomings. Those shortcomings, as identified by the Commission's last pre-accession report on Romania, provide the basis for the adoption of the MCV Decision.

153. Within such a historical and legislative context, an interpretation of the MCV Decision according to which the benchmarks included in its annex would not be binding on Romania would mean that the entire MCV gives Romania carte blanche not to comply with the core requirements of Accession.

154. A further element emphasising the binding nature of the obligation to achieve the objectives set out in the MCV benchmarks, as pointed out by the Swedish Government, concerns the significant legal consequences attached to non-compliance. As noted in recital 7 of the MCV Decision, if the benchmarks are not achieved, the Commission states that it may apply further safeguard measures on the basis of Articles 37 and 38 of the Act of Accession, including the suspension of mutual recognition. Furthermore, the specific legal consequences of a hypothetical infringement, which may arise from the particular MCV regime, do not in themselves prevent recourse to the ordinary enforcement instruments through infringement proceedings in the event of the non-fulfilment by Romania of its obligations under the MCV Decision. [56]

155. In sum, in my view, the MCV Decision, even though using the language of benchmarks, is, as to its substance and content, binding EU legislation. In a pre-accession context, benchmarking can be part of the political conditionality to measure progress that leads to accession. In a post-accession context, it becomes a legal rule enacted through a binding legal instrument, a decision, imposing

54 Recitals 1, 2 and 3 of the MCV Decision.

55 See, in particular, points 3 and 4 of Annex IX to the Act of Accession. Point 3 relates to the adoption and implementation of an Action Plan and Strategy for the reform of the Judiciary, including the measures for implementation of the Justice Laws. Point 4 concerns the fight against corruption, in particular, by 'ensuring a rigorous enforcement of the anti-corruption legislation and the effective independence of the National Anti-Corruption Prosecutor's Office …'.

56 If something may be *enforced*, that something must clearly be binding — further see my Opinion in *Belgium* v *Commission* (C-16/16 P, EU:C:2017:959, points 120 to 122).

specific obligations, the infringement of which can entail legal consequences. The consequences of non-compliance, beyond the possibilities of declaring and sanctioning a potential infringement through the usual EU law channels, may also have a significant impact on Romania's participation in the internal market and on the area of freedom, security and justice.

156. As to the content of those obligations, there is, in addition to the obligation to report, also clearly the obligation to employ all the best efforts to comply with the benchmarks set out in the Annex to the MCV Decision.

(2) The legal effects of the MCV reports

157. The referring courts have also asked about the legally binding force of the reports issued by the Commission on the basis of the MCV Decision, as well as of the recommendations of the Venice Commission and of the GRECO.

158. The Association of Judges Forum and OL maintained at the hearing that the recommendations in the Commission's reports, considered jointly with the MCV Decision, have binding legal effects. In a similar vein, the Romanian Government submitted at the hearing that, despite their *sui generis* nature and lack of binding character, the recommendations contained in the reports cannot be ignored but, with the obligation of sincere cooperation of Article 4(3) TEU in mind, are to be respected and even become binding when Romania takes legislative or administrative measures in the fields covered by the benchmarks of the Annex to the MCV Decision.

159. Conversely, the Commission and the Prosecutor General have submitted that the legal nature of the Commission's reports in the framework of the MCV is not that of a recommendation for the purposes of Article 288(5) and Article 292 TFEU, since they are rather a *sui generis* legal act adopted on the basis of the MCV Decision.

160. It follows from those views that, in the context of the specific role they play within the system established by the MCV Decision, the recommendations contained in the MCV report amount to much more than a 'traditional' recommendation. As noted by the Netherlands and Swedish Governments, the MCV reports are instruments of evaluation. The reports are adopted on the basis of Article 2 of the MCV Decision, and, as the Commission points out, they are addressed to the Parliament and to the Council. In accordance with that provision, the Commission 'will communicate to the European Parliament and the Council its own comments and findings on Romania's report'. The reports therefore provide the methodological framework within which to assess that progress. The measures contained in the recommendations found in the reports give specific expression to the benchmarks in a way that makes possible the evaluation of Romania's progress, which will, eventually, lead to the termination of the MCV.

161. Therefore, the legal effects of the reports on Romania stem from the obligations flowing from the principle of sincere cooperation enshrined in Article 4(3) TEU. Indeed, the reports constitute the basis for assessing whether Romania complies with its obligations with regard to the MCV benchmarks. Those reports contain specific recommendations to guide the efforts of Romania. As the Commission points out, the purpose of the recommendations is to support Romania's efforts to attain the objectives of the MCV Decision. Since the benchmarks give specific expression to the conditions of the Treaty of Accession and because the MCV Decision was adopted on the basis of that act, Romania has an *enhanced obligation of cooperation* on the basis of the MCV. Sincere cooperation is therefore not limited to simply reporting the progress, but rather includes the obligation to take account of the recommendations when adopting legislative or administrative measures in the fields covered by the benchmarks of the MCV Decision.

162. As a result, as the Belgian Government submits, in order to comply with the benchmarks of the MCV Decision, Romania can either adopt the measures recommended or other measures adequate to achieve those objectives. In any case, that Member State is *obliged to take the reports of the Commission into account*, in the light of Article 4(3) TEU. The obligation of sincere cooperation also implies the obligation to cooperate with the Commission within the MCV framework, and to abstain from any measure that could imperil the attainment of the objectives set out in the reference benchmarks.

163. In my view, comparing the legal effects of MCV reports to those of recommendations under Article 288 TFEU, and then arguing which one of them is more *sui generis*, is perhaps not an entirely helpful exercise.[57] In what follows therefore, I prefer to outline what, in my view, ought to be the proper role of MCV reports.

164. First, I share the overall approach of the Belgian, Danish and Swedish Governments. I am also of the view that the reports issued by the Commission are, as to their specific content, *not binding*. They ought to be read and studied, and in this sense *taken into account* by Romania when seeking to achieve the objectives set out in the MCV benchmarks. However, that does not mean that all or any of the specific recommendations contained therein must be followed. There is a duty to cooperate, but no obligation to copy verbatim.

165. Second, that naturally includes the *possibility not to follow*. Romania, like any other Member State, retains the right to design its national institutions and procedures as it sees fit. However, in devising those other models and procedures, Romania must be able to demonstrate how those other models contribute to the achievement of the benchmarks contained in the Annex to the MCV Decision, or at least put forward a plausible hypothesis in that regard.

166. Third, in contrast to what has already been stated with regard to the MCV Decision,[58] the specific recommendations contained in the reports are *not enforceable* as a freestanding legal obligation. Logically, since the MCV reports do not contain any binding legal obligations, they cannot in themselves be enforced, be it before the EU Courts or before national courts.

167. That does not preclude, however, that those reports, like other types of sources, could be taken into consideration and referred to where they are believed to shed light on the interpretation of EU or national measures. That may naturally happen, in the same way as it happens with any other purely *persuasive* (as opposed to binding) authority, which may range from the minutes of the European Council, through the works of Immanuel Kant, to, in the more discursive, not to say chatty, legal cultures, the memorable quotes from Terry Pratchett or *Alice in Wonderland*.

168. However, it is worth pointing out, in the context of the present questions referred, that because of the absence of the legally binding nature of the MCV reports, national judges cannot, as a matter of EU law, rely on the recommendations contained in those reports in order to set aside the application of provisions of national legislation that they deem contrary to such recommendations.

169. Finally, on a related issue, the second question in Case C-291/19 enquires about Romania's obligation to make legislative amendments, which would comply with the recommendations of the Venice Commission and the GRECO.

57 Especially since the precise scope of the duty of the national authorities, in particular national judges, in taking recommendations into consideration when deciding disputes submitted to them (judgment of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraph 18) is itself not entirely clear (see my Opinion in *Belgium* v *Commission* (C-16/16 P, EU:C:2017:959, points 97 to 101)).

58 Above, point 155 of this Opinion.

170. The reports of the Venice Commission and of the GRECO are often mentioned in the Commission's MCV reports. *As a matter of EU law*, those reports are, in this context, a useful source of information and offer persuasive guidance with regard to the relevant standards in order to assess compliance with the MCV benchmarks. Both international bodies provide for authoritative reports in fields closely related to the benchmarks in connection with the effectiveness of the justice system and the fight against corruption.

171. However, in the light of the above considerations with regard to the absence of binding legal effects of the MCV reports themselves, by referring to the reports of those bodies, the MCV reports cannot render obligatory the reports issued by those other international bodies. Their findings, *in as much as they are referred to specifically by the reports* of the Commission, can only trigger the same kind of obligations linked to sincere cooperation as the recommendations contained in the MCV reports themselves. [59]

172. However, the foregoing considerations provide the answer to be given as a matter of EU law. That neither precludes, nor affects, the potential for such reports to be given a different status under national (constitutional) law, in the fulfilment of the independently assumed *international law obligations* of the Member States.

(d) Do the national measures at issue fall within the scope of the MCV?

173. Finally, as pointed out in point 117 of this Opinion, there is one last issue relating to the role of the MCV Decision in the present cases that needs to be clarified: do the national measures at issue in the present cases fall within the scope of that EU law instrument?

174. When questioned about this issue at the hearing, the Commission confirmed that, in its view, the amendments to the Justice Laws that are at issue in the present cases all fall within the scope of the MCV Decision.

175. I agree.

176. In order to assess whether the national measures at issue in the present cases are covered by the MCV, the first, third and fourth benchmarks of the Annex to the MCV Decision are relevant: (1) to 'ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. …'; (3) 'building on progress already made, [to] continue to conduct professional, non-partisan investigations into allegations of high-level corruption' and (4) to 'take further measures to prevent and fight against corruption, in particular within the local government'.

177. The text of the first benchmark is particularly broad. Virtually any issue relating to the institutional design of the judiciary could be subsumed under the formula of ensuring 'a more transparent and efficient judicial process'. The extraordinary reach of this benchmark is, however, not at all surprising when considered in the light of the special situation of the Member States to which the MCV applies. [60]

59 With the arguments contained in those reports having the same persuasive force when assessing the compliance with the requirements of Article 19 TEU and of Article 47 of the Charter. See to that effect, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 82).

60 As set out above in points 134, 135 and 152 of this Opinion.

178. In that context and, in particular, in the light of the first benchmark, there can be little doubt that the provisions at issue in the present cases, concerning the appointment to management positions in the Judicial Inspection, as well as the provisions relating to the establishment and operation of the SIOJ, fall within the scope of the MCV Decision. Those provisions have been introduced by way of amendments to certain central institutional aspects of the 'Justice Laws', which together form the core legislative framework for the organisation of the justice system in Romania.

179. First, the Judicial Inspection is a body with legal personality within the SCM, whose accountability and transparency are expressly set out as an objective in the first benchmark. Second, the Judicial Inspection plays a crucial role in disciplinary proceedings in the judiciary, directly linked to the objective of enhancing the accountability, and therefore, the efficiency of the justice system. Third, the current institutional arrangement of the Judicial Inspection is closely connected to the recommendations of the MCV. As is apparent from the file before this Court, it was in connection with the information in the MCV Reports of 2010 and 2011 [61] that the Judicial Inspection was reorganised in 2012 and established as a distinct body with legal personality and operational independence within the SCM, led by a chief inspector and a deputy chief inspector appointed following a competition. [62]

180. For similar reasons, I consider that the establishment of the SIOJ is also covered by the first benchmark of the Annex to the MCV Decision. The establishment of the SIOJ affects the system of criminal liability of judges, which, together with the disciplinary procedures for judges, is not only intrinsically linked to the accountability of the members of the judiciary, but is also likely to be linked to the efficiency of the judicial process.

181. Furthermore, the establishment of the SIOJ is also linked to the third and fourth benchmarks of the Annex to the MCV Decision, according to which Romania agrees to continue to conduct investigations into allegations of high-level corruption, building on progress already made, and to take further measures to prevent and fight against corruption. Indeed, one of the central concerns expressed by the orders for reference in Cases C-127/19, C-195/19, C-291/19 and C-355/09 is precisely that, structurally, the creation of the SIOJ has significant effects on the powers of the anti-corruption section of the public prosecutor, the DNA. In that connection, as confirmed by the Romanian Government at the hearing, the consolidation of the DNA was a requirement of the MCV and its third benchmark.

182. In sum, there is little doubt that both of the substantive issues addressed by the present requests for preliminary ruling fall within the MCV Decision. As a result, EU law becomes applicable to the cases at hand, and the jurisdiction of this Court is triggered. However, a number of other provisions of EU law have also been invoked by the referring courts as potentially applicable in the present cases, an issue to which I shall now turn.

2. The principle of judicial independence: Article 47 of the Charter and/or Article 19(1) TEU

183. The various questions in the five preliminary ruling requests, which are the subject of this Opinion, follow the same structure: after seeking clarification about the nature and legal effects of the MCV Decision and the reports adopted within its framework, they question the compatibility of national provisions with various provisions of EU law. The majority of the questions referred have

61 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (COM(2010) 401 final), and Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, (COM(2011) 460 final).

62 Article 65 of Law No 317/2004 in its version of 26 January 2012.

identified Article 2, Article 4(3) and Article 19(1) TEU as the relevant EU law provisions,[63] with only a few of the questions referring to Article 47 of the Charter.[64] Those questions reflect the uncertainty regarding the different scopes of and interaction between Article 2 and the second subparagraph of Article 19(1) TEU, on the one hand, and Article 47 of the Charter, on the other.

184. The interested parties, having submitted observations, have expressed different views as to the relevant EU law provisions to be taken as the point of reference. The divergence of opinions concerns mostly the applicability of Article 47 of the Charter. All the interested parties except Poland concur in considering that the second subparagraph of Article 19(1) TEU is applicable.

185. In what follows, I will explain why I hold the view that the applicability of the Charter, including Article 47 thereof, was triggered by the MCV Decision, thus opening up the possibility of using the second paragraph of Article 47 of the Charter as the main point of reference (a). There is, however, no denying that the way in which Article 19(1) TEU has so far been interpreted and applied by the Court, means that that provision would also be applicable to the present cases (b). However, I conclude with few cautious suggestions as to why basing the entire assessment of these cases exclusively on Article 19(1) TEU might not necessarily be the best approach (c).

(a) Article 47 of the Charter

186. The interested parties have taken different positions on the potential applicability of the Charter, and of Article 47 thereof. The Polish Government and the SCM have submitted, in essence, that the present cases concern matters relating to the internal organisation of the judiciary which fall exclusively within the purview of the Member States and where the European Union has no jurisdiction.[65] Therefore, Article 47 of the Charter would not be applicable, having due regard to Article 51(1) and (2) of the Charter and to Article 6(1) TEU.

187. With regard to the fifth question in Case C-291/19, the Commission noted, albeit without raising any express objections to the jurisdiction of the Court, that Article 47 of the Charter would be applicable only in the event that the main proceedings were to relate to the implementation of EU law. That would be the case, for example, if they concerned harmonised crimes pursuant to measures adopted under Article 83(1) and (2) TFEU or if they fell within the scope of Article 325 TFEU.

188. Conversely, the Association of Judges Forum and the Belgian and Swedish Governments support the view that the MCV Decision renders the Charter applicable.

189. I agree with that latter position.

190. In my view, the applicability of the Charter was triggered from the moment the national measures at issue in the cases before this Court fell within the scope of the MCV Decision and the Act of Accession. Hence, the adoption of such national measures which, as noted in point 178 of this Opinion, concern certain central institutional aspects of the core legislative framework for the organisation of the justice system in Romania, constitutes an instance of 'implementation' of EU law for the purposes of Article 51(1) of the Charter.

63 Questions 3 and 4 in Case C-83/19; questions 3, 4 and 5 in Case C-127/19; question 2 in Case C-195/19; questions 3 and 4 in Case C-291/19; and questions 3 and 4 of Case C-355/19.

64 Question 5 in Case C-127/19 and questions 4 and 5 in Case C-291/19.

65 The Polish Government has only covered in its written observations question 3 in Case C-83/19; questions 4 and 5 in Case C-127/19; question 2 in Case C-195/19; questions 4 and 5 in Case C-291/19; question 4 in Case C-355/19. Those arguments were essentially shared by the Romanian Government in its written observations with regard to questions 4 and 5 in Case C-127/19; questions 4 and 5 in Case C-291/19; question 2 in Case C-195/19; question 4 in Case C-355/19. However, also on this account the Romanian Government changed its position at the hearing, providing observations on the merits of those cases, apparently without maintaining the grounds relating to the lack of jurisdiction of the Court.

191. As pointed out by the Belgian Government at the hearing, even though Romania has considerable discretion to comply with its obligations under the MCV, that does not detract from the applicability of the Charter. According to established case-law, the scope of the Charter, as defined by its Article 51(1), also covers situations where EU law grants Member States a margin of discretion which is an integral part of the regime established by that EU act.[66] The nature of the MCV, based on the monitoring of benchmarks the attainment of which is binding, is an instance of such 'circumscribed discretion'. Recent case-law has indeed emphasised the imposition of a specific obligation originating in EU law as one of the more relevant elements leading to the application of the Charter.[67] Nevertheless, such obligations are often defined in broad and rather vague terms.[68]

192. However, the present cases and the applicability of the Charter thereto follow a somewhat different logic. The Court's decision in *Florescu* is rather illustrative in this regard. In that case, the Court found that the adoption of national rules in the framework of the accomplishment of the conditions, broadly defined in a Memorandum of Understanding regarding financial assistance from the European Union to a Member State, falls within the scope of EU law for the purposes of the application of the Charter.[69]

193. At the level of the specificity of commitments (such as the reduction of the public sector wage bill or the reform of the pension system in order to improve long-term sustainability, which were key elements for the ruling on the applicability of the Charter in the *Florescu* case),[70] there is indeed not much difference between the Memorandum of Understanding in *Florescu* and the benchmarks contained in the MCV Decision.

194. Thus, when adopting measures closely connected to the achievement of the annex benchmarks, a Member State is acting in 'implementation' of EU law for the purposes of Article 51(1) of the Charter. The fact that the obligations imposed by the MCV Decision are broad is the logical consequence of the nature, objectives and content of the legal instrument itself. Indeed, if the Charter is supposed to be the 'shadow' of EU law,[71] that shadow necessarily reflects the size and shape of the structure it shadows.

195. The Netherlands Government has nonetheless submitted that, even if the Charter were *generally applicable*, pursuant to the criteria of Article 51(1) thereof, Article 47 of the Charter is not, because that provision requires, in order to be applicable, the existence of a material right that is the subject of judicial proceedings. That requirement is not met in the present cases.

196. To my understanding, this argument finds its basis in the fact that the first paragraph of Article 47 of the Charter establishes that the 'right to an effective remedy before a tribunal' is applicable to 'everyone *whose rights and freedoms* guaranteed by the law of the Union are violated'. Indeed, as I suggested in my Opinion in *El Hassani*, in order for the first paragraph of Article 47 of the Charter to be applicable to an individual applicant, two cumulative conditions must be met. First,

66 See, for example, judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 65 to 68); of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198, paragraphs 51 and 52); or of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 48).

67 See, for example, judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraph 53 and the case-law cited), as well as order of 24 September 2019, *QR (Presumption of innocence)* (C-467/19 PPU, EU:C:2019:776, paragraphs 34 to 37).

68 See, for example, judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 25 and 26), or of 9 November 2017, *Ispas* (C-298/16, EU:C:2017:843, paragraph 27).

69 Judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraphs 44 to 49).

70 See also Opinion of Advocate General Saugmandsgaard Øe in *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2017:395, points 52 and 53).

71 Lenaerts, K., and Gutiérrez-Fons, J.A., 'The Place of the Charter in the EU Constitutional Edifice', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A Commentary*, C.H. Beck, Hart, Nomos, Oxford, 2014, pp. 1560 to 1593, at 1568. See also my Opinion in *Ispas* (C-298/16, EU:C:2017:650, points 58 to 65).

the situation at hand must fall within the scope of EU law for the Charter, as a whole, to be applicable pursuant to Article 51(1) thereof, and, second, the applicant must have a concrete 'right or freedom' guaranteed by EU law that can trigger the specific provision of the first paragraph of Article 47.[72]

197. I cannot thus but agree with the Netherlands Government that, if a specific individual wishes to avail himself or herself of Article 47 of the Charter in order to substantiate a procedural right guaranteed by that provision, that person must have an actual 'right or freedom' guaranteed by EU law that he or she wishes to enforce before a court. It is difficult to see how Article 47 of the Charter could be invoked to enforce a non-existent individual right.

198. However, the present cases are, in structural terms, quite different. The Charter is not invoked as a source of individual rights for specific litigants. It is being invoked as an objective yardstick for the review of constitutionality as to the permissible range of normative solutions adopted by a Member State in the implementation of their EU law obligations stemming from the MCV Decision and the Act of Accession.

199. The national provisions at issue entered the scope of EU law by virtue of being the national implementation, primarily, of the MCV Decision and, secondarily, also of the Act of Accession.[73] Thus, the Charter is applicable, shadowing and monitoring the exercise of national public power being implemented in order to meet Member State's EU obligations. This does not mean, of course, that the MCV Decision or the Act of Accession, even if they triggered the applicability of the Charter pursuant to its Article 51(1), would be the basis of an actual 'right or freedom' for private parties.

200. But within that space opened up by the MCV Decision and the Act of Accession, the Charter, including its Article 47, may certainly be used as an *objective, general yardstick* of constitutionality at EU level. The role of fundamental rights as objective parameters of review, employed in *abstract review* of constitutionality carried out in a number of national legal systems, is also present in EU law. Not only can EU law be invoked as a yardstick in national proceedings concerned with the abstract review of national legal provisions,[74] but the rights enshrined in the Charter, which have the same value as the Treaties under Article 6(1) TEU, are being employed as parameters of control of EU law acts and provisions,[75] also when it comes to assessing the behaviour of Member States in the fields covered by EU law.[76]

201. In sum, there are at least two types of case in which Charter provisions might be invoked. First, there is the classic, bottom up, enforcement of a specific fundamental right guaranteed to a specific individual, mirroring in a way what has traditionally been called the *concrete review* of constitutionality. Has the right of person X in the circumstances of a specific case been infringed? Second, there is the top down, abstract assessment, in that what is analysed is the compatibility of certain legislative solutions, largely detached from an individual case. Is a certain legislative solution compatible with this or that fundamental right? That amounts to an *abstract review* of constitutionality.

72 See, with regard to this discussion, my Opinion (C-403/16, EU:C:2017:659, points 74 to 83). For a different view see Prechal, S., 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?', in Paulussen, C., et al. (eds), *Fundamental Rights in International and European Law*, TMC Asser Press, The Hague, 2016, pp. 143 to 157, or Peers, S., et al., *The EU Charter of Fundamental Rights: A Commentary*, C.H. Beck, Hart, Nomos, Oxford, 2014, p. 1199. See also, judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 51), identifying the underlying 'right' guaranteed by EU law in the principle of 'protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person'.

73 Above, points 173 to 182 of this Opinion.

74 For example, judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 50), or of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė* (C-2/18, EU:C:2019:962, paragraphs 70 and 82).

75 Just to name a few examples, see judgment of 27 June 2006, *Parliament* v *Council* (C-540/03, EU:C:2006:429, paragraphs 76, 90 and 108); of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraphs 86 to 89); of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100, paragraphs 30 to 33); or of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraphs 37 and 48 to 71).

76 See, in particular, in the framework of infringement proceedings, judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraphs 89 and 129).

202. What is in essence being requested in the present cases is an abstract review of constitutionality at EU level of two national legislative solutions with the principles of judicial independence, as notably flowing from the right to a fair trial enshrined in the second paragraph of Article 47 of the Charter. With EU law being triggered and the applicability of the Charter under Article 51(1) thereof being engaged by the MCV Decision and the Act of Accession, since all those national solutions are clearly within the scope of the latter instruments, the Charter provides a yardstick for that assessment. This results, not necessarily from any individual rights of specific persons, but rather from the fact that it shadows national legislative choices adopted in the implementation of EU law.

203. In any event, if the Court were not to follow my approach and were to decide that Article 47 of the Charter is inapplicable to the present cases, the second subparagraph of Article 19(1) TEU, in the light of the recent case-law, is applicable, a matter to which I will now turn.

(b) Article 19(1) TEU

204. With regard to the second subparagraph of Article 19(1) TEU, the Polish Government has insisted that, unlike in the judgment of the Court in *Associação Sindical dos Juízes Portugueses*,[77] where the national court decided on an annulment action brought by individuals alleging infringement of the principle of the independence of the judiciary by certain national provisions, the cases at issue have a purely national character. A similar argument is made with regard to Article 2 TEU, noting that the general principles emanating from that provision are applicable only where EU law is applied.

205. The arguments of the Polish Government cannot be upheld.

206. The second subparagraph of Article 19(1) TEU obliges Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. The Court has clarified that this provision applies irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.[78] As a result, the second subparagraph of Article 19(1) TEU finds application when a national body *could* be called upon to rule, as a court or tribunal, on questions concerning the application or interpretation of EU law, and thus falling within the fields covered by EU law.[79]

207. Since it would be rather difficult to find a national court or tribunal which could not, by definition, ever be called upon to rule on matters of EU law,[80] it would appear that the second subparagraph of Article 19(1) TEU is limitless, both *institutionally* (with regard to all courts, or even bodies, which potentially apply EU law), as well as *substantively*.

208. As far as its substantive reach is concerned, the scope of the second subparagraph of Article 19(1) TEU, at least as the case-law stands, captures any and all national rules and practices that may have a negative impact on the obligation of Member States to set up effective remedies, including the independence and impartiality of those judicial systems. Moreover, the scope of the second

77 Judgment of 27 February 2018 (C-64/16, EU:C:2018:117).

78 Judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 29); of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 50); of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 82); or of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową (Disciplinary regime for judges)* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 33).

79 Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 51); of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 83); or of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową (Disciplinary regime for judges)* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 34).

80 With national application of EU law naturally not being limited to *direct* application of EU law sources, such as a regulation, but also the application of national legislation which transposes EU law, typically a directive, that is to say *indirect* application of rules of EU law origin, with those rules being taken into account in conform interpretation.

subparagraph of Article 19(1) TEU does not appear to possess any internal, quantitative limits. There is no *de minimis* rule. Thus, there is neither an area-based, nor a seriousness-based exclusion. Anything and everything, however insignificant the matter, be it national judicial organisation, procedure, or practice, potentially falls within Article 19(1) TEU. [81]

209. At present, the only limiting condition pertains to admissibility: there needs to be a functional link. The questions referred for a preliminary ruling must be necessary to enable the referring court to give judgment in the specific case. [82] There must therefore be 'a connecting factor between the dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court'. [83]

210. As already noted above in this Opinion with regard to admissibility, [84] the resolution of the main proceedings in the present cases is substantively connected to the second subparagraph of Article 19(1) TEU, to which the questions referred relate. [85]

211. Therefore, as far as the scope of the second subparagraph of Article 19(1) TEU is concerned, it is my view that the present cases pass both tests: admissibility, as well as (the non-existent) test for the jurisdiction of the Court under the second subparagraph of Article 19(1) TEU. All concern different elements of the Romanian judicial system, which are generally applicable and which arguably entail risks for the independence of the judiciary considered as a whole, therefore affecting courts that are liable to rule on areas covered by EU law. The requests have been made in the context of proceedings for which the Court's response on the basis of Article 19(1) TEU is indeed objectively required for the national court to take a decision.

(c) Article 19(1) TEU and the dangers of gates which are too open

212. Having said that, in the circumstances of the present case, I would advise the Court not to rely exclusively on Article 19(1) TEU. In fact, there would be, in my view, robust arguments for judging these cases rather on the basis of the MCV Decision, together with the Act of Accession, considered jointly with the Charter, with Article 19(1) TEU remaining just on the periphery, so to say, if necessary at all.

213. With regard to the applicable standards, this discussion may appear rather theoretical in cases concerning 'structural' elements affecting the independence of the judiciary. Such structural cases, provided that they fulfil the condition of admissibility and connecting factor, fall, in any event, within the scope of the second subparagraph of Article 19(1) TEU, as just noted. The requirement that courts be independent and judges impartial is, after all, an essential element of the principle of effective judicial protection enshrined in both the second subparagraph of Article 19(1) TEU and in Article 47 of the Charter. Moreover, recent case-law shows that the content of the second subparagraph of Article 19(1) TEU coincides with the guarantees required by the second paragraph of

81 But see, perhaps with regard to its logic but not necessarily its wording, the recent order of 2 July 2020, *S.A.D. Maler und Anstreicher OG* (C-256/19, EU:C:2020:523).

82 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową (Disciplinary regime for judges)* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 45), and order of 2 July 2020, *S.A.D. Maler und Anstreicher OG* (C-256/19, EU:C:2020:523, paragraph 43).

83 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową (Disciplinary regime for judges)* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 48), and order of 2 July 2020, *S.A.D. Maler und Anstreicher OG* (C-256/19, EU:C:2020:523, paragraph 45).

84 Points 89 to 92, 99 to 104 and 106 to 109.

85 *A contrario*, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową (Disciplinary regime for judges)* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 49).

Article 47 of the Charter, at least expressly as far as the elements of independence and impartiality of the judiciary are concerned.[86] That principle is, in turn, essential for the protection of all rights granted by EU law, as well as for the preservation of the values of Article 2 TEU, in particular, the rule of law.[87]

214. There are, however, elements of the context of the present cases, as well as the practical consequences of relying exclusively on Article 19(1) TEU, that merit to be underlined.

215. First and foremost, Member States under the MCV are in a specific position, characterised by their submission to a rather far-reaching and detailed legal framework, in particular, concerning their commitments relating to the effective organisation of the judiciary and the fight against corruption. That specific position means that there are ample primary, as well as secondary, law bases to examine any aspect of their judicial structure, provided that it can be said to relate directly to the yardsticks and conditions set out in the MCV Decision and the Act of Accession.

216. Second, in a similar vein, the Charter is a much more elaborate and detailed instrument than Article 19(1) TEU. The second subparagraph of Article 47 of the Charter has a robust content that expressly refers to the independence of courts. That legal content is furthermore bolstered by the mandatory connection to the protection offered by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') as, under Article 52(3) of the Charter, Article 47 of the Charter must safeguard a level of protection which does not fall below the level of protection established by Articles 6 and 13 ECHR.[88] Moreover, the crucial role of Article 47 of the Charter with regard to the requirement of independence of the judiciary is confirmed by the recent case-law, according to which the normative content of the second subparagraph of Article 19(1) TEU is identified by reference to that provision. Furthermore, from the point of view of its legal effects, the case-law has confirmed that Article 47 of the Charter is endowed with direct effect.[89]

217. As a consequence, it appears to me an unnecessary detour to insist on the second subparagraph of Article 19(1) TEU as the main, or even sole, benchmark for an analysis which will eventually lead back to the application of the standards of the second subparagraph of Article 47 of the Charter in a case where that provision is, in any event, applicable on its own.

218. It is true that the use of Article 19(1) TEU by the Court in the recent past has led, for considerations of judicial economy, to a finding that an examination of Article 47 of the Charter is unnecessary.[90] That is, in my view, rather understandable when it comes to cases concerning transversal, horizontal measures which, by definition, will affect every operation of the national judiciaries as a matter of EU law.[91]

86 See the overlap of the standard with regard to Article 19(1) TEU in the judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraphs 58, 72 to 74 and 112) with judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 120 to 125).

87 Judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 71).

88 See, to that effect, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 116 to 118).

89 See judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 78); of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraph 56); and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court*) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 162).

90 Judgment of 27 February 2018, C-64/16, EU:C:2018:117, paragraph 52. But see, for a different approach based on the Charter, the Opinion of Advocate General Saugmandsgaard Øe in that case (EU:C:2017:395)

91 As I noted in my Opinion in *Torubarov* (C-556/17, EU:C:2019:339, points 53 to 55).

219. However, unlike the situation in *Associação Sindical dos Juízes Portugueses*, the examination of the applicability of Article 47 of the Charter seems unavoidable in the present cases. On the one hand, the present cases include a question on a specific aspect of Article 47 of the Charter, such as the right to a fair trial by means of a hearing within a reasonable time.[92] This makes the assessment of whether Article 47 of the Charter applies to the present cases, in any event, inevitable. On the other hand, the analysis required by the questions referred relating to the nature, scope and legal effects of the MCV with regard to the national provisions at issue already offers a solid basis for confirmation that the Charter is applicable in the present cases.[93]

220. For those reasons, in the context of the present cases, judicial economy rather advocates basing the analysis on the more specific and robust legal framework – that of the MCV Decision and Article 47 of the Charter. Indeed, as exemplified by recent case-law, where a positive finding on the applicability of the Charter is inevitable, Article 47 of the Charter is to be the relevant yardstick, therefore making it unnecessary to carry out a distinct analysis on the basis of Article 2 and the second subparagraph of Article 19(1) TEU.[94]

221. Third and finally, in addition to the double *lex specialis* argument, which makes the (exclusive) reliance on something much more general and basic unnecessary, there is the overall question of whether the road that appears to be the easiest is indeed the safest one, especially if what appears to be the easiest road is not very well mapped out.

222. The, at present apparently limitless, reach of the second subparagraph of Article 19(1) TEU is not only a strength of that provision, but it is also its main weakness. Will the Court in the future be ready to review whichever issues or elements brought to its attention by its national counterparts, alleging that this or that element of national judicial structure or procedure might pose, certainly in their subjective view, issues in terms of the degree of judicial independence they consider appropriate? The range of issues is endless: from the judicially desired level of self-governance or self-administration; through to the system of allocation of cases in a national system; down to the issue of the non-promotion of certain judges to presidents of chambers; or, the all-time favorite issues of judicial salaries, supplements, benefits, and Christmas bonuses. Must all of these elements be phrased only in 'structural' terms, in order to fall within the second subparagraph of Article 19(1) TEU?[95] It is certainly possible. It is simply a matter of formulating the right question. Or is individual 'judicial self-defence'[96] against one specific measure or even a problematic president of a court also permissible? If not, how exactly is such a structural deficiency to be established, in view of the fact that the Court previously decoupled any such formalised mechanisms, such as the Article 7 TEU procedure,[97] from being a necessary condition for the finding of (systemic) failure in the individual case?

92 Question 5 in Case C-291/19, concerned with the right to a fair and public hearing within a reasonable time.

93 As set out above in points 128 to 182 of this Opinion.

94 See judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court*) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 169).

95 Which so far does not appear to be the case. However see, suggesting such an approach, Opinion of Advocate General Tanchev in *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:529, point 115).

96 With the recent tendency being, admittedly, more strict than previously. Apart from the already discussed judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową (Disciplinary regime for judges)* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 43 to 49) (above, points 209 and 210), see also order of 2 July 2020, *S.A.D. Maler und Anstreicher OG* (C-256/19, EU:C:2020:523, paragraphs 45 to 48). Such a trend is not immediately reconcilable with the indeed quite generous approach to questions concerning the compatibility of national procedures or institutions with EU law which a national judge is normally allowed to ask (see, in particular, paragraph 47 of the latter order, as contrasted with the there cited judgment of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85, paragraphs 41 and 42) and in fact many other decisions of this Court).

97 Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraphs 68 to 79).

223. It is rather likely that the Court will need to look again at the limitless reach of Article 19(1) TEU, this time perhaps with a more restrictive eye. That, however, only emphasises the true nature of Article 19(1) TEU, which ought properly to remain an extraordinary tool for extraordinary cases. By contrast, the MCV expressly opened up a wide range of, perhaps not all of them so extraordinary, issues pertaining to any issue of efficiency of the judicial process and judicial independence, certainly in the context of the fight against corruption.

224. Within such a context, relying primarily on the MCV Decision and the Charter provides a solid basis for a detailed consideration of all those issues while respecting the equality of the Member States before the Treaties. Certainly, all the Member States must respect their obligations flowing from Article 19(1) TEU. Some, however, are subject to much more detailed and demanding rules of the MCV because of their specific terms of Accession. Injustice is believed to arise not only when similar situations are treated differently, but also when objectively different situations are treated alike.[98] The Member States subject to the MCV are simply not, objectively, in the same situation as all the other Member States.

225. Finally, for the sake of completeness, I would add that for similar reasons to those set out above with regard to the interplay between the second subparagraph of Article 19(1) TEU and the Charter, it does not appear necessary to conduct a separate analysis of Article 2 TEU. The rule of law, as one of the values upon which the Union is founded, is safeguarded through the guarantee of the right to effective judicial protection and the fundamental right to a fair trial, which in turn have as one of their essential inherent components the principle of independence of courts.[99] Article 47 of the Charter, as well as Article 19 TEU, therefore give more precise expression to the value of the rule of law laid down in Article 2 TEU.[100]

3. The yardsticks and the nature of the assessment

226. Having identified the MCV Decision, together with the second paragraph of Article 47 of the Charter, potentially in conjunction with the second subparagraph of Article 19(1) TEU, as the relevant legal framework in the present cases, the substantive elements arising from those provisions which are to be used as yardsticks for, and the nature of the assessment of, the national provisions at issue, still remain to be clarified.

(a) The yardsticks: the external aspects of judicial independence and the doctrine of appearances

227. The internal organisation of the judiciary, including the institutional arrangements for the establishment of disciplinary bodies for judges and their procedure, falls within the competences of the Member States pursuant to the default principle of institutional autonomy. That also applies to a Member State subject to the MCV.

228. Romania is nevertheless required to fulfil its obligations under the MCV Decision, in particular, with regard to the attainment of the first, third and fourth benchmarks of the annex to that decision, to ensure a more transparent and efficient judicial process, to continue to conduct investigations into allegations of high-level corruption and to take measures to prevent and fight against corruption.

98 *Aristotle's Nicomachean Ethics. A New Translation* by Bartlett, R.C., and Collins, S.D., University of Chicago Press, 2011, Book 3.

99 See, to that effect, judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 58 and the case-law cited), and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 120).

100 See, to that effect, judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 47 and the case-law cited), and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 98).

229. In structuring their judicial institutions and procedures so as to fulfil those aims, that Member State is, moreover, required to comply with its EU law obligations following from Article 47 of the Charter, whose scope and content must be interpreted in the light of Article 6(1) ECHR, as well as the second subparagraph of Article 19(1) TEU. [101]

230. The principle of judicial independence does not require Member States to adopt any particular constitutional model governing the relationship and interaction between the various branches of the State, [102] provided of course that some basic separation of powers characteristic of the rule of law is maintained. [103] There is no preconceived or singular valid model or system, but rather a variety of systems and structures. The case-law seeks to identify minimal requirements that national systems must comply with. Those requirements relate to the *internal* and *external* aspects of judicial independence, as well as to the requirement of *impartiality*, drawn from the case-law of the European Court of Human Rights ('ECtHR').

231. It is in particular the *external* element of judicial independence, closely linked to the requirement of impartiality, which requires 'that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being *protected against external interventions or pressure* liable to impair the independent judgment of its members and to influence their decisions'. [104] That not only includes direct influence in the form of instructions, but also 'types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned'. [105]

232. As the Court has pointed out, recalling the case-law of the ECtHR on Article 6(1) ECHR, in order to establish the element of 'independence', some of the relevant elements to be considered are, inter alia, the mode of appointment and term of office of judges, the existence of guarantees against outside pressures, as well as the question of whether the body presents an 'appearance of independence', since what is at stake is the confidence which tribunals must inspire in the public in a democratic society. [106] Appearances are also an important element in the objective test of impartiality, according to which, it must be determined whether, apart from a given judge's conduct, there are ascertainable facts that may raise doubts as to his or her impartiality. [107]

233. The external aspect of judicial independence, coupled with the doctrine of appearances, thus forms the bedrock for assessing, in what is effectively an abstract review, the compatibility of chosen national judicial models with those requirements. That type of examination often turns to the issue of whether there are adequate safeguards built into a system, which then, at least to some extent, prevent the external pressure and political influence from being exercised.

101 See, to that effect, judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 52), and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 115).

102 See, with regard to the second paragraph of Article 47 of the Charter, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 130 and the case-law cited).

103 Ibid., paragraphs 124 to 126 and the case-law cited.

104 Ibid., paragraph 121 and the case-law cited. Emphasis added.

105 Ibid., paragraph 125 and the case-law cited.

106 Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 127) referring, to that effect, to ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 144 and the case-law cited, and ECtHR, 21 June 2011, *Fruni v. Slovakia*, CE:ECHR:2011:0621JUD000801407, § 141.

107 Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 128) referring to ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, § 191 and the case-law cited, and 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, §§ 145, 147 and 149 and the case-law cited.

234. However, the indeed rather vague nature of such yardsticks, coupled with the abstract nature of the review of compatibility to be carried out, require clarity as to what exactly needs to be examined, with what degree of detail, and on the basis of which arguments, an issue to which I will now turn.

(b) The nature of the assessment: what is to be established

235. First, there needs to be clarity about the type of case brought before the Court. A first clarification therefore concerns the differentiation between two potential types of case in which questions relating to judicial independence may arise.

236. On the one hand, an issue of judicial independence may be brought by an individual, as an incidental issue uncovered in a situation typically concerning the infringement of rights protected by EU law in an individual case. In such a case, deficiencies in judicial independence may give rise to an infringement of the rights laid down in Article 47 of the Charter in the individual case. Such a situation may hint at a general dysfunctional nature of the rules,[108] but not necessarily: it may also concern an individual failure in an otherwise functional system.

237. On the other hand, there are also cases that concern the structural assessment of different elements of a judicial system. Such an assessment in essence looks at the compatibility of certain legislative solutions adopted in the Member States with the requirements of EU law. That situation may arise, as is the case in the present cases, where the main proceedings relate to alleged deficiencies in a judicial system, but are not necessarily, certainly not all of them, linked to a particular instance of an infringement of the individual right to a fair trial in a given case. In such a situation, the analysis calls for the abstract assessment of the compatibility of that system with EU law parameters.[109]

238. That second situation has come up before this Court recently, in the form of infringement procedures.[110] It has also come up in cases where, due to a lack of connection to the substantive issue to be tackled by the referring court in the main proceedings, the case was eventually declared inadmissible.[111] However, it is, admittedly, true that in the past, there have also been cases in which such an abstract review of structural elements constituted the core of the main proceedings, for which a reply from this Court was deemed necessary.[112]

239. The latter type of cases of abstract review of compatibility of certain national institutional or procedural solutions with the requirements of EU law is certainly possible within the framework of the MCV. As explained in detail above,[113] that mechanism allows for an abstract review of certain models adopted by Romania, without there necessarily being an alleged infringement of an individual EU law based right in each specific case. What exactly is the situation at present in this regard under Article 19(1) TEU after the recent Grand Chamber pronouncement in *Miasto Łowicz* remains to be seen.[114]

108 That was the case in the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982).

109 See, for these two types of situation, my Opinion in *Torubarov* (C-556/17, EU:C:2019:339, point 53).

110 Judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), and of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924).

111 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową (Disciplinary regime for judges)* (C-558/18 and C-563/18, EU:C:2020:234).

112 Judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117), and of 7 February 2019, *Escribano Vindel* (C-49/18, EU:C:2019:106).

113 Points 198 to 202 of this Opinion.

114 See also the already quoted order of 2 July 2020, *S.A.D. Maler und Anstreicher OG* (C-256/19, EU:C:2020:523).

240. What might perhaps be of transversal value for the purpose of the present cases, as well as other potential questions concerning the appropriate degree of judicial independence in the Member States, is the clarification of the types of argument to be covered by such an abstract type of review, be it under the MCV Decision and the Charter, or even under Article 19(1) TEU. I would distinguish three different scenarios in this regard.

241. First, the institutional or procedural set-up, already considered in a general and abstract way, is problematic. The 'blueprint' itself, considered on its own and even without any specific examples of its application, seems wrong. It would be prone to misuse since it is clear that it cannot guarantee the appropriate degree of external independence or comply with the requirements of the doctrine of appearances, as required by the second paragraph of Article 47 of the Charter, or by the second subparagraph of Article 19(1) TEU. This first option might be called 'paper assessment only'.

242. Second, there is the situation in which the institutional arrangement is perhaps not problematic in itself, but there are clear arguments, or even evidence, presented before a court, or this Court, demonstrating that such problems or the potential for misuse exists in practice. This may happen in two scenarios: on the one hand, the blueprint is placed in the context of other blueprints. This will be the case where a national rule, when considered in isolation and on paper, appears not to be problematic, but becomes extremely problematic when it is combined with other rules within that system. On the other hand, the flaws of a given model might not necessarily be visible on paper, but rather in its actual application. Thus, the common theme of the second scenario reaches beyond the mere blueprint, by looking into 'papers combined' or 'paper as applied'.

243. Third, there might also be a situation in which the institutional arrangement, as envisaged 'on paper', seems to comply with the legal requirements of the second paragraph of Article 47 of the Charter, or of the second subparagraph of Article 19(1) TEU. There are nonetheless indications that, in the specific environment and in conjunction with the particular legal and institutional context of a Member State, an otherwise solid model is in fact already being misused. This scenario, which is indeed the most problematic for the assessment of any international court or other international institution, in effect refers to 'practice only', or sadly rather to 'paper is worthless'.

244. It is necessary to stress that in the second and third scenarios, the national context and the actual application are of particular relevance in two respects. First, the provisions at issue must be examined in the context of the institutional landscape of a Member State. As far as possible, it is therefore necessary to consider the overall institutional and structural context and how the rules at issue interact with other sets of connected rules. Indeed, even though a given provision may be considered to be correct when viewed in isolation, it may be highly problematic when considered in relation with other relevant elements of the system. [115]

245. Second, there is of course the sensitive issue of the verification of statements concerning the actual application and the actual national practice which is based on the case file and arguments presented before the Court. It is certainly possible and necessary to take into account the national practice. Indeed, the case-law of the Court has confirmed time and again that what is generally relevant for an analysis of compatibility with EU law is not just national legislation as such, but also case-law and practice. [116]

115 See, for this approach, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 152 and 153). See also my Opinion in *PG* (C-406/18, EU:C:2019:1055) (on the time limit of 60 days for the court or tribunal to decide *if it is viewed* in the context of other procedural rules and institutional constraints for the operation of an effective judicial review of decisions on international protection in a Member State).

116 See, for example, regarding case-law: judgments of 19 March 2020, *Sánchez Ruiz and Others* (C-103/18 and C-429/18, EU:C:2020:219, paragraph 80); or to administrative practices, for example, judgments of 11 June 2015, *Zh. and O.* (C-554/13, EU:C:2015:377, paragraph 75); of 17 December 2015, *Viamar* (C-402/14, EU:C:2015:830, paragraphs 31 and 46); or of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 100).

246. However, if such contextual and practice-based circumstances are raised before courts, and in particular before this Court, they must be properly explained, demonstrated and discussed, be it by the national court or by the parties and interveners before this Court. In other words, if it is claimed that a given system or institutional arrangement operates, in reality, in a manner other than that indicated in the law 'on paper', it is necessary that these arguments are properly established to a reasonable degree.

247. I wish to stress to a 'reasonable' degree. On the one hand, it would be wholly unreasonable to require a national court, which for example suggests in its order for reference that the national system of disciplinary proceedings is being misused for putting political pressure on judges, to provide exhaustive statistics on all disciplinary proceedings being carried out in that Member State, as well as documented evidence of how exactly that pressure is being exercised and how exactly it influences judicial decision-making in individual cases. On the other hand, it would also be problematic just to hint at the national model and to suggest, *in abstracto*, that unless that model were changed to a different model, *it could* be misused.

248. Everything can be misused. The mere potential for misuse is not a sufficient argument for abolishing an entire structure or a model. One does also not prohibit the use of knives or cars, even though, in less responsible hands, they can be used for a number of purposes other than cutting bread or driving to work. Thus, even in the world of the external judicial independence and appearances, there must be some convincing argument brought before the Court as to how concretely and specifically a certain model is liable to be misused or, certainly, illustrative instances of how that is already being done in practice, thus amounting to a structural problem.

C. Assessment of the national provisions at issue

249. In view of this rather detailed roadmap, I will now finally turn to the assessment of the two contested institutional issues. I will start with a general overview of the national legal context (1). I shall then assess the questions relating to the appointment of the management of the Judicial Inspection posed in Case C-83/19 (2), before addressing the questions referred in Cases C-127/19, C-195/19, C-291/19 and C-355/19, concerned with the establishment of the SIOJ (3).

1. General Context

250. The present cases are all concerned with different elements of the so-called Justice Laws: Law No 303/2004 on the rules governing judges and prosecutors; Law No 304/2004 on the judicial organisation; and Law No 317/2004 on the SCM. These laws were adopted within the framework of negotiations for Romania's accession to the European Union with the purpose of improving the independence and effectiveness of the judiciary.[117]

251. These laws and their subsequent amendments were closely monitored under the MCV after accession. On the basis of these laws and their subsequent amendments, the Commission periodically reported on Romania's progress with regard to the independence and efficient functioning of the judiciary, as well as progress made in fighting corruption. This progress led the Commission to establish some final recommendations in its MCV Report of 2017, which could have led to the bringing to an end of the MCV.[118] However, the progress was reversed in the period from 2017

117 2004 Regular Report on Romania's progress towards accession (SEC(2004)1200), p. 19).

118 See the MCV Report of 2018, p. 3.

to 2018, when the Justice Laws were all amended by different laws,[119] adopted by way of an accelerated procedure by the Parliament, which entailed limited debate in the two chambers of Parliament.[120] These laws were adopted amidst great political controversy and public protests.[121] Subsequently, between September 2018 and March 2019, the Romanian Government adopted five emergency ordinances that amended and added new provisions to the Justice Laws.[122]

252. The amendments include further elements that are not the subject of the present cases, such as a new early retirement scheme, restrictions on the freedom of expression for judges and extended grounds for the removal from office of members of the SCM.[123] They also introduced the amendments which form the basis of the cases brought before this Court, such as the procedure for the interim appointment of the management of the Judicial Inspection and the establishment of the SIOJ, as well as changes in provisions on material liability of judges, which I analyse in a separate Opinion in Case C-397/19.

253. Those modifications were evaluated negatively in the MCV Reports of 2018 and 2019. Some of them were also reported on by several international bodies, including the Venice Commission,[124] and the GRECO,[125] who warned about the risks that those elements could present, namely undermining the independence, as well as the efficiency and quality, of the judiciary. The Venice Commission has also expressed concern with regard to the extensive use of emergency ordinances.[126]

254. An important common feature worth mentioning as a matter of general context is the prominent role of *emergency ordinances* adopted by the Romanian Government in order to amend important points of the various Justice Laws. Whether or not such use of an, at least, on the face of it, extraordinary, instrument is permissible under national constitutional law is not a matter for this Court, but rather for the national (constitutional) court(s).

255. However, the fact that, as acknowledged by the Romanian Government at the hearing, the legislative technique of emergency ordinances has been used extensively in the sphere of judicial reform, without there actually always being any clear justification for that practice in terms of urgency, is already an important element of the overall context. Laws that are supposed structurally to govern the third power in the State should, in a system respectful of true separation of powers, be adopted only after due reflection and deliberation, giving voice to all the appropriate legislative and judicial bodies that are normally involved in devising legislation. After all, such laws should ideally outlive a mayfly.

256. In sum, although 'governing the judiciary by emergency ordinances' is not in itself an infringement of EU law, it certainly provides for an important contextual element that should to be taken into account in the assessment of the national provisions at issue.

119 Law No 207/2018 (see point 20 of this Opinion), as well as Legea nr. 234/2018 pentru modificarea și completarea Legii nr. 317/2004 privind CSM, (Law No 234/2018 for the amendment and completion of Law No 317/2004 on the SCM, Monitorul Oficial No 850 of 8 October 2018) and Legea nr. 242/2018 pentru modificarea și completarea Legii nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 242/2018 for the amendment and completion of Law No 303/2004 on the statute of judges and prosecutors, Monitorul Oficial No 868 of 15 October 2018).

120 MCV Report of 2018, p. 9.

121 See GRECO Ad hoc Report on Romania (Rule 34). Adopted at its 79th Plenary Meeting on 23 March 2018 (2018/2).

122 Emergency Ordinances No 77/2018; No 90/2018; No 92/2018; No 7/2019 and No 12/2019. See points 18 and 27 to 34 of this Opinion.

123 See also MCV Report of 2018, p. 3.

124 Venice Commission Opinion No 924/2018 on amendments to Law No 303/2004 on the statute of judges and prosecutors, Law No 304/2004 on judicial organisation and Law No 317/2004 on the Superior Council for Magistracy (Romania) CDL-AD(2018)017.

125 GRECO Ad hoc Report on Romania (Rule 34). Adopted at its 79th Plenary Meeting on 23 March 2018 (2018/2).

126 Venice Commission Opinion No 950/2019 on Emergency Ordinances GEO No 7 and GEO No 12 Amending the Laws of Justice (Romania) CDL-AD(2019)014.

2. Interim appointment of the management of the Judicial Inspection

(a) The order for reference and the position of the parties

257. The order for reference expresses several concerns regarding the legal procedure and contextual circumstances of the adoption of Emergency Ordinance No 77/2018 as well as its consequences.

258. First, it is noted that the emergency ordinance does not have the effect of rectifying an alleged 'legislative vacuum', as the preamble of the ordinance states, but rather deprives the SCM of one of the powers attached to its constitutional role as guarantor of judicial independence. Moreover, the emergency ordinance makes it possible to hold a management office indefinitely, by way of an expired mandate being extended automatically by indiscriminate operation of law, without the SCM being able to exercise the discretion that is fundamental to its constitutional role.

259. Second, the referring court explains that under Article 133(1) of the Romanian Constitution the SCM is responsible for safeguarding judicial independence. It is also suggested that the solution adopted by Emergency Ordinance No 77/2018 constitutes an unjustified exception to the general rule of interim appointments consisting in the delegation of a person to a management office, therefore encroaching upon the competences of the SCM.

260. Before this Court, the Association of Judges Forum has submitted, in line with the arguments already put forward before the referring court and endorsed by it, that Emergency Ordinance No 77/2018 has the effect of depriving the SCM of one of the powers attached to its constitutional role as guarantor of judicial independence. At the hearing, the applicant also clarified that the system of delegation had been used for the position of chief inspector of the Judicial Inspection in the past. Moreover, the adoption of rules relating to the status of judges and prosecutors, including the organisation and functioning of the Judicial Inspection, requires an opinion from the SCM. No such opinion was requested with regard to the emergency ordinance at issue.

261. The Governments of the Netherlands and Sweden agree that the disciplinary proceedings applicable to judges, including the procedure for appointment of the Judicial Inspection, must respect the principle of independence of the judiciary in accordance with the case-law of the Court and of the ECtHR. The Netherlands Government notes that Emergency Ordinance No 77/2018, as described by the order for reference, does not seem to respect that principle. The Swedish Government points out that it is for the national court to carry out that assessment.

262. The Commission submitted at the hearing that an intervention of the Romanian Government in the appointment of the management of the Judicial Inspection is liable to raise doubts regarding the guarantees of independence of justice, bearing in mind, in particular, that the competence for such appointment belongs to the SCM. There are therefore indications of an infringement of the second subparagraph of Article 19(1) TEU.

263. The Romanian Government submitted at the hearing that Article 19 TEU precludes the national provisions according to which the management of the Judicial Inspection is appointed, *even ad interim*, by way of an emergency ordinance, in as much as that can give the impression of political influence or political pressure. That government does not dispute the urgency, but states that the possibility of delegation provided for in Article 57 of Law No 303/2004 could not have been used, because it refers exclusively to delegation in the framework of courts and prosecutors' offices. The present Romanian Government nonetheless maintains that the previous government could have adopted another mechanism in order to prevent the institutional blockage, for example, through a short-term provisional appointment, including the SCM in the procedure.

264. Conversely, the Judicial Inspection submitted that, as the preamble of that instrument indicates, the measure finds its *raison d'être* in the situation created by the fact that the mandate of the previous management had expired on 1 September 2018 without a new competition being launched by the competent body. Moreover, that act provides that only persons who have already passed the competition and who have already carried out the functions of chief and deputy chief inspector, may be appointed. Finally, since the competition was in fact organised by the SCM, the same chief inspector obtained the position with a very good score.

(b) Analysis

265. Neither the second paragraph of Article 47 of the Charter, nor the second subparagraph of Article 19(1) TEU, impose a specific model with regard to the organisation of the disciplinary systems for members of the judiciary. However, the requirement of independence means that the rules governing the disciplinary regime for judges 'must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions'.[127] For that reason, the Court has identified the involvement of an independent body and the establishment of a procedure that fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, as essential guarantees for safeguarding the independence of the judiciary.[128] That statement unequivocally means that the standards of Articles 47 and 48 of the Charter apply to disciplinary proceedings against members of the judiciary.[129]

266. It must be noted that these standards apply to the disciplinary bodies themselves (typically the disciplinary chamber deciding on the disciplinary offence), not to the entity bringing the claim before them (namely the 'disciplinary prosecutor'). The Judicial Inspection is not vested with the authority to take the decision on the existence of a disciplinary offence. That is reserved for the competent section of the SCM, which is the disciplinary body.

267. However, the Judicial Inspection, as clarified by the Romanian Government at the hearing and as noted by the applicant, plays a key role in the disciplinary procedure. It carries out the preliminary investigation and decides whether to open a disciplinary investigation. It carries out that investigation, before eventually deciding on whether to file a disciplinary action before the competent section of the SCM for adjudication.[130] It also has important functions in triggering the proceedings that lead to the determination of a judicial error.[131] In addition, as explained by the referring court, the chief inspector has key powers that have also been strengthened by recent amendments:[132] he appoints the inspectors with management functions; manages the inspection's activity and disciplinary procedures; organises the allocation of files; sets out the specific areas of activity in which review actions are exercised; is the principal issuer of instructions and has the capacity to initiate disciplinary proceedings himself.

127 Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 77).

128 See, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 77).

129 In this regard, it would appear that the Charter indeed provides a higher standard of protection than the ECtHR, despite the latter's recent evolution in, for example, ECtHR, 9 January 2013, *Volkov v. Ukraine*, CE:ECHR:2013:0109JUD002172211, §§ 87 to 91; ECtHR, 23 June 2016, *Baka v. Hungary*, CE:ECHR:2016:0623JUD002026112 (Grand Chamber) §§ 107 et seq.; ECtHR, 23 May 2017, *Paluda v. Slovakia*, CE:ECHR:2017:0523JUD003339212 (Third Section), §§ 33 to 35; ECtHR, 25 September 2018, *Denisov v. Ukraine*, CE:ECHR:2018:0925JUD007663911 (Grand Chamber), §§ 44 et seq.

130 According to the clarifications given by the Romanian Government at the hearing, the competences of judicial inspectors are listed in Article 74(1) of Law No 317/2004. Pursuant to Article 45(1) of Law 317/2004, the Judicial Inspection can start an investigation *ex officio*, or at the request of any interested person, including the SCM. According to Article 44 (3^1) of that law, the Minister of Justice can request the Judicial Inspection to establish whether there are indications of disciplinary breaches by prosecutors.

131 According to Article 74 of Law No 317/2004 and Article 94 of Law No 303/2004. See my Opinion in Case C-397/19.

132 It appears from the file before this court that those powers were strengthened by Legea nr. 234 of 4 October 2018 (Monitorul Oficial No 850 of 8 October 2018), which amended Article 69 of Law No 317/2004, regarding the powers of the chief inspector.

268. Within such a context, it is rather clear that such investigative and 'triggering' powers of disciplinary investigations are already liable, regardless of the guarantees offered by the body taking the final decision on the disciplinary proceedings, to exert pressure on the persons who have the task of adjudicating in a dispute.[133] That is *a fortiori* the case when the powers to initiate an investigation and a disciplinary action appear to be vested in one institution, which in fact specialises in inspecting and investigating judges.

269. For that reason, a body in charge of initiating disciplinary procedures such as the Judicial Inspection should demonstrate at least some degree of operational and investigative independence. Again, the expected level of independence certainly cannot be that required of disciplinary bodies themselves. However, bearing in mind both the role of the Judicial Inspection within the SCM and the powers of the chief inspector, the procedure for the appointment to that position cannot be such as to cause concerns over the powers and functions of that body being used as instruments to exert political control over, and pressure on, judicial activity.

270. How does a rule providing for a system of interim appointment that consists in the extension of the mandate of the incumbent fit into that picture? Viewed *in abstracto* and detached from any context, such a rule could hardly be said to contravene, per se, the requirements of judicial independence imposed by EU law.

271. First, not every instance of participation by the executive branch in the appointment to positions in the judiciary gives rise automatically to a relationship of subordination infringing the principle of independence, if there are guarantees shielding the appointees from influence or pressure when carrying out their role after appointment.[134] Rather to the contrary, in fact: separation of powers cuts both ways.

272. This conclusion applies likewise, in my view, to the appointment to the management positions of a body such as the Judicial Inspection. In that connection, as the Judicial Inspection submits, the Romanian Government did not directly appointed the chief inspector of the Judicial Inspection by individual decision. Emergency Ordinance No 77/2018 regulates a procedure to ensure the management *ad interim* of the Judicial Inspection.

273. Second, the second paragraph of Article 47 of the Charter does not preclude either, as a matter of principle, a system whereby the interim management of a body such as the Judicial Inspection is assured by the incumbent chief and deputy inspectors until a new management is appointed through the regular proceedings. As also submitted by the Judicial Inspection, this may indeed ensure that the persons occupying the position *ad interim* have already passed the competition provided for by law and that they have experience in the role. Such a system may indeed be necessary and is present in a number of jurisdictions with regard to certain key positions, including judicial appointments.[135]

274. However, here the devil is not in the detail, but in the context. The two seemingly unproblematic elements just mentioned rapidly lose their uncontroversial character when one looks at the specific system for the interim appointment of the management of the Judicial Inspection as provided for by Emergency Ordinance No 77/2018, and the specific result it achieved in the individual case.

133 See, regarding the effects on judicial independence of the mere potential opening of disciplinary proceedings, ECtHR, 9 February 2012, *Kinský v. the Czech Republic*, CE:ECHR:2012:0209JUD004285606, §§ 97 to 99.

134 See, for example, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 133) citing to that effect: judgment of 31 January 2013, *D. and A.* (C-175/11, EU:C:2013:45, paragraph 99), and ECtHR, 28 June 1984, *Campbell and Fell v. United Kingdom*, CE:ECHR:1984:0628JUD000781977, § 79; of 2 June 2005, *Zolotas v. Greece*, CE:ECHR:2005:0602JUD003824002, §§ 24 and 25; of 9 November 2006, *Sacilor Lormines v. France*, CE:ECHR:2006:1109JUD006541101, § 67; and of 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, § 80 and the case-law cited.

135 Just to cite the most obvious example, see Article 5 of the Statute of the Court of Justice of the European Union.

275. In accordance with Article II of that ordinance, the system for interim appointment is also applicable in the situation where the management of the Judicial Inspection *is vacant* on the date on which this emergency ordinance comes into force, which was precisely the case when Emergency Ordinance No 77/2018 was adopted.[136] In practical terms, that means that the rule ushered in by an emergency ordinance, without consultation with the body that should normally be consulted on such an appointment, is not only designed to ensure continuity in office, but its practical effect is to *ex post facto* reinstate into office a person whose mandate has already expired, through a procedure other than the one designed by law and in circumvention of the actors normally involved in that procedure.

276. That element of context and practical operation of a seemingly neutral rule is in itself sufficient to conclude that the system for the interim appointment of the management of the Judicial Inspection established by Emergency Ordinance No 77/2018 is liable to raise doubts as to the interest of the Romanian Government in appointing a given person to lead the body in charge of disciplinary investigations against members of the judiciary. As a result, such a system does not seem to contain guarantees suitable to dispel reasonable doubt in the minds of individuals as to the imperviousness of judicial bodies to external factors and their neutrality with respect to the interest before them.

277. To my mind, the analysis can and should really stop here. The referring court, and above all the (national) parties to the present proceedings, have put forward other contextual arguments, concerning not only the issues of (national) division of competence, but also the individuals and bodies involved and their alleged particular interests. I do not think that it would be either necessary or appropriate for this Court to consider any of these other elements of context in view of the fact that the argument set out above is itself clear and conclusive.

278. In sum, a person-blind neutral rule established *ex ante*, which, in the name of continuity of institutions, states that a person will remain in office until a successor is properly appointed, is fine and reasonable. To make use of such a seemingly neutral rule, the only effect of which is to reinstate a particular person into an office after the expiry of his or her mandate, in contravention to the normal appointment procedures, is neither fine nor reasonable.

(c) Interim conclusion

279. I therefore suggest that the reply to the third question in Case C-83/19 should be as follows: the second paragraph of Article 47 of the Charter, as well as the second subparagraph of Article 19(1) TEU, are to be interpreted as precluding national provisions whereby the government adopts, by derogation from the legal rules normally applicable, a system for the interim appointment of the management positions of the body in charge of carrying out disciplinary investigations within the judiciary, the practical effect of which is the reinstatement in office of a person whose mandate has already expired.

136 The initial mandate of Mr Netejoru had expired on 1 September 2018, and Emergency Ordinance No 77/2018 was adopted on 5 September 2018.

3. Section for the Investigation of Offences Committed within the Judiciary

(a) The orders for reference and the positions of the parties

280. Four of the five cases examined in this Opinion concern the legal provisions establishing and governing the SIOJ. In the main proceedings in Cases C-127/19 and C-355/19, referred by the same national court, the legality of various administrative acts implementing the legal provisions introducing the SIOJ are at issue. Cases C-195/19 and C-291/19 have been submitted in the framework of pending criminal proceedings against judges and prosecutors where the SIOJ is called on to participate.

281. It is in this context that, the fourth and fifth questions in Case C-127/19; the fourth question in Case C-291/19 and the fourth question in Case C-355/19 ask, essentially, whether the principle of judicial independence enshrined in Article 19(1) TEU and in Article 47 of the Charter, as well as the obligation to comply with the values of the rule of law under Article 2 TEU, preclude the establishment of the SIOJ. The fifth question in Case C-291/19 asks whether the second subparagraph of Article 47 of the Charter, relating to the right to a fair trial by means of a hearing within a reasonable time, precludes the establishment of the SIOJ, in view of the limited number of positions in that section.

282. The orders for reference thus raise, largely embracing the arguments made by the parties in the main proceedings, various issues concerning the establishment and operation of the SIOJ. Those arguments have been further developed by some of the interested parties which have presented observations before the Court, in particular the Association of Judges Forum, the Association 'Movement for the Defence of the Status of Prosecutors', the Prosecutor General and OL.

283. In the light of the elements put forward in the orders for reference, the Governments of the Netherlands and Sweden, as well as the Commission, have found that there are significant factors that demonstrate that the rules governing the establishment and functioning of the SIOJ are not in compliance with the requirements of judicial independence and impartiality.

284. The Romanian Government, which in its written observations defended the compatibility of the SIOJ with those standards, changed its position during the hearing. It informed the Court that, for the reasons exposed in a Memorandum approved by the government on the 27 December 2019, the current government supports the abolition of the SIOJ, in line with the recommendations of the MCV reports, as well as the reports of the Venice Commission and the GRECO.

285. That government explained some of the elements upon which its new position is based. I will point out just three of them, noted by that government and discussed by the interested parties before this Court. First, the provisions relating to the composition of the selection boards as subsequently amended seem to go against the principle established in Romanian law of the separation of careers of judges and prosecutors, according to which the nomination of prosecutors is the competence of the prosecutors' section of the SCM. Second, it appears that the creation of the SIOJ resulted in a risk of a de facto immunity from prosecution for the prosecutors belonging to that section. Third, the rule concerning the concept of a 'hierarchically superior prosecutor' is controversial, bearing in mind the constitutional principle of hierarchical control.

286. Thus, ultimately, it appears that it is only the SCM that defends the creation and functioning of the SIOJ. It has explained that the creation of the SIOJ is justified by the need to protect the members of the judiciary.[137] The SIOJ aims to provide additional guarantees to a specific category of persons in the light of the important role they play in society and to ensure a high degree of professionalism of those handling their cases. The SIOJ would therefore enhance the independence of the justice system by ensuring protection against pressures and abuses resulting from arbitrary complaints and actions against members of the judiciary.

287. At the hearing, the SCM emphasised that the system is also prompted by excesses committed against members of the judiciary by the DNA which, prior to the establishment of the SIOJ, had investigated more than half of Romania's judges, as set out in a report drafted by the Judicial Inspection and approved by the SCM in October 2019.[138] Moreover, that 'protective' purpose was upheld by the Curtea Constituțională (Constitutional Court) in its judgment No 33/2018.[139]

288. The SCM has also submitted that the creation of the SIOJ was accompanied by a system of guarantees capable of dispelling any doubt as to its independence from political pressure. Additional safeguards have strengthened the procedures for the appointment of the chief prosecutor of the SIOJ and for the selection of the prosecutors of that section.[140] The chief prosecutor of the SIOJ is appointed by the general assembly of the SCM, unlike the chiefs of other prosecution sections, which are appointed through competitions organised by the Minister of Justice, leaving the SCM to provide a consultative opinion only. It also noted, with regard to the prosecutors of the SIOJ, that the additional guarantees of independence consist in the requirement of at least 18 years of experience as a prosecutor; the selection is made without political influence through a transparent procedure; there is a rigorous examination of the last five years of the professional activity of prosecutors; and there is no possibility of delegation to that section.

(b) Analysis

289. The arguments put forward by the referring courts, as well as the concerns raised by the parties having presented observations before this Court, are extensive and complex. They relate to different elements regarding the national rules governing the creation of the SIOJ, its composition and powers, the selection of its management, its broader institutional effects in terms of its impact on the jurisdiction of other prosecution sections, and the way in which that body exercises its functions in practice.

290. In line with the recent case-law of the Court,[141] it is my view that those elements, even if they were to escape criticism when considered individually, must be subject to an overall assessment, in order to determine the impact of the creation and functioning of the SIOJ on the requirements of judicial independence.

291. As a starting point, having due regard to the effects that the creation of a specific prosecution section 'for judges' may have on the public perception of the judiciary, the establishment of such a section must necessarily correspond to a particularly weighty, transparent and genuine justification (i). Once that criterion is met, it is in addition imperative that the composition, organisation and

137 This was also the position defended by the Romanian Government in its written observations.

138 The Romanian Government cited Reports of the Judicial Inspection 5488/IJ/1365/DIP/2018 and 5488/IJ/2510/DIJ/2018.

139 Point 141 of that judgment.

140 This was also the position submitted by the Romanian Government in its written observations.

141 Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 141 to 144). See also above, points 242 to 244 of this Opinion.

functioning of such a section complies with guarantees appropriate for avoiding the risk of external pressure on the judiciary (ii). Finally, the specific circumstances surrounding the creation of the SIOJ, as well as the account of the way in which that body has exercised its functions, are also of relevance in discerning the relevant context (iii).

(i) Justification

292. Similar to what has already been outlined,[142] the EU requirements of impartiality and independence of the judiciary, enshrined in the second paragraph of Article 47 of the Charter, as well as in Article 19(1) TEU, do not impose on Member States the obligation to adopt a specific structure or model with regard to the institutional design of the public prosecutor's office. In fact, the structure of the public prosecutor's office in European States is extraordinarily varied.[143]

293. However, the creation of a dedicated prosecution section with *exclusive* jurisdiction for the offences committed by the members of the judiciary has a clear potential impact on the public perception of judicial independence and impartiality. It singles out the judiciary as a professional group to which a separate administrative structure of the public prosecutor's office is required. As noted by the Commission, this is liable to create the impression that there is widespread crime or even corruption within the justice system. It has the effect of placing the infringements committed by judges, (which can be of any kind), at a level of severity equivalent to that of corruption, organised crime or terrorism, which are the only other matters for which there are specialised sections within the Romanian public prosecutor's office.[144] This 'impression of criminality' affects one of the crucial elements in the assessment of the impact of a given measure on judicial independence, namely the confidence that the courts in a democratic society must inspire in the public.[145]

294. Again, it is difficult to maintain that the creation of specific prosecution sections, or even separate prosecution services is, per se, precluded. There are indeed dedicated prosecution structures within the Member States, based either on the specific need for protection of a certain group of people (such as minors); the special status of certain persons (such as military prosecutors' services); or relating to a particularly advanced issue in need of special expertise or knowledge (such as complex economic crimes, cybersecurity, and so on).

295. However, in view of the significant impact of such an institutional measure on the perception of the judiciary, it is vital that its justification is based on genuine and sufficiently weighty reasons, which must, moreover, be made apparent to the public in an unambiguous and accessible manner.

296. Were there such sufficiently weighty reasons to justify the creation of the SIOJ? The SCM has explained that the creation of the SIOJ is justified by the need to protect the members of the judiciary.

297. The need to protect the judiciary from undue pressure could indeed, in general terms, constitute a legitimate and sufficiently weighty reason to establish a prosecutorial structure designed to mitigate that risk, in view of the specific circumstances of a given Member State, and having due regard to the requirements of independence of impartiality of the judiciary.

142 Above, points 227 to 230 (general) as well as point 265.

143 See, on this variety, for example, the Report of the Venice Commission on European Standards as regards the Independence of the Judicial System: Part II — the Prosecution Service, adopted at its 85th plenary session (Venice, 17-18 December 2010) (CDL-AD(2010)040).

144 See also, in this connection, Venice Commission Opinion No 924/2018 on amendments to Law No 303/2004 on the statute of judges and prosecutors, Law No 304/2004 on judicial organisation and Law No 317/2004 on the Superior Council for Magistracy (Romania) (CDL-AD(2018)017).

145 Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 128 and ECtHR case-law cited therein).

– *Unambiguous and accessible justification?*

298. However, when the creation of a section such as the SIOJ is not connected with reasons relating to the fight against crime, but rather with the need to protect the judiciary itself, it is imperative that such a justification be made public in an *unambiguous and accessible* manner, so as not to undermine the confidence of the public in the judiciary.

299. The Romanian Government pointed out at the hearing that the reasons for the establishment of the SIOJ were not explained in the preamble of Law No 207/2018. The report of the Judicial Inspection concerning the excesses of the DNA, on which the SCM relies in order to justify the creation of the SIOJ, was adopted only *after the publication of the law*, which entered into force on 23 July 2018. It is thus difficult to see how it could therefore constitute its motivation. Finally, the Romanian Government pointed out at the hearing that a justification relying on the need to protect specific persons due to the nature and importance of their role fails to convince, when the very same system is not applied to other important persons such as senators or deputies.

300. In the light of those elements, it is difficult to ascertain whether the purpose of protecting the judiciary from undue pressure was in any event the objective which motivated the creation of the SIOJ. It cannot therefore be established, to my mind, that the creation of that prosecution section was explained to the public with an unambiguous and accessible justification.

– *Genuine justification?*

301. The key, and the most contentious, point of the debate between the parties having presented observations before the Court relates to whether the 'protective' justification for the establishment of SIOJ is *genuine*. The Association of Judges Forum, the Association 'Movement for the Defence of the Status of Prosecutors', the Prosecutor General and OL have offered quite detailed argument in support of the claim that the creation of the SIOJ was in reality inspired by different motives. Those parties have relied, for that purpose, on the practical consequences of the institutional design of the SIOJ. As the Prosecutor General noted at the hearing, these elements may give the public the impression that the purpose of creating the SIOJ was in fact to weaken the fight against corruption.

302. First, the Association 'Movement for the Defence of the Status of Prosecutors' and the Prosecutor General have contested the true nature of the 'protective' objective. That is, first, due to the low number of cases in which members of the judiciary were prosecuted prior to the creation of the SIOJ.[146] Moreover, the number of cases against members of the judiciary has increased rather than decreased since the SIOJ became operative. Second, the creation of the SIOJ has not been accompanied by the establishment of any additional guarantees. The SIOJ applies the same procedural rules as other prosecution sections and it is obliged, on the basis of the principle of legality, to register and investigate any complaint lodged that complies with the formal requirements of the Criminal Procedure Code. On the contrary, there is a lack of adequate instruments, which translates to less guarantees, mostly due to the limited number of prosecutors, and given the fact that, unlike other prosecution sections, there is an absence of an appropriate territorial structure at national level, since all the prosecutors of the SIOJ are based in Bucharest.

303. The Romanian Government agreed with the latter point at the hearing. It noted that the exclusive competence of the SIOJ in relation to any kind of crime committed by the members of the judiciary does not ensure that the prosecutors have the necessary specialisation, in particular, with regard to corruption crimes, that fact being even more alarming given that the SIOJ does not have any territorial structure.

146 See also Venice Commission Opinion No 924/2018 on amendments to Law No 303/2004 on the statute of judges and prosecutors, Law No 304/2004 on judicial organisation and Law No 317/2004 on the Superior Council for Magistracy (Romania) (CDL-AD(2018)017, point 88).

304. Second, several elements suggest that the creation of the SIOJ *in reality* leads to weakening the fight against high-level corruption. In accordance with Articles 88^1(1) and (2) of Law No 304/2004, the SIOJ has exclusive jurisdiction for cases concerning members of the judiciary and retains that jurisdiction where other persons are also prosecuted. The Association 'Movement for the Defence of the Status of Prosecutors' and the Prosecutor General have explained that cases being dealt with by other prosecution sections will be transferred to the SIOJ simply because fictitious claims are brought against a member of the judiciary. It is also claimed that this will mostly affect cases that fall under the jurisdiction of the DNA, since some corruption cases may also involve judges. The Association 'Movement for the Defence of the Status of Prosecutors' clarified at the hearing that the SIOJ could request any file by invoking elements of connectivity with one of the files investigated by the SIOJ. Moreover, according to the amendment introduced in Article 88^8(1)(d) by Emergency Ordinance No 7/2009, the SIOJ is competent to withdraw appeals already filed by other prosecution sections. OL submitted at the hearing that the first actions undertaken by the SIOJ were to withdraw significant corruption cases that were at the appeal phase.

305. It is also worth noting that the risk that the SIOJ will be perceived as a body whose establishment and functioning are politically motivated has been raised in the MCV reports, the Venice Commission and the GRECO.[147] That risk has also been expressly acknowledged by the Romanian Government at the hearing.

306. In view of those considerations, despite the theoretical legitimacy and seriousness of the protective aim adduced by the SCM, it appears to me that it cannot be said that the creation of the SIOJ has been justified in a clear, unambiguous and accessible manner, so as not to undermine public confidence in the judiciary. Moreover, and subject to the verification by the national court, the elements set out above, concerning the systematic detrimental effects on the jurisdiction of other prosecution sections, not only cast serious doubts on the genuine character of the justification relied on by the SCM, but are also liable to foster mistrust in the impartiality of the justice system and its imperviousness to external pressures, in particular, by creating the impression that the creation and operation of the SIOJ are politically motivated.

307. Simply put, when all the threats are put together, the emerging picture is not necessarily one of enhanced protection of judges. What rather comes to the disquieting fore is an all-powerful superstructure, which could of course protect, but which could also very much control and thereby influence. Therein lies perhaps the paradox of the entire idea: since judges are allegedly being subject to pressure by the diffusely filed denunciations, it is necessary to create one centralised unit with exclusive jurisdiction in these matters. However, in terms of structural *potential for misuse*, having one centralised and specialised unit then becomes even more dangerous. Diffused, decentralised systems are sometimes perhaps uncoordinated, but, in general, much more resilient. By contrast, in centralised systems, all that is required is a takeover of the centre.

(ii) Guarantees

308. Despite the conclusion just reached, the SCM has submitted that the establishment of the SIOJ was accompanied by a system of guarantees capable of dispelling any doubt as to its independence from political pressure.[148]

147 See, for example, MCV Technical Report of 2018, p. 24; Venice Commission Opinion No 950/2019 on Emergency Ordinances GEO No 7 and GEO No 12 Amending the Laws of Justice (Romania) CDL-AD(2019)014, point 40; and GRECO Ad hoc Report on Romania (Rule 34) Adopted at its 79th Plenary Meeting on 23 March 2018 (2018/2), point 34.

148 See above point 288.

309. I do not deem it necessary to engage in a lengthy discussion on the detailed elements of national law, which are, in any case, for the national court to assess. I would simply note that on this point, the SCM was contradicted by the Romanian Government, which acknowledged at the hearing that many of the guarantees to which the SCM refers have been substantially weakened by the subsequent reforms adopted over a short period of time by the government through emergency ordinances.

310. As the Romanian Government admitted at the hearing, the urgency in the adoption of the emergency ordinances amending the provisions relating to the SIOJ was not always established. Although some reasons were adduced regarding Emergency Ordinances No 90/2018 [149] and No 12/2019, [150] the Romanian Government noted that Emergency Ordinances No 92/2018 and No 7/2019 did not contain any kind of justification relating to the urgency or the need to amend the provisions relating to the SIOJ.

311. From the observations submitted before the Court, it appears that the emergency ordinances repeatedly amended the provisions relating to the selection procedure, relaxing the requirements for the composition of the selection board. [151] The Romanian Government pointed out at the hearing that, despite the fact that it had adduced in its written observations that the procedure for appointment of the prosecutors of the SIOJ was an additional guarantee, it left out any mention of the subsequent amendments introduced by Emergency Ordinance No 90/2018. Moreover, Article II of Emergency Ordinance No 90/2018 derogated from the provisions on the appointment procedure in order to ensure the interim appointment of the chief prosecutor and at least one third of the prosecutors of the SIOJ.

312. Besides the amendment of the selection procedure noted above, those emergency ordinances introduced and amended key provisions relating to the powers and institutional structure of the section. First, Government Emergency Ordinance No 7/2019 added a new paragraph 6 into Article 88^1. In line with that amendment, when the Criminal Procedure Code or any other special law refers to the 'hierarchically superior prosecutor' in cases relating to offences within the jurisdiction of the SIOJ, that expression is to be understood as referring to the chief public prosecutor of the SIOJ, including decisions adopted before that section became operational. [152] Second, that ordinance also amended Article 88^8, by providing for, in paragraph 1(d), a new power of the SIOJ, which consists in bringing or withdrawing actions in cases within the section's jurisdiction, including cases pending before the courts or settled definitively before it becomes operational.

313. It appears, therefore, that the Romanian Government adopted over a short period of time, no less than four emergency ordinances amending aspects of the provisions introduced by Law No 207/2018 concerning the SIOJ. That happened, in particular, with regard to the procedure of appointment and selection of its chief prosecutor and prosecutors, but also with regard to other important elements of the powers of the section and its status within the public prosecutor's office, without always providing justification for the urgency of the government's intervention.

149 Emergency Ordinance No 90/2018 (above, point 27) which modified the guarantees of the selection procedure in order to ensure an interim appointment of the management and a third of the prosecutors of the SIOJ, established a three-month deadline, until the 23 October 2018, for the SIOJ to become operative. The Romanian Government explained at the hearing that on the basis of the preamble of that ordinance, from that date on, the other prosecution sections did not have jurisdiction on the offences covered by the SIOJ. It was therefore considered necessary to create by emergency ordinance a derogating procedure to ensure interim appointment of the management of the section and one third of the prosecutors.

150 The urgency of Emergency Ordinance No 12/2019 (above, point 34) was justified by the need to establish rules on the status and functions of the police officers and specialists acting for the SIOJ.

151 Article 88^5(5) was modified by Emergency Ordinance No 92/2018 (reproduced above in point 30); Emergency Ordinance No 7/2019 introduced two new paragraphs in Article 88^5 (above, point 32).

152 As the Romanian Government noted at the hearing, Article 88^1(5) provides that the Prosecutor General is to settle conflicts of jurisdiction. The Venice Commission has stated that it is uncertain whether this guarantee will be effective, bearing in mind the potential number of conflicts and the resources of the Prosecutor General to analyse all the cases. Venice Commission Opinion No 950/2019 on Emergency Ordinances GEO No 7 and GEO No 12 Amending the Laws of Justice (Romania) (CDL-AD(2019)014, point 40).

314. As the Commission submits, those elements confirm the existence of a serious risk of interference with the independence of the justice system, which is compounded by the rapid and direct intervention of the government through emergency ordinances, thereby also adversely affecting the public perception of political influence on the judiciary.

315. All those elements lead me to conclude that, contrary to what the SCM submits, the regulation of the SIOJ does not offer sufficient guarantees to eliminate any risk of political influence on its functioning and composition. As for their content, the guarantees referred to by the SCM have subsequently been weakened by way of emergency ordinances, which have also repeatedly amended the institutional design of the section, its rules for appointment of prosecutors, and its relations with other prosecution sections. Finally, all that has happened in the context of the already rather questionable design of the SIOJ, which for the reasons outlined in the previous section, was not very robust in terms of its external perception of independence to start with.

(iii) Context and practical functioning

316. In my view, the above considerations suffice to provide a useful reply to the questions referred to the Court. However, the national courts, when ultimately adjudicating on the compatibility of national law with EU law, are also entitled to take into account, when assessing the sufficient degree of the guarantees which must be provided as noted above, the factual and contextual circumstances in which the SIOJ has carried out its functions following its establishment.

317. First, regarding the practical effects of the (often amended) rules on the selection and appointment of the chief prosecutor and of the prosecutors of the SIOJ, OL pointed out at the hearing that the competence of appointment and dismissal was in practice limited to a small group of members of the SCM who were supporters of the government at that time. In particular, the Association 'Movement for the Defence of the Status of Prosecutors' has pointed out that both the interim chief prosecutor and the chief prosecutor subsequently appointed are persons with special connections to the government at the time.

318. Second, with regard to the actions undertaken by the SIOJ since its establishment, the Association of Judges Forum and the Association 'Movement for the Defence of the Status of Prosecutors', have provided a detailed account of how the SIOJ has exercised its functions. Those interested parties have submitted that the SIOJ has opened investigations and reopened closed cases against members of the judiciary who had publicly opposed the legislative amendments, including high-ranking judges and prosecutors.[153] They also note that investigations have been initiated vis-à-vis prosecutors who had opened investigations into members of the ruling party at the time when the rules on the SIOJ were passed. It is also noted that the SIOJ has withdrawn, without providing reasons, the appeals relating to corruption and other cases concerning important members of the previous ruling party, and has sought to obtain jurisdiction on cases managed by other prosecution sections concerning members of that party. Other elements, such as leaked information, publication of notices without proper anonymisation, or official disclosure of incorrect information were also put forward as arguments confirming the premiss of the use of the SIOJ for purposes other than impartial criminal prosecution.

319. It is not for this Court to assess the factual elements set out above. However, as part of the criteria for the general assessment of the national provisions at issue,[154] I consider that national courts are entitled to take into account objective elements concerning the circumstances in which the SIOJ was established, as well as its practical functioning, as factors capable of confirming or rebutting the

153 Including the former Prosecutor General, the former chief prosecutor of the DNA, the President of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), members of the SCM and judges making a request for a preliminary ruling to the Court.

154 Above, points 241 to 247 of this Opinion.

risks of political influence. The confirmation of such risk is liable to raise legitimate doubts in the minds of individuals as to the imperviousness of judges, since it compromises the impression of the neutrality of judges with respect to the interest before them, in particular, when corruption cases are involved.

(iv) Reasonable deadline

320. Finally, the fifth question in Case C-291/19 asks whether the second paragraph of Article 47 of the Charter, which states that 'everybody is entitled to a fair and public hearing within a reasonable time' precludes the establishment of the SIOJ, in the light of the rules governing the exercise of its function and the way in which jurisdiction is established, in connection with the limited number of positions in that section.

321. The referring court considers that there is a risk that cases will not be dealt with within a reasonable period of time due to the prosecution activity of the SIOJ, essentially because, in relation to its volume of cases, there are a limited number of positions in that section. On the one hand, out of its already limited number of 15 prosecutors, only six positions were covered as of 5 March 2019. On the other hand, at the time the SIOJ became operational, it already had 1 422 cases registered with it.

322. The referring court also notes that every year, thousands of fictitious claims are filed against members of the judiciary requiring at least some investigation. That volume of cases, together with the administration of other general files, as well as with the possibility (which has already materialised) of taking over cases from other prosecution sections, entails serious doubts as to the capabilities of the SIOJ to carry out an effective investigation within a reasonable period of time.

323. In the same vein, the Association of Judges Forum, the Association 'Movement for the Defence of the Status of Prosecutors', the Prosecutor General and OL submit that the limited number of prosecutors of the SIOJ inevitably leads to its being overburdened. The Prosecutor General further added that, at the time of the hearing, the SIOJ had seven prosecutors and that there were approximately 4 000 pending files, whereas in the course of 2019, that section could only deal with 400 files.

324. I must note at the outset that the present question is different from the other questions referred examined in this section in that it is exclusively concerned with the procedural rights of the members of the judiciary, regardless of its impact on their independence or impartiality. For this reason, the Commission submits that the question must be reformulated as asking whether, in the specific circumstances of the main proceedings, Article 47 of the Charter precludes the referring court from remitting a case to the SIOJ, in the event that the appeal is upheld.[155] The Commission submits that in a case where a national court must remit a case to the public prosecutor, the second paragraph of Article 47 of the Charter must be interpreted as precluding that court from doing so if it is highly likely that criminal proceedings will not be finished within a reasonable period of time.

325. I do not deem it necessary to proceed to such reformulation. To my mind, the issue raised by the referring court yet again demonstrates the double aspect of the review function of the Charter provisions already discussed above:[156] the second paragraph of Article 47 of the Charter serves as the yardstick for the concrete review of compatibility in the individual case, which does not preclude the Charter from also serving as a yardstick for the abstract review of the national rules concerning the SIOJ.

155 I recall that, as noted in point 187 of this Opinion, the Commission considers that Article 47 is only applicable if the main proceedings concern a situation of 'implementation of EU law'.

156 See points 198 to 202 above.

326. Moreover, these two aspects effectively merge in the context of this case. The specific (subjective) approach to the second paragraph of Article 47 of the Charter must, in this case, also be carried out by reference to an abstract (objective) examination of the impact of the rules governing the SIOJ on the potential length of proceedings. Indeed, the referring court is not asking whether proceedings have already reached an unreasonable duration in the individual case of the applicant, but rather, whether the fact that the institutional design of the SIOJ is such as to lead to that result constitutes a breach of the guarantees of the second paragraph of Article 47 of the Charter.

327. The second paragraph of Article 47 of the Charter corresponds to Article 6(1) ECHR. Its scope and content must receive, in compliance with Article 52(3) of the Charter, an interpretation which does not fall below the standards of the ECHR.

328. In accordance with the case-law of the ECtHR, the 'reasonable time' referred to in Article 6(1) ECHR begins to run when a person is 'charged'.[157] The concept of 'charge' has been interpreted by the ECtHR in a flexible and substantive manner. The point in time to which it refers includes the moment of official notification by a competent authority of an allegation that the person has committed a criminal offence, but also the point in time when the situation of that person was substantially affected by actions taken by the authorities on the basis of a suspicion.[158] As noted by the Commission, that interpretation is therefore liable to cover the period of preliminary investigation.[159]

329. It is true that the ECtHR examines the reasonableness of the length of proceedings in the light of the specific circumstances of each case by reference to the complexity of the case, the conduct of the applicant and of the relevant authorities, and what is at stake for the applicant.[160] However, this does not preclude, to my mind, the examination of the institutional arrangements that may lead, almost inevitably, to an infringement of the requirement of 'reasonable time' in ongoing proceedings.

330. In the framework of the present case, where the assessment of the compliance of an institutional structure of the public prosecutor's office is at stake, the elements relevant for the assessment will be taken into account *in abstracto*. The assessment in that context involves, in particular, the 'conduct of the relevant authorities'. Article 6(1) ECHR imposes on States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements.[161] Those requirements include, of course, the functioning and actions of the public prosecutor's office.[162] Delays caused by a backlog of cases are therefore not a justification, as States may be found liable not only for the delay in a particular case 'but also for a failure to increase resources in response to a backlog of cases, or for structural deficiencies in its judicial system that cause delays'.[163]

157 See, for example, ECtHR, 5 October 2017, *Kalēja v. Latvia*, CE:ECHR:2017:1005JUD002205908, § 36 and the case-law cited.

158 See, for example, ECtHR, 11 June 2015, *Tychko v. Russia*, CE:ECHR:2015:0611JUD005609707, § 63. In the context of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1), see also judgment of 12 March 2020, *VW (Right of access to a lawyer in the event of non-appearance)* (C-659/18, EU:C:2020:201, paragraphs 24 to 27).

159 ECtHR, 22 May 1998, *Hozee v. the Netherlands*, CE:ECHR:1998:0522JUD002196193, § 43; ECtHR, 18 January 2007, *Šubinski v. Slovenia*, CE:ECHR:2007:0118JUD001961104, §§ 65 to 68; or ECtHR, 5 October 2017, *Kalēja v. Latvia*, CE:ECHR:2017:1005JUD002205908, §§ 37 to 40 and the case-law cited

160 Inter alia, ECtHR, 10 September 2010, *McFarlane v. Ireland*, CE:ECHR:2010:0910JUD003133306, § 140.

161 ECtHR, 25 November 1992, *Abdoella v. the Netherlands*, CE:ECHR:1992:1125JUD001272887, § 24.

162 See, among the many cases where the conduct of the public prosecutor led to the unreasonable length of proceedings, ECtHR, 26 November 1992, *Francesco Lombardo v. Italy*, CE:ECHR:1992:1126JUD001151985, §22.

163 ECtHR, 10 May 2011, *Dimitrov and Hamanov v. Bulgarie*, CE:ECHR:2011:0510JUD004805906, § 72. See also ECtHR, 13 July 1983, *Zimmermann and Steiner v. Switzerland*, CE:ECHR:1983:0713JUD000873779, §§ 29 to 32.

331. To my mind, it follows from those elements that the second paragraph of Article 47 of the Charter includes the obligation on Member States to organise their judicial systems so as to make them compliant with the requirements, inter alia, relating to the reasonable length of proceedings. As a consequence, that provision precludes Member States from establishing a prosecution section which is insufficiently equipped with prosecutors, in the light of the caseload resulting from its jurisdiction, so that its operational functioning will certainly result in an unreasonable length of criminal proceedings, including those against judges.

(c) Interim conclusion

332. In the light of the previous considerations, I suggest that the reply to the fourth and fifth questions in Case C-127/19; the fourth question in Case C-291/19 and the fourth question in Case C-355/19 should be as follows: the second paragraph of Article 47 of the Charter, as well as the second subparagraph of Article 19(1) TEU, must be interpreted as meaning that they preclude the establishment of a specific prosecution section with exclusive jurisdiction for offences committed by members of the judiciary, if the creation of such a section is not justified by genuine and sufficiently weighty reasons made apparent to the public in an unambiguous and accessible manner, and if it is not accompanied by sufficient guarantees to dispel any risk of political influence on its functioning and composition. In carrying out their assessment of whether that is indeed the case, national courts are entitled to take into account objective elements concerning the circumstances surrounding the establishment of such a prosecution section, as well as its subsequent practical operation.

333. The answer to the fifth question in Case C-291/19 is that the second subparagraph of Article 47 of the Charter, relating to the right to a fair trial by means of a hearing within a reasonable time, precludes Member States from establishing a prosecution section insufficiently equipped with prosecutors, in the light of the caseload resulting from its jurisdiction, so that its operation will result in an unreasonable length of criminal proceedings. It is for the referring courts to assess, in view of all the relevant factors before them, whether the national provisions on the establishment, composition and functioning of the SIOJ satisfy those requirements.

V. Conclusion

334. I propose that the Court should rule as follows:

– The second question in Case C-195/19, in so far at it refers to Article 9 TEU and Article 67(1) TFEU, as well as the third question in that case, are inadmissible.

– The first question in Cases C-83/19, C-127/19, C-291/19 and C-355/19 should be answered as follows:

Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, as well as the reports established by the European Commission on the basis of that decision, are acts of an EU institution within the meaning of Article 267 TFEU and, therefore, amenable to interpretation by the Court.

– Consideration of the first part of the second question posed in Cases C-83/19, C-127/19 and C-355/19 has not disclosed any factor liable to cast doubt on the fact that Decision 2006/928, in its current form, was validly adopted on the basis of the Treaty of Accession.

– The second part of the second question in Cases C-83/19, C-127/19 and C-355/19; the first question in Case C-195/19 and the second question in Case C-291/19 should be answered as follows:

Decision 2006/928 is legally binding. The reports adopted by the Commission in the framework of the Mechanism for Cooperation and Verification, are not legally binding on Romania. However, those reports are to be duly taken into consideration by that Member State in its efforts to fulfil its obligations to attain the benchmarks laid down in the Annex to Decision 2006/928, having due regard to the requirement of the principle of sincere cooperation of Article 4(3) TEU.

– The third question in Case C-83/19 should be answered as follows:

The second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, and the second subparagraph of Article 19(1) TEU, are to be interpreted as precluding national provisions whereby the government adopts, by derogation from the legal rules normally applicable, a system for the interim appointment of the management positions of the body in charge of carrying out disciplinary investigations within the judiciary, the practical effect of which is the reinstatement in office of a person whose mandate has already expired.

– The fourth and fifth questions in Case C-127/19, the fourth question in Case C-291/19 and the fourth question in Case C-355/19 should be answered as follows:

The second paragraph of Article 47 of the Charter, as well as the second subparagraph of Article 19(1) TEU, must be interpreted as meaning that they preclude the establishment of a specific prosecution section with exclusive jurisdiction for offences committed by members of the judiciary, if the creation of such a section is not justified by genuine and sufficiently weighty reasons made apparent to the public in an unambiguous and accessible manner, and if it is not accompanied by sufficient guarantees to dispel any risk of political influence on its functioning and composition. In carrying out their assessment of whether that is indeed the case, national courts are entitled to take into account objective elements concerning the circumstances surrounding the creation of such a prosecution section, as well as its subsequent practical operation.

– The answer to the fifth question in Case C-291/19 is that the second subparagraph of Article 47 of the Charter, relating to the right to a fair trial by means of a hearing within a reasonable time, precludes Member States from establishing a prosecution section insufficiently equipped with prosecutors, in the light of the caseload resulting from its jurisdiction, so that its operation will result in an unreasonable length of criminal proceedings. It is for the referring courts to assess, in view of all the relevant factors before them, whether the national provisions on the establishment, composition and functioning of the Secția pentru investigarea infracțiunilor din justiție (Section for the Investigation of Offences committed within the Judiciary) may indeed lead to that result.