

Case C-58/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

28 January 2022

Referring court:

Curtea de Apel Craiova (Romania)

Date of the decision to refer:

13 January 2022

Appellant:

NR

Other party:

Parchetul de pe lângă Curtea de Apel Craiova

Subject matter of the main proceedings

Appeals brought by NR ('the accused') and by the Parchetul de pe lângă Tribunalul Olt (public prosecutor's office at the Regional Court, Olt, Romania) against the judgment in criminal matters of 19 November 2018 of the Tribunalul Olt (Regional Court, Olt) sentencing the accused to one year and four months' imprisonment for the offence of passive corruption.

Subject matter and legal basis of the request

Pursuant to Article 267 TFEU, the Court is asked to interpret the *ne bis in idem* principle and Commission Decision 2006/928.

Question referred for a preliminary ruling

Is the *ne bis in idem* principle, as guaranteed by Article 50 of the Charter of Fundamental Rights of the European Union, in conjunction with Romania's obligations to address the benchmarks set out in the CVM decision (Commission

Decision 2006/928), to be interpreted as meaning that a decision to take no further action, issued by the public prosecutor after obtaining essential evidence in the case, precludes another public prosecution from being brought against the same person, for the same acts, albeit with a different legal classification, since that decision is final – unless it is established that the circumstance on which the discontinuance was based does not exist, or new facts or circumstances have emerged which show that the circumstance on which the discontinuance was based no longer exists?

Provisions of EU law and case-law of the Court of Justice relied on

Article 2 of the Treaty on European Union

Article 50 of the Charter of Fundamental Rights of the European Union

Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption

Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders

Judgments of 10 March 2005, *Miraglia* (C-469/03, EU:C:2005:156); of 28 September 2006, *van Straaten* (C-150/05, EU:C:2006:614); of 11 December 2008, *Bourquain* (C-297/07, EU:C:2008:708); of 22 December 2008, *Turanský* (C-491/07, EU:C:2008:768); of 5 June 2014, *M* (C-398/12, EU:C:2014:1057); of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483); and of 18 May 2021, *Associazione 'Forumul Judecătorilor din România'* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393)

Provisions of international law and case-law relied on

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR')

Article 4 of Protocol No 7 to the ECHR

Judgments of the European Court of Human Rights ('the ECtHR') of 29 May 2001, *Franz Fischer v. Austria*; of 10 February 2009, *Sergey Zolotukhin v. Russia*; and of 8 July 2018, *Mihalache v. Romania*

Provisions of national law relied on

Legea nr. 135 din 1 iulie 2010 privind Codul de procedură penală (Law No 135 of 1 July 2010 laying down the Code of Criminal Procedure; ‘the Code of Criminal Procedure’)

Article 6 – Ne bis in idem

‘No one may be prosecuted or tried for an offence if a final judgment in criminal matters has already been handed down for the same acts, albeit with a different legal classification.’

Article 335 – Proceedings in the event of the reopening of investigations

‘1. If it is subsequently found that the circumstance on which the discontinuance of the case is based does not exist, a more senior prosecutor than the one who issued the decision shall set aside the order and instruct the reopening of the investigations ...

2. If new facts or circumstances emerge which show that the circumstance on which the discontinuance was based no longer exists, the prosecutor shall revoke the order and instruct the reopening of the investigations.’

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 12 February 2014, the general meeting of a cooperative company decided to remove the accused from her position as chair of the company. That decision was contested in court and annulled; the accused was then reinstated by the company. In that dispute, the accused was represented by a lawyer to whom she had agreed to pay a ‘success fee’ of EUR 4 400.
- 2 On 30 April 2015, the accused demanded that amount from five employees of the company; in return, she would refrain from issuing decisions terminating their employment contracts. Since her financial demands were not met, the accused issued and signed those decisions. The abovementioned persons (‘the complainants’) therefore lodged two complaints which have identical content.
- 3 After the first complaint was filed with the competent police force on 8 June 2015, a criminal investigation file was opened at the public prosecutor’s office at the Regional Court, Olt. By special order dated 31 January 2017, the accused was committed for trial before the Regional Court, Olt, for the offence of passive corruption. This case is pending before the referring court on appeal (‘the proceedings relating to the offence of passive corruption’).
- 4 A second complaint was filed on 26 June 2015 with the Direcția Națională Anticorupție (National Anti-Corruption Directorate, Romania). Taking the view that that complaint contained evidence of the existence of the offence of extortion,

the National Anti-Corruption Directorate referred the accused to the Parchetul de pe lângă Judecătoria Slatina (public prosecutor's office at the Court of First Instance, Slatina, Romania), which had jurisdiction in the matter, and which opened a second criminal case ('the proceedings relating to the offence of extortion').

Proceedings relating to the offence of extortion

- 5 On 14 March 2016, the public prosecution service at the public prosecutor's office at the Court of First Instance, Slatina, in charge of the case, ordered criminal proceedings *in rem* to be brought for the offence of extortion. The competent police force interviewed the accused and the complainants. Documents and a CD containing an audio recording that the complainants had allegedly made on 30 April 2015 were also entered in the investigation file.
- 6 On the basis of that evidence, the police decided that the accused had not demanded any money from the complainants and that she had not sought to obtain a material gain either for herself or others, since the amount of EUR 4 400 was to be given to the lawyer with whom the accused had entered into a legal aid agreement. A request for the case to be discontinued was therefore drawn up. On the basis of that request, on 27 September 2016 the prosecutor in charge of the case issued an order for dismissal.
- 7 On 21 October 2016, the chief prosecutor of the public prosecutor's office at the Court of First Instance, Slatina, when reviewing the legality and validity of the decision to take no further action, set aside the order of 27 September 2016 and instructed the reopening of the criminal proceedings at issue. The chief prosecutor noted in particular that the same matter was the subject of proceedings relating to the offence of passive corruption before the public prosecutor's office at the Regional Court, Olt, where the investigations were at an advanced stage. Proper administration of justice dictated that jurisdiction in the proceedings relating to the offence of extortion should be declined in favour of the proceedings relating to the offence of passive corruption. The case was referred to the Judecătoria Slatina (Court of First Instance, Slatina, Romania) for confirmation of the reopening of the criminal proceedings.
- 8 On 21 November 2016, that court rejected the application, holding that the legal criteria for reopening the criminal proceedings had not been met. The fact that the same person is the subject of investigations in another case pending before a different court and that those investigations are at an advanced stage does not lead to the legal conclusion that a decision to take no further action must be set aside. This is because, when examining the order of certiorari, the law requires a determination of whether the circumstance on which the decision to take no further action is based does not exist, or whether new facts or circumstances have emerged which no longer justify the decision to take no further action, neither of which is the case here. The order for dismissal of 27 September 2016 therefore became final.

Proceedings relating to the offence of passive corruption

- 9 Following the complaint of 8 June 2015, the public prosecutor's office at the Regional Court, Olt, began criminal proceedings against the accused for the same acts, although with a different legal classification – namely that of passive corruption. Committed for trial before the Regional Court, Olt, by order dated 31 January 2017, the accused relied on the illegality of the proceedings brought before that court for the offence of passive corruption, since she had already been investigated for the same acts in the proceedings relating to the offence of extortion, and a final decision to take no further action had already been issued. On that basis, the accused invoked the *ne bis in idem* principle.
- 10 The Regional Court, Olt, rejected that defence on the ground that the criteria for the application of that principle had not been met. The Regional Court, Olt found that: (a) the proceedings before it could not be regarded as new criminal proceedings compared with the proceedings relating to the offence of extortion, considering the dates on which the two criminal complaints had been made; (b) the investigations carried out in the proceedings relating to the offence of extortion had led to a decision to take no further action *in rem*, at a time when the proceedings relating to the offence of passive corruption had already been brought against the accused and she had been subjected to supervision measures; (c) in the proceedings relating to the offence of extortion, a thorough investigation had not been carried out, first because insufficient evidence had been obtained, and second because it had been investigated by a police officer, whereas the criminal investigation in the proceedings relating to the offence of passive corruption had been conducted by the public prosecution service handling the case.
- 11 By judgment in criminal matters of 19 November 2018 of the Regional Court, Olt, the accused was sentenced, *inter alia*, to one year and four months' imprisonment for the offence of passive corruption. The accused and the public prosecutor's office at the Regional Court, Olt, appealed that judgment. By judgment of 20 October 2020, the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania) upheld the appeal entered by the accused, set aside the judgment under appeal and ordered the closure of the criminal proceedings brought against the accused.
- 12 In its reasoning for that decision, the court of appeal found, in essence, that the complaints lodged by the complainants in the two proceedings were identical in content, and that although they had been made on different dates, the first proceedings in which evidence had been obtained were those relating to the offence of extortion, which had led to a decision to take no further action. In addition, the evidence collected in the two proceedings was the same: namely, statements from the complainants, the statement from the accused, an audio recording and miscellaneous documents. On the date of the final decision in the proceedings relating to the offence of extortion, the prosecutor in charge of the case and later the court, in verifying the set-aside decision adopted by the chief prosecutor at the public prosecutor's office at the Court of First Instance, Slatina,

also examined the charges in the proceedings relating to the offence of passive corruption, since the existence of those proceedings was the reason for setting aside the decision to take no further action.

- 13 At the end of its analysis, the court of appeal concluded that the criminal investigation conducted in both proceedings was thorough and that the decision to take no further action which terminated the proceedings relating to the offence of extortion must be considered a final judgment, within the meaning of Article 4 of Protocol No 7 to the ECHR, hence the *ne bis in idem* principle applied in that case.
- 14 The Court of Appeal, Craiova, brought an appeal on a point of law against that judgment. By decision of 21 September 2021, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania; ‘the ÎCCJ’) upheld the appeal, set aside the contested decision and referred the case back to the Court of Appeal, Craiova.
- 15 In its reasoning for that decision, the ÎCCJ, recalling the case-law of the Court of Justice and of the ECtHR in the matter, stated, in essence, that, although the *ne bis in idem* principle may apply in the case of decisions taken by the public prosecution service which terminate the public prosecution, such as discontinuance of the prosecution or a sentence negotiated between the parties, not all decisions to take no further action made by the public prosecution service fall into the category of a final judgment since, in most cases, those solutions are not final and an instruction to reopen the investigation may be given.
- 16 Examining the order for dismissal of 27 September 2016 in the light of the *ne bis in idem* principle, the ÎCCJ held that the order did not fall into the category of a final judgment, since it did not contain any assessment on the substance of the case. Specifically, the public prosecution service gave no reasoning for the order, and merely instructed the case for the offence of extortion to be discontinued.
- 17 Following the decision of the ÎCCJ, the case was brought before the referring court for a re-examination of the appeals lodged by the accused NR and the public prosecutor’s office at the Regional Court, Olt, against the judgment of 19 November 2018 of the Regional Court, Olt. The referring court subsequently concluded that it was necessary to refer a question to the Court of Justice for a preliminary ruling.

The essential arguments of the parties in the main proceedings

- 18 The accused contends that Article 6 of the Code of Criminal Procedure, Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter preclude a public prosecution from being brought against her for the offence of passive corruption, since the same matter was the subject of different criminal proceedings for the offence of extortion, which had led to a decision to take no further action. The public prosecutor’s office at the Regional Court, Olt, considers that, in the present

case, the criteria for the application of the *ne bis in idem* principle have not been met.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 19 The referring court notes that the accused faces the same charges in two criminal proceedings, one of which was settled definitively by the public prosecutor with an order for dismissal for the charge of extortion, while the other is pending before the referring court for the offence of passive corruption.
- 20 On the basis of the case-law of the Court of Justice on the *ne bis in idem* principle, the referring court finds that, for an order for dismissal of the public prosecution service to be regarded as a final judgment which may be relied on in accordance with that principle, the following criteria must be met: (a) a thorough investigation of the matter must be carried out; (b) the decision to take no further action must be based on the substance of the criminal charges; (c) the *eadem personae* and *idem factum* requirements must be satisfied; (d) the criminal proceedings must be finally disposed of.
- 21 From its analysis of both proceedings, the referring court concluded that all those criteria have been met in the present case. Essential evidence – namely the complainants’ statements and the audio recording of 30 April 2015 – was obtained in both proceedings. Therefore, in the proceedings relating to the offence of extortion, a thorough investigation was carried out and the essential evidence was obtained by the public prosecutor’s office at the Court of First Instance, Slatina. That evidence was taken into account when making the decision to take no further action, as is apparent from the arguments put forward in the request for the case to be discontinued, which were accepted by the prosecutor.
- 22 Disagreeing with the ÎCCJ’s assessment that the order of 27 September 2016 was not substantiated by the public prosecution service, the referring court holds that, under Article 315(5) of the Code of Criminal Procedure, factual and legal reasoning is required only if the public prosecution service does not accept the arguments put forward in the investigating body’s request, or if there is a suspect in the case. However, because in the proceedings relating to the offence of extortion, the public prosecution had been brought *in rem*, the prosecutor could accept all the arguments of the investigating body put forward in the request for the case to be discontinued.
- 23 The order of 27 September 2016 examined the evidence and its ability to prove the existence of the act and the guilt of the accused. The same evidence was subsequently the basis of the committal for trial in the proceedings relating to the offence of passive corruption. The referring court thus considers that all the criteria for the application of the *ne bis in idem principle* are met in the present case.

- 24 The same court emphasises that, while being required to comply with the ÎCCJ's decision and having a different opinion on the interpretation of that principle, it considers it necessary to refer a question to the Court of Justice for a preliminary ruling.
- 25 Decision 2006/928 is relevant in these proceedings, given the broad scope of the benchmarks set out in the annex to that decision and their systemic impact on the effectiveness of the judicial system. Decision 2006/928 and the Charter impose an obligation to ensure that those benchmarks are met and underline the need to respect the fundamental rights guaranteed by the Charter, the principle of legality and the rule of law. The aims of promoting judicial efficiency and combating corruption must be achieved within a functioning system which is compatible with the legal context and the fundamental rights of the persons concerned.
- 26 One of the pillars of the rule of law is legal certainty, hence the *ne bis in idem* principle. Bringing two criminal proceedings against the same person for the same acts, for which the two public prosecutors' offices have provided a different legal framework – one leading to a final decision to take no further action, issued after obtaining essential evidence, and the other leading to the accused being committed for trial – has created a situation of legal uncertainty for the accused, caused by the Romanian courts involved in the two investigations.
- 27 However, a State that prosecutes one of its own citizens for the same act in two different proceedings calls into question its respect for the rule of law, the fundamental values of the European Union and the benchmarks that Romania must address under Decision 2006/928.