Provisional text

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 4 March 2021(1)

Joined Cases C-811/19 and C-840/19

Ministerul Public – Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Direcţia Naţională Anticorupţie
v
FQ,
GP,
HO,
IN
other party:
JM

(Request for a preliminary ruling from the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice, Romania))
and
Ministerul Public – Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție
v
NC

(Request for a preliminary ruling from the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice, Romania))

(Reference for a preliminary ruling – Protection of the European Union's financial interests – Article 325(1) TFEU – Criminal proceedings relating to corruption – Projects partially funded by European funds – National legislation establishing a specialisation requirement for judicial panels in corruption cases – Decision of a constitutional court ordering the re-examination at first instance of judicial decisions handed down by non-specialised panels – Right to a tribunal previously established by law – Second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union – Judicial independence – Second subparagraph of Article 19(1) TEU – Primacy of EU law – Disciplinary proceedings against judges)

I. Introduction

1. Is a judgment of a national constitutional court, which declares there to be a failure on the part of the national supreme court to comply with its legal obligation to establish specialist panels to deal at first instance with corruption offences, which leads to the re-examination of cases concerning corruption associated with the management of EU funds already adjudicated upon, compatible with EU law?

2. That is, in essence, the issue raised before this Court by the present cases. In relation to those facts, the referring court seeks to establish whether Article 325(1) TFEU, as well as the principle of judicial independence enshrined in the second subparagraph of Article 19(1) TEU and in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), preclude the adoption of such a constitutional decision. These cases also raise the question of whether the second paragraph of Article 47 of the Charter encompasses a requirement as to the specialisation of judges.

3. A number of the issues raised in the present cases overlap with those already addressed in parallel Joined Cases C-357/19 and C-547/19, *Euro Box Promotion and Others*, in which I deliver a separate Opinion today. (2) The present cases also share a number of features with other (multiple) requests for a preliminary ruling submitted to this Court by various Romanian courts over the course of 2019, for which I previously delivered the (lead) Opinion in *Asociaţia Forumul Judecătorilor din România and Others*. (3) In so far as the issues raised by the present cases have already been covered in those Opinions, I shall rely on my analysis already carried out.

II. Legal framework

A. EU law

1. The PIF Convention

4. The relevant provisions 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 ('the PIF Convention') (4) are reproduced in points 4 and 5 of the *Euro Box Promotion* Opinion.

B. Romanian law

1. Code of Criminal Procedure

5. Article 281(1)(a) of Legea nr. 135/2010 privind Codul de procedură penală (Law No 135/2010 laying down the Code of Criminal Procedure, 'the Code of Criminal Procedure'), entitled 'Absolute nullities', establishes amongst the grounds 'always causing nullification' the infringement of rules concerning the composition of judicial panels.

6. Article 421(2)(b) of the Code of Criminal Procedure, entitled 'Solutions when ruling on an appeal', provides: 'A court, ruling on an appeal, shall give one of the following solutions:

…

set aside the judgment at first instance and order that the case is to be referred back to the court whose decision has been annulled on the ground, relied on by one of the parties, that the proceedings before that court took place in the absence of that party, who either was not lawfully summoned or, if he or she was summoned lawfully, was unable to enter an appearance and to inform the court of that inability. The referral of the case back to the court whose decision has been annulled shall also be ordered where one of the cases of absolute nullity is present, except in the case of a lack of jurisdiction, in which case the case shall be referred to the court having jurisdiction.'

7. Article 426(1), Article 428(1) and Article 432(1) of the Code of Criminal Procedure are reproduced in points 12 to 14 of the *Euro Box Promotion* Opinion.

2. Criminal Code

8. Articles 154 and 155 of Legea nr. 286/2009 privind Codul penal (Law No 286/2009 on the Criminal Code), of 17 July 2009, as subsequently amended and supplemented, which are the relevant provisions regarding the regime of time limitations, are reproduced in points 15 and 16 of the *Euro Box Promotion* Opinion.

3. Law No 78/2000

9. Pursuant to Article 5(1) of Legea nr. 78/2000 pentru prevenirea, descoperirea şi sancţionarea faptelor de corupţie (Law No 78/2000 on the prevention, detection and punishment of acts of corruption, 'Law No 78/2000'), 'for the purposes of this Law, the offences set out in Articles 289 to 292 of the Criminal Code are corruption offences, including when they are committed by the persons referred to in Article 308 of the Criminal Code'.

10. Article 29 of Law No 78/2000, as amended by Law No 161/2003, states that 'specialist panels shall be established to adjudicate at first instance on the offences provided for in this law'.

4. Law No 304/2004

11. Under Article 19(3) of Legea nr. 304/2004 privind organizarea judiciară (Law No 304/2004 on the organisation of the justice system, 'Law No 304/2004'), (5) 'at the beginning of each year the governing council of the Înalta Curte de Casație și Justiție [(High Court of Cassation and Justice, Romania; the HCCJ)] … may approve the establishment of specialist panels within the chambers of the [HCCJ] …'.

5. Law No 303/2004

12. Pursuant to Article 99(ș) of Legea nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 303/2004 on the rules governing judges and prosecutors, 'Law No 303/2004'), (6) the failure to comply with decisions of the Curtea Constituțională [(Constitutional Court, Romania)] …' constitutes a disciplinary offence.

III. Facts, national proceedings and the questions referred

A. Case C-811/19

13. By judgment of 8 February 2018, delivered by a panel composed of three judges sitting in the Criminal Chamber of the HCCJ, the defendants were sentenced at first instance to terms of imprisonment of between two and eight years for committing offences including acts of corruption (trafficking of influences), money laundering, forgery of documents and offences akin to corruption.

14. The charges brought against the defendants related to a procedure for the award of three public contracts initiated in 2009 by SC Compania de Apă Olt SA with a view to carrying out works upgrading and extending the water and sewage system of various locations. The public contracts were part of a project that was mainly funded (82%) by European funds in the framework of the sectoral operational programme 'Environment'. It was held, inter alia, regarding the offence of corruption, that the first defendant, who had formerly held the positions of mayor, senator and minister, accepted the promise of payment by the director of a company of a sum equal to 20% of the total value of the three public contracts in question. He thus effectively received an amount totalling 6 200 000 Romanian lei (RON) (EUR 1 500 000) in return for influencing members of the adjudicating bodies within SC Compania de Apă Olt SA, officials of the Consiliul Național pentru Soluționarea Contestațiilor (National Council for Dispute Resolution, Romania), and judges of a court of appeal.

15. Four of the five defendants ('the appellants' in the main proceedings), as well as the Ministerul Public – Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Direcţia Naţională Anticorupţie (Public Ministry – The Prosecutor's Office attached to the High Court of Cassation and Justice – National Anti-corruption Directorate, Romania; 'the Public Prosecutor'), lodged an appeal against the judgment of 8 February 2018 before a panel of five judges sitting in the Criminal Chamber of the HCCJ.

16. While the appeal proceedings were ongoing, the Curtea Constituțională a României ('the Constitutional Court') delivered its Decision No 417 of 3 July 2019 ('Decision No 417/2019'). (7) In that decision, issued in the context of proceedings initiated by application submitted by the President of the Chamber of Deputies, the Constitutional Court declared the existence of a legal conflict of a constitutional nature between the Parliament, on the one hand, and the HCCJ, on the other, due to the failure of the HCCJ to establish specialised panels to deal with corruption offences at first instance, in breach of Article 29(1) of Law No 78/2000.

17. The Constitutional Court found that a decision in a case handed down by a non-specialised panel leads to the setting aside of the judgment pursuant to Article 281(1)(a) of the Code of Criminal Procedure. The latter provision expressly provides that the infringement of provisions relating to the composition of judicial panels be penalised by the setting aside of the decision. As such, the cases before the HCCJ, which had been decided by panels of three judges of that court at first instance prior to 23 January 2019 (the date on which the specialist panels were established), in so far as they had not become *res judicata*, would have to be re-examined at first instance by specialist panels, in accordance with Article 421(2)(b) of the Code of Criminal Procedure.

18. Following publication of Decision No 417/2019, the appellants sought recognition of the binding character of that decision, as well as recognition of the fact that it produces effects in respect of the judgment under appeal in the main proceedings. They claim that, according to Decision No 417/2019, the judgment under appeal is null and void. The panel of three judges which delivered judgment at first instance in the main proceedings did not specialise in corruption offences.

19. The referring court considers that Decision No 417/2019 of the Constitutional Court, which has the effect of setting aside judgments delivered at first instance within a specific period by panels of three judges sitting in the Criminal Chamber of the HCCJ, infringes the principle of effectiveness of criminal penalties in the case of serious illegal activities affecting the financial interests of the Union. The reason for this is that, on the one hand, the appearance of impunity is created and, on the other, a systemic risk of impunity arises as a result the proceedings being time-barred, given the complexity and duration of the proceedings until final judgment has been given following re-examination.

20. In addition, the referring court considers that the EU principle of judicial independence precludes the establishment, by judgment of a judicial body outside the judicial system, of procedural measures requiring the re-examination at first instance of certain cases, thus calling into question criminal charges, in the absence of serious grounds. The composition of the panels of the Criminal Chamber of the HCCJ by judges who specialise in dealing with criminal cases cannot be regarded as infringing the right to a fair hearing and the right of access to justice. The referring court thus considers that EU law precludes attributing binding legal effects to a decision of a judicial body, such as the Constitutional Court, which removes the jurisdiction of a national court to assess whether the principle of primacy applies.

21. In those circumstances, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 19(1) [TEU], Article 325(1) [TFEU], Article 58 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [(OJ 2015

L 141, p. 73)], Article 4 of 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)], be interpreted as precluding the adoption of a decision by a body outside the judicial system, the [Constitutional Court], which adjudicates on a procedural objection alleging that the composition of the panel seised of the case is unlawful, in the light of the principle that the judges of the [HCCJ] must be specialised (not provided for in the Romanian Constitution), and which obliges a judicial body to refer cases which are at the (full-merits) appeal stage for re-examination within the first procedural cycle before the same court?

(2) Must Article 2 [TEU] and [the second paragraph of] Article 47 of [the Charter] be interpreted as precluding a body outside the judicial system from declaring unlawful the composition of the panel seised of the case of a chamber of the supreme court (panel composed of judges in office who, at the time of their promotion, satisfied, inter alia, the specialisation requirement laid down for promotion to the Criminal chamber of the supreme court)?

(3) Must the principle of the primacy of European Union law be interpreted as permitting a national court to disapply a decision of the constitutional court which interprets a rule of lower ranking than the Constitution, concerning the organisation of the [HCCJ], contained in domestic legislation on the prevention, detection and punishment of offences of corruption, a rule which has been consistently interpreted in the same way, for 16 years, by a court?

(4) On a proper interpretation of Article 47 of [the Charter][,] [d]oes the principle of unfettered access to justice encompass the specialisation of judges and the establishment of specialist panels in a supreme court?'

B. Case C-840/19

22. By judgment of 26 May 2017, a former minister and Member of the Parliament was sentenced to a term of imprisonment of four years for corruption involving EU funds. That judgment was delivered by a panel of three judges sitting in the HCCJ.

23. The defendant promised to intervene with the mayor of the city of Iași (Romania) on behalf of a third party, who is now a witness for the prosecution in the main proceedings. The defendant was to persuade the mayor to agree to the signature of a contract relating to a road transport management project with the third party's company, and also to ensure the unhindered performance of the contract in exchange for a commission of 5% of the value of that contract. The contract at issue had an estimated value of RON 69 614 309 (excluding value added tax). It was financed by EU funds in the framework of a regional operational development programme. A sum in the amount of RON 3 400 000 was effectively paid to the defendant. That judgment also ordered the confiscation of RON 303 118 (approximately EUR 68 000) and EUR 30 000 from the defendant.

24. At first instance, the defendant ('the appellant' in the main proceedings) and the Public Prosecutor lodged an appeal against that judgment with the panel of five judges sitting in the Criminal Chamber of the HCCJ. By judgment of 28 June 2018, that panel partially allowed the appeal lodged by the appellant and annulled the measure relating to the confiscation of the sum of EUR 30 000, but upheld the sentence of four years' imprisonment imposed on the appellant.

25. Once that judgment had become final, Decision No 685/2018 of the Constitutional Court was published. (8) By that decision the Constitutional Court declared that there was a legal conflict of a constitutional nature between the Parliament, on the one hand, and the HCCJ, on the other, due to the fact that only four members of the panel of five judges were determined by the drawing of lots. As regards the effects of that finding, the Constitutional Court stated that Decision No 685/2018 also applies to final judgments, in so far as the time limits for the parties to bring extraordinary appeals have not yet expired.

26. Following the publication of Decision No 685/2018 of the Constitutional Court, both the appellant and the Public Prosecutor lodged an extraordinary appeal seeking the annulment of the judgment of 28 June 2018.

27. By judgments of 25 February 2019 and 20 May 2019 respectively, the panel of five judges of the HCCJ granted, following Decision No 685/2018 of the Constitutional Court, the action for annulment. It set aside the judgment of 28 June 2018 in its entirety and ordered re-examination of the appeals lodged by the appellant and the Public Prosecutor against the judgment of 26 May 2017.

28. Whilst the re-examination of those appeals was pending, the Constitutional Court delivered Decision No 417/2019. Following the publication of that judgment, the appellant sought recognition of the fact that it is binding and produces effects in respect of the judgment of 26 May 2017, since the panel of three judges which had delivered it did not specialise in corruption offences.

29. In those circumstances, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 19(1) [TEU], Article 325(1) [TFEU], and Article 4 of [Directive 2017/1371], adopted pursuant to Article 83(2) [TFEU], be interpreted as precluding the adoption of a decision by a body outside the judicial system, the [Constitutional Court], which requires re-examination of corruption cases decided within a specific period, and which are at the appeal stage, on grounds of failure to establish, within the supreme court, panels seised of the cases which specialise in that field, also recognising the speciality of the judges of which they were composed?

(2) Must Article 2 [TEU] and [the second paragraph of] Article 47 of [the Charter] be interpreted as precluding a body outside the judicial system from declaring unlawful the composition of the panel seised of the case of a chamber of the supreme court (panel composed of judges in office who, at the time of their promotion, satisfied, inter alia, the specialisation requirement laid down for promotion to the supreme court)?

(3) Must the primacy of Europe Union law be interpreted as permitting a national court to disapply a decision of the constitutional court delivered in a case relating to a constitutional dispute, which is binding under national law?’

C. The procedure before the Court

30. The referring court requested the application of the expedited procedure pursuant to Article 105(1) of the Rules of Procedure of the Court of Justice in both Cases C-811/19 and C-840/19. By decisions of 28 November 2019 and 16 December 2019, the President of the Court granted the application for an expedited procedure with regard to Case C-811/19 and Case C-840/19, respectively. By decision of the President of the Court of 26 February 2020, those cases were joined for the purposes of the oral procedure and the judgment.

31. In Case C-811/19, the following parties submitted written observations: the first appellant, the Public Prosecutor, the Polish and Romanian Governments, as well as the European Commission.

32. In Case C-840/19, the following parties submitted written observations: the appellant, the Public Prosecutor, the Romanian and Polish Governments, as well as the Commission.

33. The first appellant in Case C-811/19, the appellant in Case C-840/19, the Public Prosecutor, the Romanian Government and the Commission replied to the questions for written answer put to them by the Court.

IV. Analysis

34. This Opinion is structured as follows. First, I shall address the objections to the admissibility of the questions referred for a preliminary ruling raised by the interested parties (A). Second, I shall briefly set out the EU legal framework, identifying the relevant EU law provisions applicable to the present cases (B). Third, I shall carry out the assessment of the substance of the questions referred to the Court (C).

A. Admissibility of the questions referred

1. Case C-811/19

35. The Polish Government submits that the questions in Case C-811/19 are inadmissible. According to that government, the referring court is not asking for the interpretation of EU law but is in fact requesting a review of the substance of a judgment of a national court. In the framework of the preliminary ruling procedure, it is not for the Court to review the substance of national courts' decisions, ruling on whether national courts are obliged to follow the decisions of other national courts. Moreover, that government submits that the answer of the Court to the questions referred is not necessary for the resolution of the dispute in the main proceedings. The main proceedings concern a purely internal situation which has no impact upon any area in which the Union has any competence. Furthermore, the Charter applies only where Member States are implementing EU law, which is not the case here.

36. In my view, the objections of the Polish Government cannot be upheld.

37. First, the arguments concerning the lack of competences of the Union in the field of judicial organisation concern the jurisdiction of the Court and not the admissibility of a request for a preliminary ruling. In any case, the Union has indeed no direct legislative competence in the field of general judicial organisation. It is, nonetheless, also clear that Member States are under the obligation to comply with, inter alia, the requirements of Article 2 and Article 19(1) TEU, Article 325(1) TFEU, as well as Article 47 of the Charter, when they draft their rules and embrace practices that impact on the national application and enforcement of EU law. That logic is not *area dependent*. It is, and it has always been with regard to EU limits on default national procedural autonomy, *incidence dependent*. It may relate to any element of national structures or procedures used for national enforcement of EU law.

38. It is sufficient to note therefore that the request for a preliminary ruling concerns specifically the interpretation of the scope of EU law, in particular, of Article 2 and Article 19(1) TEU, Article 325(1) TFEU, Directives 2015/849 and 2017/1371 as well as Article 47 of the Charter, so that the Court has jurisdiction to provide a ruling on that request in its entirety. (9)

39. Second, as regards the issue of whether the Court's response is necessary for the referring court to adjudicate in the main proceedings for the purposes of Article 267 TFEU, (10) it should be noted that all the questions referred in Case C-811/19 are raised in the framework of the analysis of the appeals pending before the referring court. From the explanations provided by that court, it follows that its decision on whether to annul the first-instance judgment and remit the cases for re-examination to a (first-instance) panel of three judges depends on the answers provided by this Court to the questions referred. The aim of those questions is precisely to determine whether the decision of the Constitutional Court which imposes the re-examination of cases is in compliance with other provisions of EU law, the interpretation of which is requested (Questions 1, 2 and 3), and whether such a decision can be left disapplied on the basis of the principle of primacy of EU law (Question 4).

40. In the light of the foregoing considerations, it appears that the questions referred for a preliminary ruling fulfil the requirement of 'necessity' for the purposes of Article 267 TFEU. They are thus admissible.

2. Case C-840/19

41. Regarding the admissibility of the questions referred for a preliminary ruling in Case C-840/19, the Polish Government submits observations which are, in essence, identical to those in Case C-811/19.

42. The appellant maintains that there is no 'necessity' for a preliminary ruling pursuant to Article 267 TFEU. The HCCJ is merely called upon to adjudicate on a procedural matter, which consists in declaring the absolute nullity of the judgment under appeal. That issue does not require a preliminary ruling from the Court. Furthermore, the appellant argues, with regard to the second question, that it does not pose a problem in connection with the interpretation of EU law applicable to the main proceedings. Similar arguments are put forward with regard to the third question.

43. Furthermore, the appellant also submits that the facts in the order for reference have been misrepresented by the inclusion of elements external to the relevant file in the main proceedings in order that a link to the financial interests of the Union might be created for the purpose of ensuring the admissibility of the request for a preliminary ruling. Neither the charges brought against him, nor his sentence at first instance, relate specifically to an offence of corruption in the framework of public procurement of contracts financed by EU funds. The information used by the referring court originates from a different criminal case, to which he is not a party. In the same vein, the appellant submits, with regard to the first question, that the referring court has provided incomplete information with regard to the national legal framework. Similarly, the information concerning the Constitutional Court and its ruling in Decision No 417/2019 is incomplete and partially inaccurate.

44. In my view, none of the arguments put forward in order to contest the admissibility can succeed.

45. First, the considerations made above in points 37 to 40 of this Opinion, which relate both to the jurisdiction of the Court and to the 'necessity' of the answers provided by the Court for the purposes of Article 267 TFEU in Case C-811/19, are also applicable with regard to virtually the same arguments submitted in Case C-840/40.

46. Second, the additional arguments put forward by the appellant regarding the admissibility of the questions cannot be upheld either.

47. With regard to the first group of arguments, it must be recalled that proceedings under Article 267 TFEU are based on a clear separation of functions between the national courts and the Court. The referring court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. It is not for this Court to verify the accuracy of the legislative and factual context, which the national court is responsible for defining. (11) Furthermore, as regards the arguments concerning the absence of the link between the present case and the financial interests of the Union, it must be noted that the aim of the first question is precisely to establish whether Article 325(1) TFEU applies in a situation such as that at issue in the main proceedings.

48. As a result, the questions referred in Case C-840/19 are admissible.

B. Applicable EU law

49. By the various questions referred in the Joined Cases before this Court, the HCCJ enquires essentially about the interpretation of Article 2 and Article 19(1) TEU, Article 47 of the Charter, Article 325(1) TFEU, as well as of Directives 2015/849 and 2017/1371. I shall start by analysing which of those EU law provisions are relevant for the purposes of the present proceedings.

1. Article 2 and Article 19(1) TEU

50. As set out in the *AFJR* Opinion (12) and in the *Euro Box Promotion* Opinion, (13) as the case-law of this Court currently stands, the second subparagraph of Article 19(1) TEU is applicable where a national body *may* rule, as a court or tribunal, on questions concerning the application or interpretation of EU law. (14) There can be little doubt that the HCCJ, which is the judicial body whose independence

could possibly be affected by the decision of the Constitutional Court at issue in this case, is a national judicial body called upon to rule, as a court or tribunal, on questions concerning the application or interpretation of EU law.

51. Furthermore, concerning Article 2 TEU, referred to in the second questions in both Case C-811/19 and Case C-840/19,it does not appear necessary to conduct a distinct analysis of that provision for the purpose of these cases. The rule of law, as one of the values upon which the Union is founded, is safeguarded through the guarantee of the right to effective judicial protection and the fundamental right to a fair trial, which in turn have, as one of their inherent components, the principle of independence of courts. (15) Article 47 of the Charter, as well as the second subparagraph of Article 19(1) TEU, give therefore more precise expression to that dimension of the value of the rule of law set out in Article 2 TEU. (16)

2. The MCV Decision (and the Charter)

52. Similar to *Euro Box Promotion and Others* (C-357/19 and C-547/19), the two orders for reference in the present cases do not pose specific questions with regard to Commission Decision 2006/928/EC of 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 ('the MCV Decision'). (17) That decision has nonetheless formed the basis of all the previous cases dealt with in the first group of cases (*AFJR* and in a parallel case *Statul Român – Ministerul Finanţelor Publice* (18)). It is also invoked in another case in the second group of cases, namely in Case C-379/19, *DNA- Serviciul Teritorial Oradea*, in which I deliver a parallel Opinion today.

53. With the exception of the first appellant in Case C-811/19, all the interested parties that replied to the questions for written answer put by the Court agreed that the MCV Decision, taking into account, in particular, benchmarks Nos 1 and 3 of its annex, is applicable with regard to the issues raised in the present cases relating to the fight against corruption, the rule of law and the guarantee of the independence of the judiciary.

54. For the reasons that I set out in detail in the *Euro Box Promotion* Opinion, (19) that are also fully applicable to the present cases, including the fact that the national provision at issue is the decision of a national constitutional court, the MCV Decision is applicable to the present cases as well. Article 47 of the Charter also becomes applicable, by virtue of the fact that its scope is triggered by the MCV Decision pursuant to Article 51(1) of the Charter.

3. Article 325(1) TFEU (and the Charter)

55. According to Article 325(1) TFEU, the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures which shall act as a deterrent and be such as to afford effective protection in the Member States. The applicability of Article 325(1) TFEU presupposes therefore the existence of fraud or any other illegal activities liable to affect the financial interests of the Union. This begs the question of whether this is the case vis-à-vis the circumstances underlying the present cases.

56. In my view, the answer to this question is yes. First, Article 325(1) TFEU is applicable to *offences relating to corruption* in connection with *projects financed by EU funds* (a). Second, the fact that the charges brought against the appellants in the main proceedings do not concern offences that contain an explicit reference to the financial interests of the Union is not relevant in this regard (b).

(a) Article 325 TFEU (and the PIF Convention) apply in connection with corruption relating to EU funds

57. In his replies to the questions put to him by the Court, the first appellant in Case C-811/19 submits that Article 325(1) TFEU does not apply in his case. Not all offences of corruption linked to projects

financed by EU funds affect the financial interests of the Union. Article 325(1) TFEU establishes the obligation to impose criminal penalties only in cases of serious fraud covered by the PIF Convention. Furthermore, the first appellant states that it has not been argued that the award of the contracts, in respect of which he was convicted of trafficking influence, directly or indirectly disregarded the rules on the allocation of funds or on public procurement. Moreover, he states that the PIF Convention and its Protocols do not apply because his case does not have any cross-border element, and that he has not been charged either with offences of passive corruption covered by the First Protocol to the PIF Convention, or with the offence of money laundering in connection to a serious fraud within the meaning of the PIF Convention.

58. The appellant in Case C-840/19, the Romanian Government, the Public Prosecutor and the Commission have submitted in their replies to the questions put to them by the Court that Article 325(1) TFEU and, in particular, the expression, 'other illegal activities', covers corruption offences associated with projects or contracts financed by EU funds.

59. I entirely agree. For the reasons that I have explained in detail in the *Euro Box Promotion* Opinion, (20) 'other illegal activities' in Article 325(1) TFEU may cover any corruption offences committed in relation to the spending of EU funds.

60. The additional arguments put forward by the first appellant in Case C-811/19 appear, in this connection, deprived of relevance. First, there is nothing to support his statement that only cases of serious fraud covered by the PIF Convention fall within the scope of Article 325(1) TFEU. Rather to the contrary, the expression 'any other illegal activities' contained in Article 325(1) TFEU confirms the broader scope of this provision. (21)

61. Second, that very expression 'any other illegal activities' does not require, in the field of acts of corruption associated with the management or award of projects financed by EU funds, that an additional infringement of EU rules relating to the award of EU funds or to public procurement must be given. As the referring court explains in both orders for reference, the first appellant in Case C-811/19, as well as the appellant in Case C-840/19, have obtained, through their conduct giving rise to the offences at issue, a significant percentage of the value of the public projects financed (to a great extent) by EU funds. Against that background, it follows that the corruption offences at issue harm the financial interests of the Union, as they entail a serious interference with the lawful award of projects funded by EU funds, and therefore, to the correct allocation and use of such funds.

62. Third, Article 325(1) TFEU does not require a cross-border connection in order to be applicable. Fourth, it is for the national court to ascertain whether the offences at issue fall within any of the specific provisions of the PIF Convention and its Protocol (with regard to offences relating to corruption). The applicability of those instruments notwithstanding, the offences at issue, in particular the trafficking of influences with regard to the award of a public contract financed by EU funds, is in itself covered by the expression 'other illegal activities' of Article 325(1) TFEU, and by that token falls already within the scope of EU law.

(b) The connection between the criminal charges and the financial interests of the Union

63. The first appellant in Case C-811/19 and the appellant in Case C-840/19 have submitted in their written replies to the questions put to them by the Court that Article 325(1) TFEU requires that the link between the offences and the financial interests of the Union must expressly follow from the definition of the offence. The first appellant in Case C-811/19 submits that only such an approach could guarantee the rights of the defence. The appellant in Case C-840/19 submits that neither the charges brought nor the judgments delivered against him refer specifically to fraud in relation to EU-funded projects. Even though specific offences relating to the financial interests of the Union exist in the Romanian legal order, the appellant has not been charged with those offences. (22)

64. I do not agree with that view.

65. First, the scope of Article 325(1) TFEU cannot be limited to the effective enforcement of the specific offences introduced in the national legal order that make *express* reference to the financial interests of the Union or even to EU funds. That would make the scope of that EU law provision of primary law dependent on the national definition of specific crimes.

66. As the Commission, the Romanian Government and the Public Prosecutor have rightly pointed out, whether the financial interests of the Union have been affected or not should not depend on the express definition of a given offence under national law. It must be assessed with the broader factual framework in mind. Indeed, as the Romanian Government submits, national financial interests and the financial interests of the Union are often interlinked. Under national law, the relationship between general offences and those specifically concerning the financial interests of the Union cannot be the subject of a clear-cut division, once the funds are administered by the same body and become intertwined in various co-funded projects.

67. Second, with regard to the requirement to respect the rights of the defence, I fail to see how the fact that Article 325(1) TFEU might be applicable would (automatically) amount to an(y) infringement of the right to a defence.

68. Third and finally, I shall recall that the finding of applicability of Article 325(1) TFEU and possibly also of Article 2(1) of the PIF Convention, and eventually, of Article 2(1) of the Protocol to the PIF Convention leads, as a direct consequence, to the applicability of the Charter. Indeed, since the penalties and criminal proceedings to which the defendants have been or are subject to in the main proceedings constitute an implementation of Article 325(1) TFEU and, subject to the verifications to be carried out by the national court, of the PIF Convention and its Protocol, the Charter is applicable, pursuant to its Article 51(1). (23)

4. Directive 2015/849 and Directive 2017/1371

69. The first questions in both Case C-811/19 and Case C-840/19 refer to Article 4 of Directive 2017/1371 amongst the potentially applicable EU law provisions. Additionally, the first question in Case C-811/19 also refers to Article 58 of Directive 2015/849.

70. In their replies to the questions put by the Court, the interested parties have submitted different views regarding the applicability of Directive 2015/849 and Directive 2017/1371. However, as the Romanian Government notes, according to the information provided to this Court, the facts giving rise to the prosecution in the main proceedings *predate* the entry into force of both directives. It would thus appear that as a result, both directives are inapplicable to the circumstances of the main proceedings in both cases.

5. Interim conclusion

71. In summary, the MVC Decision and Article 325(1) TFEU, together with the second paragraph of Article 47 of the Charter, as well as, subject to the verifications by the national court, the PIF Convention and its Protocol, constitute relevant provisions for both Cases C-811/19 and C-840/19.

72. The second subparagraph of Article 19(1) and Article 2 TEU are also applicable to the present cases. However, it is difficult to see what additional content or clarity those provisions would bring to these cases, which is not already contained in the more specific provisions cited above. (24) For that reason, the second paragraph of Article 47 of the Charter shall be taken as the relevant legal framework, since both the MCV Decision, and Article 325(1) TFEU, trigger the applicability of the Charter.

C. Assessment

73. In order to address the questions referred in the present cases, I shall start by briefly setting out the national legal context (1). Second, I shall address the second questions in Cases C-811/19 and C-840/19, as well as the fourth question in Case C-811/19, concerned with the interpretation of Article 47 of the

Charter. In particular, I shall consider whether that provision requires the specialisation of judges (2). Third, I shall examine the first question in both cases, approached primarily from the point of view of Article 325(1) TFEU (3), before briefly dwelling on the principle of judicial independence (4). I shall conclude with the principle of primacy of EU law, responding thus to the third question in both cases (5).

1. The national legal context

74. Article 29 of Law No 78/2000, as amended by Law No 161/2003, provides that specialist panels shall be established to adjudicate at first instance on the corruption offences provided for in that law. It would appear that those panels were not established by the HCCJ until the adoption of Decision No 14 of the Governing Council of the HCCJ of 23 January of 2019 ('Decision No 14/2019').

75. According to the referring court in Case C-840/19, it follows from the case-law of the HCCJ concerning the composition of judicial panels adjudicating at first instance on the offences provided for in Law No 78/2000, that all the judges of the Criminal Chamber of the HCCJ are competent to hear at first instance all cases that fall within the jurisdiction of that court.(25) As a result, and on the basis of its interpretation of Article 19(3) of Law No 304/2004 and of Article 29 of Law No 78/2000, and also in view of the case-law of the European Court of Human Rights ('the ECtHR'), the HCCJ has found pleas relating to the unlawful composition of panels of three judges, based on the specialisation requirement, to be unfounded. There was thus no need to apply the sanction of absolute nullity.

76. By its Decision No 14/2019, the Governing Council of the HCCJ established that all panels of the HCCJ adjudicating on criminal matters were specialised panels on corruption offences, so that all panels of three judges of the HCCJ would continue to operate as specialised panels pursuant to Article 29(1) of Law No 78/2000.

77. Following an action introduced by the President of the Chamber of Deputies, the Constitutional Court, by its Decision No 417/2019, identified the existence of a legal conflict of a constitutional nature between the Parliament and the HCCJ. That conflict was caused because the HCCJ had not set up specialised panels to rule at first instance on corruption offences, contrary to what was provided for by Article 29(1) of Law No 78/2000, as amended by Law No 161/2003. The refusal of the HCCJ to establish specialised panels disregarded its obligation to respect the law, in contravention of the requirements of the rule of law and constitutional loyalty, and amounted to an interference with the institutional role of the Romanian Parliament as legislator. The Constitutional Court also declared that this refusal infringed the provisions of the Romanian Constitution relating to the right to a fair trial with regard to the right to a tribunal established by the law. (26)

78. The operative part of Decision No 417/2019 held that the cases pending before the HCCJ, which were adjudicated on at first instance before Decision No 14/2019 of the Governing Council of the HCCJ was taken, and where no final judgment had been taken, were to be re-examined, according to Article 421(2)(b) of the Code of Criminal Procedure, by specialised panels composed in accordance with Article 29(1) of Law No 78/2000.

79. The Constitutional Court stated that the adjudication of a case by a non-specialised formation, where the competence belonged to a specialised panel, would lead to the absolute nullity of the decision. According to Article 281(1)(a) of the Code of Criminal Procedure, the infringement of the rules on the composition of a judicial panel leads to absolute nullity. (27)

80. The Constitutional Court further noted that the specialisation of judges of the HCCJ with regard to corruption offences was not provided for in any legal provision and that there was an obligation to determine the specialisation of judges or of at least some of them. The possibility to consider all judges as 'specialised', in the light of their education and expertise, was not excluded, but the Constitutional Court found that that aspect should, however, be established. Therefore, even though all the judges of the HCCJ could be considered as specialised in the field of the offences covered by Law No 78/2000 and be eligible to sit on specialised panels because they have the required professional expertise, that does not mean that

all the judicial panels composed of those judges are competent to adjudicate on those offences. The fact that all judges are specialised simply means that when such panels are appointed, the choice of judges will include all of them.

81. However, with regard to *the situation following* the adoption of *Decision No 14/2019* of the Governing Council of the HCCJ, the Constitutional Court noted that even if there was lack of transparency in the establishment of the specialisation of panels brought about by that decision, following that decision, there was no longer any infringement of the Constitution. Thus, for the period following Decision No 14/2019, the objective of the law had been attained and there was no longer any infringement. (28)

82. In terms of its procedural consequence, Decision No 417/2019 of the Constitutional Court meant that all the corruption cases adjudicated on in the period before the entry into force of the specialisation rule of Law No 78/2000 (in 2003) and the adoption of Decision No 14/2019 (in 2019) at first instance by panels of three judges of the HCCJ, which have not become final, are to be re-examined at first instance. However, following Decision No 14/2019, which determined that all criminal panels of the HCCJ were panels specialised on corruption, all panels of three judges of the HCCJ would continue to operate as specialised panels pursuant to Article 29(1) of Law No 78/2000 after Decision No 417/2019 of the Constitutional Court.

83. In summary, assuming that I understood the national context correctly, what appears to lie at the heart of the matter is the *absence of formal designation*. However, once the HCCJ formally determined that all its criminal panels were panels specialised on corruption, the same panels in exactly same composition became lawfully composed.

2. Specialisation of judges and the right to a tribunal previously established by the law

84. By its fourth question, the referring court in Case C-811/19 asks whether Article 47 of the Charter encompasses a requirement as to the specialisation of judges and the establishment of specialist panels in a supreme court, such as the HCCJ. The second questions in Cases C-811/19 and C-840/19 ask, in essence, whether the second paragraph of Article 47 of the Charter is to be interpreted as precluding Decision No 417/2019 of Constitutional Court.

85. These questions have two separate layers. First, is the judicial specialisation part of the (autonomous) standard of Article 47 of the Charter, of which the failure to respect would entail incompatibility with EU law? Second, would Article 47 of the Charter preclude a declaration of unlawfulness based on the ground that a national legal provision requiring the specialisation of judges was not satisfied, thus potentially raising issues in terms of the right to a national definition of what is a ‘tribunal previously established by law’?

86. In my view, the answer to these questions is a double ‘no’. In order to explain why I believe that to be the case, it is first necessary to analyse what precisely is the standard flowing from the second paragraph of Article 47 of the Charter (a). I shall then assess whether that provision is to be interpreted as precluding the decision of the Constitutional Court at issue (b).

(a) The EU law standard

87. First, to my mind, there is no EU law requirement as to the specialisation of judges or of judicial panels that could be embodied in Article 47 of the Charter, whether it be in cases of corruption, in relation to the protection of the financial interests of the Union, or in other fields of EU law for that matter.

88. Certainly, one should insist that proven legal competence and qualifications form part of necessary requirements for judicial appointments. Failure in that regard could possibly lead to problems in terms of judicial impartiality and independence. True, technically speaking, an incompetent judge can still be independent, sometimes even remarkably independent. However, it is still fair to assume that incompetent judges are not ideal for the defence and preservation of judicial independence in long run.

89. There appears to be a striking diversity at the national level in so far as the existence of any judicial specialisation is concerned. A number of the Member States have indeed embraced advanced levels of judicial specialisation. Others have not. In addition, the rules might vary within the same legal order: often, the higher a case progresses within the judicial hierarchy, the less specialisation there is likely to be. Nevertheless, certain systems do in fact maintain a high degree of judicial specialisation even at supreme court level.

90. The same diversity is also visible in the case-law, or rather in the silence found therein on the topic of judicial specialisation, be it under Article 47 of the Charter, or under Article 6 of the European Convention on Human Rights (ECHR). When asked about any authority on the argument that there is a legal principle of specialisation of judges, the appellant in Case C-840/19 cited, in his replies to the questions of the Court, a decision of the ECtHR concerning a different matter (29) along with several non-binding documents issued by international bodies that praise and encourage judicial specialisation in certain circumstances as helpful and desirable. (30) However, those documents are very far from constituting elements that would support the argument that the specialisation of judicial panels is a requirement the absence of which would amount to an infringement of the requirements of Article 47 of the Charter (or of Article 6 ECHR).

91. Second, there is another additional layer to this issue: the right to a 'tribunal previously established by law' in accordance with Article 47 of the Charter. Indeed, despite the fact that the requirement of specialisation of judicial panels does not form part of the standard of protection granted by Article 47 of the Charter, where such a requirement is established by national rules, it could form part of the right to a 'tribunal previously established by law'.

92. The main elements of the EU law standard of protection that follow from the second paragraph of Article 47 of the Charter have been outlined in points 136 to 143 of the *Euro Box Promotion* Opinion. I will simply limit myself here to recalling two essential elements.

93. First, the right to a 'tribunal previously established by law' is necessarily determined by reference to national law. Thus, national rules may indeed become relevant by a cross-reference.

94. Second, from the EU point of view, and in close connection to the approach taken by the ECtHR on that matter, it does not appear that *any infringement* of national rules governing the composition of a judicial panel would automatically lead to an infringement of Article 47 of the Charter. Indeed, as it appears from *Simpson*, irregularities may entail an infringement of the first sentence of the second paragraph of Article 47 of the Charter 'particularly when that irregularity is of *such a kind and of such gravity* as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge or judges concerned …' The Court noted that that would be the case 'when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system'. (31)

(b) Analysis

95. First, as noted above, and also in line with the submissions of the Romanian Government, the Public Prosecutor and the Commission, the requirement of specialisation is not encompassed, per se, by the standard of Article 47 of the Charter. The suggestions that there is a principle of specialisation of judges forming part of the standard of Article 47 of the Charter can thus be put to rest.

96. Second, however, the first appellant in Case C-811/19 submits in his replies to the Court's questions that, since the right to a 'tribunal previously established by law' refers to national legislation, the second paragraph of Article 47 of the Charter, which must respect the minimum standard granted by Article 6 ECHR, cannot impose a standard based on criteria which differ from the guarantees at national level. Furthermore, he submits that Decision No 417/2019 found that the HCCJ had flagrantly infringed the legal provisions relating to the requirement of specialisation.

97. In my view, that argument cannot be upheld.

98. The autonomous and independent nature of the content of Article 47 of the Charter, which must indeed, pursuant to Article 52(3) of the Charter, grant the same or higher protection as the corresponding provisions of the ECHR, precisely departs from a purely automatic and formal assessment. Not every formal infringement of any (national) rule that might concern an element of judicial organisation amounts to an infringement of Article 47 of the Charter.

99. As noted by the Romanian Government, the Public Prosecutor and the Commission, the infringement of the rule at issue in the present case does not amount to an infringement pursuant to Article 47 of the Charter.

100. First, the requirement of specialisation appears to have an eminently formal character. As noted by the Public Prosecutor, all panels of the HCCJ became specialised overnight following Decision No 14/2019 of its Governing Council. Decision No 417/2019 of the Constitutional Court validated this outcome as being compliant with the national constitutional requirements. That meant, as noted by the Commission, that a purely formal designation of panels as specialised, with no substantive modification whatsoever, was considered to be sufficient for the purposes of complying with the constitutional requirements, including the requirements imposed by constitutional fundamental rights.

101. Second, this rule appears to be a rather circumscribed exception applying to specific areas of law only, and to the first-instance stage.

102. Third, as noted by the Commission, other additional elements, such as the doubts as to the interpretation of the applicable legislation and the lack of intentional disregard, would point to the absence of a ‘flagrant’ character of the infringement.

103. In addition, the above considerations provide useful illustrations as to the true nature of a specialisation requirement in a national court: it is indeed primarily a matter of internal management of and efficiency in the work of the court. Certainly, the blatant and intentional disregard of such a rule, if previously and firmly entrenched in the national legal system, is not devoid of legal repercussions. (32) However, in and of itself, the requirement as to the specialisation of judges does not amount to a fundamental rule of a judicial system, for the purposes of the application of the standard arising from the second paragraph of Article 47 of the Charter, which would have to always be present in order for the requirements of Article 47 of the Charter to be satisfied.

104. Finally, there is one other key question with regard to Article 47 of the Charter. Having established that that provision does not require the specialisation of judges, and hence its autonomous standard of what is a tribunal established by the law *has not been infringed*, the issue of whether the same provision *precludes* a national constitutional court from finding such an infringement on the basis of constitutionally protected fundamental rights or other values still remains.

105. For the reasons already set out in detail in points 145 to 156 in the *Euro Box Promotion* Opinion, the answer is no, Article 47 of the Charter does not preclude any such finding.

106. With regard to legal issues and situations falling within the scope of EU law, but which are not fully determined by it, although the Court has found that Article 47 of the Charter is infringed *particularly* when irregularities are of such *gravity* that they create a real risk of undue discretion which thus raises reasonable doubts as to the impartiality and independence of judges, (33) this does not preclude a national constitutional court from finding that the constitutional right to a fair trial has been infringed under a different, higher national standard. In matters and situations not fully determined by EU law, in line with Article 53 of the Charter, the Charter is the floor (minimum), but not the ceiling (maximum). Thus, a national court might embrace and apply a higher national standard.

107. The defining of such a national constitutional standard, provided, of course, that one exists, is a matter for the competent national authorities. The Romanian Government and the Public Prosecutor have submitted that the requirement of specialisation is not an element of the national standard of the right to effective judicial protection. I take note of that position, but that is as much as this Court can do. To reiterate once again, the defining of a national constitutional standard is a matter for national courts and actors. However, that does not necessarily mean that any and every argument raised as an issue of higher national standard will ultimately be accepted as a sufficient justification under EU law, an issue to which I shall turn in the following section.

(c) Interim conclusion

108. In the light of the foregoing considerations, I propose that the Court answer the second questions in Cases C-811/19 and C-840/19, and the fourth question in Case C-811/19, in the sense that Article 47 of the Charter is to be interpreted as not encompassing the requirement of the specialisation of judicial panels. However, the second paragraph of Article 47 of the Charter does not preclude a decision of a national constitutional court which declares that, in application of a genuine and reasonable national standard of protection of the right to effective judicial protection, and on the basis of its interpretation of the national provisions applicable, the composition of a judicial panel is unlawful on the basis of the infringement of a national legal requirement of specialisation of judicial panels.

3. The protection of the financial interests of the Union

109. The present cases raise two additional issues: the interpretation of Article 325(1) TFEU in relation to the adoption and effects of Decision No 417/2019 of the Constitutional Court and the interpretation of Article 19(1) and Article 2 TEU, as well as Article 47 of the Charter, in relation to that same constitutional decision. In this section, I shall address the rather more specific problems posed by the possible impact of the constitutional decision at issue on the protection of the financial interests of the Union.

110. With the specific issues raised under Article 325(1) TFEU, the referring court explains that in the two cases at issue, the re-examination required by the Constitutional Court may prevent the application of effective and deterrent penalties in cases involving activities affecting the financial interests of the Union. Given the complexity and length of the proceedings until a new final judgment is delivered following resumption of the proceedings at first instance, there is a risk of criminal liability being time-barred. The application of Decision No 417/2019 of the Constitutional Court, which is mandatory under national law, entails resumption of the proceedings at first instance, thus resulting in a double judgment at first instance and a triple judgment at the appeal stage within the same proceedings. In particular, the referring court demonstrates its concerns by referring to the circumstances of the main proceedings in Case C-840/19 where criminal proceedings commenced approximately four years ago and the case is already at the stage in which the ordinary appeal is being re-examined after the extraordinary appeal seeking annulment was allowed (as a result of the application of Decision No 685/2018 of the Constitutional Court).

111. In points 173 to 184 of the *Euro Box Promotion* Opinion, I set out in detail what considerations should guide the test of normative compatibility of national rules and practices with Article 325(1) TFEU. First, as is the case in any other area of EU law, it should remain, a test of normative compatibility. That analysis should not become a rather subjective and potentially arbitrary study of selected statistics on the number of convictions and acquittals secured, which is not usually available to a national court. Second, within the test itself, respect for legality and fundamental rights is already embedded in the interpretation of the scope of obligations stemming from Article 325(1) TFEU. Third, reasonable and genuine national constitutional concerns, including any higher protection of national fundamental rights thus framed, may potentially be a part of the equation.

112. Put simply, the guidance in this area of law should be provided by the logic and the overall approach of *M.A.S.*, *Scialdone*, and *Dzivev*, (34) not that of *Taricco* and *Kolev*. (35)

113. Therefore, the elements to be taken into account when assessing the compatibility of national provisions with the requirements of Article 325(1) TFEU include: first, the normative and systematic evaluation of content of the rules at issue; second, their purpose as well as the national context; third, their reasonably perceivable or expected practical consequences, stemming from the interpretation or the application practice of such rules (thus independent from any statistical estimation of the number of cases actually or potentially affected); fourth, the fundamental rights and legality forming part of the internal balance in the interpretation of the material requirements imposed by Article 325(1) TFEU. However, any national concerns invoked in this regard must reflect a reasonable and genuine concern for a higher rights protection. Moreover, their potential impact on the interests protected by Article 325(1) TFEU must be proportionate.

114. In my view, the national decision at issue in the present cases does not meet those requirements. Put simply, a rather ancillary and purely formal designation, apparently required under national law, is having a wholly disproportionate impact on the protected interests of the Union.

115. *First*, with regard to the abstract and systematic evaluation of the content of the decision at issue, Decision No 417/2019 does not raise, prima facie, particular concerns. Indeed, that decision does not create a new remedy, nor does it appear to circumvent the existing legal framework. As noted by the appellant in Case C-840/19, that decision mandates the application of the provisions of the Code of Criminal Procedure according to which an appellate court must be sent a case for re-examination, in particular, where there is an infringement concerning the composition of a judicial panel. (36)

116. *Second*, concerning the purpose and the national context in which Decision No 417/2019 is placed, I note that there is nothing before this Court to indicate, through objective elements, contextual framework or practical effects, that the purpose of the decision at issue was to circumvent or undermine the legal tools used in the fight against corruption or to affect the protection of the financial interests of the Union.

117. I consider that it is not possible to reach a different conclusion merely because of the fact that, as set out in the orders for reference, the application giving rise to Decision No 417/2019 was submitted by the President of the Chamber of Deputies who, at the time, was subject to a criminal investigation in relation to offences falling within the scope of Law No 78/2000, proceedings which, at the appeal stage, were pending before the panel of five judges of the HCCJ. As repeatedly emphasised in the context of the present cases, no court, and certainly not this Court, is able to proceed on the basis of insinuations and conjectures. (37)

118. *Third*, in accordance with the arguments raised by the Commission and the Public Prosecutor, serious concerns might indeed be raised regarding the third element noted above, concerning the generally perceivable or expected practical consequences of the decision at issue. In contrast to the decision of the Constitutional Court in *Euro Box Promotion and Others* (C-357/19 and C-547/19), and in line with the arguments put forward by the Commission, the effects of Decision No 417/2019 appear to be quite far-reaching when assessed from several angles.

119. As noted by the Commission, the effects of Decision No 417/2019 do not appear to be circumscribed to a relatively limited period of time: Decision No 417/2019 requires the re-examination at first instance of *all cases* in which an appeal is pending and the first-instance judgment was delivered *between 21 April 2003* (the date on which the amendments to Law No 78/2000 introduced the requirement of specialisation) *and 22 January 2019* (the date on which the Governing Council of the HCCJ declared that all panels were to be considered to be specialised panels). That is a total of 16 years. As the Commission rightly points out, given the general level of complexity of cases concerning corruption offences committed by the persons falling under the jurisdiction of the HCCJ (persons holding office or high-ranking state officials), as well as the likelihood of appeal, the reasonably expected effects of that ruling is very broad.

120. Moreover, it must certainly be added that Decision No 417/2019 is destined to have its effects focused, both *ratione materiae* and *ratione personae*, on a scope which is of particular concern from the point of view of the protection of the financial interests of the Union. Indeed, as put forward by the

Commission, that ruling impacts exclusively corruption cases where the accused persons fall under the jurisdiction of the HCCJ at first instance, with the result that the requirement of re-examination will affect all cases concerning corruption offences committed by high-ranking public office holders.

121. Although the application of Decision No 417/2019 does not lead to the discontinuation of the criminal proceedings, it is indeed correct that the risk of a criminal prosecution becoming time-barred, as a result of that application, becomes rather pressing. Furthermore, as also submitted by the Commission, even considering that Articles 154 and 155 of the Criminal Code do not contain rules on limitations that could be considered problematic in themselves, the application of Decision No 417/2019 means that cases already pending at the full merits appeal stage would not only have to be re-examined at that stage, but again from scratch. This entails repeating all the stages of the procedure, considerably increasing the possibility of reaching limitation periods.

122. *Fourth*, it is in particular the balancing between the interests of the Union and those national interests at stake, as well as the (dis)proportionate outcome in terms of the procedural consequences of that balancing act, which are decisive in the present cases, at least in my view.

123. It might again be recalled that, according to settled case-law, where EU law allows Member States a measure of discretion, national authorities and courts remain free to protect fundamental rights under the national constitution, provided that the level of protection guaranteed by the Charter, as well as the primacy, unity and effectiveness of EU law are not thereby compromised. (38) Moreover, it has been stated above in this Opinion that a given national constitutional standard could indeed require specialisation of judges, whether it be as an independent national standard, or embedded as a national rule on what will eventually amount to a tribunal previously established by law (or to a fair trial, lawful judge, or under whichever other heading national constitutional rules might place such a rule). (39)

124. However, as I have emphasised in the *Euro Box Promotion* Opinion, (40) any such national standard shall be reasonable and genuine, in order for it to be validly invoked as a legitimate national interest in the context of Article 325(1) TFEU, as well as, for that matter, as a higher national standard of protection under the Charter. The national rule must reflect a genuine concern that will reasonably contribute to the protection of national fundamental rights and values, and will be acceptable (in principle, not necessarily in degree and specific expression) as a value within the Union based on the rule of law, democracy, and human dignity.

125. Moreover, and rather crucially in the context of the present cases, even if such a national standard were to be validly admitted into the balancing equation under Article 325(1) TFEU, the outcome of that balancing exercise must be proportionate. In other words, the legitimate interests of the Union (effective protection of the financial interests of the Union) must be placed in a reasonable equilibrium with the legitimate values and standards of the national legal order. If the latter interests are indeed accepted, they should not encroach on the interests of the Union beyond what is necessary to uphold those national interests.

126. In the context of the present cases, both the first appellant in Case C-811/19 and the appellant in Case C-840/19, submit that Article 325(1) TFEU should not lead to the disapplication of decisions of a constitutional court which are the reflection of rules of national law taken at constitutional level intended to guarantee the fundamental right to a fair trial in an effective manner.

127. However, the Public Prosecutor, the Romanian Government and the Commission have cast doubts on the genuine character of the fundamental rights grounds that underpin Decision No 417/2019. The purely formal approach of that decision to the specialisation requirement leads to the practical conclusion that cases being re-examined by exactly the same panels can hardly be said to lead to any discernible infringement of national law.

128. I share those doubts.

129. First, I remain perplexed as to why a national standard of specialisation of judges, which is entirely formal and which consists in just mechanical designation of exactly the same panels and judges, ought to be considered essential. It is difficult to understand how that requirement contributes to a higher level of (effective) judicial protection.

130. Second, I am equally puzzled by the apparent degree of 'super-specialisation' required under national law. I can imagine there being judicial specialisation with regard to certain areas of law (such as criminal law, tax law, family law, intellectual property law, and so forth). (41) I can also understand how specialisation can be brought about as a matter of special jurisdiction of certain courts, based on a specific type of crime and/or with regard to a particular kind of defendant. (42) However, it is indeed unusual to see a requirement of specialisation relating to acts of (criminal) corruption, which would, in relation to its content or complexity, require a specialisation (or expertise) going beyond the requirements necessary to become a (specialised) criminal judge at the level of a national supreme court.

131. However, it could perhaps be argued that the higher national standard guaranteed by Decision No 417/2019 would not consist in the specialisation requirement as such, but in the application of a strict concept of 'tribunal established by law'. In this way, the issue of who is 'specialised' in criminal corruption would then not be a matter of specialisation per se, but rather the designation of the pool of judges from which the first-instance panels might in fact be created, thus becoming an issue of the lawful composition of the bench. If that were indeed the case, then the discussion is bound to return to the issue of whether the fundamental right to effective judicial protection would be infringed by any breach of whatever rule, even one of a purely formal nature and deprived of any consequences and material impact on the rights of the defence or on the right to fair trial. (43)

132. Be that as it may, beyond the issue of defining what the national standard is and its purpose, the issue of a *proportionate outcome* of the values being balanced within the interpretation of Article 325(1) TFEU still remains. In that respect, the national rule at issue fails rather markedly. To put it bluntly, should a rather questionable national requirement, which is applied in a purely formal (not to say formalistic) manner, and the contribution of which to the effective individual protection of individual rights is not that obvious, be allowed to potentially reopen cases in which a judgement has been handed down in the past 16 years?

133. Were such an interpretation to be retained by national courts, it would amount, in my view, to rendering those elements of national law incompatible with the requirements of Article 325(1) TFEU.

(a) Interim conclusion

134. As a result of the above considerations, the first questions in Cases C-811/19 and C-840/19, in so far as they concern Article 325(1) TFEU, are to be answered in the sense that that provision is to be interpreted as precluding a decision by a national constitutional court, which declares unlawful the composition of judicial panels of a 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 sitting on those panels have been recognised as having the requisite specialisation, where such a finding is liable to give rise to a systemic risk of impunity regarding offences affecting the financial interests of the Union.

4. The principle of judicial independence

135. The first questions in C-811/19 and C-840/19, in so far as they refer to Article 19(1) TEU, as well as the second questions in C-811/19 and C-840/19, ask whether Article 2 and Article 19(1) TEU and the second paragraph of Article 47 of the Charter, must be interpreted as precluding the Constitutional Court, defined as 'a body outside the judicial system', from adopting a decision such as Decision No 417/2019. Within this dimension (or layer of discussion), the thusly formulated questions are primarily concerned with the institutional set-up and functions of the Constitutional Court and the effects of its ruling on cases adjudicated by the HCCJ.

136. While singling out a different decision of the Constitutional Court, in their broader, institutional dimension, the present questions overlap with those already dealt with in the *Euro Box Promotion* Opinion. Similar to my explanation in that Opinion, I do not think that it is the role of this Court to engage in discussions, *in abstracto*, on the institutional choices made by a Member State with regard to the composition or competences of a national constitutional court, provided that there is nothing to indicate that such an institution no longer structurally satisfies the requirements of being an independent court within the autonomous EU law understanding of that notion. (44)

137. Moreover, in contrast to the national constitutional decision at issue in *Euro Box Promotion and Others* (C-357/19 and C-547/19), in the present case, at least in my view, elements of national law brought about by Decision No 417/2019 of the Constitutional Court fall short of the requirements of Article 325(1) TFEU.

138. Viewed in the light of that combined context, I find that it is not necessary to consider again the questions raised by the referring court in the context of the present cases.

5. The principle of primacy

139. By its third questions in Cases C-811/19 and C-840/19, the referring court asks essentially whether the principle of primacy of EU law allows a national court to disapply Decision No 417/2019 of the Constitutional Court. Those questions seem also to be in part motivated by the fact that, pursuant Article 99(ș) of Law No 303/2004, the disregard by a judge of a ruling of the Constitutional Court amounts to a disciplinary offence.

140. I already addressed those issues in depth in my parallel Opinion in *Euro Box Promotion and Others* (Joined Cases C-357/19 and C-547/19), concluding that indeed, EU law authorises a national judge not to follow (an otherwise binding) legal opinion of a superior court, if he or she believes that that legal interpretation is contrary to EU law. Moreover, from the vantage point of EU law, the same must then also apply to any potential national sanction for such behaviour: if that behaviour is, in the view of EU law, correct, no sanction for it is allowed. (45)

141. Thus, in the context of the present case, the third questions in Cases C-811/19 and C-840/19 should be answered in the affirmative: the principle of primacy must be interpreted as allowing a national court to disapply a decision of a 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.

142. Two points are worth mentioning in place of a conclusion. First, Article 325(1) TFEU is indeed endowed with direct effect. (46) Second, when potentially setting aside national law and national rules because of their incompatibility with directly effective EU rules, a national court naturally finds itself acting within the scope of EU law. It therefore must respect, also in the context of the consequences of setting aside national incompatible rules, EU standards of fundamental rights guaranteed under the Charter. (47)

V. Conclusion

143. I propose that the Court answer the questions referred for a preliminary ruling by the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice, Romania) as follows:

– The second questions in Cases C-811/19 and C-840/19, and the fourth question in Case C-811/19 should be answered in the sense that Article 47 of the Charter of Fundamental Rights of the European Union is to be interpreted as not encompassing the requirement of the specialisation of judicial panels. However, the second paragraph of Article 47 of the Charter does not preclude a decision of a national constitutional court which declares that, in application of a genuine and

reasonable national standard of protection of the right to effective judicial protection, and on the basis of its interpretation of the national provisions applicable, the composition of a judicial panel is unlawful on the basis of the infringement of a national legal requirement of specialisation of judicial panels.

– The first questions in Cases C-811/19 and C-840/19 should be answered in the sense that Article 325(1) TFEU is to be interpreted as precluding a decision of a national constitutional court declaring unlawful the composition of the judicial 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 sitting on those panels have been recognised as having the requisite specialisation, where such a finding is liable to give rise to a systemic risk of impunity regarding offences affecting the financial interests of the Union.

– The third questions in Cases C-811/19 and C-840/19 should be answered in the sense that the principle of primacy 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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1 Original language: English.

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2 C-357/19 and C-547/19, abbreviated as ‘the *Euro Box Promotion* Opinion’ for reference purposes.

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3 See my Opinion in Asociaţia “Forumul Judecătorilor din România” and Others (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, EU:C:2020:746), abbreviated as ‘the *AFJR* Opinion’ for reference purposes. See also my Opinion issued the same day in Statul Român – Ministerul Finanţelor Publice (C-397/19, EU:C:2020:747).

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4 OJ 1995 C 316, p. 49.

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5 *Monitorul Oficial al României*, part I, No 827 of 13 September 2005.

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6 *Monitorul Oficial al României*, part I, No 826 of 13 September 2005.

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7 *Monitorul Oficial al României*, part I, No 825 of 10 October 2019.

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8 See points 127 to 129 of the Euro Box Promotion Opinion.

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9 See, to that effect, judgment of 7 March 2017, *X and X* (C638/16 PPU, EU:C:2017:173, paragraph 37*)*; of 26 September 2018*, Belastingdienst* v *Toeslagen (Suspensory effect of the appeal)* (C-175/17, EU:C:2018:776, paragraph 24); of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 74); or of 9 July 2020, Land Hessen (C-272/19, EU:C:2020:535, paragraphs 40 and 41).

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10 Equally in the sense of the judgment of 26 March 2020*,* Miasto Łowicz and Prokurator Generalny (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 45 to 51).

11 See, for example, judgment of 5 December 2013, *TVI* (C-618/11, C-637/11 and C-659/11, EU:C:2013:789, paragraph 21 and the case-law cited).

12 Points 204 to 211 of the *AFJR* Opinion.

13 Point 71 of the *Euro Box Promotion* Opinion.

14 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C64/16, EU:C:2018:117, paragraph 29); of 24 June 2019, Commission v Poland (Independence of the Supreme Court) (C-619/18, EU:C:2019:531, paragraph 50); of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 82); or of 26 March 2020, Miasto Łowicz and Prokurator Generalny(C-558/18 and C-563/18, EU:C:2020:234, paragraph 33).

15 See, to that effect, judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 58 and the case-law cited), and of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 120).

16 See, to that effect, judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 47 and the case-law cited), and of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 167).

17 OJ 2006 L 354, p. 56. See points 214 to 224 of the *AFJR* Opinion.

18 See my Opinion in *Statul Român – Ministerul Finanţelor Publice* (C-397/19, EU:C:2020:747).

19 Points 75 to 85.

20 Points 91 to 100.

21 See, regarding the breadth of the scope of that provision, judgment of 2 May 2018, Scialdone (C-574/15, EU:C:2018:295, paragraph 45). See also my Opinion in that case (EU:C:2017:553, points 68 to 69).

22 See, in the same vein, the arguments regarding the admissibility of the preliminary questions put forward by that party, point 43 of this Opinion.

23 Judgment of 26 February 2013, *Åkerberg Fransson* (C617/10, EU:C:2013:105, paragraph 27).

24 See also points 185 to 225 of the *AFJR* Opinion and point 117 of the *Euro Box Promotion* Opinion.

25 By reference to judgments of 12 December 2013, of 30 January 2014 and of 27 May 2019, handed down in criminal matters by panels of five judges of the HCCJ.

26 Points 161, 162 and 167 of Decision No 417/2019.

27 Points 138 and 139 of Decision No 417/2019.

28 Point 146 of Decision No 417/2019.

29 The appellant relied on judgment of ECtHR, 3 May 2007, *Bochan v. Ukraine* CE:ECHR:2007:0503JUD000757702, § 71. However, in that judgment, the ECtHR took into account the qualification of judges as a criterion for the allocation of cases to a judge. That ruling does not imply in any way that specialisation shall be considered a requirement in the framework of Article 6 ECHR.

30 That appellant cites the Venice Commission's Report on the Independence of the Judicial System (CDL-AD (2010) 004) of 16 March 2010, points 80 and 81 and also mentioned Opinion No 1 (2001) of the Consultative Council of European Judges of 23 November 2001 (CCJE (2001) OP Nº 1) and the Evaluation Report of the Group of States against Corruption (GRECO) on Romania of 14 October 2005, Recommendation (iii) (which recommends strengthening the capacities of prosecution services and courts to deal efficiently with corruption cases through specialisation and training), and the GRECO Compliance Report of 7 December 2007, point 23, where the GRECO welcomes the initiatives to increase the resources and specialisation of prosecutors and judges.

31 Judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 75). My emphasis.

32 I wish to emphasise this point rather clearly: this is not to say that the issue of specialisation of judges, if indeed enshrined in national law, is not legally relevant. It certainly might be, in situations ranging from the proper allocation of cases to the potential abuse of discretion in that allocation by a court president 'rewarding' some judges by suddenly allocating to them cases completely outside their specialisation and competence without their prior consent.

33 Judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 75). My emphasis.

34 Judgments of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936); of 2 May 2018, Scialdone (C-574/15, EU:C:2018:295); and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30).

35 Judgments of 8 September 2015, Taricco and Others (C-105/14, EU:C:2015:555); and of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392).

36 Article 421(2)(b) and Article 281(1)(a) of the Code of Criminal Procedure.

37 See in this context points 243 to 248 in the *AFJR* Opinion and points 227 to 229 in the *Euro Box Promotion* Opinion. In addition, as would be the case with any other facts, any elements pertaining to potential abuse of office would be for the national authorities to establish.

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38 See, to that effect, judgments of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60), and of 26 February 2013, Åkerberg Fransson (C-617/10, EU:C:2013:105, paragraph 29).

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39 See above, points 103 to 107 of this Opinion.

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40 See points 149 and 194 to 195 of the *Euro Box Promotion* Opinion.

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41 See point 5 of Opinion (2012) No 15 of the Consultative Council of European Judges (CCJE) on the Specialisation of Judges (CCJE(2012) 4) of 13 November 2012 ('the CCJE Opinion on the Specialisation of Judges').

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42 See, for example, European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems. Efficiency and quality of justice*, CEPEJ Studies No 26, 2018, p. 198 et seq.

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43 Already dealt with above in points 95 to 103 of this Opinion.

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44 See points 198 to 229 of the *Euro Box Promotion* Opinion.

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45 Points 235 to 245 of the *Euro Box Promotion* Opinion.

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46 See judgment of 5 December 2017, M.A.S. and M.B. (C-42/17, EU:C:2017:936, paragraph 39).

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47 See above, points 111 to 113 of this Opinion, as well as points 174 to 176 of the *Euro Box Promotion* Opinion.