Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 4 March 2021 [1]

Joined Cases C-357/19 and C-547/19

Ministerul Public – Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție,
PM,
RO,
SP,
TQ
v
QN,
UR,
VS,
WT,
Autoritatea Națională pentru Turism,
Agenția Națională de Administrare Fiscală,
SC Euro Box Promotion SRL (C-357/19)
and
CY,
Asociația 'Forumul Judecătorilor din România'
v
Inspecția Judiciară,
Consiliul Superior al Magistraturii,
Înalta Curte de Casație și Justiție (C-547/19)

(Requests for a preliminary ruling from the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania))

(Reference for a preliminary ruling – Protection of the European Union's financial interests – Article 325(1) TFEU – Convention on the protection of the European Communities' financial interests – Criminal proceedings concerning corruption – Projects partially funded by European funds – Decision of a constitutional court ruling on the legality of the composition of judicial panels – National legislation providing for the composition of judicial panels by drawing lots – Extraordinary appeal against final judgments – Right to a tribunal previously established by law – Second paragraph of Article 47 of the Charter of Fundamental Rights of the European

[1] Original language: English.

Union – Judicial independence – Second subparagraph of Article 19(1) TEU – Primacy of EU law – Disciplinary proceedings against members of the judiciary)

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I. Introduction

1. During 2019, a number of requests for a preliminary ruling concerning judicial independence, the rule of law, and the fight against corruption were submitted to this Court by various courts in Romania. The first group of cases concerned various amendments to the national laws on the judiciary, most of which had been made by emergency ordinances. [2]

2. The present joined cases are the 'lead' cases in the second group of cases. [3] The main theme of the second group is rather different from the first: can judgments of the Curtea Constituțională a României (Constitutional Court, Romania) ('the Constitutional Court') infringe the principles of judicial independence and the rule of law, as well as the protection of the financial interests of the Union?

3. The specific focus of these two joined cases concerns the effects of a decision of the Constitutional Court which finds, in essence, that some of the panels of the national supreme court, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania, 'the HCCJ'), were improperly constituted. This decision enabled some of the parties concerned to introduce extraordinary appeals, which in turn raised potential issues concerning not only the protection of the financial interests of the Union under Article 325(1) TFEU, but also the interpretation of the concept of 'tribunal previously established by law', enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). Finally, all that falls within a national institutional environment in which the non-compliance with the decisions of the constitutional court constitutes a disciplinary offence.

II. Legal framework

A. EU law

4. Pursuant to Article 1 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests ('the PIF Convention'): [4]

2 See my Opinion in *Asociația "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, as well as my Opinion delivered on the same day in *Statul Român – Ministerul Finanțelor Publice* (C-397/19, EU:C:2020:747).

3 See also my Opinions delivered today in parallel in Case C-379/19, *DNA- Serviciul Teritorial Oradea*, and in Joined Cases C-811/19 and C-840/19, *FQ and Others*.

4 OJ 1995 C 316, p. 49.

'For the purposes of this Convention, fraud affecting the European Communities' financial interests shall consist of:

(a) in respect of expenditure, any intentional act or omission relating to:

– the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,

– non-disclosure of information in violation of a specific obligation, with the same effect,

– the misapplication of such funds for purposes other than those for which they were originally granted;

…

2. Subject to Article 2(2), each Member State shall take the necessary and appropriate measures to transpose paragraph 1 into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences.

3. Subject to Article 2(2), each Member State shall also take the necessary measures to ensure that the intentional preparation or supply of false, incorrect or incomplete statements or documents having the effect described in paragraph 1 constitutes a criminal offence if it is not already punishable as a principal offence or as participation in, instigation of, or attempt to commit, fraud as defined in paragraph 1.

4. The intentional nature of an act or omission as referred to in paragraphs 1 and 3 may be inferred from objective, factual circumstances.'

5. In accordance with Article 2 of the PIF Convention:

'1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1(1), are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition, it being understood that serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding ECU 50 000.

…'

B. Romanian law

1. The Romanian Constitution

6. The Romanian Constitution, as amended and supplemented by Law No 429/2003, contains the following provisions:

'Article 142 – Structure

1. The [Constitutional Court] is the guarantor of the primacy of the Constitution.

2. The [Constitutional Court] shall consist of nine judges, appointed for a term of office of nine years, which may not be extended or renewed.

3. Three judges shall be appointed by the Camera Deputaților (Chamber of Deputies), three by the Senat (Senate) and three by the President of Romania.

…

Article 143 – Conditions for appointment

The judges of the [Constitutional Court] must have excellent legal qualifications, a high level of professional competence and at least 18 years' experience of legal work or in higher legal education.

…

Article 145 – Independence and irremovability

The judges of the [Constitutional Court] shall be independent in the exercise of their office and shall be irremovable throughout that term of office.

Article 146 – Duties

The [Constitutional Court] shall have the following duties:

…

(e) resolving legal conflicts of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two houses of the Parliament of Romania, the Prime Minister or the President of the Consiliul Superior al Magistraturii [(Superior Council of Magistracy, "the CSM")];

…

Article 147 – Decisions of the [Constitutional Court]

1. The provisions of laws and ordinances currently in force, as well as those of regulations, that are found to be unconstitutional shall cease to have legal effect 45 days after the publication of the decision of the [Constitutional Court] if, during that time, the Parliament or the Government, as appropriate, fails to bring the unconstitutional provisions into line with the

provisions of the Constitution. Throughout that period, the provisions that have been found to be unconstitutional shall be suspended by law.

2. In cases of unconstitutionality which concern laws, before the promulgation of those laws, the Parliament shall be required to review the provisions concerned in order to bring them into line with the decision of the [Constitutional Court].

…

4. The decisions of the [Constitutional Court] shall be published in the *Monitorul Oficial al României* [(Official Gazette of Romania)]. As from the date of publication, those decisions shall be generally binding and have legal effect only for the future.'

2. Law No 303/2004

7. 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'),[5] the 'failure to comply with decisions of the [Constitutional Court] …' constitutes a disciplinary offence.

3. Law No 304/2004

8. The composition of the panels of the HCCJ is governed by Articles 32 and 33 of Legea nr. 304/2004 privind organizarea judiciară (Law No 304/2004 on the organisation of the judicial system, 'Law No 304/2004').[6] Those provisions were amended in 2010, 2013 and 2018.

9. In the version modified by Legea nr. 207/2018 pentru modificarea și completarea Legii nr. 304/2004 privind organizarea judiciară (Law No 207/2018 amending and supplementing Law No 304/2004),[7] Article 32 of Law 304/2004 reads as follows:

'1. At the beginning of each year, acting on a proposal from the President or the Vice-Presidents of the [HCCJ], the Governing Council shall approve the number of panels of five judges and the composition of those panels.

2. In criminal matters, the panels of five judges shall consist of members of the Criminal Chamber of the [HCCJ].

3. In non-criminal matters, the panels of five judges shall consist of specialised judges, depending on the nature of the case.

4. The judges sitting on those panels shall be selected by drawing lots, during a public hearing, by the President or, in his or her absence, by one of the two Vice-Presidents of the [HCCJ]. The members of panels hearing cases may be changed only on an exceptional basis, in the light of the objective criteria established by the Regulamentul privind organizarea și funcționarea

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

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

7 *Monitorul Oficial al României*, part I, No 636 of 20 July 2018.

administrativă a Înaltei Curți de Casație și Justiție [(Regulation on the organisation and administrative functioning of the HCCJ)].

5. The panels of five judges shall be chaired by the President of the [HCCJ], one of the two Vice-Presidents, or by Presidents of Chambers if they have been appointed under paragraph 4 to sit on the panel concerned.

6. If none of the above persons has been designated to sit on a panel of five judges, each judge shall chair a panel on a rotating basis, in order of their length in the service within the magistracy.

7. Cases falling within the jurisdiction of panels of five judges shall be allocated randomly using a computerised system.'

4. Regulation on the organisation and administrative functioning of the HCCJ

10. The regulamentul privind organizarea și funcționarea administrativă a ÎCCJ (Regulation on the organisation and administrative functioning of the HCCJ, 'the HCCJ Regulation')[8] was adopted on the basis of Law No 304/2004. It was amended and completed by Decision No 24 of the HCCJ of 25 November 2010 ('Decision No 24/2010'),[9] and by Decision No 3 of the HCCJ of 28 January 2014 ('Decision No 3/2014').[10]

11. In their version as modified by Decision No 3/2014, Articles 28 and 29 of the HCCJ Regulation read as follows:

'Article 28

1. Panels of five judges having jurisdiction to hear cases laid down by law shall operate within the framework of the [HCCJ].

2. At the beginning of each year, five-judge panels consisting only of members of the Criminal Chamber shall be established in criminal matters, and in non-criminal matters two five-judge panels consisting of members of the First Civil Chamber, the Second Civil Chamber, and the Chamber for Administrative and Tax Matters shall be established.

3. The number of panels of five judges in criminal matters shall be approved annually by the Governing Council, acting on a proposal from the President of the Criminal Chamber.

4. Panels of five judges shall be chaired, as appropriate, by the President, the Vice-Presidents, the President of the Criminal Chamber or the eldest member.

Article 29

1. With a view to establishing panels of five judges in criminal matters, the President or, in his or her absence, one of the Vice-Presidents of the [HCCJ] shall select annually, by drawing lots, during a public hearing, four or, where appropriate, five judges from the Criminal Chamber of the [HCCJ] for each panel.

8 *Monitorul Oficial al României*, part I, No 1 076 of 30 November 2005.

9 *Monitorul Oficial al României*, part I, No 819 of 8 December 2010.

10 *Monitorul Oficial al României*, part I, No 75 of 30 January 2014.

2. With a view to establishing the two panels of five judges in non-criminal matters, the President or, in his or her absence, one of the Vice-Presidents of the [HCCJ] shall designate, under the conditions laid down in paragraph 1, judges as members of those panels.

3. The Governing Council of the [HCCJ] shall determine annually how well the chambers are represented in the composition of the panels referred to in paragraph 2 and shall approve the composition of panels of five judges; in the case of panels of five judges in criminal matters, this shall be done in response to a proposal from the President of the Criminal Chamber.

4. Judges who have been selected the previous year shall not take part in the drawing of lots the following year.

5. Four or, where appropriate, five substitute judges shall be selected for each panel under the conditions laid down in paragraphs 1 to 3.'

5. Code of Criminal Procedure

12. According to the first paragraph of Article 426 of Legea nr. 135/2010 privind Codul de procedură penală (Law No 135/2010 laying down the Code of Criminal Procedure),[11] as amended by Legea nr. 255/2013 and by Ordonanța de urgență a Guvernului României nr. 18/2016 (Decree Law No 18/2016, 'the Code of Criminal Procedure'):

'An extraordinary action for annulment may be brought against final decisions in criminal proceedings in the following cases:

…

(d) where the composition of the appeal court is not in compliance with the law or where there is a case of incompatibility.'

13. According to Article 428(1) of the Code of Criminal Procedure, 'an extraordinary action for annulment on the grounds laid down in Article 426(a) and (c) to (h) may be brought within 30 days from the date of notification of the decision of the appeal court'.

14. Pursuant to Article 432(1) of the Code of Criminal Procedure: 'at the hearing held so that a ruling may be given on the extraordinary action for annulment, if the court, having heard the parties and the opinion of the public prosecutor, finds that the action is well founded, it shall issue a decision setting aside the decision in respect of which annulment is sought and shall remit the case for judgment or judgment on appeal, either immediately or laying down a time limit, as appropriate'.

[11] *Monitorul Oficial al României*, part I, No 486 of 15 July 2010.

6. Criminal Code

15. Article 154 of Legea nr. 286/2009 privind Codul penal (Law No 286/2009 on the Criminal Code), [12] of 17 July 2009, as subsequently amended and supplemented ('the Criminal Code'), states that:

'(1) The limitation periods for criminal liability are as follows:

(a) 15 years, where the offence committed is punishable by law by life imprisonment or by a term of imprisonment of more than 20 years;

(b) 10 years, where the offence committed is punishable by law by a term of imprisonment of not less than 10 years and not more than 20 years;

(c) 8 years, where the offence committed is punishable by law by a term of imprisonment of not less than 5 years and not more than 10 years;

(d) 5 years, where the offence committed is punishable by law by a term of imprisonment of not less than 1 year and not more than 5 years;

(e) 3 years, where the offence committed is punishable by law by a term of imprisonment of less than 1 year or by a fine.

(2) The limitation periods laid down in this Article shall begin to run from the date on which the offence is committed. The limitation period shall begin to run: in the case of continuing offences, from the date on which the action or inaction ceases; in the case of continuous offences, from the date on which the last action or inaction is committed; and in the case of habitual offences, from the date on which the last act is committed.

(3) In the case of progressive offences, the limitation period for criminal liability shall begin to run from the date on which the action or inaction is committed and shall be calculated in relation to the penalty corresponding to the final outcome.

…'

16. The causes and effects of interruptions of limitation periods are regulated in Article 155 of the Criminal Code as follows:

'(1) The completion of any procedural action in a case shall constitute an interruption of the limitation period for criminal liability.

(2) A new limitation period shall begin to run after each interruption.

(3) The interruption of the limitation period shall be enforceable against all participants in the offence, even if the interrupting action concerns only some of those participants.

(4) If the limitation periods laid down in Article 154 have been exceeded once again, they shall be regarded as completed regardless of the number of interruptions.

[12] *Monitorul Oficial al României*, part I, No 510 of 24 July 2009.

(5) The admission in principle of the request to reopen a criminal case shall give rise to a new limitation period for criminal liability.'

III. Facts, national proceedings and the questions referred

A. Case C-357/19

17. The main proceedings in this case concern extraordinary appeals introduced by the Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție (the Prosecutor's Office attached to the HCCJ – National Anti-corruption Directorate, 'the Prosecutor') on the one hand, and four appellants in that case, on the other hand, against a final judgment of 5 June 2018.

18. That judgment, which was delivered by a panel of five judges of the HCCJ, convicted the appellants on counts of corruption, abuse of office and tax evasion. By that judgment, the panel of five judges ruled on the appeal brought against the judgment of the Criminal Chamber of the HCCJ of 28 March 2017. That panel comprised the President of the Criminal Chamber of the HCCJ, and four other judges selected by drawing lots, in accordance with the HCCJ Regulation.

19. As regards the acts of *corruption*, it was found that during the period from 2010 to 2012, the first appellant, who at that time was a minister, coordinated a scheme whereby she and several persons close to her received sums of money from the representatives of certain commercial companies in return for guaranteeing that those compaies received timely payment for works carried out within the framework of programmes financed by the ministry's budget, at a time when that budget was greatly reduced and the payment for the works significantly delayed. That scheme also involved the second appellant (at that time, the personal assistant to the minister), the third appellant (at that time, the permanent secretary to the minister), as well as other persons (a personal adviser to the minister and director of a national investment body).

20. As regards the acts of *abuse of office*, it was found that, during 2011, the first appellant, in her capacity as minister, authorised the Ministry of Regional Development and Tourism to award a contract for services to SC Europlus Computers SRL, which was run by the fourth appellant. The contract concerned the provision of services to promote Romania in the context of the events that took place during the international professional boxing gala organised by the Romanian Boxing Federation. The award of the contract for advertising services benefited from public funds in the amount of 8 116 800 Romanian lei ('RON') for the organisation of a commercial event for which all the proceeds of which went to the organisers.

21. It was consequently held that the public funds were used for purposes that were unlawful and that the contract was awarded in breach of the legislation on public contracts. The services purchased did not fall within the eligible categories of expenditure for EU-funded programmes in the context of the 'Promotion of the tourist brand of Romania project', under the Regional Operational Programme 2007-2013. Those circumstances resulted in the refusal, by the managing authority for European funds, to pay of the amounts due. As such, the amounts that ought to have been reimbursed through European funds were charged in full to the State budget. The loss to the Ministry of Regional Development and Tourism amounted to RON 8 116 800.

22. As regards the acts of *tax fraud*, it was found that, in order to reduce the amount of taxes owed to the State budget in respect of the proceeds obtained from the abovementioned events, the fourth appellant included in the accounts of SC Europlus Computers documentation issued

by front companies attesting to fictitious expenses, allegedly incurred for advertising and consultancy services. This gave rise to damages in the amount of RON 646 838 (including RON 388 103 value added tax (VAT)), and RON 90 669 (including RON 54 402 VAT).

23. After the (appellate, five-judge) judgment of the HCCJ of 5 June 2018 became final, the Constitutional Court handed down Decision No 685/2018 of 7 November 2018 ('Decision No 685/2018'). That decision upheld the action brought by the Prime Minister of the Government of Romania. It stated that there was a legal conflict of a constitutional nature between the Parliament, on the one hand, and the HCCJ, on the other, resulting from the decisions of the Governing Council of the HCCJ according to which only four of the five members of the panels of five judges were selected by drawing lots. This was held to be contrary to the provisions of Article 32 of Law No 304/2004. As a result, all panels of five judges formed from 1 February 2014 onwards were considered to have been unlawfully composed. The Constitutional Court ordered the HCCJ to select, as soon as possible, all the members of the panels of five judges by drawing lots. It also stated that Decision No 685/2018 is applicable to completed cases, to the extent to which the time limits for bringing an extraordinary action have not yet expired for the parties.

24. The appellants, as well as the Prosecutor, brought an extraordinary action for annulment on the basis of Decision No 685/2018 of the Constitutional Court seeking to have the judgment of 5 June 2018 set aside and their appeals re-examined. In the present case, the referring court is thus called upon to decide on the merits of the grounds put forward by both parties. It can either dismiss the extraordinary action, and thereby uphold the judgment under appeal, or it can allow the action, and thereby set aside the judgment convicting the appellants and proceed with a re-examination of the appeals.

25. 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 1(1)(a) and (b) and Article 2(1) of the [PIF Convention], and the principle of legal certainty be interpreted as precluding the adoption of a decision by a body outside the judicial system, the [Constitutional Court], which adjudicates on the lawfulness of the composition of Chambers hearing the case, in that way creating the conditions for allowing extraordinary actions brought against final judgments delivered in a given period?

(2) Must Article 47(2) of [the Charter] be interpreted as precluding a finding by a body outside the judicial system – binding under national law – of the lack of independence and impartiality of a Chamber which includes a judge responsible for judicial administration who has not been randomly appointed, but on the basis of a transparent rule known to the parties and unchallenged by them, applicable to all the cases dealt with by that same chamber?

(3) Must the primacy of EU law be interpreted as allowing the national court to disapply a decision of the constitutional court, handed down in a case concerning a constitutional dispute, binding under national law?'

B. Case C-547/19

26. By decision of 2 April 2018, the Chamber for Judges hearing disciplinary matters of the CSM upheld the disciplinary action brought by the Inspecția Judiciară (Judicial Inspection, Romania) against the appellant, a judge at the Curtea de Apel București (Court of Appeal, Bucharest, Romania). That action imposed on her the disciplinary penalty of exclusion from the judiciary, in accordance with Article 100(e) of Law No 303/2004. That chamber held that there had been serious infringements of the provisions relating to the random allocation of cases. The appellant had thereby committed the disciplinary offence referred to in Article 99(o) of Law No 303/2004.

27. The appellant challenged the decision of 2 April 2018 before the HCCJ. Another parallel appeal against a procedural order refusing intervention in the original proceedings before the Chamber for Judges hearing disciplinary matters of the CSM was brought by the Asociația Forumul Judecătorilor din România (Association of Judges 'Forum', Romania). Both appeals were allocated to the panel of five judges – 'Civil 2', the composition of which was established on 30 October 2017 by way of drawing lots and approved by Decision No 68 of the Governing Council of the HCCJ of 2 November 2017. The two appeals were joined at the time of the hearing on 22 October 2018.

28. On 7 November 2018, the Constitutional Court handed down Decision No 685/2018. [13]

29. On 8 November 2018, the Governing Council of the HCCJ adopted Decision No 137/2018. On 9 November 2018, pursuant to that decision, all the members of the panels of five judges for 2018 were selected by drawing lots.

30. On 29 November 2018, Decision No 685/2018 of the Constitutional Court was published. Following that publication, the Chamber for Judges of the CSM adopted Decision No 1367 of 5 December 2018, which contained the rules for 'ensuring compliance with the requirements laid down in [Decision No 685/2018]' ('Decision No 1367/2018').

31. In order to comply with that latter decision, the panel seised of the present case, in the composition established by Decision No 137/2018, ordered on 10 December 2018 that the case be removed from the Register with a view to its random allocation to a panel, whose composition would be established by drawing lots, in accordance with the rules approved by the Chamber for Judges of the CSM in Decision No 1367/2018.

32. On 13 December 2018, the drawing of lots for the selection of the members of the panels of five judges for 2018 took place at the premises of the HCCJ. The file of the present case was allocated randomly to a panel of five judges – Civil 3 – 2018. This is the panel that submitted the present request for a preliminary ruling.

33. By Decision No 1535 of 19 December 2018 of the Chamber for Judges of the CSM (Decision No 1535/2018), it was established that the cases which were allocated to panels of five judges that had been established for 2018 would continue to be examined by those panels after 1 January 2019, even if no procedural acts had been taken in those cases.

[13] See above, point 23 of this Opinion.

34. In view of these events, the appellant has raised, inter alia, a plea of illegality with regard to the composition of the panel hearing her case and a plea of illegality regarding Decisions No 1367/2018 and No 1535/2018 of the Chamber for Judges of the CSM, as well as the subsequent decisions of the Governing Council of the HCCJ.[14] The appellant maintains that intervention of the Constitutional Court and the CSM in the activity of the HCCJ amounts to infringement of the principle of the continuity of the panel hearing the case. If it were not for that intervention, the case would have been correctly assigned to one of the panels of five judges established, pursuant to Article 32 of Law No 304/2004, for 2019. The continuation of the activity of a judicial panel beyond the temporal limit provided for by national law constitutes, according to the appellant, an infringement of Article 6(1) of the European Convention on Human Rights ('the ECHR') and of Article 47 of the Charter, leading to repercussions on Article 2 TEU. By imposing certain conduct on the HCCJ, the CSM, which is an administrative body, infringed the principles of the rule of law by compromising the independence and impartiality in the enforcement of justice which must always be observed by a court provided for by law.

35. The referring court explains that, although Decision No 685/2018 of the Constitutional Court does not, in principle, affect the composition of non-criminal judicial panels, it nonetheless has an indirect effect in the present proceedings. The reason for this is that, in order to apply that decision, the CSM has adopted a series of administrative acts imposing on the HCCJ a different interpretation of the provisions relating to the annual nature of the composition of panels of five judges.

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

'Must Article 2 [TEU], Article 19(1) thereof and Article 47 of [the Charter] be interpreted as precluding the intervention of a constitutional court (a body which is not, under national law, a judicial institution) as regards the way in which a supreme court has interpreted and applied infra-constitutional legislation in the activity of establishing panels hearing cases?'

C. The procedure before the Court

37. The referring court in Case C-357/19 requested the application of the expedited procedure pursuant to Article 105(1) of the Rules of Procedure of the Court of Justice. The President of the Court refused that request on 23 May 2019. By decision of 28 November 2019, priority treatment was granted to this case, as well as to Case C-547/19, pursuant to Article 53(3) of the Rules of Procedure.

38. By decision of the President of the Court of 20 February 2020, Cases C-357/19 and C-547/19 were joined for the oral procedure and for the judgment.

39. Written observations were submitted in Case C-357/19 by the first, second and fourth appellants, the Prosecutor, the Polish and Romanian Governments, as well as the European Commission.

[14] The order for reference cites Decisions No 157/2018, No 153/2018 and No 2/2019. However, no information is given regarding the content of those decisions nor on their relevance for the main proceedings.

40. In Case C-547/19, written observations were submitted by the appellant, the Association of Judges 'Forum', the CSM, the Judicial Inspection, the Romanian Government and the Commission.

41. The first appellant in Case C-357/19, the second appellant in Case C-357/19, the appellant in C-547/19, the Association of Judges 'Forum', the Prosecutor, the Romanian Government, as well as the Commission, replied to the questions for written answer put to them by the Court.

IV. Analysis

42. 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 set out the applicable EU legal framework and identify 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-357/19

43. The first, second and fourth appellants, as well as the Polish Government, submit that the questions referred in Case C-357/19 are inadmissible.[15] A first group of objections relates to the alleged lack of EU competence in the fields covered by the main proceedings, thus effectively concerning the jurisdiction of the Court (a). A second line of objections concerns the lack of relevance of the questions referred for the main proceedings (b).

(a) The lack of EU competence

44. The first and fourth appellants submit that the present case falls outside the scope of EU law because all aspects relating to the interpretation and application of the legal provisions at issue are strictly national. In a similar vein, the second appellant argues that the case does not have any connection to EU law.

45. According to the Polish Government, in the context 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, the questions referred are not necessary for the adjudication of the main proceedings. The main proceedings concern a purely internal situation which does not touch upon any area in which the Union has competence. Furthermore, the Charter is applicable only where Member States are implementing EU law, which is not the case here.

46. In my view, these arguments fail to convince.

[15] The Romanian Government submitted in its written observations that the questions referred for a preliminary ruling were inadmissible. However, that government has changed its position in its reply to the written questions put by the Court.

47. The Union has indeed no direct legislative competence in the field of general judicial organisation. It is, however, clear that Member States are under the obligation to comply with the requirements of Article 2 and Article 19(1) TEU, Article 325(1) TFEU and the PIF Convention, as well as Article 47 of the Charter, when they draft their rules and adopt practices that have an impact on the national application and enforcement of EU law. That logic is not *area dependent*. With regard to the Union's limits on default national procedural autonomy, it is, and it has always been, *incidence dependent*. It may relate to any element of national structures or procedures used for national enforcement of EU law.

48. The specific issue addressed in the present case, namely whether the national case-law and provisions concerned with the composition of judicial panels of the HCCJ, fall within the scope of those provisions and what obligations potentially flow from them, is precisely the subject matter of the questions referred for a preliminary ruling. It suffices to note therefore that the request for a preliminary ruling concerns the interpretation of EU law, in particular, of Article 2 and Article 19(1) TEU, Article 325(1) TFEU and the PIF Convention, as well as Article 47 of the Charter. In that context, the Court clearly has jurisdiction to give a ruling on that request. [16]

49. Furthermore, notwithstanding the discussion on the applicability of Article 325(1) TFEU, the PIF Convention and the Charter, and the scope of EU law in the more traditional sense, which will be analysed in some detail later in this Opinion, [17] the recent case-law of the Court has clarified that 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]

50. There can be little doubt that the HCCJ, which is the judicial body whose independence is arguably affected by the decision of the Constitutional Court at issue in this case, is a national judicial body normally called upon to rule, as a court or tribunal, on questions concerning the application or interpretation of EU law.

51. As a result, I do not consider that any of the arguments submitted are capable of casting doubt on the jurisdiction of the Court to give an answer to the questions raised in Case C-357/19.

(b) The relevance of the questions referred for the main proceedings

52. The fourth appellant submits that the request for a preliminary ruling is not necessary for the resolution of the dispute in the main proceedings and that the issue of interpretation of EU law is not relevant. The reason for this is that, regardless of the response to the questions referred, the Court's answer will not enable the referring court to rule on the case at issue. The second appellant submits that the provisions of EU law referred to in the questions referred are general in nature. As such, they do not give rise to any doubts and do not have any connection with the main proceedings. Furthermore, that appellant also argues that, in any event, his legal situation is not linked to offences relating to fraud involving EU funds.

16 See, to that effect, judgment of 7 March 2017, *X and X* (C-638/16 PPU, EU:C:2017:173, paragraph 37); of 26 September 2018, *Belastingdienst/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).

17 See below, points 86 to 115 of this Opinion.

18 See judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, 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).

53. Sharing in essence the same doubts, the first appellant further adds that by referring to the PIF Convention, the referring court has sought to satisfy to the conditions of admissibility in an unlawful and unfounded way. That appellant states that, as concerns the offence of attempted use of false, inaccurate or incomplete declarations or documents in order to obtain, unduly, funding from the EU budget, she has been definitively acquitted. Moreover, the EU budget has not been affected and the object of the extraordinary appeal in the main proceedings does not relate in any way to that offence. Therefore, the present case does not present any connection with EU law.

54. In my view, those objections cannot be upheld.

55. First, all the questions referred in Case C-357/19 are raised in the framework of the analysis of the extraordinary appeal pending before the referring court. In order to rule on that appeal, that court considers it necessary to clarify, by means of the first and second questions, the interpretation of various EU law provisions, in order to assess whether they preclude the adoption of Decision No 685/2018 of the Constitutional Court, which it would otherwise be required to apply. If EU law were to preclude the adoption of that constitutional decision, the referring court asks, in its third question, about the legal consequences of that finding, in other words, about the possibility of not applying that decision on the basis of the principle of primacy.

56. Without prejudging in any way, at this stage, the possible answer on the merits of all those questions, there is no doubt in my mind that the questions raised are *relevant* for the adjudication of the main proceedings, having a direct impact on the decision to be taken by the referring court.[19] The questions referred therefore fulfil the requirement of 'necessity' for the purposes of Article 267 TFEU.[20]

57. Second, the arguments raised in connection with the first question in Case C-357/19 concerning the particular offences and situations of the specific appellants do not affect, in my view, the admissibility of that question. Those arguments rely essentially on the fact that the first appellant was acquitted for fraud involving EU funds, that the other parties are not affected by that type of offence, and that the result of the reopening of the case through the extraordinary appeal in application of Decision No 685/2018 could allow for a review of the finding of acquittal. For those reasons, it is suggested that the questions are irrelevant for the resolution of the dispute in the main proceedings.

58. However, the first question is in any event admissible. The main proceedings also concern acts amounting to tax fraud which gave rise to non-negligible losses in collection of VAT.[21] In and of itself, that already presents a clear connection with the financial interests of the Union.[22]

59. Furthermore, with regard to the other offences mentioned (corruption and abuse of office[23]), the issue of whether Article 325(1) TFEU and/or the PIF Convention covers a situation such the one at issue in the main proceedings appertains to the merits. As the referring court explained in the order for reference, the purpose of the first question is to ascertain, in the light of the case-law of the Court, whether the Member States' obligations under Article 325(1) TFEU, and

19 See also above, point 24 of this Opinion.

20 Recently in 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).

21 As set out above at point 22 of this Opinion.

22 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 30 to 33 and the case-law cited).

23 See above, points 19 to 21 of this Opinion.

Article 1(1)(a) and (b) and Article 2(1) of the PIF Convention also concern criminal penalties already imposed. The referring court also states that an interpretation of the phrase 'and any other illegal activities affecting the financial interests of the Union' in Article 325(1) TFEU, is necessary in order to establish whether it covers acts of corruption and fraud committed in the context of public procurement, where the aim pursued was to obtain the reimbursement of sums from EU funds, even though those funds were ultimately not defrauded.

60. Therefore, establishing whether or not Article 325(1) TFEU and/or the PIF Convention apply in a situation such as the one at issue in the main proceedings is precisely the aim of the first question. Answering that question is clearly a matter of substance, not an issue of admissibility.

2. Case C-547/19

(a) The lack of EU competence

61. The Judicial Inspection submits that the question referred for a preliminary ruling in Case C-547/19 is inadmissible.[24] In its view, Article 2 TEU should not be interpreted as meaning that the Union has competences in the fields covered by that provision. After recalling that the Charter and Article 19(1) TEU have different scopes, that interested party submits that, in accordance with the case-law of the Court, the latter provision relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing EU law, within the meaning of Article 51(1) of the Charter. The application of the provisions of the Charter is only possible where Member States implement EU law, which is not the case in the main proceedings.

62. First, as I have just noted in relation to Case C-357/19, the argument raised above relates more to the jurisdiction of the Court than to the admissibility of the case.[25]

63. Second, however, regarding the issue of jurisdiction, in contrast to Case C-357/19, Case C-547/19 is not connected with the financial interests of the Union and, therefore, with Article 325 TFEU. It concerns an element which is not governed primarily by EU law (national rules on the composition of panels in a supreme court), in a dispute in a main proceedings that falls, on the conventional interpretation of the scope of EU law, outside the scope of EU law (appeal against a disciplinary penalty imposed on a judge leading to removal from office).

64. However, the recent case-law of the Court has clarified that the second subparagraph of Article 19(1) TEU is applicable when a national body *may* rule, as a court or tribunal, on questions concerning the application or interpretation of EU law.[26] In the present case, there is no doubt that the HCCJ, including its panel Civil 3,[27] which is the judicial body whose independence could possibly be affected by the ruling of the Constitutional Court at issue in this case, is a judicial body which, in its judicial activity in other cases, is a court or tribunal that *may* be called upon to rule on matters of EU law, thus complying with that requirement.

[24] The Romanian Government submitted in its written observations that the question referred for a preliminary ruling in the present case was also inadmissible. However, that government changed its position in its reply to the written questions put by the Court.

[25] See above, point 51 of this Opinion.

[26] See above, footnote 18 of this Opinion.

[27] See above, point 32 of this Opinion.

65. In view of that line of case-law, I must conclude that the Court has jurisdiction to answer the question referred in Case C-547/19. I have already expressed doubts as to whether the second subparagraph of Article 19(1) TEU should be approached in such a limitless way.[28] However, even if it is a borderline case, I suspect that this is not a good case to explore the limits of that provision, for a rather simple and pragmatic reason: the first question raised in the parallel case, Case C-357/19, enquiring essentially about the same issue, is, at least in my view, in any event admissible and falls within the jurisdiction of the Court.

(b) The relevance of the question referred for the main proceedings

66. In the interest of completeness, I would add that the question referred in Case C-547/19 complies with the requirement of 'necessity' for the purposes of Article 267 TFEU.[29] For the reasons indicated above, one could harbour doubts as to whether a case such as the present one ought to still fall within the (material) scope of the second subparagraph of Article 19(1) TEU. There is, nonetheless, no doubt that a decision of this Court could be applied directly in the main proceedings, thus being relevant and necessary for those proceedings.

67. Indeed, the question referred in Case C-547/19 concerns the interpretation of EU law in the context of the adjudication of a plea of illegality concerning the composition of a judicial panel, currently pending before the referring court. Depending on the manner in which the referring court were to deal with that exception, after receiving guidance from this Court, a very different outcome of the case in the main proceedings is possible. The interpretation requested from the Court is thus 'necessary' for the purposes of Article 267 TFEU.

B. Applicable EU law

68. By the different questions referred in the two joined cases before this Court, the HCCJ is enquiring about the interpretation of Article 325(1) TFEU; the PIF Convention; Article 47 of the Charter; and Article 2 and Article 19(1) TEU, as well as the principle of primacy, and whether those provisions and principles preclude the adoption or the application of Decision No 685/2018 of the Constitutional Court.

69. In my view, there is a rather crucial instrument with regard to the specific case of Romania that has not been invoked by the referring court in the present proceedings, but which forms the basis of the previous (as well as parallel)[30] requests for preliminary rulings: 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').[31]

70. As such, it is necessary to establish which EU law provisions are relevant for the purposes of the present proceedings.

28 In detail, see points 204 to 224 of my *AFJR* Opinion.

29 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 48 to 51).

30 See points 120 to 182 of the *AFJR* Opinion. The MCV Decision is, however, expressly addressed by the questions referred in Case C-379/19, with which I deal in a separate Opinion delivered today.

31 OJ 2006 L 354, p. 56.

1. Article 2 and Article 19(1) TEU

71. As I have explained in detail in my *AFJR* Opinion,[32] the second subparagraph of Article 19(1) TEU, as so far applied by the Court, is potentially limitless. It obliges Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law. It applies irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.[33] The second subparagraph of Article 19(1) TEU is applicable whenever a national body *may* rule, as a court or tribunal, on questions concerning the application or interpretation of EU law.[34]

72. This approach leads to a very broad scope of the second subparagraph of Article 19(1) TEU not only *institutionally*, but also *substantively*. The substantive scope of the second subparagraph of Article 19(1) TEU covers any national rules and practices that may impinge on the obligation of Member States to establish effective remedies, including the independence and impartiality of those judicial systems, without there being any sort of *de minimis* rule. The true boundaries of the second subparagraph of Article 19(1) TEU flow only, at least for the moment, from elements linked to the admissibility of the case.[35]

73. In the light of those considerations, once the admissibility threshold is satisfied,[36] the second subparagraph of Article 19(1) TEU is applicable in both the present cases. Substantively, both cases currently before the Court concern the interpretation of the second subparagraph of Article 19(1) TEU with regard to the implications of a ruling of the Constitutional Court and its compliance with the requirements of the EU principle of judicial independence. From an institutional perspective, requests for a preliminary ruling come from a supreme court, the HCCJ, which may in fact be called upon to rule, in its jurisdictional capacity, on matters concerning the application or interpretation of EU law.

74. With regard to the references to Article 2 TEU in the first question in Case C-357/19 and in the question in C-547/19, as in my *AFJR* Opinion,[37] I do not see any reason to conduct a separate analysis of that Treaty provision. 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

32 See points 204 to 211 of that Opinion.

33 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, 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).

34 Judgments 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.

35 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 45), and order of 2 July 2020, *S.A.D. Maler und Anstreicher* (C-256/19, EU:C:2020:523, paragraph 43).

36 See above, points 52 to 60, as well as points 66 to 67 of this Opinion.

37 See point 225 of that Opinion.

the principle of independence of courts.[38] 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 affirmed in Article 2 TEU.[39]

2. The MCV Decision (and the Charter)

75. Unlike the cases that were the subject matter of my *AFJR* and *Statul Român – Ministerul Finanțelor Publice* Opinions, the two orders for reference in the present cases do not raise specific questions with regard to the MCV Decision.[40] Conversely, the MCV Decision is invoked once more in the questions referred in the parallel case, Case C-379/19, in which I deliver a separate Opinion today.

76. It should be recalled at the outset that the Court has consistently held that the fact that a question submitted by the referring court refers only to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation that may be of assistance, whether or not that court has referred to those points in its questions. It is for the Court to extract from all the information provided by the referring court the points of EU law which require interpretation in view of the subject matter of the dispute.[41]

77. In reply to the questions for written answer put to the parties by the Court, the first appellant in Case C-357/19 submits that the MCV Decision does not concern issues relating to the implementation or monitoring of the rule of law, judicial independence, or the protection of EU financial interests. Moreover, that decision is not applicable to the Constitutional Court. The first and second appellants in Case C-357/19 submit that that case does not relate to the effectiveness of the fight against corruption.

78. Conversely, the Commission, the Romanian Government, the Prosecutor and the Association of Judges 'Forum' argue, in essence, that the MCV Decision, taking into account, in particular, benchmarks 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 independence of the judiciary, irrespective of any particular connection with the financial interests of the Union. The appellant in Case C-547/19 also considers that the MCV Decision is applicable in the field of the fight against corruption. Those interested parties have noted that the Commission's MCV Report of 2019,[42] although, as pointed out by the Commission, not containing specific recommendations, nevertheless raised concerns about the impact of proceedings initiated by the Romanian Government before the Constitutional Court on the attainment of the objectives laid down in benchmarks 1 and 3 of the Annex to the MCV Decision.

38 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).

39 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).

40 The order for reference in Case C-357/19 nonetheless refers to the MCV Decision by pointing out that Decision No 685/2018 of the Constitutional Court was examined in the Commission's MCV Report of 2018 as one of the actions with clear implications for the independence of the judicial system (SWD(2018) 551 final, p. 5 of the Romanian version).

41 Recently, for example, judgment of 7 March 2017, *X and X* (C-638/16 PPU, EU:C:2017:173, paragraph 39 and the case-law cited).

42 Report of 22 October 2019, COM(2019) 499 final, pp. 8 and 15 of the English version (the MCV Report of 2019).

79. In my view, similar to what I suggested in the *AFJR* Opinion,[43] the MCV Decision (and the relevant provisions of the Charter the applicability of which is triggered by that decision) should be the primary yardstick for the assessment of the situation in the Member States subject to the specific regime of the MCV Decision. The same reasons are also applicable in the present cases. The fact that the order for reference in Case C-547/19 does not refer to the MCV Decision is of little relevance.

80. There are two additional points which are worth noting in the context of the present cases. First, the wide scope of the benchmarks contained in the Annex to the MCV Decision can indeed accommodate the present cases. It may be recalled that 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 [CSM]. …'; 'building on progress already made, 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'.

81. Both Cases C-357/19 and C-547/19 concern the potential effects of Decision No 685/2018 of the Constitutional Court regarding the efficiency of the judicial process (benchmark 1). Additionally, Case C-357/19 concerns the impact of that constitutional ruling vis-à-vis the fight against corruption, covered by benchmarks 3 and 4 of the MCV Decision. There is thus a clear material connection between the subject matter of the present cases and the MCV Decision: the ruling of the Constitutional Court at issue has repercussions on the efficiency of the judicial process in general (since it allows for the possibility of reopening closed cases) and, more specifically, on the fight against corruption (in as much as the effects of that constitutional ruling is also applied in practice to corruption cases, such as Case C-357/19).[44]

82. Second, from the point of view of the (material or institutional) scope of application of the MCV Decision, should it matter that the rules at issue are not the product of express national legislative implementation of the obligations arising from the MCV Decision, but are contained in a judgment of the national constitutional court?

83. The Commission, the Romanian Government and the Prosecutor stated in their answers to the questions put to them by the Court that the fact that the present cases concern a decision of the Constitutional Court, and not acts adopted by the legislative or the executive, is irrelevant.

84. I agree entirely. The systemic nature and impact of the rulings of a constitutional court, which are of general application and liable to modify substantially the legislative environment, makes such rulings indistinguishable, from the point of view of their effects, from the actions of the legislature or other actors with regulatory powers.

[43] See points 214 to 224 of the *AFJR* Opinion.

[44] This connection between the MCV benchmarks and Decision No 685/2018 of the Constitutional Court has also been noted, as the Prosecutor and the Association of Judges 'Forum' submit, by the Commission's MCV Report of 2019, which expressly refers to the constitutional ruling at issue in the present cases, indicating that it 'has given rise to major uncertainty' and stating that 'the Constitutional Court rulings directly impact ongoing high-level corruption cases, entailing delays and restarts of trials, and have allowed the re-opening of several final cases, under certain conditions' and that 'this clear knock-on on the process of justice also raised broader doubts about the sustainability of the progress made so far by Romania in the fight against corruption …' MCV Report of 2019, pp. 14 and 15. See also the technical MCV Report of 2019, SWD(2019) 393 final, pp. 21 and 22.

85. Finally, the fact that the ruling of the Constitutional Court at issue in the present Opinion falls within the scope of the MCV Decision means that, for the reasons explained in my *AFJR* Opinion,[45] it should be considered, at the same time, as an instance of implementation of the MCV Decision, and thus of EU law, for the purposes of Article 51(1) of the Charter. Therefore, the second paragraph of Article 47 of the Charter becomes applicable as the yardstick. Its function is not necessarily as the source of any subjective rights of individual litigants, but rather as the general yardstick of the correctness of national implementation of EU obligations.[46] Against this background, Article 47 of the Charter is indeed, for the purposes of the present cases, the most relevant and specific provision in order for the Court to provide the referring court with a useful answer to the questions submitted.[47]

3. Article 325(1) TFEU, the PIF Convention (and the Charter)

86. Pursuant 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 that 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.

87. Are any of the offences identified in Case C-357/19 likely to fall within the scope of that provision?

88. In my view, the answer is yes. First, Article 325(1) TFEU is, in any event, applicable to offences relating to VAT (a). Second, the same should hold true with regard to the offences relating to corruption involving EU-funded projects (b). Third, the fact that the present case concerns situation where harm to the financial interests of the Union did not ultimately materialise is, for the purpose of the interpretation of the scope of Article 325(1) TFEU, irrelevant (c). The fact that some of the appellants were acquitted of the specific offences relating to the financial interests of the Union is also not relevant (d).

(a) Article 325(1) and VAT

89. As noted by the Commission in its written observations and by the Prosecutor in its reply to the questions for written answer put by the Court, the main proceedings in Case C-357/19 concern, in part, the fourth appellant's conviction for tax fraud which resulted in losses in the collection of VAT. The VAT-related convictions are sufficient to bring the present proceedings within the scope of Article 325(1) TFEU and Article 1(1)(b) of the PIF Convention, which concerns fraud in respect of revenue. Indeed, there is a direct connection between the collection of VAT revenue and the availability to the EU budget of the corresponding VAT resources.[48] Moreover, as noted by the Commission and the Prosecutor, it would appear that the amount of VAT which were not collected in the present case reaches the EUR 50 000 threshold necessary in order to be classified as 'serious fraud' under Article 2(1) of the PIF Convention.

45 See points 190 to 194 of that Opinion.

46 See points 198 to 202 of my *AFJR* Opinion.

47 See points 214 to 220 of my *AFJR* Opinion.

48 Judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 26 and the case-law cited).

90. This leads to the conclusion, subject to the verification by the national court, that both Article 325(1) TFEU and Article 2(1) of the PIF Convention are applicable as a relevant yardstick with regard to Case C-357/19, in so far as the VAT-related conviction is concerned.

(b) Article 325(1) TFEU, the PIF Convention, and corruption in involving EU funds

91. With regard to the other convictions for corruption and abuse of office,[49] the question arises as to whether those offences relating to public procurement, where the projects or contracts at issue may at least be funded in part from EU funds, are also covered by Article 325(1) TFEU.

92. The Romanian Government, the Prosecutor and the Commission submit in their replies to the questions put by the Court that that question is to be answered in the affirmative.

93. I agree.

94. The case-law of the Court on the interpretation of Article 325(1) TFEU has been concerned for the most part with the 'collection' side of that provision, notably in cases relating to the collection of VAT[50] and customs duties.[51] However, the concept of 'financial interests' of the Union clearly encompasses both revenue *and* expenditure covered by the EU budget.[52] Therefore, Article 325(1) TFEU is applicable with regard to fraudulent conduct resulting in the misappropriation of EU funds.[53]

95. That is entirely logical. Indeed, it is logical that one's budget and financial interests will not only be affected by a loss of income (the money that was owed did not come in), but also by inappropriate or incorrect spending (the money that was in is now gone).

96. The same is also confirmed by the PIF Convention,[54] which offers a more precise definition of the concept of fraud vis-à-vis the financial interests of the Union. Its Article 1(1)(a) states that fraud affecting the financial interests of the Union covers, *in respect of expenditure*, any intentional act or omission relating to 'the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of *funds from the general budget of the European Communities* or budgets managed by, or on behalf

49 Set out above in points 19 to 21 of this Opinion.

50 Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 26); of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraphs 37 to 40); of 5 April 2017, *Orsi and Baldetti* (C-217/15 and C-350/15, EU:C:2017:264, paragraph 16); of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 30 to 31); of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraph 27); and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 25).

51 Regarding export refunds, see judgment of 28 October 2010, *SGS Belgium and Others* (C-367/09, EU:C:2010:648, paragraph 40 et seq.). On the recovery of interest for undue advantages in the field of the common agricultural policy, see judgment of 29 March 2012, *Pfeifer & Langen* (C-564/10, EU:C:2012:190, paragraph 52). On the collection of custom duties, see judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraphs 50 to 53).

52 See to that effect, judgment of 10 July 2003, *Commission* v *ECB* (C-11/00, EU:C:2003:395, paragraph 89).

53 See, for a recent example, judgment of 1 October 2020, *Úrad špeciálnej prokuratúry* (C-603/19, EU:C:2020:774, paragraph 47 et seq.).

54 For the sake of completeness, it might be added that the PIF Convention appears to be applicable to Case C-357/19 *ratione temporis*. The facts giving rise to the relevant convictions predate the entry into force 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), which, according to its Article 16, replaced the PIF Convention and its Protocols as of 6 July 2019. Equally, by virtue of Council Decision of 6 December 2007 concerning the accession of Bulgaria and Romania to 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 Protocol of 27 September 1996, the Protocol of 29 November 1996 and the Second Protocol of 19 June 1997 (OJ 2008 L 9, p. 23), that convention is applicable to Romania.

of, the European Communities'; the 'non-disclosure of information in violation of a specific obligation, with the same effect'; and 'the *misapplication of such funds* for purposes other than those for which they were originally granted'.[55]

97. A situation that may give rise to the misappropriation, wrongful retention or misapplications of EU funds, therefore affects the financial interests of the Union within the meaning of Article 325(1) TFEU and Article 1(1)(a) of the PIF Convention.

98. Furthermore, without prejudice to any pertinent verifications to be made by the national court, I recall that the Protocol to the PIF Convention also covers acts of corruption.[56] Article 2(1) of that Protocol defines passive corruption as 'the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European [Union's] financial interests …'.

99. As pointed out by the Commission in its reply to the questions put by the Court, there can be little doubt that, despite the fact that the term 'corruption' is not listed in Article 325(1) TFEU, it is covered by the reference to 'other illegal activities' in that provision. Indeed, 'other illegal activities' is a term that may encompass any and all unlawful behaviour without distinction.[57]

100. Thus, the concept of 'any other illegal activities' within the meaning of Article 325(1) TFEU may cover corruption of public officials or abuse of office which affects the financial interests of the Union through the misappropriation of EU funds.

(c) Does Article 325(1) TFEU also cover attempt?

101. With regard to the counts of corruption and abuse of office, it appears from the order for reference in Case C-357/19 that the referring court wishes to know whether Article 325(1) TFEU covers a situation where there was an *attempt* to illegally obtain EU funds, which nonetheless failed. The first appellant and the Prosecutor have explained, in their replies to the questions put by the Court, that the first appellant has faced charges for attempting improperly to obtain EU funds.

102. The referring court explains that it is in that context that it wishes to know whether the phrase 'and any other illegal activities affecting the financial interests of the Union' in Article 325(1) TFEU covers acts of corruption or fraud committed in the context of public procurement, where the *aim pursued* was to obtain the reimbursement of sums fraudulently allocated from EU funds, even though those funds were ultimately not allocated.

103. In my view, the phrase 'any other illegal activities affecting the financial interests of the Union' in Article 325(1) TFEU *could* cover not only (accomplished) acts of corruption and fraud committed in the context of public procurement, but also attempts to commit the same acts, provided naturally that the threshold of 'attempt' is reached and is punishable under national law.

55 My emphasis.

56 See Article 2 of Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests (OJ 1996 C 313, p. 1).

57 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 and 69).

104. Beyond that general statement, I do not think that it is the role of this Court either to comment in any way on the factual circumstances present in the main proceedings, or to engage in an analysis of the various stages of criminal acts. Naturally, *aims*, intents or desires (*forum internum*) are not punishable. Once any one of these crosses over into external action and becomes an *attempt*, it may become punishable, provided of course that there is the appropriate evidence. Attempt, if punishable, usually comes under the same heading as the completed act itself.

105. I therefore see no reason why an attempt at a corruption offence contrary to the interests protected under Article 325(1) TFEU should be treated or even classified, from the point of view of the scope of EU law, any differently to a completed corruption offence of the same kind. The fact that the perpetrator was ultimately unsuccessful in his or her objective and did not succeed in obtaining the funds may naturally be relevant to the fact that he or she is on trial for attempt (and not a completed act), but has no bearing on the scope of the concept of 'other illegal activities' within the meaning of Article 325(1) TFEU. Moreover, there are three additional points which are worthy of mention.

106. First, the wording of Article 325(1) TFEU does not expressly require materialisation of any specific (amount of) damage. As the Commission rightly points out, the case-law has made clear that even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the European Union. [58]

107. Second, Article 1(3) of the PIF Convention must also be considered. From that provision, it follows that Member States are under an obligation to establish as a criminal offence the *preparation* of offences such as the supply of incorrect statements for the purpose of misappropriating EU funds, if such conduct is not already punishable otherwise as a principal or accessory offence (such as attempt or instigation). [59]

108. Third, the definition of passive corruption in Article 2(1) of the Protocol to the PIF Convention includes the acts of corruption when they are performed in a way which damages or *is likely to damage* the financial interests of the Union.

(d) Is the scope of Article 325(1) TFEU conditional on the outcome of proceedings?

109. The particular circumstances of Case C-357/19 call for yet another clarification. The main proceedings concern several persons, only one of whom was *charged* with an offence involving EU funds, but was finally *acquitted*. This fact has led the first and second appellants to contest the applicability of Article 325(1) TFEU in that case. First, the first appellant submits essentially that since she was finally acquitted of the charges relating to that specific offence, the present case is not linked to the financial interests of the Union. Next, the second appellant argues that, the effects of the extraordinary appeal brought pursuant to Decision No 685/2018 of the Constitutional Court would lead to the reopening of an otherwise final judgment of acquittal. To reopen that judgment would provide a fresh opportunity to re-examine those charges and could potentially result in a conviction. As a consequence, the Constitutional Court's ruling could not have detrimental effects on the financial interests of the Union. Impliedly, it could even be beneficial to those interests, in that a person previously acquitted could eventually be sentenced.

[58] See judgments of 15 September 2005, *Ireland* v *Commission* (C-199/03, EU:C:2005:548, paragraph 31), and of 21 December 2011, *Chambre de commerce et d'industrie de l'Indre* (C-465/10, EU:C:2011:867, paragraph 47).

[59] My emphasis.

110. In my view, those arguments cannot be upheld.

111. First, and as a preliminary note, it cannot be excluded that the other two offences for which a sentence was imposed (corruption and abuse of office) are not such as to affect the financial interests of the Union. The scope of Article 325(1) TFEU cannot be limited to the sanctioning of the offences established in the national legal order which 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.

112. Therefore, as the Commission, the Romanian Government and the Prosecutor have rightly pointed out, whether the financial interests of the Union have been affected or not should not depend on the definition of a given offence under national law, but should be assessed in the light of the broader factual framework measured against the interests protected by Article 325(1) TFEU. Indeed, as the Romanian Government notes, national financial interests and the financial interests of the Union are often interlinked. It is therefore rather natural that the division between general offences which affect in one way or another national public spending and those which concern specifically the financial interests of the Union is hardly straightforward in the abstract.

113. Second, with regard to the offence of (attempted) fraud of EU funds, with which the first appellant was charged, I note that the 'effect' on the financial interests of the Union is to be assessed in an objective manner. The link with the financial interests of the Union thus arises in relation to the *objective elements of the charges* at issue.[60] It does not naturally follow from the circumstantial *outcome* of the case itself.

114. Thus, put simply, whether a person is charged with an offence that could fall under 'any other illegal activities affecting the financial interests of the Union' under Article 325(1) TFEU depends on the objective (constitutive) elements of the crime he or she is charged with. Whether or not that person is eventually convicted or acquitted with regard to those charges is not relevant for the scope of Article 325(1) TFEU.[61]

115. As a closing remark pertaining to the scope of Article 325(1) TFEU, I note that the finding of applicability of Article 325(1) TFEU (or of Article 2(1) of the PIF Convention, or possibly also of Article 2(1) of the Protocol to the PIF Convention), again triggers the applicability of the Charter. If the penalties and criminal proceedings to which the appellants in the main proceedings have been or are subject constitute an implementation of Article 325(1) TFEU and Article 2(1) of the PIF Convention, the Charter is applicable, according to Article 51(1) thereof.[62]

60 See for example, in *Åkerberg Fransson*, the Court considered as the relevant element that the penalties and criminal proceedings to which the defendant in the main proceedings 'has been subject or is subject' was the implementation of Article 325 TFEU. Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 27).

61 Were it otherwise, not only would the scope of Article 325(1) TFEU be dependent on the outcome of the criminal proceedings, but it would also be, rather intriguingly, different at the beginning and at the end of court proceedings.

62 See also judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 27).

4. Interim conclusion

116. As a result of the foregoing considerations, it appears that the MVC Decision, together with the second paragraph of Article 47 of the Charter, constitute relevant provisions for both Cases C-357/19 and C-547/19. Furthermore, in the framework of Case C-357/19, and subject to the verifications of the national court, Article 325(1) TFEU, as well as the PIF Convention and its Protocol, seem equally applicable.

117. The second subparagraph of Article 19(1) and Article 2 TEU are, in principle, equally applicable to both cases. However, I recall that, due to the specific legal framework provided for by the second paragraph of Article 47 of the Charter with regard to the standards related to the independence of the judiciary, that provision already offers a solid yardstick for conducting the necessary analysis in the present cases.

C. Assessment

118. In order to address the merits of the questions referred for a preliminary ruling in the present cases, I shall start by briefly setting out the national legal context (1). Second, I shall address the second question in Case C-357/19, concerned with the interpretation of Article 47 of the Charter (2). Third, I shall turn to the first question in Case C-357/19, relating to the interpretation of Article 325(1) TFEU and the PIF Convention (3), moving then to the same issues when measured against the principle of judicial independence, invoked at the end of the question in Case C-547/19 (4). Finally, I shall finish with the primacy of EU law, in reply to the third question in Case C-357/19, placed in the particular context raised by the order for reference, in which the disregard by a national judge of a ruling of the national constitutional court constitutes a disciplinary offence (5).

119. In structuring the answers to be provided to the referring court, I purposefully prefer to deal with the actual substance and only then to move on, to the extent there still is any need, to any broader institutional issues raised by the referring court. I acknowledge that this approach does not reflect the order, nor the exact wording of the questions submitted by the referring court. However, it is, in my view, the way in which this Court, the function of which is not to adjudicate on inter-institutional conflicts in a Member State, and even less so to lend a hand in institutional challenges to the authority of other national actors, can deal with the issues raised by the referring court.

1. The national legal context

120. According to the order for reference in Case C-547/19, panels of five judges were introduced for the first time in national legislation by Law No 202/2010,[63] which amended Articles 32 and 33 of Law No 304/2004. These panels, hearing criminal and non-criminal matters, were organised separately from the Chambers of the HCCJ. They performed the role of a review tribunal (appeal panels) within the HCCJ.

[63] Legea nr. 202/2010 privind unele măsuri pentru accelerarea soluționării proceselor (Law No 202/2010 providing measures for the acceleration of the adjudication of proceedings), *Monitorul Oficial al României*, part I, No 714 of 26 October 2010.

121. Initially, the members of those (appeal) panels were chosen by the President of the HCCJ at the beginning of each year. The panels were chaired by the President of the HCCJ, the Vice-President or a president of a chamber. The other four members of the panel, (those other than the chairperson), were selected by drawing lots pursuant to Decision 24/2010 completing the HCCJ Regulation.

122. Law No 255/2013[64] subsequently amended Article 32 of Law No 304/2004 on judicial organisation, establishing the rule on drawing lots for members of panels of five judges. The referring court in Case C-547/19 explains that the fact that those amendments were introduced by way of a normative act in the field of criminal procedure, as well as the wording of the relevant provisions, caused interpretative difficulties. This was mainly because there were differences between the position conferred by Article 32(5) of Law No 304/2004 on the President and Vice-President of the HCCJ, who should chair the panel of five judges 'where he forms part of the panel, under paragraph 4 [of Article 32]' and the position of 'the President of the Criminal Chamber or the oldest member', with regard to whom that very same provision stated that they should chair the panel, without making any reference to Article 32(4) of that law. Moreover, Article 33(1) of Law No 304/2004, which provided that 'the President [of the HCCJ] or, in his absence, the Vice-President, shall chair the Combined Chambers, … the five-judge panel, and any panel within the chambers, where he participates in the proceedings', was left untouched.

123. It appears that it was in this context that the Governing Council of the HCCJ adopted Decision No 3 of 28 January 2014 amending and supplementing the HCCJ Regulation. That decision stated that panels of five judges are to be chaired, as appropriate, by the President, the Vice-Presidents, the president of the Criminal Chamber or the oldest member, and the drawing of lots, in the case of those panels, is to *relate only to the other four members*.

124. Law No 207/2018,[65] which then amended Article 32 of Law No 304/2004, maintained the rule under which the Governing Council of the HCCJ approves the number and composition of panels of five judges at the beginning of each year. That amendment removed the previous inaccuracies by providing that the drawing of lots *concerned all the members* of a five-judge panel.

125. Following that last amendment, the Governing Council of the HCCJ adopted Decision No 89/2018 on 4 September 2018, stating that having examined 'the provisions of Article 32 of Law No 304/2004 …, regarding the activity of five-judge panels, it finds, by a majority, that the provisions of that new law constitute rules on organisation which are aimed at court formations with specific regulations, established "at the beginning of each year" and, in the absence of transitional rules, become applicable as from 1 January 2019'.

126. It was in this context that the Constitutional Court, seised by the Prime Minister of the Government of Romania on 2 October 2018, adopted Decision No 685/2018.

127. Decision No 685/2018 of the Constitutional Court found that the HCCJ, by Decisions No 3/2014 and No 89/2018 of its Governing Council, had amended by an administrative act a law adopted by Parliament.[66] The Constitutional Court then analysed the consequences of that

64 Legea nr. 255/2013 pentru punerea în aplicare a Legii nr. 135/2010 privind Codul de procedură penală și pentru modificarea și completarea unor acte normative care cuprind dispoziții procesual penale (Law No 255/2013 implementing Law No 135/2010 on the Code of criminal procedure and amending and completing certain normative acts adopting provisions relating to criminal procedure), *Monitorul Oficial al României*, part I, No 515 of 14 August 2013.

65 Legea nr. 207/2018, pentru modificarea și completarea Legii nr. 304/2004 privind organizarea judiciară (Law No 207/2018, amending Law No 304/2004 on the organisation of the justice system), *Monitorul Oficial al României*, part I, No 636 of 20 July 2018.

66 Point 175 of Decision No 685/2018 of the Constitutional Court.

situation in the light of the right to a fair trial, enshrined in Article 21(3) of the Romanian Constitution. It found that that constitutional provision had been infringed due to the subsequent lack of objective independence and impartiality, which also resulted in a breach of the guarantee of a tribunal established by law. [67]

128. The Constitutional Court noted that Article 32 of Law No 304/2004 is a guarantee of the objective impartiality of a court, as a component of the right to a fair trial. That guarantee includes both the random allocation of cases and the composition of judicial panels by drawing lots. [68] It further stated that the random composition of court panels aimed at avoiding a situation where senior judges of the HCCJ, who would be members of those panels 'by right', would become the president of such panels. [69] Relying on the case-law of the European Court of Human Rights ('the ECtHR'), [70] the Constitutional Court found that the interpretation which had been given by the Governing Council of the HCCJ to Article 32 of Law No 304/2004 through its administrative acts was such as to create latent pressure on the other members of the panel. It made the judges subject to their judicial superiors or, at least, had the potential to make those judges unwilling or hesitant to contradict them. [71] Furthermore, the Constitutional Court also pointed out, referring again to the case-law of the ECtHR, [72] that the HCCJ was at the relevant time not composed in accordance with the law, as the panels of five judges had been appointed through a mechanism circumventing the applicable legal provisions. [73]

129. Finally, Decision No 685/2018 concluded, inter alia, that 'in the light of the unlawful conduct, in constitutional terms, of the [HCCJ], through the Governing Council, which is not such as to offer guarantees as to the proper restoration of the legal framework for the functioning of five-judge panels, it is incumbent on the Chamber for judges of the [CSM], on the basis of its constitutional and legal prerogatives … to identify the solutions, on the level of principle, as regards the statutory composition of panels hearing cases and to ensure the implementation of those solutions'.

130. Following the decision of the Constitutional Court, the CSM adopted Decisions No 1367/2018 and No 1535/2018. Pursuant to those latter decisions, the HCCJ drew lots for new panels hearing cases for 2018. The judicial activity of those panels also continued in 2019. This was the case even though no measure had been ordered by the end of 2018 in respect of the cases assigned. However, the existing case-law of the HCCJ at the time prescribed that, where a panel hearing cases, in the composition established for a year, had not ordered any measure in a particular case by the end of the year, the composition of that panel was to be changed. The case was to be allocated to the judges selected by the drawing of lots for the new calendar year. However, that approach has apparently been superseded by the CSM decisions.

131. The national legal and case-law developments outlined above had a series of consequences for the two cases at hand. First, with regard to Case C-357/19, Decision No 685/2018 of the Constitutional Court opened up the possibility for the parties to introduce an extraordinary appeal against the final judgments already handed down by the HCCJ. Second, with regard to Case C-547/19, that same decision, together with the subsequent administrative decisions taken by the

67 Point 193 of Decision No 685/2018 of the Constitutional Court.

68 Point 188 of Decision No 685/2018 of the Constitutional Court.

69 Point 188 of Decision No 685/2018 of the Constitutional Court.

70 In particular, ECtHR, 22 December 2009, *Parlov-Tkalčić v. Croatia*, CE:ECHR:2009:1222JUD002481006.

71 Point 189 of the Decision No 685/2018 of the Constitutional Court.

72 ECtHR, 5 October 2010 *DMD GROUP a.s., v. Slovakia*, CE:ECHR:2010:1005JUD001933403 §§ 60 and 61.

73 Points 191 and 192 of Decision No 685/2018 of the Constitutional Court.

section of judges of the CSM and by the Governing Council of the HCCJ in order to implement it, had direct consequences in the determination of the panel responsible for adjudicating on the appellant's case.

132. In short, although in slightly different substantive and procedural contexts, the main issue underlying both requests for a preliminary ruling is whether Decision No 685/2018, due to its impact on final decisions of the HCCJ and on the composition of judicial panels within that jurisdiction, is (in)compatible with EU law.

2. The right to a tribunal previously established by the law

133. By its second question in Case C-357/19, the referring court asks whether the second paragraph of Article 47 of the Charter is to be interpreted as precluding the finding, by the Constitutional Court, of a lack of independence and impartiality of a judicial panel where that panel includes a judge responsible for judicial administration who, unlike the other four members of that panel, was not randomly selected. That question points out the fact that such a judge is appointed to the panel on the basis of a transparent rule known to the parties, which has not been challenged by them, and which is generally applicable to all the cases dealt with by that same panel. According to the referring court, the principles of judicial independence and legal certainty preclude the binding effects of Decision No 685/2018 of the Constitutional Court on judgments that were final at the time of the adoption of that decision, in the absence of serious grounds calling into question the right to a fair trial in the cases concerned.

134. In order to provide a response to that question, I deem it necessary, first, to analyse the standard flowing from the second paragraph of Article 47 of the Charter (a), in order to subsequently assess whether EU law, and in particular, that provision, is to be interpreted as precluding the decision of the Constitutional Court at issue (b).

(a) The EU law standard

135. By its second question, the referring court appears to express its doubts only with regard to the right to a tribunal previously established by the law. That seems to tell, however, only one part of the story. It transpires from the decision of the Constitutional Court at issue that what is at stake is the interpretation of the second paragraph of Article 47 of the Charter with regard not only to the right to a 'tribunal previously established by law', but also with regard to other elements of the right to a fair trial, such as the requirements of independence and impartiality, in particular with regard to the 'internal independence' of judges. [74]

136. Under Article 52(3) of the Charter, the first sentence of the second paragraph of Article 47 of the Charter is to be interpreted in accordance with the meaning and scope of the rights laid down in Article 6(1) ECHR. The aim is to ensure that the level of protection does not fall below the standard of the ECHR, as interpreted by the ECtHR. [75]

74 Summarised above at points 127 and 128 of this Opinion.

75 See, with regard to the element of 'tribunal previously established by the law', 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 72). See, for the analysis of the case-law of the ECtHR, Opinion of Advocate General Sharpston in *Review Simpson* v *Council and Review HG* v *Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2019:977, point 63 et seq.).

137. First, the ECtHR has stated that the guarantee of a tribunal previously established by the law seeks to ensure that the organisation of the judicial system does not depend on the discretion of the executive.[76] Nor should it depend, in fact, on that of the judiciary, even though there is indeed some room for self-organisation. The applicable rules should be provided for by law emanating from the legislature[77] Moreover, the expression 'established by law' reflects the principle of the rule of law. It is closely connected with the requirements of independence and impartiality of the judiciary.[78]

138. The term 'established by law' covers not only the legal basis for the existence of a tribunal, but also the composition of the bench in each case,[79] which is the matter at issue in the present case.

139. The case-law of the ECtHR accepts that the default rules for what exactly is a 'tribunal establish by the law' are set in national law. In principle, an infringement of national legal provisions gives rise to a violation of Article 6(1) ECHR.[80] The analysis focuses on whether 'law' (comprising of legislation and other provisions whose breach would render participation of judges in the adjudication of a case irregular), was breached.[81] For example, where national law contains rules relating to the composition of a panel by drawing lots, then this represents one of the requirements of national law that the Court takes into account as one of the national legal requirements to be complied with.[82]

140. There is nonetheless the principle of *subsidiarity*. The ECtHR has acknowledged that, given the important countervailing interests at stake (such as legal certainty and the principle of the irremovability of judges) and the potential implications of finding a violation, the right to a tribunal established by law under Article 6(1) ECHR should not be construed in an overly expansive manner.[83] That implies that *not every breach* of domestic law would amount to a violation of Article 6(1) ECHR: the ECtHR has devised a 'threshold test' to assess whether irregularities are of *such gravity* as to entail a breach of the right to a tribunal established by the law, based on the manifest character of the breach (i); on the impact of such a breach on the purpose of that right, in order to avoid undue interference with the judiciary, to preserve the rule of law and separation of powers (ii); taking also into account the assessment conducted by national courts as to the legal consequences of the breach (iii).[84]

76 With that requirement being broader than the principle of 'lawful judge', which principally focuses on the criteria for the allocation of cases. See, for a similar distinction, Rönnau, T. and Hoffmann, A., '"Vertrauen ist gut, Kontrolle ist besser": Das Prinzip des gesetzlichen Richters am EuGH', *Zeitschrift für Internationale Strafrechtsdogmatik*, 7-8, 2018, pp. 233-248.

77 ECtHR, 2 May 2019, *Pasquini v. San Marino*, CE:ECHR:2019:0502JUD005095616, §§ 100. See also 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 73 and the case-law cited).

78 ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, Grand Chamber judgment, §§ 231 to 234.

79 ECtHR, 4 May 2000, *Buscarini v. San Marino*, CE:ECHR:2000:0504DEC003165796, § 2. See also, 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 73 and the case-law cited).

80 ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, Grand Chamber judgment, § 216.

81 ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, Grand Chamber judgment, § 226.

82 ECtHR 4 March 2003, *Posokhov v. Russia*, CE:ECHR:2003:0304JUD006348600, § 43; ECtHR 29 April 2008, *Barashkova v. Russia*, CE:ECHR:2008:0429JUD002671603, § 32.

83 ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, Grand Chamber judgment, §§ 236 to 241, declaring that not all irregularities in judicial appointments would be liable to compromise that right.

84 ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, Grand Chamber judgment, §§ 243 to 252.

141. Those considerations appear to be of a similar nature to those set out by this Court in *Simpson*. In relation to the (allegedly defective) appointment of a judge to the European Union Civil Service Tribunal, the Court stated that an irregularity committed during the appointment of judges amounts to 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 …' [85] 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'. [86]

142. Second, as far as the 'internal aspect' of judicial independence is concerned, that issue has so far not been dealt with in the case-law of this Court. There is, however, considerable guidance from the ECtHR on that matter. [87] In *Parlov-Tkalčić v. Croatia*, the ECtHR stated that judicial independence demands that individual judges be free 'not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court … The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified …' [88]

143. In the framework of this analysis, the ECtHR examines, inter alia, whether the powers conferred on judicial superiors such as court presidents are 'capable of generating latent pressures resulting in judges' subservience to their judicial superiors or, at least, making individual judges reluctant to contradict their president's wishes, that is to say, of having "chilling" effects on the internal independence of judges …' [89]

(b) Analysis

144. In the present case, in Decision No 685/2018, the Constitutional Court found that the administrative decisions of the Governing Council of the HCCJ infringed the right to a tribunal established by law, as well as the requirement of impartiality. With regard to the latter, the Constitutional Court pointed out the importance of the internal aspect of judicial independence.

145. I wish to emphasise, at the outset, that it is not necessary to analyse, in the present case, whether the second paragraph of Article 47 of the Charter *requires* the same result. That is not the question. What can, however, be concluded without much difficulty is that the second paragraph of Article 47 of the Charter *does not preclude* the findings arrived at by the Constitutional Court.

85 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.

86 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).

87 Further, see, for example, Sillen, J., 'The concept of "internal judicial independence" in the case-law of the European Court of Human Rights', *European Constitutional Law Review*, vol. 15, 2019, pp. 104-133.

88 ECtHR, 22 December 2009, CE:ECHR:2009:1222JUD002481006, § 86 and the case-law cited.

89 Ibid., § 91. The ECtHR nontheless acknowledged that 'any supervision of the work of judges involves a certain risk to their internal independence and that it is impossible to devise a system that would completely eliminate that risk'.

146. It is settled case-law that, where EU law provides Member States with a measure of discretion, national 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. [90]

147. If that condition was stated *M.A.S.* as an opening to national constitutional standards as a limit to the obligation to *set aside* national rules materially incompatible with Article 325(1) TFEU, [91] then it is quite clear that the same approach may also operate as a tool to assess in general the *compatibility* between national law, practice and case-law, on the one hand, and EU law, on the other. [92]

148. In the present case, the issue of the composition of judicial panels, as well as the issue of the remedies available in the event of an infringement of the national rules on that matter (as interpreted by national courts, including the Constitutional Court), is not regulated by EU law. With regard to situations not fully determined by EU law, Member States maintain their discretion. Their arguably higher or different standard of protection of fundamental rights, which is for national courts to identify, is permissible pursuant to Article 53 of the Charter, particularly with respect to issues not fully determined by EU law. [93]

149. This is not to say that every national rule, practice or judicial decision would satisfy that logic, merely by being 'packaged and sold' as an instance of a higher or different national standard of protection of a given fundamental right. The Court's case-law has already set out the requirements under which such a situation may be permitted. The application of the standards of protection for national fundamental rights must not be such as to compromise the level of protection guaranteed by the Charter. Moreover, as a preliminary and a rather obvious requirement, I would add that the national rule or decision must reasonably and genuinely contribute to the protection of fundamental rights at national level, as duly interpreted through the applicable national standard of protection.

150. However, if that is the case, as I have already noted elsewhere, the caveat of 'primacy, unity and effectiveness of EU law' should probably not be taken literally. [94] Otherwise, it would make little sense to insist on unity in areas where the default rule is national diversity. The bottom line is nonetheless clear: with regard to issues and situations not determined by EU law, the Charter is not the ceiling. [95]

151. In that context, I see no reason why a national constitutional court should not be allowed to place greater emphasis on the meticulous observance of the rules on the composition of national judicial panels, including the issue of internal independence, and thus not be able to reach the conclusion that, since those rules were infringed, the (apparent) default national consequences for decisions handed down by improperly constituted judicial panels should apply in those cases.

90 See already, 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).

91 Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 47).

92 See, for example, judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 29 and 36); of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60 et seq.); or of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraph 28 et seq.).

93 *A contrario* to the judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107), where the recourse to Article 53 of the Charter was precluded by virtue of the issue at stake in that case being fully harmonised by EU law.

94 See my Opinion in *Dzivev* (C-310/16, EU:C:2018:623, points 89 to 91).

95 Ibid., points 92 to 95.

152. First, accommodating diversity under Article 53 of the Charter should in particular be possible in situations where there is no difference *in kind* for the right protected, but, often due to the national historical experience and ensuing sensitivity, there is a difference *in the degree* and the resulting balance. Thus, certain legal systems might react with greater sensitivity to the improper composition of the judicial bench, simply because they still retain some historical memory as to what might happen if such rules are replaced with 'flexibility'. The same is true with regard to concerns about the internal dimension of judicial independence and impartiality. It would be a mistake to remain in the categories of past decades, in which the threats to judicial independence were believed to come from the other branches of government. There is no shortage of highly problematic things that judges, in particular those in charge of managerial functions, may do to other judges. [96]

153. Second, the same then applies to the consequences of such an infringement. Allowing for different or higher yardsticks in terms of defining the right or principle logically also includes allowing for the finding of the appropriate national balance between considerations linked to the right to a tribunal previously established by the law, on the one hand, and the principle of *res judicata*, [97] on the other.

154. Third, in view of that framework, the reaction to the arguments put forward by the interested parties in relation to Article 47 of the Charter may be relatively concise.

155. The second appellant in Case C-357/19 submits that the application of the rule concerning the selection of members of panels of five judges of the HCCJ by drawing lots constitutes a specific national standard. It shields the composition of panels of the highest court at the appellate level from political pressures, given the fact that the President and Vice-President of that court are appointed by the President of Romania. Conversely, the Prosecutor, the Association of Judges 'Forum' and the Romanian Government submit, in their replies to the questions put to them by the Court, that the principle of selecting the panels of five judges of the HCCJ by drawing lots cannot be considered to be part of a specific national standard linked to the protection of fundamental rights. They rely mainly on the fact that the rule on the selection of panel members by drawing lots is not applicable to all judicial formations, but rather it is an exception. The Association of Judges 'Forum' submits in its written observations in Case C-547/19 that the fact that not all judges of a panel are selected by drawing lots should not give rise to doubts as to their impartiality. [98]

156. The relatively concise reaction is the following: it is for the competent national institutions to determine precisely the national standard. Although the fact that not all judges of a panel are selected by drawing lots does not automatically mean there is a lack of impartiality, where such a requirement is contained in a legal rule, it could legitimately be regarded as a rule relating to the composition of a panel covered by the right to a court established by law. The definition of what is

96 In detail, see, for example, Kosař, D., *Perils of Judicial Self-Government in Transitional Societies*, Cambridge University Press, Cambridge, 2016, p. 407, suggesting that certain forms of judicial self-governance generate a 'system of dependent judges within an independent judiciary', with undue influence being exercised by judicial officials, such as presidents of courts or judicial self-administration bodies officials, *within the judiciary*.

97 It seems that in this regard there is quite some variety in the approaches adopted by the Member States as to the consequences of irregularities on the composition of a court and the balance between the right to a tribunal establish by law and the principle of legal certainty. See Opinion of Advocate General Sharpston in *Review Simpson* v *Council and Review HG* v *Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2019:977, points 98 to 104).

98 This interested party mentions ECtHR, 15 September 2015, *Tsanova-Gecheva v. Bulgaria*, CE:ECHR:2015:0915JUD004380012, § 108, where the ECtHR found that even if the selection of the five judges of a panel had not been done by way of drawing lots (a fact which the parties disagreed on), in the absence of other elements indicating a lack of impartiality, it did not appear that the requirements of Article 6 ECHR had been violated.

a tribunal previously established by law refers back to national law.[99] It can be assessed only with regard to the requirements of the legal order which governs the establishment and functioning of the court at issue,[100] in this case, the Romanian legal order. Provided that EU law accepts, within the bounds of what is reasonable and genuine,[101] that such issues which are not determined by EU law gives rise to national differentiation and diversity, it must then also accept that it is for the competent national actor(s) to set such a standard. It is not the task of this Court to arbitrate on issues of national law.

(c) Interim conclusion

157. In the light of the foregoing considerations, I propose that the Court answer the second question in Case C-357/19 as follows: the second paragraph of Article 47 of the Charter does not preclude that, in a situation which generally falls within the scope of EU law but which is not fully determined by it, a national constitutional court declares, in application of a genuine and reasonable national standard of protection of constitutional rights and on the basis of its interpretation of the applicable national provisions, that judicial panels within the national supreme court have not been established in accordance with the law.

3. The protection of the financial interests of the Union

158. The first question in Case C-357/19 concerns the interpretation of Article 325(1) TFEU in relation to the adoption and the effects of Decision No 685/2018 of the Constitutional Court. That same question in Case C-357/19, as well as the question in Case C-547/19, concern the interpretation of Article 19(1) and Article 2 TEU, as well as Article 47 of the Charter, in relation with that same constitutional decision.

159. In this section, I shall address the potential issues which may affect the protection of the financial interests of the Union, before turning, in the following section of this Opinion, to the more general and structural dimension of the questions referred which focus on the potential repercussions of that decision from the perspective of the principles of judicial independence and the rule of law.

160. By its first question in Case C-357/19, in so far as it refers to Article 325(1) TFEU and to Article 1(1) and Article 2(1) of the PIF Convention, the referring court seeks essentially to ascertain whether Article 325(1) TFEU, as well as the PIF Convention, are to be interpreted as meaning that they allow a national court not to apply the decision of a national constitutional court which leads to the reopening of final decisions, which could potentially affect cases concerning the financial interests of the Union.

161. The obligation imposed by Article 2(1) of the PIF Convention with regard to the conduct described in Article 1 thereof amounts to the giving of specific expression to the broader and more encompassing obligations set out in Article 325(1) TFEU. However, since the discussion in

[99] See above, point 139 of this Opinion.

[100] See, for example, as regards the internal allocation of cases, judgment of 2 October 2003, *Salzgitter* v *Commission* (C-182/99 P, EU:C:2003:526, paragraphs 28 to 36); order of 9 December 2009, *Marcuccio* v *Commission* (C-528/08 P, EU:C:2009:761, paragraphs 57 to 60); or judgment of 2 October 2014, *Strack* v *Commission* (C-127/13 P, EU:C:2014:2250, paragraphs 50 to 55).

[101] See above, point 149 of this Opinion.

the present case revolved around the scope of Article 325(1) TFEU, I will limit my analysis to the latter provision. After all, it is rather unlikely that the nature of the obligations incumbent on a Member State would be radically different under either instrument.

(1) The EU law framework

162. The present case represents an illustration of the problems arising from the interpretation of Article 325(1) TFEU and the practical consequences attached to a potential infringement thereof. As is apparent from recent case-law, [102] that provision of EU primary law encompasses a complex set of obligations and consequences when it comes to balancing it with other values and principles of EU law, such as fundamental rights.

163. As far as the *obligations* imposed by Article 325(1) TFEU are concerned, the case-law of the Court is relatively clear. Article 325(1) TFEU requires Member States to counter illegal activities affecting the financial interests of the Union through effective and deterrent measures. [103] Member States are free to choose the penalties. They must nonetheless ensure that their obligations are effectively met, which implies, in some instances, that criminal penalties are imposed. [104] The obligations imposed by Article 325(1) TFEU do not stop at the stage of 'criminalisation': Member States must also ensure that other rules of material or procedural nature (such as rules of criminal procedure [105] or statutory limitation periods [106]) allow for the effective punishment of infringements affecting the financial interests of the Union.

164. The procedural and institutional autonomy enjoyed by the Member States in order to counter infringements affecting the financial interests of the Union is nonetheless limited, inter alia, by the requirement of effectiveness which requires that penalties be effective and dissuasive. [107]

165. However, the case-law reveals a certain degree of complexity when it comes to the test for assessing the *compatibility* of national law with Article 325(1) TFEU, its internal *limits* and the practical *consequences and remedies* in the event that a situation of incompatibility may arise, in particular, the obligation of national courts to *set aside* incompatible national rules. [108]

(2) The position of the parties

166. In the present case, neither the parties having submitted observations nor the referring court have disputed the effectiveness or deterrence of the criminal penalties laid down by national law with regard to serious fraud or other serious illegal activities affecting the financial interests of

102 Judgments of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555); of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936); of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392); and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30).

103 See, for example, judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 30).

104 Ibid., paragraphs 33 and 34 and the case-law cited.

105 Judgments of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 55), and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 29 and the case-law cited).

106 Judgments of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 47), and of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 36).

107 See, to that effect, judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 30 and the case-law cited).

108 Critically, see my Opinions in *Scialdone* (C-574/15, EU:C:2017:553, point 137 and seq.), and in *Dzivev* (C-310/16, EU:C:2018:623, points 65 to 68).

the Union per se. The issue is, rather, whether Decision No 685/2018 of the Constitutional Court is such as to have an adverse effect on the effective prosecution and punishment of offences, and is therefore in breach of Article 325(1) TFEU.

167. The referring court and the Prosecutor consider that the decision of the Constitutional Court at issue is liable to have adverse effects on the financial interests of the Union. This argument is based essentially on the consideration that Decision No 685/2018 of the Constitutional Court has the effect of setting aside final judgments given by the panels of five judges and may therefore deprive the penalties applied in a considerable number of serious fraud cases of their effectiveness and deterrence. This is liable to affect the financial interests of the Union because it creates, on the one hand, the appearance of impunity and, on the other, a systemic risk of impunity as a result of the application of national rules relating to limitation periods, in view of the complexity and duration of the proceedings until final judgment has been given following re-examination. As a result, the decision of the Constitutional Court should be declared incompatible with Article 325(1) TFEU.

168. Taking a different view, the Commission submits that, subject to the verification by the national court, the present case is not such as to show that there is an effect of systematic impunity. Even though the Commission arrives at the opposite conclusion, it is intriguing to note that its approach seems to rely on the same foundations as that of the referring court and the Prosecutor. The Commission's analysis also relies primarily on considerations of 'effectiveness', which is measured in terms of the systemic impunity as a function of the potential number of cases affected.

(3) Analysis

(i) The test to be applied?

169. The fact that the actors in the present cases (the referring court, the Prosecutor and the Commission) refer to the same 'test' in order to arrive at opposite conclusions is intriguing. Certainly, one or more of the parties might simply be wrong. However, it is also possible that such an outcome could be indicative of a broader predicament: perhaps the test itself is not ideal.

170. As the submissions in the present case illustrate, the test as to the existence of an infringement of Article 325(1) TFEU would consist, in essence, of the assessment of the *effects* of a national rule, case-law or practice. An infringement of Article 325(1) TFEU would be found to exist if the impact of national measures were to lead to a risk of systematic impunity. That would be measured in terms of the potential number of cases affected, even if other factors, such as the specific impact on the EU budget, the type or complexity of cases concerned, are also proposed as additional elements to be taken into account.

171. According to that view, with perhaps only a slight exaggeration, Article 325(1) TFEU would constitute an absolute maxim of effectiveness, measured in terms of how much money came in and how many persons were sentenced if that money did not come in. The issue of compatibility of norms is reduced to subjective judicial estimates of (empirical) impact in a further unspecified (but *significant*) number of cases. On that basis, any national rules of criminal law or procedure may be selectively disregarded, needless to say to the detriment of the accused. Furthermore,

although fundamental rights remain relevant within such an approach, their protection may perhaps only come at a subsequent stage, as a potential boundary to the possibility of disapplying national measures or enforcing a newly created rule to the detriment of the individual on trial.

172. For the reasons already set out in my Opinion in *Dzivev*,[109] I find that approach problematic.

173. First, more generally, effectiveness in the sense of effective deterrence in the framework of Article 325(1) TFEU, or anywhere else in EU law,[110] cannot be understood as an absolute value overriding all other considerations. Article 325(1) TFEU indeed contains a reference to effectiveness-oriented obligations it imposes on Member States. However, it is also imbued with a strong component of institutional and procedural autonomy, which should be the point of departure. In that intrinsically open-ended structure, effectiveness cannot be the sole element to be taken into account in an analysis of *compatibility*. If effectiveness is taken to its fullest extent, each and every result could be justified: any national rule standing in the way of a conviction could be declared incompatible with Article 325(1) TFEU. That is not a recipe for the effective enforcement of the law, but rather for individual arbitrariness and structural chaos generated by EU law.

174. Second, it is thus vital that the potentially limitless argument of 'effectiveness' be balanced against other EU law rules, principles and values, including fundamental rights or legality. That must take place *already at the stage of the assessment of compatibility*.[111] Legality or fundamental rights do not simply appear at a later stage, as a potential (but often rather inconvenient) limitation. They are part of the same body of rules within the same EU legal order and carry the same weight and importance.

175. The Court confirmed that understanding in *M.A.S.* and *Dzivev*, where it pointed out that 'the obligation to ensure the effective collection of the European Union's resources does not dispense national courts from the necessary observance of the fundamental rights guaranteed by the Charter and of the general principles of EU law, …'[112] including 'the necessary observance of the principle of legality and the rule of law which is one of the primary values on which the European Union is founded, as is indicated in Article 2 TEU'.[113]

176. Indeed, in *Dzivev*, the Court, *even without* embarking on an assessment of whether the rules at issue led to impunity in a considerable number of cases, noted that EU law cannot require a national court to set aside a national procedural rule, even if that would increase the effectiveness of criminal prosecutions enabling penalisation of non-compliance with EU law, where such a procedural rule reflects precisely requirements connected with the protection of fundamental rights.[114] In any event, even if it that were the case in perhaps another scenario, the obligation to amend the national rule at issue and thus remedy the incorrect or insufficient application of Article 325(1) TFEU would be incumbent primarily on the national legislature.[115]

109 C-310/16, EU:C:2018:623, points 121 to 127.

110 See, for other examples, Opinion of Advocate General Saugmandsgaard Øe in *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:972, points 81 to 84), or also my Opinion in *Nemec* (C-256/15, EU:C:2016:619, point 64).

111 My Opinion in *Dzivev* (C-310/16, EU:C:2018:623, points 122 and 123).

112 Judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 33). See also, to that effect, judgments of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 52) and of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraphs 68 and 71).

113 Judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 34).

114 See, judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraphs 35 to 39).

115 See, to that effect, judgments of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 41), and of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 31).

177. Third, as far as concerns the nature and criteria of the examination of the potential incompatibility of national rules with Article 325(1) TFEU, I believe that such an assessment should be carried out in the same way any other such assessment of (in)compatibility with EU law. The examination should be one of *normative* compatibility of rules, not an empirical, *statistical* study of (an unspecified) number of cases involved. [116]

178. Courts tend to be bad at statistics. The type of analysis entrusted to the national courts by the Court in *Taricco* requires solid evidence, probably coupled with a specific effects-oriented prospective analysis. That appears to be entirely beyond what might reasonably be required of a national judge, certainly one from a lower-instance court, who may, of course, have a general idea of other pending cases or about structural issues facing his or her field of law, but is who is called on primarily to rule on a particular case. Moreover, apart from the typical lack of such evidence, any such outcome is likely to be deeply circumstantial, dependent on factors such as the potential number of cases pending before a court at a given time, which is likely to change over time and can hardly be taken as a substantive point of reference in order to assess the compatibility of a national rule or practice with EU law. [117]

179. The discussion in the present cases vividly illustrates these problems. To start with, there is no clarity as to what exactly is a *significant* amount of cases that may amount to *structural* impunity. More than 10%? More than 25%? Over 40%? This naturally leads the various actors to arrive at different results even if invoking the same test. [118] On the one hand, since all these proceedings are in fact pending before the HCCJ, it appears, that there is indeed some data available. In Case C-357/19, as explained by the Romanian Government in its answers to the questions put by the Court, the HCCJ seems to possess quite detailed and complete statistics. [119] On the other hand, this may not be the case generally with other courts, which may also be required to apply Article 325(1) TFEU. The first appellant in Case C-357/19 notes in her replies to the Court's questions that national courts can hardly proceed to an analysis of the systemic risk of impunity in terms of a measurable or ascertainable number of cases affected, since they are in charge of adjudicating individual cases only. In these circumstances, a test based on the number or potential number of cases affected would risk rendering the 'compliance' analysis contingent upon the availability and quality of statistical information, which would in turn rather easily result in an inconsistent application or, rather, disapplication of national procedural rules in criminal law cases.

180. In summary, in order to find an infringement of Article 325(1) TFEU, the relevant test should simply be whether a national rule, case-law or practice, is liable to compromise, from a *normative* point of view, and *regardless of* its actual measurable effect in terms of the *number of cases affected*, the effective protection of the financial interests of the Union.

181. The elements for the assessment to be undertaken include: first, the normative and systematic evaluation of the content of the rules at issue; second, their purpose as well as the national context; third, their reasonably perceivable or expected practical consequences,

116 My Opinion in *Dzivev* (C-310/16, EU:C:2018:623, point 129).

117 The problematic nature of that assessment might only be emphasised by considering the other side of the courtroom, that is, the possible legal advice a criminal lawyer is supposed to provide to his or her client in reply to a question on whether the national law being applied in his or her case is compatible with EU law: 'I don't know, it depends on how other cases go'.

118 See above, points 167 and 168 of this Opinion.

119 That government explained that the HCCJ has communicated by letter of March 2020 the relevant information and statistics concerning: inter alia, the impact of Decisions No 685/2018 and No 17/2019 of the Constitutional Court on the activity of the HCCJ, the number of cases affected, the number of those cases affecting the financial interests of the Union, the damages caused, the duration of proceedings, and the number of cases where there was a risk of impunity.

stemming from the interpretation or the application practice of such rules (thus independently of any statistical estimation of the number of cases actually or potentially affected); fourth, the fundamental rights and the principle of legality forming part of the internal balance in the interpretation of the material requirements imposed by Article 325(1) TFEU *when assessing the compatibility* of national rules and practices with that provision. Indeed, fundamental rights and the principle of legality are not mere 'corrective' elements that may eventually limit (ex post) the practical effects of that provision. They play a role from the outset in the interpretation of the substantive content of Article 325(1) TFEU, constituting its *internal* limits as to the reasonably conceivable interpretation of that provision. However, any national concerns about the protection of legality and a higher standard of national protection of fundamental rights invoked in this regard must reflect, as to their articulation, a reasonable and genuine concern for a higher level of protection of fundamental rights. Moreover, their potential impact on the interests protected by Article 325(1) TFEU must be proportionate.

182. Finally, in the cases in which these considerations may lead to a declaration of incompatibility of national rules or practices with Article 325(1) TFEU, the next issue concerns the remedies and consequences in the individual case. Of particular importance in such cases, especially those involving criminal proceedings, is whether further considerations are present that would prevent such a statement of incompatibility from being effectively applied to the detriment of the individuals in the main proceedings.

183. At that last stage, the perspective changes. The structural interests of the Union are no longer weighed up against national autonomy and the permissible degree of diversity, but are to be balanced fairly against the individual rights of the persons concerned in the context of the individual case. While finding that latter balance is indeed primarily the role of national courts in the application of the guidance provided by this Court, the reasoning of this Court must provide an opening for reaching such individual equitable solutions at national level.

184. In summary, a statement of incompatibility reached in the framework of an individual case does not necessarily require that, as a consequence, the new legal rule will also be applicable to the case in the main proceedings. From a structural point of view, such a result is no threat to either the effectiveness or primacy of EU law. Moreover, on a more pragmatic note, if certain practices at national level are considered indeed to have adversely affected the financial interests of the Union, the Commission is now in possession of a powerful tool under Article 258 TFEU for reclaiming the amounts owed by a Member State to the EU budget, without the protection of fundamental rights of the individuals at national level becoming a collateral damage in the process.[120]

(ii) Application to the present case

185. Assessed against the criteria set out above in point 181 of this Opinion, Decision No 685/2018 of the Constitutional Court does not seem capable of compromising the effective protection of the financial interests of the Union.

186. First, from the point of view of the normative and systematic evaluation of the content of the decision at issue, it is to be noted, as the first and fourth appellants submit, that Decision No 685/2018 of the Constitutional Court does not create new remedies nor does it modify the

[120] See judgment of 31 October 2019, *Commission* v *United Kingdom* (C-391/17, EU:C:2019:919), which opened up the possibility for the Commission to claim exact sums for damage to the EU budget directly in infringement proceedings.

pre-existing system of remedies. It is not in any way specifically targeted at the enforcement of Article 325(1) TFEU. That decision merely found that there had been an infringement of legal standards relating to the composition of judicial panels, which also had an impact on national procedures falling broadly within the scope of Article 325(1) TFEU. It enabled parties to seek an extraordinary appeal already provided for by law, in the Code of Criminal Procedure. It is to be noted that the limited instances for allowing such extraordinary appeals are those listed in Article 426(1) of that code, point (d) of which expressly refers to the situation 'where the composition of the appeal court is contrary to law …'. The possibility of reviewing final decisions on the grounds of the irregularity of the composition of a judicial panel is a solution not uncommon in the various Member States. [121]

187. Second, regarding the purpose of Decision No 685/2018, as well as the national context, there is nothing before the Court which indicates that the purpose of the decision at issue was to circumvent or to undermine the legal instruments available for the fight against corruption or to affect the protection of the financial interests of the Union. I would like to clearly emphasise this point at this stage already: there is no objective, substantiated argument of any instrumental use or rather abuse of normal procedures. [122]

188. Third, as the Commission notes, the potential practical effects of Decision No 685/2018 of the Constitutional Court are circumscribed in time. The decision at issue is applicable, primarily, to pending or future cases. With regard to the application of the decision at issue to *closed* cases, the parties can file for this extraordinary appeal only where the period of extraordinary appeal is still running. However, according to Article 428(1) of the Code of Criminal Procedure, that opportunity lapses within 30 days from the date of notification of the decision of the appeal court.

189. Furthermore, as was also appropriately noted by the Commission and the second appellant in Case C-357/19, the setting aside of a ruling of an appeal court as a result of the application of Decision No 685/2018 of the Constitutional Court does not lead to the discontinuation of the criminal proceedings, but only to a reopening of one stage of the proceedings. Moreover, reopening does not mean reversal: exactly the same result can of course be reached again, this time by a correctly constituted panel. Finally, the delays potentially caused are unlikely to lead to the prosecution being time-barred. Subject to verification by the national court, the regime of prescription provided in Articles 154 and 155 of the Criminal Code, does not seem to lead to unreasonable consequences, account being taken of the length of limitation periods as well as the rules governing the causes and effects of interruptions of such periods, including their upper limit. [123]

190. Fourth, it cannot be ignored, as the first, second and fourth appellants in Case C-357/19 submit, that the statement of reasons for Decision No 685/2018 of the Constitutional Court is based on the fundamental right to a fair trial, in particular, in connection with its aspect of the right to a tribunal previously established by the law in connection with concerns relating to the principle of internal judicial independence. [124]

[121] For examples, with regard to irregularities in judicial appointments, see the Opinion of Advocate General Sharpston in *Review Simpson* v *Council and Review HG* v *Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2019:977, points 98 to 104).

[122] In the sense foreshadowed at point 243 in my *AFJR* Opinion, from which it would transpire that the rules written on the paper hide a very different reality. That could naturally include the situation in which certain general, objective processes would be misused for the personal aims of a select group of persons.

[123] See above, the prescription rules set out in points 15 and 16 of this Opinion.

[124] See above, points 127 to 128 of this Opinion.

191. Can such considerations be advanced in the context of Article 325(1) TFEU, as limiting the considerations relating to the effective deterrent of criminal penalties to be applied at national level?

192. In my view, in line with *M.A.S.* and *Dzivev*, those considerations may not only be advanced, but should also be accepted. Again, if in *M.A.S.*, national constitutional concerns in an area not determined by EU law (in that case limitation periods) was allowed to restrict the obligation to *set aside* national rules that are materially incompatible with Article 325(1) TFEU,[125] the same must be true a fortiori with regard to the assessment conducted one step before, namely the *compatibility* between national law, case-law and practice, on the one hand, and EU law, on the other.[126]

193. For the rest, the analysis that could be carried out here is as to its substance the same as that previously carried out in the context of the standard under the second paragraph of Article 47 of the Charter.[127] Put simply, EU law does not (directly) set any rules on the composition of judicial panels at national level. Within that context of permissible diversity, the Romanian system appears to embrace a stricter vision as to what is the required standard of a tribunal previously established by law and the consequences for its infringement. Those concerns appear to be reasonable and genuine, reflecting only a somewhat different balance between the values at stake.

194. In conclusion, I shall stress again the 'reasonable and genuine' elements, in the context of Article 325(1) TFEU, as well as, for that matter, with regard to any higher national standard of protection under the Charter. The national rule thus formulated 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.

195. Admittedly, it will always be for the competent national actors to define the national (constitutional) standard. However, the fact that this Court cannot but acknowledge that definition does not mean that it must accept any and all of its content, especially if invoked as a limitation or exception to EU law, including within the framework of Article 325(1) TFEU.

(iii) Interim conclusion

196. I conclude that the first question in Case C-357/19, in so far as it concerns Article 325(1) TFEU (as well as potentially Article 1(1)(a) and (b) and Article 2(1) of the PIF Convention, subject to verification by the national court), is to be answered in the sense that those provisions are to be interpreted as not precluding a decision of a national constitutional court declaring unlawful the composition of panels of a national supreme court on the ground that the right to an impartial tribunal has been infringed, thereby creating the conditions for allowing extraordinary actions to be brought against final judgments.

125 Judgments of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 47).

126 See, for example, judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 29 and 36); of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60 et seq.); or of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraph 28 et seq.).

127 See above, points 146 to 156 of this Opinion.

4. The principle of judicial independence

197. By its first question in Case C-357/19, in so far as it refers to Article 19(1) TEU, the referring court asks, in essence, whether that provision precludes the adoption of a decision by the Constitutional Court (referred to as 'a body outside the judicial system'), such as Decision No 685/2018. The question referred in Case C-547/19 asks, in similar terms (although here the Constitutional Court is referred to as 'a body which is not, under national law, a judicial institution'), whether Article 2 and Article 19(1) TEU and Article 47 of the Charter preclude the intervention of the Constitutional Court as regards the way in which a supreme court has interpreted and applied infra-constitutional legislation in the framework of the composition of judicial panels.

198. I must emphasise that, in my view, it is not the role of this Court to assess, in a general manner, the structure and competences of national (judicial) institutions. With the exception of the extreme and unfortunate scenarios in which an entire judicial institution (or even parts of the judicial system) no longer satisfy the systemic requirements of the rule of law and thus can no longer be referred to as an independent court, and when the institutional analysis of a national judicial actor becomes inevitable, the Court has always limited its analysis to substantive issues raised by a referring court. It is true that within such a discussion, the previous decision of another, even a higher judicial institution within the same legal order, might be indirectly called into question. However, the subject matter of that discussion was always primarily the substance of that decision, not an abstract assessment of the competences or the general authority of a national institution issuing it.

199. The previous sections of this Opinion sought to follow that tradition.[128] However, since it is the role of the Advocate General to fully assist the Court in exploring all the potential dimensions of the case referred, I shall also offer some, indeed rather concise remarks, on the broader, institutional points raised by the referring court.

200. In the light of the concerns raised by the referring court (1), I will examine, after some general observations on the EU legal framework (2), whether the requirements relating to judicial independence enshrined in the second paragraph of Article 47 of the Charter and in the second subparagraph of Article 19(1) TEU preclude the application of Decision No 685/2018 of the Constitutional Court (3).

(1) The concerns raised by the referring court

201. In its orders for reference, the referring court points out different issues relating to the status and composition of the Constitutional Court in general (i); to its particular competence regarding the establishment of legal conflicts of a constitutional nature and to the specific use of that competence in the process of the adoption of Decision No 685/2018 (ii); as well as to the effects of that decision on the principle of legal certainty (iii).

202. The first issue, relating to the status and the position of the Constitutional Court, is explained in greater detail by the referring court in its order for reference in Case C-547/19. It states that the Constitutional Court is not a judicial institution since it does not form part of the judiciary. Political considerations play an important role in the appointment of its members.

[128] See also above, point 119 of this Opinion.

Article 142(3) of the Romanian Constitution provides that, of the nine members of the Constitutional Court, 'three judges shall be appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania'.

203. The second issue, also explored in the order for reference in Case C-547/19, relates to the competences of the Constitutional Court for establishing the existence of a conflict of a constitutional nature. It includes both the authorities empowered to initiate that procedure and the impact of such a procedure on the competences of the judiciary.

204. On the one hand, the referring court observes that, under Article 146(d) of the Romanian Constitution, the procedure for establishing the existence of a conflict of a constitutional nature can be initiated only at the request of the President of Romania, one of the presidents of the two houses, the Prime Minister or the President of the CSM. With the exception of the President of the CSM, the other persons involved are political bodies. By combining this aspect with the political element affecting the appointment of members of the Constitutional Court, the referring court considers that the conditions are such as to give rise to a risk of intervention for political purposes or in the interests of politically influential persons. The referring court seems to consider that this danger is illustrated by the fact that the procedure leading to Decision No 685/2018, initiated by the Prime Minister, came at a time when the President of the Chamber of Deputies, who was also the president of the ruling party, was himself the defendant in criminal proceedings registered with a panel of five judges established to hear criminal cases.

205. On the other hand, with regard to the impact of the specific procedure for establishing a conflict of a constitutional nature on the independence of the judiciary, the referring court explains that there is an unclear separation between 'mere questions of legality', which should fall within the jurisdiction of ordinary courts, and the 'conflict of a constitutional nature', which may be adjudicated on by the Constitutional Court. The referring court notes that a judicial decision contrary to the law is an unlawful decision and an administrative act contrary to the law is an unlawful act, and not the expression of a 'judicial conflict of a constitutional nature with the legislature'. The relief available in such cases should be the use of legal remedies or, where appropriate, the bringing of an administrative action.

206. As regards, in particular, the adoption of Decision No 685/2018, the referring court observes that the interpretation adopted by the Governing Council of the HCCJ in Decision No 3/2014 was motivated by a lack of clarity in the law. It could thus not be regarded as a deliberate act denying the will of the legislature. In this context, the Constitutional Court merely countered the interpretation given by the HCCJ of the unclear provisions contained in the law. For that reason, the referring court considers that the review of the lawfulness of the HCCJ's activity by the Constitutional Court, as well as the fact that the Constitutional Court ordered that powers which, pursuant to the law, belonged to the HCCJ be transferred to the CSM, may have a negative impact not only on judicial independence, but also on the foundations of the rule of law itself.

207. The third issue relates to the effects of the decision at issue on the principle of legal certainty. The referring court notes, in a more general fashion, in its request in Case C-357/19, that the principles of judicial independence and of legal certainty preclude conferring binding effects to Decision No 685/2018 in relation to decisions which have already become final from the date of the decision of the Constitutional Court, in the absence of serious grounds which call into question the observance of the right to a fair trial in the relevant cases. The interpretation

provided by the administrative committee of the HCCJ, incorporated into the HCCJ Regulation, which is uncontested and unanimously accepted by judicial practice, does not constitute a reasonable ground warranting such effects.

(2) The EU law framework

208. The structure and the organisation of the judiciary falls within the competences of the Member States pursuant to the default principle of institutional autonomy.[129] This includes the establishment and functioning of a constitutional court. The principle of judicial independence does not require Member States to adopt any particular constitutional model governing the relationship and interaction between the various branches of the State,[130] provided of course that some basic level of the separation of powers (which is essential for the rule of law) is maintained.[131]

209. In structuring their judicial institutions and procedures, Member States are nevertheless required to comply with their EU law obligations flowing from Article 47 of the Charter, whose scope and content must be interpreted in the light of Article 6(1) ECHR, as well as the second subparagraph of Article 19(1) TEU.[132] However, there is no preconceived or singular valid model or system. The case-law of the Court seeks instead to identify minimum requirements with which the national systems must comply. Those requirements are related to the *internal* and *external* aspects of judicial independence, as well as to the requirement of *impartiality*, stemming from the case-law of the ECtHR.

210. The *external* element of judicial independence, closely linked to the requirement of impartiality, requires 'that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being *protected against external interventions or pressure* liable to impair the independent judgment of its members and to influence their decisions'.[133] That not only includes direct influence in the form of instructions, but also 'types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned'.[134]

211. As the Court has pointed out, recalling the case-law of the ECtHR on Article 6(1) ECHR, in order to establish the element of 'independence', some of the relevant elements to be considered are, inter alia, *the mode of appointment and the term of office of judges*, the existence of guarantees against outside pressures, as well as the question of whether the body presents an 'appearance of independence', since the confidence which courts must inspire in the public in a democratic society is precisely what is at stake.[135]

129 See points 227 to 232 of my *AFJR* Opinion.

130 See, with regard to the second paragraph of Article 47 of the Charter, 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 130 and the case-law cited).

131 Ibid., paragraphs 124 to 126 and the case-law cited.

132 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 52), 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 115).

133 Ibid., paragraph 121 and the case-law cited. My emphasis.

134 Ibid., paragraph 125 and the case-law cited.

135 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 127) referring, to that effect, to ECtHR, 21 June 2011, *Fruni v. Slovakia*, CE:ECHR:2011:0621JUD000801407, § 141, and ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 144 and the case-law cited.

212. Another important element in the objective test of impartiality is (the doctrine of) appearances: the test requires that it be determined whether, quite aside from the conduct of a particular judge, there are ascertainable facts giving rise to doubts as to his or her impartiality.[136] In particular, with regard to judicial appointments, it is necessary for 'the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges'.[137]

213. However, in order to examine the attainment of that threshold, the Court has favoured an overall analysis that takes into account elements connected with institutional design, legal regulation and practical implementation. In this context, the Court has found that, for example, the mere fact that the executive or legislative authorities play a part in the process of judicial appointments does not give rise to a relation of subordination if, once appointed, judges are not subject to pressures and do not receive any instructions in performing the duties of their judicial office.[138]

214. The Court has found that 'the assessment of the independence of a national court or tribunal must, including from the perspective of the conditions governing the appointment of its members, be made in the light of all the relevant factors'.[139] That means that even if some of the factors indicated by a national court escape criticism per se, those factors, when taken together, in addition to the circumstances surrounding them, could appear problematic.[140]

(3) Analysis

(i) Composition and status of the Constitutional Court

215. As to the first issue raised by the referring court relating to the *composition and status of the Constitutional Court*, it does not appear, in my view, that the method of appointment to the Constitutional Court is, in and of itself, problematic. The fact that 'political' institutions participate in the appointment of a body such as the Constitutional Court does not per se transform it into a political body being part of or subordinated to the executive. What is important instead is that constitutional judges, once appointed, are free from influence or pressure when carrying out their functions.[141]

136 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 128) referring to ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, § 191 and the case-law cited, and ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, §§ 145, 147 and 149 and the case-law cited.

137 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 134, and the case-law cited). See also, 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 71 and the case-law cited).

138 See, to that effect, judgments 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 133, and the case-law cited), and of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 54).

139 Judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 56).

140 See, to that effect, judgments 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 142), and of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 57).

141 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 133 and the case-law cited).

216. From the point of view of structure and organisation, constitutional courts are indeed different from other courts. In this dimension and to that extent, constitutional courts, especially in those systems where they carry out specialised, concentrated constitutional review, are not like any of the ordinary courts within a national system.[142] However, while there might be the occasionally taxonomic hesitation as to exactly which branch of government they belong to, this does not mean that as a consequence, such courts are no longer 'jurisdictions'.[143] For the purposes of that definition, when determining the status of the constitutional judges and the legal guarantees of their independence while in office, it is important that such courts be endowed with the attributes of impartiality and independence.

217. This also provides an answer to the issue of appointment. Who actually does the appointing is not conclusive,[144] but it is partially relevant, in particular in connection with the selection process for judges. It is the guarantees of independence in the exercise of the office, coupled potentially with actual conduct, that matter. On a side note, it could even be suggested that it is precisely the involvement of other branches of the government in the appointment of judges that is an example of true separation of powers. Separation of powers should not be confused with overblown visions of judicial independence that effectively mean judicial isolation and insularity.

218. In the context of the present cases, it should be noted that the requirement of independence forms part of the constitutional status of judges of the Constitutional Court under Article 145 of the Romanian Constitution. Pursuant to Article 142(2) of the Romanian Constitution, the nine-year mandate of constitutional judges is not renewable. During that period, they are, in accordance with Article 145 of the Romanian Constitution, irremovable. The conditions for their nomination, which include excellent legal qualifications, a high level of professional competence and at least 18 years' experience of legal work or in higher legal education, are set out in Article 143 of the Romanian Constitution. Moreover, as the Commission notes, Article 144 of the Romanian Constitution also establishes a regime of incompatibilities for constitutional judges, aimed at safeguarding their independence.

219. Moreover, constitutional courts in general,[145] and the Romanian Constitutional Court in particular,[146] have also been considered as valid interlocutors by the Court in the framework of the preliminary ruling procedure of Article 267 TFEU, which requires, at least to a certain extent, their independence in order to satisfy the definition of a 'court or tribunal' under Article 267 TFEU.[147]

142 See, for example, on this debate, Grimm, D., 'Constitutions, Constitutional Courts and Constitutional Interpretation at the Interface of Law and Politics', *EMERJ*, vol. 21(3), 2019, pp. 55-71; Ginsburg, T., and Garoupa, N., 'Building Reputation in Constitutional Courts: Political and Judicial Audiences', *Arizona Journal of International and Comparative Law*, vol. 28, 2011, pp. 539-568.

143 See, on this debate in comparative perspective, fuelled by the special nature of the French Constitutional Council, Favoreu, L., and Mastor, W., *Les cours constitutionnelles*, 2nd Edition, Dalloz, Paris, 2016, p. 22 et seq.

144 Otherwise, would the fact that in a significant number of the Member States, judges are appointed by a head of state or government, that is to say the executive, also mean that all of them are *eo ipso* not independent?

145 Amongst the many cases referred by now by the national constitutional courts, see for example, judgments of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100); of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107); of 30 May 2013, *F.* (C-168/13 PPU, EU:C:2013:358); and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400).

146 Judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385).

147 See, for example, judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587, paragraphs 49 to 53), or, most recently, judgments of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraph 55 et seq.); of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 45 et seq.), and of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)* (C-658/18, EU:C:2020:572, paragraph 42 et seq.).

(ii) Competences and practice of the Constitutional Court

220. Similarly, the concerns of the referring court regarding the *competence of the Constitutional Court* to establish a legal conflict of a constitutional nature between constitutional powers falls within the realm of institutional and procedural autonomy of that Member State.

221. There is no preconceived catalogue of competences that constitutional courts ought or ought not to be given in order to be compliant with the EU principle of judicial independence. In a way, it is intrinsic to the functions of constitutional courts that their powers will have (direct or indirect) effects on the rulings handed down by ordinary courts. [148]

222. It might only be added that, at least to my knowledge, none of the constitutional courts in Europe have ever been able to find a precise formula for distinguishing what is an issue of 'constitutional' significance and what is an issue of 'mere' or 'simple' legality. The absence of any such clear distinction has led to no shortage of conflicts between national supreme (ordinary) courts and national constitutional courts in the past, in particular in systems which are familiar with concrete (or individual) review of constitutionality on the basis of an individual constitutional complaint. [149]

(iii) The principle of res judicata

223. Finally, it must be noted that the specificity of those effects and the practical consequences of the rulings of constitutional courts also form part of the elements to be defined by the national legal systems, including the protection of principles such as *res judicata* and legal certainty.

224. In the specific framework of EU law, the Court has repeatedly pointed out the importance of both principles. [150] This means that as far as requirements stemming from EU law are concerned, apart from some quite exceptional scenarios, [151] the Court has never required the setting aside in general terms the force of *res judicata* of final decisions. However, at the same time, the Court has taken no issue with the extraordinary remedies provided for reopening final decisions contrary to EU law in Romania, respecting the balance and particular procedural choice reached by a national legislature. [152] The same must, a fortiori, be true for the effects and impact of a national constitutional decision.

148 For a comparative overview, see for instance, Cremer, H.-J., 'Die Wirkungen verfassungsrechtlicher Entscheidungen: Ein Vergleich zwischen der Rechtslage in der Bundesrepublik Deutschland und der Rechtslage in den Staaten Mittel- und Osteuropas', in Frowein, J.A., Marauhn, T., (eds.), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, Springer, Berlin, 1998, p. 237, or the various contributions in Luchterhandt, O. et al. (eds.), *Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, Nomos, Baden-Baden, 2007.

149 For a comparative discussion with examples from Germany, Spain, the Czech Republic, Slovakia, or Slovenia, see the volume edited by the Ústavní soud (Constitutional Court, Czech Republic) entitled *The Limits of the Constitutional Review of the Ordinary Courts' Decisions in the Proceedings on the Constitutional Complaint*, Linde, Prague, 2005. With regard to the reproached 'overreach' of the constitutional control, see for instance already Bundesministerium der Justiz, *Entlastung des Bundesverfassungsgerichts: Bericht der Kommission*, Moser, Bonn, 1998, pp. 62 to 66.

150 For a recent example, see judgment of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260, paragraph 88 and the case-law cited).

151 Set out and discussed recently in my Opinion in *Călin* (C-676/17, EU:C:2019:94, point 80 et seq.).

152 Judgment of 11 September 2019, *Călin* (C-676/17, EU:C:2019:700, paragraph 57).

(iv) Caveat

225. As I explained in my *AFJR* Opinion, the nature of the assessment, in terms of judicial independence and impartiality, by this Court, in the framework of 'structural cases' which lead to a review of certain national institutional or procedural solutions with the requirements of EU law, may be analysed at three levels: the 'paper assessment only' analysis; the analysis of the 'papers combined' or 'paper as applied' in practice; and the analysis of the practice on its own which is entirely different from what is stated on the paper. [153]

226. In the present cases, the assessment of the 'theory' or 'paper only' does not seem to cast any doubts on the impartiality or independence of the Constitutional Court.

227. Certainly, one cannot overlook the hints at potential risks and even occasional insinuations appearing in this case file, in particular when referring specifically to Decision No 685/2018, the actors involved, and their alleged motives. [154]

228. However, that would be a very different case from the one brought before this Court. [155] It is unfortunately conceivable in the European Union today that there could be instances of manipulation or outright abuse of a specific constitutional procedure, which, although governed by seemingly neutral rules, could be used to the benefit or interest of a particular person or group. An even more extreme scenario might be that in which it is not just one or even more individual institutional failures, but an entire judicial institution going rogue. In such a case, the basic, structural guarantees of independence and impartiality of an institution would no longer be ensured because, through the system of appointments for example, the entire institution is hijacked by politics, or because threats to the general structure which concern respect for the principle of separation of powers clearly materialise. [156]

229. However, I fully agree with the Commission on this point, in the present cases, no elements have been disclosed which are liable to call into question the independence or impartiality of the Constitutional Court. The concerns of the referring court relate rather to considerations linked to the interpretation of the national law embraced by the ruling of the Constitutional Court and its consequences for the practice of the referring court, with which that court simply disagrees.

(v) Interim conclusion

230. As a result, the first question in Case C-357/19, in so far as it concerns the principle of judicial independence, as well as the question in Case C-547/19, are to be answered in the sense that 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 the adoption of a decision by a national constitutional court, which, in the exercise of its constitutional competences, rules on the lawfulness of the composition of judicial panels of the national supreme court, even if that has the consequence of allowing for extraordinary actions to be brought against final judgments.

153 Points 240 to 243 of that Opinion.

154 See also above, point 204 of this Opinion.

155 For various arguments that have been brought before this Court – in detail see my *AFJR* Opinion, points 235 to 248.

156 See, for an example of such a situation, 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).

5. The principle of primacy

231. By its third question in Case C-357/19, the referring court asks whether the principle of primacy of EU law allows a national court to disapply a decision of the constitutional court, handed down in a case concerning a constitutional dispute, binding under national law.

232. I have already provided an answer to that question in the light of the specific obligations arising from Article 325 TFEU and the protection of fundamental rights. In view of the answer that I suggest to the Court in response to Questions 1 and 2 in Case C-357/19, there is no need to answer Question 3.

233. However, I do consider it useful to add several closing remarks on the principle of primacy and the obligation of national courts to follow the rulings of a constitutional court. This is not only in view of the possibility that the Court may not agree with my suggested answers to Questions 1 and 2 in Case C-357/19. It is also because there is another important issue hiding behind that general question: as it transpires from the order for reference, the Question 3 appears to be 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 under national law. [157]

234. To a certain extent, the established case-law of this Court already provides answers to that issue raised by the referring court.

235. On the one hand, there is established case-law on the primacy of EU law and its implications for national judicial institutions and procedures. First, national courts called upon to apply provisions of EU law are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means. [158] Second, provisions or practices which might impair the effectiveness of EU law by withholding from the national court which has jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect, are incompatible with the requirements which are the very essence of EU law. [159] Third, these considerations apply with regard to any and all level of national rules, including those of a constitutional nature. [160]

236. Therefore, as a matter of principle, and naturally assuming that there is in fact a form of material incompatibility between the constitutional decision at issue in the present case and EU law, *quid non* in my view, the principle of primacy must be interpreted as allowing a national

[157] See above, point 7 of this Opinion. In the context of the present case, the use of that provision remains in the realms of possibility, provided that this Court were to embrace a certain interpretation of EU law and the referring court were later to apply it at national level, thus potentially going against a decision of the national constitutional court. However, that same provision has already been applied in other, parallel case before the Court: see my Opinion, delivered today, in Case C-379/19, *DNA- Serviciul Territorial Oradea*, in which it would appear that disciplinary investigation has been initiated against the referring judge because by making a reference to the Court, he expressed his disagreement with a decision of the Constitutional Court.

[158] See, for a recent example, judgment of 4 December 2018, *The Minister for Justice and Equality and Commissioner of the Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 35, and the case-law cited).

[159] Recently, for example, the judgment of 4 December 2018, *The Minister for Justice and Equality and Commissioner of the Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 36 and the case-law cited).

[160] See, to that effect, judgment of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraph 61 and the case-law cited).

court to disapply a decision of the national constitutional court in the event that the referring court considers that to be the only possible way to comply with the obligations deriving from directly effective provisions of EU law.

237. On the other hand, as regards the preliminary ruling procedure and its potential impact on the national judicial hierarchy and the obligation to follow the legal opinion of a superior court, ever since the Court's judgment in *Rheinmühlen I*,[161] the subsequent case-law has been very clear. Three important points flowing from that line of case-law, which is also applicable to the rulings of constitutional courts,[162] ought to be mentioned and emphasised.

238. First, where a national court considers that a ruling of a higher court could lead it to give a judgment contrary to EU law, the national rules according to which lower courts are bound by rulings of a higher court cannot take away the discretion to make a request for a preliminary ruling to the Court. Second, a national court having exercised the discretion conferred on it by Article 267 TFEU is bound by the interpretation given by this Court and must, if need be, disregard the rulings of the higher court.[163] Third, those considerations should also apply, in my view, in the event that a lower court finds the ruling of a higher court incompatible with EU law, without submitting a request for a preliminary ruling to the Court. Indeed, the case-law has insisted that the *possibility* for lower-instance courts to request a preliminary ruling, if necessary, by disapplying directions of a higher court which prove to be contrary to EU law cannot be turned into *an obligation* to make such a request.[164]

239. Thus, EU law indeed authorises a national judge not to follow a (otherwise binding) legal opinion of a superior court, if he or she believes that that legal interpretation is contrary to EU law. It is quite logical that, from the perspective of EU law, the same must then also apply to any possible (subsequent) national sanction for such a conduct: if that conduct is, from the point of view of EU law, correct, then no sanction for it is allowed.

240. There is nonetheless a rather crucial 'but'. In my view, EU law provides a national judge a limited 'licence to disagree', but no universal 'licence to disregard'. In view of the structure of the EU legal order, within which it is the Court of Justice that is the ultimate interpreter of EU law, the case-law of the Court referred to above has one purpose: to keep the access to this Court open to the lower courts of the Member States. In particular, superior courts in the Members States must not be allowed to prevent, by the use of their formal authority within the domestic system, the courts within their jurisdiction from making requests for a preliminary ruling to the Court.

241. That purpose nonetheless also establishes limits as to how far that licence given by EU law extends. Indeed, if one were to take the often abstract and thus rather sweeping propositions of the Court to their fullest extent, one could not but join the calls for the *Rheinmühlen* line of case-law to be re-considered, certainly back in 2010.[165] Viewed in abstract, institutional terms, that case-law could be said to rely on a number of unwarranted silent assumptions, including that

[161] Judgment of 16 January 1974, *Rheinmühlen-Düsseldorf* (166/73, EU:C:1974:3).

[162] Judgment of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 70).

[163] See, to that effect, judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraphs 27, 28 and 30), and of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraphs 68 and 69).

[164] Judgments of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraphs 53 to 55); of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 28); and order of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673, paragraph 75).

[165] See, for example, Opinion of Advocate General Cruz Villalón in *Elchinov* (C-173/09, EU:C:2010:336, points 23 to 39).

national upper courts wish to prevent lower courts within their jurisdictions from requesting preliminary rulings to the Court. Fortunately, that assumption has been unwarranted – at least until rather recently. [166]

242. Seen in this light, I would suggest that the case-law of the Court quoted above should therefore be read as allowing a space for rational discourse about the proper interpretation of EU law for all national judicial actors, irrespective of the hierarchy. However, it should certainly not be understood as a limitless, universal trump card, the playing of which will shield the judge, irrespective of the circumstances, from any normal rules concerning judicial procedures, hierarchy, and discipline at national level.

243. Beyond that general qualification, I do not think one can offer any further guidance on the myriad variable scenarios that may occur in real life. The bottom line in all such cases is nonetheless to *reason* properly any elements and considerations relating to EU law at issue in the individual case. That, rather transversal duty, [167] is already able to partially demarcate which arguments drawn from EU law remain within realms of the rational legal discourse. In any case, as a rule of thumb, a duly reasoned disagreement by a (lower) court, in particular when an issue is being addressed for a first time and potentially leading to a request to the Court for a preliminary ruling, *must always be possible*.

244. All that precludes, as the Court has recently confirmed, provisions of national law exposing national judges to disciplinary proceedings simply *because* they have submitted a request for a preliminary ruling to the Court, [168] one may add *irrespective* of the outcome of that request before the Court. This means that the mere prospect of being the subject of disciplinary proceedings as a result of making such a request (or deciding to maintain that request 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. [169] Furthermore, not being subjected to disciplinary proceedings or other measures for having exercised such a discretion to bring a matter before the Court also constitutes a guarantee essential to judicial independence. [170]

245. In summary, in a Union based on the rule of law, a judge cannot be punished for legitimately exercising the right given to any 'court or tribunal' to seise the Court of Justice pursuant to Article 267 TFEU.

166 Admittedly, in the present context in some Member States, the *Rheinmühlen* line of case-law might become imbued with new life and another structural reason: protecting judicial dissidents.

167 This follows from Article 47 of the Charter, read in the light of Article 6(1) ECHR. See also, for example, judgment of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraph 53 et seq.).

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

169 See, to that effect, judgment of 26 March 2020, *Miasto Łowicz and Prokurator* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 57 to 58).

170 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).

V. Conclusion

246. I propose that the Court answer the question referred for a preliminary ruling by the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) as follows:

– The second question in Case C-357/19 is to be answered in the sense that the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union does not preclude that, in a situation which generally falls within the scope of EU law but which is not fully determined by it, a constitutional court declares, in application of a genuine and reasonable national standard of protection of constitutional rights and on the basis of its interpretation of the applicable national provisions, that judicial panels within the national supreme court have not been established in accordance with the law.

– The first question in Case C-357/19, as well as the question in Case C-547/19, are to be answered as follows:

  – Article 325(1) TFEU, as well as Article 1(1)(a) and (b) and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, are to be interpreted as not precluding a decision of a national constitutional court declaring unlawful the composition of panels of a national supreme court on the ground that the right to an impartial tribunal has been infringed, thereby creating the conditions for allowing extraordinary actions brought against final judgments.

  – The EU principle of judicial independence, enshrined in the second paragraph of Article 47 of the Charter and the second subparagraph of Article 19(1) TEU, does not preclude the adoption of a decision by a national constitutional court, which, in the exercise of its constitutional competences, rules on the lawfulness of the composition of judicial panels of the national supreme court, even if that has the consequence of allowing for extraordinary actions to be brought against final judgments.

– In view of the answers provided to the first and second questions in Case C-357/19, there is no need to provide an answer to the third question in that case.