The Inviolability of National Centrals Banks as a Matter of EU Law

Composite administrative procedures must be followed before national investigative authorities in Member States seize documents from national central banks

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It is well established that national central banks (NCBs) in the Eurozone have a dual professional role. They are, on the one hand, actors with national character and tasks within their respective national legal orders. However, since the advent of economic and monetary union (EMU), on the other hand, NCBs are also part of the European System of Central Banks (ESCBs), with their Governors sitting on the Governing Council of the European Central Bank (ECB). This hybrid role of NCBs is unique in EU governance, and the ESCB system is undoubtedly a novel legal construct.

As a result, the role of NCBs, as a matter of EU law, is quite extensive. It might even be claimed that NCBs are an extended part of the EU institutional framework. With this in mind, questions arose in a recent case at the Court of Justice of the European Union on the issue of the inviolability of NCBs, when carrying out their duties as a matter of EU law. In *Commission v Slovenia (ECB Archives)* (Case C-316/19), the Court had to determine whether a Member State's authorities, by unilaterally seizing documents from a NCB, resulted in that Member State failing to fulfil its obligations under EU law. It answered in the affirmative.

Sitting in Grand Chamber, the Court in *Commission v Slovenia (ECB Archives)* was an opportunity for the Court to clarify how the archives of the Union, even in NCBs located in Member States, must be protected against unilateral seizures by investigating or police authorities of Member States in the conduct of national criminal investigations.

Facts

In June and July 2016, national authorities in Slovenia first searched and then unilaterally seized a range of documents from the Central Bank of Slovenia (*Banka Slovenije*). This was after initial requests by investigators to *Banka Slovenije* to hand over documents being denied. The national authorities seized the documents from the NCB after the Ljubljana Regional Court (*Okrožno sodišče v Ljubljani*) had given two orders granting national authorities the possibility to do so. This was despite the protests of the Central Bank of Slovenia, who argued that national authorities being granted seizure orders was a violation of EU law, given that it would impinged on the archives of the ECB.

In the midst of this, and as soon as the ECB's attention was drawn to the developments in the Member State – which resulted in President Draghi of the ECB sending a letter to Slovene authorities warning them of potential violations of EU law, namely, the inviolability of NCBs and the protections of the archives of the ECB – the ECB launched national legal proceedings in the Ljubljana Region Court to secure the ECB archives, but without success. A subsequent complaint petitioned by the ECB to the Constitutional Court of Slovenia (*Ustavno sodišče*) was also dismissed. In neither instance, despite the pleas of the ECB, did either of the national courts make an order for a preliminary reference under Article 267 TFEU to the Court, which they arguably should have had, in light of the uncertainty of the applicability of the immunities and privileges of the archives arising from EU law to NCBs, such as *Banka Slovenije*.

Infringement proceedings

The Commission were of the view that Slovenia had not fairly cooperated with the ECB as regards the seizures that it made from within *Banka Slovenije*. By contrast, Slovenia maintained that the documents that it had seized did not originate from the ECB archives, and in any event, that the documents that it had seized were that of *Banka Slovenije*. Moreover, Slovenia viewed the *Banka Slovenije* as a 'third party' to that of the ECB, and thus, was not a member of the ESCB, and not covered by any grounds within EU law of its inviolability.

In essence therefore, the Court was asked to balance, firstly, on the one hand, the rights of the ECB in ensuring that it is able to continue to fulfil its tasks under the EU treaties, by having its archives protected. Secondly, on the other hand, the Court had to counterweight that with the rights of national authorities in Member States to be able to properly conduct national criminal investigations, and make seizures when not encroaching upon tasks attributed to NCBs as part of the ESCB.

The Commission relied upon two pleas in bringing the infringement proceedings before the Court. Firstly, that the actual seizure of documents from *Banka Slovenije* was a violation by Slovenia of the ECB's archives, which are protected under the inviolability clauses in EU primary law. Secondly, the Commission argued that the Member State had failed in its duty of sincere (loyal) cooperation to engage with the ECB prior to the seizure. Both the Advocate General (AG) and the Court sitting in Grand Chamber found in favour of the Commission on both its pleas.

The Court

There were numerous aspects of EU primary law at play – Article 127 TFEU, Article 129 TFEU, Article 282 TFEU, Article 283 TFEU, Article 343 TFEU, Protocol (No 4) on the Statute of the ESCB and of the ECB, and Protocol (No 7) of the Privileges and Immunities of the European Union. More precisely however, EU primary law is rather clear on the role of the archives of the Union, and thereby the ECB, and its inviolability, as stated in Article 2 of Protocol (No 7) on the Privileges and Immunities. However, what was not clear was whether such inviolability of the Union extended to NCBs as part of the ESCB, in the implementation of the ECB's tasks.

Admittedly, as AG Kokott opined, EU primary law does not provide an affirmative definition of what constitutes 'archives of the ECB'. Yet just because there is no affirmative definition of archives in EU law did not mean that national investigative bodies can interpret that to suit its own ends. On the contrary, as the Court had long held, 'archives' in EU law have an autonomous interpretation. On this, the Court noted that what constitutes archives of the Union 'is an autonomous concept of EU law, distinct from that which might be accepted by international organisations and courts or by the law of the Member States'. Accordingly, just because the documents seized by the national authorities were not on the premises of the ECB itself, did not mean that documents seized from *Banka Slovenije* fell outside the scope of protection of the applicable privileges and immunities as a matter of EU law. The Court said Protocol (No 7) of Privileges and Immunities covers archives 'located at premises other than those of the European Union', that is to say, at NCBs, like *Banka Slovenije*. That is to say that what is categorised as archives of the NCBs should be *all* documents of the ECB, whether they be authored or transmitted by them in the performance of their tasks of the ESCB, regardless of whom holds them, be it NCBs or the ECB.

After concluding that NCBs in their role under the ESCB were covered by the autonomous definition of archives under EU law, the Court had little difficulty in making its next and most important finding in light of the Commission's pleas. Given that the national authorities in Slovenian had *unilaterally* acted in seizing documents from *Banka Slovenije*, which, de facto, had included documents that formed part of the archives of the ECB, it had no problem in finding an infringement of EU law. As succinctly put by the Court, 'the unilateral seizure by the national authorities of documents belonging to the archives of the Union must be considered to constitute an infringement of

the principle of the inviolability of those archives of the Union' (para. 92).

Importantly, however, was a qualification. Inviolability of NCBs was only to be considered only in so far as the ECB did not authorise the lifting of the inviolability of the archives, or, where the Court lifts inviolability by Order. Furthermore, the Court said national authorities may still search and seize documents from NCBs that do not belong to the archives of the Union. However this firm distinction would later be made in practice is questionable. Nonetheless, that would be saved for future case law.

Rightly, the inviolability of national central banks in their role within the ESCB is not, and far from absolute. In fact, this case could and should have been avoided altogether. Slovenia could have went to the ECB to ask its permission to seize certain documents that were applicable for the purposes of its national investigation that were not related to the archives of the Union. Moreover, an alternatively, if the ECB had denied the national authorities the possibility to seize the documentation necessary for its national investigation, proceedings could be brought to the Court, seeking a determination of the Court on whether inviolability of an NCB can be lifted, if the Court considered appropriate in given circumstances. In the events at hand, neither was done.

Rather, Slovenian authorised proceeded with unilateral seizure, without any involvement of the applicable EU institutions, and thus violated the archives, with the Court clearly lowering the threshold for the Commission to provide strong evidence to prove an infringement of EU law. This was sensible, as Slovenian authorities could have easily engaged in prior cooperation of applicable EU institutions, given that the threshold for demanding that the applicable EU institutions cooperate with national investigations under a duty of sincere (loyal) cooperation is low. The Court's prior judgment in *Zwartveld* (C-2/88 IMM) confirms that EU institutions can be ordered, in appropriate circumstances, to facilitate investigations of national authorities.

Conclusion

Commission v Slovenia (ECB Archives) was ultimately about the performance of NCBs in their tasks in the ESCB and Eurosystem. The result is clear: national authorities have to be extremely cautious in their dealings with NCBs in national investigations. Given the role of NCBs in EU law, and their place within the EU legal order, the judgment of the Court in these infringement proceedings should be seen as a stern warning to investigative authorities of the Member States. They must engage with the applicable EU institutions, *prior* to seizing documents of NCBs (and for that matter, carrying out searches too).

National investigative authorities may not like this procedural component of prior engagement, but that feeling they have is immaterial. As AG Kokott stated in the case, national authorities 'cannot unilaterally decide to use the documents concerned in criminal proceedings', and that rather, they must pre-emptively engage with the applicable EU authorities. The unilateralism of the Slovenian authorities, which was unusually approved by the Slovenian judiciary, including the Constitutional Court of Slovenia, meant the composite administrative procedures demanded by EU law on inviolability being lifted was not followed.

The Commission took this infringement proceedings case, *Commission v Slovenia (ECB Archives)*, not only because Slovenia disagreed with the Commission's assessment of the facts and the law, but also because the ECB had exhausted potential legal remedies in the Slovene courts. This case therefore also demonstrates the limits to which national courts in Member States can be trusted with providing remedies under EU law, which they must according to Article 19 TFEU. If either of the two Slovene courts whom heard the matters in the events had referred to the Court for guidance under the preliminary reference procedure located in Article 267 TFEU on the applicability of the privileges and immunities granted to NCBs, these infringement proceedings against the Member State could have been avoided.

Lastly, the *Commission v Slovenia (ECB Archives)* case therefore supports the prior assertions made by

the Court in its *Rimšēvičs and ECB v Latvia* judgment, in which it emphasised the ESCB is to be considered 'a novel legal construct in EU law which brings together national institutions'. As further espoused by the Court, NCBs and the ECB are to 'cooperate closely with each other, and within which a different structure and *a less marked distinction between the EU legal order and national legal orders*' (emphasis added). The entanglement of EU and national procedures – composite administrative procedures – are needed to seize documents from NCBs, given that NCBs constitute authorities in EU law as much as they do in national law. Arising from this judgment, NCBs are slowly gravitating towards a more central position in the EU institutional framework.

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