

Case C-357/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 May 2019

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

6 May 2019

Applicants:

Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție

PM and Others

Defendants:

QN and Others

Autoritatea Națională pentru Turism

Agencia Națională de Administrare Fiscală

SC Euro Box Promotion SRL

Subject matter of the main proceedings

Extraordinary action for annulment of the decision of 5 June 2018 of a Chamber of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania; ‘the ICCJ’) composed of five judges.

Subject matter and legal basis of the request for a preliminary ruling

An interpretation is requested, under Article 267 TFEU, of Article 19(1) TEU, Article 325(1) TFEU, Article 1(1)(a) and (b) and Article 2(1) of the Convention

drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, and Article 47(2) of the Charter of Fundamental Rights of the European Union. It is also requested that the present request for a preliminary ruling be determined pursuant to the expedited procedure.

Questions referred

1. Must Article 19(1) of the Treaty on European Union, Article 325(1) of the Treaty on the Functioning of the European Union, Article 1(1)(a) and (b) and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, and the principle of legal certainty be interpreted as precluding the adoption of a decision by a body outside the judicial system, the Curtea Constituțională a României (Constitutional Court of Romania), which adjudicates on the lawfulness of the composition of Chambers hearing the case, in that way creating the conditions for allowing extraordinary actions brought against final judgments delivered in a given period?
2. Must Article 47(2) of the Charter of Fundamental Rights of the European Union be interpreted as precluding a finding by a body outside the judicial system — binding under national law — of the lack of independence and impartiality of a Chamber which includes a judge responsible for judicial administration who has not been randomly appointed, but on the basis of a transparent rule known to the parties and unchallenged by them, applicable to all the cases dealt with by that same chamber?
3. Must the primacy of EU law be interpreted as allowing the national court to disapply a decision of the constitutional court, handed down in a case concerning a constitutional dispute, binding under national law?

Provisions of EU law and case-law of the Court of Justice relied on

Article 19(1) TEU

Article 325(1) TFEU

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests ('the PFI Convention'), Article 1(1)(a) and (b) and Article 2(1)

Charter of Fundamental Rights of the European Union ('the Charter'): Article 47(2)

Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources

Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105; judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936; judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392; judgment of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295; judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555; judgment of 20 March 2018, *Di Puma*, C-596/16 and C-597/16, EU:C:2018:192; judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117; judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587; judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126; judgment of 30 September 2001, *Köbler*, C-224/01, EU:C:2003:513; judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067; judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49; judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363.

National provisions relied on

Legea nr. 135/2010 privind Codul de procedură penală (Law No 135/2010 laying down the Code of Criminal Procedure), as amended by Legea nr. 255/2013 (Law No 255/2013) and by Ordonanța de urgență a Guvernului României nr. 18/2016 (Decree Law No 18/2016). Article 426(1)(d) provides for the possibility of bringing an action to set aside final judgments in criminal proceedings in the event that the composition of the appeal court is contrary to law. Article 432(1) lays down the effects of upholding such an action, providing that the contested judgment must be set aside and the action re-examined.

Regulamentul privind organizarea și funcționarea administrativă a ÎCCJ (Regulation on the organisation and administrative functioning of the ICCJ), adopted by the management committee of the ICCJ, on the basis of Law No 304/2004, republished, as amended by Decision No 3/2014 of the ICCJ ('the Regulation on organisation and administrative functioning').

Article 28 provides that, in the context of the ICCJ, Chambers are to comprise five judges with jurisdiction laid down by law, and such Chambers are to be presided, as applicable, by the President, the Vice-Presidents, the President of the Criminal Division or the most senior member.

Article 29(1) lays down the procedure for establishing the five-judge Chambers in criminal matters. Thus, the President, or in his absence, one of the Vice-Presidents of the ICCJ is to appoint each year, by lot and at a public hearing, four or, if necessary, five judges from the Criminal Division of the ICCJ for each Chamber.

Judgment No 685 of 7 November 2018 of the Curtea Constituțională a României (Constitutional Court, Romania) found that there was a legal dispute of

a constitutional nature between the Parliament, on the one hand, and the ICCJ, on the other, due to the fact that only four of the five members of the five-judge Chamber were appointed by drawing lots, contrary to the provisions of Article 32 of Legea nr. 304/2004 privind organizarea judiciară (Law No 304/2004 on the judiciary). As regards the effects of such a finding, the Constitutional Court stated that the above-mentioned judgment is also applicable to completed cases, to the extent to which the time limits for bringing an extraordinary action have not yet expired for the parties.

Legea nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 303/2004 on the status of judges and prosecutors), republished, provides, in Article 99(1)(ș) that the failure to comply with the decisions of the Constitutional Court is a disciplinary offence.

Brief outline of the facts and the main proceedings

- 1 By judgment of 5 June 2018, a five-judge Chamber of the ICCJ ruled on the appeal against the judgment of the ICCJ – Criminal Division of 28 March 2017. That chamber comprised the President of the Criminal Division, in addition to four other judges appointed by lots, in accordance with the Regulation on organisation and administrative functioning. By that decision convictions were imposed, which have become final, for certain acts of corruption, abuse of office and tax evasion.
- 2 As regards the **acts of corruption**, it was held, in essence, that during the period 2010 to 2012 Ms PM, a minister, coordinated a mechanism whereby PM and those close to her (UR – personal adviser to the minister, VS – director of a national investment body, SP – permanent secretary to the minister and RO – personal assistant) received sums of money from the representatives of certain commercial companies in order to guarantee those companies the timely payment of the works carried out in the context of programmes financed from the ministry's budget, in a context in which the budget amount was notably reduced and the payment of the works significantly delayed.
- 3 As regards the **acts of abuse of office**, it was found that, in the course of 2011, Ms PM, in her capacity as minister, had the Ministry for Regional Development and Tourism award a contract for services to SC Europlus Computers SRL; the contract concerned the provision of services to promote Romania in the context of the events during the international professional boxing gala organised by the Romanian boxing federation.
- 4 In fact, the sporting event was organised by SC Europlus Computers SRL, run by TQ, which, through the award of the contract for advertising services, benefited from public funds in an amount of 8 116 800 Romanian lei (RON) for organising a commercial event for which it took all the proceeds.

- 5 It was, therefore, held that the public funds were used having recourse to unlawful arrangements and that the contract was awarded in breach of the legislation on public contracts, since services were purchased which did not fall within the permitted categories of expenditure for EU-funded programmes in the context of the project 'Promotion of the tourist brand of Romania', by means of the Regional Operational Programme 2007-2013. Those circumstances led to the payment of the amounts being refused by the European funds managing authority, so that the amounts which ought to have been reimbursed through European funds were charged in full to the State budget, entailing a loss to the Ministry of Regional Development and Tourism of RON 8 116 800.
- 6 As regards the **acts of tax evasion**, it was found that, for the purposes of reducing the amount of the taxes owed to the State budget in respect of the proceeds obtained from the abovementioned events, Mr TQ included in SC Europlus Computers SRL's accounts documentation issued by front companies which certify fictional expenses, allegedly incurred for advertising and consultancy services; this gave rise to damage in the amount of RON 646 838, of which RON 388 103 by way of VAT, and RON 90 669, of which RON 54 402 by way of VAT.
- 7 After the judgment became final, Mr RO's three-year term of imprisonment and Mr TQ's five-year term of imprisonment were activated, whereas the six-year term of imprisonment imposed on Ms PM could not be activated, since she had left Romanian territory, being subsequently arrested in Costa Rica for the purposes of extradition to Romania. The other persons convicted, namely UR, VS, QN and SP, received suspended terms of imprisonment.
- 8 Following the Constitutional Court's judgment of 7 November 2018, the applicants brought an extraordinary action for annulment, seeking to have the ICCJ's judgment of 5 June 2018 set aside and their appeals re-examined. The applications lodged by the applicants were held admissible and were joined in order to be dealt with together. Meanwhile, the execution of the terms of imprisonment was suspended, pending judgment in the extraordinary action for annulment brought in relation to RO, TQ and PM, who were released from prison.
- 9 In the present case, the referring court is called upon to decide on the merits of the grounds put forward and either dismiss the extraordinary action, and thereby uphold the judgment under appeal, or allow the action, and thereby set aside the judgment imposing conviction and re-examine the appeals.

The essential arguments of the parties in the main proceedings

- 10 The parties, with the exception of Parchetul de pe lângă Înalta Curte de Casație și Justiție (the public prosecution office attached to the High Court of Cassation and Justice, Romania), have argued that EU law is not applicable to the present case. Consequently, having regard to the subject matter of the case, and the binding nature of the judgments of the Constitutional Court, which cannot be excluded by

a judgment of the Court of Justice of the European Union, national-law provisions alone are applicable to the present case.

Succinct presentation of the reasons for the reference

- 11 By the questions referred for a preliminary ruling, the referring court asks, in essence, whether, in view of the principle that criminal penalties must be effective in cases of serious fraud, the provisions whose interpretation is requested and the principle of legal certainty, read in the light of the Charter, preclude a national court from applying a decision of an authority which does not form part of the judicial system and which adjudicates on the merits of an extraordinary action, in the sense that it requires the judgments which have become final before that decision was handed down to be set aside and calls into question the initial indictment, remitting the case for appeal.
- 12 Thus, in the Court of Justice's case-law, it has been held that Article 325(1) TFEU requires the Member States to counter fraud and other illegal activities affecting the financial interests of the European Union itself through effective deterrent measures and, given that the European Union's own resources include in particular, as provided in Article 2(1)(b) of Decision 2007/436, revenue from the application of VAT, there is a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (*Åkerberg Fransson* judgment).
- 13 It has also been held that although the Member States enjoy procedural and institutional autonomy in order to counter infringements of harmonised VAT rules, that autonomy is nevertheless limited not only by the principle of proportionality and the principle of equivalence, the application of which is not at issue in the present case, but also by the principle of effectiveness, which requires that the penalties be effective and dissuasive (judgments in *Scialdone* and *Taricco and Others*).
- 14 The Court has held that it is primarily for the national legislature to adopt the necessary measures. It is, therefore, for the national legislature, where required, to amend its legislation and to ensure that the procedural rules applicable to the prosecutions of offences affecting the financial interests of the European Union are not designed in such a way that there arises, for reasons inherent in those rules, a systemic risk that acts that may be categorised as such offences may go unpunished, and also to ensure that the fundamental rights of accused persons are protected.
- 15 The Court has held that it is for the national courts to give full effect to the obligations under Article 325(1) TFEU and to disapply national provisions which, in connection with proceedings concerning serious VAT infringements, prevent the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union.

- 16 However, the obligation to ensure the effective collection of the European Union's resources does not dispense national courts from the necessary observance of the fundamental rights guaranteed by the Charter and of the general principles of EU law, given that the criminal proceedings instigated for VAT offences amount to an implementation of EU law, within the meaning of Article 51(1) of the Charter. In criminal law, those rights must be respected not only during the criminal proceedings, but also during the stage of the investigation, from the moment when the person concerned becomes an accused (judgments in *M.A.S. and M.B., Kolev and Others* and *Di Puma and Zecca*).
- 17 After recalling that Article 19 TEU gives concrete expression to the value of the rule of law stated in Article 2 TEU and entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals, the referring court states that the principle of the effective judicial protection of individuals' rights under EU law, referred to in Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Article 47 of the Charter.
- 18 Every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection, the maintenance of that body's independence being essential.
- 19 The guarantee of independence, which is inherent in the task of adjudication, is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, but also at the level of the Member States as regards national courts (judgment in *Associação Sindical dos Juizes Portugueses*).
- 20 The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgments in *Wilson* and *Margarit Panicello*).
- 21 The Court has on several occasions emphasised the importance of the principle of *res judicata* (judgment in *Köbler*). It has, therefore, been held that EU law does not require a judicial body to go back on a judgment given, not even in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after delivery of that judgment which has acquired the authority of *res judicata* (judgment in *Impresa Pizzarotti*).
- 22 In the light of the Court of Justice's case-law interpreting the provisions held relevant by the referring court and having regard to the subject matter of the case

and the relevant facts, the answer to the **first question referred for a preliminary ruling** is necessary in order to clarify whether the Member States' obligations under Article 325(1) TFEU, and Article 1(1)(a) and (b) and Article 2(1) of the PFI Convention also concern the execution of criminal penalties already applied.

- 23 The referring court considers that it would be useful to interpret the phrase 'and any other illegal activities affecting the financial interests of the Union' in Article 325(1) TFEU, in order to examine whether it is possible to include within that phrase true acts of corruption and also fraud committed in the course of public procurement, in particular when the aim pursued was to obtain the reimbursement of sums which had been fraudulently allocated from European funds, even though those funds were not actually defrauded, in a context in which such facts constitute a particularly serious threat to the European Union's financial interests.
- 24 In the light of the Court's case-law, but also the importance in both the EU and national legal systems of the principle of legality (on the basis of which the law must be foreseeable, certain and not retroactive), by its **second question referred for a preliminary ruling** the referring court requests the Court to clarify whether the meaning of the concept of 'previously established by law' in Article 47(2) of the Charter precludes the interpretation provided by the Constitutional Court concerning the unlawful nature of the judicial body's composition.
- 25 The interpretation is necessary to allow the court to determine whether there is any bar on disapplying the decision on which the extraordinary action is based.
- 26 In the Court's case-law, it has thus been held that when the national courts having jurisdiction decide to disapply provisions of substantive criminal law, they are required to ensure that the fundamental rights of the persons accused of an offence are respected (judgment in *Taricco and Others*) and that those courts are free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised (judgments in *Åkerberg Fransson* and *M.A.S. and M.B.*).
- 27 Lastly, by its **third question referred for a preliminary ruling**, the referring court requests the Court to clarify whether it is necessary to disapply a decision of the Constitutional Court in order give full effect to EU law, in a situation in which the observance of EU law is mandatory for the court and its infringement constitutes a disciplinary offence.
- 28 In the Court's case-law, it has been held that a national court is under a duty to give full effect to EU law, if necessary refusing of its own motion to apply any conflicting provision of national law, and that any provision of a national legal system and any legislative, administrative or judicial practice which withholds that power from the court having jurisdiction is incompatible with the

requirements which are the very essence of EU law (judgments in *Simmenthal* and *Melki and Abdeli*).

- 29 An interpretation from the Court of Justice is necessary in order to clarify whether the judgment of the Constitutional Court, a court outside the judicial system, which has exclusive jurisdiction for constitutional disputes and whose rulings are binding *erga omnes*, forms part of those rulings which can and must be disapplied in order to give full effect to the provisions of EU law, in particular where there is a national rule which allows a disciplinary penalty to be imposed on a judge if he annuls their effects.
- 30 Such clarification is essential since, in the absence of an answer, there is a serious risk that, regardless of the answer to the first two questions, the judgment cannot be applied in national law.
- 31 The referring court draws the Court of Justice's attention to the interpretation according to which, given the importance of the principle of judicial independence, extending the connection with EU law also to cases in which national law alone is being applied is warranted, when such a principle is jeopardised by the effects of the decisions of a court, including those of the Constitutional Court.

The national court's view

- 32 In the national court's view, EU law precludes the application of a judgment of the Constitutional Court which has the effect of setting aside final judgments given by the five-judge Chamber and which deprives the penalties applied in a considerable number of serious fraud cases of their effectiveness and deterrence; such application affects the European Union's financial interests, and creates, on the one hand, the appearance of impunity and, on the other, a systemic risk of impunity as a result of time bar, given the complexity and duration of the proceedings until final judgment has been given following re-examination.
- 33 In addition, the principles of judicial independence and of certainty in legal relations preclude conferring binding effects in relation to decisions which have already become final as at the date of the Constitutional Court's decision, in the absence of serious grounds which call into question the observance of the right to a fair trial in the relevant cases.
- 34 Consequently, the interpretation provided by the administrative committee of ICCJ and incorporated into the Regulation on organisation and administrative functioning, uncontested and unanimously accepted by judicial practice, does not constitute a reasonable ground warranting such effects.
- 35 In addition, the decision to refer the ICCJ to the Constitutional Court, following which the judgment of 7 November 2018 was handed down, was referred to, in the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, as one

of the actions against the key judicial institutions with ‘clear implications for judicial independence’.

- 36 In the referring court’s view, EU law precludes attributing binding legal effects to a decision of a court, including that of a constitutional court, which removes the jurisdiction of a national court to assess whether the principle of primacy applies.
- 37 The application of the expedited procedure to the present case is warranted either in order to clarify swiftly the legal position of the individuals convicted in the proceedings, or by the fact that the passage of time creates risks concerning both the actual possibility of penalties being implemented, bearing in mind that one of the individuals convicted and sentenced is not in Romania, and the recovery of losses.

WORKING DOCUMENT