Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 April 2021 [1]

Case C-3/20

LR Ģenerālprokuratūras Krimināltiesiskā departamenta Sevišķi svarīgu lietu izmeklēšanas nodaļa
v
AB,
CE and
MM investīcijas SIA

(Request for a preliminary ruling
from the Rīgas rajona tiesa (Riga District Court, Latvia))

(Reference for a preliminary ruling – Article 343 TFEU – Statute of the European System of Central Banks and the European Central Bank – Article 39 – Protocol on the privileges and immunities of the European Union – Article 22, first paragraph – Member of a decision-making body of the European Central Bank – Governor of the central bank of a Member State – Article 11(a) – Immunity from legal proceedings – Continuation after the person has ceased to hold office – Acts of servants of the EU performed in their official capacity – Functional immunity – Article 130 TFEU – Independence of the ECB, the ESCB and the central banks of the Member States – Article 18 – Cooperation – Article 4(3) TEU – Principle of sincere cooperation – Article 17 – Waiver of immunity by the ECB – Interests of the EU – Immunity from main court proceedings – Immunity from coercive measures by public authorities)

I. Introduction

1. May the governor of a national central bank, who is also a member of the Governing Council of the European Central Bank (ECB), be exposed to criminal prosecution at Member State level, or is this precluded by immunity under EU law? This question arises in the present request for a preliminary ruling, which is based on criminal proceedings in Latvia brought against the former president of the central bank of Latvia for taking bribes and money laundering in connection with a prudential supervision procedure concerning a Latvian bank.

[1] Original language: German.

2. According to Article 11(a) of Protocol (No 7) on the privileges and immunities of the European Union ('the Protocol on the privileges and immunities of the EU' or 'the Protocol'),[2] officials and other servants of the EU are immune from legal proceedings in all Member States in respect of acts performed by them in their official capacity. This case provides the Court with an opportunity to determine the scope of that immunity.

3. The first particularity of the present case resides in the fact that the governors of the central banks of the Member States are national authorities, but, at the same time, as members of the Governing Council of the ECB, they determine the monetary policy of the euro zone within the framework of the European System of Central Banks (ESCB) and, since the creation of the banking union, they also perform supervisory tasks in that capacity under Regulation No 1024/2013.[3] In order to clarify whether the accused governor of a central bank enjoys immunity under the Protocol, those different functions must therefore be clearly delineated.

4. Second, it is necessary to clarify what role the circumstance that the ECB, the national central banks and the members of their decision-making bodies perform their tasks in complete independence in accordance with Article 130 TFEU plays with regard to the permissibility of criminal-prosecution measures against a former governor of a central bank, such as the accused person in the main proceedings. Ultimately, therefore, it is necessary in the present case to strike a fair balance between the Member States' interest in pursuing criminal prosecution and the European Union's interest in the functionality of its institutions.

II. Legal context

A. EU law

1. Treaty on the Functioning of the European Union (TFEU)

5. The governance of the ESCB is provided for in Article 129(1) TFEU:

'The ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board.'

6. Article 130 TFEU governs the independence of the ECB, the ESCB and the central banks of the Member States:

'When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.'

2 OJ 2016 C 202, p. 266.

3 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the SSM Regulation').

7. Article 282(1) TFEU defines the ESCB:

'The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB). The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union.'

8. Article 283(1) TFEU determines who is a member of the Governing Council:

'The Governing Council of the European Central Bank shall comprise the members of the Executive Board of the European Central Bank and the Governors of the national central banks of the Member States whose currency is the euro.'

9. Article 343 TFEU is the fundamental provision on the privileges and immunities of the European Union:

'The Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union. The same shall apply to the European Central Bank and the European Investment Bank.'

2. Statute of the ESCB and of the ECB

10. Article 12.1 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank[4] governs the responsibilities of the decision-making bodies of the ECB:

'The Governing Council shall adopt the guidelines and take the decisions necessary to ensure the performance of the tasks entrusted to the ESCB under these Treaties and this Statute. The Governing Council shall formulate the monetary policy of the Union including, as appropriate, decisions relating to intermediate monetary objectives, key interest rates and the supply of reserves in the ESCB, and shall establish the necessary guidelines for their implementation.

…

To the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB.'

11. Article 14 of the Statute of the ESCB and of the ECB relates to the central banks of the Member States:

'…

14.2. The statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years.

4 OJ 2016 C 202, p. 230.

A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

14.3. The national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it.

14.4. National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.'

12. Article 39 of the Statute of the ESCB and of the ECB concerns privileges and immunities:

'The ECB shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol on the privileges and immunities of the European Union.'

13. Article 44 of the Statute of the ESCB and of the ECB concerns the General Council of the ECB:

'44.1. Without prejudice to Article 129(1) [TFEU], the General Council shall be constituted as a third decision-making body of the ECB.

44.2. The General Council shall comprise the President and Vice-President of the ECB and the Governors of the national central banks. …'

3. Protocol on the privileges and immunities of the EU

14. Article 8 of the Protocol on the privileges and immunities of the EU governs the immunity of Members of the European Parliament in respect of opinions expressed or votes cast by them:

'Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.'

15. Article 9 of that protocol provides for the immunity of Members of the European Parliament during sessions:

'During the sessions of the European Parliament, its Members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their parliament;

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.

Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.'

16. The first paragraph of Article 10 of the same protocol concerns representatives of the Member States:

'Representatives of Member States taking part in the work of the institutions of the Union, their advisers and technical experts shall, in the performance of their duties and during their travel to and from the place of meeting, enjoy the customary privileges, immunities and facilities.'

17. Article 11(a) of the Protocol on the privileges and immunities of the EU reads as follows:

'In the territory of each Member State and whatever their nationality, officials and other servants of the Union shall:

(a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Union and, on the other hand, to the jurisdiction of the Court of Justice of the European Union in disputes between the Union and its officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office'.

18. Article 17 of that protocol provides:

'Privileges, immunities and facilities shall be accorded to officials and other servants of the Union solely in the interests of the Union.

Each institution of the Union shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union.'

19. Article 18 of the same protocol states:

'The institutions of the Union shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned.'

20. The first paragraph of Article 22 of the Protocol on privileges and immunities of the EU reads as follows:

'This Protocol shall also apply to the European Central Bank, to the members of its organs and to its staff, without prejudice to the provisions of the Protocol on the Statute of the European System of Central Banks and the European Central Bank.'

4. The SSM Regulation

21. Since 4 November 2014, the ECB has assumed the specific tasks conferred on it by the SSM Regulation in relation to policies relating to the prudential supervision of credit institutions. [5]

22. Recitals 28 and 29 of that regulation state that:

'(28) Supervisory tasks not conferred on the ECB should remain with the national authorities. Those tasks should include … the prevention of the use of the financial system for the purpose of money laundering and terrorist financing …

(29) The ECB should cooperate, as appropriate, fully with the national authorities which are competent to ensure … the fight against money laundering.'

23. Article 4 of the same regulation lists the tasks conferred on the ECB:

'1. Within the framework of Article 6, the ECB shall … be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States:

(a) to authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14;

…

(d) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters;

(e) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models;

(f) to carry out supervisory reviews … in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by these institutions ensure a sound management and coverage of their risks, and on the basis of that supervisory review to impose on credit institutions specific additional own funds requirements, specific publication requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law;

…'

[5] See the first subparagraph of Article 33(2) of that regulation.

24. Article 6 of the SSM Regulation governs the cooperation between the ECB and the national competent authorities that make up the Single Supervisory Mechanism ('the SSM') pursuant to paragraph 1 of that article. In accordance with Article 6(4), for supervisory purposes, a distinction is to be made, in essence, between significant and less significant credit institutions, whereby the latter continue, in principle, to be supervised by the national authorities. An exception exists for the supervisory tasks under Article 4(1)(a), which are always carried out by the ECB. Article 6(5) and (6) reads, in extract, as follows:

'5. With regard to the credit institutions referred to in paragraph 4 …

(a) the ECB shall issue regulations, guidelines or general instructions to national competent authorities, according to which the tasks defined in Article 4 excluding points (a) and (c) of paragraph 1 thereof are performed and supervisory decisions are adopted by national competent authorities.

…

(b) when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4 …;

(c) the ECB shall exercise oversight over the functioning of the system …;

…

6. Without prejudice to paragraph 5 of this Article, national competent authorities shall carry out and be responsible for the tasks referred to in points (b), (d) to (g) and (i) of Article 4(1) and adopting all relevant supervisory decisions with regard to the credit institutions referred to in the first subparagraph of paragraph 4 of this Article …

…

The national competent authorities shall report to the ECB on a regular basis on the performance of the activities performed under this Article.

…'

25. The ECB's specific supervisory powers include the withdrawal of authorisation pursuant to Article 14(5) of that regulation:

'Subject to paragraph 6, the ECB may withdraw the authorisation in the cases set out in relevant Union law on its own initiative, following consultations with the national competent authority of the participating Member State where the credit institution is established, or on a proposal from such national competent authority. …

Where the national competent authority which has proposed the authorisation in accordance with paragraph 1 considers that the authorisation must be withdrawn in accordance with the relevant national law, it shall submit a proposal to the ECB to that end. In that case, the ECB shall take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national competent authority.'

26. Article 26 of the SSM Regulation relates to the Supervisory Board:

'1. The planning and execution of the tasks conferred on the ECB shall be fully undertaken by an internal body composed of its Chair and Vice Chair, appointed in accordance with paragraph 3, and four representatives of the ECB, appointed in accordance with paragraph 5, and one representative of the national competent authority in each participating Member State ("Supervisory Board"). All members of the Supervisory Board shall act in the interest of the Union as a whole.

Where the competent authority is not a central bank, the member of the Supervisory Board referred to in this paragraph may decide to bring a representative from the Member State's central bank. For the purposes of the voting procedure set out in paragraph 6, the representatives of the authorities of any one Member State shall together be considered as one member.

…

8. Without prejudice to Article 6, the Supervisory Board shall carry out preparatory works regarding the supervisory tasks conferred on the ECB and propose to the Governing Council of the ECB complete draft decisions to be adopted by the latter, pursuant to a procedure to be established by the ECB …'

5. The CRD

27. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (Capital Requirements Directive; 'the CRD') [6] governs, in Article 18 thereof, the material conditions for a withdrawal of authorisation as follows:

'The competent authorities may only withdraw the authorisation granted to a credit institution where such a credit institution:

…

(c) no longer fulfils the conditions under which authorisation was granted;

(d) no longer meets the prudential requirements set out in Parts Three, Four or Six of Regulation (EU) No 575/2013 [of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investments firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1)] or imposed under Article 104(1)(a) or Article 105 of this Directive or can no longer be relied on to fulfil its obligations towards its creditors, and, in particular, no longer provides security for the assets entrusted to it by its depositors;

(e) falls within one of the other cases where national law provides for withdrawal of authorisation; or

[6] At the same time, Directive amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338). Article 18 was later amended by Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 (OJ 2019 L 150, p. 253) but this is without incidence on the case at hand.

(f) commits one of the breaches referred to in Article 67(1).'

6. The SSM Framework Regulation

28. Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities[7] governs, in Article 83 thereof, the 'ECB decision on the withdrawal of an authorisation'. Paragraphs 1 and 2 of that provision are worded as follows:

'1. The ECB shall take a decision on the withdrawal of an authorisation without undue delay. In doing so it may accept or reject the relevant draft withdrawal decision.

2. In taking its decision, the ECB shall take into account all of the following: (a) its assessment of the circumstances justifying withdrawal; (b) where applicable, the NCA's draft withdrawal decision; (c) consultation with the relevant NCA and, where the NCA is not the national resolution authority, the national resolution authority (together with the NCA, the "national authorities"); (d) any comments provided by the credit institution …'

B. Latvian law

29. Article 120 of the Kriminālprocesa likums (Code of Criminal Procedure, Latvia)[8] contains a list of authorities that enjoy immunity. The Bank of Latvia and its Governor are not listed in it.

30. Article 404 of that law provides that, in principle, where a person enjoys immunity from prosecution, the Office of the Public Prosecutor is to provide the competent authority with a proposal to authorise the prosecution of that person if it considers there to be grounds for establishing that he or she is criminally liable. The proposal is to be accompanied by information concerning the evidence of the guilt of the person whose immunity is to be waived.

31. The Krimināllikums (Criminal Code, Latvia)[9] criminalises, inter alia, money laundering (Article 195) and taking bribes (Article 320).

III. Facts and main proceedings

32. AB, the accused person in the main proceedings ('the accused person'), had been the Governor of Latvijas Banka (Central Bank of Latvia) since 21 December 2001. In that capacity, he was entitled to attend meetings of the Board of the Finanšu un kapitāla tirgus komisija (Financial and Capital Market Commission, Latvia; 'the FKTK'), which is responsible for the authorisation and supervision of credit institutions in Latvia.

7 ECB/2014/17 (OJ 2014 L 141, p. 1; 'the SSM Framework Regulation').

8 *Latvijas Vēstnesis* (Official Gazette of the Republic of Latvia) No 74 of 11 May 2005.

9 *Latvijas Vēstnesis* No 199/200 of 8 July 1998.

33. Trasta Komercbanka AS is a Latvian credit institution authorised by the FKTK in 1991 to provide financial services. Since 4 November 2014, the FKTK has performed the supervisory tasks conferred on the ECB under Article 4(1)(b), (d) to (g) and (i) of the SSM Regulation in relation to Trasta Komercbanka. [10]

34. Acting on a proposal by the FKTK of 5 February 2016, the ECB withdrew Trasta Komercbanka's authorisation as a credit institution by decision of 3 March 2016, replaced by decision of 11 July 2016, pursuant to Article 4(1)(a) in conjunction with Article 14(5) of the SSM Regulation and Article 83(1) of the SSM Framework Regulation. [11]

35. On 15 February 2018, the Korupcijas novēršanas un apkarošanas birojs (Anti-Corruption Office, Latvia) opened a criminal investigation against the accused person into allegations of taking bribes in connection with the supervisory proceedings against Trasta Komercbanka in Latvia that had led to the withdrawal of its authorisation.

36. Specifically, the accused person is alleged, on the one hand, to have accepted, from 20 to 30 August 2010, a leisure trip worth EUR 7 490 from the chairman of the executive board and shareholder of Trasta Komercbanka. In return, he is alleged to have unlawfully given advice to the latter before the end of 2015, making use, inter alia, of information which he had lawfully obtained in his official capacity concerning the actions taken by the FKTK to supervise and monitor Trasta Komercbanka. That advice allegedly related to the following points: first, the inability of Trasta Komercbanka to guarantee on a lasting basis an internal control system in order to comply with the requirements of the Latvian Law on combating money laundering and terrorist financing; second, the increase in the company's capital needed to ensure a qualifying holding; and, third, the steps necessary to attract investors (shareholders). These issues were the subject of several inspections conducted by the FKTK in the period from 29 July 2009 to 31 December 2015, during which the accused person allegedly helped to formulate answers to the questions put by the FKTK during the inspections and advised Trasta Komercbanka on how to conduct itself during the inspections.

37. On the other hand, he is alleged to have accepted, between 23 August 2012 and 9 May 2013, an offer of a bribe of EUR 500 000 made by the vice-chairman of the administrative board and shareholder of Trasta Komercbanka, and to have received half of that sum – EUR 250 000 – from him or from a jointly accused intermediary. In return, the accused person allegedly advised Trasta Komercbanka, after 23 August 2012 and until 31 December 2015, on matters relating to supervision by the FKTK and helped it to formulate correspondence with the FKTK. This allegedly contributed to the FKTK partly removing the restrictions on Trasta Komercbanka's activities. The accused person allegedly did not receive the rest of the bribe because the FKTK retained some of the restrictions already applied and also imposed further restrictions on Trasta Komercbanka's activities.

38. In connection with both allegations of the Korupcijas novēršanas un apkarošanas birojs (Anti-Corruption Office), the accused person is alleged not to have taken part, up until the point at which the FKTK proposed that Trasta Komercbanka's authorisation be withdrawn, in the meetings of the FKTK board, in the course of which questions relating to the supervision of

[10] See Article 6(6) of the SSM Regulation.

[11] This process was and is the subject of various cases before the Court of Justice of the European Union; see order of 12 September 2017, *Fursin and Others* v *ECB* (T-247/16, not published, EU:T:2017:623); judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923); and the pending Case T-698/16, *Trasta Komercbanka and Others* v *ECB*.

Trasta Komercbanka were addressed. He is therefore alleged, in particular, to have failed in his duty to prevent, in that context, a deterioration of Trasta Komercbanka's capital ratio and liquidity requirements and to prevent the possibility of money laundering taking place in that credit institution.

39. Finally, the accused person is alleged to have covertly invested, in 2012 and 2013, a substantial sum of the received bribe of EUR 250 000 in a building through a jointly accused company.

40. On 28 June 2018, the competent public prosecutor initially brought charges for bribery before the Rīgas rajona tiesa (Riga District Court, Latvia), to which the allegation of money laundering was added on 24 May 2019.

41. The accused person's final term as President of the Bank of Latvia ended on 20 December 2019.

42. The Rīgas rajona tiesa (Riga District Court) has opened criminal proceedings at first instance and must now decide whether to open the judicial inquiry.

IV. Questions referred for a preliminary ruling and the procedure before the Court of Justice

43. As the Rīgas rajona tiesa (Riga District Court) has doubts in that context as to the applicability and scope of the immunities under the Protocol on the privileges and immunities of the EU, it stayed the proceedings, by order of 20 December 2019, and referred the following questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'(1) Do Article 11(a) and the first paragraph of Article 22 of [the Protocol on the privileges and immunities of the EU] apply to the post of member of the Governing Council of the European Central Bank, held by the governor of the central bank of a Member State, that is to say, the President of the Bank of Latvia …?

(2) If the answer to the first question is in the affirmative, does that person continue to be immune from criminal proceedings under those provisions even after he has left the post of governor of the central bank of a Member State and, therefore, the post of member of the Governing Council of the European Central Bank?

(3) If the answer to the first question is in the affirmative, does that immunity relate only to immunity "from legal proceedings" as referred to in Article 11(a) of [the Protocol on the privileges and immunities of the EU] or does it also cover the criminal prosecution, including service of the indictment and the gathering of evidence? In the event that the immunity applies to the criminal prosecution, does that fact influence whether the evidence can be used?

(4) If the answer to the first question is in the affirmative, does Article 11(a) of [the Protocol on the privileges and immunities of the EU], read in conjunction with Article 17 of that protocol, allow the person directing the proceedings or, at the corresponding stage of the proceedings, the composition of the court, to assess whether there is a European Union interest in those proceedings and, only where it is found that there is – that is to say, if [the accused person's] alleged conduct relates to the performance of his duties at an EU institution – to request the institution concerned, that is to say, the European Central Bank, to waive that person's immunity?

(5) For the purposes of applying the provisions of [the Protocol on the privileges and immunities of the EU], must the existence of a European Union interest always relate directly to decisions taken or acts carried out in performance of duties at an EU institution? May such an official be subjected to a measure of criminal procedure if his indictment does not relate to his duties at an EU institution but to activities carried on as part of his duties in a Member State?'

44. The accused person, the Republic of Latvia, the Italian Republic, the European Central Bank and the European Commission submitted written observations and presented oral argument in the hearing on 26 January 2021. The jointly accused person CE and the LR Ģenerālprokuratūras Krimināltiesiskā departamenta Sevišķi svarīgu lietu izmeklēšanas nodaļa (Department for Investigation of Particularly Serious Cases of the Criminal Law Division of the Office of the Prosecutor-General of the Republic of Latvia) also presented argument at that hearing.

V. Legal assessment

45. The referring court is seised of criminal proceedings brought against the former president of the central bank of Latvia in which he is accused of, inter alia, taking bribes in the context of a prudential supervision procedure concerning a Latvian bank. Under Latvian law, the referring court may not open the judicial inquiry in criminal proceedings where this is precluded by the immunity of the accused person.

46. It is true that Latvian law does not provide for immunity of the central bank of Latvia or its bodies. However, pursuant to Article 11(a) of the Protocol on the privileges and immunities of the EU, in the territory of each Member State, officials and other servants of the EU are immune from legal proceedings in respect of 'acts performed by them in their official capacity'. Pursuant to the first paragraph of Article 22, the Protocol also applies to the ECB, to the members of its organs, and to its staff. According to the first sentence of Article 282(1) TFEU, the national central banks form an integral part of the ESCB, and their governors – in so far as the Member State concerned is part of the Eurosystem[12] – are members of the Governing Council, which is the highest decision-making body of the ECB.

47. Against that background, by its five questions, the referring court seeks to ascertain, in essence, whether the provisions of the Protocol on the privileges and immunities of the EU, in particular the immunity from legal proceedings in respect of official acts as provided for in Article 11(a), are applicable to the accused former president of the central bank of Latvia under the circumstances of the main proceedings, and what the specific consequences of that are for the criminal proceedings pending before it.

48. To that end, it is first necessary to clarify, in answer to the first three questions referred, the conditions under which the immunity in respect of official acts as provided for in Article 11(a) of the Protocol on the privileges and immunities of the EU applies to the governor of a national central bank, and to clarify the scope of such immunity. In that context, it is necessary to clarify, inter alia, whether Article 11(a) of the Protocol also relates to the permissibility of criminal-prosecution measures. This forms the subject matter of the first part of the third question referred (see Section A).

[12] See Article 283(1) TFEU.

49. Next, in answer to the fourth question referred, it is necessary to examine how and by whom it is to be determined in a specific case whether the acts which the accused person is alleged to have committed are covered by the immunity provided for in Article 11(a) of the Protocol on privileges and immunities of the EU and under what conditions that immunity may be waived (see Section B).

50. In that context, it is also necessary to address the question as to whether, in the specific case of a governor of a central bank, more extensive immunity might be appropriate under certain circumstances. The referring court raises this matter in its fifth question referred, by which it seeks to ascertain, in essence, whether EU law precludes measures of criminal procedure taken against a governor of a central bank which do not relate to his or her duties under EU law (see Section C).

51. Lastly, with a view to answering the second part of the third question referred, it is necessary to clarify what the legal consequence of a violation of the immunity under Article 11(a) of the Protocol would be (see Section D).

A. Applicability of the Protocol on the privileges and immunities of the EU and the scope of the relevant immunity (Questions 1 to 3)

1. Relevant provisions of the Protocol on privileges and immunities of the EU (first and second questions referred)

52. As already stated, the Protocol on the privileges and immunities of the EU also applies to the ECB, to the members of its organs, and to its staff, in accordance with the first paragraph of Article 22 of that protocol. The supreme decision-making body of the ECB is the Governing Council, which, in accordance with Article 283(1) TFEU, comprises the members of the Executive Board of the ECB and the governors of the national central banks of the Member States whose currency is the euro. [13]

53. It is true that the indictment in the main proceedings covers acts from mid-2010 to the end of 2015, some of which therefore predate Latvia's accession to the euro zone on 1 January 2014 and thus the accused person's membership of the Governing Council of the ECB. However, the governors of the central banks of all Member States are, in accordance with the first sentence of Article 44.2 of the Statute of the ESCB and of the ECB, part of the General Council, which, according to Article 44.1 of that statute, is the third decision-making body of the ECB. The accused person was therefore a member of that body ever since Latvia's accession to the EU on 1 May 2004 and thus during the entire period covered by the indictment.

54. The Protocol on the privileges and immunities of the EU provides for immunities for three different categories of persons, each immunity having a different scope in terms of its *subject matter*, on the one hand, and *extent of protection*, on the other.

55. First, the Protocol provides for the immunities for Members of the European Parliament that are set out in Articles 8 and 9. The subject matter of the immunity under Article 8 is limited to opinions expressed and votes cast in an official capacity, but includes protection from any

[13] See judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraphs 76, 79 and 81).

involvement in an inquiry, as well as from detention or legal proceedings. The subject matter of the immunity under Article 9 is limited only in time, to the sessions of the European Parliament, and the protection under Article 9(1)(b) relates only to measures of detention and legal proceedings during those sessions in the territory of any Member State other than the home Member State.

56. Second, according to Article 10 of that protocol, the representatives of the Member States taking part in the work of the institutions of the EU 'enjoy the customary privileges, immunities and facilities'. This is to be understood as a reference to the Vienna Convention on Diplomatic Relations ('the VCDR') and in particular Articles 29 to 31 thereof. According to Article 29 of the VCDR, the 'person of a diplomatic agent' is inviolable. No further limitation of the subject matter of that immunity is provided for under that provision. In addition, the person of a diplomatic agent is also not liable to 'any form of arrest or detention'. Lastly, Article 31(1) of the VCDR provides that diplomatic agents are to enjoy immunity from the criminal, civil and administrative jurisdiction of the receiving State, without this being limited to specific acts.[14] According to Article 31(2) of the VCDR, they are also not obliged to give evidence as a witness.

57. Third, Article 11(a) of the Protocol on privileges and immunities of the EU applies to all other officials and other servants of the EU. The subject matter of the immunity provided for in that provision is limited to acts performed by them 'in their official capacity' and relates, in terms of its scope of protection, to 'legal proceedings' in the Member States.

58. Articles 8 and 9 of the Protocol on the privileges and immunities of the EU clearly do not apply in the present case.

59. Nor are the governors of the central banks of the Member States covered by Article 10 of the Protocol. This is because, in so far as they act in their capacity as members of the decision-making bodies of the ECB, they are precisely not to be regarded as 'representatives of the Member States'. Specifically with regard to the ESCB framework, the Court has previously ruled that a less marked distinction between the EU legal order and national legal orders exists in that respect.[15] The governors of the national central banks have a dual professional role and a hybrid status in this highly integrated system.[16] Parallel considerations apply to the banking union. As members of the Governing Council of the ECB, they fulfil tasks of European banking supervision in this respect.[17] In that capacity, they therefore cannot be regarded as representatives of national authorities. Moreover, the diplomatic immunities of representatives of the Member States apply only vis-à-vis the receiving State, but not vis-à-vis the home State.

60. Governors of central banks are therefore left only with the immunity under Article 11(a) of the Protocol.

[14] See, however, the exceptions in Article 31(1) of the VCDR in respect of real actions relating to private immovable property situated in the territory of the receiving State (subparagraph (a)), actions relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State (subparagraph (b)) and actions relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his or her official functions (subparagraph (c)).

[15] Judgments of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraphs 69 and 70), and of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 83).

[16] Judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 70).

[17] See above, point 45 of this Opinion.

2. Limitation of the immunity to 'acts performed [in an] official capacity'

61. Under Article 11(a) of the Protocol on the privileges and immunities of the EU, 'in the territory of each Member State … officials and other servants of the Union' are 'immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written'. Unlike the personal diplomatic immunity already mentioned (immunity *ratione personae*), that provision does not apply to a person, but only to acts with a specific factual connection – namely, those of an official nature. This is what is known as functional immunity. It is therefore also referred to as immunity *ratione materiae*. The mere status of EU staff member is therefore not sufficient for such immunity to apply. [18]

62. For the governors of national central banks, this means that, in view of their dual professional role or hybrid status in the ESCB and in the banking union, Article 11(a) of the Protocol is in principle applicable to them only in so far as they act in their capacity as officials of the EU. [19]

63. The reason why the scope of immunity of EU staff is limited resides in the fact that, according to Article 343 TFEU, the European Union enjoys only 'such privileges and immunities as are necessary for the performance of its tasks'. It follows from the case-law of the Court that the privileges and immunities accorded to the EU are intended to avoid any interference with the functioning and independence of the EU. [20] The limited nature of the European Union's immunities is confirmed by the first paragraph of Article 17 of the Protocol, according to which immunities are to be accorded to officials and other servants of the EU solely in the interests of the EU [21] – and not in the staff's own interests. The immunities are therefore functional not only in terms of their subject matter, but also in terms of their rationale and purpose.

64. Immunity in respect of official acts is vital to ensure the smooth functioning and independence of the EU institutions. If EU staff were not immune from legal proceedings in the Member States in respect of their official acts, they would first run the risk of prosecution for those very acts by the authorities of the Member States. [22] This could result in them exercising excessive caution and could even paralyse the activities of the EU institutions.

65. Second, it would impair the functioning and independence of the EU institutions if their activities could be examined in the light of any criteria based on the domestic law of Member States. [23] This could possibly hinder the fulfilment of such tasks. It is for that reason that Article 11(a) of the Protocol on the privileges and immunities of the EU excludes legal proceedings in the Member States in respect of official acts of EU staff.

18 Judgment of 11 July 1968, *Sayag and Zürich* (5/68, EU:C:1968:42, p. 600). In that sense, the second sentence of Article 23(1) of the Staff Regulations confirms that, subject to the Protocol on privileges and immunities of the EU, officials are not exempt from fulfilling their personal obligations or from complying with the laws and police regulations in force.

19 See, by analogy with the protection of the archives of a national central bank under Article 2 of the Protocol on the privileges and immunities of the EU, judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraphs 84 and 85).

20 Order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315, paragraph 19), as well as judgments of 19 December 2019, *Junqueras Vies* (C-502/19, EU:C:2019:1115, paragraph 82); of 18 June 2020, *Commission* v *RQ* (C-831/18 P, EU:C:2020:481, paragraph 47); and of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraphs 73 and 100).

21 Order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315, paragraph 20), and judgment of 18 June 2020, *Commission* v *RQ* (C-831/18 P, EU:C:2020:481, paragraph 47).

22 See Opinion of Advocate General Bobek in *OH (Immunity from legal proceedings)* (C-758/19, EU:C:2021:86, point 67 with further references).

23 Judgment of 11 July 1968, *Sayag and Zürich* (5/68, EU:C:1968:42, p. 600).

66. Moreover, this ensures the exclusive jurisdiction of the Court of Justice of the European Union under Article 263 TFEU to review the legality of acts of the EU institutions. Where an official acts in an official capacity, it is ultimately the institution itself that acts. Consequently, such an act must not be subject to examination by the Member States.

67. Both objectives of the immunity in respect of official acts are underpinned by the second paragraph of Article 340 TFEU. According to that provision, it is the European Union that is externally liable for the official acts of its servants, not the latter personally. The Court has exclusive jurisdiction to assess the existence of such liability under Article 268 TFEU. [24]

3. Limitation of the immunity to 'legal proceedings' in the Member States (first part of the third question referred)

68. Against that background, the referring court asks whether Article 11(a) of the Protocol on the privileges and immunities of the EU excludes only main court proceedings concerning acts committed by EU staff members in their official capacity or whether even the criminal prosecution which precedes the main court proceedings is impermissible with regard to such acts.

69. It follows already from the wording of Article 11(a) of the Protocol that no main proceedings may be instituted against the persons referred to in that provision in respect of acts performed by them in their official capacity. The provision covers all types of jurisdiction and thus also includes criminal jurisdiction. [25]

70. Contrary to the view taken by the Republic of Latvia, however, the immunity under Article 11(a) of the Protocol on the privileges and immunities of the EU is not limited to judicial proceedings in the strict sense, but also covers preliminary investigations.

71. This is supported by the wording of some language versions of that provision, which does not always contain a limitation to a 'judicial' element. [26] In any event, however, the preliminary investigations may already contain judicial elements, for example in the form of ad hoc competences of an investigating judge. But since the scope of the immunity cannot depend on the specific form taken by the criminal proceedings and the division of competence between the law-enforcement authorities and the courts in the individual Member States, it must be assumed that the immunity applies generally to coercive measures by public authorities in the context of criminal investigations. [27]

72. Specific measures that are therefore impermissible without a prior waiver of immunity under Article 11(a) of the Protocol include the provisional arrest of the accused person, the questioning of an accused person and searches on the premises of the accused person. The same applies to such measures in the context of administrative or civil proceedings relating to an official act of EU staff. [28]

[24] See judgment of 10 July 1969, *Sayag and Zürich* (9/69, EU:C:1969:37, paragraphs 5 to 7). Internal liability is limited to serious misconduct in accordance with the first paragraph of Article 22 of the Staff Regulations.

[25] See Opinion of Advocate General Bobek in *OH (Immunity from legal proceedings)* (C-758/19, EU:C:2021:86, point 27).

[26] See, for instance, in addition to 'immune from legal proceedings' in the English-language version, 'fritagelse for retsforfølgning' in Danish and 'vrijgesteld van rechtsvervolgin' in Dutch.

[27] See my Opinion in *Rimšēvičs* v *Latvia* and *ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2018:1030, point 144).

[28] Even outside the context of criminal proceedings, obligations requiring a person to appear or provide information, on pain of an administrative fine, or the ordering of protective measures are conceivable.

73. This understanding of the scope of Article 11(a) of the Protocol on the privileges and immunities of the EU has recently been confirmed by the Court, when it emphasised that, under that provision, officials of the EU are not subject, in particular, to measures involving deprivation of liberty for acts committed in their official capacity. [29]

74. That interpretation is further supported by Article 19 of the Staff Regulations, which provides that EU officials must be granted permission if they are to disclose, in any legal proceedings, information about official activities or facts of which they have knowledge by reason of their duties. It follows, by *a contrario* reasoning, that the EU legislature proceeded on the assumption that otherwise, immunity from legal proceedings would preclude the questioning of an official as a witness or an accused person.

75. The functional character of the immunity provided for in Article 11(a) of the Protocol, on the other hand, precludes an interpretation of that immunity as a comprehensive prohibition on investigations or even the opening of cases.

76. First, if the intention had been to preclude any involvement of EU staff in criminal investigations, this would have been expressly prescribed in the Protocol on the privileges and immunities of the EU. This has been provided for accordingly in respect of Members of the European Parliament in Article 8 of the Protocol, for example. They must not be subject to 'any form of inquiry … or legal proceedings' in respect of opinions expressed or votes cast by them in the performance of their duties.

77. Second, a prohibition on the opening of investigations in the first place or the opening of cases that could possibly be covered by the immunity of Article 11(a) of the Protocol could in practice be linked only to the person of the EU staff member concerned. However, this would blur the distinction from personal immunity. [30]

78. Third, it would simply not be possible – as rightly stated by the Italian Government – to establish the existence of a possible link with the official tasks of an EU institution if the prosecuting authorities were not even allowed to initiate an investigation into the relevant facts with regard to the actions of EU staff.

79. And fourth, in accordance with the case-law of the Court, the Protocol on the privileges and immunities of the EU must not be interpreted to the effect that criminal investigations on the territory of the Member States are rendered excessively difficult, if not impossible. [31] In other words, the functional and thus limited nature of the privileges and immunities of the Protocol is intended to ensure an appropriate balance between the interests of the EU in its independence and functioning, on the one hand, and the interest of the Member States in the effectiveness of their criminal prosecution, on the other. A comprehensive prohibition of investigations would, however, go beyond what is 'necessary for the performance of its tasks' within the meaning of Article 343 TFEU.

80. It is true that it cannot be ruled out that, in certain cases, investigations against an EU official in respect of official acts may already threaten to impair the independence or functioning of EU institutions. For that reason, however, Article 18 of the Protocol on the privileges and immunities of the EU provides that, for the purpose of applying that protocol, the institutions of

29 Judgment of 18 June 2020, *Commission* v *RQ* (C-831/18 P, EU:C:2020:481, paragraph 45).

30 See, in that regard, points 56 and 61 of this Opinion.

31 See judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 105).

the EU are to cooperate with the responsible authorities of the Member States concerned. This is intended to avoid conflicts in the interpretation and application of the provisions of the Protocol [32] and generally to ensure that the objectives of the latter are not frustrated. Article 18 of the Protocol gives concrete expression to the provision of Article 4(3) TEU in this respect. [33]

81. Therefore, national prosecuting authorities or investigating judges are obliged, already at an early stage of the proceedings, to inform the EU institution for which an accused person works about ongoing investigations and, if necessary, to request a waiver of immunity. [34] This is because that institution must be given the opportunity to assess whether there is a threat of any interference with its functioning and independence. [35] An exception may apply, if need be, in cases where there is clearly no connection whatsoever between the acts that are the subject of the investigation or criminal proceedings and the tasks and obligations of the accused person under EU law. In view of how closely intertwined national and EU competences are in the area of the ESCB and European banking supervision, however, it is hardly conceivable that an ostensibly official act of a governor of a central bank can clearly be attributed exclusively to the national sphere of competence.

82. If the EU institution takes the view either that there is no connection between the alleged acts and its tasks or that the EU does not have an interest in maintaining immunity for the purposes of the second paragraph of Article 17 of the Protocol on the privileges and immunities of the EU, the preliminary investigation may be continued. In such cases, the person concerned may make use of the remedy pursuant to Article 90(2) of the Staff Regulations and, where applicable, Article 91 thereof before the Court of Justice of the European Union; the Court will then decide whether immunity was wrongly refused or waived. In that respect, the Court has held that such a decision by the institution constitutes an 'act adversely affecting such person', since it produces binding legal effects capable of directly and immediately affecting the interests of the applicant by bringing about a distinct change in his or her legal position. [36] The decision on the refusal or waiver of immunity therefore fulfils all the requirements of a legal act open to challenge for the purposes of the fourth paragraph of Article 263 TFEU, [37] with the result that it can also be challenged by entitled persons who are not covered by the Staff Regulations – such as all staff members of the ECB and the governors of the national central banks.

83. If, on the other hand, the institution takes the view that there is a connection with its tasks and that it would be against its interests to waive immunity, the competent investigating judge can submit a 'request for judicial cooperation' to the Court as early as during the preliminary investigation if he or she does not wish to accept that decision. [38] This is a separate type of

32 Judgments of 21 October 2008, *Marra* (C-200/07 and C-201/07, EU:C:2008:579, paragraph 42); of 6 September 2011, *Patriciello* (C-163/10, EU:C:2011:543, paragraph 40); and of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 119).

33 Judgments of 21 October 2008, *Marra* (C-200/07 and C-201/07, EU:C:2008:579, paragraph 41), and of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 119).

34 See, by analogy with the archives of the European Union, judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 126).

35 See, to that effect, judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 102).

36 See judgment of 18 June 2020, *Commission* v *RQ* (C-831/18 P, EU:C:2020:481, paragraphs 44 to 54).

37 See, inter alia, judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraphs 36 and 37).

38 See, in relation to those circumstances, order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315).

procedure bearing the abbreviation 'IMM' (request concerning immunities, 'demande relative aux immunités'). In that context, the Court examines whether the institution was entitled to refuse to waive immunity. [39]

84. Finally, in the event that the national authorities or courts refuse to involve the EU institutions or the Court in the sense described just above, even the alleged beneficiary of the immunity may bring 'IMM' proceedings before the Court himself or herself in order to obtain a declaration that immunity does exist. [40] In addition, a breach of the obligation of sincere cooperation in the application of the Protocol can be sanctioned in infringement proceedings. [41]

85. If this has not happened either, a national court is obliged, pursuant to Article 18 of the Protocol on the privileges and immunities of the EU, to make a reference to the Court for a preliminary ruling under Article 267 TFEU at the latest before the main proceedings are opened – as happened in the present case. [42]

86. It follows from the foregoing that although the immunity from legal proceedings in respect of official acts of servants of the European Union within the meaning of Article 11(a) of the Protocol on the privileges and immunities of the EU does cover coercive measures taken by public authorities in criminal proceedings, it does not preclude the opening and conduct of preliminary investigations in general.

4. Interim conclusion

87. The governors of the central banks of the Member States fall within the scope of the Protocol on the privileges and immunities of the EU pursuant to the first paragraph of Article 22 read in conjunction with Article 11(a) thereof in so far as they act in an official capacity as officials of the EU within the framework of the ESCB or the banking union, in particular in their capacity as members of the General Council of the ECB or of the Governing Council of the ECB.

88. The immunity from legal proceedings within the meaning of Article 11(a) of the Protocol on the privileges and immunities of the EU covers, in addition to main proceedings before the courts in respect of acts performed in an official capacity, coercive measures taken by public authorities in criminal proceedings concerning such acts, but does not preclude in a general manner the opening and conduct of preliminary investigations in respect of such acts.

89. It also follows from the wording of that provision that the immunity from legal proceedings continues to be enjoyed 'after they have ceased to hold office'. This makes clear that immunity continues to exist even after the end of the term of office. However, it applies only to official acts performed during the term of office. The timing of the complaint as regards an act performed during the term of office is, however, irrelevant.

39 See, to that effect, order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315, paragraph 24); see also, in that regard, point 106 below of this Opinion.

40 See, in relation to those circumstances, judgment of 16 December 1960, *Humblet* v *Belgian State* (6/60-IMM, EU:C:1960:48).

41 See, in that regard, judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 111 et seq.).

42 See, in that regard, point 93 et seq. of this Opinion; see also, ultimately to the same effect, judgment of 6 September 2011, *Patriciello* (C-163/10, EU:C:2011:543, paragraph 40).

B. The individual conditions for immunity from legal proceedings under Article 11(a) of the Protocol on the privileges and immunities of the EU (fourth question referred)

90. By its fourth question, the referring court essentially seeks to ascertain how to assess whether the accused person in this specific case is immune from legal proceedings under Article 11(a) of the Protocol on the privileges and immunities of the EU, what role the existence of an EU interest plays in that regard, and in what circumstances that court must request the ECB to waive the immunity.

91. In order to determine whether a particular act has been performed in an official capacity within the meaning of Article 11(a) of the Protocol on the privileges and immunities of the EU, the decisive factor is whether there is a connection between the act and the duties and tasks of the EU servant.[43] In this respect, the referring court asks, in particular, whether it may itself assess whether such a connection exists.

92. It is therefore necessary, in a first step, to clarify who is responsible for assessing the existence of a connection with the tasks of an EU institution or its staff (see Section 1). It is then necessary to determine, in a second step, what standards are to be used to assess that connection (Section 2). Lastly, in a third step, it is necessary to examine which circumstances are relevant for the purposes of that assessment in the present case (Section 3).

1. Competence to assess the connection with EU tasks

93. It is true that, in practice, it is the prosecuting authorities or courts of the Member States that will initially address the question of whether there might be a procedural impediment due to the immunity of EU staff. Only they have the necessary factual information from which a possible connection with the tasks of an EU institution can arise in the first place. It is therefore natural that it is the national authorities or courts that first carry out the assessment as to whether there is immunity under the Protocol on the privileges and immunities of the EU.

94. However, this does not mean that they can independently decide whether the acts established are connected with the official duties of an EU member of staff. Rather, they must refer to the Court as soon as conduct could prima facie fall within the scope of Article 11(a) of the Protocol on the privileges and immunities of the EU.[44]

95. In that regard, it should first be recalled that, in accordance with the case-law of the Court, the immunity in respect of official acts provided for in Article 11(a) of the Protocol on the privileges and immunities of the EU is intended to prevent official activities from being examined in the light of any criteria based on the domestic law of Member States. It is thus intended to ensure, in particular, the exclusive jurisdiction of the Court of Justice of the European Union under Article 263 TFEU to review the legality of acts of the EU institutions.[45]

43 As already stated in the Opinion of Advocate General Gand in *Sayag and Zürich* (5/68, not published, EU:C:1968:30, p. 407); in relation to opinions expressed in an official capacity, see also judgments of 6 September 2011, *Patriciello* (C-163/10, EU:C:2011:543, paragraph 33), and of 17 September 2020, *Troszczynski* v *Parliament* (C-12/19 P, EU:C:2020:725, paragraph 40).

44 In that regard, see point 81 et seq. above of this Opinion.

45 See points 65 and 66 of this Opinion.

96. Only the Court can define in a binding manner what is included in the tasks and duties of EU staff in cases of doubt. [46] However, if the task of assessing the question of whether or not there is a connection with a task of the European Union were to fall to the courts of the Member States, they would ultimately determine what falls within the remit of the EU institutions and what does not.

97. The situation is different with the parliamentary inviolability provided for in subparagraph (a) of the first paragraph of Article 9 of the Protocol on the privileges and immunities of the EU. However, based on its wording, that inviolability depends expressly on national law. [47] Since only national courts have the power to determine the scope of the parliamentary immunity that exists under their domestic law, it follows that only they can determine whether conduct is covered by that immunity.

98. In the cases referring to Article 11(a) of the Protocol on the privileges and immunities of the EU, therefore, the obligation for a national court to refer a matter to the Court by way of preliminary ruling pursuant to Article 267 TFEU follows from Article 18 of the Protocol at the latest when it is contemplating the opening of proceedings against a member of EU staff. [48] Were that not the case, there would be a risk that a national court would examine the actions of an EU institution in a manner contrary to Article 263 TFEU.

99. It is only if the Court concludes that, under the factual circumstances conveyed by the national court, there is no connection with the tasks of an EU institution that that court may open criminal proceedings. Otherwise, the EU institution concerned must first be requested to waive immunity in accordance with the second paragraph of Article 17 of the Protocol. [49] This gives that institution the opportunity to assess whether the immunity is necessary for the preservation of its functioning and independence. The Protocol on the privileges and immunities of the EU is specifically intended to enable such an assessment. [50]

100. This is the second reason why a national court may not itself decide that there is no connection between an act and the tasks of the EU carried out by an accused person and that Article 11(a) of the Protocol therefore does not apply. This is because, if it were to do so, it would pre-empt or prevent such an assessment by the institution concerned. This distinguishes the case of immunity under Article 11(a) of the Protocol from the cases in Article 8 thereof, in which there is no provision for the Parliament to review whether the immunity of one of its Members is required in the specific case in question. [51]

101. In conclusion, therefore, the connection between an act and the duties of EU staff that is required for the existence of 'acts performed by them in their official capacity' within the meaning of Article 11(a) of the Protocol is to be determined autonomously under EU law and by

46 See, to that effect, Opinions 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraphs 224, 225, 230 and 231), and 1/17 (EU-Canada CET Agreement) of 30 April 2019 (EU:C:2019:341, paragraph 132).

47 Judgment of 6 September 2011, *Patriciello* (C-163/10, EU:C:2011:543, paragraph 25).

48 Regarding the obligations arising from Article 18 of the Protocol on privileges and immunities of the EU, see, already, point 80 et seq. of this Opinion.

49 In principle, this should have already taken place in the preliminary investigation (see above, point 81 et seq. of this Opinion), but it must be done at this stage at the latest if the institution has not yet been given the opportunity to assess whether the proceedings could interfere with its independence and functioning.

50 See, to that effect, judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 102).

51 Only this is addressed by the Court in the judgment of 21 October 2008, *Marra* (C-200/07 and C-201/07, EU:C:2008:579, paragraph 32).

the Court.[52] This does not of course alter the fact that only the national court seised of the case can make the factual findings required for that assessment. In doing so, however, it is merely called upon to subsume the facts established in accordance with its findings under the standards established by the Court for that purpose.[53]

2. Standards to be used to determine the required connection with tasks of the EU

102. The Court has to date had only one opportunity to take a position on the question of when an act is connected with the duties of a member of EU staff in such a way that he or she can be deemed to be 'acting in [his or her] official capacity' within the meaning of Article 11(a) of the Protocol on privileges and immunities of the EU.[54] In the *Sayag and Zürich* judgments, it ruled in that regard that immunity from legal proceedings only covers acts which, by their nature, represent a participation by the person entitled to the immunity in the performance of the tasks of the institution to which he or she belongs.[55] The acts must, by virtue of an internal and direct relationship, be the necessary extension of the tasks entrusted to the institutions.[56]

103. In order to make those criteria workable, it is necessary to pose the question as to which acts, according to the rationale and purpose of the immunity in respect of official acts, must be covered by such immunity.

104. It would therefore appear to be logical to proceed on the basis of whether the act concerned is 'necessary' for an official task[57] or there is a link of causality or a connection therewith.[58] The smooth functioning and independence of the EU institutions could be impaired if EU civil servants had to fear civil or criminal liability for acts which, although not part of the core of their statutory activities, nevertheless facilitate the execution of those activities or are necessary for them.[59]

105. As already stated above, however, immunity in respect of official acts is intended, in particular, to prevent the acts of the EU institutions from being examined by national authorities and courts, thereby interfering with the functioning and independence of the EU institutions. Consequently, a connection between an act and the tasks of an EU institution must be assumed whenever an examination of that act would require an examination of the scope of duties of its staff, which, in line with the statements made above,[60] cannot be the responsibility of the national authorities and courts, but must be carried out only by the EU institutions and, ultimately, the Court.

52 See, inter alia, the statements made by the Court in relation to that question in the judgment of 6 September 2011, *Patriciello* (C-163/10, EU:C:2011:543, paragraphs 28 to 37).

53 See, to that effect, judgments of 6 September 2011, *Patriciello* (C-163/10, EU:C:2011:543, paragraph 37), and of 17 September 2020, *Troszczynski* v *Parliament* (C-12/19 P, EU:C:2020:725, paragraph 57).

54 However, this question has now also been raised in the currently pending Case in *OH (Immunity from legal proceedings)* (C-758/19, EU:C:2021:86), in which Advocate General Bobek delivered his Opinion on 2 February 2021.

55 Judgment of 11 July 1968, *Sayag and Zürich* (5/68, EU:C:1968:42, p. 402).

56 Judgment of 10 July 1969, *Sayag and Zürich* (9/69, EU:C:1969:37, paragraph 7).

57 See Opinion of Advocate General Sharpston in *Commission* v *RQ* (C-831/18 P, EU:C:2019:1143, point 54).

58 See Opinion of Advocate General Gand in *Sayag and Zürich* (5/68, not published, EU:C:1968:30, p. 407).

59 See also, to that effect, Opinion of Advocate General Bobek in *OH (Immunity from legal proceedings)* (C-758/19, EU:C:2021:86, points 27, 29 and 67), who focuses on the criterion of proximity.

60 See points 95, 96 and 98 of this Opinion.

106. Such an understanding of the necessary connection does not unduly restrict the Member States' legitimate interest in pursuing criminal prosecution. This is because the existence of an act performed in an official capacity and the associated immunity under Article 11(a) of the Protocol on the privileges and immunities of the EU – possibly after having been established by the Court – does not mean that the person concerned may not ultimately be prosecuted and sentenced. Rather, the authorities or courts of the Member States may request the institution concerned to waive immunity in accordance with the second paragraph of Article 17 of the Protocol. In accordance with the case-law of the Court, the EU institutions are in turn obliged, in accordance with the principle of sincere cooperation enshrined in Article 18 of the Protocol, to grant the request if there is no EU interest in the immunity in the specific case. [61] If they wrongly refuse to waive it after such a request, the Court can still allow the criminal prosecution to proceed. [62]

107. In this respect, the immunity under Article 11(a) of the Protocol on the privileges and immunities of the EU differs from the immunity of Members of the European Parliament under Article 8 thereof, which cannot be waived. [63] This particularity, however, seems to be precisely the reason why the Court has ruled that the connection in that regard must be direct and obvious. [64] Such a narrow understanding of the connection is therefore not appropriate in the cases referred to in Article 11(a) of the Protocol.

108. In any case, the existence of an act performed in an official capacity cannot be precluded by the fact that it may be unlawful. [65] In accordance with the statements made just above, this must be the case simply because it is only in the proceedings concerned that the unlawfulness of the act can actually be assessed in the first place. If such unlawfulness were to be assumed prematurely and therefore the immunity from legal proceedings of the Member States were to be waived, this could ultimately result in a national court instead of the Court ruling on the lawfulness of the acts of an EU institution. In the case of many particularly serious accusations – such as the commission of homicide – immunity will therefore generally have to be refused because such an act does not require an assessment of the duties performed by the accused person under EU law and is therefore clearly totally unrelated to the duties performed by that person under EU law, but not because the act is unlawful. [66]

109. Rather, the potential unlawfulness of an act is to be considered only at the level of the waiver of immunity. In the case of an act that is likely to be unlawful, there would have to be a particularly strong EU interest in order to justify the preservation of immunity.

110. Contrary to the referring court's consideration in the first part of the fifth question referred, the existence of specific EU interests is likewise irrelevant for the assessment of the connection between an act and EU tasks. It is true that, in accordance with the general provision in the first paragraph of Article 17 of the Protocol, the privileges and immunities under it are accorded

61 See, to that effect, order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315, paragraphs 22 and 25), and judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 101).

62 See, in that regard, point 83 of this Opinion, and order of 6 December 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:440).

63 Judgments of 21 October 2008, *Marra* (C-200/07 and C-201/07, EU:C:2008:579, paragraph 44), and of 6 September 2011, *Patriciello* (C-163/10, EU:C:2011:543, paragraph 27).

64 Judgments of 6 September 2011, *Patriciello* (C-163/10, EU:C:2011:543, paragraph 35), and of 17 September 2020, *Troszczynski* v *Parliament* (C-12/19 P, EU:C:2020:725, paragraph 39); see, in that regard, Opinion of Advocate General Pikamäe in *Troszczynski* v *Parliament* (C-12/19 P, EU:C:2020:258, point 51).

65 See judgment of 19 December 2019, *Junqueras Vies* (C-502/19, EU:C:2019:1115, paragraph 89), and Opinion of Advocate General Bobek in *OH (Immunity from legal proceedings)* (C-758/19, EU:C:2021:86, point 27).

66 See Opinion of Advocate General Poiares Maduro in the Joined Cases *Marra* (C-200/07 and C-201/07, EU:C:2008:369, point 12).

solely in the interests of the EU. However, in connection with the question of the existence of an immunity, all that follows from that is that such an immunity is functionally limited and can therefore be considered only in respect of acts performed in an official capacity.[67] The existence of interests of the EU, on the other hand, is to be assessed only in the context of a possible waiver of immunity. The second paragraph of Article 17 of the Protocol makes clear in this respect that each institution is to waive the immunity if doing so is not contrary to the interests of the EU. But the institution concerned does not have to show that the criminal prosecution could interfere with its functioning or independence in order to establish the mere existence of functional immunity.[68]

111. As a result, 'acts performed [in an] official capacity' within the meaning of Article 11(a) of the Protocol on the privileges and immunities of the EU must therefore be regarded as acts which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions and must therefore, by their nature, represent a participation by the person referred to in that provision in the performance of the tasks of the institution to which he or she belongs. This is the case where the judicial review of that act requires an assessment of the scope of the tasks of the institution concerned or its staff, for which the Court has exclusive jurisdiction.

3. Existence of the necessary connection in this specific case

112. In order to provide the referring court with a useful answer to its actual question – namely, whether Article 11(a) of the Protocol on the privileges and immunities of the EU precludes the opening of the judicial inquiry in the criminal proceedings – it is necessary in what follows to assess the necessary connection, in so far as that is possible on the factual basis conveyed. Furthermore, it is necessary to address the factual conditions, the fulfilment of which the referring court has yet to verify in that connection.[69]

113. In that context, categorisation as tasks performed by a governor of a central bank under national or EU law within the framework of the ESCB and European banking supervision can cause difficulties in practice due to the high level of integration of those systems.[70] On the one hand, this illustrates the obligation to involve the ECB at an early stage in such proceedings,[71] and, on the other hand, it stresses the need to leave the assessment of a connection with EU tasks to the Court.[72]

114. It follows from the order for reference, first, that the accused person is alleged to have advised, from mid-2010 until the end of 2015, Trasta Komercbanka on supervision by the FKTK in return for money or contributions in kind and to have helped the bank to formulate its correspondence with the FKTK by exploiting information which he had received from the FKTK by virtue of his official position. Second, up until the point at which the FKTK proposed, on 5 February 2016, to withdraw Trasta Komercbanka's authorisation, he did not participate in the meetings of the board of the FKTK, in the course of which questions relating to the supervision of Trasta Komercbanka were addressed, and he thus failed to prevent a deterioration of Trasta

67 See, in that regard, points 63 and 64 of this Opinion.

68 Judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 100).

69 See, in that regard, point 101 of this Opinion.

70 See, in relation to that requirement, point 62 of this Opinion.

71 See point 81 of this Opinion.

72 See, in particular, points 95 and 96 of this Opinion.

Komercbanka's capital ratio and to counteract the occurrence of money laundering. Third, he is alleged to have invested the money received in return in immovable property in 2012 and 2013 in order to conceal its origin.

(a) Allegations relating to the period before 4 November 2014

115. Within the framework of the ESCB, the governors of the national central banks perform tasks of the EU when, in particular, they take decisions on monetary-policy measures as members of the Governing Council of the ECB. In accordance with Article 129(1) TFEU, read in conjunction with the first paragraph of Article 12.1 of the Statute of the ESCB and of the ECB, the Governing Council of the ECB is to formulate the monetary policy of the Union. [73] For its part, the General Council of the ECB is to coordinate, in accordance with Article 141(2) TFEU, the monetary policies of the Member States, with the aim of ensuring price stability.

116. In their capacity as members of the Governing Council of the ECB, the governors of the national central banks have, since 4 November 2014, the date on which the SSM entered into force, also been able to carry out EU tasks in banking supervisory matters. This is because, according to Article 6(1) of the SSM Regulation, the ECB is responsible for the effective and consistent functioning of the SSM, which consists of the ECB and the national competent authorities. [74] Pursuant to Article 26(8) of the SSM Regulation, the final decisions on the supervisory tasks conferred on the ECB under Article 4(1) of that regulation are adopted by the Governing Council after preparation by the Supervisory Board. [75] The General Council of the ECB, which also includes the governors of the central banks of the Member States that are not members of the monetary union, naturally has no tasks within that framework, since only the banks of the euro zone are supervised in the SSM.

117. As regards the allegation of money laundering, it is not apparent how this could be related to the accused person's functions under EU law as a member of a decision-making body of the ECB. The investment of a sum of money in a real-estate project has absolutely no internal relationship to the spheres of activity of monetary policy or banking supervision.

118. A connection with the accused person's functions under EU law is also ruled out in so far as the acts are alleged to have been committed in the period before 1 January 2014 – the day of Latvia's accession to the euro zone. This is because, during that time, the accused person was only a member of the General Council of the ECB, which only has a monetary-policy mandate. [76] An internal connection of the described allegations with monetary-policy measures is, however, not apparent.

119. Accordingly, there is also no connection with the accused person's tasks as a member of the Governing Council between 1 January 2014 and 3 November 2014, as the Governing Council also performed only monetary-policy tasks during that period. The Governing Council of the ECB has been performing the banking-supervision tasks referred to in point 116 of this Opinion only since

73 Judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 38).

74 Judgments of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraph 53), and of 2 October 2019, *Crédit Mutuel Arkéa* v *ECB* (C-152/18 P and C-153/18 P, EU:C:2019:810, paragraph 60).

75 In that regard, see the first sentence of Article 13g.1 of the Rules of Procedure of the ECB. In accordance with Article 26(1) of the SSM Regulation, the supervisory body is responsible for planning and executing the decisions. The prominent role of the ECB Governing Council in banking supervision is also made clear by Article 7(7), Article 19(3), Article 24(7) and (8) as well as Article 25(4) and (5) of the SSM Regulation.

76 See, already, point 53 of this Opinion.

4 November 2014, the date of entry into force of the SSM Regulation. The FKTK, of which, according to the referring court, the accused was an advisory member throughout the entire period covered by the indictment, also performed only national supervisory tasks before SSM entered into force.[77]

(b) Allegations relating to the period since 4 November 2014

120. It is true that, even after the SSM entered into force, Trasta Komercbanka, as a less significant credit institution within the meaning of Article 6(4) of the SSM Regulation, continued to be subject to direct supervision by the FKTK in accordance with Article 6(6) of that regulation in relation to the supervisory tasks referred to in Article 4(1)(b), (d) to (g) and (i) thereof.

121. However, in accordance with Article 4(1)(a) of the SSM Regulation, the ECB is exclusively competent to withdraw authorisations, even if the credit institution concerned is less significant, as in the case of Trasta Komercbanka.

122. It is true that the Governing Council of the ECB did not take the decision on the withdrawal of Trasta Komercbanka's authorisation until 3 March 2016 and thus – as far as can be seen – after the period to which the indictment in the main proceedings relates. However, in the present case, that decision was taken pursuant to Article 14(5) of the SSM Regulation and Article 83(1) of the SSM Framework Regulation in response to the proposal of the FKTK as the 'national competent authority' within the meaning of point 2 of Article 2 of the SSM Regulation, of which the accused person was also an advisory member. It can be assumed in that respect that the FKTK had already been investigating whether Trasta Komercbanka continued to meet the requirements for authorisation for a longer period of time before submitting that proposal to the ECB.

123. In such circumstances, I am of the opinion that the national supervisory authorities functionally act as EU institutions. Consequently, in their capacity as members of such authorities, the governors of national central banks are also to be regarded as such.[78]

124. The acts of the national supervisory authorities in the SSM can be divided into three groups of cases. In the first group, the national supervisory authorities fulfil the tasks assigned to them under national law in all areas that are not covered by the SSM Regulation (see the fifth paragraph of Article 1 of the SSM Regulation).

125. Although, in a second group of cases, they perform tasks governed by the SSM Regulation, they act as independent players. This group of cases includes, for example, the supervision of less significant credit institutions pursuant to Article 6(6) of the SSM Regulation. In that context, the national supervisory authorities are themselves responsible for the adoption of all relevant supervisory decisions pursuant to Article 6(6) of the SSM Regulation and are subject only to the general instructions issued by the ECB pursuant to Article 6(5)(a) of the SSM Regulation.

126. In the third group of cases, the national supervisory authorities merely carry out acts preparatory to a decision by the ECB, without taking any independent decisions by which the ECB would be bound. An example of this from the case-law of the Court is the procedure for

77 Regarding the tasks of the FKTK under EU law, see points 124 to 128 of this Opinion.

78 According to recital 13 of the SSM Regulation, the national competent authorities are not necessarily the central banks, although that is the case in many Member States. It is true that, in the case of Latvia, it is not the central bank that is responsible for supervision in the SSM, but the FKTK. However, according to the referring court, the governor of the central bank is an advisory member of the FKTK under Latvian law.

authorising a qualifying holding under Articles 22 and 23 of the CRD in conjunction with Article 4(1)(c) and Article 15 of the SSM Regulation. [79] In that regard, the Court has held that any involvement of the national authorities in the course of the procedure leading to the adoption of a decision by the ECB cannot affect their classification as EU acts. [80] Since the ECB bears ultimate responsibility, it is therefore accountable for the actions of the national supervisory authorities under such circumstances.

127. It follows, first, that the Court has exclusive jurisdiction to assess the legality of such a measure, even where the acts to be assessed are those of the national supervisory authority. [81] Second, this must at the same time mean that the acts of those authorities in that context are immune from legal proceedings in the Member States because they are functionally to be regarded as organs of the ECB within the meaning of the first paragraph of Article 22 of the Protocol on the privileges and immunities of the EU. Otherwise, those acts could be examined by the courts of the Member States. [82]

128. This is exactly the case with the procedure for the withdrawal of the authorisation pursuant to Article 4(1)(a) and Article 14(5) of the SSM Regulation, read in conjunction with Article 83 of the SSM Framework Regulation, as was applied in the present case with regard to Trasta Komercbanka. Although the withdrawal of the authorisation pursuant to Article 14(5) of the SSM Regulation took place on a proposal by the FKTK, and the ECB had to take full account of that proposal, it was not bound by it, in accordance with Article 83(1) of the SSM Framework Regulation. The FKTK acted only in an ancillary function in that respect. Consequently, the assessment of the FKTK's acts in that context is also the sole responsibility of the Court. [83]

129. In order to determine whether the acts which the accused person is alleged to have carried out from 4 November 2014 onwards are connected with his duties under EU law, the referring court must therefore examine whether the 'advisory activities' of which he is accused after that date related to requirements the non-fulfilment of which could lead to the withdrawal of a credit institution's authorisation and on which the FKTK could consequently have based its proposal under Article 18 in conjunction with Article 14(5) of the SSM Regulation.

130. Specifically, it must examine, for instance, whether the allegation set out in the indictment, according to which the accused person gave advice on the increase in the company's capital needed to ensure a qualifying holding and on the steps necessary to attract investors (shareholders), was connected to the requirements in respect of the own fund requirements for credit institutions the non-fulfilment of which can result in the withdrawal of a credit institution's authorisation, for instance pursuant to Article 18(d) of the CRD. The same applies to the alleged advice on the inability of Trasta Komercbanka to ensure compliance with the requirements of the Latvian Law on combating money laundering and terrorist financing. This is because, while recitals 28 and 29 of the SSM Regulation make clear in that respect that the prevention of the use of the financial system for the purpose of money laundering is a purely national supervisory task, the suspicion of money laundering in the person of a shareholder is an aspect that can play a role

79 Judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraphs 43 and 55).

80 Judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraphs 43 and 56).

81 Judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraph 57).

82 In that regard, see points 65 and 66 of this Opinion.

83 See, by analogy, judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraph 57).

in the withdrawal of authorisation.[84] In addition, the withdrawal of authorisation pursuant to Article 18(e) and (f) in conjunction with Article 67(o) of the CRD can also be considered in the case of infringements of the relevant national law.

131. In this context, it must be clarified that the 'advice' given to a bank by a member of the body responsible for checking the bank's compliance with the abovementioned requirements on an ongoing basis – *in casu*, the FKTK – or for subsequently establishing its non-compliance – *in casu*, the Governing Council – has an internal relationship with the tasks of that body with regard to those very requirements also where circumstances which would have to lead to the withdrawal of the authorisation are thereby concealed. It is true that such acts by a member of the Governing Council may constitute a breach of duty because there is no provision for the ECB to provide advice to credit institutions and, in providing such advice, the accused person may have violated the confidentiality of the information received. It is precisely for that reason, however, that such acts are related to the duties of that member in the sense referred to above, since the assessment of the acts in question as being in line with or in breach of the duties concerned is a matter not for the referring court, but ultimately for the Court of Justice.[85]

132. This means that the ECB must be requested to waive immunity in this respect in accordance with the second paragraph of Article 17 of the Protocol on the privileges and immunities of the EU.[86]

133. However, contrary to that which the referring court appears to consider in its fifth question, the finding of a connection with the accused person's official activities under EU law does not make any statement as to the existence of EU interests in his immunity from legal proceedings. This is because, on the one hand, if there is no connection with the tasks of the European Union, there is no immunity that would have to be waived. On the other hand, a waiver of immunity does not always run counter to the interests of the EU if the necessary connection exists. Otherwise, a waiver of immunity would never enter into consideration.

134. In other words, it is entirely conceivable – and, given the position taken by the ECB in the present case, even probable – that the ECB will waive the immunity of the accused person and there will be nothing left to stand in the way of the criminal prosecution in Latvia. If, contrary to expectations, the ECB refuses to waive immunity, the referring court may once more refer that decision to the Court of Justice for review.[87]

(c) Interim conclusion

135. Under the factual circumstances conveyed by the referring court, there is no connection between the acts that the accused person is alleged to have carried out in the period prior to 4 November 2014 and his duties under EU law as a member of the General Council of the ECB or of the Governing Council of the ECB. In respect of the period since the SSM entered into force on 4 November 2014, there is a connection with his duties under EU law as a member of the Governing Council of the ECB and the FKTK as 'national competent authority' within the meaning of point 2 of Article 2 of the SSM Regulation if the advice that the accused person is

84 See ECB, *Guide to assessment of licence applications, Licence applications in general*, Second revised edition, January 2019, p. 26.

85 See, in that regard, point 108 of this Opinion.

86 See, in relation to that procedure, point 99 of this Opinion.

87 In that regard, see, in particular, points 83 and 106 *in fine* of this Opinion.

alleged to have given to Trasta Komercbanka related to requirements that may be relevant for the withdrawal of the authorisation of a credit institution. It is for the referring court to establish whether that is the case.

C. Requirements of Article 130 TFEU (fifth question referred)

136. However, the question arises as to whether Article 130 TFEU, which provides for the independence of the ECB, the national central banks and the members of their decision-making bodies, could provide a basis for more extensive immunity on the part of governors of central banks. In that context, the referring court asks, in its fifth question referred, whether EU law precludes measures taken against the governor of a central bank in the course of criminal proceedings which do not relate to his or her duties under EU law in that respect.

137. In accordance with Article 130 TFEU, the bodies and persons referred to in that provision may not take instructions from other bodies or seek to influence them in the performance of their tasks. According to the concepts underlying the Treaties, the independence of the ECB, the national central banks and the members of their decision-making bodies is an indispensable condition for ensuring price stability, which is the main task entrusted to the ESCB. [88]

138. However, that independence could also be impaired by national preliminary investigations or criminal proceedings and coercive measures taken by public authorities against a governor in connection with purely national tasks or even in non-official matters. The political pressure that they might generate or the simple prevention of that person from carrying out his or her activities – for example in the event of his or her arrest – would be likely to impair the independent performance of the tasks to be carried out within the framework of the ESCB. [89]

139. Against this background, it might be appropriate for the members of the ECB's decision-making bodies to be afforded more extensive protection, particularly from coercive measures taken by public authorities, which is not limited to the exercise of their functions under EU law. This is because the provisions on independence are, in essence, intended to shield the ESCB from all political pressure in order to enable it to pursue effectively the objectives attributed to its tasks. [90]

140. Such personal immunities are not entirely alien to EU law. Accordingly, the Judges and Advocates General of the Court are immune from legal proceedings pursuant to the first sentence of the first paragraph of Article 3 and Article 8 of the Statute of the Court of Justice, whereby Article 20 of the Protocol on the privileges and immunities of the EU is to be without prejudice to those provisions. Unlike diplomatic immunity, the immunity for members of the Court applies even in the Member State that appointed them. This is intended to ensure that the impartiality of the members of the Court is particularly well protected. [91]

88 See, in this regard, my Opinions in *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:641, point 59), and in *Rimšēvičs* v *Latvia* and *ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2018:1030, points 5 and 76).

89 See, to that effect, judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraphs 52, 61 and 73).

90 Judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 40), and of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 47).

91 See the oath provided for in Article 2 of the Statute of the Court of Justice.

141. Nevertheless, no provision was made for extending the immunity of governors of central banks beyond Article 11(a) of the Protocol on the privileges and immunities of the EU, although the Protocol explicitly leaves that possibility open. [92]

142. Nor is it necessary.

143. This is because, as regards the purely national sphere of tasks, the comprehensive duty of sincere cooperation described above [93] already ensures that the ECB is informed at an early stage of any investigative activities of the national authorities and is given the opportunity to assess whether there is a risk of interference with its functioning or independence. This is because the exception to the involvement of the EU institution concerned in cases in which there is clearly no connection with the duties of the person concerned under EU law can, in the case of a governor of a central bank, apply at best to acts that are clearly not of an official nature. [94] As soon as an act appears to be official, national prosecuting authorities are obliged to involve the ECB. [95]

144. In contrast, in so far as there is a threat of criminal proceedings in respect of acts that are purely non-official in nature, it is not prima facie apparent why the governor of a central bank should initially be spared from such proceedings solely on the basis of his or her position.

145. It should be emphasised in that connection that the fear of politically motivated criminal prosecution or of the use of judicial proceedings as a means of exerting pressure cannot justify the inviolability of the governor of a central bank. The EU is a legal union based on the values set out in Article 2 TEU, which are common to all Member States. [96] Those values include, in particular, the rule of law. This establishes and justifies mutual trust between the Member States and, in particular, their courts. [97]

146. However, in particular the imprisonment of the governor of a central bank – regardless of the context, that is to say, even if it were not abusive – admittedly could lead to an impairment of the independence provided for in Article 130 TFEU. In that sense, the Court has previously ruled that the prolonged lack of participation of a member of the Governing Council is likely seriously to affect the proper functioning of that essential body of the ECB. [98]

92 See the reference in the first paragraph of Article 22 of the Protocol, pursuant to which the latter is to be without prejudice to the Statute of the ESCB and of the ECB. However, the latter does not provide for any immunities for the members of the ECB's decision-making bodies that go beyond the Protocol – unlike the Statute of the Court of Justice.

93 See, in that regard, points 81 to 84 of this Opinion.

94 See point 81 of this Opinion.

95 See also point 113 of this Opinion.

96 The starting position in the context of the VCDR is different in this respect. The traditional approaches to justifying diplomatic immunity – the theories of personal representation, of extraterritoriality and of functional necessity – cannot, according to the prevailing opinion, justify a comprehensive personal immunity as provided for in Article 31(1) of the VCDR; see, inter alia, Ross, M., 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities', *American University International Law Review*, 4(1) (1989), p. 173 (pp. 179 and 180); Maginnis, V., 'Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations', *Brook. J. Int'l L.*, 28, 2003, p. 989 (p. 992). For that reason, it can be assumed that the comprehensive diplomatic immunity is intended to take account of the fear of political persecution of diplomats or the use thereof as a means of exerting pressure; see Maginnis, loc. cit. (p. 996).

97 Judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 30); of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 35); and of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 43).

98 Judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 73).

147. However, the Court also held in that connection that the instrument that serves to prevent such an impairment of independence is not immunity, but rather the possibility of bringing an action provided for in Article 14.2 of the Statute of the ESCB and of the ECB. [99]

148. According to that provision, a governor may be relieved from office only if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she has been guilty of serious misconduct. It follows from the case-law of the Court in this respect that that provision applies to any measure which results de facto in it being impossible to exercise the position of governor of a central bank. [100] Against that background, the imprisonment of the governor of a central bank appears to be ruled out, in principle, regardless of the context, solely by virtue of Article 14.2 of the Statute of the ESCB and of the ECB. Exceptions are conceivable only in respect of particularly serious misconduct.

149. However, even in the case of particularly serious misconduct, the authorities of the Member State would be obliged under Article 4(3) TEU to notify the ECB immediately in order to enable Article 130 TFEU to take full effect. This would ensure that the ECB has the right of judicial remedy provided for in Article 14.2 of the Statute of the ESCB and of the ECB if it considers that the coercive measure in question unjustifiably impairs its independence. In that context, it can even obtain interim measures against the national law-enforcement authorities. [101] The Court will then examine, in particular, whether there is sufficient indications that the governor concerned has engaged in serious misconduct. [102] If this is the case, however, it is not apparent why the functioning of the Governing Council would have to take precedence over the legitimate law-enforcement interests of the Member State.

150. The guarantees under Article 14.2 of the Statute of the ESCB and of the ECB in conjunction with the duty of sincere cooperation under Article 18 of the Protocol on the privileges and immunities of the EU and Article 4(3) TEU – compliance with which may be enforced by infringement proceedings where necessary [103] – therefore ultimately ensure sufficient protection against interferences with the independence of the ECB, the national central banks and members thereof by criminal-prosecution measures in purely national and non-official matters, and this makes it unnecessary to extend the immunity of the persons concerned beyond the clear wording of Article 11(a) of the Protocol on the privileges and immunities of the EU.

151. It therefore remains the case that the governors of the central banks of the Member States enjoy only the immunity provided for in Article 11(a) of the Protocol on privileges and immunities of the EU.

D. Legal consequences of violations of the immunity (second part of the third question referred)

152. Lastly, by the second part of the third question referred, the referring court seeks to ascertain, in essence, whether evidence obtained in breach of the immunity under Article 11(a) of the Protocol on the privileges and immunities of the EU may be used. Possible examples in that

99 See, to that effect, judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraphs 48 and 61).

100 See, to that effect, judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraphs 52, 61 and 73).

101 Judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 73 and 74).

102 See, to that effect, judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 92).

103 See judgment of 17 December 2020, *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:1030, paragraph 111 et seq.).

context could include, in particular, results of interviews or searches which, in line with the statements made above, should not have been carried out before the institution concerned had waived immunity.[104]

153. In that respect, there are doubts, from the outset, as to whether that part of the question is not hypothetical. This is because the request for a preliminary ruling does not contain any indication as to what evidence is alleged to have been taken in breach of the immunity in question and is relevant to the decision to be given in the main proceedings.

154. In any event, with regard to a possible prohibition of the use of evidence, reference can once again be made to the waiver procedure. As soon as immunity has been waived, the use of evidence is in principle no longer contrary to the interests of the EU within the meaning of the first paragraph of Article 17 of the Protocol on the privileges and immunities of the EU in any event. However, since the question of the use of evidence is not regulated by the Protocol, the procedural autonomy of the Member States applies in this respect.[105] This means that, in principle, the national provisions that are applied in comparable cases in respect of the question of whether illegally obtained evidence can be used apply (principle of equivalence). In doing so, however, the national courts must ensure that the objectives of the Protocol on the privileges and immunities of the EU are not undermined (principle of effectiveness).

VI. Conclusion

155. I therefore propose that the Court answer the questions referred as follows:

1. The governors of the central banks of the Member States fall within the scope of the Protocol (No 7) on the privileges and immunities of the European Union pursuant to the first paragraph of Article 22, read in conjunction with Article 11(a) thereof, in so far as they perform official tasks within the framework of the European System of Central Banks or the banking union, in particular in their capacity as members of the General Council of the European Central Bank (ECB) or of the Governing Council of the ECB. In addition, if a central bank is a national competent authority within the meaning of point 2 of Article 2 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, or its governor is a member of that authority under national law, he or she falls within the scope of the Protocol on the privileges and immunities of the European Union pursuant to the first paragraph of Article 22 thereof in so far as that authority performs preparatory acts in a procedure based on the ECB's exclusive decision-making power. The immunity in respect of such acts performed in an official capacity continues to exist after the end of the term of office.

2. 'Acts performed [in an] official capacity' within the meaning of Article 11(a) of the Protocol on the privileges and immunities of the European Union are to be regarded as acts which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions and must therefore, by their nature, represent a participation by the person referred to in that provision in the performance of the tasks of the institution to which he or she

104 See above, point 72 of this Opinion.

105 In that regard, see also the judgment of 19 December 2019, *Junqueras Vies* (C-502/19, EU:C:2019:1115, paragraph 93), and my Opinion in *Commission* v *Slovenia (Archives of the ECB)* (C-316/19, EU:C:2020:641, point 83).

belongs. This is the case where the judicial review of such an act requires an assessment of the scope of the tasks of the institution concerned or its staff, for which the Court of Justice has exclusive jurisdiction.

3. The immunity from domestic legal proceedings pursuant to Article 11(a) of the Protocol on the privileges and immunities of the European Union precludes the opening of legal proceedings in respect of acts performed in an official capacity or the taking of coercive measures by a public authority in respect of a person referred to in that provision before agreement has been reached with the EU institution to which that person belongs. However, this provision does not generally preclude the opening and conduct of preliminary investigations in respect of such acts.

4. In the case of evidence obtained in breach of the immunity provided for in Article 11(a) of the Protocol on the privileges and immunities of the European Union, the national rules on the admissibility of illegally obtained evidence apply, having due regard to the principles of equivalence and effectiveness.