

AG Gives Opinion on Compatibility of Romanian Constitutional Court Decisions Involving PIF Obligations

Thomas Wahl

On 4 March 2021, Advocate General (AG) *Michal Bobek* delivered his opinions on cases referred by Romanian courts, in which doubts were voiced over the compatibility of decisions rendered by the Romanian Constitutional Court in conjunction with Union law, including Art. 325 TFEU. The [Joined Cases C-357/19 and 547/19](#) (*Euro Box Promotion and Others*) and the [Joined Cases C-811/19 and 840/19](#) (*FQ and Others*) particularly concern the impact of three Constitutional Court decisions:

- In 2018, the Constitutional Court of Romania held that some panels of the Romanian High Court of Cassation and Justice (HCCJ), the national supreme court, were not properly composed. This enabled some parties to criminal proceedings involving corruption and abuse of office to introduce extraordinary appeals;
- In 2016, the Constitutional Court declared the participation of domestic intelligence services in technical surveillance measures for the purposes of acts of criminal investigation to be unconstitutional. This led to the exclusion of such evidence in criminal proceedings.
- In 2019, the Constitutional Court ruled that the HCCJ failed to comply with its legal obligation to establish specialised panels to deal with corruption cases at first instance. As a result, cases involving corruption connected with EU funds, which had already been adjudicated, had to be re-examined.

The HCCJ and the Regional Court of Bihor, Romania, were unsure whether the Constitutional Court decisions are compatible with certain provisions and principles of EU law, in particular Art. 325(1) TFEU and the PIF Convention, Art. 47 of the Charter of Fundamental Rights, Art. 19(1) TEU, and Decision 2006/928/EC 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.

Specifically regarding the obligations arising from Art. 325(1) TFEU to counter illegal activities affecting the EU's financial interests, AG *Bobek* clarified the elements that must be taken into account in order to assess the effectiveness of the protection these interests. In general, he noted that “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.”

Against this background, the AG concluded that the 2018 decision of the Romanian Constitutional Court did not compromise the effective protection of the EU's financial interests. He argued, *inter alia*, that the decision

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did not undermine the legal instruments enabling the fight against corruption and that the motivation for this decision relied on fundamental rights protection.

Similarly, Union law does not preclude a decision by which evidence obtained by technical surveillance measures is excluded from criminal proceedings. EU law does not regulate the manner in which investigative measures are carried out. The fact that a constitutional decision has repercussions for ongoing or future criminal proceedings relating to corruption is a necessary and logical consequence.

Ultimately, the AG took a different stance as regards the 2019 decision declaring unlawful the composition of panels of the HCCJ not specialised in corruption. An infringement of Art. 325(1) TFEU is possible if such a finding is liable to give rise to a systemic risk of impunity regarding offences affecting the EU's financial interests.

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