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Advocate General's Opinions in Joined Cases C-357/19 Ministerul Public - Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie and others v QN and others and C-547/19 CY and others, Case C-379/19 DNA- Serviciul Teritorial Oradea v IG and others and Joined Cases C-811/19 and C-840/19 Ministerul Public – Parchetul de pe lângă Înalta Curte de Casaţie and others v FQ and others

Press and Information

According to Advocate General Bobek, decisions of a constitutional court declaring unlawful the composition of panels of a supreme court on the ground that the right to an independent and impartial tribunal has been infringed and declaring unconstitutional the technical surveillance measures in criminal proceedings by domestic intelligence service are compatible with EU law

However, EU law precludes a decision declaring unlawful the composition of panels of a supreme court on the ground that the panels are not specialized, if such a finding is liable to affect the effective protection of the financial interests of the Union

Over the course of 2019, several Romanian Courts have referred questions to the Court of Justice concerning the judicial independence, the rule of law, and the fight against corruption. The first group of cases concerned various amendments to the national laws on the judiciary, which had been mostly carried out by emergency ordinances [1].

The present cases form a second group whose main theme is if judgments of the Curtea Constituțională a României (Constitutional Court, Romania) can infringe the principles of judicial independence and the rule of law, as well as the protection of the financial interests of the Union.

First, on 7 November 2018, the Constitutional Court issued Decision 685/2018 stating, in essence, that some panels of the national supreme court, the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice, Romania, 'the HCCJ'), were improperly composed. This decision had enabled some of the parties concerned to introduce extraordinary appeals, which in turn raised potential issues not only concerning the protection of the financial interests of the EU under Article 325(1) TFEU, but also the interpretation of the concept of 'tribunal previously established by law' enshrined in the second paragraph of Article 47 of the Charter.

Second, on 16 February 2016 the Constitutional Court issued Decision 51/2016 declaring the participation of domestic intelligence services in the carrying out of technical surveillance measures for the purposes of acts of criminal investigation to be unconstitutional, leading to the exclusion of such evidence from criminal proceedings.

Third, on 3 July 2019, the Constitutional Court issued Decision 417/2019 declaring the failure of the HCCJ to comply with its legal obligation to establish specialist panels to deal at first instance with corruption offences. This leads to the re-examination of cases concerning corruption connected with the management of EU funds already adjudicated.

By the different questions referred in the present cases, the HCCJ and the Tribunalul Bihor (Regional Court of Bihor, Romania) ask the Court to ascertain if Decisions 685/2018, 51/2016 and

[1] Opinions of 23 September 2020, *Asociaţia "Forumul Judecătorilor Din România" & others,* Joined Cases C-83/19, C-127/19 & C-195/1, Case C-291/19, Case C-355/19 & Case C-397/19 (see Press Release No 114/20).

417/2019 of the Constitutional Court are compatible with certain provisions and principles of EU law [2].

Decision 685/2018

In today's Opinion, Advocate General Michal Bobek proposes, **first, that the Court rule that EU law [3] does not preclude a decision of a national constitutional court declaring unlawful the composition of panels of a national supreme court on the ground that the right to an independent and impartial tribunal has been infringed, even if it has the consequence of allowing for extraordinary actions to be brought against final judgments.**

The Advocate General reminds, first of all, that the issues of composition of judicial panels and of remedies available in the event of an infringement of the national rules are not regulated by EU law, so Member States maintain their discretion. Therefore, EU law does not preclude that in a situation which is not fully determined by it a national constitutional court declares, in application of a genuine and reasonable standard of protection of constitutional rights that judicial panels of the supreme court have not been established in accordance with the law.

Concerning the protection of the financial interests of the EU, the Advocate General recalls that Article 325(1) TFEU requires Member States to counter illegal activities affecting EU's financial interests through effective and deterrent measures.

In this regard, the relevant test is whether a national rule, case-law or practice, is liable to compromise, from a normative point of view, and regardless of its actual effect in terms of the number of cases affected, the effective protection of the financial interests of the Union. The elements for the assessment to be undertaken are: first, the normative and systematic evaluation of the content of the rules at issue; second, their purpose as well as the national context; third, their reasonably perceivable or expected practical consequences; fourth, fundamental rights and the principle of legality, which form part of the internal balance in the interpretation of Article 325(1) TFEU when assessing the compatibility of national rules and practices with that provision.

The Advocate General notes that, assessed against this criteria, Decision 685/2018 of the Constitutional Court does not seem liable to compromise the effective protection of the financial interests of the Union. First, it does not create new remedies nor does it modify the preexisting system of remedies. Second, nothing suggests that its purpose is to undermine the legal instruments enabling the fight against corruption or to affect the protection of the financial interests of the Union. Third, its potential practical effects are circumscribed in time, and do not lead to the discontinuation of the criminal proceedings, but only to a reopening of one stage of the proceedings. Fourth, its motivation relies on the fundamental right to fair trial.

Concerning the principle of judicial independence, the Advocate General notes that it does not appear that the method of appointment to the Constitutional Court is, in and of itself, problematic. The fact that 'political' institutions participate in the appointment of a body such as the Constitutional Court does not transform it into a political body appertaining or subordinated to the executive. Moreover, no elements have been disclosed which are liable to call into question the independence or impartiality of the Constitutional Court.

Decision 51/2016

[2] Article 325(1) TFEU; the PIF Convention; Article 47 of the Charter; Articles 2 and 19(1) TEU, as well as the principle of primacy; Decision 2006/928/EC, 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. 56–57)

[3] Second paragraph of Article 47 of the Charter, Article 325(1) TFEU, as well as Article 1(1)(a) and (b) and Article 2(1) of the PIF Convention, as well as the EU principle of judicial independence

Second, Advocate General Michal Bobek proposes **that the Court rule that EU law [4] does not preclude a decision of a national constitutional court,** such as Decision 51/2016, **declaring the carrying out of technical surveillance measures in the framework of criminal proceedings by domestic intelligence services to be unconstitutional and requiring the exclusion of any evidence thus obtained from criminal proceedings.**

According to the Advocate General, EU law does not regulate the manner in which technical surveillance measures in the framework of criminal proceedings are carried out, or the role and powers of domestic intelligence services. Within that framework, a national constitutional court is naturally able to exclude certain actors or bodies from the possibility to carry out technical surveillance measures. The fact that such a constitutional decision will have procedural repercussions for ongoing and future criminal proceedings relating to corruption is the necessary and logical consequence.

Concerning the disciplinary sanctions for the disregard of rulings of the Constitutional Court, the Advocate General considers that EU law [5] precludes that disciplinary proceedings be initiated against a judge merely for having submitted a request for a preliminary ruling to the Court whereby that judge questions the case-law of the national constitutional court and considers the possibility to disapply its case-law.

Decision 417/2019

Third, Advocate General Bobek proposes **that the Court rule that Article 325(1) TFEU precludes a decision of a national constitutional court** such as Decision 417/2019, **declaring unlawful the composition of the panels of the national supreme court adjudicating at first instance on corruption offences, on the ground that those panels are not specialised in corruption, even though the judges composing those panels were recognised as having the required specialisation, when such a finding is liable to give rise to systemic risk of impunity regarding offences affecting the financial interests of the EU.**

The Advocate General notes that the infringement of the national rule governing the composition of a judicial panel in the present case does not amount to an infringement from the point of view of Article 47 of the Charter. First, the requirement of specialisation appears to have an eminently formal character. Second, this rule appears to be a rather circumscribed exception applied to specific areas of law only, and to the first instance stage. Third, other additional elements would point to the absence of a 'flagrant' character of the infringement.

Concerning the protection of the financial interests of the Union, the Advocate General considers that the decision at issue does not meet the above-mentioned requirements of Article 325(1) TFEU because serious concerns might be raised regarding the generally perceivable or expected practical consequences of the decision at issue.

Decision 417/2019 requires the re-examination at first instance of all cases where an appeal is pending and the first instance judgment was rendered between 21 April 2003 and 22 January 2019. Given the general level of complexity of cases concerning corruption offences committed by the persons falling under the jurisdiction of the HCCJ, as well as the likelihood of appeal, the reasonably expected effects of that ruling is very broad.

Concerning the principle of primacy, the Advocate General considers that it must be interpreted as allowing a national court to disapply a decision of the national constitutional court, which is binding under national law, if the referring court finds it necessary in order to comply with the obligations deriving from directly effective provisions of EU law.

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[4] EU principle of judicial independence and the Decision 2006/928/EC, 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. 56–57)

[5] Article 267 TFEU, as well as the principle of judicial independence enshrined in the second paragraph of Article 19(1) TEU and in Article 47 of the Charter

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice.

The full text of the Opinion in Joined Cases C-357/19, C-547/19, Case C-379/19 and Joined Cases C-811/19, C-840/19 is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

Pictures of the delivery of the opinion are available from "Europe by Satellite" ☎ (+32) 2 2964106