Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 29 June 2023 [1]

Case C-107/23 PPU [*Lin*] [i]

C.I.,
C.O.,
K.A.,
L.N.,
S.P.
v
Statul român

(Request for a preliminary ruling
from the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania))

(Reference for a preliminary ruling – Protection of the Union's financial interests – VAT fraud – Article 325(1) TFEU – PFI Convention – Directive (EU) 2017/1371 – Obligation to counter fraud affecting the Union's financial interests by taking dissuasive and effective measures – Decision 2006/928/EC – Mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption – Limitation period in criminal matters – Judgment declaring unconstitutional national provisions on the interruption of limitation periods in criminal law – Systemic risk of impunity – Protection of fundamental rights – Last sentence of Article 49(1) of the Charter – Principle of the retroactive application of the more lenient criminal law (*lex mitior)* – National standard of protection of fundamental rights – Duty on national courts to give full effect to judgments of the Curtea Constituțională (Constitutional Court) – Disciplinary liability of judges in the event of non-compliance with such decisions – Power to disapply decisions of the Curtea Constituțională (Constitutional Court) that conflict with EU law – Principle of the primacy of EU law)

1. In this request for a preliminary ruling, the referring court asks the Court to interpret a number of provisions of EU law to enable the former to decide whether it should uphold or dismiss extraordinary appeals brought by persons sentenced to imprisonment for tax evasion and establishment of an organised crime group.

[1] Original language: Spanish.

[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.

2. The dispute revolves around the compatibility with EU law of national rules governing limitation periods for criminal liability which, following the intervention of the Curtea Constituțională (Constitutional Court, Romania), did not provide, for a time, for the possibility of those periods being interrupted. According to the referring court, those rules could result in numerous criminal acts affecting the Union's financial interests going unpunished.

3. The answer to the questions referred for a preliminary ruling will require the Court to develop its still nascent case-law on the principle of the retroactivity of the more lenient criminal law (*lex mitior*), enshrined in the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

I. Legal framework

A. European Union law

1. PFI Convention [2]

4. Article 1(1) of the PFI Convention reads:

'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,

…'

5. Article 2 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] 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. 49; 'the PFI Convention').

2. Decision 2006/928/EC[3]

6. Article 1 states:

‘Romania shall, by 31 March of each year, and for the first time by 31 March 2007, report to the Commission on the progress made in addressing each of the benchmarks provided for in the Annex.

…’

7. The Annex reads as follows:

‘Benchmarks to be addressed by Romania, referred to in Article 1:

1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.

2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.

3. Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.

4. Take further measures to prevent and fight against corruption, in particular within the local government.’

3. Directive (EU) 2017/1371[4]

8. Article 2(2) reads:

‘In respect of revenue arising from VAT own resources, this Directive shall apply only in cases of serious offences against the common [system of value added tax (‘VAT’)]. For the purposes of this Directive, offences against the common VAT system shall be considered to be serious where the intentional acts or omissions defined in point (d) of Article 3(2) are connected with the territory of two or more Member States of the Union and involve a total damage of at least EUR 10 000 000.’

9. Under Article 16:

‘The Convention on the protection of the European Communities’ financial interests of 26 July 1995, 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.

[3] Commission Decision 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).

[4] Directive 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 PIF Directive’).

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

10. Article 17(1) provides:

'Member States shall adopt and publish, by 6 July 2019, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate the text of those measures to the Commission. They shall apply those measures from 6 July 2019.

…'

B. Romanian law

1. The Romanian Constitution

11. Article 15(2) provides that 'the law shall have legal effect only for the future, with the exception of the more lenient criminal or administrative law'.

12. Article 147 provides:

'1. The provisions of laws and decrees currently in force, as well as those of regulations, which are found to be unconstitutional shall cease to have legal effect 45 days after the publication of the judgment of the Constitutional Court, unless, in the intervening period, the Parliament or the Government, as appropriate, brings the unconstitutional provisions into line with the provisions of the Constitution. Throughout that period, the provisions found to be unconstitutional shall be suspended automatically.

…

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

2. Criminal law

(a) Criminal Code of 1969, as amended in 1996[5]

13. Under the first paragraph of Article 123, 'the limitation period … 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'.

[5] Codul Penal din 21 iulie 1968, republicat (Monitorul Oficial al României, Part I, No 65, of 16 April 1997) (Criminal Code of 21 July 1968, republished). That criminal code is the result of the text as consolidated by Lege nr. 140/1996, pentru modificarea și completarea Codului penal (Monitorul Oficial al României, Part I, No 289, of 14 November 1996) (Law No 140/1996 amending the Criminal Code) and was in force until 1 February 2014 ('the Criminal Code of 1969').

(b) Criminal Code of 2009[6]

14. Paragraph 1 of Article 5 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'.

15. Under paragraph 2 of Article 5, the preceding paragraph also applies where laws or any of the provisions thereof which have been found to be unconstitutional contain more lenient criminal provisions.

16. In accordance with paragraph 1 of Article 6, 'where a law providing for a lesser penalty has entered into force after the conviction has become final and before the enforcement in full of the custodial sentence or fine, the penalty imposed, if it exceeds the special upper limit provided for in the new law for the offence committed, shall be reduced to that upper limit'.

17. Under Article 154(1):

'The following limitation periods for criminal liability shall apply:

(a) 15 years, where the offence committed is punishable by life imprisonment or by a term of imprisonment of more than 20 years;

(b) 10 years, where the offence committed is punishable by a term of imprisonment of not less than 10 years and not more than 20 years;

(c) 8 years, where the offence committed is punishable by a term of imprisonment of not less than 5 years and not more than 10 years;

(d) 5 years, where the offence committed is punishable by a term of imprisonment of not less than 1 year and not more than 5 years;

(e) 3 years, where the offence committed is punishable by a term of imprisonment not exceeding 1 year or by a fine.'

18. Article 155 used to provide:

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

2. Each interruption shall cause the limitation period to run afresh.

…'

[6] Legea nr. 286/2009 privind Codul penal, of 17 July 2009 (Monitorul Oficial al României, Part I, No 510, of 24 July 2009) (Law No 286/2009 on the Criminal Code; 'the Criminal Code of 2009'). In force since 1 February 2014.

19. Decree-Law No 71 of 30 May 2022[7] amended Article 155 of the Criminal Code of 2009. Paragraph 1 of that article has since been worded as follows: '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'.

(c) Code of Criminal Procedure[8]

20. Under Article 426(b), an extraordinary appeal may be brought against a final criminal judgment where the defendant has been convicted despite evidence of the existence of a ground for discontinuance of the criminal proceedings.

(d) Judgment No 297/2018

21. By judgment No 297/2018 of 26 April 2018, published on 25 June 2018, the Curtea Constituțională (Constitutional Court), upholding a plea of unconstitutionality, found that the interruption of the limitation period for criminal liability on account of the performance in the proceedings of any procedural act, as provided for in Article 155(1) of the Criminal Code of 2009, was unconstitutional.

22. According to the Curtea Constituțională (Constitutional Court), that provision of the Criminal Code of 2009 lacked foreseeability and infringed the principle that offences and penalties must be defined by law, since the expression 'any procedural act' in that provision also covered acts which are not notified to the suspect or defendant. That circumstance prevented the suspect or defendant from knowing that the limitation period had been interrupted and that a new limitation period for criminal liability had begun to run.[9]

23. The Romanian legislature did not take steps to amend Article 155(1) of the Criminal Code of 2009 in the manner prescribed by the Curtea Constituțională (Constitutional Court), resulting in a body of inconsistent case-law of the ordinary courts on the interruption of limitation periods for criminal liability.[10]

(e) Judgment No 358/2022

24. By judgment No 358/2022 of 26 May 2022, published on 9 June 2022, the Curtea Constituțională (Constitutional Court), upholding a further plea of unconstitutionality, found that Article 155(1) of the Criminal Code of 2009 was unconstitutional.

25. That court made the following observations.

7 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 (*Monitorul Oficial al României*, Part I, No 531, of 30 May 2022) (Decree-Law No 71 of 30 May 2022 amending Article 155(1) of Law No 286/2009 on the Criminal Code; 'Decree-Law No 71/2022').

8 Legea nr. 135/2010 privind Codul de procedură penală (Monitorul Oficial al României, Part I, No 486, of 15 July 2010) (Law No 135/2010 on the Code of Criminal Procedure).

9 By contrast, the Curtea Constituțională (Constitutional Court) held that the previous legislative approach (enshrined in the first paragraph of Article 123 of the Criminal Code of 1969) satisfied the foreseeability requirements imposed by the Constitution, since it provided that only the performance of an act which, by law, had to be notified to the accused could interrupt the limitation period for criminal liability.

10 According to the order for reference, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) declared inadmissible the requests for interpretation of Article 155(1) of the Criminal Code of 2009 following judgment No 297/2018 and an extraordinary appeal in the interest of the law seeking an interpretation of that provision. That is reflected in its judgments No 5 of 21 March 2019 and No 25 of 11 November 2019, respectively.

– The legislature had not taken steps, as required by Article 147(1) of the Constitution, to bring the provisions found to be unconstitutional in judgment No 297/2018 into line with the Constitution and to enact provisions governing cases in which the limitation period for criminal liability is interrupted.

– In the absence of such legislative action, the judicial authorities could not themselves define the grounds for interrupting that limitation period. The application of Article 155(1) of the Criminal Code of 2009 lacked clarity and foreseeability, resulting in inconsistent judicial practice. The existing legal framework did not provide the legislative tools necessary to ensure the foreseeable application of Article 155(1) of the Criminal Code of 2009 following judgment No 297/2018.

– Consequently, positive Romanian law did not provide for any ground for interrupting the limitation period for criminal liability between the date of publication of judgment No 297/2018 and the entry into force of an enactment of the legislature expressly governing the grounds for interrupting that period. [11]

(f) Judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice)

26. 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), ruling on an appeal in the interest of the law, as thus described by the referring court, [12] made the following findings.

– The provisions on the interruption of limitation periods are rules of substantive criminal law. From the perspective of their temporal application, they are subject to the principle of non-retroactivity of offences and penalties, laid down in Article 3 of the Criminal Code of 2009, with the exception of more lenient provisions, in accordance with the *lex mitior* principle set out in Article 15(2) of the Romanian Constitution and Article 5 of the Criminal Code of 2009.

– Between 25 June 2018 (the date of publication of judgment No 297/2018, as clarified by judgment No 358/2022) and 30 May 2022, Article 155(1) of the Criminal Code of 2009 did not provide for any ground for interrupting the limitation period for criminal liability.

– A court adjudicating on an extraordinary appeal, based on the consequences of judgments No 297/2018 and No 358/2022, may not re-examine the limitation period for criminal liability if the appellate court has discussed and considered the effect of that ground for discontinuance of the criminal proceedings in the course of proceedings prior to judgment No 358/2022.

11 That enactment was passed shortly after publication of judgment No 358/2022 of the Curtea Constituțională (Constitutional Court) (see point 19 of this Opinion).

12 It would appear, from reading that judgment, that the case concerned, rather, a reference for a ruling on preliminary questions of law.

3. Legislation on the disciplinary regime for judges

27. Article 99(ș) of Law No 303/2004[13] provides that 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) in appeals in the interest of the law constitutes a disciplinary offence.

28. Article 271(s) of Law No 303/2022[14] states that 'the following shall constitute disciplinary offences: … the performance of duties in bad faith or as a result of gross negligence'.

29. Under Article 272 of Law No 303/2022:

'(1) A judge or prosecutor acts in bad faith where he or she knowingly infringes the rules of substantive or procedural law with the aim of causing detriment, or allowing detriment to be caused, to a person.

(2) A judge or prosecutor commits gross negligence where he or she commits a culpable, serious, unambiguous and inexcusable infringement of the rules of substantive or procedural law.

…'

II. Facts, dispute and questions referred for a preliminary ruling

30. By judgment No 285/AP of 30 June 2020,[15] the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania) finally convicted a number of individuals (C.O., C.I., L.N., K.A. and S.P.) of tax evasion and establishment of an organised crime group.

31. As regards the offence of tax evasion, the trial court found that, in the course of 2010, the persons convicted had omitted, wholly or in part, to record in their accounts the commercial transactions carried out and the income earned from the sale to national customers of gas oil purchased under the excise duty suspension regime. That caused a loss to the tax authorities, both as regards VAT and excise duty on gas oil.

32. The sentences imposed included imprisonment and the obligation to pay damages in respect of the tax loss, totalling 13 964 482 Romanian lei (RON) (approximately EUR 3 240 000), including VAT.

33. Two of the persons convicted (K.A. and S.P.) are currently serving prison sentences pursuant to the judgment of 30 June 2020.

34. The persons convicted brought an extraordinary appeal before the referring court (Article 426(b) of the Code of Criminal Procedure) against the judgment of 30 June 2020.

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

14 Legea nr. 303/2022 din 15 noiembrie 2022 privind statutul judecătorilor și procurorilor (published in the *Monitorul Oficial al României*, No 1102, of 16 November 2022) (Law No 303/2022 of 15 November 2022 on the rules governing judges and prosecutors).

15 The judgment of 30 June 2020 upheld judgment No 38/S of 13 March 2018 delivered by the Tribunalul Brașov (Regional Court, Brașov, Romania).

35. In their extraordinary appeal, they seek to have that judgment set aside on the ground that they were convicted despite the expiry of the limitation period for criminal liability. They rely, in that regard, on judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court).

36. The appellants put forward the following arguments.

– The principle of the more lenient criminal law should be applied to them. In respect of the offences for which they were convicted, the more lenient law entailed a shorter limitation period for criminal liability, which expired before the case was finally concluded. The limitation period for criminal liability came to light after the final criminal judgment, as a result of judgment No 358/2022, by which the Curtea Constituțională (Constitutional Court) declared Article 155(1) of the Criminal Code of 2009 to be unconstitutional and held that, during the period following the publication of judgment No 297/2018, domestic criminal legislation contained no grounds for interrupting the limitation period for criminal liability.

– The absence, in the period between the two judgments of the Curtea Constituțională (Constitutional Court), of grounds for interrupting the limitation period for criminal liability, as highlighted in judgment No 358/2022, in itself constitutes a more lenient criminal law. That more lenient criminal law should be applied to defendants who committed offences that were not finally judged before the date of publication of judgment No 297/2018. In those circumstances, if the grounds of interruption had not been taken into account, the 10-year limitation period set out in Article 154(1)(b) of the Criminal Code of 2009 would have expired before the judgment convicting them acquired the force of *res judicata*.

37. In the context of the extraordinary appeal, the Ministerul Public – Direcția Națională Anticorupție (Public Prosecutor's Office – National Anti-Corruption Directorate ('DNA'), Romania) requested the referring court to submit a question to the Court of Justice for a preliminary ruling in order to ascertain whether Article 325 TFEU, Decision 2006/928 and Article 49 of the Charter must be interpreted as permitting the disapplication of the constitutional line of authority deriving from judgment No 358/2022. It contends that the implementation of that judgment entails a systemic risk of impunity in cases where EU law applies.

38. The appellants, on the other hand, argued that EU law is not relevant in the present case, with the result that the request for a preliminary ruling is inadmissible. They also stated that the principle of the application of the more lenient criminal law has constitutional status and takes precedence over any rule of EU law.

39. The referring court points out that, if it were to uphold the appellants' claims, it would have to set aside their final convictions and discontinue the criminal proceedings, thereby preventing them from completing their sentences. On that basis, it sets out, in summary form, various reasons for disapplying in the present case the principle of the more lenient criminal law, guaranteed by the Romanian Constitution, the application of which would be contrary to EU law.

40. In those circumstances the Curtea de Apel Brașov (Court of Appeal, Brașov) submits the following questions to the Court of Justice 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 [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 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 [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 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 [Decision 2006/928], with reference to the last sentence of Article 49[(1)] of the [Charter], as in the situation in the main proceedings?'

III. Procedure before the Court

41. The request for a preliminary ruling was received at the Court on 22 February 2023, together with a request for the case to be dealt with under the expedited procedure.

42. After receiving confirmation from the referring court that two of the appellants in the main proceedings were serving prison sentences pursuant to the judgment of 30 June 2020 and that they would have to be released if the extraordinary appeals filed against their convictions were upheld, the Court decided to deal with the request for a preliminary ruling under the urgent procedure.

43. On 24 March 2023, the referring court sent the Court an addendum to its request for a preliminary ruling, which was notified to the interested parties so that they could take it into account in their observations.

44. Written observations were submitted by four of the appellants in the main proceedings (C.O., C.I., L.N. and S.P.), the Romanian Government and the European Commission.

45. The Romanian Government and the Commission took part in the hearing on 10 May 2023.

IV. Assessment

A. Admissibility

46. I am in no doubt that the three questions referred for a preliminary ruling are admissible, but I am unsure whether the same can be said of the addendum sent by the referring court on 24 March 2023.

47. In that addendum, the referring court asks the Court, if it answers the questions in the affirmative, to include reasons which would prevent the principle of non-discrimination set out in the Romanian Constitution from rendering the answer ineffective. [16]

[16] According to the referring court, the case-law of the Curtea Constituțională (Constitutional Court) has rendered numerous custodial sentences invalid, in the absence of grounds for interrupting the limitation period for criminal liability. That results in a situation of discrimination as regards, on the one hand, the appellants in this dispute and, on the other, convicted persons to whom the *lex mitior* principle does not apply.

48. The addendum in fact conceals a new, additional request for a preliminary ruling which, as C.I., C.O. and the Romanian Government point out, is hypothetical,[17] because it is not essential for the resolution of the main proceedings. The concerns behind it relate to judgments that have already been set aside by the Romanian courts pursuant to the case-law of the Curtea Constituțională (Constitutional Court). The appellants are not in that situation in the main proceedings.

B. First and second questions referred

49. By its first two questions, which may be answered together, the referring court asks, in essence, whether, in factual and legal circumstances such as those described by it, Article 325(1) TFEU, read in conjunction with Article 2 of the PFI Convention, Decision 2006/928 and Article 49 of the Charter, precludes the national provisions and case-law on the interruption of limitation periods for criminal liability.

50. Both questions start from the premiss that the application of domestic provisions in accordance with the constitutional case-law creates a risk that acts constituting serious fraud affecting the Union's financial interests will go unpunished. Against that backdrop, the referring court's reasoning cites, inter alia, the judgments of the Court in *Åkerberg Fransson*,[18] *Taricco and Others*,[19] *M.A.S. and M.B.*[20] and *Euro Box Promotion and Others*.[21]

1. Applicable provisions of EU law

51. First of all, the PFI Directive, Article 12 of which lays down common rules on limitation periods for criminal liability in respect of offences constituting fraud affecting the Union's financial interests, does not apply in the present case for the following reasons.

– Those common rules concern offences committed after 6 July 2019 (Article 17). The conduct penalised in this dispute dates from 2010.

– The PFI Directive governs serious offences against the common VAT system connected with the territory of two or more Member States which involve a total damage of over EUR 10 000 000 (Article 2(2)). The offences in this dispute involve lower amounts.

52. For its part, Directive 2006/112/EC,[22] read in conjunction with Article 4(3) TEU, does indeed require Member States to combat VAT fraud,[23] but it does not contain specific rules applicable to situations such as that in the main proceedings.

17 The Court may refuse to rule on a question referred by a national court 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* (emphasis added), 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 22 February 2022, *Stichting Rookpreventie Jeugd and Others*, C-160/20, EU:C:2022:101, paragraph 82).

18 Judgment of 26 February 2013 (C-617/10, EU:C:2013:105; 'the judgment in *Åkerberg Fransson*').

19 Judgment of 8 September 2015 (C-105/14, EU:C:2015:555; 'the judgment in *Taricco*').

20 Judgment of 5 December 2017 (C-42/17, EU:C:2017:936; 'the judgment in *M.A.S. and M.B.*').

21 Judgment of 21 December 2021 (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034; 'the judgment in *Euro Box Promotion*').

22 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

23 Judgments in *Åkerberg Fransson*, paragraph 25, and in *Taricco*, paragraph 36. In particular, 'it follows … from Articles 2 and 273 of [Directive 2006/112], read in conjunction with Article 4(3) TEU, that Member States are required to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and for preventing fraud' (judgment of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, paragraph 26).

53. As regards Article 2, the second subparagraph of Article 19(1) and Article 4(3) TEU, when considering the compatibility of national legislation and case-law with Article 325(1) TFEU, account may be taken of provisions of primary law establishing the principle of the protection of the Union's financial interests.

54. The same is true of the PFI Convention, which clarifies the principle established by Article 325 TFEU.

55. In addition to Article 325 TFEU, Decision 2006/928 [24] may also have a bearing on the answer. Although the offences punished here concern VAT fraud, the situation which arose as a result of the case-law of the Curtea Constituțională (Constitutional Court) on limitation periods for criminal liability also has an impact on corruption offences, particularly high-level ones, as the Commission noted in its 2022 CVM Report. [25]

56. With those clarifications in mind, my analysis below will consider:

– whether the Romanian constitutional case-law on the interruption of limitation periods for criminal liability is contrary to Article 325 TFEU and Decision 2006/928;

– if so, whether the *lex mitior* principle enshrined in the last sentence of Article 49(1) of the Charter could be applied to that case-law; and

– whether there exists in Romanian law a higher standard of protection of the *lex mitior* principle, to which the abovementioned constitutional case-law is related.

2. Article 325(1) TFEU and the case-law on the protection of the Union's financial interests

57. Pursuant to Article 325(1) TFEU, the Member States 'shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures … which shall act as a deterrent and be such as to afford effective protection in the Member States …'. [26]

58. The Member States are obliged in particular to adopt the measures necessary to guarantee the effective and comprehensive collection of own resources, including revenue from the application of a uniform rate to the harmonised VAT assessment bases. [27]

[24] On its nature, content and effects, see judgments 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, 'the judgment in *Asociația "Forumul Judecătorilor din România"*', paragraphs 152 to 178), and in *Euro Box Promotion*, paragraphs 155 to 175.

[25] COM(2022) 664 final of 22 November 2022, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism ('the 2022 CMV Report'), pp. 11-12 and 24.

[26] Judgments of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, 'the judgment in *Kolev*', paragraph 50); of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, 'the judgment in *Dzivev*', paragraph 25); and in *Euro Box Promotion*, paragraph 181.

[27] Judgments in *M.A.S. and M.B.*, paragraphs 31 and 32; in *Kolev*, paragraphs 51 and 52; and in *Euro Box Promotion*, paragraph 182.

59. The reference in Article 325 TFEU to 'fraud and any other illegal activities affecting the financial interests of the Union' implies, according to the Court, [28] that acts of corruption may be linked to cases of fraud and, conversely, the commission of fraud may be facilitated by acts of corruption. Financial interests can, in certain cases, be affected as a result of a combination of VAT fraud and acts of corruption. [29]

60. The concept of 'fraud' defined in Article 1 of the PFI Convention [30] covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules. [31]

61. As indicated above, the individuals in this case were convicted of tax evasion and establishment of an organised crime group, offences committed in connection with VAT and excise duties on gas oil. There is therefore no doubt that Article 325(1) TFEU applies and that we are dealing with serious fraud affecting the Union's financial interests: the amount defrauded exceeds EUR 50 000 (Article 2(1) of the PFI Convention).

62. When implementing Article 325(1) TFEU, Member States are free to choose the applicable penalties. They may take the form of administrative penalties, criminal penalties or a combination of the two. In any event, they must ensure that all VAT revenue is collected and, in doing so, that the Union's financial interests are protected. Criminal penalties may be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner. [32]

63. Romanian law lays down criminal penalties for fraud of that kind and, in the present reference for a preliminary ruling, there is no doubt that, as such, they are effective and dissuasive. It is also not in dispute that, in the abstract, the limitation periods [33] established by the Criminal Code of 2009 for that category of offences are appropriate, [34] that is to say, they are not a bar to the penalties being effective and dissuasive. Those periods exceed the minimum periods set out in Article 12 of the PFI Directive.

64. The issue raised does not therefore concern penalties, as framed under Romanian law, or the limitation periods established by the Criminal Code of 2009, but rather the legal impossibility of interrupting those periods following two judgments of the Curtea Constituțională (Constitutional Court).

65. For the highest Romanian courts, the limitation periods for criminal liability are, under Romanian law, a component of substantive law (and not, therefore, of procedural law). As I will examine below, that premiss is not contrary to EU law.

28 'in view of the importance that should be accorded to protecting the financial interests of the European Union, which in itself constitutes an objective of the latter …, the concept of "illegal activities" [of Article 352(1) TFEU] cannot be interpreted restrictively' (judgment of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, paragraph 45 and the case-law cited).

29 Judgment in *Euro Box Promotion*, paragraph 186, and Opinion of Advocate General Bobek in that case (EU:C:2021:170, points 98 and 99).

30 '… 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 Union] or budgets managed by, or on behalf of, the [European Union]'.

31 Judgment in *Taricco*, paragraph 41.

32 Judgment in *Taricco*, paragraph 39.

33 'It is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU, in the light of the considerations set out by the Court in paragraph 58 of the *Taricco* judgment. It is that legislature's task to ensure that the national rules on limitation in criminal matters do not lead to impunity in a significant number of cases of serious VAT fraud …' (judgment in *M.A.S, and M.B.*, paragraph 41).

34 As L.N. observed in his written observations, the limitation periods laid down in Article 154 of the Criminal Code of 2009 vary between 8 and 10 years for serious VAT fraud.

66. The consequence of those judgments and of the national legislature's inertia was that, for a time,[35] no act adopted in the course of criminal proceedings was capable of interrupting the limitation periods for criminal liability. The cessation of existence of the grounds for interruption is regarded as a 'more lenient criminal law' for the purposes of Article 15(2) of the Romanian Constitution and Article 5 of the Criminal Code of 2009. Despite the inconsistent case-law of the lower courts, that is the interpretation of Romanian law which the Court must abide by as regards that interval of time, since it is the binding interpretation of the Curtea Constituțională (Constitutional Court) deriving from judgments No 297/2018 and No 358/2022 and of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) deriving from judgment No 67/2022, delivered in the interest of the law.

67. Consequently, persons who have been convicted of serious fraud affecting the Union's financial interests and of other offences[36] may have their convictions set aside and be released: it will suffice if, between the commission of the acts and the final judgment imposing the penalties, the limitation periods provided for in the Criminal Code of 2009 expired (without the possibility of taking any ground for interruption into account).

68. The referring court[37] favours an interpretation of domestic law enabling the existence of a 'more lenient criminal law' to be excluded in this dispute.[38] That is, however, a matter for the referring court alone. The possibility of interpreting national law in conformity with EU law, even if it involves departing from the case-law of a higher court, is limited by the fact that interpretations of national law *contra legem* are not permitted.[39]

69. For my part, I do not see how the relevant domestic provisions and constitutional case-law on the interruption of limitation periods for criminal liability between 2018 and 2022 could be interpreted in a manner that does not conflict with the decisions of the Curtea Constituțională (Constitutional Court). Those decisions definitively state the law which applies in Romania and the precedents set are the 'last word' on national law.[40]

70. Having ruled out the possibility of any other interpretation, the question which arises is whether national law, resulting from the relevant provisions and the constitutional case-law interpreting those provisions, infringes the obligation to punish cases of serious fraud affecting the Union's financial interests by means of effective and dissuasive criminal penalties. In the order for reference, the referring court takes the view that it does.

35 Between 25 June 2018 (the date of official publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court)) and 30 May 2022 (the date of official publication and entry into force of Decree-Law No 71/2022).

36 In cases involving the application of the more lenient criminal law (on account of the grounds for interrupting the limitation period for criminal liability ceasing to exist) to persons convicted of driving without a licence, the Court, by order of 12 January 2023, *SNI* (C-506/22, not published, EU:C:2023:46), declared inadmissible a request for a preliminary ruling.

37 Order for reference, paragraph 121.

38 In a similar vein, the Commission states that, between 2018 and 2022, until the publication of Decree-Law No 71/2022, the ordinary courts interpreted judgment No 297/2018 of the Curtea Constituțională (Constitutional Court) as meaning that acts notified to the accused interrupted the limitation periods for criminal liability. Since that same approach was taken as regards the Criminal Code of 1969, a more lenient criminal law would not have existed during the period at issue, so that it would not be necessary to disapply the constitutional case-law.

39 Judgments of 4 March 2020, *Telecom Italia* (C-34/19, EU:C:2020:148, paragraphs 59 and 60), and of 4 May 2023, *Agenția Națională de Integritate* (C-40/21, EU:C:2023:367, paragraph 71).

40 A *contra legem* interpretation of Romanian law would be likely to infringe Article 147(4) of the Romanian Constitution, although that is a matter for the national courts alone to decide on.

71. Based on the information available in the present preliminary ruling procedure, that assessment could be regarded as well founded if, during the period under consideration, the situation in Romania resulted in a considerable number of offences affecting the Union's financial interests going unpunished, in terms which are not compatible with Article 325(1) TFEU.

72. According to the Court, the obligation to counter illegal activities affecting the Union's financial interests through effective and deterrent measures has direct effect. Article 325(1) TFEU imposes on Member States a precise obligation as to the result to be achieved that is not subject to any condition. [41]

73. It is for each Member State to ensure that the rules applicable to offences affecting the Union's financial interests are not designed in such a way that they present a systemic risk of impunity. They must do so, however, in a manner ensuring that the fundamental rights of the accused are protected. [42]

74. As is apparent from the order for reference, the Romanian legislature failed to fulfil that obligation for almost four years, by failing to amend Article 155(1) of the Criminal Code of 2009 following judgment No 297/2018 of the Curtea Constituțională (Constitutional Court). In the end, the amendment was made by Decree-Law No 71/2022 but, during the period which elapsed between that judgment and the decree-law, a large number of serious offences went unpunished, to the detriment of the Union's financial interests, on account of the retroactive effect of the *lex mitior*.

3. Decision 2006/928 and the systemic risk of impunity

75. Decision 2006/928 is an act adopted by the Commission on the basis of the Act of Accession, which forms part of EU primary law. More specifically, it is a decision within the meaning of the fourth paragraph of Article 288 TFEU.

76. The Commission's reports to the European Parliament and to the Council, drawn up under the Cooperation and Verification Mechanism (CVM) established by Decision 2006/928, must also be regarded as acts adopted by an EU institution having as their legal basis Article 2 of that decision. [43]

77. The Court has already examined the nature and legal effects of Decision 2006/928, pointing out that that decision is binding in its entirety on Romania as long as it has not been repealed.

78. The benchmarks in the annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law (Article 2 TEU) and are binding on it: Romania is required to take the appropriate measures to meet those benchmarks, taking due account, under the principle of sincere cooperation (Article 4(3) TEU), of the reports drawn up by the Commission and the recommendations made in those reports. [44]

41 Judgment in *Taricco*, paragraph 51.

42 Judgments in *Kolev*, paragraph 65, and in *Dzivev*, paragraph 31.

43 Judgments in *Asociația 'Forumul Judecătorilor din România'*, paragraph 149, and in *Euro Box Promotion*, paragraph 156.

44 Judgments in *Asociația 'Forumul Judecătorilor din România'*, paragraph 178, and in *Euro Box Promotion*, paragraph 175.

79. In particular, Decision 2006/928 established the CVM and laid down the benchmarks, referred to in Article 1 and detailed in the annex thereto, in the areas of reform of the judicial system and the fight against corruption in Romania. Those benchmarks are binding, with the result that Romania is subject to the specific obligation to address them and to refrain from implementing any measure which could jeopardise their being met. [45]

80. The referring court points out that the Romanian courts are discontinuing criminal proceedings, including as a result of extraordinary appeals, on account of the grounds for interrupting the limitation periods for criminal liability ceasing to exist between 2018 and 2022, as a result of the case-law of the Curtea Constituțională (Constitutional Court).

81. In that context, it recalls that the 2022 CVM Report found that the situation at issue could have a 'substantial impact on ongoing pre-trial and court proceedings', possibly with 'serious consequences' arising from the 'removal of criminal liability in a substantial number of cases'. [46] That is why the referring court is of the view that the situation affects the entire Romanian judicial system.

82. The situation described by the referring court and in the 2022 CVM Report reveals a risk of impunity in Romania for offences of serious fraud affecting the Union's financial interests (and for high-level corruption offences, which often go hand in hand) during the period from 2018 to 2022, although no precise figure is put on the number of cases affecting those financial interests. That risk arises from the absence of grounds for interrupting the limitation periods for criminal liability (and, at the same time, from the excessive length of the corresponding criminal proceedings, beyond the limitation period).

83. It is for the referring court to determine whether, as a question of fact, on account of the case-law of the Curtea Constituțională (Constitutional Court), there is a systemic risk in Romania of offences of serious fraud affecting the Union's financial interests and related corruption offences going unpunished. If there is, Romania would not fulfil the specific obligation to address the benchmarks set out in the annex to Decision 2006/928 (in particular, the benchmarks concerning the fight against corruption).

4. Article 49 of the Charter and the more lenient criminal law

84. Like Decision 2006/928, Article 325(1) TFEU has direct effect. Under the principle of the primacy of EU law, those provisions render automatically inapplicable any conflicting provision of national law. [47]

45 Judgments in *Asociația 'Forumul Judecătorilor din România'*, paragraph 172, and in *Euro Box Promotion*, paragraph 169.

46 'According to an estimate published by the DNA [National Anti-Corruption Directorate], 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 around [EUR]1.2 billion and the total amount of bribery and influence peddling at around [EUR]150 million. … Beyond corruption cases, according to an estimate provided by the specialised prosecution office handling terrorism and organised crime, a total of 605 ongoing cases, with a total estimated financial damage of over [EUR]1 billion, would be affected … Estimates from the General Prosecutor's office on other crimes were not available' (COM(2022) 664 final, p. 24).

47 Judgment in *Taricco*, paragraphs 50 to 52.

85. 'It is … for the competent national courts to give full effect to the obligations under Article 325(1) and (2) TFEU and to disapply national provisions, including rules on limitation, which, in connection with proceedings concerning serious VAT infringements, prevent the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union'. [48]

86. In the proceedings at issue, Article 325(1) TFEU and Decision 2006/928 apply, that is to say, 'EU law is implemented' for the purposes of Article 51(1) of the Charter.

87. Based on that premiss, the referring court will have to satisfy itself that the fundamental rights guaranteed by the Charter (in this case, the fundamental rights of the persons convicted) are respected. If, in the light of the foregoing, it decides not to apply the national case-law on the non-existence of grounds for interrupting the limitation period for criminal liability between 2018 and 2022, it must do so within the confines of the Charter, which is of no lesser value than Article 325(1) TFEU. [49]

88. The obligation to ensure effective recovery of the Union's own resources does not relieve national courts of their duty to ensure respect for the fundamental rights guaranteed by the Charter, where they are dealing with criminal proceedings for VAT offences in which EU law is being implemented. [50]

89. In that context, the fundamental right that could justify maintaining and applying the Romanian constitutional case-law in question is that enshrined in the last sentence of Article 49(1) of the Charter: the retroactivity of the more lenient criminal law or *lex mitior*.

90. The obligation to protect the Union's own resources in the field of VAT cannot, I repeat, relieve the national courts of their obligation to apply the *lex mitior*, as a principle linked to the principle of the legality of criminal offences and penalties, which is a crucial component of the rule of law. The rule of law is, in turn, one of the primary values on which the European Union is founded (Article 2 TEU).

91. Under Article 49(1) of the Charter, '… a heavier penalty [shall not] be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable'.

48 Judgment in *M.A.S. and M.B.*, paragraph 39.

49 Judgments in *Kolev*, paragraphs 68 and 71; in *Dzivev*, paragraph 33; and in *Euro Box Promotion*, paragraph 204.

50 Judgment in *M.A.S. and M.B.*, paragraph 52: 'That principle [that offences and penalties must be defined by law], as enshrined in Article 49 of the Charter, must be observed by the Member States when they implement EU law, in accordance with Article 51(1) of the Charter, which is the case where, in the context of their obligations under Article 325 TFEU, they provide for the application of criminal penalties for infringements relating to VAT. The obligation to ensure the effective collection of the Union's resources cannot therefore run counter to that principle'.

92. The principle of the retroactivity of the more lenient criminal law, enshrined in those terms in the Charter, is part of EU primary law [51] and features in international treaties concluded by the Member States of the European Union. [52]

93. According to the Court, 'the application of the more lenient criminal law necessarily involves a succession of laws over time and is based on the conclusion that the legislature changed its position either on the criminal classification of the act or the penalty to be applied to an offence'. [53]

94. The *lex mitior* principle is intended to be an exception to the prohibition on the retroactive application of criminal provisions. In so far as retroactivity *in bonam partem* favours the defendant, it cannot be argued that enforcement of the subsequent criminal law infringes the principle that offences and penalties must be defined by law (*nullum crimen, nulla poena sine lege*). Quite simply, the former law, in force when the acts constituting the offence took place, retroactively gives way to the new law and thus improves the situation in criminal terms of the defendant (or the person convicted).

95. Although its foundations are disputed, the *lex mitior* principle is based on the consideration that a person should not be convicted or kept in detention for conduct which, in the (revised) view of the legislature, is no longer deserving of the punishment provided for under the previous law. Thus, that person enjoys the *benefit* of the revised assessment of the legislature. [54]

96. It follows from the Explanations relating to the Charter (Article 52(3)) that the right recognised in Article 49 has the same meaning and scope as that guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

97. Since the ECHR did not expressly include that principle, the European Court of Human Rights ('the ECtHR') – in line with the case-law of the Court – inferred it from Article 7 thereof. [55]

98. According to the ECtHR:

— 'Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represented – now considered excessive'. [56]

51 The Court has held on previous occasions that that principle followed from the constitutional traditions common to the Member States and, therefore, had to be regarded as forming part of the general principles of EU law, which national courts must respect when applying national law: judgments of 7 August 2018, *Clergeau and Others* (C-115/17, EU:C:2018:651, 'the judgment in *Clergeau*', paragraph 26); of 6 October 2016, *Paoletti and Others* (C-218/15, EU:C:2016:748, 'the judgment in *Paoletti*', paragraph 25); and of 3 May 2005, *Berlusconi and Others* (C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraphs 68 and 69).

52 See, in particular, the first sentence of Article 15(1) of the International Covenant on Civil and Political Rights, opened for signature on 19 December 1966 (*UN Treaty Series*, Vol. 999, p. 171).

53 Judgments in *Clergeau*, paragraph 33, and in *Paoletti*, paragraph 27.

54 Opinions of Advocate General Kokott in Joined Cases *Berlusconi and Others* (C-387/02, C-391/02 and C-403/02, EU:C:2004:624, points 159 to 161), and in *Clergeau and Others* (C-115/17, EU:C:2018:240, points 39 and 40), and of Advocate General Bobek in *Scialdone* (C-574/15, EU:C:2017:553, points 155 to 160). Also see judgment in *Paoletti*, paragraph 27.

55 Judgment of the Grand Chamber of the ECtHR, 17 September 2009, *Scoppola v. Italy (No. 2)* (CE:ECHR:2009:0917JUD001024903, 'judgment in *Scoppola v. Italy*', § 108).

56 ECtHR, judgment in *Scoppola v. Italy*, § 108.

— '… the obligation to apply, from among several criminal laws, the one whose provisions were the most favourable to the accused was a clarification of the rules on the succession of criminal laws, which was in accord with another essential element of Article 7 [ECHR], namely the foreseeability of penalties'. [57]

— The principle of retroactivity implies that 'where there were differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment was rendered, the courts were required to apply the law whose provisions were most favourable to the defendant'. [58]

99. To date, however, neither the ECtHR nor the Court has precisely defined the exact scope of the *lex mitior* principle in cases such as the one here. The present reference for a preliminary ruling affords the Court the opportunity to develop its case-law with a view to determining whether it follows from the last sentence of Article 49(1) of the Charter that:

– the *lex mitior* principle applies to limitation periods for criminal liability and their grounds for interruption;

– an amendment to criminal legislation and the case-law of a national constitutional court are on the same footing for the purposes of applying the *lex mitior*;

– the *lex mitior* principle applies only to criminal proceedings in which a final judgment has not yet been handed down or, on the contrary, applies also to criminal proceedings concluded by judgments having the force of *res judicata* (thus affecting penalties at the stage of enforcement).

100. The truth is that the constitutional traditions of the Member States have 'little in common' when it comes to the *lex mitior* principle. Some countries make almost no provision for that basic criminal safeguard, while others confer on it extensive, even constitutional, protection (including Portugal, Romania, Italy and Spain). In my view, the Court should establish an independent, specific standard of protection under the last sentence of Article 49(1) of the Charter, offering its beneficiaries high safeguards and not only *de minimis* protection.

(a) Lex mitior *and interruption of the limitation period for criminal liability*

101. The last sentence of Article 49(1) of the Charter refers to the retroactivity of the law providing for 'a lighter penalty'. As indicated above, the Court has stated that the application of the more lenient criminal law is based on the conclusion that the legislature changed its position 'either on the criminal classification of the act or the penalty to be applied to an offence'. [59]

102. Those two references are not decisive, but they indicate that the *lex mitior* principle under the Charter applies only to rules of substantive criminal law, not to rules of criminal procedure.

57 ECtHR, judgment in *Scoppola v. Italy*, § 108.

58 ECtHR, judgment in *Scoppola v. Italy*, § 109, and 18 March 2014, *Öcalan v. Turkey (No. 2)* (CE:ECHR:2014:0318JUD002406903, § 175). See also ECtHR, 12 January 2016, *Gouarré Patte v. Andorra* (CE:ECHR:2016:0112JUD003342710, § 28); 12 July 2016, *Ruban v. Ukraine* (CE:ECHR:2016:0712JUD000892711, § 37); and 24 January 2017, *Koprivnikar v. Slovenia* (CE:ECHR:2017:0124JUD006750313, § 49).

59 Judgments in *Clergeau*, paragraph 33, and in *Paoletti*, paragraph 27.

103. If that is so, it will be necessary to determine in each case whether the limitation periods and their interruptions are substantive in nature or purely procedural, for the purposes of Article 49 of the Charter. That distinction is important because the rules of criminal procedure normally abide by the maxim *tempus regit actum*.

104. According to the case-law of Romania's highest courts, in Romania, the rules governing limitation periods in criminal law are substantive in nature. Nothing in EU law precludes that national case-law, as the Court acknowledged in its judgment in *M.A.S. and M.B.*

105. The protection of the Union's financial interests by the enactment of criminal penalties falls within the shared competence of the European Union and the Member States within the meaning of Article 4(2) TFEU.

106. At the material time, the limitation rules applicable to VAT-related criminal proceedings had not been harmonised by the EU legislature.[60] Member States were free to provide that, in their legal systems, the rules on limitation periods for criminal liability and their interruptions were to fall under substantive criminal law.[61]

107. In the absence of harmonisation of the rules on limitation periods for criminal liability in respect of offences affecting the Union's financial interests, it is therefore for the law of each Member State to determine whether the limitation rules are of a procedural or substantive nature.[62]

108. It is true that, in its judgment in *Taricco*, the Court decided that the rules on limitation periods for criminal liability were *procedural* in nature, as the ECtHR had indicated.[63] In other cases, however, the Court has taken a different view with regard to limitation periods.[64]

109. The ECtHR had tended, in its case-law, to regard those rules as being procedural in nature, in so far as they do not define offences or the penalties which they attract, but merely lay down a precondition for the investigation of the case.[65] However, the ECtHR has found that Article 7 ECHR is infringed where a defendant is convicted of an offence which is already time-barred.[66]

60 At a later stage, Article 12 of the PFI Directive partially harmonised the limitation rules applicable to that type of offence, but did not clarify whether the rules on limitation periods for criminal liability are substantive or procedural in nature.

61 Like the definition of offences and the determination of penalties, the rules of which are also subject to the principle that offences and penalties must be defined by law (judgment in *M.A.S. and M.B.*, paragraph 45).

62 In Belgium, Germany and France, limitation rules are regarded as being of a procedural nature. By contrast, in Greece, Spain, Italy, Latvia, Sweden and Romania, those rules fall under substantive criminal law. In Poland and Portugal, they are both substantive and procedural rules.

63 Judgment in *Taricco*, paragraphs 55 to 57.

64 Judgment of 22 June 2022, *Volvo and DAF Trucks* (C-267/20, EU:C:2022:494, paragraph 46): '… unlike procedural time limits, the limitation period, by resulting in the extinction of the legal action, is a matter of substantive law since it affects the enforceability of a subjective right which the person concerned can no longer effectively assert before the courts'. That is why the Court accords substantive rather than procedural status to Article 10 ('Limitation periods') of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

65 ECtHR, 22 June 2000, *Coëme and Others v. Belgium* (CE:ECHR:2000:0622JUD003249296, § 149); 12 February 2013, *Previti v. Italy* (CE:ECHR:2013:0212DEC000184508, § 80); and 22 September 2015, *Borcea v. Romania* (CE:ECHR:2015:0922DEC005595914, § 64).

66 Advisory opinion P16-2021-001 of 26 April 2022 on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture, §§ 72 to 77, and ECtHR, 18 June 2020, *Antia and Khupenia v. Georgia* (CE:ECHR:2020:0618JUD000752310, §§ 38 to 43).

110. In its judgment in *M.A.S. and M.B.*,[67] the Court (rightly in my view) provided the following nuances to the judgment in *Taricco*.

– It referred to the case-law of the ECtHR on Article 7(1) ECHR, according to which provisions of criminal law must comply with certain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty.[68]

– It made clear that the condition that the applicable law must be precise implies that legislation 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 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.[69]

– It pointed out that the requirements of foreseeability, precision and non-retroactivity inherent in the principle that offences and penalties must be defined by law apply also (in Italy) to the limitation rules for criminal offences relating to VAT.

111. In the light of the judgment in *M.A.S. and M.B.*, my view is that as long as there is no harmonisation in EU law,[70] each Member State may continue to accord substantive status to the rules governing limitation periods for criminal liability (including, of course, those governing the interruption of limitation periods). By the same token, such rules are subject to the *lex mitior* principle set out in the last sentence of Article 49(1) of the Charter.

(b) Lex mitior *and decisions of the constitutional courts*

112. In addition to finding that limitation periods for criminal liability form part of substantive criminal law, the Curtea Constituțională (Constitutional Court) declared that Article 155 of the Criminal Code of 2009, concerning the interruption of limitation periods, was unconstitutional. As a result of that case-law, between 25 June 2018 and 30 May 2022, those periods ran without any possibility of interruption.

113. It could be argued that the decisions of a constitutional court are not a 'more lenient criminal law', as they are not, strictly speaking, legislative measures adopted by a Member State. However, I think that that objection must be overruled.

114. The Curtea Constituțională (Constitutional Court), in declaring that Article 155 of the Criminal Code of 2009 was unconstitutional, acted as a 'negative legislature'.[71] In States with a concentrated constitutional review, declarations that laws are unconstitutional have a value and a binding force analogous to the laws themselves which are declared to be inapplicable (and, where appropriate, invalid) in whole or in part on the ground that they are incompatible with the

67 Judgment in *M.A.S. and M.B.*, paragraphs 54 to 58.

68 ECtHR, 15 November 1996, *Cantoni v. France* (CE:ECHR:1996:1115JUD001786291, § 29); 7 February 2002, *E.K. v. Turkey* (CE:ECHR:2002:0207JUD002849695, § 51); 29 March 2006, *Achour v. France* (CE:ECHR:2006:0329JUD006733501, § 41); and 20 September 2011, *OAO Neftyanaya Kompaniya Yukos v. Russia* (CE:ECHR:2011:0920JUD001490204, §§ 567 to 570).

69 Judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 162).

70 The Court cannot implement, through its case-law, a harmonisation which the EU legislature was unable to carry out, however desirable it may be in order to achieve greater effectiveness in the prosecution of serious offences affecting the Union's financial interests.

71 Kelsen, H., 'La garantie juridictionnelle de la constitution (la justice constitutionnelle)', *Revue du droit public et de la science politique en France et à l'étranger*, 1928, pp. 197-257.

national constitution. In those countries, declarations that laws are unconstitutional have *erga omnes* effect and entail the disappearance in whole or in part of such laws from the legal order (Spain, Poland, Portugal, Lithuania, Romania, Germany and Italy).

115. As such, for the purposes of the retroactive application of the *lex mitior*, I see no difference between the repeal in whole or in part of a criminal law by another subsequent law (by decision of the legislature) and the expulsion from the legal order, also in whole or in part, of that law by a declaration of unconstitutionality (by decision of a constitutional court).[72]

116. Accordingly, a declaration of unconstitutionality such as the one made by the Curtea Constituțională (Constitutional Court) in judgments No 297/2018 and No 358/2022 is tantamount, in substance, to a legislative amendment for the purposes of applying the *lex mitior* principle. Such a declaration is binding on all public authorities, including the courts,[73] although the latter continue to have jurisdiction to assess whether or not a national provision which a constitutional court has declared to be consistent with the Constitution is compatible with EU law.[74]

117. In the present case, judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) settle a question of Romanian constitutional law and do not rule on its compatibility with EU law or 'challenge' the primacy of EU law.

118. Where the Court of Justice refers to the 'succession of laws over time', the word 'laws' is used in a broad sense. Naturally, that term includes laws enacted by the Member State's legislative bodies, but it also covers changes to those laws as a result of declarations of unconstitutionality made by a constitutional court. To my mind, that statement is more consistent with the obligation to refrain from interpreting the rights protected by the Charter in such a way as to restrict their essence.

119. My proposed interpretation is not at variance with the ECtHR's judgment in *Ruban v. Ukraine*. That case concerned a possible breach of the *lex mitior* principle by the Ukrainian State as a result of a judgment of its constitutional court. Although the ECtHR found that Article 7 ECHR had not been infringed, it examined the declaration of unconstitutionality as if it were a legislative change, without asserting that that constitutional case-law did not entail a succession of 'laws' over time.[75]

72 In the same vein, see the judgment of the Cour de cassation, chambre criminelle (Criminal Chamber, Court of Cassation, France) of 8 June 2021, No 20-87.078 (FR:CCASS:2021:CR00864): '*Decisions of the Conseil constitutionnel [(Constitutional Council, France)]* binding on public authorities and on all administrative authorities and courts under Article 62 of the Constitution, declarations of non-conformity or the interpretative reservations contained therein, the effect of which is that an offence ceases, within the time limits and subject to the conditions and restrictions established therein, to be criminalised, *must be treated as laws for the purposes of applying the second paragraph of Article 112-4 of the Criminal Code*' (emphasis added). The abovementioned article of the French Criminal Code provides that the enforcement of a penalty must cease where that penalty was imposed for conduct which, under a law post-dating the judgment, is no longer regarded as constituting a criminal offence.

73 The Court has restated that Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 do not preclude national rules or a national practice under which the decisions of a constitutional court are binding on the ordinary courts. That statement is based on the assumption that national law guarantees the independence of the constitutional court from, in particular, the legislature and the executive. There is nothing in the requests for a preliminary ruling submitted in other cases or in this case to suggest that the Curtea Constituțională (Constitutional Court), which is responsible, in particular, for reviewing the constitutionality of laws and decrees and for resolving legal disputes of a constitutional nature between public authorities, in accordance with Article 146(d) and (e) of the Romanian Constitution, does not satisfy the requirements of independence established by EU law (see, to that effect, judgments in *Euro Box Promotion*, paragraphs 230 and 232, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, 'judgment in *RS*', paragraph 44).

74 Judgment in *RS*, paragraphs 45 and 46.

75 ECtHR, 12 July 2016, *Ruban v. Ukraine* (CE:ECHR:2016:0712JUD000892711, §§ 41 to 46).

(c) Lex mitior *and final criminal judgments*

120. In its judgment in *Scoppola v. Italy*, the ECtHR appeared inclined to limit the application of the *lex mitior* to criminal proceedings in which a final judgment has not yet been handed down.[76] However, in a number of subsequent cases, it has also extended that principle to final judgments, provided that national law envisages such a possibility.[77]

121. At first sight, it might be thought that the Court of Justice has also limited the *lex mitior* principle to cases where final judgment has not yet been handed down.[78] I think, however, that that reaction would be overly hasty given that the national legislation at issue in the judgment in *Delvigne* afforded convicted persons the possibility of a reassessment, in accordance with the new law, of the situation resulting from a prior final criminal conviction.

122. In my view, the *lex mitior* should also apply to final criminal judgments in the process of enforcement. I admit that that is not the case in all EU Member States, although it is the approach taken by some of them.[79] Even in Member States where, as a general rule, the *lex mitior* does not apply to criminal judgments having the force of *res judicata*, there are many exceptions to that rule. Thus, it is often the case that the retroactive effect *in melius* is extended to such judgments where provision is made to that effect in new criminal legislation, where conduct is decriminalised,[80] or where a constitutional court declares a criminal law to be unconstitutional.[81]

123. In any event, the principle set out in the last sentence of Article 49(1) of the Charter has an autonomous meaning, not dependent on the multiple approaches taken by the Member States, and the level of protection which it must provide is a high one and not only *de minimis*, as I have already suggested.

124. It would be illogical if the legislature's revised values (or punitive criteria) applied only to defendants or the accused and not to persons who, for similar acts, are serving final sentences. The lack of logic is most striking where conduct which has already been punished is decriminalised by a later law (*abolitio criminis*). It would be anathema to right-minded legal consciousness if, in such a situation, purely temporal reasons were to dictate that persons finally convicted of such conduct should remain in prison, while the perpetrators of the same conduct, still awaiting judgment, escape criminal liability.

76 ECtHR, judgment in *Scoppola v. Italy*, § 109: 'where there were differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment was rendered, the courts were required to apply the law whose provisions were most favourable to the defendant'.

77 ECtHR, 12 January 2016, *Gouarré Patte v. Andorra* (CE:ECHR:2016:0112JUD003342710, §§ 33 to 36); 12 July 2016, *Ruban v. Ukraine* (CE:ECHR:2016:0712JUD000892711, § 39); and 24 January 2017, *Koprivnikar v. Slovenia* (CE:ECHR:2017:0124JUD006750313, § 49).

78 Judgment of 6 October 2015, *Delvigne* (C-650/13, EU:C:2015:648, paragraph 56).

79 Under Article 23(2) of the Spanish Criminal Code, criminal laws favouring the offender have retroactive effect even if, on the date of their entry into force, the person concerned has been finally judged and is serving his or her sentence. Similar provisions exist in the legal systems of Lithuania, Portugal and Poland.

80 As provided for, for example, in the second paragraph of Article 112-4 of the French Criminal Code and Article 2(2) of the Italian Criminal Code.

81 In Germany, the Code of Criminal Procedure of 7 April 1987 (BGBl. I, p. 1074 et seq., particularly p. 1319), as amended by the Law of 25 March 2022 (BGBl. I, p. 571), allows a convicted person to request the reopening of criminal proceedings which have already been disposed of by a judgment having the force of *res judicata* where that judgment is based on a provision which has been declared by the Bundesverfassungsgericht (Federal Constitutional Court, Germany) to be unconstitutional and incompatible with the Basic Law, or invalid or incompatible with that court's interpretation of the Basic Law. See Schmidt-Bleibtreu, Klein, Bethge, *Bundesverfassungsgerichtsgesetz*, 62nd edition, 2022, C.H. Beck, Munich, note 25, paragraph 79.

125. The same criterion of fairness and consistency which the *lex mitior* entails for defendants or accused may be transposed to persons who have already been convicted. It is unreasonable, I repeat, for two persons who committed similar acts on the same day to benefit – or not – from that principle simply because criminal proceedings were concluded more swiftly in respect of one of them, resulting in a final conviction, while they were more protracted in respect of the other, not yet finally convicted.

126. The rationale behind the principle of the retroactivity of the more lenient criminal law must also apply to final criminal judgments, so as to avoid inconsistencies such as that mentioned above. It is true, however, that that approach would require there to be a procedure for reviewing convictions having the force of *res judicata*, but that does not seem to me to be an insurmountable obstacle. It is not an obstacle where conduct previously classified as a criminal offence is decriminalised and I see no reason why it should be in other cases involving a succession of laws over time. [82]

127. In order for final judgments to be reviewed as a consequence of the *lex mitior*, domestic law must provide a procedural mechanism enabling such review to take place, at the request of the convicted person. In Romania, that mechanism is, according to the order for reference, the extraordinary appeal provided for in Article 426(1)(b) of the Romanian Code of Criminal Procedure, subject to the limits set out in judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice).

(d) Interim conclusion

128. In short, I propose an interpretation of the principle of the retroactivity of the more lenient criminal law, enshrined in the last sentence of Article 49(1) of the Charter, which:

– covers the rules governing the interruption of limitation periods for criminal liability where national criminal law accords substantive status to those rules;

– treats amendments to criminal legislation as a result of a declaration of unconstitutionality made by a national constitutional court in the same way as the succession of criminal laws over time; and

– applies to ongoing criminal proceedings and final judgments where provided for by national law and even generally.

129. In the present case, the principle of the retroactivity of the more lenient criminal law, established by the last sentence of Article 49(1) of the Charter, justifies releasing from criminal liability convicted persons who, in the past, had been subject to rules governing the interruption of limitation periods for criminal liability which were subsequently declared unconstitutional, provided that areas to which EU law applies are at play. That release from criminal liability therefore covers offences of serious fraud affecting the Union's financial interests, contrary to Article 325 TFEU and Decision 2006/928.

[82] The application of the *lex mitior* may be adjusted in cases of, for instance, purely temporary laws, laws only establishing financial penalties, or laws enacted to address exceptional situations which subsequently cease to exist.

130. Consequently, EU law does not require, in a situation such as the one described above, that the case-law of the Curtea Constituțională (Constitutional Court) at issue be disapplied, even though its effects may result in the perpetrators of some of those offences going unpunished.

5. *Higher standard of protection of the* lex mitior *principle in Romanian law*

131. If the Court were to disagree with my proposed approach and take the view that the retroactivity of the more lenient criminal law under the last sentence of Article 49(1) of the Charter does not apply in this case, it would be necessary to consider whether Romanian law provides for a higher standard of protection of the *lex mitior* principle.

132. A court of a Member State may be confronted, as here, with a situation in which it is called on to assess the compatibility with fundamental rights of a national provision or measure implementing EU law within the meaning of Article 51(1) of the Charter.

133. Where, in that context, Member States' actions are not entirely determined by EU law, Article 53 of the Charter confirms that national authorities and courts remain free to apply national standards of protection of fundamental rights.

134. In Romanian law, the national standard of protection of the principle of retroactivity of the more lenient criminal law is set by Article 15(2) of the Constitution and Article 5(1) of the Criminal Code of 2009, the scope of which has been defined by the Curtea Constituțională (Constitutional Court).

135. As I have already pointed out, according to the case-law of the Curtea Constituțională (Constitutional Court) and the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), the rules governing limitation periods for criminal liability and those governing the interruption of those periods are substantive in nature and are therefore subject to the *lex mitior* principle. [83]

136. Judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court) made clear that, between 25 June 2018 and 30 May 2022, there were no grounds for interrupting the limitation periods for criminal liability, in accordance with that principle.

137. If that national standard of protection of the principle of the retroactivity of the more lenient criminal law, established by Romanian law, is to apply, the Court of Justice requires two conditions to be met: [84]

– the level of protection provided for by the Charter, as interpreted by the Court, must not be compromised; and

– the primacy, unity and effectiveness of EU law must also not be compromised.

[83] See, in particular, judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice).

[84] Judgments in *Åkerberg Fransson*, paragraph 29; of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60); in *M.A.S. and M.B.*, paragraph 47; of 29 July 2019, *Pelham and Others* (C-476/17, EU:C:2019:624, paragraph 80); and in *Euro Box Promotion*, paragraph 211.

138. EU law has not established any specific rules as regards the first condition. The application of the Romanian standard of protection does not therefore compromise the level of protection provided for by the last sentence of Article 49(1) of the Charter.

139. Determining whether the standard of protection of the *lex mitior* principle provided for by Romanian law compromises the unity, primacy and effectiveness of EU law is a more difficult task, as the precedents set by the judgments in *M.A.S. and M.B.*, on the one hand, and *Euro Box Promotion*, on the other, are not easily reconciled.

140. In its judgment in *M.A.S. and M.B.*, the Court:

– acknowledged that the Italian Republic was, at that time, free to provide that, in its legal system, the rules governing limitation periods for criminal liability, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby, like those rules, subject to the principle that offences and penalties must be defined by law; [85]

– pointed out that the Italian Republic was entitled to apply a higher national standard of protection of the principle that offences and penalties must be defined by law than the standard established by EU law, provided that it did not compromise the unity, primacy and effectiveness of EU law; [86]

– stated that, in the light of the arguments of the Italian Constitutional Court concerning the negative effects of applying the judgment in *Taricco* for the principle that offences and penalties must be defined by law established by the Italian Constitution, it is for the national court to ascertain whether the disapplication of the provisions of the Criminal Code (which prevented the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the Union's financial interests) led to a situation of uncertainty in the Italian legal system as regards the determination of the applicable limitation rules, in breach of the principle that offences and penalties must be defined by law; [87]

– found that, if the national court were to come to the view that the obligation to disapply the provisions of the Criminal Code governing limitation periods for criminal liability conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied. [88]

141. The Court thus accepted a limit on the application of the principle of the primacy of EU law: national courts may apply domestic provisions which are contrary to EU law in order to protect a fundamental right (that offences and penalties must be defined by law) guaranteed to a higher standard under national law than the standard set under EU law. [89]

85 Judgment in *M.A.S. and M.B.*, paragraphs 45 and 58.

86 Judgment in *M.A.S. and M.B.*, paragraphs 47 and 48.

87 Judgment in *M.A.S. and M.B.*, paragraphs 49, 50 and 59.

88 Judgment in *M.A.S. and M.B.*, paragraphs 59 and 61.

89 Judgment in *M.A.S. and M.B.*, paragraphs 41, 42 and 60.

142. The judgment in *M.A.S. and M.B.* does not therefore require national courts to give absolute priority to the protection of the Union's financial interests, to the point that they are given precedence over a fundamental right such as the principle that offences and penalties must be defined by law.

143. In its judgment in *Euro Box Promotion*, the Court examined Romanian constitutional legislation and case-law [90] which, like that Italian law considered in the judgment in *M.A.S. and M.B.*, were capable of giving rise to a systemic risk of acts constituting serious fraud affecting the Union's financial interests going unpunished, to the detriment of the obligation laid down in Article 325(1) TFEU. At the end of that analysis, it made the following findings.

– The referring court must ensure the necessary observance of the fundamental rights enshrined in the first sentence of the second paragraph of Article 47 of the Charter, namely the entitlement of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

– '… an irregularity committed during the composition of panels [of a court] entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the panel composition process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned'. [91]

– The practice concerning the specialisation and the composition of the panels hearing cases in Romania related to corruption did not constitute an infringement of the first sentence of the second paragraph of Article 47 of the Charter, with the result that the situation was different from the one decided on by the judgment in *M.A.S. and M.B.* Accordingly, '… the requirements arising from the first sentence of the second paragraph of Article 47 of the Charter do not preclude the non-application of the [constitutional] case-law'. [92]

– Romanian constitutional legislation and case-law concerning the requirement that judgments on appeal in corruption cases must be given by panels all the members of which were selected by the drawing of lots may constitute a national standard of protection of fundamental rights. [93]

– Such a national standard of protection could compromise the primacy, unity and effectiveness of EU law, in particular Article 325(1) TFEU, read in conjunction with Article 2 of the PFI Convention, and Decision 2006/928, because it would entail a systemic risk of acts

[90] According to that constitutional legislation and case-law, judgments in matters of corruption and VAT fraud which were not delivered, at first instance, by panels specialised in such matters or, on appeal, by panels all the members of which were selected by drawing lots, are rendered absolutely null and void, such that the cases of corruption and VAT fraud must, as the case may be, further to an extraordinary appeal against final judgments, be re-examined at first or second instance.

[91] Judgment in *Euro Box Promotion*, paragraph 206. In paragraph 207, the Court added: '… although the Curtea Constituțională (Constitutional Court) found, in the decisions at issue in the main proceedings, that the earlier practice of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), based inter alia on the Regulation on organisation and administrative functioning, relating to the specialisation and the composition of the panels hearing cases related to corruption, was inconsistent with the applicable national provisions, it does not appear that that practice was vitiated by a manifest breach of a fundamental rule of Romania's judicial system, such as to call into question the fact that the panels of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) hearing cases related to corruption, such as those established in line with the practice adopted prior to those decisions of the Curtea Constituțională (Constitutional Court), constitute a tribunal "previously established by law"'.

[92] Judgment in *Euro Box Promotion*, paragraph 209.

[93] Judgment in *Euro Box Promotion*, paragraph 210.

constituting serious fraud affecting the Union's financial interests or corruption in general going unpunished. [94]

144. In my view, the present dispute more closely resembles the dispute giving rise to the judgment in *M.A.S. and M.B.* than that giving rise to the judgment in *Euro Box Promotion*. In the latter judgment, the Court did not find that the first sentence of the second paragraph of Article 47 of the Charter had been infringed by the practice concerning the composition of the panels of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) specialising in corruption, which the Curtea Constituțională (Constitutional Court) declared to be unconstitutional. Nor did Romanian law contain a clear national standard of protection of the right to an independent tribunal previously established by law. In response to a question from the Court, one of the parties at the hearing suggested that it did, but the Romanian Government and the Commission denied that that was the case. [95]

145. In any event, a claim of a systemic risk of serious offences affecting the Union's financial interests going unpunished does not seem to me to justify restricting a fundamental right such as the retroactive application of the more lenient criminal law, where the standard of protection of that right in the constitutional system of a Member State is higher than the standard set by the last sentence of Article 49(1) of the Charter.

146. In short, if the Court does not endorse my proposed interpretation of the last sentence of Article 49(1) of the Charter, I submit that the case-law of the Curtea Constituțională (Constitutional Court) on the non-existence of the limitation periods for criminal liability between 2018 and 2022 established a higher national standard of protection of the principle of the retroactivity of the more lenient criminal law than the standard set by that article of the Charter.

147. It is true that the application of that national standard may entail a risk of impunity for persons who have been tried for serious fraud affecting the Union's financial interests, as I have already examined and as the referring court points out.

148. However, the precedent set in the judgment in *M.A.S. and M.B.* gave rise to the same risk of impunity and I see no reason why it should be avoided in the present case. The national standard of protection of the *lex mitior* principle is clearly higher here, as it was in the judgment in *M.A.S. and M.B.*, unlike in that in *Euro Box Promotion*.

149. The Union's financial interests undoubtedly warrant protection, but that protection cannot override the protection of a fundamental right such as that represented by the principle of the retroactivity of the more lenient criminal law.

150. Fundamental rights in a community based on the rule of law such as the European Union are no less important than its financial interests. Put another way, the protection of the Union's financial interests cannot come at the cost of infringing fundamental rights.

151. If the application of Article 325 TFEU and of the provisions implementing it is defective and a systemic risk of impunity arises in one or more States, the European Union has other legal mechanisms at its disposal to deal with that situation, such as infringement proceedings. It does

94 Judgment in *Euro Box Promotion*, paragraph 212.

95 Judgment in *Euro Box Promotion*, paragraph 210.

not seem to me to be compatible with the value of the rule of law enshrined in Article 2 TEU to diminish the level of protection of the *lex mitior* principle in order better to safeguard the Union's financial interests.

152. Accordingly, the primacy of EU law does not take effect in this case and the referring court does not have to disapply the case-law of the Curtea Constituțională (Constitutional Court) to ensure compliance with Article 325(1) TFEU and Decision 2006/928. In fact, it is required to abide by that case-law in order to preserve the higher standard of protection of the *lex mitior* principle in Romanian law, which, by its very nature, favours the perpetrators of criminal offences.

153. That approach is also the most compatible with the principle that offences and penalties must be defined by law and with its requirements of foreseeability and precision of the applicable criminal law.[96] The judgments of the Curtea Constituțională (Constitutional Court), supplemented by the judgment of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), clarified the rules governing the interruption of limitation periods for criminal liability laid down in Article 155(1) of the Criminal Code of 2009 after a period during which the ordinary courts had expressed doubts. Disapplying that case-law would generate fresh uncertainty as to the interruption of limitation periods for criminal liability between 2018 and 2022.

C. Third question referred

154. The referring court submits its third question in the event that the Court answers the first two questions in the affirmative (and only if an interpretation in conformity with EU law cannot be provided).

155. As I propose that the first two questions be answered in the negative, there is no need to address the third question. I will nevertheless do so in case the Court takes a different view.

156. The Court's previous rulings on certain aspects of the Romanian judicial system[97] enable an answer to be given to this last question. In its third question, the referring court stresses that judges may be disciplined if they depart from the case-law of the Curtea Constituțională (Constitutional Court) on the ground that it is inconsistent with EU law.

157. As pointed out by the referring court[98] and the Romanian Government, Article 99(ș) of Law No 303/2004, which treated a 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) in appeals in the interest of the law as a disciplinary offence, was repealed following the judgment in *RS*.

158. However, in judgment No 520/2022 of 9 November 2022, the Curtea Constituțională (Constitutional Court) held that a failure by judges to observe the judgments of the Curtea Constituțională (Constitutional Court) or the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) may give rise to a disciplinary penalty if the judge in question acted in bad faith or as a result of gross negligence. The referring court is uncertain whether that new disciplinary regime is compatible with EU law.

96 Judgment in *M.A.S. and M.B.*, paragraphs 55 and 56.

97 Judgments in *Asociația 'Forumul Judecătorilor din România'*; in *Euro Box Promotion*; and in *RS*.

98 Order for reference, paragraphs 145 and 146.

159. The judgments in *Eurobox Promotion* and *RS* contain sufficient pointers to be able to answer that question. I will therefore confine myself to reproducing some of the considerations set out therein:

– '… the safeguarding of the independence of the courts cannot, in particular, have the effect of totally excluding the possibility that the disciplinary liability of a judge may, in certain entirely exceptional cases, be triggered as a result of judicial decisions adopted by him or her. Such a requirement of independence is clearly not intended to support any serious and totally inexcusable forms of conduct on the part of judges, which would consist, for example, in infringing deliberately and in bad faith, or as a result of particularly serious and gross negligence, the national and EU law with which they are supposed to ensure compliance, or in acting arbitrarily or denying justice when they are called upon, as guardians of the duty of adjudicating, to rule in disputes which are brought before them by individuals'. [99]

– 'However, it appears essential, in order to preserve the independence of the courts and to prevent the disciplinary regime from being diverted from its legitimate purposes and being used to exert political control over judicial decisions or pressure on judges, that the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law, or in the assessment of the facts and the appraisal of the evidence, cannot in itself trigger the disciplinary liability of the judge concerned'. [100]

– '… Article 2 and the second subparagraph of Article 19(1) TEU must be interpreted as precluding national rules or a national practice under which any failure to comply with the decisions of the national constitutional court by a national judge can trigger his or her disciplinary liability'. [101]

– 'The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law'. [102]

160. The answer to the third question referred for a preliminary ruling must therefore be along the same lines.

[99] Judgment in *RS*, paragraph 83, citing judgments of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraph 137), and in *Euro Box Promotion*, paragraph 238.

[100] Judgment in *RS*, paragraph 84, citing judgments of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraph 138), and in *Euro Box Promotion*, paragraph 239.

[101] Judgment in *RS*, paragraph 87, citing judgment in *Euro Box Promotion*, paragraph 242.

[102] Judgment in *RS*, paragraph 93 and point 2 of the operative part.

V. Conclusion

161. In the light of the foregoing considerations, I propose that the following answer be given to the request for a preliminary ruling from the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania):

(1) National legislation and case-law on the interruption of limitation periods for criminal liability which result in a considerable number of acts constituting serious fraud affecting the Union's financial interests going unpunished infringes, in principle, Article 325(1) TFEU and 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.

National courts are not required to disapply that national legislation and case-law if such legislation and case-law are justified by the application of the principle of the retroactivity of the more lenient criminal law, enshrined in the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union, or, failing that, by a higher national standard of protection of that principle, laid down by national law.

(2) Article 2 and the second subparagraph of Article 19(1) TEU must be interpreted as precluding national rules or a national practice under which any failure to comply with the decisions of the national constitutional court or supreme court by a national judge can trigger his or her disciplinary liability. They do not, however, preclude such disciplinary liability being triggered in exceptional cases of serious and wholly inexcusable conduct on the part of judges, consisting in infringing deliberately and in bad faith, or as a result of particularly serious and gross negligence, the national and EU law with which they are supposed to ensure compliance.

The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court that is incompatible with the principle of the primacy of EU law.