# Hot Rule of Law Potatoes

## The CJEU's Formalism in Joined Cases C-313/23, C-316/23, C-332/23 and Its Implications

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26.05.2025 doi: 10.59704/270dbde4eeb474e9

Bulgaria's civil society has much anticipated a key judgment by the CJEU as concerns over the entrenched capture and politicization of the Inspectorate with the Supreme Judicial Council (JI), which is responsible for monitoring the ethical values of all magistrates, continue to cast doubts about judicial independence and accountability in the country.

On 30 April 2025, the Court finally handed down its judgment in joined cases C-313/23, C-316/23, C-332/23, which, among other pertinent questions on the GDPR, concerns the compatibility of Article 19 TEU and Article 47 of the EU Charter with a situation in which the members of a judicial inspection body have de facto remained in office indefinitely. Though not pertinent in the eyes of the CJEU, the question of the JI's mandate duration is closely linked to the election process and composition of the JI.

The judgment was met with enthusiasm by some rule of law afficionados and opposition parties such as the PPDB coalition primarily because, in their eyes, its reasoning also analogously applies to the Supreme Judicial Council (SJC) to which the JI reports. The politicization of the SJC is, in fact, regarded as even more problematic than the politicization of the JI because of its wide-ranging powers – it appoints and promotes all magistrates and is responsible for the initiation of disciplinary proceedings against them.

Regrettably, however, the highly formalist ruling will hardly make a difference. It fails to address the underlying rule of law challenges faced by both the JI and the SJC at their core. As such, the judgment is a missed opportunity – an attempt to hand off a hot "rule of law" potato.

### The JI's role and composition

Pursuant to article 132a(6) of Bulgaria's Constitution, the JI verifies the integrity of magistrates, checks for conflicts of interests and identifies actions that undermine the prestige of the judiciary. Based on such inquiries, the JI may propose the initiation of disciplinary proceedings against magistrates to the SJC. Bulgaria, however, has a track record of using such proceedings to harass magistrates who resist political orders. The Todorova ECHR judgment, for instance, shed light on how disciplinary proceedings can be weaponized against judges who speak up against political meddling within the judiciary.

The JI is composed of a General Inspector and ten inspectors (Article 132a(1) of the Constitution). The General Inspector manages the JI, controls the work of the inspectors and, more importantly, determines the methodology of the JI. He or she is elected by two-thirds of Parliament for a mandate of five years (Article 132a(2)). The remaining inspectors are elected for four-year mandates by two-thirds of Parliament (Article 132a(3)).

The dependencies of this body quickly become apparent in light of its faulty design. In theory, the required qualified two-third majority in Parliament could act as a guarantee for the inspectors' neutrality or, at least, as equidistance from the various political parties. However – as outlined by the Venice Commission in its Opinion No. 855/2016 – quotas in the JI get distributed among parties in "covert political negotiations" (para 58) in Bulgaria. This will imply that "...at the end of the day, each inspector is to have some political obligations vis-à-vis one or another party" (para 58), which ultimately undermines their

independence. Even more importantly, the simultaneous election of all inspectors ensures that candidacies mirror the prevailing political mood and preferences of the dominant political majority. So, if the inspectors were elected during a period of single-party dominance, they may all be reasonably suspected of political loyalty to that same party. Indeed, if the party in question – such as GERB – has a track record of pursuing policies that undermine the rule of law, this raises further concerns about the true motives behind the inspectors' election and the potential behind-the-scenes relationships that may have influenced it. Under the given circumstances, the election mechanism of JI members therefore threatens the independence of the institution.

## Mandates between constitutional interpretation and political calculation

The current General Inspector, Teodora Tochkova, was elected in April 2015 during Boyko Borissov's second government. At this point, his autocracy had already been solidified as key institutions – including the prosecutor's office, which plays a central role in Bulgaria's justice system – had been captured. The ten remaining inspectors were elected in 2016. The terms of all JI members thus came to an end in 2020. These members have, however, de facto remained in office ever since, despite not having been reelected.

The situation at the SJC, which appoints and promotes all magistrates and is responsible for disciplinary proceedings, is similar – the mandate of its members expired in 2022. Nonetheless, new members of the so-called political quota, comprising 11 out of the SJC's 25 members, have still not been elected by Parliament (on the SJC's quotas, see here).That is why the SJC's members elected for the 2017-2022 term continue to exercise the functions of this institution.

The explanation for the current situation in the JI and the SJC is prosaic and entirely political. In 2020, Bulgaria was marked by mass protests against the corruption of Borissov's government and Bulgaria's General Prosecutor. Since 2021, Bulgaria has been caught in a cycle of snap elections. As Borissov's GERB party lost popularity, it secured fewer seats in Parliament. Meanwhile, opposition parties have managed to pass the 4% barrier to enter it. With this changed composition of Parliament, Borissov's GERB party found itself in a difficult dilemma. On the one hand, it did not want to strike a deal with the new opposition parties and elect JI and SJC members acceptable from the opposition's perspective as well. On the other hand, it sought to avoid formally acknowledging its close ties to controversial parties like DPS – whose leader, Delyan Peevski, was sanctioned for corruption by the US and the UK Government in 2021 and 2023 respectively – and elect new members of the JI and the SJC alongside them.

The failure to hold elections for these members is therefore a politically motivated choice. As is often the case in Bulgaria, the Constitutional Court swiftly constructed a constitutional scaffolding to obscure the underlying motive in its Decision 12 of 27 September 2022. The Court was formally petitioned by the Plenum of the Supreme Administrative Court (SAC), asking it to assess, among other matters, whether the JI's indefinite mandate was compatible with the rule of law, the separation of powers, and the independence of magistrates (Articles 4(1), 8 and 117(2) of the Constitution). The Constitutional Court's key argument in favor of allowing the JI to continue functioning despite the expiration of its members' mandates was the need to preserve the system of checks and balances embedded in the Constitution:

> *When no other legal remedy against the obstruction of the work of a constitutionally established state body is envisaged [in legislation], the continuation of the implementation of the functions of this body through its specific personal composition until a new election/appointment … is a constitutionally permissible means of preventing a factual change in the balance of powers … [envisaged in the Constitution].*

Given that the Constitution is the supreme law of the land (Article 5(1) of the Constitution) and the Constitutional Court has the final say on its interpretation (Article 149(1), point 1), the current state of indefinite

mandates seems galvanized – at least from the perspective of Bulgarian constitutional law.

## Pontius Pilate washing his hands

The CJEU's long-awaited judgment in joined Cases C-313/23, C-316/23, C-332/23 originally stems from three preliminary references concerning proceedings initiated by the JI before the Sofia Regional Court, seeking to lift banking secrecy on the accounts of several judges, public prosecutors and their family members. These proceedings – and the ensuing preliminary references – must be viewed within the broader struggle to expose structural threats to the rule of law in Bulgaria. At least one of the references concerns the case of a judge who is publicly known for refusing to follow political orders. Moreover, the judge who wrote the (identical) texts of the references, Andrey Georgiev, (see here, here,and here) has a track record of exposing the controversies at the SJC. In 2023, he petitioned the Supreme Administrative Court (SAC) to declare his own excellent professional evaluation (atestatsiya) by the Judicial College of the SJC null and void based on the expiration of the SJC's mandate. His appeal was deemed inadmissible due to an alleged lack of legitimate interest – a common excuse the SAC uses to disguise its politically motivated decisions. Essentially, it seems that Georgiev saw an opportunity to expose the structural problems of the JI's and, by analogy, the SJC's problems through the lens of EU Law, and seek alternative means to shield magistrates from arbitrary actions by the JI by relying on the GDPR.

In this context, the CJEU held in this judgment that

> *... the principle of judicial independence precludes a Member State's practice under which the members of a judicial body of that Member State ... continue to perform their functions ... where the extension of the expired terms of office does not have an express legal basis in national law containing clear and precise rules such as to circumscribe the performance of those functions and where it is not guaranteed that that extension is, in practice, limited in time (para 139).*

To reach this conclusion, the CJEU stressed that Bulgarian legislation does not contain any rule as to whether members of the Inspectorate whose terms of office have expired may continue to perform their functions; nor does it contain rules under which a potential gridlock in the process for the appointment of new members of the Inspectorate can be resolved (para 92).

This formalistic requirement of "an express legal basis in legislation" produces an impasse in the Bulgarian context. Amendments to Bulgaria's Constitution require a qualified majority (Article 155 of the Constitution). So the same formal deadlock that has obstructed the election of members of the JI and the SJC is also likely to block any constitutional amendment that would provide the required "express legal basis". Faced with this gridlock, Bulgarian legislators may opt for the path of least resistance by amending the Law on the Judiciary by simple majority. Such amendments, however, could still be subject to challenge before the Constitutional Court.

The CJEU's formalism thus resembles a case of Pontius Pilate washing his hands of responsibility. While the Court reminds us that any extension of mandates must "enable" the members of the body "to act objectively and impartially" (para 94) and that such extensions should be the exception rather than the rule (para 95), it does not see an issue with the way the members of the JI are elected to begin with. But, as explained above, it is this mechanism of election itself that allows for political capture and enables the notorious partiality of the JI.

This part of the judgment is also disappointing in view of the Opinion of Advocate General Pikamäe, in which he openly discussed the political dependencies of the JI and the risks of misuse of powers. He even referenced the Venice Commission which had argued that the covert political negotiations accompanying the election process often mean that the inspectors owe political obligations to those who elected them (see in paras 42 and subsequent).

## It is not about mandates, but what lurks behind them

The politicization of the JI and, respectively, the SJC is a long-standing threat to judicial independence and accountability, which are key facets of the rule of law. It is regrettable that the CJEU relied on an excessively formalistic approach in this case and missed an opportunity to make a difference by addressing the problem at its core – and considering its context. The refusal to tackle the question of the election of JI's members suggests a clear aversion to handling hot "rule of law" potatoes, discouraging the few brave judges trying to expose Bulgaria's rule of law challenges from making politically sensitive preliminary references in the future. Meanwhile, considering that the EU Commission has underestimated the SJC's and the JI's dependencies in its rule of law assessments, including Bulgaria's CVM, the CJEU can be seen as yet another EU institution that prefers to look the other way when confronted with hot "rule of law" potatoes from Bulgaria.

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### SUGGESTED CITATION

Vassileva, Radosveta: Hot Rule of Law Potatoes: The CJEU's Formalism in Joined Cases C-313/23, C-316/23, C-332/23 and Its Implications, Verfassungsblog, 26.05.2025, doi: 10.59704/270dbde4eeb474e9.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250627-142551-0.