

**Case C-430/21****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:**

14 July 2021

**Referring court:**

Curtea de Apel Craiova (Romania)

**Date of the decision to refer:**

7 July 2021

**Applicant/Complainant:**

RS

**Subject matter of the main proceedings**

Complaint concerning the duration of criminal proceedings, brought before the formation of the Division for Criminal Matters and for Cases involving Children of the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania) having responsibility for matters relating to rights and freedoms by the applicant/complainant RS in relation to the duration of the prosecution conducted by the Public Prosecutor's Office attached to the Înalta Curte de Casație și Justiție – Secția pentru investigarea infracțiunilor din justiție (High Court of Cassation and Justice, Romania – Section for the Investigation of Offences Committed within the Judiciary; 'the 'SIJ').

**Subject matter and legal basis of the request**

In accordance with Article 267 TFEU, interpretation is sought of Article 2 TEU, the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

**Questions referred for a preliminary ruling**

1. Does the principle of the independence of the judiciary, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2

TEU and Article 47 of the Charter of Fundamental Rights of the European Union, preclude a provision of national law, such as that contained in Article 148(2) of the Romanian Constitution, as interpreted by the Curtea Constituțională (Constitutional Court, Romania) in Decision No 390/2021, according to which national courts have no jurisdiction to examine the conformity with EU law of a provision of national law that has been found to be constitutional by a decision of the Constitutional Court?

2. Does the principle of the independence of the judiciary, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the Charter of Fundamental Rights of the European Union, preclude a provision of national law, such as that contained in Article 99(ș) of Legea nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 303/2004 on the rules governing judges and prosecutors), which provides for the initiation of disciplinary proceedings and the application of disciplinary penalties in respect of a judge for failure to comply with a decision of the Constitutional Court, where that judge is called upon to acknowledge the primacy of EU law over the grounds of a decision of the Constitutional Court, that provision of national law depriving him or her of the possibility of applying a judgment of the Court of Justice of the European Union which he or she regards as taking precedence?

3. Does the principle of the independence of the judiciary, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the Charter of Fundamental Rights of the European Union, preclude a national judicial practice which precludes a judge, on pain of incurring disciplinary liability, from applying the case-law of the Court of Justice of the European Union in criminal proceedings in relation to a complaint regarding the reasonable duration of criminal proceedings, governed by Article 488<sup>1</sup> of the Romanian Code of Criminal Procedure?

### **Provisions of European Union law and case-law relied on**

Article 2, Article 4(3) and Article 19(1) TEU, as well as Article 47 of the Charter

Judgment of 18 May 2021, *Asociația '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; 'the judgment of 18 May 2021')

Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 42 to 44)

Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 48)

### **Provisions of national law relied on**

**Constituția României (Romanian Constitution)**, Article 11(3), which provides that, if a treaty to which Romania is to become a party includes provisions contrary to the Constitution, its ratification is to take place only after the revision of the Constitution, and Article 148(2) and (4), pursuant to which the provisions of the Treaties establishing the European Union, and other binding Community regulations, are to take precedence over conflicting provisions of national laws (paragraph 2) and, accordingly, the Parliament, the President of Romania, the Government and the judiciary are to ensure that the obligations under the Act of Accession and the provisions of paragraph 2 are fulfilled (paragraph 4).

**Codul penal (Criminal Code)**, Article 297 on abuse of office, which provides that, where, in the performance of his or her duties, a public official fails to perform an act or performs an act improperly and thereby causes harm to, or infringes the rights or legitimate interests of an individual, he or she is to be punished by a term of imprisonment of between two and seven years and is to be disqualified from holding public office; Article 283 on abuse of process, which provides that any person who initiates criminal proceedings or adopts a preventive measure entailing the deprivation of liberty or commits a person to trial while knowing that the person in question is innocent is to be punished by a term of imprisonment of between three months and three years and is to be disqualified from holding public office.

**Codul de procedură penală (Code of Criminal Procedure)**, Articles 488<sup>1</sup> to 488<sup>6</sup>, which govern complaints relating to the excessive duration of proceedings. In accordance with those provisions, such a complaint, seeking to expedite the proceedings, may be made where the work of the prosecution is not completed within a reasonable period of time. In the case of pending criminal proceedings, the application containing that complaint may be lodged one year after the proceedings were commenced, and jurisdiction to rule on that application lies with the judge having responsibility for matters relating to rights and freedoms at the court having jurisdiction to try the case. When he or she considers the application to be well founded, that judge is to determine the period within which the public prosecutor must deal with the case, although he or she may not offer guidance or suggest solutions to issues of fact or law.

**Legea nr. 304/2004 privind organizarea judiciară (Law No 304/2004 on the organisation of the judicial system)**, Articles 88<sup>1</sup> to 88<sup>11</sup>, which establish the SIIJ (the wording of those provisions is set out in the request for a preliminary ruling in Case C-127/19).

**Ordonanța de urgență a Guvernului nr. 90/2018 privind unele măsuri pentru operaționalizarea Secției pentru investigarea infracțiunilor din justiție (Government Emergency Ordinance No 90/2018 introducing certain measures concerning the functioning of the Section for the Investigation of Offences Committed within the Judiciary)**

**Legea nr. 303/2004 privind statutul judecătorilor și procurorilor (Law No 303/2004 on the rules governing judges and prosecutors)**, Article 99(ș), in accordance with which failure to comply with a decision of the Constitutional Court constitutes a disciplinary offence.

**Decision No 1039/2012 of the Romanian Constitutional Court** finding that judgments of the Court of Justice are binding *erga omnes* within the Member States.

**Decision No 390/2021 of the Constitutional Court, in which that court dismissed a plea of non-constitutionality directed against the provisions of Articles 88<sup>1</sup> to 88<sup>9</sup> of Law No 304/2004 and against Government Emergency Ordinance No 90/2018**, paragraphs 81 and 83 to 87 (emphasis added by the referring court):

‘81. A special rule in the Romanian Constitution governs the relationship between national law and EU law, in the terms laid down in Article 148(2) and (4) thereof [...]. Thus, the provision concerning accession to the European Union contains a subsidiary clause on compliance with [EU] law, in accordance with which all the national bodies of the State are required, as a matter of principle, to give effect to and to apply [EU] law. This also applies to the Constitutional Court, which is required, under Article 148 of the Constitution, to ensure the primacy of EU law. **However, that primacy, or precedence, is not to be understood as excluding or negating the national constitutional identity, enshrined in Article 11(3) of the Constitution, read in conjunction with Article 152 thereof, which is a guarantee of the core identity of the Romanian Constitution and is not to be relativised in the process of European integration. By virtue of this constitutional identity, the Constitutional Court has power to ensure the primacy of the Constitution within the territory of Romania (see, *mutatis mutandis*, the judgment of 30 June 2009, 2 BvE 2/08 and Others, delivered by the Federal Constitutional Court of the Federal Republic of Germany).** Pursuant to the provision on compliance set out in Article 148 of the Constitution, Romania may not adopt laws contrary to the obligations which it has assumed in its capacity as a Member State [...], but those obligations are certainly subject to a constitutional limit, based on the concept of “national constitutional identity” [...]

83. This court considers that a court or tribunal has the power to examine the conformity of a provision “*of national laws*”, which is to say, a provision forming part of domestic law, with EU law in the light of Article 148 of the Constitution and that, where it finds a conflict, it has jurisdiction to give precedence to provisions of EU law in disputes concerning the subjective rights of citizens. In any event, this court considers that, by the terms “national laws” and “domestic law”, the Constitution refers exclusively to infra-constitutional legislation, since the Constitution maintains its hierarchically superior position by virtue of Article 11(3) thereof. Accordingly, [...] **Article 148 of the Constitution does not confer on EU law precedence over the Romanian Constitution, with the result that a national court has no power to examine the conformity with EU law of a**

*provision of domestic law that has been held to be constitutional in accordance with Article 148 of the Constitution.* The Romanian legal system consists in the entire body of legal rules adopted by the Romanian State, which must be in conformity with the principle of the primacy of the Constitution and with the principle of legality, which are the core principles of the rule of law, enshrined in Article 1(5) of the Constitution, pursuant to which, “*in Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory*”, the only legislative authority of the country being its Parliament, and the State being organised in accordance with the principle of the separation and balance of powers – legislative, executive and judicial – within a constitutional democracy. Constitutional democracy, in a State governed by the rule of law, is not an abstraction, but is the manifestation of a system within which the primacy of the Constitution limits the sovereignty of the legislature which, in the process of creating legal rules and of adopting legislation, must have regard to a series of constitutional principles [...]

84. This court observes that, in holding Decision 2006/928 to be binding, the Court of Justice limited the effects of that decision in two ways: first it established that the obligations arising under that decision fall within the scope of the duties of the Romanian authorities having competence to engage in institutional cooperation with the European Commission (paragraph 177 of the judgment), and thus within the scope of the duties of the political institutions, the Romanian Parliament and the Romanian Government; secondly, those obligations are to be discharged in accordance with the principle of sincere cooperation, referred to in Article 4 TEU. *From both perspectives, the obligations cannot fall on the courts, which are bodies of the State that have no authority to cooperate with a political institution of the European Union.*

85. Therefore, this court finds that the application of point 7 of the operative part of the judgment of the Court of Justice, according to which a court is “permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928 which it considers, in the light of a judgment of the [Court of Justice], to be contrary to that decision or to the second subparagraph of Article 19(1) TEU”, has no basis in the Romanian Constitution because, as has previously been mentioned, Article 148 of the Constitution enshrines *the primacy of EU law* over conflicting provisions of national laws. However, CVM reports, drawn up on the basis of Decision 2006/928, by virtue of their content and effects, as established by the Court of Justice in the judgment of 18 May 2021, do not constitute rules of EU law to which courts must give priority, disapplying rules of national law. National courts cannot, therefore, be put in a position where they must decide on the priority application of recommendations to the detriment of national law, because CVM reports are not legislative acts and, for that reason, cannot be in conflict with domestic legislation. That conclusion is all the more necessary where the provision of national law has been held to be consistent with the Constitution by the national constitutional court in the light of the provisions of Article 148 of the Constitution.

86. Lastly, this court observes that *the principle of the rule of law presupposes legal certainty*, which is to say that those who are subject to the provisions of prevailing laws may have legitimate expectations regarding the effects and application of those laws, so that they can determine their conduct with foresight. If, however, some courts or tribunals disappplied of their own motion provisions of national law which they considered to be contrary to EU law, while others applied those same provisions, considering them to be in conformity with EU law, the standard of predictability of the law would be greatly diminished, which would generate serious legal uncertainty and, by implication, a breach of the principle of the rule of law.

87. In conclusion, since the judgment of the Court of Justice of 18 May 2021 in Case C-355/19 cannot be regarded as sufficient to bring about a reversal of the case-law determining the effect of Decision 2006/928 on the review of constitutionality and, by implication, infringement of Article 148 of the Constitution, the Constitutional Court dismisses as unfounded the plea of non-constitutionality directed against the provisions of Article 88<sup>1</sup>(1) to (5), Articles 88<sup>2</sup> to 88<sup>7</sup>, Article 88<sup>8</sup>(1)(a), (b), (c) and (e) and (2) and Article 88<sup>9</sup> of Law No 304/2004.’

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 1 April 2020, the wife of the applicant/complainant RS lodged a criminal complaint seeking the criminal prosecution of three individuals who were protected witnesses in Case No 1272/63/2018, accusing them of the offence of perjury. In that same complaint, she also made accusations against a forensic doctor, alleging that he was guilty of perjury and abuse of office, and against three members of the judiciary – a public prosecutor and two judges – accusing them of the offences of abuse of process and abuse of office, in the case of the public prosecutor, and the offence of abuse of office, in the case of the two judges.
- 2 Concerning the public prosecutor, it was asserted in the criminal complaint, in essence, that he had initiated criminal proceedings in breach of the applicant/complainant’s rights of defence and had laid charges against him on the basis of false testimony.
- 3 As regards the judges, it was alleged in the criminal complaint that, in the course of appeal proceedings, they had failed to comply with Decision No 250/2019 of the Constitutional Court by failing to examine and failing to rule on an application for the legal re-classification of the facts, thus breaching the rights of the defence.
- 4 Since the complaint related to individuals who were members of the judiciary, it was registered with the SIIJ and, on 14 April 2020, the public prosecutor at the SIIJ initiated criminal proceedings relating to the offences of perjury, abuse of process and abuse of office, as provided for by Articles 273, 283 and 297 of the Romanian Criminal Code.

- 5 On 10 June 2021, RS lodged with the judge of the referring court, the Curtea de Apel Craiova (Court of Appeal, Craiova), having responsibility for matters relating to rights and freedoms a complaint concerning the duration of the criminal proceedings pending before the SIIJ, requesting the court to fix a date by which the prosecutor in charge of the case should conclude it.
- 6 The SIIJ sent the file relating to the criminal prosecution to the referring court, at the latter's request. The referring court found that it included 90 documents consisting mainly in (i) the criminal complaint, (ii) a number of applications made by RS, through his chosen counsel, requesting to be informed of the roll number and to be informed of any steps taken in the criminal investigation, and requesting access to, and the right to take photocopies of the file, all of which had remained unanswered, (iii) the indictment prepared by the public prosecutor MR, (iv) a note dated 10 June 2021 requesting the referring court to send a copy of Criminal Judgment No 1427/2019, delivered by the judges concerned by the criminal complaint, (v) two forms setting out personal information relating to the injured party and his spouse, (vi) the criminal record of the injured party RS, and (vii) an extract from the European Criminal Records Information System database concerning Case No 1272/63/2018.

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

- 7 The referring court first of all observes that, in the proceedings before it, it must either uphold or reject the application made by RS. If it rejects the application, the file will be returned to the public prosecutor, on the view that a reasonable period of time has not been exceeded. If it upholds the application, the court will have to set a date by which the case must be dealt with and then return the file to the public prosecutor. Any failure to comply with that time limit will not, however, have any legal consequences.
- 8 The referring court considers that, in order to reach a decision in the proceedings before it, it must analyse (i) the national legislation governing the establishment and operation of the SIIJ, (ii) the criteria developed by the Court of Justice in the judgment of 18 May 2021 for deciding whether or not the SIIJ operates in accordance with EU law and (iii) the effect of Decision No 390/2021 of the Constitutional Court.
- 9 The referring court observes, first, that, in Romanian law, the binding nature of judgments of the Court of Justice may be inferred indirectly from Article 148(2) and (4) of the Constitution, and that it has also been established directly by the Constitutional Court, in Decision No 1039/2012, in which that court held that 'the [preliminary rulings of the Court of Justice] are binding *erga omnes* within all the Member States ...' and that 'the legal effects of preliminary rulings of the Court of Justice of the European Union have been outlined in the case-law. Thus, the Court in Luxembourg has held that a preliminary ruling on the interpretation or validity of an EU measure is binding on the court which made the request for a

preliminary ruling, and its interpretation, which forms a whole together with the provisions of EU law interpreted, also has authority for other national courts or tribunals, which cannot give their own interpretation of the provisions in question. Similarly, the effect of preliminary rulings is direct, in the sense that citizens of the Member States have the right to rely directly on EU law before national and European courts, including retroactively, because the interpretation of a rule of EU law, given in preliminary ruling proceedings, clarifies and defines the meaning and scope of that rule as from the date of its entry into force [...].

- 10 Similarly, as regards the declaratory nature of the preliminary rulings of the Court of Justice, the referring court cites paragraph 59 of the judgment of 22 September 2016, *Microsoft Mobile Sales International, formerly Nokia Italia and Others* (Case C-110/15).
- 11 Referring to the Court of Justice's findings in paragraphs 221 and 222 of the judgment of 18 May 2021, the referring court states that the question that arises is whether, in light also of Decision No 390/2021 of the Constitutional Court, it is permitted to analyse, in accordance with the judgment of 18 May 2021, the provisions on the establishment and operation of the SIIJ.
- 12 The need to refer to the Court of Justice the first question for a preliminary ruling arises from the conflict between the judgment of 18 May 2021 and Decision No 390/2021 of the Constitutional Court and from the risk that proceedings for failure to fulfil obligations might be brought against Romania.
- 13 As regards the second question referred for a preliminary ruling, the referring court states that it is called upon to choose between applying EU law, in accordance with the judgment of 18 May 2021, and applying Decision No 390/2021 of the Constitutional Court. If the judge chooses to apply the judgment of the Court of Justice, and to disapply Decision No 390/2021 of the Constitutional Court, she will expose herself to disciplinary proceedings, in accordance with Article 99(§) of Law No 303/2004, because failure to comply with a decision of the Constitutional Court constitutes a disciplinary offence and, as a result of those disciplinary proceedings, she could be suspended from office, and that possibility could undermine her independence in reaching a decision.
- 14 The referring court also considers that Decision No 1039/2021 of the Constitutional Court effected a substitution of its competences, which seriously undermines its freedom to make decisions, and it refers, in this regard, to the explanations set out by certain judges of the Constitutional Court in a separate opinion dissenting from the opinions which were accepted by the Constitutional Court in Decision No 1039/2021.
- 15 According to that separate opinion, the judgment of 18 May 2021 merely confirms a long line of consistent case-law of the Court of Justice, and the Constitutional Court acted *ultra vires* when, without being formally seised by the court which

raised the plea of non-constitutionality, it launched into assessments of the jurisdiction of the Court of Justice.

- 16 The authors of that separate opinion maintain that the judgment of 18 May 2021 should have been an additional argument for the Constitutional Court to reverse its case-law, and that such a reversal would, in any event, have been necessary following a careful review of the Constitution.
- 17 Referring to Article 148 of the Constitution, they also submit that that provision acknowledges the systematic precedence of EU law over contrary provisions of domestic law. That precedence can and must be observed by every national public authority (court or public administrative body).
- 18 Moreover, by requiring all public authorities, including the judiciary, to *guarantee* the fulfilment of the obligations undertaken by the Romanian State upon acceding to the European Union, the Constitution ensured the effective legal protection of the rights of all Union citizens.
- 19 Still with regard to the second question referred for a preliminary ruling, the referring court also cites the judgments of the Court of Justice in Cases C-64/16 and C-216/18 PPU and submits that the provision of Law No 303/2004 which provides for the initiation of disciplinary proceedings and the imposition of a disciplinary penalty on judges in the event that they fail to comply with a decision of the Constitutional Court, where that decision of the Constitutional Court deprives the national court of the ability to apply a judgment of the Court of Justice which it regards as taking precedence, is contrary both to the standard of independence enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the Charter, and to the case-law of the Court of Justice.
- 20 Thus, the Constitutional Court is making the application of rules of EU law subject to the fulfilment of additional conditions which are at odds with the case-law of the Court of Justice, such as the condition that the rules in question must ‘fill a gap in the Constitution’ (paragraph 49 of Decision No 390/2021), and is preventing the referring court from disapplying rules of national law that are contrary to EU law.
- 21 According to the referring court, the Constitutional Court is reserving to itself exclusive powers to apply EU law, even though it is not hierarchically superior to the Court of Appeal and has no mechanism recognised in EU law available to it that would enable it to intervene in order to correct, invalidate or confirm the application of EU law by judges of the ordinary Romanian courts.
- 22 As regards the third question, the referring court points out that the applicant/complainant lodged a complaint with the national court claiming that the criminal proceedings had gone on beyond a reasonable period and complaining that he had still not received answers to the applications he had made to the SIIJ more than a year earlier.

- 23 In this context, the judge having responsibility for matters relating to rights and freedoms is required to examine all the circumstances of the case affecting the duration of the criminal proceedings, which the applicant/complainant regards as unreasonable, including the legislation governing the activities of the SIIJ, the workload of the section in relation to the number of public prosecutors, the resolution rate and whether the SIIJ is operating in conformity with the judgment of 18 May 2021, in order to determine whether the work that the section is doing, within the current legal framework and with its current staffing, is justified by objective and verifiable requirements relating to the proper administration of justice and whether it is in a position to conduct criminal proceedings where the right of every person to a fair trial is properly observed, including in terms of the duration of those proceedings.
- 24 In addition, the referring court will have to decide whether the file can be returned for the purposes of the continued conduct of the criminal proceedings by a public prosecutor's office which could, in the light of the judgment of 18 May 2021, be held to be operating in breach of EU law.
- 25 However, the analysis which the referring court is required to carry out is impeded by Decision No 390/2021 of the Constitutional Court, in which the latter court held that 'a national court has no power to examine the conformity with EU law of a provision of domestic law that has been held to be constitutional in accordance with Article 148 of the Constitution'.
- 26 The referring court mentions the case of a judge of the Curtea de Apel Pitești (Court of Appeal, Pitești, Romania), reported in the press. The Inspectia Judiciară (Judicial Inspectorate) had initiated disciplinary proceedings against that judge for alleged misconduct, consisting in the performance of his duties in bad faith or with gross negligence, in the handling of a case in which a complaint had been made concerning the duration of proceedings. In that case, applying Articles 2 and 19 TEU, Decision 2006/928 and the judgment of 18 May 2021, the judge had held that the SIIJ was 'not justified by objective and verifiable requirements relating to the proper administration of justice and [did] not offer specific guarantees that, first, [precluded] any risk of that section being used as an instrument by means of which political control [could] be exercised over the activities of individual judges and public prosecutors in such a way as to undermine their independence and, secondly, [ensured] that its powers [could] be exercised in relation to such individuals in accordance with the obligations arising under Articles 47 and 48 of [the Charter]', and had required the public prosecutor to decline competence to resolve the case, resulting in the disapplication of the provisions of Article 88<sup>1</sup> of Law No 304/2004 in connection with the determination of jurisdiction. According to the Judicial Inspectorate, 'the *ex officio* investigation regarding the judge of the Curtea de Apel Pitești does not concern the interpretation of the judgment of the Court of Justice of 18 May 2021 but the manner in which the procedural rules applicable to the complaint concerning the duration of the proceedings have been observed'.

- 27 In those circumstances, the referring court questions whether the practice of subjecting to disciplinary proceedings a judge who, on the basis of the judgment of 18 May 2021, has taken the view that the national provisions relating to the SIIJ are contrary to EU law is consistent with the principle of the independence of the judiciary.

**Request for application of the urgent preliminary ruling procedure or, in the alternative, the expedited procedure**

- 28 The referring court requests that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure provided for in the Statute of the Court of Justice and in the Rules of Procedure of the Court of Justice, or, in the alternative, under the expedited procedure.
- 29 That request is based on the fact that disciplinary proceedings are pending concerning the application of EU law, namely the judgment of 18 May 2021, which gravely undermines the independence of the judiciary and the stability of the judicial system. In addition, the uncertainties created by the national provisions at issue affect the functioning of the system of judicial cooperation established by Article 267 TFEU.

WORKING DOCUMENT