- C-107/23 PPU - Conclusioni
- C-107/23 PPU - Domanda di pronuncia pregiudiziale
- C-107/23 PPU - Domanda (GU)
- C-107/23 PPU - Sintesi
- C-107/23 PPU - Sentenza
- C-107/23 PPU - Sentenza (GU)

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

24 July 2023 (*)

(Reference for a preliminary ruling – Protection of the financial interests of the European Union – Article 325(1) TFEU – PFI Convention – Article 2(1) – Obligation to counter fraud affecting the financial interests of the European Union by taking effective deterrent measures – Obligation to provide for criminal penalties – Value added tax (VAT) – Directive 2006/112/EC – Serious VAT fraud – Limitation period for criminal liability – Judgment of a constitutional court invalidating a national provision governing the grounds for interrupting that period – Systemic risk of impunity – Protection of fundamental rights – Article 49(1) of the Charter of Fundamental Rights of the European Union – Principle that offences and penalties must be defined by law – Requirements of foreseeability and precision of criminal law – Principle of the retroactive application of the more lenient criminal law (lex mitior) – Principle of legal certainty – National standard of protection of

fundamental rights – Duty on the courts of a Member State to disapply judgments of the constitutional court and/or the supreme court of that Member State in the event that they are incompatible with EU law – Disciplinary liability of judges in the event of non-compliance with those judgments – Principle of the primacy of EU law)

In Case C-107/23 PPU [Lin], (i)

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania), made by decision of 22 February 2023, received at the Court on the same day, in the criminal proceedings against

C.I.,

C.O.,

K.A.,

L.N.,

S.P.,

other party:

Statul român,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, C. Lycourgos (Rapporteur), E. Regan, P.G. Xuereb, L.S. Rossi and D. Gratsias, Presidents of Chambers, J.-C. Bonichot, S. Rodin, F. Biltgen, N. Piçarra, N. Jääskinen, J. Passer and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2023,

after considering the observations submitted on behalf of:

– C.I., by C.-I. Gliga, avocat,

– C.O., by M. Gornoviceanu, avocată,

– L.N., by C.-I. Gliga, avocat,

– S.P., by H. Crișan, avocat,

– the Romanian Government, by L.-E. Baţagoi, M. Chicu, E. Gane and O.-C. Ichim, acting as Agents,

– the European Commission, by J. Baquero Cruz, F. Blanc, I.V. Rogalski, F. Ronkes Agerbeek and P.J.O. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2, Article 4(3) and the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU, the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995 (OJ 1995 C 316, p. 48; 'the PFI Convention'), Articles 2 and 12 of 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 (OJ 2017 L 198, p. 29; 'the PFI Directive'), Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), 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 (OJ 2006 L 354, p. 56), and the principle of the primacy of EU law.

2 The request has been made in the context of extraordinary appeals brought by C.I., C.O., K.A., L.N. and S.P. ('the appellants in the main proceedings'), seeking to have set aside the final judgments convicting them of tax evasion and establishment of an organised criminal group and imposing prison sentences pursuant to those convictions.

Legal context

European Union law

The PFI Convention

3 Article 1 of the PFI Convention, entitled 'General provisions', provides:

'1. For the purposes of this Convention, fraud affecting the European Communities' financial interests shall consist of:

…

(b) in respect of revenue, any intentional act or omission relating to:

– the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,

…

2. Subject to Article 2(2), each Member State shall take the necessary and appropriate measures to transpose paragraph 1 into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences.

3. Subject to Article 2(2), each Member State shall also take the necessary measures to ensure that the intentional preparation or supply of false, incorrect or incomplete statements or documents having the effect described in paragraph 1 constitutes a criminal offence if it is not already punishable as a principal offence or as participation in, instigation of, or attempt to commit, fraud as defined in paragraph 1.

…'

4 Article 2 of that convention, headed 'Penalties', provides:

'1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1(1), are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition, it being understood that serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding [EUR] 50 000.

2. However, in cases of minor fraud involving a total amount of less than [EUR] 4 000 and not involving particularly serious circumstances under its laws, a Member State may provide for penalties of a different type from those laid down in paragraph 1.

…'

The PFI Directive

5 Article 16 of the PFI Directive, entitled 'Replacement of the [PFI Convention]', states:

'The [PFI Convention], including the Protocols thereto of 27 September 1996, of 29 November 1996 and of 19 June 1997, is hereby replaced by this Directive for the Member States bound by it, with effect from 6 July 2019.

For the Member States bound by this Directive, references to the Convention shall be construed as references to this Directive.'

Romanian law

The Romanian Constitution

6 The principle of the retroactive application of the more lenient criminal law (*lex mitior*) is laid down in Article 15(2) of the Constituția României (Romanian Constitution), which provides that 'the law shall have legal effect only for the future, with the exception of the more lenient criminal or administrative law'.

7 Article 147(1) and (4) of the Romanian Constitution provides:

‘1. The provisions of laws and ordinances currently in force, as well as those of regulations, that are found to be unconstitutional shall cease to have legal effect 45 days after the publication of the decision of the Curtea Constituțională [(Constitutional Court, Romania)] if, during that time, the Parliament or the Government, as appropriate, fails to bring the unconstitutional provisions into line with the provisions of the Constitution. Throughout that period, the provisions that have been found to be unconstitutional shall be suspended by law.

…

4. The decisions of the Curtea Constituțională [(Constitutional Court)] shall be published in the *Monitorul Oficial al României*. As from the date of publication, those decisions shall be generally binding and shall have legal effect only for the future.’

Romanian criminal law

8 The offence of tax evasion is established as follows in Article 9 of Legea nr. 241/2005, pentru prevenirea și combaterea evaziunii fiscale (Law No 241/2005 on preventing and combating tax evasion), of 15 July 2005 (*Monitorul Oficial al României*, Part I, No 672 of 27 July 2005), in the version applicable to the main proceedings:

‘1. Commission of the following acts in order to avoid fulfilling tax obligations shall constitute tax evasion and shall be punishable by a prison term of two to eight years and the loss of certain rights or a fine:

…

(c) the recording, in the accounts or in other legal documents, of expenditure which does not correspond to actual transactions or the recording of other fictitious transactions;

…

2. If the acts referred to in paragraph 1 give rise to a loss of more than EUR 100 000, in the equivalent in national currency, the minimum and maximum penalties shall be increased by five years.

3. If the facts referred to in paragraph 1 give rise to a loss of more than EUR 500 000, in the equivalent in national currency, the minimum and maximum penalties shall be increased by seven years.’

9 On 1 February 2014, Legea nr. 286/2009, privind Codul penal (Law No 286/2009 on the Criminal Code), of 17 July 2009 (*Monitorul Oficial al României*, Part I, No 510 of 24 July 2009; ‘the Criminal Code’), entered into force.

10 Under Article 154(1)(b) of the Criminal Code, the general limitation period for the criminal offences of which the appellants in the main proceedings are accused is 10 years.

11 Before the entry into force of the Criminal Code, the provision governing the interruption of limitation periods in criminal matters provided as follows:

‘The limitation period laid down in Article 122 shall be interrupted by the performance of any act which, by law, must be notified to the suspect or defendant in the course of criminal proceedings.’

12 In its initial version, Article 155(1) of the Criminal Code provided:

‘The limitation period for criminal liability shall be interrupted by the performance in the proceedings of any procedural act.’

13 Article 155(1) of the Criminal Code was amended as follows by Ordonanța de urgență a Guvernului nr. 71/2022, pentru modificarea articolului 155 alineatul (1) din Legea nr. 286/2009 privind Codul penal (Decree-Law No 71/2022, amending Article 155(1) of Law No 286/2009 on the Criminal Code), of 30 May 2022 (*Monitorul Oficial al României*, Part I, No 531 of 30 May 2022; ‘Decree-Law No 71/2022’):

‘The limitation period for criminal liability shall be interrupted by the performance in the proceedings of any procedural act which, by law, must be notified to the suspect or defendant.’

14 The scope of the principle of the retroactive application of the more lenient criminal law (*lex mitior*), laid down in Article 15(2) of the Romanian Constitution, is specified in Article 5(1) of the Criminal Code, according to which:

‘If, between the commission of an offence and the final judgment in the case, one or more criminal laws are passed, the more lenient law shall be applied.’

15 Article 426 of Legea nr. 135/2010, privind Codul de procedură penală (Law No 135/2010 on the Code of Criminal Procedure), of 1 July 2010 (*Monitorul Oficial al României*, Part I, No 486 of 15 July 2010), in the version applicable to the dispute in the main proceedings, entitled ‘The cases in which an extraordinary appeal may be brought’, provides, in point (b):

‘An extraordinary appeal may be brought against final judgments in criminal proceedings in the following cases:

…

(b) where the defendant has been convicted despite evidence of the existence of a ground for discontinuance of the criminal proceedings.

…’

Legislation on the disciplinary regime for judges

16 Article 99 of Legea nr. 303/2004, privind statutul judecătorilor și procurorilor (Law No 303/2004 on the rules governing judges and prosecutors), of 28 June 2004 (republished in the *Monitorul Oficial al României*, Part I, No 826 of 13 September 2005), provided:

‘The following shall constitute disciplinary offences:

…

(ș) failure to comply with the judgments of the Curtea Constituțională [(Constitutional Court)] or the Înalta Curte de Casație și Justiție [(High Court of Cassation and Justice, Romania)] in appeals in the interest of the law;

…’

17 Article 271 of Legea nr. 303/2022, privind statutul judecătorilor și procurorilor (Law No 303/2022 on the rules governing judges and prosecutors), of 15 November 2022 (*Monitorul Oficial al României*, Part I, No 1102 of 16 November 2022), provides:

‘The following shall constitute disciplinary offences:

…

(s) the performance of duties in bad faith or with gross negligence.’

18 Article 272(1) and (2) of that law provides:

‘1. A judge or prosecutor shall be deemed to have acted in bad faith if he or she knowingly infringes rules of substantive or procedural law and either has the intention of harming another person or accepts that the infringement will cause harm to another person.

2. A judge or prosecutor commits gross negligence if he or she negligently disregards rules of substantive or procedural law in a manner that is serious, irrefutable and inexcusable.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 In 2010, the appellants in the main proceedings omitted, wholly or in part, to indicate in their accounting documents the commercial transactions and income relating to the sale, to national recipients, of diesel fuel acquired under the excise duty suspension regime, thereby causing a loss to the State budget, in particular as regards value added tax (VAT) and excise duty on diesel fuel.

20 By criminal judgment No 285/AP of 30 June 2020, the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania), the referring court, convicted or upheld the convictions of the appellants in the main proceedings, handed down by the Tribunalul Brașov (Regional Court, Brașov, Romania) in its criminal judgment No 38/S of 13 March 2018, to terms of imprisonment for the commission of the offence of tax evasion, provided for in Article 9(1)(b) and (c) and Article 9(3) of Law No 241/2005 on preventing and combating tax evasion, in the version applicable to the dispute in the main proceedings, and the offence of establishment of an organised criminal group, provided for in the combined provisions of Article 7 and Article 2(b)(16) of Legea nr. 39/2003, privind prevenirea și combaterea criminalității organizate (Law No 39/2003 on preventing and combating organised crime), of 21 January 2003 (*Monitorul Oficial al României*, Part I, No 50 of 29 January 2003), in the version applicable to the dispute in the main proceedings, with application of Article 5 of the Criminal Code.

21 Two of the appellants in the main proceedings, K.A. and S.P., were serving prison sentences at the time the present request for a preliminary ruling was lodged, pursuant to judgment No 285/AP of 30 June 2020 of the Curtea de Apel Brașov (Court of Appeal, Brașov).

22 The appellants in the main proceedings were also ordered to pay tax losses, including sums due by way of VAT, totalling 13 964 482 Romanian lei (RON) (approximately EUR 3 240 000).

23 In its request for a preliminary ruling, the referring court refers to national case-law relating to the initial version of Article 155(1) of the Criminal Code, which may have a decisive effect on the situation of the appellants in the main proceedings.

24 More specifically, that court states, first, that the Curtea Constituțională (Constitutional Court), by its judgment No 297 of 26 April 2018, published on 25 June 2018 ('judgment No 297/2018 of the Curtea Constituțională (Constitutional Court)') upheld a plea of unconstitutionality concerning that provision in so far as it provided for the limitation period for criminal liability to be interrupted by the performance of 'any procedural act'.

25 The Curtea Constituțională (Constitutional Court) found, inter alia, that that provision lacked foreseeability and that it infringed the principle that offences and penalties must be defined by law, given that the expression 'any procedural act' also covered acts which were not notified to the suspect or accused person, thus preventing him or her from becoming aware of the fact that a new limitation period for his or her criminal liability had begun to run.

26 It also found that the earlier legislative provision satisfied the conditions of foreseeability imposed by the relevant constitutional provisions, since it provided that only the performance of an act which, by law, must be notified to the suspect or accused person was capable of interrupting the limitation period for criminal liability.

27 Secondly, it is apparent from the explanations provided by the referring court that, for several years, the national legislature did not take action following judgment No 297/2018 of the Curtea Constituțională (Constitutional Court), in order to replace the provision held to be unconstitutional, namely Article 155(1) of the Criminal Code.

28 Thirdly, the referring court states that the Curtea Constituțională (Constitutional Court), by its judgment No 358 of 26 May 2022, published on 9 June 2022 ('judgment No 358/2022 of the Curtea Constituțională (Constitutional Court)'), upheld a further plea of unconstitutionality concerning Article 155(1) of the Criminal Code. In that judgment, the Curtea Constituțională (Constitutional Court) clarified that its judgment No 297/2018 had the legal status of a 'simple' judgment of unconstitutionality. Emphasising the lack of action by the legislature since judgment No 297/2018 and the fact that the combined effect of the latter judgment and of that lack of action had given rise to a new situation which lacked clarity and foreseeability as regards the rules applicable to the interruption of the limitation period for criminal liability, which had resulted in inconsistent case-law, the Curtea Constituțională (Constitutional Court) stated that, between the date of publication of judgment No 297/2018 and the entry into force of a legislative measure determining the applicable rule, '[Romanian] positive law [did] not provide for any ground for interrupting the limitation period for criminal liability'.

29 Furthermore, the Curtea Constituțională (Constitutional Court) stated that the purpose of its judgment No 297/2018 was not to remove the limitation periods for criminal liability or to preclude the interruption of those periods, but to bring Article 155(1) of the Criminal Code into line with the constitutional requirements.

30 Fourthly, it is apparent from the request for a preliminary ruling that, on 30 May 2022, namely after judgment No 358/2022 of the Curtea Constituțională (Constitutional Court) was delivered, but before it had been published, the Romanian Government, acting on the basis of its delegated legislative powers, adopted Decree-Law No 71/2022, which entered into force on the same date, by which Article 155(1) of the Criminal Code was amended so that the limitation period for criminal liability is interrupted by any procedural act which must be notified to the suspect or accused person.

31 Fifthly, the referring court states that, by judgment No 67/2022 of 25 October 2022, published on 28 November 2022, the Înalta Curte de Casație și Justiție (High Court of Cassation

and Justice) stated that, under Romanian law, the rules relating to the interruption of the limitation period for criminal liability fall within the scope of substantive criminal law and that, consequently, they are subject to the principle of non-retroactivity of criminal law, without prejudice to the principle of the retroactive application of the more lenient criminal law (*lex mitior*), as guaranteed, inter alia, in Article 15(2) of the Romanian Constitution.

32 Consequently, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) held that a final conviction may, in principle, be the subject of an extraordinary appeal based on the effects of judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) as a more lenient criminal law (*lex mitior*). That possibility is, however, precluded where the appeal court has already examined the issue of the limitation period for criminal liability in the course of the proceedings which gave rise to that final conviction.

33 The appellants in the main proceedings brought extraordinary appeals before the Curtea de Apel Brașov (Court of Appeal, Brașov) seeking to have that court's judgment No 285/AP of 30 June 2020 set aside. They seek, on the basis of Article 426(b) of Law No 135/2010 on the Code of Criminal Procedure, in the version applicable to the dispute in the main proceedings, the annulment of their criminal convictions, on the ground that they were convicted even though there was evidence of the existence of a ground for discontinuing the criminal proceedings, namely the expiry of the limitation period for their criminal liability.

34 In support of their action, those appellants claim, on the basis of the principle of the retroactive application of the more lenient criminal law (*lex mitior*), that their criminal liability is time-barred following judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court).

35 Those appellants argue, in essence, that, between the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court), namely 25 June 2018, and the date of publication of its judgment No 358/2022, namely 9 June 2022, Romanian law did not provide for any ground for interrupting the limitation period for criminal liability.

36 The fact that, during the period between those dates, positive law did not provide for any ground for interrupting the limitation period for criminal liability constitutes, in itself, a more favourable criminal law which should be applied to them in accordance with the principle of the retroactive application of the more lenient criminal law (*lex mitior*), which is enshrined, inter alia, in the Romanian Constitution.

37 If such an interpretation were to be accepted, the referring court finds that, having regard to the date on which the offending acts were committed, the limitation period of 10 years laid down in Article 154(1)(b) of the Criminal Code would, in the present case, have expired before the decision convicting the appellants in the main proceedings became final, which would entail the discontinuation of the criminal proceedings against the appellants and would render impossible their conviction.

38 That court sets out several grounds capable of precluding the application of the principle of the retroactive application of the more lenient criminal law (*lex mitior*), as guaranteed by the Romanian Constitution, in a situation such as that in the main proceedings.

39 That court notes, in particular, that the legal situation characterised by the absence of grounds for interrupting the limitation period in criminal matters, pleaded by the appellants in the main proceedings, results not from an act reflecting the intention of the legislature, but from a judgment

of the Curtea Constituțională (Constitutional Court) declaring the initial version of Article 155(1) of the Criminal Code unconstitutional. According to the referring court, the principle of the retroactive application of the more lenient criminal law (*lex mitior*) is applicable only in the event of a succession of laws adopted by the legislature over time.

40 It is in that context that the referring court questions the compatibility with EU law of the interpretation put forward by the appellants in the main proceedings, since it would have the effect of exempting them from their criminal liability for tax evasion offences liable to affect the budget of the European Union and the protection of the European Union's financial interests. Such an interpretation, which could apply in a considerable number of criminal cases, would be liable to undermine, inter alia, Article 2 and the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU, Article 2(1) of the PFI Convention, Articles 1, 3 and 4 of Decision 2006/928, Article 2 and Article 12(1) of the PFI Directive and Directive 2006/112.

41 In that regard, that court notes that, subject to the limited information available to it, the effects of judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) on the limitation period for criminal liability are likely to affect a considerable number of cases. The national courts have ruled in favour of criminal liability being time-barred, including in the context of extraordinary appeals such as those at issue in the main proceedings. Moreover, in its report of 22 November 2022 to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (COM(2022) 664 final), the European Commission referred to its concerns about the impact of that case-law on important ongoing criminal cases.

42 Furthermore, the referring court points out that it might be required – if it transpires that an interpretation consistent with EU law is not possible in the light of the pleas raised before it – to disapply the approaches adopted in the case-law of the Curtea Constituțională (Constitutional Court) and/or the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) ruling on appeals in the interest of the law.

43 The referring court notes that the new disciplinary regime, provided for in Articles 271 and 272 of Law No 303/2022 on the rules governing judges and prosecutors, allows for the imposition of penalties on judges who, knowingly and therefore 'in bad faith', or through gross negligence, within the meaning of those articles, disregard the judgments of the Curtea Constituțională (Constitutional Court) or the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) ruling on appeals in the interest of the law.

44 For those reasons, the Curtea de Apel Brașov (Court of Appeal, Brașov) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 2 TEU, the second [sub]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 Directive [2006/112], 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 [Decision 2006/928], with reference to the last sentence of Article 49(1) of the [Charter], be interpreted 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 which was revealed only subsequently, by a decision of

the national Constitutional Court which declared unconstitutional legislation on interrupting the limitation period for criminal liability ([judgment No 358/2022 of the Curtea Constituțională (Constitutional Court)]), 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 ([judgment No 297/2018 of the Curtea Constituțională (Constitutional Court)]) – by which time the case-law of the ordinary courts formed in application of [that judgment No 297/2018] had already established that the legislation in question was still in force, in the form understood as a result of [that judgment No 297/2018] – 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 [judgment No 297/2018 of the Curtea Constituțională (Constitutional Court)] is reduced by half and the criminal proceedings against the defendants in question are 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 [Decision 2006/928] 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], 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 which was revealed only subsequently, by a decision of the national Constitutional Court which declared unconstitutional legislation on interrupting the limitation period for criminal liability ([judgment No 358/2022 of the Curtea Constituțională (Constitutional Court)]), 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 ([judgment No 297/2018 of the Curtea Constituțională (Constitutional Court)]) – by which time the case-law of the ordinary courts formed in application of [that judgment No 297/2018] had already established that the legislation in question was still in force, in the form understood as a result of [that judgment No 297/2018] – 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 [judgment No 297/2018 of the Curtea Constituțională (Constitutional Court)] is reduced by half and the criminal proceedings against the defendants in question are consequently discontinued?

(3) If [the first and second questions are answered in the affirmative], 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 [sub]paragraph of Article 19(1) TEU and Article 4(3) TEU, read in conjunction with Article 325(1) TFEU, in application of [Decision 2006/928], with reference to the last sentence of Article 49(1) of the [Charter], as in the situation in the main proceedings?'

45 By a communication of 24 March 2023, received at the Court on the same day, the referring court referred to several judgments, delivered between 15 December 2022 and 8 March 2023, by which the Curtea de Apel București (Court of Appeal, Bucharest, Romania) and the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) upheld extraordinary appeals, on the basis of the expiry of the limitation period for criminal liability of the persons concerned.

46 Furthermore, in that communication the referring court emphasised that an appeal on a point of law is the only remedy that would allow, where appropriate, a final judicial decision to be challenged on the basis of an infringement of EU law as interpreted by the Court in its answers to the questions referred for a preliminary ruling. However, the period of 30 days from notification of the decision of the appeal court within which an appeal on a point of law must be lodged precludes the bringing of such an appeal, since, on the date on which the Court rules on the present request for a preliminary ruling, that period will have expired in most of the cases concerned.

47 Consequently, the referring court asked the Court to state that, 'in accordance with the principle of sincere cooperation, in order to comply with the principles of equivalence and effectiveness, in the context of national procedural autonomy, and to guarantee equal treatment and non-discrimination for the parties to the main proceedings in relation to individuals in similar situations, in the event of an appeal on a point of law brought against final judgments delivered in similar cases in the meantime, national courts are required to rule that [that period] runs from the date of delivery of the judgment of the Court' ruling on the present request for a preliminary ruling.

Application of the urgent preliminary ruling procedure

48 Exercising the power conferred on him by Article 107(3) of the Rules of Procedure of the Court of Justice, the President of the Court invited the Fourth Chamber, designated in accordance with Article 108(1) of those rules, to consider whether it was necessary to deal with the present reference for a preliminary ruling under the urgent preliminary ruling procedure referred to in the first paragraph of Article 23a of the Statute of the Court of Justice of the European Union.

49 It follows from Article 107(1) of the Rules of Procedure that only requests for a preliminary ruling which raise one or more questions relating to one of the areas covered by Title V of Part Three of the TFEU – which is devoted to the area of freedom, security and justice – may be dealt with under the urgent procedure.

50 In the present case, the questions referred for a preliminary ruling concern, inter alia, the interpretation of Article 2(1) of the PFI Convention, which was drawn up on the basis of Article K.3 TEU. Article K.3 TEU became Article 31 TEU, the provisions of which were reproduced in Articles 82, 83 and 85 TFEU, which fall within Title V of Part Three of the TFEU.

51 It follows that the present reference for a preliminary ruling raises questions concerning one of the areas covered by Title V and that, accordingly, it may be dealt with under the urgent procedure.

52 As regards the criterion relating to urgency, it follows from settled case-law that that criterion is satisfied when the person concerned in the case in the main proceedings is, as at the date when the request for a preliminary ruling is made, deprived of his or her liberty and the question as to whether he or she may continue to be held in custody depends on the outcome of the dispute in the main proceedings (judgment of 12 January 2023, *MV (Formation of a cumulative sentence)*, C-583/22 PPU, EU:C:2023:5, paragraph 45 and the case-law cited).

53 In that regard, it is apparent from the order for reference that the appellants in the main proceedings were sentenced to terms of imprisonment and that two of them, K.A. and S.P., are currently serving their respective terms of imprisonment.

54 In response to the request for clarification which the Court sent to the referring court on 15 March 2023, the latter stated, first, that those two appellants in the main proceedings are

currently incarcerated pursuant to its criminal judgment No 285/AP of 30 June 2020 and, secondly, that their detention would be terminated if it were to decide to uphold the extraordinary appeals brought before the referring court against their convictions.

55 Furthermore, it is apparent from the explanations provided by that court that the outcome of the extraordinary appeals brought by the appellants in the main proceedings depends on the Court's answers to the questions referred.

56 In those circumstances, pursuant to Article 108(1) of the Rules of Procedure, the Fourth Chamber of the Court decided, on 23 March 2023, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, of its own motion, to deal with the present reference for a preliminary ruling under the urgent preliminary ruling procedure.

57 It also decided, on the basis of Article 113(2) of the Rules of Procedure, to refer the present case back to the Court for allocation to the Grand Chamber.

Admissibility of the request for a preliminary ruling

58 L.N. and C.I. argued that the request for a preliminary ruling is inadmissible in its entirety. L.N. submitted inter alia, in that respect, that Decision 2006/928 and the PFI Directive were not relevant in the circumstances of the dispute in the main proceedings.

59 The Romanian Government also questions the hypothetical nature of the third question referred.

60 Lastly, C.O., C.I. and the Romanian Government have argued that the request referred to in paragraph 47 above is inadmissible on the ground that, in the dispute in the main proceedings, the referring court is ruling not on an appeal on a point of law, but on extraordinary appeals.

61 It should be noted that, according to settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraph 52 and the case-law cited).

62 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraph 53 and the case-law cited).

63 In the present case, as regards, in the first place, the three questions referred for a preliminary ruling by the referring court, it should be noted, first, that the interpretation of EU law sought by that court could lead that court to disapply judgments No 297/2018 and No 358/2022 of the Curtea

Constituțională (Constitutional Court) and/or judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), which were relied on by the appellants in the main proceedings in order to support their claim concerning the expiry of the limitation period for their criminal liability. Those questions are therefore not hypothetical.

64 That being said, secondly, it should be noted that, under Article 16 of the PFI Directive – in respect of which the referring court seeks an interpretation of Articles 2 and 12 in its first question – that directive replaces the PFI Convention with effect from 6 July 2019. The acts giving rise to the dispute in the main proceedings were committed in 2010. Accordingly, that directive is clearly not applicable to that dispute, with the result that the interpretation of that directive does not appear necessary for the resolution of that dispute.

65 Moreover, since, according to the information brought to the Court's attention, the acts at issue in the main proceedings do not constitute corruption, it is clear that the interpretation of Decision 2006/928 is also irrelevant for the purposes of the answer to be given to the first and second questions referred for a preliminary ruling.

66 As regards, thirdly, the other provisions of EU law referred to in the three questions referred for a preliminary ruling by the referring court, it is sufficient, however, to note that, where it is not obvious that the interpretation of a provision of EU law bears no relation to the facts of the main action or its purpose, the objection alleging the inapplicability of that provision to the case in the main action does not relate to the admissibility of the request for a preliminary ruling, but concerns the substance of the questions raised (judgments of 19 December 2019, *Dobersberger*, C-16/18, EU:C:2019:1110, paragraph 21, and of 27 April 2023, *M.D. (Ban on entering Hungary)*, C-528/21, EU:C:2023:341, paragraph 52).

67 As regards, in the second place, the request referred to in paragraph 47 above, it seeks, according to the explanations provided by the referring court, to determine whether EU law requires that the 30-day period for lodging an appeal on a point of law begin to run on the date on which the Court delivers its judgment in the present case.

68 However, in the context of the dispute in the main proceedings, the referring court is seised not of an appeal on a point of law, but of extraordinary appeals, as noted by C.O., C.I. and the Romanian Government.

69 Consequently, the question referred to in paragraph 47 above concerns a hypothetical problem, within the meaning of the case-law referred to in paragraph 62 above, and must therefore be declared inadmissible.

70 It follows from the foregoing that the present request for a preliminary ruling is admissible, with the exception of (i) the first and second questions, in so far as they concern the interpretation of the PFI Directive and Decision 2006/928, and (ii) the question referred to in paragraph 47 above.

Consideration of the questions referred

The first and second questions

71 The first and second questions, which it is appropriate to examine together, concern the interpretation of Article 2, Article 4(3) and the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU, the last sentence of Article 49(1) of the Charter, Article 2(1) of the PFI Convention and Directive 2006/112.

72 However, it is apparent from the grounds of the order for reference that referring court's doubts which gave rise to those questions concern, in essence, the interpretation, first, of the provisions of EU law requiring Member States to counter illegal acts affecting the financial interests of the European Union effectively and, secondly, of the guarantees stemming from the principle that offences and penalties must be defined by law.

73 In those circumstances, it is necessary to examine the first and second questions only in the light of Article 325(1) TFEU, Article 49(1) of the Charter and Article 2(1) of the PFI Convention.

74 It follows that, by those questions, the referring court asks, in essence, whether those provisions must be interpreted as meaning that the courts of a Member State are required to disapply (i) judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as to its requirements relating to the foreseeability and precision of criminal law, and (ii) a judgment of the supreme court of that Member State, from which it follows that the rules governing those grounds of interruption, as derived from that constitutional case-law, may be applied retroactively as a more lenient criminal law (*lex mitior*) in order to call into question final convictions, it being understood that, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability.

75 As a preliminary point, it should be noted that the exact scope of the rules governing, in Romania, the interruption of limitation periods in criminal matters during the period from 25 June 2018, the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court), to 30 May 2022, the date on which Decree-Law No 71/2022 entered into force, was debated by the parties both in their written observations and at the hearing before the Court.

76 It must be borne in mind, in that regard, that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (judgments of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57, paragraph 61, and of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraph 59).

77 In the present case, according to the explanations provided by the referring court, it follows from judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court), summarised in paragraphs 23 to 29 above, that, during the period from 25 June 2018 to 30 May 2022, Romanian law did not provide for any ground for interrupting the limitation period for criminal liability. Accordingly, for the purposes of the answer to be given to the first and second questions, it must be considered that that was the position under Romanian law during that period.

78 In the light of the case-law referred to in paragraph 76 above, it is also necessary to answer those questions on the basis of the referring court's interpretation of judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), according to which the latter's interpretation of the principle of the retroactive application of the more lenient criminal law (*lex mitior*) allows the effects of the absence of grounds for interrupting that limitation period in Romanian law to be applied retroactively to procedural acts which took place before 25 June 2018, namely the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court).

Breach of the obligation to counter fraud affecting the financial interests of the European Union through effective deterrent measures

79 Since it is apparent from the order for reference that the dispute in the main proceedings concerns, inter alia, acts constituting serious VAT fraud, it must be borne in mind that it is for the Member States to adopt the measures necessary to guarantee the effective and comprehensive collection of the European Union's own resources, namely the revenue from the application of a uniform rate to the harmonised VAT assessment bases (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, paragraph 182 and the case-law cited).

80 That being said, the enactment of criminal penalties in order to protect the financial interests of the Union, and in particular the correct collection of that revenue, falls within the shared competence of the European Union and the Member States within the meaning of Article 4(2) TFEU (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 43).

81 In the present case, at the material time for the main proceedings, the rules governing limitation periods applicable to criminal offences affecting the financial interests of the European Union had not been harmonised by the EU legislature and harmonisation has since taken place only to a partial extent by the adoption of the PFI Directive (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 44), which, as noted in paragraph 64 above, is not applicable to the dispute in the main proceedings.

82 Accordingly, the adoption of rules governing limitation periods for criminal offences affecting the financial interests of the European Union fell, at the time of the facts in the main proceedings, within the competence of the Member States. However, those Member States are required, when exercising that competence, to comply with their obligations deriving from EU law (see, to that effect, judgments of 26 February 2019, *Rimšēvičs and ECB* v *Latvia*, C-202/18 and C-238/18, EU:C:2019:139, paragraph 57, and 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, paragraph 216).

83 In that regard, it must be pointed out, in the first place, that Article 325(1) TFEU requires the Member States to counter fraud and any other illegal activities affecting the financial interests of the European Union through effective deterrent measures (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, paragraph 181 and the case-law cited).

84 While the Member States are free to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two, they must nonetheless ensure, pursuant to Article 325(1) TFEU, that cases of serious fraud or other serious illegal activities affecting the financial interests of the European Union are punishable by criminal penalties that are effective and that act as a deterrent (see, to that effect, judgments 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, paragraph 191, and of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)*, C-213/19, EU:C:2022:167, paragraph 219).

85 In the second place, under Article 2(1) of the PFI Convention, Member States must take the necessary measures to ensure that conduct constituting fraud affecting the financial interests of the European Union, including VAT fraud, is punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud – namely fraud involving a minimum

amount which may not be set by the Member States at a sum exceeding EUR 50 000 – penalties involving deprivation of liberty (see, to that effect, judgment of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, paragraph 36 and the case-law cited).

86 Accordingly, those Member States must ensure that the limitation rules laid down by national law allow effective punishment of infringements linked to such fraud (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 36).

87 In the present case, it is apparent from the explanations provided by the referring court, as summarised in paragraphs 23 to 32 above, that, first, pursuant to judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court), during the period from 25 June 2018, the date of publication of judgment No 297/2018, to 30 May 2022, the date on which Decree-Law No 71/2022 entered into force, Romanian law did not provide for any ground allowing the limitation period for criminal liability to be interrupted, and that, secondly, according to judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), that constitutional case-law can be invoked as a more lenient criminal law (*lex mitior*), including to challenge final convictions.

88 As regards the specific effects that might result from that case-law, the referring court states that, in the dispute in the main proceedings, the application, as a more lenient criminal law (*lex mitior*), of the rule laid down in judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court), according to which, during the period referred to in the preceding paragraph, Romanian law did not provide for any ground for interrupting the limitation period for criminal liability, would have the result that the 10-year limitation period laid down for the offences at issue in the main proceedings would have expired before the conviction of the appellants in the main proceedings became final, which would entail the discontinuation of the criminal proceedings and would render impossible the conviction of those appellants.

89 The referring court also pointed out that judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) are likely to affect a ‘significant number of cases’, including cases closed by the delivery of final convictions, which could be challenged by means of extraordinary appeals such as those at issue in the main proceedings.

90 In addition, although, as noted in paragraph 65 above, Decision 2006/928 is not applicable as such to tax evasion offences, such as those at issue in the main proceedings, the data presented by the Commission in its report of 22 November 2022 to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (COM(2022) 664 final), pursuant to Article 2 of that decision, nevertheless confirm the existence of a risk that many cases of serious fraud affecting the financial interests of the European Union may no longer be penalised because of the expiry of the corresponding limitation period for criminal liability. It is apparent from that report, mentioned by the referring court, that judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) could lead to ‘to the termination of criminal proceedings and the removal of criminal liability in a substantial number of cases’ and that the situation created entails the ‘risk that thousands of defendants would not face criminal liability’.

91 It may be inferred from the foregoing that the legal situation resulting from the application of judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) and of judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) entails a systemic risk of offences of serious fraud affecting the financial interests of the European Union going unpunished, in particular in cases whose complexity calls for a longer investigation by the criminal authorities.

92 The existence of such a systemic risk of impunity is incompatible with the requirements of Article 325(1) TFEU and Article 2(1) of the PFI Convention, as noted in paragraphs 83 to 86 above (see, to that effect, 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, paragraph 203).

93 In that regard, it is primarily for the national legislature to take the measures necessary to comply with those requirements, inter alia by adopting the necessary provisions and, where appropriate, by amending the existing provisions in order to ensure that the procedural rules applicable to the prosecution and punishment of offences of serious fraud affecting the financial interests of the European Union, including the rules governing the limitation period for criminal liability, comply with the provisions of Article 325(1) TFEU and Article 2(1) of the PFI Convention. Those rules must be designed in such a way that no systemic risk arises, for reasons inherent in those rules, that acts that may be categorised as such offences may go unpunished, and also to ensure that the fundamental rights of accused persons are protected (see, to that effect, judgments of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 41, and 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, paragraph 193).

94 A legal situation in which the legislation of a Member State governing the interruption of the limitation period for criminal liability has been invalidated and, accordingly, rendered ineffective by the constitutional court of that Member State, without the national legislature having remedied that situation during a period of almost four years, is incompatible with the obligation, referred to in paragraphs 83 to 86 above, to ensure that cases of serious fraud affecting the financial interests of the European Union, committed on the national territory, are punishable by criminal penalties that are effective and that act as a deterrent. Such a situation, which concerns a provision of general application that was applicable to all criminal proceedings and in which it was not foreseeable, either by the prosecuting authorities or by the criminal courts, that that provision would not be replaced after it had been declared unconstitutional, entails the inherent risk that numerous cases of serious fraud affecting the financial interests of the European Union will go unpunished because of the expiry of that limitation period, particularly in cases whose complexity calls for a longer investigation by the criminal authorities.

The obligations of the national courts

95 It is settled case-law that, in accordance with the principle of the primacy of EU law, the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, where it is unable to interpret national law in compliance with the requirements of EU law, to give full effect to the requirements of EU law in the dispute brought before it, by disapplying, as required, of its own motion, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means (judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 24; of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 61 and 62; and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 53).

96 In the present case, Article 325(1) TFEU and Article 2(1) of the PFI Convention are formulated in clear and precise terms and are not subject to any conditions, and they therefore have direct effect (see, to that effect, 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, paragraph 253 and the case-law cited).

97 Accordingly, it is, in principle, for the national courts to give full effect to the obligations under Article 325(1) TFEU and Article 2(1) of the PFI Convention and to disapply national provisions which, in connection with proceedings concerning serious fraud affecting the financial interests of the European Union, prevent the application of effective and deterrent penalties in order to counter such offences (see, to that effect, 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, paragraph 194 and the case-law cited).

98 It thus appears that, in principle, the national courts are required, in accordance with Article 325(1) TFEU and Article 2(1) of the PFI Convention, to disapply judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court), from which it follows that, during the period from 25 June 2018, the date of publication of judgment No 297/2018, to 30 May 2022, the date of entry into force of Decree-Law No 71/2022, Romanian law did not provide for any ground for interrupting the limitation period for criminal liability, in so far as those judgments have the effect that criminal liability is time-barred in a large number of cases of serious fraud affecting the financial interests of the European Union and, accordingly, as noted in paragraph 91 above, of creating a systemic risk of impunity for such offences.

99 Similarly, the national courts are required, in principle, in accordance with those provisions, to disapply judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), in so far as that judgment makes it possible to invoke the expiry of the limitation period for criminal liability, on the basis of the effects of judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) as a more lenient criminal law (*lex mitior*), in cases of serious fraud affecting the financial interests of the European Union and, accordingly, increases the systemic risk of such offences going unpunished.

100 However, it remains necessary to ascertain whether the obligation to disapply such judgments conflicts, in a situation such as that at issue in the main proceedings, with the protection of fundamental rights.

101 In that regard, it should be recalled, in the first place, that, as is apparent from settled case-law, the obligation to ensure the effective collection of the European Union's resources does not dispense national courts from the necessary observance of the fundamental rights guaranteed by the Charter and of the general principles of EU law, given that the criminal proceedings instigated for VAT offences amount to an implementation of EU law, within the meaning of Article 51(1) of the Charter (judgment of 17 January 2019, *Dzivev and Others*, C-310/16, EU:C:2019:30, paragraph 33, and, to that effect, 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, paragraph 204).

102 In the present case, it follows from the explanations provided by the referring court that the relevant national case-law in the context of the dispute in the main proceedings, summarised in paragraphs 23 to 32 above, is based on two separate principles, namely, first, as regards judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court), the principle that offences and penalties must be defined by law, as to its requirements relating to the foreseeability and precision of criminal law, and, secondly, as regards judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), the principle of retroactive application of the more lenient criminal law (*lex mitior*), including to final convictions handed down after 25 June 2018.

103 In the EU legal order, the principle that offences and penalties must be defined by law and the principle of the retroactive application of the more lenient criminal law (*lex mitior*) are enshrined in Article 49(1) of the Charter.

104 Pursuant to the principle that offences and penalties must be defined by law, provisions of criminal law must, inter alia, ensure accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty (see, to that effect, judgments of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 55, and of 11 June 2020, *Prokuratura Rejonowa w Słupsku*, C-634/18, EU:C:2020:455, paragraph 48).

105 In addition, the requirement that the applicable law must be precise, which is inherent in that principle, means that the law must clearly define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him or her criminally liable (judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 56, and, to that effect, judgment of 11 June 2020, *Prokuratura Rejonowa w Słupsku*, C-634/18, EU:C:2020:455, paragraph 49).

106 Lastly, in accordance with the last sentence of Article 49(1) of the Charter, the principle of the retroactive application of the more lenient criminal law (*lex mitior*) requires that, if, after the commission of an offence, the law provides for a lighter penalty, that penalty must be applied.

107 First of all, the application of the more lenient criminal law presupposes a succession of legal regimes over time and is based on the conclusion that that succession reflects, in the legal system concerned, a change of position either as regards the criminal classification of the act liable to constitute an offence or as regards the penalty to be applied to such an offence (see, to that effect, judgment of 7 August 2018, *Clergeau and Others*, C-115/17, EU:C:2018:651, paragraph 33 and the case-law cited).

108 Next, it follows from the Court's case-law that the rules governing limitation periods in criminal matters do not fall within the scope of Article 49(1) of the Charter (see, to that effect, judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraphs 54 to 57).

109 Consequently, the obligation for national courts to disapply judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) and judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) is not such as to undermine either the principle of foreseeability, precision and non-retroactivity of offences and penalties or the principle of the retroactive application of the more lenient criminal law (*lex mitior*), as guaranteed in Article 49(1) of the Charter.

110 In the second place, it must be borne in mind that, where, as in the present case, a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by EU law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 29; of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 47; and 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, paragraph 211).

111 In the present case, according to the explanations provided by the referring court, judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) and judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) are based on the premiss that, in Romanian law, the rules concerning the interruption of the limitation period for criminal liability fall within the scope of substantive criminal law and, consequently, are subject to the principle that offences and penalties must be defined by law and to the principle of the retroactive application of the more lenient criminal law (*lex mitior*), as guaranteed by the Romanian Constitution. Those principles must therefore be regarded as national standards of protection of fundamental rights, within the meaning of the preceding paragraph.

112 It follows from the considerations set out in paragraphs 108 and 109 above that those national standards of protection of fundamental rights are not liable, in cases such as those at issue in the main proceedings, to compromise the level of protection provided for by the Charter, as interpreted by the Court.

113 In this respect, 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 criminal law applicable, must be recalled (judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 51).

114 Those requirements of foreseeability, precision and non-retroactivity of criminal law constitute a specific expression of the principle of legal certainty. That fundamental principle of EU law requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular where they may have adverse consequences. That principle constitutes an essential element of the rule of law, which is identified in Article 2 TEU both as a founding value of the European Union and as a value common to the Member States (see, to that effect, judgments of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraphs 161 and 162, and of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 136 and 223).

115 In the present case, it should be observed that, by holding, first, that the Romanian legislature had infringed the constitutional principle of foreseeability and precision of criminal law by allowing procedural acts to interrupt the limitation period for criminal liability, even though those acts were not notified to the suspect or accused person, the Romanian Constitutional Court applied a national standard of protection of fundamental rights which supplements the protection against arbitrariness in criminal matters offered by EU law, under the principle of legal certainty. It also applied such a national standard of protection of fundamental rights when, secondly, it found, in essence, that the lack of action by the Romanian legislature to replace the provision of the Criminal Code relating to the interruption of that limitation period declared unconstitutional had given rise to a new situation that lacked clarity and foreseeability, in breach of that constitutional principle.

116 It is with regard to the importance of that protection against arbitrariness, in both the EU legal system and in the legal systems of the Member States, that the Court held, in essence, in paragraphs 58 to 62 of the judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936), that a national standard of protection intended to guarantee the requirements of foreseeability, precision and non-retroactivity of criminal law, including the rules on limitation periods for criminal offences, could preclude the obligation which – in the circumstances at issue in

the case which gave rise to that judgment – the national courts were under, pursuant to Article 325(1) and (2) TFEU, to disapply national provisions governing limitation periods in criminal matters, even though the application of those national provisions was liable to prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union.

117 It was also relevant, in that regard, that the rules governing limitation periods for criminal offences affecting the financial interests of the European Union which were at issue in that case had, as in the present case, not been the subject of full harmonisation, as noted in paragraph 81 above.

118 In the light of the considerations set out in paragraphs 113 to 117 above and as the Court held in its judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936), it must therefore be concluded that, in a case such as that at issue in the main proceedings, the Romanian courts are not required to disapply the national case-law referred to in paragraph 111 above, in accordance with Article 325(1) TFEU and Article 2(1) of the PFI Convention, notwithstanding the existence of a systemic risk of serious fraud offences affecting the financial interests of the European Union going unpunished, in so far as the judgments referred to in paragraph 111 above are based on the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements concerning the foreseeability and precision of criminal law, including the rules on limitation periods for criminal offences.

119 However, it is apparent from the explanations provided by the referring court that judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) is also based on the principle of the retroactive application of the more lenient criminal law (*lex mitior*) arising from judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court). According to the referring court's interpretation of judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), the latter court found that, in accordance with that principle, the effects of the absence of grounds for interrupting the limitation period for criminal liability under Romanian law, resulting from those two judgments of the Curtea Constituțională (Constitutional Court), could be applied retroactively to procedural acts which took place before 25 June 2018, that is to say the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court).

120 The application of a national standard of protection relating to the principle of the retroactive application of more lenient criminal law (*lex mitior*) must be distinguished from that of the national standard of protection examined by the Court in the judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936).

121 In that regard, it is apparent from the order for reference that the application of that first national standard of protection is liable to exacerbate the systemic risk that serious fraud affecting the financial interests of the European Union will escape any criminal penalty, in breach of Article 325(1) TFEU and Article 2(1) of the PFI Convention.

122 Contrary to the national standard of protection relating to the foreseeability of criminal law, which, according to the referring court, is limited to neutralising the interrupting effect of procedural acts which occurred during the period from 25 June 2018, the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court), to 30 May 2022, the date on which Decree-Law No 71/2002 entered into force, the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) permits, at least in certain cases, the neutralisation of the interrupting effect of procedural acts

which took place even before 25 June 2018 but after the entry into force of the Criminal Code on 1 February 2014, that is to say, during a period of more than four years.

123 In such circumstances, in view of the need to weigh the latter national standard of protection against the provisions of Article 325(1) TFEU and Article 2(1) of the PFI Convention, the application of that standard by a national court in order to call into question the interruption of the limitation period for criminal liability by procedural acts which took place before 25 June 2018, the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court), must be regarded as being liable to compromise the primacy, unity and effectiveness of EU law, within the meaning of the case-law referred to in paragraph 110 above (see, to that effect, 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, paragraph 212).

124 Consequently, it must be held that the national courts cannot, in the context of judicial proceedings seeking to impose criminal penalties for serious fraud offences affecting the financial interests of the European Union, apply the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*), as referred to in paragraph 119 above, in order to call into question the interruption of the limitation period for criminal liability by procedural acts which took place before 25 June 2018, the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court).

125 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 325(1) TFEU and Article 2(1) of the PFI Convention must be interpreted as meaning that the courts of a Member State are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability. However, those provisions of EU law must be interpreted as meaning that the courts of that Member State are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) which makes it possible, including in the context of appeals brought against final judgments, to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity.

The third question

126 By its third question, the referring court asks, in essence, whether the principle of primacy of EU law must be interpreted as precluding national legislation or a national practice under which the ordinary courts of a Member State are bound by the decisions of the constitutional court and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to EU law.

127 In that regard, it must be borne in mind that, although the organisation of justice in the Member States falls within the competence of those Member States, they are nevertheless required, when exercising that competence, to comply with their obligations deriving from EU law. The same

applies vis-à-vis the disciplinary liability of judges for failure to comply with the decisions of the constitutional court and of the supreme court of the Member State concerned (see, to that effect, 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, paragraph 133 and the case-law cited).

128 In accordance with the Court's settled case-law, the principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States. That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 18 May 2021, *Asociația* '*Forumul Judecătorilor din România*' *and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 244 and the case-law cited).

129 As recalled in paragraph 95 above, in accordance with the principle of primacy, the national court has a duty to give full effect to the requirements of EU law in the dispute brought before it, by disapplying, as required, of its own motion, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect, such as Article 325(1) TFEU, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means.

130 In the present case, the referring court states that it might be required, in the event that the existence of an incompatibility with EU law results from the answer to the first and second questions and if it transpires that an interpretation in conformity with EU law is not possible in the light of the pleas raised before it, to disapply the approaches adopted in the national case-law referred to in paragraph 111 above.

131 However, the referring court points out that the new disciplinary regime, provided for in Articles 271 and 272 of Law No 303/2022 on the rules governing judges and prosecutors, allows penalties to be imposed on judges who have, in bad faith or through gross negligence, disregarded judgments of the Curtea Constituțională (Constitutional Court) or judgments of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) ruling on appeals in the interest of the law.

132 In that regard, it must be recalled that a judgment in which the Court of Justice gives a preliminary ruling is binding on the national court as regards the interpretation of the provisions of EU law in question for the purposes of the decision to be given in the main proceedings (see, to that effect, judgments of 3 February 1977, *Benedetti*, 52/76, EU:C:1977:16, paragraph 26, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 74).

133 The national court, having exercised the discretion conferred on it by the second paragraph of Article 267 TFEU, must therefore, if necessary, disregard the rulings of a higher national court if it considers, having regard to the interpretation provided by the Court, that they are not consistent with EU law, if necessary refusing to apply the national rule requiring it to comply with the decisions of that higher court (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 75).

134 The national court which exercised the discretion or complied with its obligation to make a reference to the Court for a preliminary ruling under Article 267 TFEU cannot be prevented from forthwith applying EU law in accordance with the decision or the case-law of the Court, since otherwise the effectiveness of that article would be impaired. It must be added that the power to do everything necessary, when applying EU law, to disregard national rules or a national practice

which might prevent EU rules from having full force and effect is an integral part of the role of a court of the European Union which falls to the national court responsible for applying, within its jurisdiction, the EU rules (see, to that effect, 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, paragraph 257).

135 National rules or a national practice under which the decisions of the constitutional court and of the supreme court of the Member State concerned are binding on the ordinary courts, even where the latter are of the view, in the light of a judgment given on a request for a preliminary ruling by the Court of Justice, that the case-law established in those decisions is contrary to EU law, can prevent those ordinary courts from ensuring that full effect is given to the requirements of EU law; that preventive effect may be heightened by the fact any non-compliance with that case-law may be classified as a disciplinary offence under national law (see, to that effect. 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, paragraph 259).

136 As regards, more specifically, the disciplinary liability that judges may incur, under the legislation of a Member State, in the event of failure to comply with the decisions of the constitutional court and of the supreme court of that Member State, the fact that a national court performs the tasks entrusted to it by the Treaties and fulfils its obligations under the Treaties, by giving effect – in accordance with the principle of the primacy of EU law – to a provision of EU law such as Article 325(1) TFEU or Article 2(1) of the PFI Convention and to the interpretation given to it by the Court, cannot, by definition, be regarded as a disciplinary offence on the part of judges sitting in that court without that provision and that principle being infringed ipso facto (see, to that effect, judgments 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, paragraph 260, and of 13 July 2023, *YP and Others (Lifting of a judge's immunity and his or her suspension from duties)*, C-615/20 and C-671/20, EU:C:2023:562, paragraph 85 and the case-law cited).

137 It follows from the foregoing that the principle of primacy of EU law must be interpreted as precluding national legislation or a national practice under which the ordinary national courts of a Member State are bound by the decisions of the constitutional court and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of EU law having direct effect.

Costs

138 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995**

must be interpreted as meaning that the courts of a Member State are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability.

However, those provisions of EU law must be interpreted as meaning that the courts of that Member State are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) which makes it possible, including in the context of appeals brought against final judgments, to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity.

2. **The principle of the primacy of EU law**

must be interpreted as precluding national legislation or a national practice under which the ordinary national courts of a Member State are bound by the decisions of the constitutional court and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of EU law having direct effect.

[Signatures]

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* Language of the case: Romanian.

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i The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.