

## Anonymised version

Translation

C-603/19 — 1

Case C-603/19

### Request for preliminary ruling

**Date lodged:**

9 August 2019

**Referring court:**

Špecializovaný trestný súd (Slovak Republic)

**Date of the decision to refer:**

24 July 2019

**Applicant:**

Úrad špeciálnej prokuratúry Generálnej prokuratúry Slovenskej republiky

**Defendants:**

TG and UF

[...]

[case number]

### ORDER

The Špecializovaný trestný súd (Special Criminal Court; hereinafter: ‘the Special Criminal Court’) [...] [composition of the court], in the criminal proceedings against TG and his partner for the offence of subsidy fraud under Articles 20(1) and 225(1) and (6)(a) of the Criminal Code (zákon č. 300/2005, Trestný zákon), inter alia, deliberating in chambers on 24 July 2019 in Pezinok,

#### has decided as follows:

Under Article 267 of the Treaty on the Functioning of the European Union, signed in Rome on 25 March 1957, as amended by the Lisbon Treaty of 13 December

2007, and pursuant to Article 290(1) and on the grounds set out in Articles 283(1) and 24(4) of the Code of Criminal Procedure (zákon č. 301/2005 Z.z., Trestný poriadok), the Court of Justice of the European Union is requested to give a preliminary ruling on the following questions:

1. Is Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (principally the right to participate actively in criminal proceedings and the right to secure compensation for damage in criminal proceedings) applicable, as regards rights which, by their nature, are not enjoyed solely by a natural person, as a sentient being, also to legal persons and the State, or State authorities, where the provisions of national law confer on them the status of injured party in criminal proceedings?
2. Are legislation and decision-making practice,<sup>1</sup> such that the State may not claim compensation in criminal proceedings for the damage caused to it by fraudulent [Or. 2] conduct on the part of an accused person<sup>2</sup> resulting in the misappropriation of funds from the budget of the European Union, or may not appeal, under Article 256(3) of the Code of Criminal Procedure, against the order by which the court decides not to admit it, or not to admit the authority representing it, to the main proceedings to seek compensation for the damage as an injured party, and it does not have any other type of procedure available to it by which it may assert its right as against the accused, which means that it is also not possible to guarantee its right to compensation for damage against the property and property rights of the accused under Article 50 of the Code of Criminal Procedure, thus rendering that right *de facto* unenforceable, compatible with Articles 17 and 47 of the Charter of Fundamental Rights of the European Union,<sup>3</sup> Article 325 of the Treaty on the Functioning of the European Union, and Article 38(1)(h) of Council Regulation (EC) No 1260/1999 of 21 June 1999, read in conjunction with Commission Regulation (EC) No 1681/94 of 11 July 1994?
3. Is the concept of ‘the same undertaking’ referred to in Council Regulation (EC) No 994/98 of 7 May 1998, read in conjunction with Article 2(2) of Commission Regulation (EC) No 69/2001 of 12 January 2001, to be interpreted only formally as meaning that it is

<sup>1</sup> Opinion of the Criminal Division of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) of 29 November 2017 [...] [case number].

<sup>2</sup> Once the main hearing has been scheduled, the defendant becomes the accused.

<sup>3</sup> ‘Protection of the EU Charter for Private Legal Entities and Public Authorities. The Personal Scope of Fundamental Rights within Europe Compared’, in *Utrecht Law Review*, No 1/15, accessible on line: <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.490/>.

necessary and sufficient to establish whether the companies concerned have separate legal personality under national law, such that it is possible to grant to each of those companies State aid of up to EUR 100 000, or is the decisive criterion the actual mode of operation and management of those companies, held by the same persons and inter-related, in the manner of a system of branches managed by a central company, even though each has its own legal personality under national law, so that they must be deemed to form ‘the same undertaking’ and, as a single entity, may receive State aid of up to EUR 100 000 only once?

4. For the purposes of the Convention on the protection of the European Communities’ financial interests<sup>4</sup> of 26 July 1995, does the term ‘*damage*’ [to be compensated] mean only that part of the funds wrongly obtained, which are directly related to the fraudulent conduct, or also the costs actually incurred and duly proven and the use of the assistance, if the evidence shows that their expenditure was necessary to conceal the fraudulent conduct, delay the detection of the fraudulent conduct and obtain the full amount of the State aid granted?

[...] [staying of proceedings before the referring court] [Or. 3]

### Grounds

- 1 The request for a preliminary ruling is made by the Special Criminal Court, which is a court of first instance. Its jurisdiction covers the most serious offences,<sup>5</sup> including that of harming the financial interests of the European Union, as referred in Article 261 of the Criminal Code. Appeals are determined by the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic; hereinafter: ‘Supreme Court of the Slovak Republic’), as the court of appeal.
- 2 At the main hearing on 30 April 2019, the court informed the parties that it intended to submit a request for a preliminary ruling to the Court of Justice of the European Union, together with the grounds for the request, and invited the parties to comment and submit observations in that regard.
- 3 The grounds for the request for a preliminary ruling are the (repeated)<sup>6</sup> inconsistencies in the decision-making activity of the courts of the Slovak Republic and the dismissal by the Specialist Criminal Court of the opinion of the

<sup>4</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law (OJ 2017, L 198, p. 29).

<sup>5</sup> Article 83 of the Treaty on the Functioning of the European Union.

<sup>6</sup> Point 1 of the Opinion of Advocate General Kokott in Case C-73/16 and the questions referred for a preliminary ruling by the Special Criminal Court in Case C-709/18, *UL and VM*.

Criminal Division of the Supreme Court of the Slovak Republic, which is de facto binding on the Specialist Criminal Court.<sup>7</sup>

- 4 Answers to the questions referred for a preliminary ruling are necessary in order to assess the degree to which the accused are guilty and the extent of the offence in the event of a conviction, and to enable the court to rule on the status of the injured parties in criminal proceedings and the claims for damages.

### **I. Subject matter of the proceedings and the facts**

- 5 The accused TG and UF are on trial before the Specialist Criminal Court on charges brought by the Public Prosecutor of the Úrad špeciálnej prokuratúry Generálnej prokuratúry Slovenskej republiky (Office of the Special Prosecutor in the Office of the Public Prosecutor of the Slovak Republic) of 7 January 2015 for the aggravated offence of subsidy fraud, as referred to in Article 225(1) and (6)(a) of the Criminal Code, and for the continued offence of harming the financial interests of the European Union, as referred to in Article 261(1) and (4)(a) of the Criminal Code, which was committed in the form of complicity. [Or. 4]

- 6 The charge sets out the facts as follows:

- 7 On 10 November 2005, the Ústredie práce sociálnych vecí a rodiny (Central Office for Labour, Social Affairs and Family) announced call No 1/2005 and on 20 February 2006 call No 1/2006 for the submission of applications for non-repayable, flat-rate assistance from the State budget under the *de minimis* scheme to support job creation in micro-enterprises and job creation for disabled persons in sheltered offices and sheltered workplaces ('assistance'). In the case of call No 1/2006, the assistance was 75% funded by the European Social Fund.

- 8 The assistance relating to call No 1/2005 was paid as one-off assistance, whilst the assistance paid in relation to call No 1/2006 was granted in the form of reimbursement of proven costs.

- 9 The assistance was granted for costs incurred in creating a job (salary costs and social security and health insurance contributions) and for additional costs (workplace goods and equipment) for the first 12 months. The recipient of the assistance was required to maintain the post for a period of at least three years.

- 10 In the period between May and December 2005, the accused set up a 'network' of six companies and, subsequently, in March 2006, a further nine companies,

<sup>7</sup> Under Article 21(3)(a) of Law No 757/2004 on the judicial system (zákon č. 757/2004 Z.z. o súdoch), the Division of the Supreme Court is to adopt an opinion on unification of the interpretation of laws and other universally applicable provisions of law in the event of differences of interpretation in the final decisions of the Grand Chambers of the Divisions. Under Article 2(15) of the Rules of Procedure of the Supreme Court, published in *Official Gazette* No 200/2016, the courts are, in their decision-making activity, to take the adopted opinion as a basis.

established in several district main towns, with a business name containing the term ‘*Infoservis*’ and the name of the district town in which the company was established.<sup>8</sup> In addition to these companies, they set up a further four with a different name in January and March. In all the cases they were limited liability companies.

- 11 The accused acted as partners and managers in those companies.
- 12 However, only those companies that actually received and collected the assistance are the subject of the charge (a total of ten companies).
- 13 In the case of the nine companies established in March 2006, the assistance was not granted either because the applications were not approved, given the suspicion of fraudulent conduct, or because they were approved only for a limited number of employees compared with [those stated in] the applications submitted by the accused. Subsequently, those companies engaged in no other business activity and were transferred to third parties in the course of 2007. [Or. 5]
- 14 In total, the accused applied for an amount of EUR 1 636 917.91. An overall amount of EUR 750 613.79 was contractually agreed by the district offices for labour, social affairs and family. In actual fact, assistance totalling EUR 654 588.34 was paid, of which EUR 279 272.18 came from the budget of the European Union and EUR 375 316.20 from the State budget of the Slovak Republic.
- 15 A total of 107 (one hundred and seven) persons with disabilities were employed in the individual companies, but their employment activity was not related to the objectives set out in the applications for assistance. According to a sworn expert’s report, the companies reported a loss. The activities carried out by the employees were merely formal and devoid of any real economic content. None the less, all salaries and health insurance and social security contributions were paid regularly to all employees.
- 16 Goods and equipment were supplied to each individual company by, inter alia, RAMADA Slovakia s.r.o., which, however, carried out no actual activity. Its only revenue came from payments from the ‘*Infoservis*’ companies. The company’s bank statements do not show any payment for operating costs, goods or services. The transferred funds were subsequently withdrawn in cash from the company’s accounts.

<sup>8</sup> Infoservis Košice, s. r. o., Infoservis Prešov, s. r. o., Infoservis Vranov, s. r. o., Infoservis Michalovce, s. r. o., Infoservis Trebišov, s. r. o., Infoservis Poprad, s. r. o., Infoservis Bardejov, s. r. o., Infoservis Humenné, s. r. o., Infoservis Lučenec, s. r. o., Infoservis Rožňava, s. r. o., Infoservis Spišská Nová Ves, s. r. o., Infoservis Martin, s. r. o., Infoservis Žilina, s. r. o., Infoservis Banská Bystrica, s. r. o. and Infoservis Zvolen, s. r. o.

- 17 The other invoiced expenditure included payments for rental of premises, Internet, energy, water and telephone connection and for other necessary operating costs, which were properly recorded and proven.
- 18 In the proceedings the accused seek a reduction in the amount of the damage, in comparison with that set out in the charge, by the expenses incurred, and thus reclassification of the offence following reduction of the charge.
- 19 The companies were managed by the accused centrally from the ‘*Infoservis*’ headquarters in Košice, where they were habitually resident. In each of the companies, the accused appointed one of the employees as manager. In their applications [for assistance], the accused declared their intention to establish an ‘*Infoservis*’ in each district main town of the Slovak Republic. The Slovak Republic has 79 districts.
- 20 The purpose of the ‘*Infoservis*’ companies was to create databases of economic operators active in a particular district, in the style of *trivago.com*, and to supply information to future customers by means of a free infoline.
- 21 Once the period for payment of the assistance expired, the accused transferred, on 20 April 2007, their shares in each company to the company AZ-Dendy, s.r.o., with a registered office in the Czech Republic, whose manager was a national of the Czech Republic regarded as a [Or. 6] ‘straw man’.<sup>9</sup> Subsequently, the companies no longer carried on any activities, not even formal ones. Immediately afterwards, the employment of all the employees was terminated.
- 22 The injured parties — the competent district offices for work, social affairs and family — applied duly and in good time for compensation for damage from the accused at the pre-trial investigation stage, to that extent to which the assistance had actually been paid.
- 23 The goods whose purchase was declared by the accused during the period in which the assistance was paid were no longer to be found on the companies’ premises. The companies were removed automatically from the commercial register.

## II. National legislation

- 24 Under Article 124(1) of the Criminal Code, damage means damage to property or actual loss of property or damage to the rights of the injured party or any other damage which is causally related to the offence, regardless of whether there is damage to property or rights. For the purposes of that law, ‘damage’ also means the securing of financial gain having a causal connection with the offence.

<sup>9</sup> A person who acts as the partner and/or manager of another person and follows the directions thereof in order to conceal the identity of the real owner.

## 25 The Code of Criminal Procedure

The criminal law of the Slovak Republic draws a distinction between the victims of crime <sup>10</sup> and persons injured by crime.

Under Article 46(1), (3) and (4), an injured party is a person to whom material harm was caused by an offence. That person has to right to seek compensation, to make applications for evidence to be provided or supplemented, present evidence, consult and study the files, participate in the main hearing in order to comment on the taking of evidence, present conclusions, make use of the remedies to the extent defined by [that code of criminal procedure], and to inquire as to the state of the criminal proceedings. The injured party, who is legally entitled to compensation from the accused for the damage caused to him by the offence, is also entitled to ask the court to require the accused to pay compensation for damage in the judgment; the injured party must submit an application at the latest by the conclusion of the pre-trial investigation stage. The application must show clearly the grounds on which, and the extent to which, the right to compensation [Or. 7] for damage is being asserted. An application can no longer be made if a decision on the right has already been taken in civil or other proceedings.

Under Article 50(1), where there is a well-founded fear that satisfaction of the injured party's right to compensation for the damage caused by an offence will be frustrated or made complicated, it is possible to guarantee the right up to the likely amount of the damage.

Under Article 256(3), where the injured party's rights are to be asserted by a person who clearly does not have that right, the court is to declare, by way of an order, that that person is not admitted to the main hearing to seek compensation. That decision does not preclude an application for compensation for damage before the competent authority. Appeals against such an order are inadmissible.

Under Article 287(1), if the court finds the accused guilty of the offence by which he caused damage to others, it is, in general, to require him to provide compensation for the damage, if the right has been asserted correctly and in good time. The court will always require the accused to compensate the unpaid damage, or the unpaid part of the damage, where the amount thereof is included in the description of the act referred to in the operative part of the judgment by which the accused was found guilty.

Under Article 307(1)(c), the injured party may appeal against the judgment solely on the grounds that the operative part of the judgment ruling on compensation for damage is incorrect.

<sup>10</sup> The definition corresponds to Article 2(1)(a) of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, [and is contained in] Article 2(b) of Law 274/2017 on the victims of crime (zákon č. 274/2017 Z.z. o obetiach trestných činov).

- 26 Under Law No 513/1991 establishing the Commercial Code (zákon č. 513/1991 Z.z., Obchodný zákonník), a limited liability company is a legal person having legal personality which is separate from that of its directors and partners.<sup>11</sup> The company is liable with all its assets for any breach of its liabilities. A partner is liable for the company's obligations up to the amount of his unpaid contribution entered in the commercial register.
- 27 Under Article 18(2) and (3) of Law No 231/1999 on State aid (zákon č. 231/1999 Z.z. o štátnej pomoci),<sup>12</sup> State aid is to be granted pursuant to a contract, with the exception of State aid provided indirectly; where State aid has been paid with funds from the State budget, a municipality or a [special] fund for State purposes, failure to satisfy the conditions under which the State aid was paid is to be deemed to constitute a breach of the budgetary requirements.
- 28 Under Article 31 of Law No 523/2007 laying down the financial rules governing the budget of public administrative authorities (zákon č. 523/2007 Z.z. o rozpočtových pravidlách verejnej správy), a legal or natural person who has infringed financial rules is required [Or. 8] to return the funds to the budget from which they were provided or taken, and to do so in the amount of the infringement of the financial rules; it is further required to pay a penalty. [In general,] a charge in the amount of the financial infringement, a penalty and a fine are to be imposed for infringement of the financial rules. The imposition and execution thereof are governed by the general rules on administrative procedure.

### III. Decision-making practice<sup>13</sup>

- 29 Opinion of the Criminal Division of the Supreme Court of the Slovak Republic of 29 November 2017 [...] [case number] (hereinafter: 'Opinion 39-60/2017').<sup>14</sup>

<sup>11</sup> Judgment of the Court of Justice of 5 April 2017, *Orsi* (C-217/15 and C-350/15), and the judgments of the European Court of Human Rights in *Pirttimäki v. Finland* of 20 May 2014, No 35232/11, and, as regards inadmissibility, *Veselá and Loyka v. Slovak Republic* of 13 December 2005, No 58411/00, among others.

<sup>12</sup> Article 26 et seq. of Law No 528/2008 on aid and support from funds of the European Community (zákon č. 528/2008 Z.z. o pomoci a podpore poskytovanej z fondov Európskeho spoločenstva účinný), in force since January 2009, currently corresponds to the provision in question.

<sup>13</sup> The decisions cited are amended for reasons of clarity, whilst preserving the essential content thereof; in describing the decision-making practice, the present court reflects the need to demonstrate a structural problem in the light of the Opinion of Advocate General Bobek in Case C-310/16.

<sup>14</sup> The opinion was adopted in a criminal case for the continuing offence of tax evasion and unjustified claim for repayment of value added tax (tax fraud) for a total of around EUR 58 171 046.79. The conclusions of the opinion [Tpj 39-60/2017] are that this applies universally to all cases where the amount of the damage has its legal basis in the rules of administrative law — tax, VAT, duty, State aid, non-repayable financial contributions, agricultural subsidies, environmental crimes, inter alia. There are currently several sets of

A/I. State property rights arising from the rules governing individual types of taxes, which are initially decided by the competent administrative authority, in the respective field of application, according to the procedure laid down in the Tax Code, including the right arising from an unjustified claim made by a taxable person for repayment of value added tax or a duty, are administrative in nature and decisions on them are subject to review by an administrative court under the Code of Administrative Procedure. Being precisely of that nature, the State's material right to compensation for damage cannot be asserted in criminal proceedings — in so-called 'ancillary proceedings'. Nor does a civil court rule on compensation for the material damage to the State since recognition of the relevant right does not come within the jurisdiction of the courts. Thus, there is no overlap, that is to say no conflict of allocation between bodies (administrative and judicial authorities), and in particular no duplication of decisions on the same right.

The fact that the property right in question (with a substantive tax-law basis) corresponds quantitatively, in the case of a tax offence which is the subject of criminal proceedings, to the amount of the damage at the time at which the offence occurs (the element constituting a tax offence), alters nothing in the conclusion following on from the preceding paragraphs. Similarly, it is irrelevant, as regards the ancillary proceedings, whether the tax claim is directed at a legal person and the person accused of the related tax offence is merely a natural person whose conduct resulted in the offence; the basis of the claim for compensation for damage in respect of that offender is not twofold in nature. **[Or. 9]**

Despite it not being possible to assert the tax claim in ancillary proceedings, the Slovak Republic, represented by the competent authority, is the injured party in criminal proceedings for a tax offence and enjoys other rights under the Code of Criminal Procedure.

II. If a tax claim (such as a claim for compensation for damage against the natural or legal person concerned) is asserted at the main hearing, the court will, by way of an order, deny the injured party admission to the main hearing solely as regards the application to assert the right to compensation for damage. The injured party will retain the status of party to the proceedings with regard to his other procedural rights. This applies even if a final decision on the claim has already been taken in tax proceedings since the obstacle of *res judicata* concerns only the right to compensation for damage in respect of which a decision has been taken, and does not concern any other right.

B/I. The legal considerations set out in points I and II of Section A also apply *mutatis mutandis* to any other material right which, by virtue of its substantive basis (that is to say, the provision of law governing that right), does not constitute

criminal proceedings under way in the Slovak Republic for the offences of tax fraud, tax and customs evasion and harming the financial interests of the European Union, amounting to tens of millions of euros.

an application for compensation for damage, in particular non-material damage. Therefore, given the nature of this right there is no element constituting an offence, although ultimately the monetary quantification of the damage may be the same.

II. In the case of the offence of infringement of the protection of flora and fauna, as referred to in Article 305 of the Criminal Code, the element of the offence corresponds to the legal definition of damage and, at the level of monetary quantification, also to the social value under the law on the protection of nature. However, the decision on an application for material repair of the damage (against the municipality) caused by an unauthorised felling of a tree, including the determination of the social value of the tree, comes within the competence of the nature protection authority, which, in this case, is the district authority or the municipality. It is therefore a claim of an administrative nature which does not come within the jurisdiction of the courts and cannot be asserted by means of ancillary proceedings under the Code of Criminal Procedure. This conclusion applies irrespective of the fact that the injured party will be the municipality in whose territory the unauthorised felling took place; this also applies to the Slovak Republic, represented by the competent district office, if the district office enters an appearance as an injured party in the criminal proceedings.

30 **Order of the Grand Chamber of the Criminal Division of the Supreme of the Czech Republic, published in the Court Reports under No R 39/2014<sup>15</sup> [Or. 10]**

The State's claim arising from the evaded (unpaid) tax is a right to compensation for damage which, however, the competent tax authority cannot assert in criminal proceedings as against the person liable for payment of the tax. It is therefore necessary for the court to rule at the beginning of the main hearing, by means of an order, that the injured party cannot assert this right to compensation for damage in (ancillary) criminal proceedings. In the judgment, subsequently, the court will no longer rule on the assertion of that right.

Assertion of the right to compensation for damage in criminal (ancillary) proceedings may be taken into consideration only where the evidence gathered shows that the accused, as a person acting on behalf of a legal person, evaded the corporation (or other) tax of this legal person in respect of whom the financial authority has issued a tax assessment notice for the calculation of the actual tax on it, but it is clear that that tax assessment notice is not enforceable because the legal person has no assets which could be executed. Where there is a joint-stock company or a limited liability company, and the accused is a member of the

<sup>15</sup> Given the previous common legal development and the similarity of the two legal systems, the present court also refers to Czech decision-making practice. According to the established decision-making practice of the Supreme Court of the Czechoslovak Socialist Republic, the State's claim to payment of taxes is not a right to compensation for damage caused by the offence of tax evasion, but a right arising directly from the law. Therefore, it is not a right which the financial authority could assert in ancillary proceedings.

management body, it is necessary to determine whether or not, in that case, there is a guarantee obligation on it, on the basis of which it can be required, in ancillary proceedings, to provide compensation for the damage caused or can be required to return the unjust enrichment obtained through offence. Assertion of the right to compensation could also be taken into consideration if it were possible to infer the liability of the accused, not as the person liable for payment, in particular of the evaded (or unpaid) tax, but as the perpetrator of the offence relating to the damage caused by that offence or the unjustified enrichment obtained by or through that offence.

- 31 With reference to Opinion Tpj 39-60/2017, in its subsequent decision-making practice the Supreme Court of the Slovak Republic <sup>16</sup> set aside the operative part of the judgments of the Specialist Criminal Court by which the court of first instance ordered the accused to compensate the damage in the amount of the assistance fraudulently obtained, the subsidy or other financial assistance provided from the State budget or the budget of the European Union, ruling that there [was] no compensation for damage that could be asserted in criminal proceedings, but rather a specific public-law right to repayment of the non-repayable financial assistance, the content and extent of which are governed by the relevant administrative rules with the subsequent possibility of review by the administrative courts. **[Or. 11]**
- 32 In previous decision-making activities, the courts have always required the accused to compensate the damage caused by fraudulently obtaining a subsidy or State aid in so far as its fraudulent conduct has been proven.
- 33 In practice, this opinion meant that the State representative, as the injured party, does not seek compensation for damage in criminal tax proceedings on the grounds that this is not possible. In some cases, the investigating authorities do not even hear the Public Prosecutor, as the injured party, at the pre-trial investigation stage, thereby obstructing his ability to seek compensation for damage in a proper and timely manner. <sup>17</sup>
- 34 The same development can also be presumed in the case of the persecution of subsidy fraud and the offences of harming the financial interests of the European Union.

<sup>16</sup> Judgments of the Supreme Court of the Slovak Republic of 15 February 2018 [...] [case number], of 23 January 2019 [...] [case number], and of 20 March 2019 [...] [case number], given in criminal cases other than that covered by the present request for a preliminary ruling.

<sup>17</sup> Order of the Special Criminal Court of 30 November 2016 [...] [case number], in a case of evasion and excessive deduction of value added tax totalling EUR 7 459 853.45, by which the charge was dismissed and the files were remitted to the Public Prosecutor on account of serious breach of the rights of the injured party.

#### IV. Case-law of the European Union

- 35 Judgments of 8 September 2015 of the Court of Justice in *Taricco*, C-105/14, in the light of the judgments of 5 December 2017 in *[M.A.S]. and M.B.*, C-42/17, and of 17 January 2019 in *Dzivev and Others*, C-310/16, among others.
- 36 Judgments of the Court of Justice of 13 March 2008 in *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, C-383/06 to C-385/06, and of 21 December 2011 in *Chambre de commerce et d'industrie de l'Indre*, C-465/10.

#### V. Opinion of the Special Criminal Court

- 37 Legal persons, primarily limited liability companies, which offenders use to commit offences and which are the recipients of the assistance, in almost all cases end up with no assets. Recovery of the assistance provided cannot therefore be sought from them.
- 38 In administrative proceedings the competent national authority may impose an obligation to repay assistance unduly paid only on the recipient of the assistance, that is to say the legal person, and not on a partner or manager thereof and in any event not on the third party who is often behind the entire offending activity. **[Or. 12]**
- 39 In law, it is likewise not possible to invoke the possibility of imposing the penalty of confiscation of assets under Article 50 of the Criminal Code. If the State does not have claims which it can invoke in insolvency proceedings,<sup>18</sup> its claims for the imposition of the penalty of asset confiscation can be met only after all the other claims against the insolvency estate and all the other claims against the insolvent party have been satisfied.<sup>19</sup> In all the cases known to the present court, the assets of those convicted have not even been sufficient to settle those claims, and still less the [further] claims of the State.
- 40 The decisive criterion for deciding on the right to compensation for damage asserted should be the nature of the persons and the relationship of liability between the State, as the injured party, and the perpetrator of the offence, who has been lawfully convicted, which has arisen from the unlawful conduct of the latter, irrespective of the substantive basis of the right.

<sup>18</sup> Under Article 107a(1) of Law No 7/2005 on insolvency proceedings and restructuring (zákon č. 7/2005 Z.z. o konkurze a reštrukturalizácii), if the court having jurisdiction delivers to the insolvency court a final judgment ordering the confiscation of assets, the insolvency court is, without delay, to rule of its own motion on the declaration of the insolvency of the assets of the person on whom that penalty has been imposed.

<sup>19</sup> Under Article 107a(2)(d) of Law No 7/2005 on insolvency proceedings and restructuring.

- 41 In the event of a court decision to the effect that the injured party is not permitted to assert the right to compensation for damage at the main hearing, that decision must be subject to judicial review by a higher court. This is a matter of fundamental importance for the proper and timely assertion of his rights in criminal proceedings. In the present case, it is the right to the timely, retroactive recovery of the assistance. Judicial review of a decision in the context of a constitutional appeal cannot be considered sufficient.
- 42 In criminal proceedings it is necessary to respect the rights and legitimate interests of all those involved, in particular those of the injured parties. The theory that the purpose of the criminal proceedings is solely to clarify the offending activity and to establish the penalty for the offender, with the injured party being perceived merely in terms of compensation (the damaged victim), must be regarded as out-dated.<sup>20</sup>
- 43 The status of the injured party in the criminal proceedings and the extent of his rights under national law cannot be manifestly disproportionate to the status and rights which national law confers on the Public Prosecutor and the accused in accordance with the requirement of due process and equality of arms. **[Or. 13]**
- 44 Although in the judgments in Cases C-205/09 and C-467/05 the Court of Justice did not extend the concept of victim also to legal persons, the present court considers that the right of the injured party to participate actively in criminal proceedings and the right to compensation for damage in criminal proceedings<sup>21</sup> can also be granted to legal persons and the State,<sup>22</sup> since they are necessary for the effective protection of their property rights,<sup>23</sup> which are not rights that, per se, can be granted solely to a natural person as a sentient being.
- 45 The lack of funds in the State budget or in the EU budget is reflected in the scope and quality of the services provided by the State (education, health, social services, support for science and sport, regional development, and so forth).

<sup>20</sup> Article 1 of the Code of Criminal Procedure lays down the procedure of investigating authorities and the courts in such a way that offences are duly [that is to say, properly] uncovered and the perpetrators thereof are punished in accordance with the law, whilst respecting the fundamental rights and freedoms of natural and legal persons. None the less, the injured party remains on the fringes of the interest of criminal proceedings: see, for example, the judgment of the European Court of Human Rights of 11 December 2018 in the case of *Lakatošová and Lakatoš v. Slovak Republic* No 655/16.

<sup>21</sup> Recital 20 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ 2012 L 315, p. 57), and Article 16 thereof; right of the injured party to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union.

<sup>22</sup> The State as an injured party has the status of a legal person in the criminal proceedings.

<sup>23</sup> Article 17 of the Charter of Fundamental Rights of the European Union; ‘Protection of the EU Charter for Private Legal Entities and Public Authorities. The Personal Scope of Fundamental Rights within Europe Compared’, loc. cit.

- 46 The foregoing is important also in the light of the interruption of the limitation period and the obstacle of *lis pendens* at the time when the application for compensation for damage is submitted in criminal proceedings<sup>24</sup> and the fact that the civil court is bound by the decision which established that an offence has been committed.<sup>25</sup> If the current decision-making practice is accepted, assertion of the right to compensation for damage, by the State, as the injured party, would be ineffective and the limitation period would continue to run during the criminal proceedings. The right of the injured party, who relied in good faith on the decision-making practices to date, would be time-barred through no fault of his own.
- 47 As regards the third question, the present court considers that the decisive criterion is the actual mode of operation and management of the companies. Where several limited liability companies, which are essentially a system of centrally managed branches, are established, they must be regarded as the same undertaking for the purposes of the granting of State aid under the *de minimis* scheme. An interpretation in the opposite sense would lead to a chaining of State aid and circumvention of the financial limit laid down on such aid.
- 48 In the case of the fourth question, the present court takes the view that it is necessary to include in the damage [and thus not deduct] also the costs actually incurred and properly proven and the use of the assistance, where it is established in the criminal proceedings that there has been fraudulent intent from the outset and that the costs, that is to say, the losses related to the crime, were necessary for the recipient. Therefore, it is not possible to take the view that these funds have been used in accordance with the purpose for which they were granted. **[Or. 14]**

[...] [notification of legal remedies available]

Pezinok, 24 July 2019

[...]

[name of the president of the Court]

<sup>24</sup> Article 112 of the Civil Code (zákon č. 40/1964, Občiansky zákonník).

<sup>25</sup> Article 193 of the Code of Civil Procedure (zákon č. 160/2015, Civilný sporový poriadok).