

Florescu: A Memorandum of Understanding Finally Before the Court

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## International Labor Rights Case Law\_Template for Commentaries

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Decision-making body:	Court of Justice of the European Union
Date of Decision:	13 June 2017
Case/Decision name:	C-258/14, <i>Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others</i>
Primary legal issues:	Legal nature of a Memorandum of Understanding – Application of the EU Charter of Fundamental Rights to the implementation of a Memorandum of Understanding – Protection of pension claims under the right to property
Applicable legal provisions:	<p>EU Charter of Fundamental Rights, Articles 17, 51 and 52(3).  Memorandum of Understanding between the European Community and Romania, concluded in Bucharest and Brussels on 23 June 2009.  Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Articles 1 and 2.</p> <p>Law No 329/2009 on the reorganisation of certain public authorities and institutions, on streamlining public spending, on supporting businesses and on complying with the framework agreements with the European Commission and the International Monetary Fund, Articles 17-26.</p>
Hyperlink to case:	<a href="http://curia.europa.eu/juris/liste.jsf?language=en&amp;num=C-258/14">http://curia.europa.eu/juris/liste.jsf?language=en&amp;num=C-258/14</a>
Related cases, if any:	<p>Court of Justice of the European Union, Case C-128/12 <i>Sindicato dos Bancários do Norte and others v BPN</i>, 7 March 2013; Joined Cases C-105/15 P to C-109/15 P <i>Mallis v Commission and ECB</i>, 20 September 2016; Joined Cases C-8/15 P to C-10/15 P <i>Ledra Advertising v Commission and ECB</i>, 20 September 2016.</p> <p>European Court of Human Rights, 20 March 2012, <i>Panlife v. Romania</i>, Application no. 13902/11; 7 May 2013, <i>Koufaki and Adedy v. Greece</i>, Applications n° 57665/12 and 57657/12; 7 July 2011, <i>Stummer v. Austria</i>, Application n° 37452/02.</p>

Paragraph/page numbers to be extracted from decision/case:	1-2, 28, 35-36, 40-42, 48, 50-51, 55-58, 61-63, 69
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Summary of decision: facts/arguments of the parties/ final decision/ motivation (approx. 250 words; opinions about the	The claimants oppose a reform of the Romanian state pension that, under certain conditions, prohibits civil servants from receiving income from both a pension and work. The provision was adopted to implement the Memorandum of Understanding of 2009 between Romania and the EU, and is criticized on the basis of the right to property and of nondiscrimination law. The Court concludes that, though it has standing to scrutinize the Memorandum, because implementation falls under the
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judgment must be avoided):	scope of the EU Charter of Fundamental Rights, the restriction to the right to property was justified and proportionate in light of the objective of rationalize public spending. In turn, the difference of treatment the claimants invoked does not fall under discrimination legislation.
Title of Commentary:	<i>Florescu: A Memorandum of Understanding Finally Before the Court</i>

## Introduction

Romania was among the first EU Member States to face economic difficulties at the onset of the 2008 financial crisis. Article 143 TFEU and Regulation 332/2002 were therefore activated to provide financial assistance.<sup>2</sup> This procedure, aimed at Member States outside the eurozone, entails the conclusion of a Memorandum of Understanding (MoU) with the state that requires assistance. The case at hand deals with the implementation of the MoU signed between the EU and Romania, which required, among other commitments, reform of the public pension system.<sup>3</sup> In implementing these commitments, a provision was introduced forbidding civil servants from receiving income from both a public pension and work as civil servants, notably if the net pension is higher than the national gross average income.<sup>4</sup> The claimants are retired Romanian judges who, under the new legislation, were obliged to choose between keeping their state pension and keeping their teaching position at a university.

The referring judge asks, first, whether the MoU is a legal act that the Court has jurisdiction to interpret; second, whether the loss of the state pension would infringe on the right to property protected by Article 17 of the EU Charter of Fundamental Rights (EUCFR); and, third, whether the prohibition, given that it does not cover persons occupying a post whose term is laid down in the national Constitution, infringes on the principle of equal treatment enshrined in directive 2000/78.<sup>5</sup>

The case is relevant to the debate surrounding MoUs and austerity policies, which have been criticized by various international bodies.<sup>6</sup> The issue of cuts to public pensions has been questioned, in the Greek context, by the European Committee of Social Rights.<sup>7</sup> At a national level, the Portuguese Constitutional Tribunal had to judge on a reform of the system of public pensions in the context of the implementation of a MoU.<sup>8</sup> The measure has also been assessed by the Romanian Constitutional Court, which has upheld it in multiple occasions.<sup>9</sup>

Moreover, the Court had to consider whether to refer to the case law of the European Court of Human Rights (ECtHR), given that the latter court scrutinizes reduction in pensions payments as a restriction

<sup>2</sup> Council Regulation 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balance of payments.

<sup>3</sup> Court of Justice of the European Union (Grand Chamber), *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others*, C-258/14, 13 June 2017; Memorandum of Understanding between the European Community and Romania, 23 June 2009, Article 5(b).

<sup>4</sup> Law No. 329/2009 on the reorganisation of certain public authorities and institutions, on streamlining public spending, on supporting businesses and on complying with the framework agreements with the European Commission and the International Monetary Fund, Articles 17–26; *Florescu*, § 19.

<sup>5</sup> *Ibid.*, § 61; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>6</sup> See, among others, ILO Committee on the Freedom of Association, *Report on Greece* (1–16 November 2012) § 950–1003; CEDAW, *Concluding observations on the seventh periodic report of Greece*, 44th Session (11 February–1 March 2013); Council of Europe Commissioner for Human Rights, *Safeguarding Human Rights in Times of Economic Crisis* (2013).

<sup>7</sup> European Committee of Social Rights, 7 December 2012, Complaints from no. 76/2012 to 80/2012.

<sup>8</sup> Portuguese Constitutional Tribunal, Decision 862/2013 of 19 December 2013. See Roberto Cisotta and Daniele Gallo, "The Impact of the Troika's Austerity Measures on the Portuguese Labour Law System: A General Assessment of the Scope of Social Sovereignty in the Light of the Constitutional Tribunal Case Law," *European Journal of Social Law* 1-2 (January-June 2014): 103–15.

<sup>9</sup> See, among others, Romanian Constitutional Court, decisions no. 1414 of 9 November 2009, no. 297 of 1 March 2011, and no. 378 of 22 March 2011.

to the right to property, protected by Article 1 Protocol 1 of the European Convention on Human Rights.<sup>10</sup> Indeed, the ECtHR had already analyzed the measure at stake in light of the right to property,<sup>11</sup> and ultimately found that the restriction was justified by the need to rationalize public spending during the crisis, and that it did not impose the loss of a substantial amount of the applicant's income.<sup>12</sup>

## Key Issues

The Court must first ascertain whether the MoU is an act of the EU institutions falling under its competence on the basis of Article 267 TFEU. The Court asserts that it is, given that the legal basis of the MoU is in EU law provisions, notably Article 143 TFEU, Regulation 332/2002 and Decision 2009/459.<sup>13</sup> AG Bot reached the same conclusion, stressing that the Court was competent even though the MoU itself had no binding force.<sup>14</sup> The legal basis of the Romanian MoU hence plays an important role in defining its nature, differentiating it from other MoUs (such as the Greek ones) that are based exclusively in international law structures set up during the crisis.<sup>15</sup>

Having ascertained its competence, the Court turned to the argument dealing with the right to property. First it confirmed the applicability of the EUCFR, noting that, because the MoU is an act of EU law, the acts aimed at respecting the conditions established therein must be considered as implementing EU law under Article 51 EUCFR.<sup>16</sup> The Court also stressed that this finding retains its validity even though the MoU did not directly mandate the specific reform at stake.

The Court then analyzed the substantial issues raised by the referring judge. To assess the alleged violation of the right to property, the Court referred to Article 17 EUCFR, immediately stating that Article 52(3) of the same instrument requires to consider the ECtHR case law. On this basis, the Court recognized that the right to property, though not entailing the right to a pension of a particular amount, protects the automatic payments of a social benefit, such as a pension.<sup>17</sup>

The Court then analyzed the restriction to the right to property. Based on its precedent dealing with another challenge to crisis measures, the Court stated that a restriction to this right can be justified by objectives of general interest.<sup>18</sup> The presence of such a general interest is subsequently confirmed, in light of the need to "rationalise public spending in an exceptional context of global financial and economic crisis." The measure is then found to be proportionate because of its exceptional and temporary nature, as well as to its well-defined and limited application. Furthermore, the Court considers that the restriction to the right to property does not impose an excessive burden because those involved "may at any time decide to terminate their employment relationship and receive their pension again."<sup>19</sup>

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<sup>10</sup> European Court of Human Rights, 7 July 2011, *Stummer v. Austria*, Application no. 37452/02.

<sup>11</sup> European Court of Human Rights, 20 March 2012, *Panlife v. Romania*, Application no. 13902/11. In the same vein, see European Court of Human Rights, 7 May 2013, *Koufaki and Adedy v. Greece*, Applications no. 57665/12 and 57657/12.

<sup>12</sup> *Panlife v. Romania*, § 21–23.

<sup>13</sup> Council Decision 2009/459 of 6 May 2009 providing Community medium-term financial assistance for Romania.

<sup>14</sup> Opinion of AG Bot in *Florescu*, § 53.

<sup>15</sup> Claire Kilpatrick, "The EU and Its Sovereign Debt Programmes: The Challenges of Liminal Legality," *EUI Working Paper Law* 14 (2017): 1–27, pp. 2–3.

<sup>16</sup> *Florescu*, § 48.

<sup>17</sup> *Ibid.*, §§ 49, 50.

<sup>18</sup> Court of Justice of the European Union (Grand Chamber), *Ledra Advertising v Commission and ECB*, Joined Cases C-8/15 P to C-10/15 P, 20 September 2016; *Florescu*, § 51.

<sup>19</sup> *Florescu*, §§ 56, 55, 58. See also Opinion of AG Bot, § 86.

Concerning the issue of the alleged discriminatory nature of the measure at stake, the Court refers to its previous decision about the same law, stating that the difference between the applicants and other judges whose term is directly laid down by the national Constitution does not fall into the scope of any of the grounds provided by Directive 2000/78.<sup>20</sup>

## Conclusions

As noted, the Court took an unusually long time —three years— to decide the case.<sup>21</sup> Because it did, the present decision, which for the first time scrutinizes the respect of a fundamental right by (the implementation of) an MoU through the preliminary reference procedure, comes at a time when only one adjustment program —Greece— is still ongoing. This casts doubts over the effectiveness of EU legal mechanisms for the protection of fundamental rights in times of crisis.

Moreover, the Court's reasoning does not inspire confidence as to the role of fundamental rights as floodgates against austerity measures. The Court accepts the need to reduce public spending as a general interest justifying the restriction to the right to property, without any further questioning as to the usefulness of the measure for such an objective.<sup>22</sup> This is also epitomized by the (somewhat chilling) statement of AG Bot in his Opinion: "*it does not seem open to debate* that the objective of . . . meeting obligations resulting from the Memorandum of Understanding . . . is an objective of general interest."<sup>23</sup> Thus, measures implementing a MoU or cutting public spending during an economic crisis (what came to be known as austerity), seem to be automatically interpreted as pursuing the general interest. What is more, the sheer relevance of the interest invoked,<sup>24</sup> makes it harder not to find the restriction to the fundamental right as proportionate.

Finally, in *Florescu*, the Court explicitly refers to the case law of the ECtHR, acknowledging for the first time the ECtHR stance on the protection of pension claims under the right to property.<sup>25</sup> This is relevant because such references are rare and becoming more so in recent years.<sup>26</sup> Still, the openness showed in the case at hand does not seem to warrant any optimism about the willingness of the Court to follow a more pluralistic approach toward other international legal orders protecting social rights and the case law of the respective monitoring bodies.<sup>27</sup> The ECtHR, relative to other monitoring bodies, is in fact peculiar given the reference to its case law made by Article 52(3) EUCFR and by its explanations.<sup>28</sup> Also, the position of ECtHR in *Panlife v. Romania* provided the perfect underpinning for the approach of the Court in the current case.

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<sup>20</sup> Court of Justice of the European Union (Sixth Chamber), *SCMD*, C-262/14, 21 May 2015; *Florescu*, § 62–63.

<sup>21</sup> Kilpatrick, "The EU and its sovereign debt programmes," p. 10.

<sup>22</sup> The measure covered only a few individuals through the country, no more than ten (see Opinion of AG Bot, § 34), so that its impact on public spending was limited at best.

<sup>23</sup> Opinion of AG Bot, § 82 (emphasis added). This although the AG himself had concluded (§ 58) that the measure at stake was in fact *not* specifically mandated by the MoU.

<sup>24</sup> See, for instance, in *Ledra Advertising*, where the individual right to property was pitted against "the stability of the banking system in the euro area" (§ 74).

<sup>25</sup> Jasper Krommendijk, "The CJEU's reliance on the case law of by the ECtHR since 2015: Opinion 2/13 as a game changer?" forthcoming in *A Global and Multilayered Approach of Human Rights: Promises and Challenges*, ed. Emmanuelle Bribosia and Isabelle Rorive (Cambridge: Intersentia, 2017).

<sup>26</sup> Grainne de Burca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator," *Maastricht Journal of European and Comparative Law* 20, no. 2 (2013): 168–184, pp. 174 and 184.

<sup>27</sup> See Marco Rocca, "Enemy at the (Flood) Gates EU 'exceptionalism' in recent tensions with the international protection of social rights", *European Labour Law Journal* 7, n° 1 (2016): 51–79.

<sup>28</sup> Official Journal of the European Union, 14.12.2007, No. C 303.