

Slovenia, Constitutional Court, Up-709/15-29, Up-710/15-34, constitutional, 9 October 2019, ECLI:SI:USRS:2019:Up.709.15

Member State

 Slovenia

Topic

Accountability (individual judges' liability), impartiality (corruption), rule of law (fight against serious crime)

Deciding Court Original Language

Ustavno sodišče Republike Slovenije

Deciding Court English translation

Constitutional Court of the Republic of Slovenia

Registration N

Up-709/15-29, Up-710/15-34

Date Decision

9 October 2019

ECLI (if available)

ECLI:SI:USRS:2019:Up.709.15

EU legal sources and CJEU jurisprudence

Articles 7, 8 of the CFREU

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC,

CJEU, C-293/12 and C-594/12, Digital Rights Ireland [GC], 8 April 2014.

CJEU, C203/15, Tele2 Sverige [GC], 21 December 2016

CJEU, C-207/16, Ministerio Fiscal [GC], 2 October 2018

ECtHR Jurisprudence

Figueiredo Teixeira v. Andorra, app. no. 72384/14, 8 November 2016

Ben Faiza v. France, app. no. 31446/12, 8 February 2018

Benedik v. Slovenia, app. no. 62357/14, 24 April 2018

Subject Matter

The CC interpreted Article 37 of the Constitution, Article 7 CFREU and Article 8 ECHR in a case where a judge's conviction for bribery was based on allegedly unlawfully obtained traffic data.

Legal issue(s)

The case relates to accountability of judges. The CC had to determine inter alia whether bribe-taking of a criminal judge constitutes a serious crime in the sense of CJEU jurisprudence, which allows the retention and use of traffic data.

First indicate if it is related to independence, impartiality, accountability, second of which legal profession, then briefly describe the general legal issues concerning one or more of the above topics

National Law Sources

Articles 37, 38 of the Constitution of Republic of Slovenia

Articles 149.b, 154 of the Criminal Procedure Act

Constitutional Court, Decision U-I-65/13 of 3 July 2014

Constitutional Court, Decision U-I-25/95 of 27 November 1997

Constitutional Court, Decision U-I-158/95 of 2 April 1998

Constitutional Court, Decision U-I-272/98 of 8 May 2003

Constitutional Court, Decision Up-2094/06 of 20 March 2008

Facts of the case

The CC heard a constitutional complaint of a criminal judge, who was convicted of bribe-taking. He argued *inter alia* that the regular courts violated his right to personal data and communication privacy under Articles 37 and 38 of the Constitution, Article 8 of the CFREU and Article 8 of the ECHR since their decisions were based on traffic data, obtained unlawfully (para 16). The courts were said to have received the traffic data from the operators who collected them in a non-selective (non-discriminatory) and thus unconstitutional manner.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The CC rejected the constitutional complaint. First, it held that in the circumstances of the specific case, the protection offered by the right to communication privacy consumes the right to protection personal data. Accordingly, it examined the allegations only from the perspective of communication privacy (Article 37 of the Constitution, Article 7 of CFREU and Article 8 of the ECHR) (para. 44). Second, it enumerated the conditions set in the case-law of the CC, CJEU (Tele2 Sverige C203/15, Ministerio Fiscal, C-207/16) and ECtHR (Figueiredo Teixeira v. Andorra, Ben Faiza v. France, Benedik v. Slovenia) for the proportionality of the interference with the right to communication privacy. One of the conditions, flowing from the jurisprudence of the CJEU is that a serious interference, i. e. an interference which allows the authorities very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, can only be justified by the legitimate aim to fight serious crime. The CC found that the interference was serious (para. 52). Consequently, it had to establish, whether the criminal activity (taking bribes by a judge) was of serious nature. The CC agreed with the regular courts that the crime was serious. It based its conclusion on the following arguments (para. 53):

- Relatively severe prescribed punishment (1-8 years of imprisonment + pecuniary penalty)
- Involvement of more persons, some even not yet discovered, the crime itself is hard to discover
- the criminalization of the bribery of state officials implements Article 15 of UN Convention against Corruption (2004), which is a consequence of awareness of the states, that corruption poses serious problems and threats to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law
- the case concerns a judge, who, as a representative of judicial branch of power, has a duty to adjudicate upon the existence of corruption, and not take part or tolerate corruptive behaviour in his ranks.

Then, the CC verified, whether the interference in the applicant's right to communication privacy was proportionate and thus justified. It found that it was, inter alia because the personal data, on which the district court based its conviction have been retained for a short period: only a month and a few days before the first warrant and two months before the last warrant was issued. It also found that the lower courts, especially the Supreme Court, have adequately assessed the interference in the light of the principle of proportionality. As a result, the constitutional complaint was rejected.

Relation of the case to the EU Charter

The CC did explicitly mention the Charter only once and did not determine its applicability. However, it did rely heavily on the relevant jurisprudence of the CJEU, where the Charter was at the centre of the CJEU's reasoning. The CC therefore implicitly used the Charter, which in fact had a decisive impact on the CC's assessment. Thus the Charter was not merely an additional argument to support the CC's ruling, but a true guideline, providing specific standards, according to which, the proportionality test was carried out.

The CC did not provide any explanation, why it used the CJEU jurisprudence.

It can be inferred from the CC's decision that when a court determines the seriousness of a crime in the sense of Article 7 of the CFREU with respect to retention and use of traffic data, a criminal offence committed by a judge is an aggravating factor for the severity of the crime (relevant for justifying the interference into communication privacy), since the judges are the paramount guarantee for the rule of law, democracy and fair administration of justice, and should not themselves be involved in crimes, which contradict these values.

Relation between the EU Charter and ECHR

The overreaching purpose of invoking supranational sources was, as indicated above, to provide guidelines for review of proportionality of the interference with the applicant's rights. In this context, the CC invoked the ECtHR jurisprudence as a supplement to the CJEU's case-law, which was relatively new and thus did not cover all the relevant aspects. For example, the CC referred to *Figueiredo Teixeira v Andorra* to hold that the proportionality assessment depends on the duration of the measure in general and in the specific case, and whether the measure was implemented for a maximum period or for a shorter period. Such requirement was not found in the jurisprudence of the CJEU. Moreover, the case-law of both European courts was invoked to mutually reinforce the standards, that were established by both the Luxembourg and the Strasbourg court. For instance, the CC cited *Tele2 Sverige*, as well as *Figueiredo Teixeira v Andorra* and *Ben Faiza v France* when it found that the access to traffic data can be justified only by fight against serious crime.

The case concerns the standards, that are evolving under both supranational jurisdictions. It is thus hard to conclude, whether a one or the other instrument affords higher protection.

Use of Judicial Interaction technique(s)

Proportionality and consistent interpretation: the CC referred to the CFREU standards, developed in *Tele2 Sverige* and *Ministerio Fiscal* (as well as the ECHR standards) to guide its assessment of proportionality of the interference in the applicant's right to communication privacy. However, the CC did not clarify, whether these standards were applied directly in addition to the existing ECHR and constitutional standards or indirectly through a consistent interpretation of the constitution.

Comparative reasoning with foreign case-law: the Supreme Court distinguished the decision of the CC to the decision of the Austrian Constitutional Court, which related to *Digital Rights Ireland* case (see fn. no. 3. of this template)

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with

foreign courts)

The CC distinguished the present case from its previous Decision U-I-65/13 of 3 July 2014, where the CC had suspended the proceedings and waited for the CJEU to decide its famous *Digital Rights Ireland* case. After the decision of the CJEU, the CC annulled the provisions of Electronic Communications Act, which transposed the Directive 2006/24/EC, annulled by the CJEU. However, the CC had not found Article 149.b or Article 154 of the Criminal Procedure Act unconstitutional. Its decision was thus somewhat unclear. In the present case, the CC clarified that the Decision U-I-65/13 referred to retention and not to subsequent use of such data in criminal proceedings, and that consequently, the criteria set in it do not apply to the present case, which concerns access to personal data, as was already explained by the Supreme Court. (para. 48) It held that in this case, the review must be based on the standards established by the CC, the CJEU and the ECtHR, set out a few paragraphs earlier (see vertical interaction patterns below).

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

At the outset of the reasoning with respect to the right to privacy, the CC established the general rules, which would guide the court's assessment of the proportionality of interference. It first listed the criteria from its established jurisprudence (para. 45). Then it immediately added the requirements of the CJEU and ECtHR jurisprudence (para. 46). Here, it did not engage at large with the existing supranational standards, but simply held that these are similar standards to the ones guaranteed by the constitution.

The CC distinguished the case at hand from C-207/16, *Ministerio Fiscal*, where the CJEU held that the interference was not serious and that such interference may be justified by fight against crime in general. The CC held that in the present case, the interference was indeed serious, since it allowed very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, and that according to the CJEU's case-law, only fight against serious crime can justify it. (paras. 52-53).

When the CC determined the seriousness of the crime, it invoked Article 15 of the 2004 UN Convention against Corruption and held that this provision is a consequence of awareness of the states, that corruption poses serious problems and threats to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law. The CC thus used a treaty as a additional argument in support of its conclusion that the crime was serious.

Strategic use of judicial interaction technique (purpose aimed by the national court)

There are arguably two reasons, why the CC invoked the supranational standards. First, it was probably a response to the applicant's arguments, which were predominantly based on *Digital Rights Ireland*. The CC presumably referred to the jurisprudence of the CJEU and the ECtHR to shed light on the applicant's deficient understanding of the CJEU case-law and its implications. Second, the CC used the supranational sources to establish the relevant standards, which were not yet

clarified under national law, in order to solve the legal problem at hand.

Other

The case does not concern the disciplinary measures taken against the applicant. It was reported by the media, that the applicant was acquitted in the disciplinary proceedings. These decisions are not publicly available. However, the SC held in para. 31 of its judgment that the personal data obtained could only be used to fight serious crime, but not for the purpose of disciplinary proceedings. The SC thus seems to have hinted the reason for acquittal of the applicant.

(Link to) full text

<http://odlocitve.us-rs.si/sl/odlocitev/US32084?q=Up-709%2F15-29%2C+Up-710%2F15-34>

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History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. District court of Ljubljana, Judgment X K 4980/2011 of 23 December 2013 (not available online)
 2. High Court of Ljubljana, Judgment II Kp 4980/2011 of 22 September 2014
 3. Supreme Court, Judgment I Ips 4980/2011-785 of 9 June 2015
 4. Constitutional Court, Decision Up-709/15-29, Up-710/15-34 of 9 October 2019
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