Provisional text

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 23 September 2020(1)

Case C-397/19

AX
v
Statul Român - Ministerul Finanţelor Publice

(Request for a preliminary ruling from the Tribunalul Bucureşti (Regional Court, Bucharest, 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) – Article 47 of the Charter of Fundamental Rights of the European Union – Second subparagraph of Article 19(1) TEU - Rule of law – Judicial independence – State liability – Civil liability of members of the judiciary for judicial error)

I. Introduction

1. The applicant in the main proceedings was sentenced for a criminal offence at first instance but was subsequently acquitted by the appellate court. He now seeks compensation before the referring court, a civil jurisdiction, from the Romanian State, for the damages allegedly sustained because of his criminal conviction, including his pre-trial detention.

2. In this context, the referring court questions the compatibility of several aspects of the definition and procedure of State liability for judicial error in Romania, as recently amended, with the requirements of the rule of law. The present case concerns an action for State liability against the Romanian State. However, the referring court also expresses doubts with regard to the national provisions that govern any subsequent stage: if the State were indeed obliged to pay damages, then it is possible that an action for recovery would be brought by the State against the magistrate (judge or prosecutor). In such a scenario, the Ministerul Finanţelor Publice (Ministry of Public Finances, Romania) would go before a civil court and bring an action to establish the civil liability of the judge or prosecutor who caused the error, provided that the judicial error and the damage it caused were made in bad faith or through gross negligence.

3. The present case forms part of a series of requests for preliminary rulings concerned with the amendments of different aspects of the Romanian legal system by the reform of the so-called ‘Justice

Laws'. In all these cases, the referring courts question the compatibility of national provisions with EU law, seeking clarification on the meaning and legal value of the 'Mechanism for Cooperation and Verification' ('the MCV') established by Commission Decision 2006/928/EC. (2) I have dealt with that transversal issue in another Opinion delivered today, in Joined Cases *Asociaţia 'Forumul Judecătorilor din România'*, *Asociaţia 'Forumul Judecătorilor din România' and Asociaţia Mişcarea Pentru Apărarea Statutului Procurorilor*, and *PJ*, and in Cases *SO* and *Asociaţia 'Forumul Judecătorilor din România' and Others*. (3)

4. In the present Opinion, I shall therefore focus on the interpretation of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and of the second subparagraph of Article 19(1) TEU, with regard to the national provisions concerning the State liability and the civil liability of judges for judicial error, and their compatibility with the principle of judicial independence enshrined in those provisions.

II. Legal framework

A. EU law

5. The relevant provisions of EU law are reproduced in points 5 to 12 of my Opinion in *Asociaţia Forumul Judecătorilor din România and Others*.

B. Romanian law

6. Article 1381 of the Codul civil (Civil Code) provides that all damage shall give rise to a right to compensation.

7. Article 539(1) of the Codul de procedură penală (Romanian Code of Criminal Procedure) provides that a person unlawfully deprived of his or her liberty is entitled to compensation. According to Article 539(2) of that code, the unlawful deprivation of liberty is to be established, as the case may be, by an order of a prosecutor, by a final order of a judge responsible for matters relating to rights and freedoms or of a judge conducting the preliminary hearing, or by the final order or judgment of the court hearing the case.

8. Article 541 of the Code of Criminal Procedure states that:

'1. An action for damages may be brought by the person entitled to do so under Articles 538 and 539, and, after the death of that person, such an action may be pursued or brought by persons who were dependants of the deceased at the time of his or her death.

2. The action may be brought within 6 months of the date on which the decision of the court, order of the prosecutor or order of the judicial authorities establishing the judicial error or the unlawful deprivation of liberty has become final.

3. In order to obtain compensation for the harm suffered, the person entitled to that compensation may bring a civil action against the State before the Tribunalul (Regional Court) of the judicial district where that person is resident; the claim shall be served on the State through the Ministry of Public Finances.

…'

9. The regime of civil liability of judges initially provided in Legea nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 303/2004 on the rules governing the status of judges and prosecutors), was amended by Legea nr. 242/2018 pentru modificarea și completarea Legii nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 242/2018 on the amendment and completion of Law No 303/2004 on the status of judges and prosecutors). (4)

10. Article 96 of Law No 303/2004, as amended by Law No 242/2018, provides as follows:

‘1. The State shall make good using its own resources any damage resulting from judicial errors.

2. The liability of the State shall be established in accordance with the law and shall not exclude the liability of judges and prosecutors who, even if they are no longer in office, have performed their duties in bad faith or with gross negligence for the purposes of Article 99^1.

3. A judicial error exists where:

(a) in the course of legal proceedings, a procedural act has been performed in clear breach of provisions of substantive or procedural law, entailing a serious infringement of the rights, freedoms or legitimate interests of an individual and causing harm that it has not been possible to remedy by means of an ordinary or extraordinary appeal;

(b) a final judgment has been delivered that is manifestly contrary to the law or inconsistent with the factual situation established by the evidence taken in the course of the proceedings, entailing a serious infringement of the rights, freedoms or legitimate interests of an individual, that it has not been possible to remedy by means of an ordinary or extraordinary appeal.

4. Specific cases in which a judicial error exists may be covered by the Code of Civil Procedure, the Code of Criminal Procedure, or other special laws.

5. In order to obtain compensation for the damage caused, the injured party may take action exclusively against the State, represented by the Ministry of Public Finances. Jurisdiction to hear the civil action shall lie with the court in whose area of jurisdiction the applicant is domiciled.

6. The State shall pay any sums due by way of compensation within one year, at the latest, of the date of notification of the final judgment.

7. Within two months of notification of the final judgment delivered in the action referred to in paragraph 6, the Ministry of Public Finances shall refer the matter to the Judicial Inspection, so that it may ascertain whether the judicial error was caused by a judge or prosecutor as a result of his performing his duties in bad faith or with gross negligence, in accordance with the procedure laid down in Article 74^1 of Law No 317/2004, republished, as amended.

8. The State, represented by the Ministry of Public Finances, shall bring an action for redress against the relevant judge or prosecutor where, following the advisory report of the Judicial Inspection referred to in paragraph 7 and its own assessment, it considers that the judicial error was caused by the judge’s or prosecutor’s performance of his duties in bad faith or with gross negligence. The action for redress shall be brought within six months of the date of notification of the report of the Judicial Inspection.

9. The Civil Division of the Curtea de Apel (Court of Appeal) of the judicial district where the defendant is resident shall have jurisdiction to hear and determine at first instance the action for redress. If the judge or prosecutor against whom that action is brought carries out his or her duties in that Court of Appeal or in the prosecutor’s office attached to that Court of Appeal, the action for redress shall be brought before a neighbouring Court of Appeal to be selected by the applicant.

10. The decision delivered in the proceedings described in paragraph 9 may be appealed before the competent division of the Înalta Curte de Casație şi Justiție (High Court of Cassation and Justice, Romania).

11. The Superior Council of Magistracy shall establish, within six months of the date of entry into force of this law, the conditions, terms and procedures pertaining to the compulsory professional insurance of judges and prosecutors. The insurance shall be paid for entirely by the judge or prosecutor and its absence

shall not delay, diminish or exclude the civil liability of a judge or prosecutor for any judicial error caused by the performance of his duties in bad faith or with gross negligence.'

11. Finally, Article 99[1] of Law No 303/2004, as amended, defines bad faith and gross negligence in the following terms:

'(1) A judge or prosecutor shall be deemed to have acted in bad faith if he or she knowingly infringes rules of substantive or procedural law and either has the intention of harming another person or accepts that the infringement will cause harm to another person.

(2) A judge or prosecutor commits gross negligence if he or she negligently disregards rules of substantive or procedural law in a manner that is serious, irrefutable and inexcusable.'

III. Facts, national proceedings and the questions referred

12. In the period between 21 January 2015 and 21 October 2015, the applicant was arrested, placed in pre-trial detention, and subsequently placed under house arrest. Those measures were ordered and then extended by the First Criminal Division of the Tribunalul București (Regional Court, Bucharest, Romania), and later upheld by the Curtea de Apel București (Court of Appeal, Bucharest, Romania).

13. By judgment of 13 June 2017, the Tribunalul București (Regional Court, Bucharest), sentenced the applicant to a suspended term of imprisonment of four years for the offence of continuous tax evasion. The applicant was also ordered to pay damages to the civil party.

14. On appeal, the Curtea de Apel București (Court of Appeal, Bucharest) acquitted the applicant, finding that he had not committed the offence for which he had been convicted at first instance. The referring court explains that that judgment did not contain any statement relating to the legality of the preventive measures taken against the applicant.

15. By application lodged on 3 January 2019 at the Third Civil Division of the Tribunalul București (Regional Court, Bucharest), the applicant brought an action against the Romanian State, represented by the Ministerul Finanţelor Publice (Ministry of Public Finances, Romania) ('the defendant'), seeking an order requiring the defendant to pay EUR 50 000 in material damages and EUR 1 000 000 in non-material damages. The applicant submits that he has been the victim of an error on the part of the First Criminal Division of the Tribunalul București (Regional Court, Bucharest), consisting in unjust conviction, the deprivation of liberty and the unlawful restriction of his freedom during the criminal proceedings.

16. The Ministry of Public Finances, acting on behalf of the State, submitted, inter alia, that the application is inadmissible, and, in any case, unfounded, since the conditions for establishing the civil liability of the State are not satisfied. The applicant failed to demonstrate that the preventive measures and the measures restricting his freedom were unlawful.

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

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

(2) Does the [MCV], established by [the MCV Decision], constitute an integral part of the [Treaty of Accession], and must it be interpreted and applied in the light of the provisions of that treaty? Are the requirements set out in the reports drawn up in the context of that mechanism binding on Romania and, if so, is a national court which is responsible for applying, within its sphere of jurisdiction, provisions of EU law required to ensure the application of those rules, where necessary refusing, of

its own motion, to apply provisions of national legislation that are contrary to the requirements set out in the reports drawn up pursuant to that mechanism?

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

(4) Does Article 2 [TEU], read in conjunction with Article 4(3) thereof, and in particular the obligation to observe the values of the rule of law, preclude a provision of national legislation, such as Article 96(3)(a) of Law No 303/2004 on the rules governing judges and prosecutors, which defines, succinctly and in the abstract, a "judicial error" as the performance of a procedural act in clear breach of provisions of substantive or procedural law, without specifying the nature of the provisions infringed, the scope of application of those provisions, *ratione materiae* and *ratione temporis*, in the proceedings, the methods, time limits and procedures for establishing infringement of legal provisions, or the authority competent to establish infringement of those legal provisions, and thus creates a risk of pressure being indirectly exerted on the judiciary?

(5) Does Article 2 [TEU], read in conjunction with Article 4(3) thereof, and in particular the obligation to observe the values of the rule of law, preclude a provision of national legislation, such as Article 96(3)(b) of Law No 303/2004 on the rules governing judges and prosecutors, which defines a "judicial error" as the delivery of a final judgment that is manifestly contrary to the law or inconsistent with the factual situation established by the evidence taken in the course of the proceedings, without defining the procedure for establishing inconsistency and without defining in specific terms what is meant by that inconsistency of the judgment vis-à-vis the applicable legal provisions or the factual situation, and thus creates a risk that the interpretation of the law and the evidence by the judiciary (judges and prosecutors) will be hindered?

(6) Does Article 2 [TEU], read in conjunction with Article 4(3) thereof, and in particular the obligation to observe the values of the rule of law, preclude a provision of national legislation, such as Article 96(3) of Law No 303/2004 on the rules governing judges and prosecutors, pursuant to which the civil liability of a member of the judiciary (a judge or prosecutor) vis-à-vis the State is established solely on the basis of the State's own assessment, and, where appropriate, the advisory report of the [Judicial Inspection], regarding the question of the intention or gross negligence of the judge or prosecutor in the commission of the material error, without that judge or prosecutor having the opportunity fully to exercise his rights of defence, and which thus creates the risk of the procedure for establishing the liability of the judge or prosecutor vis-à-vis the State being commenced and completed arbitrarily?

(7) Does Article 2 [TEU], and in particular the obligation to observe the values of the rule of law, preclude a provision of national legislation, such as the last sentence of Article 539(2) of the Code of Criminal Procedure, read together with Article 541(2) and (3) thereof, whereby a defendant who has been acquitted on the merits, implicitly and *sine die*, is provided with an extraordinary *sui generis* means of appeal against a final judgment on the lawfulness of pre-trial detention, an appeal which is to be heard solely by a civil court, in the event that the unlawfulness of the pre-trial detention has not been established by a decision of a criminal court, in breach of the principle that legal provisions must be predictable and accessible, the principle of the specialisation of judges and the principle of legal certainty?'

18. The application of the expedited procedure was requested by the referring court in the order for reference. It was rejected by decision of the President of the Court of 26 June 2019. Priority treatment was accorded by decision of the President of the Court of 19 September 2019.

19. Written observations were submitted by the Polish and Romanian Governments, and by the European Commission. A joint hearing with Cases C-83/19, C-127/19 and C-195/19, *Asociaţia 'Forumul*

Judecătorilor din România' and Others; C-291/19, *SO* and C-355/19, *Asociaţia 'Forumul Judecătorilor din România' and Others* was held on 20 and 21 January 2020, in which the following interested parties presented oral argument: the Asociația 'Forumul Judecătorilor din România' ('Association of Judges Forum'), the Asociația 'Mișcarea pentru Apărarea Statutului Procurorilor' (the Association 'Movement for the Defence of the Status of Prosecutors'), the Superior Council of Magistracy (SCM), OL, the Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Procurorul General al României (the 'Prosecutor General'), the Governments of Belgium, Denmark, the Netherlands, Romania and Sweden, and the Commission. The Governments of the Netherlands and Romania, as well as the Commission, have presented oral argument specifically in relation to the present case.

IV. Analysis

20. I have suggested an answer to the first, second and third questions of the referring court in points 120 to 172 of my parallel Opinion delivered today in *Asociaţia Forumul Judecătorilor din România and Others*, to which I cannot but refer. For that reason, I shall deal with neither the admissibility, nor the merits of the first, second and third questions in the present Opinion. In what follows, I shall focus on questions four to seven, that is to say the issues of State liability and the civil liability of judges.

21. What might be added specifically with regard to the present case, is that as was the case with the national provisions at issue in *Asociaţia Forumul Judecătorilor din România and Others*, (5) also the present case is concerned with domestic provisions covered by the Annex to the MCV Decision. A system of State liability and the possible subsequent civil liability of judges for judicial error finds itself at the crossroad between the independence of the judges and their accountability. In that way, it can certainly be subsumed, similar to the elements addressed in my Opinion in the abovementioned cases, under the obligation to 'ensure a more transparent, and efficient judicial process …' set out in the Annex to the MCV Decision.

22. This Opinion is structured as follows. I shall start with examining admissibility and with proposing a reformulation of the questions referred (A). Turning to the merits of the case (B), I will first set out the overall context (1), before turning to what appear to be the contested elements of the system, in order to examine their compatibility primarily with the second paragraph of Article 47 of the Charter (2).

23. Finally, this Opinion is limited to State liability and the civil liability *of judges*. Although the national legislation, as well as the questions raised by the referring court, relate to the civil liability of both *judges and prosecutors*, the present case is, on its facts, concerned exclusively with judicial error that might be attributable to a judicial decision.

A. Admissibility of the questions referred and their reformulation

1. Admissibility

24. The Romanian Government stated in its written submissions that all the preliminary questions in the present case are inadmissible. Regarding the admissibility of questions four to six, the EU law rules invoked by the referring court — Article 2 and Article 4(3) TEU — are irrelevant in the main proceedings. Those provisions, as well as the Charter, are only relevant in so far as Member States act in application of EU law. Moreover, question six, which in reality refers to Article 96(8) of Law No 303/2004, goes beyond the object of the main proceedings. That provision relates to the action seeking to trigger the personal liability of judges, which is not at stake in the case before the referring court. Finally, question seven contains unfounded considerations and raises a question of hypothetical interpretation, which has no bearing on the adjudication on the main proceedings.

25. The Commission has also submitted that all the questions referred are inadmissible. It points out that the proceedings covered by Article 96 of Law No 303/2004 are composed of two phases. The first concerns the liability of the State. If the State has been found liable at the first phase, the Ministry of Public

Finances can bring, at the second phase, an action in order to trigger the personal liability of the judge concerned for judicial error. However, a successful action against the State does not automatically trigger proceedings against a judge. In view of those elements, the Commission submits that questions one to six are inadmissible because the provisions of EU law, the interpretation of which is requested, concern the second phase of that procedure, whereas this case deals with the first phase concerning the liability of the State. As a result, the Commission submits that the interpretation of EU law sought bears no relation to the actual facts of the main action nor to its object. Finally, the Commission has submitted that question seven is also inadmissible because the referring court has not provided the Court with the elements necessary in order for it to give a useful response.

26. The Polish Government has presented observations solely with regard to questions four to seven. According to that government, those questions are inadmissible because EU law is not applicable to the legal problems at issue in the main proceedings. The interpretation of the provisions of EU law sought by the referring court is not necessary for the purposes of adjudicating on the case. The questions have been referred in a case that is purely internal in nature and relates to national provisions adopted by a Member State in the field of its exclusive competence. In the main proceedings, the applicant is not seeking damages in connection with an infringement of EU law. EU law does not impose any obligations with regard to proceedings seeking damages for infringements of national law.

27. I understand and partially share the doubts expressed, in particular, by the Commission concerning the admissibility of question six. However, on balance, I would still suggest that the Court declare questions four, five and six admissible. By contrast, question seven is indeed inadmissible.

28. First, as noted in my Opinion in *Asociaţia Forumul Judecătorilor din România and Others*, (6) the arguments relating to the lack of competence of the European Union in the field of State liability for judicial error are not so much related to the admissibility of the questions, but to the jurisdiction of the Court. For the same reasons set out in that Opinion, I would suggest that the questions fall within the jurisdiction of the Court under Article 267 TFEU. (7)

29. Second, I agree that the referring court, by invoking Article 2 and Article 4(3) TEU in order to assess whether those provisions preclude the national rules at issue, has not relied on the appropriate provisions. However, if those provisions were to be substituted with the MCV Decision, applied in conjunction with the Charter and/or Article 19(1) TEU, then it can hardly be maintained that, in particular, questions four and five are not relevant for the actual case pending before the referring court.

30. Thus, contrary to what the Commission has argued, *questions four and five* specifically address the definition of judicial error contained in Article 96(3)(a) and (b) of Law No 303/2004 for the purposes of its application at the stage of proceedings seeking to trigger the liability of the State, which is exactly the context of the proceedings before the referring court. In those circumstances, it appears that the questions relating to the implications of the EU principle of judicial independence for the assessment of a regime of State liability for judicial errors indeed concern the merits of the case.

31. Admittedly, the situation is different with regard to *question six*. That question, although citing Article 96(3) of Law No 303/2004, is in reality concerned with the (subsequent) civil liability of members of the judiciary, governed by Article 96(7) to (10) of that law. In this way indeed, the suggestion that the Ministry of Public Finances could, perhaps one day, in the event that the action for State liability currently pending were to be successful in the first place, bring a recovery action against the judge who allegedly committed the judicial error remains, in the proceedings currently pending before the referring court, at the level of a mere hypothesis.

32. Moreover, in view of a recent decision of the Court in *Miasto Łowicz*, it could also be suggested that the answer to question six is, in the context of the present proceedings, not necessary to enable the referring court to give judgment. (8) Indeed, reasoning *a fortiori*, if the fact that a number of judges are being subjected to disciplinary proceedings, and the actual judges who submitted the specific requests for a preliminary ruling in the cases at hand are the object of what appear to be preliminary disciplinary

investigations, (9) is not enough to bring such a case over the admissibility finishing line, it would indeed be difficult to see how question six could ever cross that line.

33. However, I understand the statement of the Court made in *Miasto Łowicz* as an expression of the problem of the disconnection between the extremely broad questions referred and the specific cases within which the issues were raised. It is indeed impossible for any court, including this Court, to carry out an *in abstracto* analysis of an alleged political abuse of disciplinary proceedings with very little information. The Court is not an international advisory body that is free to comment on a political situation and recommend best practices. The Court can rule on the infringement of specific rules or principles. However, in order for that to happen, specific arguments, not to say evidence, must be submitted. That is the case, in particular, in a situation where what is in essence suggested is that certain rules or practices operate differently from what is stated on paper. (10)

34. Thus, I would not read *Miasto Łowicz* as banning what might perhaps best be called 'judicial self-defence', that is to say a situation in which a judge, seised by a certain case on merits firmly within the scope of EU law in the traditional sense, raises broader structural issues relating to the national procedures or institutions, considering that they might raise issues in terms of his or her judicial independence. (11) That would indeed be a rather radical departure from the practice of this Court, which has always been rather lenient in accepting such general issues stretching beyond the confines of the specific case as being admissible, traditionally invoking the presumption of relevance of questions posed by its Member States' interlocutors. (12)

35. With those clarifications in mind, I would suggest declaring question six of the referring court admissible, essentially for three reasons.

36. First, there is an intrinsic connection. The first phase, concerning the proceedings against the State — including the definition of judicial error — is the gateway and *condition sine qua non* to the second phase, involving the possible personal responsibility of the judge. Moreover, it appears that the definition of judicial error contained in Article 96(3) of Law No 303/2004 remains relevant for both phases of the procedure. What is then simply added in the potential second phase is the need to establish the subjective elements on the part of the judge in question, amounting either to bad faith or gross negligence pursuant to Article 99^1 of Law No 303/2004.

37. Second, apart from this substantive overlap as to the key concept used, the concerns expressed by the referring court seem to be motivated precisely by the connection between the proceedings for State liability and the possible subsequent action for recovery by the Ministry of Public Finances against the judge responsible for the judicial error. The 'automaticity', or the lack thereof, between a successful liability action against the State and the triggering of an action brought against the judge is, moreover, a question which has been debated between the parties and which appears to be unresolved.

38. Third, it is precisely this substantive and procedural connection between the two phases that is the key to any overall assessment of case. After all, it is primarily the possibility of an ultimate recovery action of the State against the individual judge that may be debated in terms of a potential issue concerning judicial independence. By contrast, it would not be immediately obvious, in view of the case-law of this Court on State liability (for infringements of EU law), how the structural issue of whether, in fact, the possibility exists for an individual to claim State liability for judicial errors would immediately translate into possible threats to the independence of the individual judge. (13)

39. Finally, I do, however, agree with the Commission and the Romanian Government that *question seven* must be declared inadmissible.

40. Question seven asks whether EU law precludes a provision such as Article 539(2) of the Code of Criminal Procedure read in conjunction with Article 541(2) and (3) of that code, which, according to the referring court, allows a person who has been acquitted on merits an extraordinary and *sine die* means of appeal on the lawfulness of the pre-trial detention before the civil courts, with the unlawfulness of the pre-

trial detention not being established by a decision of a criminal court. The referring court implies that this is in breach of the principle that legal provisions must be predictable and accessible, the principle of the specialisation of judges and the principle of legal certainty.

41. The request for a preliminary ruling does not, however, contain any explanation as to the specific reasons that led the referring court to raise that question or why it considers it to be necessary for the main proceedings. The order for reference limits itself to the citation of Article 539(2) and Article 541(2) and (3) of the Code of Criminal Procedure. Without providing any kind of explanation or context concerning those provisions, the question referred contains an evaluative interpretation of those provisions. That interpretation is rather unclear and does not follow from the text of the relevant national provisions. That question, therefore, invites the Court to endorse a certain reading of national law (14) without providing the necessary information regarding the relevance of the provisions at issue in the framework of the main proceedings.

42. Question seven does not, therefore, meet the requirements of Article 94 of the Court's Rules of Procedure.

2. Reformulation of the questions

43. Questions four to six ask, in essence, about the interpretation of Article 2 and Article 4(3) TEU in order to assess whether those provisions preclude the national rules at issue. Whereas questions four and five concern the different elements of the definition of judicial error for the purpose of State liability proceedings, question six concerns the recovery action whereby the Ministry of Public Finances may sue before a civil court so as to trigger the civil liability of the judge who caused that error.

44. First, those questions should, in my view, be considered jointly. They concern different aspects and stages of a regime that could ultimately result in triggering the civil liability for judicial error committed by an individual judge. The latter issue is indeed the one that could, for reasons similar to those already outlined above at the stage of admissibility, (15) be considered as potentially problematic in terms of judicial independence.

45. Second, however, in order to be able to give a useful answer to those questions, I consider it necessary to reformulate them. In terms of applicable EU law, those questions have referred exclusively to Article 2 and Article 4(3) TEU. They must be understood, to my mind, as referring to the second paragraph of Article 47 of the Charter, possibly together with the second subparagraph of Article 19(1) TEU.

46. The order for reference, while not including it in the text of the questions, refers broadly to Article 19(1) TEU in its reasoning. Moreover, the concerns underpinning all of the questions referred are motivated by the repercussions that State liability proceedings, if subsequently followed up by an action for recovery brought against the individual judge, may have on the independence of the judiciary. That principle is enshrined both in the second paragraph of Article 47 of the Charter, as well as in the second subparagraph of Article 19(1) TEU. Thus, both of those provisions constitute the more specific legal reference, which gives therefore precise expression to the value of the rule of law, affirmed in Article 2 TEU. (16)

47. As far as the relationship between the second paragraph of Article 47 of the Charter and the second subparagraph of Article 19(1) TEU is concerned in a case such as the present one, I have already explained in detail why I would consider primarily the second paragraph of Article 47 of the Charter, triggered and made applicable to some elements of organisation of the Romanian judicial system by the MCV Decision and the Act of Accession, to be the appropriate yardstick for assessment. (17) Those considerations are, to my mind, equally applicable to the present case. Indeed, in the specific fields covered by the MCV benchmarks, Romania is deemed to be implementing EU law, for the purposes of Article 51(1) of the Charter, and so the second paragraph of Article 47 of the Charter becomes applicable. (18)

48. Moreover, the questions referred concern the independence of the judiciary 'as a whole'. Thus, they clearly raise a transversal issue that will be of relevance for the independence of the courts that may be called to upon rule on the application or interpretation of EU law. (19) While again perhaps just wondering what added value in terms of legal basis or analytical sharpness the simultaneous, not to say exclusive, invocation of the second subparagraph of Article 19(1) TEU in a case such as the present one would bring, (20) there is no denying that the present case, certainly as far as questions four and five are concerned, (21) would also be covered by that provision.

49. Against that background, it must be borne in mind that the Court has a duty to interpret all EU law provisions which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred. (22)

50. I therefore suggest that the questions referred be reformulated in such a way that they ask whether the second paragraph of Article 47 of the Charter, and the second subparagraph of Article 19(1) TEU, must be interpreted as meaning that they preclude national provisions relating to the proceedings for the establishment of State liability for judicial error, such as Article 96(3) of Law No 303/2004, bearing in mind the terms of the definition of judicial error for the purposes of the proceedings for State liability, and the potential repercussions in the subsequent civil proceedings in which the State may file a recovery action against the judge responsible for the judicial error.

B. Merits

51. I shall start by setting out the legal, and at present the largely unknown operational, context of the national provisions at issue (1). I then turn to what appear to be the contentious elements of the new legal framework (2), namely the vagueness criticised in the definition of the constitutive elements of judicial error for the purposes of State liability (a), before turning to the alleged shortcomings in the procedural framework of the subsequent procedure for triggering the civil liability of judges (b).

1. Context

52. Three elements are of note: the overall legislative context within which the contested amendments were adopted (a), their evaluation and the problems highlighted by various international bodies and the nature of the recommendations of those bodies (b), and the absence of any practical application of the new procedure and system at national level (c).

(a) The overall legislative context

53. In 2018, Law No 242/2018 amended Article 96 of Law No 303/2004, which is the national provision to which the questions referred relate.

54. However, as the Commission and the Romanian Government have explained in their written observations, the current wording of the definition of judicial error results from the amendments to the original draft text, which was changed in response to two consecutive decisions of the Curtea Constituțională România (Constitutional Court, Romania) declaring previous drafts of the relevant provision unconstitutional. (23) The Romanian Government clarified that, in contrast to its two previous versions, this third version of the law has passed the review of constitutionality before the Curtea Constituțională (Constitutional Court). (24)

55. In addition to the abovementioned amendments to Law No 303/2004, Law No 234/2018 (25) modified Law No 317/2004 on the Consiliul Superior al Magistraturii (Superior Council of Magistracy; 'the SCM') by adding a new article — Article 74^1 — which regulates the procedure through which the Judicial Inspection assesses, at the request of the Ministry of Public Finances, whether the judge or prosecutor who caused the judicial error was acting in bad faith or with gross negligence. (26)

56. From the file before this Court, it appears that, prior to the 2018 amendment, the State liability for judicial error could be established, according to the provisions of Law No 303/2004, only if a final decision had previously established the criminal or disciplinary liability of the judge. (27) It was then envisaged that the State could bring a recovery action against the judge in cases of gross negligence or bad faith, without providing further specification as to the competent authority or the procedure. (28)

57. Law No 303/2004 thus introduced two important structural changes to the previous approach to the liability of judges. First, it amended the requirements for introducing actions for State liability in the case of judicial error. It is no longer necessary to have a definitive criminal or disciplinary decision establishing the judicial error before an action for State liability can be brought. The existence of a judicial error may be ascertained directly in the proceedings against the State, pursuant to the newly established criteria in Article 96(3) of Law No 303/2004.

58. Second, the possibilities for the State to initiate a recovery action against the judge whose decision gave rise to the liability of the State is no longer left merely to the discretion of the State without further specification, as was apparently previously the case. A new procedure was established by Article 96(7) to (10), under which the Ministry of Public Finances is designated as the competent authority. That Ministry *shall* refer the matter, within two months, to the Judicial Inspection, which, in turn, must assess whether the judicial error was caused by a judge as a result of negligence or bad faith on the part of the judge in carrying out his duties. Following that advisory report and on the basis of its own assessment, the Ministry of Public Finances, if it considers that the judicial error was caused by bad faith or gross negligence, shall bring the recovery action against the judge before the civil division of the Court of Appeal of the judicial district where the defendant judge is resident (or before a neighboring appellate court, if the defendant sits on the Court of Appeal of the place where he or she resides).

59. At the hearing, the Romanian Government maintained that the aim of the amendments to Law No 303/2004 was to ensure effective judicial protection for individuals. Looking at the previous procedural set-up, one might indeed wonder whether an individual would see such a system as fair and effectively protecting his or her rights. If I understand the previous system correctly, for an individual even to be allowed to institute State liability proceedings (which is now the first phase), there needed to be, in the first place, either a criminal or a disciplinary final conviction of the judge in question. However, if that was indeed the system, then it would be rather surprising if any individuals were ever able to receive damages from the State. A prior conviction of a judge, which naturally also requires proof of subjective elements of fraud and/or gross negligence, is a very high threshold for State liability. The latter, if forming part of the overall system of liability of the State for wrongs attributable to the exercise of public power, finds itself much closer to an objective liability for a certain result. (29) Moreover, it is also quite clear that any such action (whether criminal or disciplinary), its initiation and its pursuit, is unlikely to be within the reach of any allegedly harmed individual, whose access to remedies would be made entirely dependent on the action of the State authorities.

60. In a similar vein, it also appears that the possibility for the State to bring an action for recovery against an individual had always been part of valid law. However, I suppose that, similarly to a number of other Member States, this possibility was somehow the dusty attics of national constitutional law; rarely explored and in practical terms never used. The only change appears to be that, unlike the previous system where there was the possibility for bringing such an action, but no procedure for doing so, a procedure has now been established.

(b) Its evaluation by international bodies and their recommendations

61. Without containing any specific recommendation in that regard, the Commission's reports in the framework of the MCV included the new provisions concerning the material liability of judges amongst the problematic elements of the reforms of the Justice Laws, (30) echoing the concerns of the European Commission for Democracy through Law ('the Venice Commission') and the Group of States against corruption ('the GRECO'). (31) Indeed, the provisions relating to the civil liability of judges and

prosecutors introduced by Law No 242/2018 have been met with criticism by the Venice Commission, the GRECO and the Consultative Council of European Judges of the Council of Europe ('the CCJE').

62. The Venice Commission concluded that the main requirements for a satisfactory definition of judicial error were satisfied by the current wording of Article 96(3) of Law No 303/2004. (32) However, it considered it problematic that the plenary assembly of the SCM is excluded from the procedure, (33) and that the main role is given to the Ministry of Public Finances. This is because the Ministry of Public Finances is an actor external to the judiciary and because there are no criteria for the 'own evaluation' upon which that Ministry is to base its decision, together with the report of the Judicial Inspection, in order to initiate the recovery action against the judge. Therefore, even while the Venice Commission states that, 'since it is the public funds of the State which are at loss, the Ministry of Public Finances may indeed be the active plaintiff', it emphasises that it should nevertheless 'not have any role in assessing the existence or causes of the judicial error'. (34)

63. The Venice Commission also noted that the exclusion of the SCM should be seen in the context of other provisions, such as the creation of the Secția pentru investigarea infracțiunilor din justiție (Section for the Investigation of Offences committed within the Judiciary) ('the SIOJ'). When taken together, the Venice Commission considered that those different elements could result in pressure being placed on judges and could undermine the independence of the judiciary. (35) The Venice Commission therefore advised that it would be preferable for the recovery action seeking to trigger the civil liability of the judge to take place only after disciplinary procedures before the SCM are concluded. (36)

64. In a first report, the GRECO recommended that the amendments affecting the liability of judges for judicial errors 'be reviewed so as to ensure sufficient clarity and predictability of the rules concerned, and to avoid that they become a threat to the independence of the judiciary'. (37) When assessing, in a follow-up report, the final wording of Article 96 of Law No 303/2004, the GRECO considered that that recommendation had not been implemented. It noted that the system of personal liability established by that provision is questionable, due to its chilling effect on the independence of judges from the executive. Recalling its position on the 'functional immunity' that members of the judiciary ought to enjoy, the GRECO stated that judicial errors should preferably be dealt with by appeal before a higher instance, or as a disciplinary matter to be handled within the judiciary. Elements of concern noted by the GRECO were that the State recovery action is mandatory; that the authorities have not put in place additional safeguards against the risk of pressure on judges; the exclusion of the SCM from this procedure and the prominent role of the Ministry of Public Finances in assessing the existence and causes of judicial error. (38)

65. Finally, in addition to the points already noted by the Venice Commission and the GRECO, the CCJE emphasised its endorsement of a full functional immunity of judges. In the view of that body, only bad faith should trigger the liability of judges for any judicial errors, rejecting gross negligence as a ground for material liability of judges due to the practical difficulties of interpretation and application of that concept. (39) The CCJE recommended that the definition of judicial error be supplemented by an unambiguous statement that judges are not liable unless bad faith or gross negligence on their part has been established by due procedure.

(c) The (practical) operation of the system?

66. I have recounted the national context and international context in quite some detail in order to highlight two important elements and to add another.

67. First, the national context: the changes to Law No 303/2004 came during what appears to be, on the whole, a rather difficult period for the Romanian judiciary. (40) However, unless a court wishes to pass a sentence by temporal association, it is always necessary to examine in detail what exactly has been changed and why. If one focuses on the detail, what appears to come to the fore is that first, there was the intention to dissociate State liability from the need for a previous conviction, be it criminal or disciplinary, of a judge. That is, in view of the different aims and purposes of both proceedings, rather understandable, especially if one believes that individuals could, at least perhaps occasionally, receive some compensation

for State liability. Second, the possibility of recovery action that has always been there, but apparently previously without any procedure and thus control, was given a foreseeable, predictable framework.

68. Second, what problems are presented by such amendments? A careful study of the valuable recommendations by the various international bodies cited in the previous section shows that the recommendations contained therein are normative, prospective, and in this sense, political. In particular, the CCJE appears to have a clearly acknowledged normative vision of what the laws to be adopted by States in this area should contain. Thus, in these reports, a State is reprimanded essentially because the model it adopted does not live up to the hopes and expectations of an international body, together with an indication of the possibility of misuse.

69. This is certainly not to downplay the valuable assistance that such reports can provide for a State looking for suitable models. It is rather to point out the different type of assessment this Court is called upon to carry out, which cannot be based on *ex ante* advocated *normative* visions that the legal order of a Member State should adopt. The assessment of this Court can be based only on *ex post* ascertained *facts* or at least reasonably plausible arguments about the genuine operation and function of a system, which can then lead, to an abstract but still clearly substantiated, statement of *legal incompatibility* based on the infringement of a legal obligation.

70. However, it is precisely in terms of providing specific details about what exactly is wrong with such a model of State liability, potentially followed up by an action for recovery brought against an individual judge, that the cited reports of the international bodies are remarkably thin. Rather what emerges is perhaps best captured by the CCJE's recommendation, stating essentially that any model which does not embrace the full 'functional immunity' of the members of the judiciary is problematic. That is indeed a clearly stated normative vision on where the balance between independence and accountability should lie. (41) However, it is in itself hardly evidence showing exactly how a model, such as the one in the Member State at issue, provided that indeed the default principle of national procedural and institutional autonomy is not to turn into an empty incantation, is incompatible with the requirements of judicial independence.

71. Third and last, it is also important to note that, as confirmed by the Romanian Government at the hearing, there has so far been no application of the contested national provisions in practice. I understand that there are as yet no instances of cases that have advanced into the second phase, where after an individual has successfully received compensation from the State for State liability, an action for recovery against an individual judge would be initiated by the Ministry of Public Finances, following a report from the Judicial Inspection.

72. For a system established in 2018, that is understandable. This has, however, two further consequences. On the one hand, for the substantive assessment that will be carried out in the following section, a number of elements of the system remain at the level of conjecture, since there is no practical application.

73. On the other hand, in structural terms, this fact limits the type of compatibility review that can be carried out in the present case. This leaves the Court to look at the blueprint only – a model as stated on paper. As I suggested in my parallel Opinion, (42) when carrying out what effectively amounts to an abstract review of compatibility, a court can carry out three types of assessment: (i) blueprint or 'paper only', (ii) papers combined or paper as applied, correcting the understanding of certain elements of the abstract model when combined with other problematic provisions in the Member States' legal order or when nuanced by the application practice, or finally (iii) practice only.

74. In view of the absence of (iii) and the very limited information on (ii), the assessment to which I now turn can only consist of (i), with a limited foray into (ii) if possible elements of the blueprint are combined with other elements of national rules or procedure. However, the fact remains that, with no application practice or arguments relating to it, including in the order for reference of the national court in this case, there is essentially no tangible context that could rebut the functioning of the model as stated 'on paper'.

2. Assessment

75. Aside from the statement of principle that there has to be State liability for damages caused to individuals by judicial infringements of EU law, and the effective harmonisation of conditions for that liability, (43) EU law does not contain any further rules regarding either State liability for judicial errors in general or the civil liability of judges.

76. The point of departure is, therefore, the principle of procedural autonomy of the Member States and the fact that the organisation of their justice systems, including the rules governing liability for judicial error, falls within their competence. This does not, however, exclude that Member States are required to comply with their obligations flowing from EU law, in particular, those arising from the second paragraph of Article 47 of the Charter (when they are acting within its scope) and, in any case, from the second subparagraph of Article 19(1) TEU. (44)

77. Bearing those considerations in mind, I will first address the problems posed by the definition of judicial error in proceedings for State liability (a). I will then consider the consequences of establishing such judicial error for any subsequent procedure whereby the State, represented by the Ministry of Public Finances, can initiate a civil liability action against the individual judge in cases of bad faith or gross negligence (b).

(a) The definition of judicial error for the purposes of State liability

78. Article 96 of Law No 303/2004, as amended, establishes as a point of departure in its paragraph 1, the principle of State liability for judicial error. It continues by stating in paragraph 2, that the liability of the State does not exclude the (subsequent) liability of judges who have performed their duties in bad faith or with gross negligence, even if they are no longer in office. According to paragraph 5 of that provision, injured parties must take action *exclusively* against the State, represented by the Ministry of Public Finances.

79. Furthermore, paragraph 3 of Article 96 of Law No 303/2004 defines the judicial error which can be committed in two different situations: (a) regarding procedural acts adopted in the course of legal proceedings, and (b) when delivering a final judgment. In both situations, the judicial error is characterised by three elements: (i) the procedural act has been performed in *clear breach* of provisions of substantive or procedural law, or the final judgment is *manifestly contrary* to the law or inconsistent with the factual situation established by the evidence taken in the course of the proceedings; (ii) such procedural act or final judgment entails a *serious infringement* of the rights, freedoms or legitimate interests of an individual; and (iii) it causes harm that it has *not been possible to remedy* by means of an ordinary or extraordinary appeal.

80. It appears from that definition that State liability for judicial error is accepted not only as a result of procedural acts, but also because of the content of final judicial decisions including the interpretation of the law and the assessment of evidence. Moreover, as the Romanian Government explained in its written observations referring to the case-law of the Curtea Constituțională (Constitutional Court), the regime of State liability can be qualified as ‘direct and objective’, not dependent on the behaviour (subjective elements) of the judge (bad faith or gross negligence).

81. It is in this context, and within the first phase pertaining to State liability, that the referring court questions the compatibility of the definition of ‘judicial error’ set out above with EU law. Even though the order for reference does not offer any grounds explaining the doubts of the referring court in this regard, it follows from the wording of the fourth question that the referring court considers that the definition provided for by Article 96(3)(a) of Law No 303/2004 *is too succinct and abstract*. In particular, the referring court states, in that question, that that provision does not specify the nature or scope of the provisions infringed giving rise to such error and that it does not establish the methods, time limits and procedures for establishing the infringement of legal provisions, nor the actual authority competent to establish such infringement. For the referring court, this creates a risk of indirect pressure on the judiciary.

82. With regard to Article 96(3)(b) of Law No 303/2004, the concerns of the referring court, conveyed in the text of the fifth question, follow from the fact that that provision does not define in specific terms what is meant by the reference to 'inconsistency' vis-à-vis the applicable legal provisions or the factual situation. In the view of the referring court, this creates a risk that the interpretation of the law and evidence by the judiciary will be hindered.

83. I agree with the view expressed by the Commission at the hearing that the definition mentioned above does not appear to be as such problematic. Considered in and of itself, I fail to see how such a definition of judicial error would be liable to create a risk of indirect pressure on the judiciary. If a potential issue could be detected from the abstract definition of judicial error framed in this (rather narrow) way *for the purpose of State liability*, it would rather be the opposite to the one implied by the referring court.

84. First, as a matter of principle, and despite the national divergences in this field, State liability for judicial conduct is widely acknowledged in the Member States. (45) EU law does not preclude that the State can be held liable for the damages caused by the judiciary in the exercise of its functions. (46) In fact, EU law *requires* there to be State liability for judicial breaches of (at least) EU law. As the Court noted in *Köbler*, 'the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary'. (47)

85. Second, the definition in question in the present case contains several elements which circumscribe the scope of judicial error that may trigger State liability. (48) Only *manifest* errors seem to qualify as judicial errors under the definition set out above above, 'clear breach of provisions of substantive or procedural law', or a judgment which is 'manifestly contrary to the law or inconsistent with the factual situation'. In this connection, the Court has stated, in a different context, that to limit State liability to the exceptional case where a court has manifestly infringed the applicable law is an element which ensures respect for the specific nature of the judicial function and for the legitimate requirements of legal certainty. (49) In addition, the definition at issue also limits the existence of judicial error by reference to the *seriousness of the prejudice caused* ('entailing a serious infringement of the rights, freedoms or legitimate interest'). A relationship of causality is also required ('causing harm'). Moreover, there is an '*ultima ratio*' requirement, in that it is necessary for it to have *not been possible to remedy* the harm 'by means of ordinary or extraordinary appeal'.

86. Interpreting the criteria taken at face value, it would appear that the conditions for State liability will in practice be limited to final decisions only, in which the manifest errors committed have directly resulted in serious harm to the individual. If that were indeed the case, then the question to be asked would not necessarily be whether such criteria are not too broad as to be potentially misused for putting pressure on individual judges for their individual decisions, but, *as far as State liability is concerned*, whether such, indeed rather narrow, conditions of State liability do not make it excessively difficult, or in practice impossible, for individuals to obtain reparation from the State.

87. The existence of liability for damage caused in the exercise of the judicial function is necessarily connected with access to courts and with the right to an effective remedy. (50) In this light, criteria for State liability that are too narrow, in the absence of any possibilities of direct action against judges themselves for civil liability, may in themselves become problematic.

88. Indeed, as the Court noted in *Traghetti del Mediterraneo* 'although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of [EU] law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law'. (51)

89. This Court has also found that the EU principle of State liability for damage caused to individuals as a result of an infringement of EU law by last-instance courts precludes national provisions excluding State liability due to the fact that the infringement results from a judicial interpretation of the rules of law or an

assessment of facts or evidence, as well as national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the national court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in cases where a manifest infringement of the applicable law was committed. (52) That principle also precludes national rules requiring, as a precondition, the setting aside of the decision given by the court or tribunal which caused the loss or damage, when such setting aside is, in practice, impossible. (53)

90. Third, there is the succinct and abstract character of the definition of judicial error criticised by the national court. However, I must admit to being somewhat puzzled in this regard. Given its infinitely variable nature, how else could judicial error be defined? Hardly by an exhaustive list of acts which are to constitute judicial error. Any such provision would soon turn into a phonebook, owing to the continuous discovery of a number of new acts that were not previously included in the list. Thus, in a similar way to the definition of, for example, judicial disciplinary offence, the structure of the definition of what may constitute judicial error cannot be anything other than a general and somewhat abstract definition with which makes reference to indeterminate legal concepts. (54) This, in turn, underlines the importance and the knowledge of its interpretation by the relevant national courts and authorities. There has, however, been no such practice to date, or at least no such practice has been brought to the attention of this Court.

91. As a result, I do not consider that the EU principle of judicial independence enshrined in the second paragraph of Article 47 of the Charter and in the second subparagraph of Article 19(1) TEU would preclude, in principle, a definition of judicial error which, for the purposes of State liability, relies on elements such as those outlined in the present proceedings.

(b) Repercussions for the civil liability of judges

(1) General considerations

92. The separation of the regime of State liability, on the one hand, and the personal liability of the members of the judiciary, be it civil or disciplinary, on the other, is essential from the point of view of the principle of judicial independence. The establishment of a system of State liability for judicial error represents a compromise between the principle of effective judicial remedies for judicial error and the independence of the judiciary. It enables compensation for individuals who have suffered harm while shielding judges from direct actions taken by the those individuals against them.

93. In *Köbler*, the Court was already faced with arguments submitted by the Member States suggesting that extending the EU law principle of State liability to damages attributable to judicial acts or omissions could compromise judicial independence. In response to those arguments, the Court stated that 'the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to [EU] law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question'. (55) As Advocate General Léger noted in his Opinion in that case, the question of the independence of the judiciary should not be raised in the context of rules governing the liability of the State, but in the context of the establishment of rules governing the personal liability of judges. (56)

94. It is indeed the second phase, involving the possible personal liability of judges, that is crucial in terms of judicial independence. That is not to say that the first phase, concerning the State liability, is deprived of any relevance. However the threat is more remote. When assessing the second phase, the external aspect of the EU principle of judicial independence requires that the rules relating to the civil liability of judges through the possibility for the State to directly recover damages paid to the injured parties must ensure that judges are protected against pressure liable to impair their independent judgment and to influence their decisions. (57) Bearing in mind the existential link between these two procedures, as the latter cannot exist without the former, due consideration must also be given to the degree of connection between them, as well as to the specific modalities concerning the substantive requirements and procedural guarantees for judges in the framework of State liability proceedings .

95. As a matter of principle, judicial independence certainly does not equal judicial immunity from liability, be it civil or disciplinary.The possibility for the State to seek recovery, in specific cases, is in my view not precluded by the principle of judicial independence. Such a possibility reintroduces an element of accountability on the part of the judiciary, which is also essential for maintaining the public confidence in the justice system.

96. That proposition finds solid support in comparative law. With the exception of the Member States belonging to the common law tradition, in which there is indeed an established tradition of judicial immunity as a safeguard of judicial independence, (58) State liability for damages caused by the judiciary is widely accepted, as noted above. In particular, where such State liability exists, several Member States (albeit not all of them) enable the State to recover the sums paid from the judge concerned, in cases where aggravating elements are given, such as bad faith or serious negligence.

97. Domestic solutions as far as the civil and personal liability of judges is concerned, vary greatly in that regard. Some (civil law) jurisdictions apply the general regime of recovery from civil servants to judges. Others impose additional requirements and guarantees, such as a previous criminal or disciplinary judgment, or cap the amount of damages to be borne by the judge. In yet more jurisdictions, the partial recovery of damages borne by the State may be carried out in the criminal or disciplinary proceedings themselves. (59) These divergences show that the balance between accountability and judicial independence is understood rather differently in various jurisdictions, depending on judicial traditions and constitutional conceptions concerning the principle of the separation of powers and the different arrangements of checks and balances between those powers. Perhaps the only common denominator is that, in practice, such instances do not happen frequently and the national rules on the personal liability of judges are indeed the dusty attic of constitutional law.

98. In view of that rather broad variety, several international bodies have proposed certain standards in this regard. However, depending on the nature and the type of international body, such recommendations appear in fact to vary. The dividing line appears to run, with some simplification, between the standards drafted by judges themselves at the international level, and the standards proposed by bodies or institutions composed of members with more diverse professional backgrounds. On the one hand, there is, for example, the clear position of the CCJE, advocating for a broad or even full functional immunity. (60) On the other hand, the Venice Commission has summarised its position in Opinion No 924/2018 in the following terms: ‘in general, judges should not become liable for recourse action when they are exercising their judicial function according to professional standards defined by law (functional immunity)’ and that ‘judges’ liability is admissible as long as there is intent or gross negligence on the part of the judge’. (61)

99. However, on this specific point, the positions of some international bodies, especially those unchecked by political processes within which other powers from the State would be represented at the international level and have an effective say in their approval, should be taken with a (rather large) pinch of salt. A sound balance between judicial independence and judicial accountability is rather likely to emerge in the often painful and lengthy dialogue or ‘multilogue’ within the framework of the separation of powers, where the sometimes one-sided ideas of one power are indeed mutually checked and balanced by the others.

100. In sum, in my view, the EU principle of judicial independence does not preclude, per se, the possibility that, in cases where the responsibility of the State has been triggered for damages caused in the exercise of the judicial functions, the State seeks, in cases of bad faith or gross negligence, to recover the sums paid from the judge concerned. Moreover, bearing in mind the diversity of national models available in the Member States, it simply cannot be maintained that the EU principle of judicial independence imposes a specific regime of liability, linked, for example, to a criminal conviction or disciplinary sanction that has previously been imposed, or even would provide that any judicial liability may be triggered only as a form of sanction in those proceedings.

101. What is important is the quality of, and guarantees within, the framework chosen. Whatever the model, the rules within that model, such as those relating to the civil liability of judges through the

possibility for the State to seek the recovery of damages paid to the infringed persons, must ensure that judges are protected against pressure liable to impair their independence of judgment and to influence their decisions. For the reasons set out above, in the absence of any practical application at the national level that would hint at any actual misuse, in what follows I will focus solely on the *abstract review of the blueprint*, coupled with the suggested possible interplay of the rules on judicial liability with other rules recently adopted in the field of the reform of the Justice Laws in 2018. (62)

(2) The contested elements

102. As noted when examining the admissibility of the questions in this case, the order for reference is lacking in information on the reasons which led the referring court to raise its questions. In particular, even though the main proceedings concern the liability of the State with regard to an alleged unlawful deprivation of liberty, the referring court has not given any explanation regarding the relationship between the general definition of judicial error provided for in Article 96(3) of Law No 303/2004 and the specific provisions relating to the liability of the State in criminal procedures in Articles 539 and 541 of the Code of Criminal Procedure.

103. That fact has motivated my proposal to declare the seventh question inadmissible. It is also relevant in the context of the response to be given to questions four to six. Therefore, my analysis below is based on the premiss that Article 96(3) of Law No 303/2004 is indeed relevant for the purposes of the main proceedings.

104. In order to provide a useful answer to the referring court, there are three different sets of issues that merit consideration and that emerged from the submissions of the parties as well as at the hearing: whether the subjective elements giving rise to the civil liability of judges may legitimately be tied to instances of bad faith or gross negligence (i); whether the procedure regarding the decision to pursue the action for recovery is subject to specific guarantees (ii); and whether that procedure, in view of the narrow connection with the proceedings deciding on the liability of the State for judicial error, respects the rights of the defence of the judges concerned (iii).

(i) Bad faith or gross negligence

105. Article 96(7) of Law No 303/2004 provides that the recovery action by the State against the judge who is responsible the judicial error is limited to cases of bad faith or serious negligence. Those concepts are defined in Article 99^1 of Law No 303/2004, a provision which comes under the section of that law devoted to the disciplinary liability of judges and prosecutors. In my understanding, for State liability to be paid out in the first phase, there must be a judicial error meeting all the criteria set out in either Article 96(3)(a) or (b) of Law No 303/2004. Next, in order for a recovery action brought against a judge to succeed in the second phase, there must also be, apart from those conditions, a subjective element established vis-à-vis the individual judge concerned, either in the form of bad faith or gross negligence.

106. If that is indeed the case, then I am bound to agree with the submissions of the Commission and the Romanian Government on this point. The fact that a recovery action is possible in cases of bad faith or serious negligence is again not per se problematic. Those concepts are defined by the law in a way that does not appear to deviate from the generally established definitions of those concepts. According to Article 99^1(1) of Law No 303/2004, bad faith is found where the judge ‘knowingly infringes rules of substantive or procedural law and either has the intention of harming another person or accepts that the infringement will cause harm to another person’. According to Article 99^1(2), there is gross negligence when the judge ‘negligently disregards rules of substantive or procedural law in a manner that is serious, irrefutable and inexcusable’. Moreover, it appears that the exercise of that judicial function in bad faith or with gross negligence, irrespective of possible criminal liability, can also amount to a disciplinary offence pursuant to Article 99(t) of that law, even if the act does not meet the constitutive elements of a crime.

107. No argument has been put forward before this Court explaining what exactly is wrong with such a definition, nor has it been demonstrated that the judicial interpretation of those concepts casts doubt on their practical application or indicate abuse. Again, if the argument that 'true judicial independence' requires full functional immunity is not embraced, then the acknowledgement of liability for damages caused in bad faith or through gross negligence is in line with what appears to be the general standard, as also pointed out by the Venice Commission. (63)

108. I also fail to see why the requirements imposed by the EU principle of judicial independence should seek to deviate from such balance. Once judges are effectively shielded from any direct liability actions by the establishment of State liability as the only possible path for individuals to seek damages, the existence of a narrower possibility of recovery by the State in indeed egregious instances of actual misuse of power by the judge (64) and gross negligence, renders the judicial function accountable to a standard of diligence where only serious breaches are liable to trigger the civil liability of the judge.

109. However, on the whole, the point of contention in this case seems to be not so much the material conditions for triggering the civil liability of members of the judiciary but, rather, the procedure which makes it possible for the Ministry of Public Finances, acting as the applicant, to trigger an action in the second phase. It is that element to which I now turn.

(ii) The Ministry of Public Finances as the applicant?

110. The referring court has noted that in the second phase, where it is to be established whether the error was committed by the member of the judiciary in bad faith or with gross negligence, the rules established by Article 96(3) of Law No 303/2004 are manifestly arbitrary because the liability of the member of the judiciary is left exclusively to the determination of the State.

111. The Government of the Netherlands submitted at the hearing that the new system for civil liability of members of the judiciary is problematic if the executive power has a discretionary and decisive role in the triggering of the action for recovery. That government also notes the need to consider that system in the light of the global assessment of the reforms of the justice system in Romania.

112. The Commission submits for its part that, even if the liability of judges in instances of bad faith or gross negligence is not problematic per se, it is, however, necessary that some procedural guarantees be provided. In its view, the fact that the recovery action is examined by an independent jurisdiction is already a procedural guarantee. It is also necessary that the conditions in which the recovery action is introduced present specific guarantees. In that respect, the Commission states that there are different possibilities. The triggering of the recovery action could be limited to cases in which the criminal or disciplinary liability of the judge has already been established by a definitive decision. Another possible guarantee could be that the introduction of the recovery action is entrusted to an independent judicial structure, such as the SCM. The Commission submits that those guarantees are not ensured by the provisions at issue in this case because the Ministry of Public Finances can initiate the recovery action at its own discretion and because the opinion of the Judicial Inspection is purely advisory. In that regard, the position of the Commission is in line with some of the observations of the GRECO and the Venice Commission. (65)

113. It appears from those considerations that the main concerns regarding the new provisions on the civil liability of judges revolve around the participation of two bodies in the process leading to the decision of the State to initiate the action for recovery: the Ministry of Public Finances and the Judicial Inspection.

114. According to Article 96(7) of Law No 303/2004, the Ministry of Public Finances *shall* within two months of notification of the final judgment deciding on the liability of the State for judicial error refer the matter to the Judicial Inspection. That body may, in accordance with the procedure laid down in Article 74^1 of Law No 317/2004, determine whether the judicial error was caused by a judge acting in bad faith or with gross negligence. Within six months from the date of the notification of that report, pursuant to Article 96(8) of Law No 303/2004, the State, represented by the Ministry of Public Finances, *shall bring an action* for redress where, following the advisory report of the Judicial Inspection mentioned above and

'its own assessment', it considers that the judicial error was caused by the judge acting in bad faith or with gross negligence.

115. In my view, one element is worth highlighting at the outset: if I understand the national rules correctly, the role of the Ministry of Public Finances is limited to deciding whether it will initiate the recovery action and thereby start the second phase. Thus, for all practical purposes, that ministry is simply the potential applicant in a procedure that is supposed to take place before an independent court. Moreover, that ministry may only act if, following another procedure before another independent court, a final judicial decision is taken which confirms the existence of a judicial error and the liability of the State.

116. Thus, for all practical purposes, the discretion in the decision-making of the Ministry of Public Finances appears to be in fact 'sandwiched' in between two instances of independent civil courts. Within such a context, I again have some difficulty in seeing what is incompatible per se with a solution which provides the treasury, which has had to pay out money to the injured individual following the independent assessment of one civil court, with standing, as the applicant, the possibility of pursuing redress from the judge who might have caused that damage in bad faith or with gross negligence. (66) Moreover, the Ministry cannot decide itself on the matter of civil liability – it merely decides whether to go before another (independent) court.

117. What further safeguards against potential abuse by the public power exerting pressure on judges are necessary in such a system? To start with, the suggestion that there must be some additional safeguards implies that, in that Member State, two sets of independent courts with all the remedies available (67) are not enough to prevent structural misuse. However, if that is in fact the starting assumption, what is the judicial independence to be protected within such a system? Two sets of litigation are susceptible to misuse, but if a third were to be added, this time perhaps in the form of disciplinary proceedings, will all be well? Moreover, in structural terms, the assumption that the first round of the State liability procedure could be influenced in order to put pressure on an individual judge by selectively deciding whether to initiate the action for recovery, also labours under the somewhat singular assumption of a kamikaze Member State that would be ready to influence its own courts to its detriment, thus effectively inducing them to award individual damages against it, in order to put pressure on individual judges in the second phase.

118. Be that as it may, again I do not see how in an EU legal order which is respectful of procedural autonomy and institutional diversity amongst its Member States, a national system in which the possible civil liability of judges can be ascertained only after two separate sets of litigation before (independent) civil courts, subject to review and the remedies available under the national system, would per se be incompatible with the EU principle of judicial independence.

119. Certainly, there might be other conceivable institutional or procedural arrangements. Any liability of a judge, be it civil or disciplinary, could be made exclusively dependent on a final decision of the body adjudicating disciplinary procedures in the judiciary. That may indeed be, under certain circumstances, a more logical and advisable institutional approach, guaranteeing coherence between the disciplinary and civil liability proceedings. (68) However, those considerations, which advocate for a presumably better institutional design, do not automatically mean that there is an infringement of the requirements of the principle of judicial independence simply because other institutional designs are envisaged. (69) Indeed, from the point of view of the requirements of the EU principle of judicial independence, what is decisive is not so much the disciplinary, civil or criminal nature of the jurisdiction taking the final decision, but its independence.

120. However, when one focuses on the specific element of the role of the Ministry of Public Finances in deciding whether to initiate the recovery action, there appears to be a lack of clarity on precisely what those rules are. I understand that this is in part attributable to the fact of there that there is no practical application on that point. The Romanian Government has submitted first that the action *is not automatic*. At the hearing, however, that government explained that the initiation of an action for recovery *is*

conditional on a report from the Judicial Inspection establishing that the judicial error was caused by bad faith or serious negligence.

121. Rather than imposing an obligation on the Ministry of Public Finances to initiate the action, it seems therefore that Article 96(7) of Law No 303/2004 sets out a systematic procedure that the Ministry of Public Finances *must* activate by remitting the case to the Judicial Inspection every time a claim against the State for judicial error is successful. This means that State liability automatically gives rise to an investigation concerning the existence of bad faith or serious negligence on the part of the judge, which then crystallises in a report.

122. In my view, provided that a decision on either State liability or potential successive civil liability of a judge in cases of bad faith or gross negligence can be taken only by an independent court, this is a sufficient guarantee in itself. However, taking into account the intention of the national legislature to clearly subject the discretion of the applicant before the second phase to further guarantees, the participation of the Judicial Inspection, as the independent body within the SCM in charge of the investigations of a disciplinary nature within the judiciary, constitutes an element suitable to enhance the guarantees of the system. However, this is subject to two conditions: first, the Judicial Inspection must itself be independent. Second, the report issued by it must be binding on, if it arrives at a negative conclusion, the Ministry of Public Finances.

123. Regarding the first condition, as noted in my Opinion in *Asociaţia Forumul Judecătorilor din România and Others*, despite the fact that the Judicial Inspection does not adjudicate on disciplinary issues, it is quite evident that its investigative powers are already liable, regardless of the guarantees offered by the body taking the final decision on the disciplinary proceedings, to exert some pressure on the persons who have the task of adjudicating in a dispute. (70) Therefore, to my mind, in a system such as the one at issue in this case, it is imperative that the body in charge of providing an expert assessment regarding bad faith or gross negligence is itself, to a reasonable degree, impartial. Neither the order for reference nor the parties have, however, presented arguments to this Court liable to cast doubt on the impartiality of the Judicial Inspection in that regard. (71)

124. As to the second condition, even though the Court expressly asked for some clarifications at the hearing, it remains uncertain whether the Ministry of Public Finances can bring the action in the event that the report of the Judicial Inspection concludes that there *that there was no* bad faith or gross negligence. The Romanian Government explained at the hearing that, even if that is not apparent from the text of the provision, the finding of bad faith or serious negligence in the report of the Judicial Inspection is a condition for the Ministry of Public Finances to initiate the recovery action.

125. If that were indeed the case, which is ultimately for the national court to ascertain, then the system would not only provide the necessary guarantees (that any finding of personal judicial liability is subject to rather narrow conditions and can only be established by an independent court), but would even provide guarantees above and beyond what is strictly necessary as a matter of course (for example, that the Ministry, as the applicant in the second phase, must respect specific requirements in order to initiate a recovery action before such an independent court).

(iii) Rights of the defence

126. The referring court has stated in the order for reference that the judge does not have the opportunity to exercise fully his or her rights of defence. First, the national court considers that the first phase, concerning exclusively the injured individual as the applicant and the State as the defendant, excludes the member of the judiciary actually concerned from the proceedings. That is liable to undermine the principle of *audi alteram partem* and the rights of the defence of the judge in the subsequent proceedings in which the State may seek redress directly from the judge, in so far as the legal issue of the existence of a judicial error is resolved in the course of the first phase.

127. The Commission submitted at the hearing that a finding of a judicial error cannot trigger the liability of a judge if that judge is unable to present his or her position in the proceedings leading to the establishment of that error. The judge should also be heard in the procedure aimed at establishing the liability of the State for judicial error.

128. The Romanian Government clarified at the hearing that the defendant judge can call into question, in the procedure on his or her liability, all the statements relating to the existence of judicial error contained in the judgment ruling on the liability of the State. Furthermore, that judge can also participate as intervener in the procedure against the State.

129. I am afraid that, with regard to this specific question, this Court finds itself somewhat lacking in information. It is not clear whether the court adjudicating on the judicial error during the first phase is obliged to accept any application for leave to intervene. The procedural status of the judge is in those proceedings is unclear. Finally, due to the fact that the case before the national court is actually in the first phase, and not the second one, there is a distinct lack of clarity as to how any final statement of the civil court in the first phase vis-à-vis the existence of judicial error will be taken into account in the second phase. After all, the substantive definition of what exactly constitutes a judicial error appears to be the same for both phases: what is added in the second phase is the subjective element of bad faith or gross negligence, but with regard to the same judicial error.

130. In any case, in my view, a judge facing an action for civil liability in the second phase must be able to contest any and *all elements* appertaining to that case: all the definitional elements which may be used to establish his or her alleged judicial error under Article 96(3) of Law No 303/2004, as well as his or her intent (or the lack thereof), in relation to that error under Article 991 of Law No 303/2004. How exactly such a full right of defence is to implemented in the structure of the two proceedings is indeed a matter for national law. All that is clear is what *cannot happen*, namely a judge finding himself or herself in the second phase, having not participated in any meaningful way in the first one, faced with a finding on the existence of judicial error which would already have been decided in the first phase, thereby effectively pre-judging his or her personal liability.

131. It is for the national court to determine whether the national procedural provisions applicable in the framework of the recovery action lodged by the State allow for such full rights of defence for the judge concerned. If that were not the case, it is for the referring court to interpret the national procedural provisions in conformity with the requirements of the rights of the defence of Article 47 of the Charter, in order to give the judge, in the framework of either the proceedings between the injured party and the State or certainly at latest in the proceedings between the State and the judge concerned, the possibility to present his or her position in full with regard to all the elements alleged.

(c) Conclusion and a caveat

132. In my view, the second paragraph of Article 47 of the Charter and the second subparagraph of Article 19(1) TEU neither preclude national provisions on State liability for judicial error such as Article 96(3) of Law No 303/2004, nor the existence of the possibility for the State subsequently to bring a recovery action for civil liability against the judge concerned in cases of bad faith or gross negligence on the part of that judge, provided that those procedures offer sufficient guarantees to ensure that members of the judiciary are not subjected to direct or indirect pressure liable to affect their decisions. It is for the national court to assess, in the light of all the relevant factors before it, whether those conditions are satisfied by Article 96 of Law No 303/2004, by other pertinent national rules, and in the application practice.

133. In the context of the present case and the information provided to this Court in these proceedings, any other conclusion would, in my view, come dangerously close either to suggesting that, as a matter of EU law, there must be full functional immunity for national judges, or having this Court effectively engage in redesigning national institutions and procedures by taking certain competences from one institution (civil courts) and effectively shifting it to another (disciplinary panels or other bodies within the SCM), without

having any specific reason to do so apart from a preconceived vision of a certain structure of judicial accountability. Needless to say, not only would that contradict the principle of national institutional and procedural autonomy, but it would also render a number of other national solutions which exist in the Member States incompatible with EU law.

134. As highlighted in my Opinion in *Asociaţia Forumul Judecătorilor din România and Others*, (72) but also in recent judgments of this Court concerning the independence of the Polish judiciary, (73) the assessment of the rules touching on judicial organisation and the separation of powers is closely connected to a broader legal and circumstantial context. Unless it is only the abstract compatibility of an institutional blueprint that is to be examined, the assessment of those rules cannot be detached from the factual circumstances and examples of their use in practice. In this sense, national rules designed to foster the accountability of the judiciary, as perfect as they may seem 'on paper', are certainly not immune from internal or external pressure in practice.

135. However, as repeatedly highlighted throughout this Opinion, nothing has been revealed in this case which would demonstrate how exactly the rules at stake in the present case would be prone to misuse in combination with other rules, or how they are actually being misused in practice.

136. My conclusion reached above is therefore valid in the abstract context presented to this Court, where the parties have expressly acknowledged that there is no practice or indication as to the practical (mis)use of the new system as a measure for pressure on judges. That conclusion naturally does not preclude a different outcome being reached by a national court, or even by this Court, in the light of future developments in terms of the practical use of the system just assessed.

V. Conclusion

137. In the light of the foregoing considerations, it is my view that the Court should answer the questions referred 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 neither preclude national provisions on State liability for judicial error such as Article 96(3) of Legea nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 303/2004 on the rules governing the status of judges and prosecutors), nor the existence of the possibility for the State subsequently to initiate a recovery action for civil liability against the judge concerned in cases of bad faith or gross negligence on the part of that judge, provided that those procedures offer sufficient guarantees to ensure that members of the judiciary are not subjected to direct or indirect pressure liable to affect their decisions. It is for the national court to assess, in the light of all the relevant factors before it, whether those conditions are satisfied by Article 96 of Law No 303/2004, by other pertinent national rules, and in the application practice.

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1 Original language: English.

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2 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').

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3 Opinion of 23 September 2020 in Joined Cases C-83/19, C-127/19, C-195/19, in Case C-291/19 and in Case C-355/19 (EU:C..) 'the Opinion in *Asociaţia Forumul Judecătorilor din România and Others*', abbreviated as 'the AFJR Opinion' for reference purposes.

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4 *Monitorul Oficial al României*, Part I No 868 of 15 October 2018.

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5 See points 173 to 182 of the AFJR Opinion.

6 See point 78 of the AFJR Opinion.

7 See point 79 of the AFJR Opinion.

8 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).

9 Ibid., paragraphs 20, 21 and 54.

10 For a presentation of the individual scenarios, together with a suggestion about the elements to be argued and established in each individual case, see points 240 to 248 of the AFJR Opinion.

11 Which is, in a way, just an issue of how to pose a question formally: (i) is a national system of disciplinary proceedings compatible with EU requirements on judicial independence because judge X fears being threatened with a disciplinary sanction?, can easily be rephrased as (ii) is the right to a fair trial of applicant A in a case involving EU law not compromised by the fact that that case is being adjudicated by judge X, who is being threatened with disciplinary proceedings if he or she does not decide in a certain way?

12 See, by way of illustration, judgment of 14 March 2013, Aziz (C−415/11, EU:C:2013:164, paragraph 32 et seq.) or of 9 November 2017, Ispas (C−298/16, EU:C:2017:843, paragraph 20 et seq.).

13 The Court, as will be discussed below in point 93, having regard to the merits of the questions, excluded that the requirement of a system of State liability for judicial errors amounts to an issue of the threat to the independence of an individual judge.

14 See, similarly, my recent Opinion in Hochtief Solutions Magyarországi Fióktelepe (C−620/17, EU:C:2019:340, point 36).

15 Above, points 35 to 38 of this Opinion.

16 See point 220 of the AFJR Opinion.

17 Points 186 to 225 of the AFJR Opinion.

18 See also above, point 21 of this Opinion.

19 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 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); and 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).

20 In detail, points 212 to 225 of the AFJR Opinion.

21 Above, point 30 of this Opinion.

22 See, for a recent example, judgment of 2 April 2020, *I.N.* (C−897/19 PPU, EU:C:2020:262, paragraph 43).

23 Decisions of the Curtea Constituțională (Constitutional Court) No 45/2018 of 30 January 2018, *Monitorul Oficial al României* Part I No 199 of 5 March 2018 and No 252/2018 of 19 April 2018, *Monitorul Oficial al României* Part I No 399 of 9 May 2018.

24 Decision No 417/2018 of 19 June 2018, *Monitorul Oficial al României* Part I No 534 of 27 June 2018.

25 *Monitorul Oficial al României,* Part I No 850 of 8 October 2018.

26 To sum up that provision, the assessment by the Judicial Inspection is carried out by a committee of three judges or three prosecutors depending on the position of the person being assessed. The assessment shall be completed within 30 days of the referral with a possibility of extension by up to 30 days ordered by the chief inspector. Such assessment is also possible when the person concerned no longer holds the position of judge or prosecutor (paragraphs 1, 2, 3 and 6). The hearing of the judge concerned is mandatory, but the refusal of the judge being assessed to make statements or to participate at the hearings shall be recorded in the minutes and shall not prevent the completion of the assessment. The judge concerned has the right to know all acts of the assessment procedure and to request evidence in defence. The assessment shall be finalised by a report which is subject to confirmation by the chief inspector (paragraphs 4, 5 and 8). Finally, the report shall be communicated to the Ministry of Public Finances and to the judge concerned (paragraph 7).

27 According to the previous wording of Article 96(4) of Law No 303/2004, before its amendment, as reproduced in the document CDL-REF(2018)023 accompanying the Opinion of the Venice Commission 924/2018, ‘an injured person’s right to compensation for the material damages caused through judicial errors committed in trials other than the criminal trials can be exercised only if a final decision has previously established the criminal or disciplinary liability, according to case, of the judge or prosecutor for an act committed during trial and if this act is likely to determine a judicial error’.

28 According to the previous wording of Article 96(7) of Law No 303/2004, before its amendment, as reproduced in the document CDL-REF(2018)023 accompanying the Opinion of the Venice Commission 924/2018, ‘after the damages have been covered by the State on grounds of an irrevocable decision handed down according to paragraph (6), the State may lodge an action for compensation against the judge or prosecutor who committed, either in bad faith or with serious negligence, the judicial error that caused the damages’.

29 See, for example, for the liability for judicial acts in the EU law field, Martín Rodríguez, P., ‘State Liability for Judicial Acts in European Community Law: the Conceptual Weaknesses of the Functional Approach’, *Columbia Journal of European Law*, Vol. 11, issue 3, 2005, pp. 605 to 621, at 614 et seq. In general, see for example Fairgrieve, D., *State Liability in Tort: a Comparative Law Study*, Oxford University Press, 2003 or Oliphant, K., (ed.), *The Liability of Public Authorities in Comparative Perspective*, Intersentia, 2016.

30 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2018) 851 of 13 November 2018 (MCV Commission Report 2018), paragraph 3.1, p. 3. In this report, the Commission 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.'

31 Commission Staff Working Document. Romania: Technical Report accompanying the MCV Commission Report 2018, SWD (2018) 551, p. 6.

32 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, adopted by the Commission at its 116th Plenary Session (Venice, 19 to 20 October 2018), CDL-AD(2018)017, ('Venice Commission Opinion No 924/2018), point 115.

33 Ibid., point 116.

34 Ibid., point 117.

35 Ibid., point 121.

36 Ibid., points 118 and 122.

37 GRECO Ad hoc Report on Romania (Rule 34), 23 March 2018, Greco-AdHocRep(2018)2, ('GRECO Report of 2018'), point 47.

38 Follow-up Report to the Ad hoc Report on Romania (Rule 34), 21 June 2019, Greco-AdHocRep(2019)1, ('Follow-up GRECO Report of 2019'), points 45 to 52.

39 Opinion of the CCJE Bureau following a request by the Romanian Judges Forum Association as regards the situation on the independence of the judiciary in Romania, 25 April 2019, CCJE-BU(2019)4, ('CCJE Opinion of 2019'), points 34 to 44.

40 See points 250 to 256 of the AFJR Opinion.

41 Or perhaps where it should not lie: with the wealth of assembled empirical evidence particularly in central and eastern European countries since the 1990s, it is now being suggested that the institutional models and designs that have been recommended for a number of years by various European actors are not necessarily ideal with regard to their impact on the accountability and efficiency of the judicial process. See notably, for example, Kosař, D., *Perils of Judicial Self-Government in Transitional Societies*, Cambridge University Press, 2016.

42 See points 240 to 243 of the AFJR Opinion.

43 See, for example, judgments of 30 September 2003, *Köbler* (C−224/01, EU:C:2003:513); of 13 June 2006, *Traghetti del Mediterraneo* (C−173/03, EU:C:2006:391); of 9 September 2015, *Ferreira da Silva e Brito and Others* (C−160/14, EU:C:2015:565).

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44 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 52).

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45 For the situation some years ago, see Opinion of Advocate General Léger in Köbler (C−224/01, EU:C:2003:207, points 77 to 84). From that analysis, he concluded that 'the principle of State liability for the acts or omissions of supreme courts can be acknowledged as a general principle of Community law' (point 85 of that Opinion). The criteria for such liability in 'internal situations' in a considerable number of Member States seems to be, however, substantially stricter. See, for example, Scherr, K.M., 'Comparative aspects of the application of the principle of State liability for judicial breaches', *ERA*, 2012, pp. 565 to 588; or Varga, Z., 'Why is the Köbler Principle not Applied in Practice?', *Maastricht Journal of European and Comparative Law*, 2016, pp. 984 to 1008, at 989 to 991.

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46 See, with regard to state liability for damages caused to individuals by Member States' courts, judgment of 30 September 2003, *Köbler* (C−224/01, EU:C:2003:513); or of 13 June 2006, *Traghetti del Mediterraneo* (C−173/03, EU:C:2006:391); or, most recently, of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe* (C−620/17, EU:C:2019:630).

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47 Judgment of 30 September 2003, *Köbler* (C−224/01, EU:C:2003:513, paragraph 43).

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48 Moreover, the Romanian Government has added at the hearing that, regarding the definition of judicial error, the case-law of the Curtea Constituțională (Constitutional Court) and, in particular, Decision No 417/2018 has introduced at least eight conditions for the admissibility of State liability claims.

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49 See, to that effect, judgment of 30 September 2003, *Köbler* (C−224/01, EU:C:2003:513, paragraph 53).

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50 See, for example, ECtHR judgments of 15 July 2003 *Ernst and Others v. Belgium*, CE:ECHR:2003:0715JUD003340096, §§ 47 to 57, and of 12 June 2012, *Gryaznov v. Russia*, CE:ECHR:2012:0612JUD001967303, §§ 76 et seq. See also judgment of 30 September 2003, *Köbler* (C−224/01, EU:C:2003:513, paragraph 36).

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51 Judgments of 13 June 2006 (C−173/03, EU:C:2006:391, paragraph 44).

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52 See judgments of 13 June 2006, *Traghetti del Mediterraneo* (C−173/03, EU:C:2006:391, paragraph 46), and of 24 November 2011, *Commission* v *Italy* (C−379/10, not published, EU:C:2011:775, paragraphs 35 to 37).

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53 Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others* (C−160/14, EU:C:2015:565, paragraph 60).

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54 See, in a similar vein, the conclusion of the Venice Commission when examining the current wording of the definition of judicial error, noting that 'it is not possible to define judicial error without recourse to general notions, which have to be interpreted by the courts'. Venice Commission, Opinion No 924/2018, point 115.

55 Judgment of 30 September 2003 (C−224/01, EU:C:2003:513, paragraph 42).

56 Opinion of Advocate General Léger in Köbler (C−224/01, EU:C:2003:207, point 90).

57 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, paragraph 121 and the case-law cited).

58 See, for example, Frau, M., 'The Doctrine of Judicial Immunity from Civil Liability in a Comparative Perspective' in Cygan, A. and Spadacini, L., (eds.), *Constitutional Implications of the Traghetti Judgment*, biblioFabbrica, Brescia, 2010, pp. 163 to 179; for a critical account, Toner, H., 'Thinking the Unthinkable? State Liability for Judicial Acts after Factortame (III)', *Yearbook of European Law*, 1997, pp. 165 to 189.

59 See, for example, Canivet, G., and Joly-Hurard, J., 'La responsabilité des juges, ici et ailleurs', *Revue internationale de droit comparé*, 2006, Vol. 58, No 4, pp. 1049 to 1093, at p. 1074 et seq. See, for an older account, Opinion no. 3 (2002) of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.

60 Opinion no. 3 (2002) CCJE to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality. In that Opinion, the CCJE considered that 'it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of willful default'. Similarly, in the Magna Carta of Judges drafted by the CCJE, Strasbourg, 17 November 2010, it is stated in point 22 that 'it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of willful default'. This position is emphasised with regard to the provisions at issue in this case in the CCJE Opinion of 2019, point 39.

61 See Venice Commission Opinion No 924/2018, point 113, referring to CDL-AD (2016)015, *Amicus Curiae* Brief for the Constitutional Court on the Right of Recourse by the State against Judges, paragraphs 77 to 80. See also, for example, Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to Member States on judges: independence, efficiency and responsibilities, adopted on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, points 66 and 67 'the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence. Only the state may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation'.

62 Above, points 53 to 60 and 66 to 74 of this Opinion.

63 Above, point 98 of this Opinion.

64 It is worth noting that Article 99[1](1) of Law No 303/2004 requires double subjective intent (*mens rea*): not only that the judge *knowingly* infringes the applicable rules (intent with regard to the illegality), but by so doing *pursues or accepts* the injury of a person (intent in the form of *dolus directus* or *indirectus*) with regard to the specific illegal consequence pursued. On its face, that appears to be the standard of the criminal act of misuse of office.

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65 See points 62 to 64 of this Opinion.

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66 As also noted by the Venice Commission, since that ministry is in charge of the public treasury, it is not at all to be excluded that it may be the representative of the State in this kind of proceedings. See point 62 of this Opinion.

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67 In the second phase, the appellate court of the domicile of the defendant, against which there is a right to appeal before the Înalta Curte de Casație şi Justiție (High Court of Cassation and Justice) — see above, point 10 of this Opinion.

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68 Coherence and coordination, but not necessarily greater guarantees for structural independence. If there is the fear of potential misuse of certain procedures by certain parts of the political spectrum or even certain parts within the judiciary, to put all the decision-making power in the hands of just one central authority is, in terms of institutional design, a very bad idea. In a similar vein to what I already suggested in point 307 of the AFJR Opinion, in terms of the potential for structural independence, for someone with malicious intentions, it will be easier to control one or several disciplinary panels in the capital than 15 courts of appeal spread all over the country.

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69 See also above, points 68 to 70 of this Opinion.

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70 See points 267 to 269 of the AFJR Opinion.

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71 Certainly, my suggested conclusion in points 274 to 278 of the AFJR Opinion cast doubts as to the *ad interim* appointment of the judicial chief inspector under Emergency Ordinance No 77/2018. That cannot, however, be read as stating that the institution itself is not impartial. Moreover, a statement of incompatibility of this or that structural element of a judicial system can hardly be understood as meaning that anything and everything connected to that institution and that element is then also automatically ‘tainted’. With that logic, sooner or later, the entire judicial system could be declared incompatible ‘by association’.

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72 Points 242 to 244 of the AFJR Opinion, as well points 73 and 74 of this Opinion.

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73 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 142).