Provisional text

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

Case C-379/19

DNA- Serviciul Teritorial Oradea

v

KI,

LJ,

IG,

JH

(Request for a preliminary ruling from the Tribunalul Bihor (Regional Court of Bihor, Romania))

(Reference for a preliminary ruling – Commission Decision 2006/928/EC establishing a mechanism for cooperation and verification (MCV) – Legal effects of the MCV and of the reports established by the Commission on its basis – Criminal proceedings relating to corruption – Decisions of a constitutional court ruling on the exclusion of evidence obtained by or in collaboration with the intelligence services – 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. Are decisions of a national constitutional court, which declare the participation of domestic intelligence services in the carrying out of technical surveillance measures for the purposes of acts of criminal investigation to be unconstitutional, and insist on the exclusion of such evidence from criminal proceedings, compatible with EU law?

2. That is, in essence, the question at issue in the present case. However, this case also raises a number of other issues that I have had the privilege of dealing with in my previous Opinions, notably in *Asociaţia "Forumul Judecătorilor din România" and Others*, (2) as well as in Opinions parallel to the present one, in particular *Euro Box Promotion and Others*. (3) I shall therefore rely on my analysis already carried out therein for the purposes of the present case.

II. Legal framework

A. EU law

1. Primary law

3. The relevant EU law provisions of the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union ('the Treaty of Accession'), (4) as well as of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania ('the Act of Accession')(5) have been reproduced in points 5 to 8 of the *AFJR* Opinion.

2. Secondary law

4. 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') (6) was adopted, according to its recital 5, on the basis of Articles 37 and 38 of the Act of Accession.

5. According to recital 6 of the MCV Decision, 'the remaining issues in the accountability and efficiency of the judicial system and law enforcement bodies warrant the establishment of a mechanism for cooperation and verification of the progress of Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption'.

6. Article 1 of the MCV Decision states that Romania is to report to the Commission every year on the progress made in addressing each of the benchmarks provided for in the annex to that decision. In accordance with Article 2, the Commission will communicate to the European Parliament and the Council its comments and findings on Romania's report for the first time in June 2007, and thereafter, as and when required and at least every six months. Article 3

provides that the MCV Decision 'shall enter into force only subject to and on the date of the entry into force of the Treaty of Accession'. Pursuant to Article 4, the MCV Decision is addressed to all Member States.

7. The Annex to the MCV Decision contains the 'benchmarks to be addressed by Romania, referred to in Article 1'. The first, third and fourth benchmarks established therein are, respectively: to 'ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. …'; 'building on progress already made, [to] continue to conduct professional, non-partisan investigations into allegations of high-level corruption'; and to 'take further measures to prevent and fight against corruption, in particular within the local government'.

B. Romanian law

1. The Code of Criminal Procedure

8. Pursuant to Article 102(2) 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'), 'evidence obtained unlawfully may not be used in criminal proceedings'. According to paragraph 3 of the same provision 'the nullity of the act by which the taking of evidence was ordered or approved or by which that evidence was taken shall entail the exclusion of that evidence'.

9. Article 142(1) of the Code of Criminal Procedure, in its version preceding Decision No 51 of the Curtea Constituțională (Constitutional Court, Romania) ('the Constitutional Court') of 16 February 2016 ('Decision No 51/2016'), entitled 'enforcement of the technical surveillance warrant' provided that 'the prosecutor shall carry out the technical surveillance or may order that it be carried out by the criminal investigation body, by specialised police officers, or by other specialist State bodies'.

10. Article 142(1) of the Code of Criminal Procedure, in its version following Decision No 51/2016 of the Constitutional Court, as modified by Emergency Ordonnance No 6/2016, states that 'the prosecutor shall carry out the technical surveillance or may order that it be carried out by the criminal investigation body or by specialised police officers'.

11. Article 281 of the Code of Criminal Procedure, entitled 'Absolute nullities', provides that:

'1. Infringement of provisions concerning the following shall always entail nullity:

…

(b) the jurisdiction *ratione materiae* and *ratione personae* of courts, where the judgment has been delivered by a lower-ranking court than the court legally having jurisdiction;

…

2. Absolute nullity shall be found either *ex officio* or on request.

3. Infringement of the legal provisions laid down in points (a) to (d) of paragraph 1 may be relied on at any stage of the proceedings.

…'

2. Law No 303/2004

12. According 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'), (7) the 'failure to comply with decisions of the [the Constitutional Court] …' constitutes a disciplinary offence.

III. Facts, national proceedings and the questions referred

13. On 22 August 2016, the Direcția Națională Anticorupție – Serviciul Teritorial Oradea (National Anti-Corruption Directorate – Oradea Regional Department, Romania; 'the Prosecutor') brought criminal proceedings against four persons, the defendants in the main proceedings. The defendants were charged with corruption offences.

14. At the preliminary hearing stage, the first defendant and the second defendant requested the examining magistrate, inter alia, to exclude, in line with Decision No 51/2016 of the Constitutional Court, the evidence acquired from reports of recordings of wiretaps from the body of evidence relied on as such evidence was, in their view, unlawful.

15. By order of 27 January 2017, the examining magistrate of the Tribunalul Bihor (Regional Court of Bihor, Romania) rejected that request. The magistrate found that the evidence had been lawfully acquired. He ordered that the case should proceed to trial. He declared that Decision No 51/2016 was not applicable to the case, as that decision had legal effect only for the future.

16. The appeal lodged by the defendants against the order of 27 January 2017 was dismissed on 10 May 2017 by the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania). That court found that Decision No 51/2016 was not applicable to the technical surveillance measures ordered in the course of the proceedings in question, because that decision was published in the Monitorul Oficial (Official Journal) after the evidence had been taken at the criminal investigation stage. That court noted that, in accordance with Article 147(4) of the Romanian Constitution, decisions of the Constitutional Court are binding from the date on which they are published and produce legal effect only for the future. The decision made at the stage of the preliminary hearing had thus become final and none of the pieces of evidence adduced in the course of the criminal proceedings was excluded.

17. At the trial stage, several of the defendants asked the court to verify whether the Prosecutor had collaborated with the Serviciul Român de Informații (Romanian Intelligence Services ('the SRI')) during the criminal investigation stage on the basis of the protocols concluded between the Parchetul de pe lângă Înalta Curte de Casație și Justiție (Prosecutor's Office attached to the High Court of Cassation and Justice, Romania) and the SRI. A number of the defendants also requested, relying on Decision No 302 of 4 May 2017 of the Constitutional Court ('Decision No 302/2017'), a declaration of absolute nullity in respect of the measures used in executing the surveillance warrants and requested that all reports of recordings deriving from those surveillance measures be excluded from the evidence.

18. The defendants also relied on Decision No 26 of 16 January 2019 of the Constitutional Court ('Decision No 26/2019'), which found that there was a legal conflict of a constitutional nature between the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Parliament, on the one hand, and the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, 'the HCCJ') and the other judicial bodies on the other, as a result of the protocols concluded between the Prosecutor's Office attached to the HCCJ and the SRI.

19. At the request of the trial court, the Prosecutor disclosed that, in the proceedings under consideration, nine technical surveillance warrants had been executed with the technical support of the SRI. Two further warrants were executed after Decision No 51/2016 was published, but without any involvement of the SRI.

20. The referring court considers that it is required to give a ruling, as a matter of priority, on the request for the exclusion of the evidence submitted at the criminal investigation stage before being able to continue with the proceedings. This is vital to ensure that the entire criminal proceedings are not vitiated by evidence which may have been obtained unlawfully.

21. In those circumstances, the Tribunalul Bihor (Regional Court of Bihor), decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

Are the [the MCV], established by [the MCV Decision], and the requirements laid down in reports prepared in accordance with that mechanism binding on Romania?

Is Article 2 [TEU], in conjunction with Article 4(3) [TEU], to be interpreted as meaning that the obligation on Romania to comply with the requirements laid down in reports prepared in accordance with [the MCV], established by [the MCV Decision], forms part of the Member State's obligation to comply with the principles of the rule of law, including in so far as concerns a constitutional court (a politico-judicial institution) refraining from intervening in order to interpret the law and to establish the specific and mandatory rules for the application of the law by judicial bodies, a task which falls within the exclusive jurisdiction of the judicial authorities, and in order to introduce new legislative measures, a task which falls within the exclusive competence of the legislative authorities? Does EU law require that the effects of any such decision, adopted by a constitutional court, should be disregarded? Does EU law preclude a provision of national law which governs the liability to disciplinary action of the judge who disapplied the decision of the [Constitutional Court], in the context of the question referred?

Does 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")], as interpreted by the Court of Justice of the European Union (Grand Chamber, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117), preclude the competences of courts being replaced by decisions of the [Constitutional Court] ([Decision No 51/2016, Decision No 302/2017 and Decision No 26/2019]), the result of which is that criminal proceedings are unforeseeable (retroactive application) and that it is impossible to interpret the law and apply it in the case under consideration? Does EU law preclude a provision of national law which governs the liability to disciplinary action of the judge who disapplied the decision of the [Constitutional Court], in the context of the question referred?'

IV. Procedure before the Court

22. The referring court requested the application of the urgent preliminary ruling procedure pursuant to Article 107 of the Rules of Procedure of the Court of Justice and, alternatively, of the expedited procedure pursuant to Article 105(1) of the Rules of Procedure. The application of the urgent preliminary ruling procedure was rejected by decision of the Court of 13 June 2019. The application of the expedited procedure was also rejected by decision of the President of the Court of 17 June 2019.

23. By letter of 27 June 2019, the referring court informed this Court that by decision of 18 June 2019, the Curtea de Apel Oradea (Court of Appeal of Oradea) upheld the appeal introduced by the Prosecutor against the suspension of the main proceedings which had been decided by order of 7 May 2019 and adopted by the Tribunalul Bihor (Regional Court of Bihor) in order to refer the present questions for a preliminary ruling. The decision of the Curtea de Apel Oradea (Court of Appeal of Oradea) ordered the continuation of the proceedings in so far as they concern issues other than the ones submitted to the Court for a preliminary ruling.

24. In response to a question posed by the Court, the Tribunalul Bihor (Regional Court of Bihor) replied by letter of 26 July 2019 that it wished to maintain the questions referred. The referring court explained that, even if the main proceedings are no longer suspended, pursuant to national rules, it will not be able to adjudicate on the evidence forming the subject matter of the present request for a preliminary ruling until the Court has provided a response to the questions referred.

25. In the same letter, the referring court also informed the Court that a disciplinary investigation had been initiated against the referring judge by the Inspecția Judiciară (Judicial Inspection, Romania) on the basis of Article 99(ș) of Law No 303/2004, according to which the failure to comply with decisions of the Constitutional Court constitutes a disciplinary offence.

26. By decision of the President of the Court of 18 September 2019, priority treatment was accorded to the present case.

27. The first and second defendants, the Polish Government and the European Commission have submitted written observations.

28. The first and second defendants, the Prosecutor, the Romanian Government and the Commission have replied to the questions for written answer put by the Court.

V. Analysis

29. 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 relevant EU law

provisions applicable to the present case (B). Third, I shall carry out the assessment of the substance of the preliminary questions referred to the Court (C).

A. Admissibility of the questions referred

30. The first and second defendants, as well as the Polish Government submit that the questions referred in the present case are inadmissible.

31. The first and second defendants argue, with reference to the judgment in *Cilfit*, (8) that the first question is inadmissible because the answer to that question is obvious. Furthermore, they submit that it is clear that the interpretation requested from the Court is not connected in any way to the subject matter of the main proceedings. In their view, the referring court is, in reality, inviting the Court to rule on the lawfulness of the decisions at issue of the Constitutional Court in order to be exempted from the obligation to apply those decisions. With regard to the third question, the first and second defendants submit that the questions raised are unconnected to the decision to be taken in the main proceedings. In their view, it is, in reality, aimed at obtaining immunity from national disciplinary proceedings for the referring judge.

32. The Polish Government, which has presented observations with regard to the third question only, considers that question to be inadmissible because, first, the Union does not have any competences in the field of judicial organisation and, second, the criminal proceedings at issue in the main proceedings are purely internal in nature.

33. In my view, none of the objections can be upheld.

34. First, the fact that the correct application of EU law may be obvious in the context of the main proceedings may indeed have an impact on the obligation of last-instance courts to submit a question to the Court, (9) or, alternatively, on the way a question will be dealt with by this Court. (10) However, as EU law currently stands, that matter is not relevant for the admissibility of a question referred for a preliminary ruling.

35. Second, with regard to the connection between the interpretation of EU law requested by the referring court and the subject matter of the main proceedings, that court has explained why it considers the answer from this Court to be 'necessary'. Indeed, in order to proceed to a decision on merits, the referring court has emphasised that it is required to give a ruling on the request for exclusion of the evidence submitted at the criminal investigation stage. To that end, the referring court considers it necessary to establish whether the rulings of the Constitutional Court, which order the exclusion of such evidence, are in compliance with the provisions of EU law, the interpretation of which is requested by its questions referred for a preliminary ruling.

36. Third, the first and second defendants also claim that the referring court is in fact seeking immunity from disciplinary proceedings. This argument may be understood as indirectly challenging the admissibility of the third part of the second question and of the second part of the third question. Indeed, both of those questions ask whether EU law precludes, in the specific context of the request for a preliminary ruling submitted to the Court, a provision of national law according to which the disregard of the decisions of the Constitutional Court gives rise to the disciplinary liability of the referring judge.

37. In *Miasto Łowicz and Prokurator Generalny*, the Court considered that the mere fact that the judges who made the requests for a preliminary ruling were, as a result of those requests, the subject of a preliminary disciplinary investigation, was not relevant for the purposes of admissibility. The disputes in the proceedings, in respect of which the Court was requested to provide a preliminary ruling, did not relate to that fact. (11)

38. However, those considerations were made in the context of a preliminary ruling, the *sole object* of which was to determine the compatibility of the provisions relating to disciplinary proceedings with EU law, while the main proceedings in those cases were *not connected in any other way* with EU law. It was in that specific context that the Court declared that the preliminary question referred in such circumstance could not be considered to be necessary for the adjudication of the cases before the national court. (12)

39. This case is, however, different. The present request for a preliminary ruling has raised several preliminary questions, which seek the interpretation of clearly identified sources of EU law, and are thus in themselves already admissible. In that context, even if the referring judge is evidently not adopting a judicial decision concerning his own disciplinary liability, the questions raised with regard to that issue are, to my mind, in no way deprived of relevance.

40. The issue of potential disciplinary liability, whether it arises before or after a request for a preliminary ruling is made, is, simply because such a request has been made, thereby potentially indirectly challenging the legal opinion of another national actor, in particular a superior court, becomes deeply intertwined with the substance of that request. In such a situation, questions relating to the system of disciplinary liability of judges who have made a request for a preliminary ruling are, in my view, 'necessary' for the adjudication of the case in the main proceedings for a rather simple reason: if the disciplinary liability of national judges were triggered because they refer questions to the Court of Justice, (13) then it is likely that very few questions will be referred. Therefore, a reply given by the Court is liable to have a decisive impact on the eventual decision of the judge to maintain or withdraw the request for a preliminary ruling and, more importantly, on the subsequent application, in the main proceedings, of the response provided by the Court. (14)

41. Furthermore, the possibility that disciplinary proceedings may be initiated, far from being merely theoretical, has actually materialised in the present case with regard to the referring judge, since the Judicial Inspection has initiated a preliminary disciplinary investigation directly connected to the present request. (15)

42. The foregoing considerations demonstrate that it is not the role of this Court to adjudicate on individual cases of judicial discipline, just as it is also not its task, in general, to apply EU law to individual cases. However, it is certainly the role of this Court to pass judgment on structural, systemic issues of national law which have a clear impact on and repercussions for national judges wishing to make use of the prerogative granted to them directly by Article 267 TFEU.

43. Fourth, regarding the argument put forward by the Polish Government, concerning the lack of competence of the European Union in the field of judicial organisation, it must be recalled that Member States are under the obligation to comply with the requirements of Article 2 and Article 19(1) TEU, as well as any other applicable sources of EU law, including, in the present case, the MCV Decision. It suffices therefore to note that the request for a preliminary ruling does, in fact, concern the interpretation of EU law, in particular, of Article 2 and Article 19(1) TEU, and the MCV Decision, so that the Court has jurisdiction to provide a ruling on that request in its entirety. (16)

44. As a result, in my view, none of the arguments submitted are capable of calling into question the jurisdiction of the Court or the admissibility of the questions raised in the present case.

B. Applicable EU law

45. The referring court has formulated its questions by invoking the MCV Decision, Article 2 and Article 19(1) TEU and Article 47 of the Charter. In my view, and in line with the approach embraced in the previous and parallel cases, (17) I think that the pertinent EU source for the present case is the MCV Decision, which triggers and opens up the scope of the Charter, in particular of Article 47 thereof.

46. 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. (18) So far as that provision is concerned, the referring court, which is the judicial body whose independence could possibly be affected by the rulings of the Constitutional Court at issue in this case, is a national judicial body that may be called upon to rule, as a court or tribunal, on questions concerning the application or interpretation of EU law.

47. It does not appear necessary to conduct a separate analysis of Article 2 TEU for the purpose of the present case. 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 essential inherent components the principle of independence of courts. Article 7 of the Charter, as well as the second subparagraph of Article 19(1) TEU, give a more precise expression to that dimension of the value of the rule of law set out in Article 2 TEU. (19)

48. The Commission, the Romanian Government and the Prosecutor have submitted in their replies to the questions put by the Court, that in their view, the MCV Decision is applicable to the main proceedings.

49. I agree.

50. The MCV Decision is relevant for the purposes of the present proceedings due to (i) the wide scope of the benchmarks contained in the Annex thereto, and (ii) the scope of the rulings of the Constitutional Court at issue in the main proceedings and their systemic impact on the effectiveness of the judicial system and, more generally, on the fight against corruption. Indeed, the Annex to the MCV Decision contains the 'benchmarks to be addressed by Romania, referred to in Article 1'. The first, third and fourth benchmarks established therein are, respectively: to 'ensure a more transparent, and efficient judicial process …'; 'building on progress already made, [to] continue to conduct professional, non-partisan investigations into allegations of high-level corruption' and to 'take further measures to prevent and fight against corruption, in particular within the local government'.

51. The present case is concerned with the potential effects of several decisions of the Constitutional Court which, by leading to the exclusion of certain evidence, may have an impact on the efficiency of the judicial process (benchmark 1). Additionally, the main proceedings specifically concern corruption offences, which illustrates that the rulings of that court may also have an effect on the fight against corruption, covered by benchmarks 3 and 4 of the MCV Decision. There is, therefore, ample material connection between the subject matter of the present case and the MCV Decision.

52. The fact that the present case concerns decisions of a constitutional court, and not acts adopted by the executive or the legislature, is irrelevant. The systemic nature of the rulings of a constitutional court, which have general value and clearly set general rules modifying the legislative environment, makes such rulings indistinguishable, from the point of view of their effects, from the actions of the legislature or other political actors with regulatory powers.

53. Moreover, the fact that the decisions of the Constitutional Court at issue in the present Opinion fall within the scope of the MCV means, at the same time, that they constitute an instance of 'implementation' of the MCV Decision, and therefore, of EU law, for the purposes of Article 51(1) of the Charter. Article 47 of the Charter is, for the purposes of the present case, the most specific provision to ensure that the Court may provide the referring court with a useful answer.

C. Assessment

54. In order to address the questions referred in the present case, I shall start by briefly setting out the national legal context (1). Second, I shall address the first and second questions, concerned with the legal effects of the MCV Decision and reports (2). Third, I shall examine the third question, concerned with the principle of judicial independence (3). Fourth and finally, I shall conclude with few observations on the impact that the principle of primacy of EU law has on the application of disciplinary sanctions to judges for disregarding the decisions of the constitutional court (4).

1. The national legal context

55. On 4 February 2009 and 8 December 2016, the Prosecutor's Office attached to the HCCJ and the SRI, the Romanian domestic intelligence service, signed two protocols entrusting the SRI with the task of carrying out technical surveillance measures, such as the interception of communications, on the basis of Article 142 of the Code of Criminal Procedure.

56. By its Decision No 51/2016, ruling on a plea of unconstitutionality, the Constitutional Court declared the expression 'or by other specialist State bodies' in Article 142 of the Code of Criminal Procedure to be unconstitutional.

That court found, inter alia, that that expression lacked clarity, precision and foreseeability. It did not enable the identification of the bodies entrusted with the carrying out of measures involving a high degree of intrusion on the private life of individuals.

57. Furthermore, pursuant to Article 147(4) of the Romanian Constitution, the Constitutional Court declared that Decision No 51/2016 does not apply to judgments having become final at the date of its publication, but that it will be applicable to pending cases.

58. Following that decision, Article 142(1) of the Code of Criminal Procedure was amended by Emergency Ordinance No 6/2016. The new wording of that provision specifies that the Prosecutor is empowered to carry out the technical surveillance or can order that such surveillance is carried out by the body in charge of the criminal investigation or by specialised police officers, removing the expression 'or by other specialist State bodies'.

59. By Decision No 302/2017, ruling on a plea of unconstitutionality, the Constitutional Court found Article 281(1)(b) of the Code of Criminal Procedure to be unconstitutional, in as much as that provision did not include among the cases of absolute nullity those in which the body responsible for bringing criminal proceedings does not have jurisdiction *ratione materiae* and *ratione personae*.

60. By Decision No 26/2019, the Constitutional Court found that there was a legal conflict of a constitutional nature between the Prosecutor attached to the HCCJ and the Parliament, on the one hand, and the HCCJ and the other jurisdictions, on the other. This conflict resulted from the conclusion between the Prosecutor's Office attached to the HCCJ and the SRI of the protocols of 4 February 2009 and of 8 December 2016, as well as from the inappropriate exercise of parliamentary control over the activities of the SRI. That court found, inter alia, that the provisions of the protocols infringed the right to a fair trial and the right to private and family life provided for in the Romanian Constitution. Decision No 26/2019 required judicial bodies to apply Decisions No 51/2016 and No 302/2017 and to verify, in pending cases, whether there had been an infringement of the rules relating to the personal and material jurisdiction of the body in charge of the criminal investigation.

2. The MCV Decision and reports

61. By its first question, the referring court asks whether the MCV Decision and the requirements laid down in the reports adopted on its basis are binding on Romania. By the first and second parts of the second question, the referring court enquires, essentially, whether Article 2 TEU, in conjunction with Article 4(3) TEU, imposes on Romania the obligation to comply with the requirements laid down in the MCV reports, and whether that obligation also requires the Constitutional Court to refrain from adopting decisions which interpret national law and which establish mandatory rules for the application of the law by judicial bodies. The referring court further asks whether, in those circumstances, it is to disapply the decisions of the Constitutional Court.

62. Those questions should be considered jointly. They have two layers. First, they enquire about the nature and the legal effects of those instruments. Second, they ask whether the constitutional decisions at issue in the present case are in fact compliant with those instruments.

63. First, I have addressed the issue of the nature of the legal effects of the MCV Decision and the reports adopted on its basis in detail in my *AFJR* Opinion. (20) I suggested that the MCV Decision is legally binding on Romania. I also suggested that the MCV Decision triggers the applicability of the Charter: national rules which are adopted and applied within the scope of the MCV Decision mean that those rules also fall within the scope of Article 51(1) of the Charter. (21)

64. However, the MCV reports and the recommendations contained therein are not legally binding on Romania. Those reports must nevertheless be duly taken into consideration by Romania in its efforts to fulfil its obligations to attain the benchmarks contained in the Annex to the MCV Decision, having due regard for the principle of sincere cooperation enshrined in Article 4(3) TEU. (22)

65. The latter point raises another important consequence which is also of relevance in the present case: since the MCV reports do not contain any binding legal obligations, they cannot in and of themselves be enforced before national courts. Thus, national judges cannot, as a matter of EU law, rely on the recommendations contained in those reports in order to disapply the provisions of national law that they deem contrary to such recommendations. (23)

66. Second, turning to the issue of substance, would the MCV Decision preclude the adoption of the constitutional decisions at issue? Two main lines of argument have been put forward in this regard.

67. First, the wording of the second question referred states that the Constitutional Court has interpreted the law and established specific and mandatory rules for the application of the law by judicial bodies, which is a task falling within the exclusive jurisdiction of the judicial authorities. That question also states that the actions of that court introduce new legislative measures, a task which falls within the exclusive competence of the legislative authorities. That argument suggests, essentially, that the Constitutional Court has disregarded the separation of powers, and that its decisions encroach upon the prerogatives of other state actors, in particular the judiciary.

68. Second, the Prosecutor has submitted in its replies to the questions put to it by the Court that, since the decisions of the Constitutional Court at issue in the main proceedings have led to the exclusion of all the evidence obtained with the technical support of the SRI, this affects negatively and significantly the fight against high-level corruption. It deprives ordinary courts of the faculty to determine in each case whether the participation of the SRI has given rise to an infringement of fundamental rights.

69. The first and second defendants submit in their replies to the questions put by the Court that nothing has been put forward which would suggest that such decisions of the Constitutional Court run counter to the objectives set out in the benchmarks contained in the Annex to the MCV Decision.

70. In my view, the arguments suggesting that the decisions of the Constitutional Court at issue would amount to an infringement of the obligations incumbent on Romania, by virtue of the MCV Decision, are wholly unfounded.

71. It ought to be emphasised that, even if subject to the indeed special regime of the MCV Decision, a Member State retains its default institutional autonomy in choosing and designing its national institutions and procedures. That autonomy also includes the choice of which bodies are entitled to carry out, under national law, technical surveillance that may be used as evidence in criminal proceedings. It naturally also includes the organisation and powers of domestic intelligence services.

72. Next, the MCV Decision, and the obligations under the Charter triggered by that decision, do not only consist of the obligation to seek the (somewhat mechanical) attainment of the benchmarks set out in the Annex to the MCV Decision. They also entail an enhanced need for the respect of fundamental rights guaranteed by the Charter, legality, and the rule of law. After all, it is perhaps safe to assume that a Member State would not have been subject to the special MCV regime had everything already been ideal before.

73. In summary, the MCV Decision indeed seeks to foster (judicial) efficiency and the fight against corruption, but those objectives must be achieved within (or *above all* within) a functional system that respects its own legal framework and the fundamental rights of the individuals concerned. It is incorrect (and very dangerous) to think that the purpose of the MCV Decision is simply to maximise one value (effectiveness measured in the number of final convictions (24)) to the detriment of other, equally important, values. (25)

74. Against such a background, if anything could be said about the constitutional decisions at issue, it would be rather that they are in fact implementing the objectives and benchmarks laid out in the Annex to the MCV Decision, but *certainly not* that they are in infringement thereof. Put simply, I find nothing problematic with a national constitutional decision declaring that, as a matter of national constitutional law and safeguards, domestic intelligence services are not to participate in criminal investigations.

75. In fact, in line with the observations made by the Commission on this issue in the past, there would certainly be reason for concern if domestic intelligence services routinely participated in criminal investigations. The Commission's MCV Report of 2018 pointed out the problems raised by the protocols with the SRI. (26) Moreover, the Commission's MCV Report of 2019 referred to the decisions of the Constitutional Court at issue, emphasising that 'the goal should be a framework where the intelligence services are under proper democratic oversight, where crimes can be effectively investigated and sanctioned in full respect of fundamental rights, and where the public can have confidence that judicial independence is secure'. (27)

76. Therefore, it may simply be repeated that, EU law, including the indeed rather far-reaching MCV Mechanism, does not in any way regulate the manner in which technical surveillance measures in the framework of criminal proceedings are carried out, or the role and powers of domestic intelligence services. Within that framework, a national constitutional court is naturally able to exclude certain actors or bodies from being authorised to carry out technical surveillance measures.

77. The fact that such a constitutional decision will have procedural repercussions for ongoing and future criminal proceedings relating to corruption is the necessary and logical consequence. In *Dzivev*, the Court has accepted the necessity of such consequence in the form of an 'exclusionary rule' for unlawfully obtained evidence even in cases falling under the scope of Article 325(1) TFEU. (28) The same must then be necessarily true, a fortiori, for the much vaguer regime of the MCV Decision.

78. As a result of these considerations, I propose that the Court answer Question 1 as well as the first and second parts of Question 2 as follows:

Decision 2006/928 is legally binding. The reports adopted by the Commission in the framework of the MCV, are not legally binding on Romania. However, those reports are to be duly taken into consideration by that Member State in its efforts to fulfil its obligations to attain the benchmarks set out in the Annex to the MCV Decision, having due regard to the requirement of the principle of sincere cooperation enshrined in Article 4(3) TEU.

The obligation on Romania to attain the objectives set out in the MCV Decision do not preclude decisions of the national constitutional court declaring the carrying out of technical surveillance measures in the framework of criminal proceedings by domestic intelligence services to be unconstitutional and requiring the exclusion of any evidence thus obtained from criminal proceedings.

3. The principle of judicial independence

79. By the first part of its third question, the referring court wishes to know, in essence, whether the principle of judicial independence enshrined in the second subparagraph of Article 19(1) TEU and in the second paragraph of Article 47 of the Charter is to be interpreted in the sense that it precludes Decision No 51/2016, Decision No 302/2017 and Decision No 26/2019 of the Constitutional Court.

80. The referring court considers that the combined effects of Decisions No 51/2016, No 302/2017 and No 26/2019 of that court encroach on the competences of ordinary courts. They lead to the exclusion of evidence in cases where the SRI was involved in the execution of surveillance warrants, depriving ordinary courts of the possibility of carrying out an assessment *in concreto* in the light of the particular circumstances of each case. The referring court also considers that, by imposing the application of that case-law to pending cases, the constitutional decisions mentioned above have retroactive effect, rendering the results of criminal proceedings unforeseeable. In the view of the referring court, this is liable to compromise its judicial independence.

81. The Commission has submitted that the fact that the referring court is bound by the decisions of the Constitutional Court does not compromise as such its independence, so long as the Constitutional Court itself complies with the requirements of judicial independence. According to the Commission, there is nothing to indicate that the Constitutional Court, and in particular, the constitutional decisions at issue, are not compliant with the requirements of judicial independence and impartiality flowing from the second subparagraph of Article 19(1) TEU and from Article 47 of the Charter.

82. I agree with that latter position.

83. First, nothing in this case or in the parallel cases has exposed any structural reasons as to why the national constitutional court should be regarded as not being independent. In particular, in the *Euro Box Promotion* Opinion, to which I cannot but refer also for the purposes of the present case, I suggested that nothing in the composition, status and competences of the Constitutional Court was such as to give rise to any doubts as to the independence and impartiality of that court. (29) Furthermore, no factual elements or arguments were put forward which revealed manipulation, circumvention, or abuse of normal procedures established under national law. (30)

84. Those considerations are also valid in the present context. The present request for a preliminary ruling does not contain any additional elements obliging one to revisit that conclusion in the specific framework of the decisions of the Constitutional Court at issue in the main proceedings.

85. Second, the specific concerns raised by the referring court, implying that the Constitutional Court has encroached on the competences of the judiciary to the extent that its rulings entail a threat to the judicial independence of ordinary courts, do not appear substantiated. There is nothing to indicate that, by declaring specific aspects of certain provisions of the Code of Criminal Procedure to be unconstitutional in its Decisions No 51/2016 and No 302/2017, or by declaring, in Decision No 26/2019, a legal conflict of a constitutional nature, the Constitutional Court acted outside the realm of its competences or otherwise endangered the independence of ordinary courts.

86. Third, nor does it appear that the application of the effects of the decisions of the Constitutional Court at issue to pending cases, even though the surveillance measures had already been executed in accordance with the provisions that were previously accepted as constitutional, would amount to a retroactive application of the case-law endangering the principle of legality. As the Commission rightly notes, the exclusion of evidence based on those surveillance warrants does not operate to the detriment of individual rights. Moreover, the fact that a new interpretation of the law delivered by a supreme or constitutional jurisdiction will be applicable, unless expressly stated otherwise,to all future and pending cases is rather common. (31)

87. In summary therefore, what appears to be at the core of the concerns raised by the referring court is in fact a disagreement about the specific legal approach embraced by the national constitutional court which results in certain limitations for the referring court. However, this cannot be interpreted, per se, as a structural threat to the judicial independence of that court. 'Judicial independence' should not be mistaken for judicial insularity or a judiciary that is unchecked. Judges are indeed endowed with the privilege of independence, in order for them to be impartial, but within the bounds of the law and with the constitutional checks and balances being exercised by other powers of the State.

88. However, it is true that the foregoing applies only to the structures and institutions of the Member States which themselves remain within (what may be considered) 'the rule of law rules of the game'. I acknowledge that it is impossible to follow such (normal) rules in (abnormal) times, in national systems where other institutions are no longer playing by those rules. Thus, respecting the formal institutional authority of another (judicial) institution is warranted *as long as* that institution itself meets the structural guarantees of independence and impartiality. (32)

89. As a result, I propose that the Court answer the first part of Question 3 as follows: the EU principle of judicial independence, enshrined in the second paragraph of Article 47 of the Charter and in the second subparagraph of Article 19(1) TEU, does not preclude decisions of a national constitutional court declaring the carrying out of technical surveillance measures in the framework of criminal proceedings by domestic intelligence services to be unconstitutional and requiring the exclusion of any evidence thus obtained from criminal proceedings.

4. Disciplinary sanctions for the disregard of decisions of the Constitutional Court

90. In the framework of its second and third questions, the referring court asks whether EU law precludes a provision of national law which governs the disciplinary liability of a judge who disapplied a decision of the Constitutional Court in the context of a case where a request for a preliminary ruling has been submitted to the Court.

91. This question is motivated by the fact that, pursuant to 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. However, in contrast to the *Euro Box Promotion* Opinion, in which a similar issue had been raised by the referring court in anticipation of the possibility at a later stage to disregard the potentially incompatible national constitutional case-law (without being exposed to disciplinary proceedings as a result), (33) the situation in the present case finds itself at a later stage.

92. By letter of 26 July 2019, the referring court informed the Court that a preliminary disciplinary investigation had been initiated by the Judicial Inspection against the referring judge on the basis of Article 99(ș) of Law No 303/2004. The initiation of such an investigation appears to have been motivated by the content of the order for reference in the present case, in which the referring judge adopts a critical position vis-à-vis the case-law of the Constitutional Court, questioning its jurisdiction and the binding character of its rulings. (34)

93. In my Opinion in *Euro Box Promotion*, I sought to place the case-law of the Court on the permissible limits of 'judicial disobedience' into its proper context. I suggested, in essence, that EU law opens up a space for rational legal discourse about the correct interpretation of EU law for any national court (no account being taken of formal judicial hierarchy). On the one hand, that means that any national court or tribunal must be allowed to apply EU law and, if it considers it necessary, to make a make a request for a preliminary ruling to the Court of Justice under Article 267 TFEU. On the other hand, however, provided that these minimum standards are met, by merely invoking EU law, a national judge does not completely break free from any constraints normally applicable to the exercise of the national judicial function, including national judicial hierarchy and discipline. (35)

94. However, provided that it is indeed correct that the national judge is faced with disciplinary proceedings *merely because* he made a request for a preliminary ruling, in which he questioned the legal opinion of a national constitutional court, then in my view, any debate about the appropriate balance between the systemic requirements of

national law and EU law is over. EU law categorically precludes that judges are subject to national disciplinary proceedings *solely* because they made use of the right given to them by Article 267 TFEU. (36)

95. It suffices to recall that, according to the case-law of the Court, EU law precludes provisions of national law exposing national judges to disciplinary proceedings because they have submitted a request for a preliminary ruling to the Court. (37) This means that the mere prospect of being the subject of disciplinary proceedings as a result of submitting a request or deciding to maintain a request for a preliminary ruling after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions of national courts in the framework of Article 267 TFEU. (38) Furthermore, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court also constitutes a guarantee essential to judicial independence. (39)

96. As a result, I propose that the Court answer the third part of Questions 2 and the second part of Question 3 as follows: Article 267 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, preclude disciplinary proceedings being initiated against a judge merely for having submitted a request for a preliminary ruling to the Court whereby that judge questions the case-law of the national constitutional court and raises the possibility to that case-law being disapplied.

VI. Conclusion

97. I propose that the Court answer the questions referred for a preliminary ruling by the Tribunalul Bihor (Regional Court of Bihor, Romania) in the following way:

Question 1 and the first and second parts of Question 2 should be answered as follows:

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 is legally binding. The reports adopted by the European Commission in the framework of the mechanism for cooperation and verification, are not legally binding on Romania. However, those reports are to be duly taken into consideration by that Member State in its efforts to fulfil its obligations to attain the benchmarks set out in the Annex to Decision 2006/928, having due regard to the requirement of the principle of sincere cooperation enshrined in Article 4(3) TEU.

The obligation on Romania to attain the objectives set out in Decision 2006/928 do not preclude decisions of the national constitutional court declaring the carrying out of technical surveillance measures in the framework of criminal proceedings by domestic intelligence services to be unconstitutional and requiring the exclusion of any evidence thus obtained from criminal proceedings.

The first part of Question 3 is to be answered as follows: the EU principle of judicial independence, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union and in the second subparagraph of Article 19(1) TEU, does not preclude decisions of a national constitutional court declaring the carrying out of technical surveillance measures in the framework of criminal proceedings by domestic intelligence services to be unconstitutional and requiring the exclusion of any evidence thus obtained from criminal proceedings.

The third part of Question 2 and the second part of Question 3 shall be answered as follows: Article 267 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, preclude disciplinary proceedings being initiated against a judge merely for having submitted a request for a preliminary ruling to the Court whereby that judge questions the case-law of the national constitutional court and raises the possibility of that case-law being disapplied.

Original language: English.

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2 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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3 See my Opinion in *Euro Box Promotion and Others* (Joined Cases C-357/19 and C-547/19), abbreviated as 'the *Euro Box Promotion* Opinion' for reference purposes. See also my Opinion issued the same day in *FQ and Others* (Joined Cases C-811/19 and C-840/19).

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4 OJ 2005 L 157, p. 11.

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5 OJ 2005 L 157, p. 203.

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6 OJ 2006 L 354, p. 56.

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

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8 Judgment of 6 October 1982, Cilfit and Others (283/81, EU:C:1982:335, paragraph 16).

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9 Potentially triggering the exception to the duty of the courts of last instance to make a request for a preliminary ruling because the interpretation of EU law sought is beyond reasonable doubt – see judgment of 6 October 1982, Cilfit and Others (283/81, EU:C:1982:335, paragraphs 16 to 20).

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10 See Article 99 of the Rules of Procedure.

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11 Judgment of 26 March 2020, Miasto Łowicz and Prokurator Generalny (C-558/18 and C-563/18, EU:C:2020:234, paragraph 54).

12 Judgment of 26 March 2020, Miasto Łowicz and Prokurator Generalny (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 45 to 53).

13 I certainly acknowledge that, technically speaking, the '*actus reus*' or 'objective element' of the disciplinary offence under Article 99(ș) of Law No 303/2004 (quoted above, in point 12 of this Opinion), is not the fact of '[making] a request for a preliminary ruling to the Court of Justice', but 'the failure to comply with decisions of the Constitutional Court'. However, the two become one when a request is made to this Court *in order to* question the soundness of legal opinion contained in a decision of the Constitutional Court.

14 See, with regard to the effect of disciplinary sanctions on the prerogatives granted to national courts and tribunals by Article 267 TFEU, judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraphs 24 and 25).

15 See, *a contrario*, judgment of 16 July 2020, *Governo della Repubblica italiana(Status of Italian magistrates)* (C-658/18, EU:C:2020:572, paragraphs 73 to 75).

16 See, to that effect, judgment 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).

17 See points 173 to 224 of the *AFJR* Opinion and points 79 to 85 of the *Euro Box Promotion* Opinion.

18 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C64/16, EU:C:2018:117, paragraph 40); of 24 June 2019, Commission v Poland (Independence of the Supreme Court) (C-619/18, EU:C:2019:531, paragraph 51); 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 83); or of 26 March 2020, Miasto Łowicz and Prokurator Generalny(C-558/18 and C-563/18, EU:C:2020:234, paragraph 34). My emphasis.

19 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).

20 See points 145 to 172 of the *AFJR* Opinion.

21 See points 186 to 202 of the *AFJR* Opinion and point 85 of the *Euro Box Promotion* Opinion.

22 See points 160 to 167 of the *AFJR* Opinion.

23 Point 168 of the *AFJR* Opinion.

24 It may be emphasised in that context that, in my view, what the case-law of the Court aims at is 'structural effectiveness' (achieving the smooth operation of the mechanism at issue), but not necessarily 'individual effectiveness' (meaning that there would have to be a conviction in each individual case at any price) – further see my Opinion in X (European arrest warrant against a singer) (C-717/18, EU:C:2019:1011, point 86).

25 With naturally that theme not being limited to the MCV Decision only, but featuring prominently also in other areas of EU law, such as Article 325(1) TFEU – see, for similar considerations in the context of a balanced interpretation of that provision, points 173 to 176 of the parallel *Euro Box Promotion* Opinion.

26 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (COM(2018) 851 final of 13 November 2018, p. 2).

27 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, (COM(2019) 499 final of 22 October 2019, p. 3). See also the accompanying Technical Report (SWD(2019) 393 final, p. 12).

28 Judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraphs 33 to 41).

29 See points 215 to 222 of the *Euro Box Promotion* Opinion.

30 See points 225 to 229 of the *Euro Box Promotion* Opinion. See also more generally points 242 to 248 of the *AFJR* Opinion.

31 Both, in civil and common law in Europe, *incidental retrospectivity*, flowing from the fact that a legal interpretation entails effects *ex tunc*, is actually the rule, while *prospective overruling* is the exception that will have to be expressly provided for by limiting the temporal effects of such a decision – see for instance, the chapter on Prospective Overruling in Arden, M., *Human Rights and European Law: Building New Legal Orders*, Oxford University Press, 2015, pp. 267 to 272. The same is in fact true of the procedure before this Court, where the limitation of temporal effect of a decision (and thus limiting the applicability of the judgment of the Court only to future cases) would have to be specifically requested (and is rarely granted) – see for example, Barents, R., *Remedies and Procedures before the EU Courts*, Wolters Kluwer, 2016, pp. 454 to 458.

32 See, for an example of when such guarantees are no longer met, judgment 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, paragraphs142 to 152).

33 See point 233 of the *Euro Box Promotion* Opinion.

34 See above, points 25 and 41 of this Opinion.

35 See points 235 to 243 of the *Euro Box Promotion* Opinion.

36 As already stated above in points 36 to 42 of this Opinion, it is not for this Court to decide on individual cases of judicial discipline. Thus, while EU law precludes that national disciplinary proceedings are used in certain ways in general, that statement naturally cannot account for the infinite variety of individual cases, in which a request for a preliminary ruling may be made by a national judge, potentially giving rise to *other* reasons for disciplinary investigation. Hence the intentional stress on *merely because*. See also points 244 and 245 of the *Euro Box Promotion* Opinion.

37 See judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 58).

38 Ibid., paragraphs 57 to 58.

39 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 59). See also, to that effect, judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 25), and order of 12 February 2019, RH (C-8/19 PPU, EU:C:2019:110, paragraph 47).