

Case C-107/23 PPU

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:

22 February 2023

Referring court:

Curtea de Apel Braşov (Romania)

Date of the decision to refer:

22 February 2023

Appellants:

C.I.

C.O.

K.A.

L.N.

S.P.

Respondent:

Romanian State

Subject matter of the main proceedings

Extraordinary appeal (extraordinary petition) seeking to set aside the final judgment of the referring court sentencing the appellants to terms of imprisonment. The questions referred for a preliminary ruling relate to case-law of the Curtea Constituţională (Constitutional Court, Romania) concerning the interruption of the limitation period for criminal liability, the application of which would result in the convictions being quashed and would make it impossible to convict the defendants, even for the commission of acts to which provisions of European Union law are applicable.

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 TFEU, interpretation is sought of Article 2, Article 4(3) and the second paragraph of Article 19(1) TEU, Article 325(1) TFEU, Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union ('the PFI Convention'), Articles 2 and 12 of Directive 2017/1371 ('the PFI Directive'), Directive 2006/112, Decision 2006/928, the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union, and the principle of the primacy of EU law.

Questions referred for a preliminary ruling

1. Should Article 2 TEU, the second paragraph of Article 19(1) TEU and Article 4[(3)] TEU, read in conjunction with Article 325(1) TFEU, Article 2(1) of the PFI Convention, Articles 2 and 12 of the PFI Directive and Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, with reference to the principle of effective and dissuasive penalties in cases of serious fraud affecting the financial interests of the European Union, and applying Commission Decision 2006/928/EC, with reference to the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union, be interpreted as precluding a legal situation, such as that at issue in the main proceedings, in which the appellants seek, by means of an extraordinary appeal, to set aside a final judgment in criminal proceedings and request the application of the principle of the more lenient criminal law, which they allege was applicable in the course of the substantive proceedings and which would have entailed a shorter limitation period that would have expired before the case was finally concluded, but subsequently revealed by a decision of the national Constitutional Court which declared unconstitutional legislation on interrupting the limitation period for criminal liability (decision of 2022), on the ground that the legislature had failed to act to bring the legislation in question into line with another decision of the same Constitutional Court delivered four years earlier (decision of 2018) – by which time the case-law of the ordinary courts formed in application of the former decision had already established that the legislation in question was still in force, in the form understood as a result of the first decision of the Constitutional Court – with the practical consequence that the limitation period for all the offences in relation to which no final conviction had been handed down prior to the first decision of the Constitutional Court was reduced by half and the criminal proceedings against the defendants in question were consequently discontinued?

2. Should Article 2 TEU, on the values of the rule of law and respect for human rights in a society in which justice prevails, and Article 4(3) TEU, on the principle of sincere cooperation between the European Union and the Member States, applying Commission Decision 2006/928/EC as regards the commitment to ensure the efficiency of the Romanian judicial system, with reference to the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union, which enshrines the principle of the more lenient criminal law, be

interpreted, in relation to the national judicial system as a whole, as precluding a legal situation, such as that at issue in the main proceedings, in which the convicted appellants seek, by means of an extraordinary appeal, to set aside a final judgment in criminal proceedings and request the application of the principle of the more lenient criminal law, which they allege was applicable in the course of the substantive proceedings and which would have entailed a shorter limitation period that would have expired before the case was finally concluded, but subsequently revealed by a decision of the national Constitutional Court which declared unconstitutional legislation on interrupting the limitation period for criminal liability (decision of 2022), on the ground that the legislature had failed to act to bring the legislation in question into line with another decision of the same Constitutional Court delivered four years earlier (decision of 2018) – by which time the case-law of the ordinary courts formed in application of the former decision had already established that the legislation in question was still in force, in the form understood as a result of the first decision of the Constitutional Court – with the practical consequence that the limitation period for all the offences in relation to which no final conviction had been handed down prior to the first decision of the Constitutional Court was reduced by half and the criminal proceedings against the defendants in question were consequently discontinued?

3. If so, and only if it is impossible to provide an interpretation in conformity with EU law, is the principle of the primacy of EU law to be interpreted as precluding national legislation or a national practice pursuant to which the ordinary national courts are bound by decisions of the national Constitutional Court and binding decisions of the national supreme court and may not, for that reason and at the risk of committing a disciplinary offence, of their own motion disapply the case-law resulting from those decisions, even if, in light of a judgment of the Court of Justice, they take the view that that case-law is contrary to Article 2 TEU, the second paragraph of Article 19(1) TEU and Article 4(3) TEU, read in conjunction with Article 325(1) TFEU, in application of Commission Decision 2006/928/EC, with reference to the last sentence of Article 49[(1)] of the Charter of Fundamental Rights of the European Union, as in the situation in the main proceedings?

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

Article 2, Article 4(3) and the second paragraph of Article 19(1) TEU;

Article 325(1) TFEU;

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, Article 1(1) and Article 2(1);

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, Articles 1, 2 and 12;

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;

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax;

Charter of Fundamental Rights of the European Union ('the Charter'), Article 49(1), last sentence;

The principle of the primacy of EU law;

Judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19), EU:C:2021:1034; judgment of 8 September 2015, *Taricco and Others* (C-105/14), EU:C:2015:555; judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17), EU:C:2017:936; judgment of 14 September 2010, *Akzo Nobel Chemicals and Akeros Chemicals v Commission* (C-550/07 P), EU:C:2010:512; judgment of 22 March 1961, *S.N.U.P.A.T. v High Authority* (42/59 and 49/59), EU:C:1961:5; 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; judgment of 22 February 2022, *RS* (C-430/21), EU:C:2022:99; judgment of 26 February 2013, *Åkerberg Fransson* (617/10) EU:C:2013:105; judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513); judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17); judgment of 15 November 2012, *Gothaer Allgemeine Versicherung and Others* (C-456/11, EU:C:2012:719); judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434).

Provisions of international law and case-law of the European Court of Human Rights referred to in the proceedings

Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), Article 7;

Judgment of the European Court of Human Rights ('ECtHR') of 18 October 2000, *Coëme and Others v. Belgium*; judgment of the ECtHR of 12 February 2013, *Previti v. Italy*; judgment of the ECtHR of 22 September 2015, *Borcea v. Romania*; judgment of the ECtHR of 17 September 2014, *Mocanu and Others v. Romania*; judgment of the ECtHR of 15 November 2016, *A and B v. Norway*; judgment of the ECtHR of 3 April 2012, *Michelioudakis v. Greece*.

Provisions of national law and national case-law relied on

Constituția României (Romanian Constitution, ‘the Constitution’), Article 147(1) and (4);

Codul penal (Criminal Code), republished by Law No 140/1996, in force until 1 February 2014 (‘the old Criminal Code’). In accordance with Article 123 of the old Criminal Code, ‘the limitation period... shall be interrupted by the performance of any act which, by law, must be communicated to the defendant in the course of criminal proceedings’.

Codul penal (Criminal Code), adopted by Law No 286 of 17 July 2009, which entered into force on 1 February 2014. Article 5(1) of the code provides that ‘if, between the commission of an offence and final judgment in the case, one or more criminal laws are passed, the more lenient law shall be applied’. Article 155(1) of that code provided that ‘the limitation period for criminal liability shall be interrupted by the performance of any procedural act in the case’.

Codul de procedură penală (Code of Criminal Procedure), Article 426, first paragraph, letter (b), in accordance with which an extraordinary appeal may be brought against a final criminal judgment where a defendant has been convicted despite there being evidence of the existence of a cause for discontinuance of the criminal proceedings.

Decizia nr. 297 din 26 aprilie 2018 (Decision No 297 of 26 April 2018) of the Constitutional Court (‘Decision No 297/2018’). In this decision, the Constitutional Court held, in essence, that the legislative solution that provided for the interruption of the limitation period for criminal liability as a result of the performance of ‘any procedural act in the case’, contained in Article 155(1) of the Criminal Code, was unconstitutional. In its analysis, the Constitutional Court stated that it was necessary to ensure the predictability of the effects of Article 155(1) of the Criminal Code in relation to the person who has committed an offence under criminal law, including by ensuring that that person may be apprised of the fact that the limitation period for criminal liability has been interrupted and that a new limitation period has started to run. To accept the contrary view would be tantamount to creating in the person concerned, where procedural acts are performed that are not notified to the suspect or defendant but have the effect of interrupting the limitation period for criminal liability, a state of perpetual uncertainty, caused by the impossibility of making a reasonable estimate of the period within which he or she may be held criminally liable for the offence committed; such uncertainty could last until the special limitation period expires. The provisions of Article 155(1) of the Criminal Code were therefore not foreseeable, as well as being contrary to the principle of legality in criminal matters, since the expression ‘any procedural act’ used therein also included acts that are not notified to the suspect or defendant.

Decizia nr. 5 din 21 martie 2019 and **Decizia nr. 25 din 11 noiembrie 2019** (Decision No 5 of 21 March 2019 and Decision No 25 of 11 November 2019) of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania; ‘the Court of Cassation’).

Decizia nr. 358 din 26 mai 2022 (Decision No 358 of 26 May 2022) of the Constitutional Court (‘Decision No 358/2022’). In this decision, the Constitutional Court held the provisions of Article 155(1) of the Criminal Code to be unconstitutional, holding, in essence, as follows: ‘The Court considers that, on account of the effects which it produces, Decision [No 297/2018] is, in legal terms, a simple/extreme decision, inasmuch as ... the Court objected to the only legislative solution which the provisions of Article 155(1) of the Criminal Code governed. ... The Court notes that, in paragraph 34 of Decision [No 297/2018], it emphasised the fact that the legislative solution in the [old Criminal Code] satisfied the requirements of clarity and foreseeability, since it provided for interruption of the limitation period for criminal liability only by the performance, in a case in which the person concerned was the suspect or the defendant, of an act which, by law, had to be notified. The Court would observe, however, that the statement of the legislative solution in the previous legislative act had a guiding role and can in no way be attributed an absolute nature, in the sense of requiring the legislature to adopt a rule identical to that contained in the [old Criminal Code]. Thus, the Court would emphasise that, although it objected to the legislative solution provided for in Article 155(1) of the Criminal Code, because it established that the limitation period could be interrupted by the performance of procedural acts that are not made known to the suspect or defendant, whether through notification or through that person being present when the act is performed, it did not require that all acts notified to the suspect or defendant or all acts involving the suspect or defendant be regarded as acts capable of interrupting the limitation period for criminal liability, since it is for the legislature to determine what these are, subject to the fundamental condition that they satisfy the requirements mentioned by the Constitutional Court. ... Precisely in view of the scope of the legislature’s competence, the Court would observe that, in paragraph 34 of Decision [No 297/2018], it emphasised the points of reference of the constitutional approach which the legislature, and not the judiciary, was required to adopt, and that, under Article 147 of the Constitution, the legislature was required to intervene by means of legislation and to establish in a clear and foreseeable manner the cases in which the limitation period for criminal liability would be interrupted. ... The Court finds that such an outcome is the result of a failure by the legislature to comply with its obligations under the Constitution and of its inaction, even in spite of the fact that decisions of the [Court of Cassation] have been pointing out since 2019 the non-uniform practice resulting from the lack of legislative intervention. Similarly, the Court would emphasise that the rationale of Decision [No 297/2018] was not to abolish limitation periods for criminal liability or the interruption of those periods, but to bring the provisions of Article 155(1) of the Criminal Code into line with constitutional requirements. ... The Court notes that the situation created by the legislature’s inaction following the publication of the aforementioned decision upholding the objection of

unconstitutionality, constitutes an infringement of Article 1(3) and (5) of the Constitution, which enshrines the rule of law of the Romanian State and the primacy of the Constitution ... The legislature infringed Article 147(4) of the Constitution by ignoring the binding effects of Decision [No 297/2018], thus creating a more serious defect of unconstitutionality arising from the non-uniform application of the wording in the legislation “the limitation period for criminal liability is interrupted by the performance ...”, which clearly does not specify any case of interruption of the limitation period for criminal liability’.

Ordonanța de urgență a Guvernului nr. 71 din 30 mai 2022 pentru modificarea articolului 155 alineatul (1) din Legea nr. 286/2009 privind Codul penal (Government Emergency Order No 71/2022 of 30 May 2022 amending Article 155(1) of Law No 286/2009 on the Criminal Code; ‘Order No 71/2022’). Pursuant to the single article of Order No 71/2022, Article 155(1) of the Criminal Code is amended to read as follows: ‘the limitation period for criminal liability shall be interrupted by the performance of any procedural act in the case that, by law, must be notified to the suspect or defendant’.

Decision No 67 of 25 October 2022 of the Court of Cassation. By that decision, delivered in an appeal in the interests of the law, the Court of Cassation held that the rules on the interruption of the limitation period for criminal liability are substantive rules of criminal law, subject, as regards their application over time, to the principle of the operability of the criminal law, without prejudice to more lenient provisions of criminal law. It also held that a court deciding an extraordinary appeal for annulment based on the effects of Decisions No 297/2018 and 358/2022 may not re-examine the limitation period for criminal liability if an appeal court had discussed and considered the effect of that ground for discontinuance of the criminal proceedings in the course of those proceedings prior to Decision No 358/2022.

Legea nr. 241/2005 pentru prevenirea și combaterea evaziunii fiscale (Law No 241/2005 on the prevention and combating of tax evasion).

Legea nr. 303/2022 privind statutul judecătorilor și procurorilor (Law No 303/2022 on the rules governing judges and prosecutors).

Decision No 520 of 9 November 2022 of the Constitutional Court concerning objections of unconstitutionality in relation to Law No 303/2022 on the rules governing judges and prosecutors.

Succinct presentation of the facts and procedure in the main proceedings

- 1 By final judgment of 30 June 2020, la Curtea de Apel Brașov (Court of Appeal, Brașov) sentenced the appellants to terms of imprisonment for the criminal offences of tax evasion and setting up a criminal organisation and ordered them to pay damages totalling 13 964 482 Romanian lei (RON) (approximately EUR 3 240 000), including value added tax (VAT).

- 2 As regards the offence of tax evasion, the court held in that judgment, essentially, that, in the course of 2010, the appellants had omitted, wholly or in part, to record in their accounts the commercial transactions that had been carried out and the income from the sale to national recipients of quantities of gas oil which they had purchased under the regime for the suspension of payment of excise duty, thus causing a loss to the State budget, including VAT and excise duty on the gas oil.
- 3 The appellants have brought before the referring court an extraordinary appeal against the judgment of 30 June 2020, seeking that it be set aside on the ground that they were convicted despite the existence of evidence of a cause for discontinuance of the criminal proceedings, namely the expiry of the limitation period for criminal liability, in which connection they rely on Decision No 358/2022.
- 4 Two of the appellants are currently serving prison sentences imposed on them by the judgment under appeal.

The essential arguments of the parties in the main proceedings

- 5 The Direcția Națională Anticorupție (National Anti-Corruption Directorate; ‘the DNA’) requested the referring court to make a reference to the Court of Justice for a preliminary ruling in order to establish whether Article 325 TFEU, Decision 2006/928 and Article 49 of the Charter must be interpreted as precluding the disapplication of a national provision such as Decision No 358/2022. According to the DNA, the application of that decision entails a systemic risk of impunity in cases where EU law is applicable.
- 6 The appellants maintain that there is no rule of EU law that applies to the present case and have requested the court to reject the DNA’s request for a reference to be made to the Court of Justice. Moreover, the principle of the application of the more lenient criminal law is of constitutional status and takes precedence over any rule of EU law that might be relevant to the case.

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

- 7 As a preliminary point, the referring court notes that the appellants seek, by way of an extraordinary appeal seeking annulment, the setting aside of a final criminal conviction, relying on the application of the principle of the more lenient criminal law, which they allege was applicable during the course of the substantive proceedings. Accordingly, the appellants maintain that, in respect of the offences for which they were convicted, the more lenient law would have entailed a shorter limitation period for criminal liability, which would have expired before the case was finally concluded. However, the existence of that limitation period for criminal liability only became evident after the judgment had been handed down, following the delivery of Decision No 358/2022, in which the Constitutional

Court declared the provisions of Article 155(1) of the Criminal Code to be unconstitutional and held that, in the period following the publication of Decision No 297/2018, domestic criminal legislation contained no causes of interruption of the limitation period for criminal liability.

- 8 In other words, according to the appellants, the absence, in the period between those two decisions, from the applicable legislation of any definition of the causes of interruption of the limitation period for criminal liability, as noted in Decision No 358/2022, in itself constitutes a more lenient criminal law that should be applied for the benefit of defendants who have committed offences that were not finally judged before the date of publication of Decision No 297/2018. In those circumstances, the general limitation period (which is ten years under the applicable provisions of national law) would have expired before the judgment convicting them acquired the force of *res judicata*, if the causes of interruption of the general limitation period are not taken into account.
- 9 The referring court states that, if it accepts that argument, it will have to allow the extraordinary appeal, set aside the judgment convicting the appellants and order the criminal proceedings to be discontinued, which would make it impossible to convict the appellants.
- 10 The referring court also emphasises that the present case concerns, inter alia, offences of tax evasion in the area of VAT, to which the provisions of EU law on the protection of the Union's financial interests are applicable.

The first and second questions referred for a preliminary ruling

- 11 *As regards the first question*, the referring court considers that a decision absolving the appellants of criminal liability for the offences of VAT evasion, which affect the European budget, would generally undermine the values of the rule of law, enshrined in Article 2 TEU, and the principle of effective judicial protection of the rights conferred on individuals under the second paragraph of Article 19(1) TEU. In addition, such a solution would conflict, in particular, with recital 3 and Articles 1, 3 and 4 of Decision 2006/928 – as regards the commitment to ensure greater transparency and efficiency in judicial proceedings and to prevent and combat corruption, including high-level corruption, in particular within local government – as well as Article 325(1) TFEU, Article 2(1) of the PFI Convention and Articles 2 and 12(1) of the PFI Directive, as regards the principle of effective and dissuasive penalties for criminal offences which affect the Union's financial interests. Those provisions of EU law must be read in conjunction with Directive 2006/112 and must be referred to the last sentence of Article 49(1) of the Charter, which enshrines the principle of the more lenient criminal law. In this connection, the national court refers to the judgment of 26 February 2013, *Åkerberg Fransson*, in particular, paragraphs 24 to 31 thereof, and the judgment in *Euro Box Promotion and Others*, in particular, paragraph 194 thereof.

- 12 *As regards the second question*, the referring court emphasises that the circumstances of the present case are by no means unique, but extremely widespread in the Romanian judicial system. At present, national case-law is unanimous in finding that criminal proceedings must be discontinued, including as a result of an extraordinary appeal, if prosecution is time-barred. A significant number of cases could be in that situation. In this context, the referring court recalls the conclusions to that effect reached by the European Commission in its Report to the European Parliament and the Council of 22 November 2022 (COM(2022) 664 final), in which it observed that the situation in question could have ‘a particularly damaging impact on important ongoing criminal cases’, possibly with ‘serious consequences’ arising from the ‘removal of criminal liability in a substantial number of cases, while ‘the DNA estimates damage in these cases to [be] around [EUR] 1.2 billion and the total amount of bribery and influence peddling at around [EUR] 150 million’, and observed that ‘[t]he risk that thousands of defendants would not face criminal liability has triggered major criticism in Romania’.
- 13 In those circumstances, the referring court considers, with reference to the provisions of EU law mentioned in the second question, that the situation in the present case concerns the entire Romanian judicial system, in terms of its ability to observe the values of the rule of law and human rights in a society in which justice prevails, to ensure effective judicial protection in the areas covered by EU law and to observe the principle of sincere cooperation between the European Union and the Member States. The situation is at odds with mutual respect and assistance in carrying out the tasks which flow from the Treaties and with the efficiency of the judicial system in a country based on the rule of law, in terms of ensuring the predictability of the law and the provision of sufficient means for combating all crimes. The abovementioned provisions of EU law must also be referred to the last sentence of Article 49(1) of the Charter.
- 14 Consequently, the case-law of the Court of Justice according to which the national authorities and courts are free to apply national standards of protection of fundamental rights, provided that the level of protection provided by the Charter and the primacy, unity and effectiveness of EU law are not compromised, is applicable in the present case. However, the referring court considers that, in situations such as that in the present case, that level of protection could be compromised and that the very nature of the applicable legal provisions unequivocally gives rise to a systemic risk of impunity, within the meaning of the judgment in *Euro Box Promotion and Others*.
- 15 Next, under the heading ‘Opinion of the national referring court’, the referring court set out an extensive legal analysis of the situation at issue, which is common to the first two questions referred for a preliminary ruling, from the perspective of national law, EU law and ECHR law.
- 16 Thus, the referring court begins by examining the case-law of the Constitutional Court on the time-barring of criminal liability, the application of the more lenient

criminal law and the interpretation of the law by the ordinary courts. It then examines how those courts have applied that case-law and concludes that it has been rigorously followed. More specifically, the ordinary courts have complied with Decision No 297/2018, as they have understood it must be applied, and have narrowed the scope of the relevant legislation, taking the view that the limitation period for criminal liability is interrupted exclusively by acts that must be communicated to the defendant. Therefore, the ordinary courts' interpretation has not been *extra legem* or *contra legem*, but *intra legem*, and has not overstepped the bounds of ordinary judicial interpretation.

- 17 The referring court then proceeds to analyse the case-law of the ECtHR on the time-barring of criminal liability and the principle that offences and penalties must be defined by law, and concludes that, since Decision No 297/2018 was delivered, the ordinary courts have complied with that case-law too.
- 18 Thus, the ordinary courts have interpreted and applied the legislation on the interruption of the limitation period, as it has been interpreted by the Constitutional Court, in light of the European rule which enshrines the inevitability of the interpretation of any legislative provision, including provisions of criminal law. In the situation at issue, the legal form given to the relevant legislative text following its interpretation in conformity with Decision No 297/2018 was entirely consistent with the only legislative solution that was traditional under Romanian law and was favourable to the defendants, which is to say the interruption of the limitation period only by acts that must be communicated to the defendant, and not by acts of any kind. In that context, it may be concluded that the legislation, thus interpreted, was reasonably clear and predictable.
- 19 The referring court then goes on to analyse the case-law of the Court of Justice on the time-barring of criminal liability and the principle of the more lenient criminal law, in particular, the judgments in *Taricco and Others* and *M.A.S. and M.B.* From that case-law it draws the conclusion that the Court of Justice has acknowledged that a national court may disapply provisions of national law which reduce a special limitation period if it finds that they would make it harder to combat serious fraud in a significant number of cases and would undermine the necessary application of effective and dissuasive criminal penalties in order to protect the Union's financial interests. However, in the second of these judgments, the Court of Justice contemplated an exception for cases in which the disapplication of such provisions would entail a breach of the principle that offences and penalties must be defined by law, because of a lack of precision in the applicable law or because of the retroactive application of legislation that imposes conditions of criminal liability that are stricter than those which were in force at the time the offence was committed. The Court of Justice recalled the importance given, both in the EU legal order and in national legal systems, to the principle that offences and penalties must be defined by law, as to its requirements concerning the foreseeability, precision and non-retroactivity of the applicable criminal law.

- 20 Nevertheless, the referring court emphasises that, by contrast with the cases in which those two judgments of the Court of Justice were delivered, the present case does not involve a criminal law that has been applied for a certain period of time, but concerns a decision of a constitutional court, which is not the same thing as a law.
- 21 In addition, in the meantime, the PFI Directive was adopted, establishing a number of minimum conditions relating to penalties and limitation periods, which appear to be fulfilled by the national legislation. However, the referring court considers that, in order to comply with Articles 1 and 12 of that directive, the relevant provisions of national law must be interpreted in a practical and teleological fashion. On the other hand, the practical effect of applying the relevant provisions in the manner in which the defendants have interpreted them, relying on decisions of the Constitutional Court, would be to halve the limitation period for criminal liability, in a wholly unexpected and unforeseeable manner, without the legislature having taken action to that effect. On the contrary, the legislature did take explicit subsequent action, but to the opposite effect, by means of Order No 71/2022.
- 22 The referring court also examines the case-law of the Court of Justice on the principle of *res judicata* and recalls, on the one hand, the importance of that principle for legal certainty and, on the other, the fact that it is not an absolute rule but must be weighed, in each individual case, against other legal principles that come into play.
- 23 The referring court then makes a detailed analysis, from the perspective of national law, of the principle of the more lenient criminal law, and concludes that that principle is not applicable in the present case and that its non-application does not lead to any breach of the principle that offences and penalties must be defined by law.
- 24 Lastly, the referring court examines the hypothesis that, during the relevant period, a more lenient law on the time-barring of criminal liability *was* in force, and takes the view that, in such a situation, the principle of the more lenient criminal law would conflict with the principle of equity and justice. It therefore analyses, on the one hand, the case-law of the Constitutional Court and domestic legislation and, on the other hand, the case-law of the Court of Justice and the ECtHR. It emphasises the need for those two principles to be weighed against each other and concludes that, in situations such as that in the present case, the scale should tip in favour of the principle of equity and justice.

The third question referred for a preliminary ruling

- 25 The referring court considers that, if the first two questions are answered in the affirmative, it will be possible to interpret Decisions Nos 297/2018 and 358/2022 in a manner consistent with EU law. However, if it is held that an interpretation in conformity with EU law is not possible, the referring court considers that it will

have to be authorised to disapply those decisions, since, under national law, any failure to follow such decisions can render the judge in the case liable to disciplinary measures.

- 26 Indeed, although the legal provision which the Court of Justice analysed in its judgment of 22 February 2022, *RS*, which provided for the disciplinary liability of judges in the event of failure to comply with decisions of the Constitutional Court, has been repealed, the new law on the rules governing judges and prosecutors establishes that ‘the performance of duties in bad faith or with gross negligence’ is a disciplinary offence. By Decision No 520 of 9 November 2022, the Constitutional Court held, in essence, that the Constitution provided that its decisions were binding generally, and for that reason any infringement of that constitutional text in bad faith or with gross negligence constituted a disciplinary offence.
- 27 That being so, the referring court considers that the same liability for failure to follow judgments of the Constitutional Court under the old legislation is to be found also in the new legislation, and for that reason the third question remains pertinent, even now that new legislation in the area has been adopted.

Request for an expedited procedure

- 28 The referring court requests that the case be dealt with under the expedited procedure. It emphasises the gravity of the situation at issue and the fact that it is not an isolated situation, but widespread, appearing in a considerable number of cases, many of which fall within the EU’s areas of competence.
- 29 The referring court also points out that some of the appellants are currently serving the prison sentences imposed on them by the judgment of 30 June 2020. They applied for a stay of execution of their sentences, but the referring court refused that application on the ground that, at this stage of the proceedings, it is necessary to strike a fair balance between preserving the legal certainty conferred by the force of *res judicata* which the judgment convicting them has acquired, on the one hand, and the need to ensure that the convicted individuals can exercise their procedural rights, on the other, account being taken of the extraordinary nature of the appeal that has been made. In those circumstances, the effects of the final judgment of conviction should be maintained.
- 30 The referring court then acknowledges that it is aware that the large number of individuals or legal situations potentially concerned cannot, as such, constitute an exceptional circumstance such as to justify recourse to the expedited procedure. However, it emphasises the particular seriousness of the legal uncertainty which is the subject of this request for a preliminary ruling and the general consequences, both for the authorities competent to apply criminal law in conformity with EU law and for the rights of the individuals concerned.

- 31 There is a risk that the existing uncertainty will impede the coherent and effective functioning of the criminal justice system, especially because many of the cases will already have been decided before the Court of Justice's answer is received. That will lead to increased legal uncertainty, because other legal principles, such as the principle of *res judicata*, could also come into play. The referring court points out in this context that it is not mandatory, but merely optional for courts hearing similar cases to stay the proceedings and that, once a ruling on the substance of the case has been given, for the purposes of the application of the limitation period for criminal liability, it can be set aside only under the particularly restrictive conditions of an extraordinary appeal.
- 32 The referring court emphasises that the particular seriousness of the legal situation at issue was pointed up by the Commission in its Report to the European Parliament and the Council of 22 November 2022 (COM(2022) 664 final). That report states that, 'according to an estimate published by the DNA, a total of 557 criminal cases under criminal prosecution or pending before the courts could consequently be terminated ... While the exact prejudice would need to be assessed case by case, the DNA estimates damage in these cases to [be] around [EUR] 1.2 million and the total amount of bribery and influence peddling at around [EUR] 150 million.'
- 33 Finally, the referring court states that, as in the case in which the judgment of 5 December 2017, *M.A.S. and M.B.*, was delivered, under the expedited procedure, a swift answer will help remove these uncertainties and, since they relate to fundamental questions of national constitutional law and of EU law, the application of the expedited procedure would appear to be fully justified.

Request for the joinder of cases

- 34 The referring court requests that the present case be joined with Cases C-74/23 and C-75/23, since all these cases involve the same question of law, from the perspective of the interpretation of EU law.