



Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

7 November 2022 *

(References for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Fight against corruption – Protection of the European Union’s financial interests – Article 325(1) TFEU – PFI Convention – Decision 2006/928/EC – Criminal proceedings – Decisions of the Curtea Constituțională (Constitutional Court, Romania) concerning the composition of panels hearing cases relating to serious corruption – Duty on national courts to give full effect to decisions 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 are inconsistent with EU law – Principle of primacy of EU law)

In Joined Cases C-859/19, C-926/19 and C-929/19,

THREE REQUESTS for a preliminary ruling under Article 267 TFEU from the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), made by decisions of 19 November 2019 (C-859/19), 6 November 2019 (C-926/19) and 16 December 2019 (C-929/19), received at the Court on 26 November 2019 (C-859/19) and 18 December 2019 (C-926/19 and C-929/19), in criminal proceedings against

FX,

CS,

ND (C-859/19),

BR,

CS,

DT,

EU,

FV,

GW (C-926/19),

CD,

* Language of the case: Romanian.

CLD,

GLO,

ŞDC,

PVV (C-929/19),

other parties:

Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție (C-859/19, C-926/19 and C-929/19),

Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția de Investigare a Infracțiunilor de Criminalitate Organizată și Terorism – Structura Centrală (C-926/19),

Parchetul de pe lângă Înalta Curte de Casație și Justiție – Secția pentru Investigarea Infracțiunilor din Justiție (C-926/19),

Agencia Națională de Administrare Fiscală (C-926/19 and C-929/19),

HX (C-926/19),

IY (C-926/19),

SC Uranus Junior 2003 SRL (C-926/19),

SC Complexul Energetic Oltenia SA (C-929/19),

THE COURT (Sixth Chamber),

composed of A. Arabadjiev (Rapporteur), President of the First Chamber, acting as President of the Sixth Chamber, A. Kumin and I. Ziemele, Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

- 1 These requests for a preliminary ruling concern, in essence, the interpretation of Article 2 and the second subparagraph of Article 19(1) TEU, of Article 325(1) TFEU, of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Article 1(1) and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the

protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995 (OJ 1995 C 316, p. 48; 'the PFI Convention'), and of the principle of primacy of EU law.

- 2 The requests have been made in criminal proceedings against FX, CS and ND (Case C-859/19), BR, CS, DT, EU, FV and GW (Case C-926/19) and CD, CLD, GLO, ŞDC and PVV (Case C-929/19) for offences inter alia of corruption and of tax fraud that relates to value added tax (VAT).

Legal context

European Union law

The PFI Convention

- 3 Article 1(1) of the PFI Convention is worded as follows:

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

(a) in respect of expenditure, 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 misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,
- non-disclosure of information in violation of a specific obligation, with the same effect,
- the misapplication of such funds for purposes other than those for which they were originally granted;

(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,

...'

- 4 Article 2(1) of the PFI Convention provides:

'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 case 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.’

- 5 By act of 27 September 1996, the Council of the European Union drew up the Protocol to the Convention on the protection of the European Communities’ financial interests (OJ 1996 C 313, p. 1). Pursuant to Articles 2 and 3 thereof, that protocol covers acts of passive and active corruption.

The Act of Accession

- 6 The Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded (OJ 2005 L 157, p. 203; ‘the Act of Accession’), which entered into force on 1 January 2007, provides in Article 39:

‘1. If, on the basis of the Commission’s continuous monitoring of commitments undertaken by Bulgaria and Romania in the context of the accession negotiations and in particular the Commission’s monitoring reports, there is clear evidence that the state of preparations for adoption and implementation of the *acquis* in Bulgaria or Romania is such that there is a serious risk of either of those States being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas, the Council may, acting unanimously on the basis of a Commission recommendation, decide that the date of accession of that State is postponed by one year to 1 January 2008.

2. Notwithstanding paragraph 1, the Council may, acting by qualified majority on the basis of a Commission recommendation, take the decision mentioned in paragraph 1 with respect to Romania if serious shortcomings have been observed in the fulfilment by Romania of one or more of the commitments and requirements listed in Annex IX, point I.

3. Notwithstanding paragraph 1, and without prejudice to Article 37, the Council may, acting by qualified majority on the basis of a Commission recommendation and after a detailed assessment to be made in the autumn of 2005 of the progress made by Romania in the area of competition policy, take the decision mentioned in paragraph 1 with respect to Romania if serious shortcomings have been observed in the fulfilment by Romania of the obligations undertaken under the Europe Agreement or of one or more of the commitments and requirements listed in Annex IX, point II.’

- 7 Annex IX to the Act of Accession, entitled ‘Specific commitments undertaken, and requirements accepted, by Romania at the conclusion of the accession negotiations on 14 December 2004 (referred to in Article 39 of the Act of Accession)’, contains the following passage in point I:

‘In relation to Article 39(2)

...

(4) To considerably step up the fight against corruption and in particular against high-level corruption by ensuring a rigorous enforcement of the anti-corruption legislation and the effective independence of the National Anti-Corruption Prosecutors’ Office (NAPO) and by submitting on a yearly basis as of November 2005 a convincing track-record of the activities of NAPO in the fight against high-level corruption. NAPO must be given the staff, financial and training resources, as well as equipment necessary for it to fulfil its vital function.

- (5) ... [The National Anti-Corruption Strategy] must include the commitment to revise the protracted criminal procedure by the end of 2005 to ensure that corruption cases are dealt with in a swift and transparent manner, in order to guarantee adequate sanctions that have a deterrent effect; ...

...'

Decision 2006/928/EC

- 8 Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56) was adopted, in the context of the planned accession of Romania to the European Union on 1 January 2007, on the basis, in particular, of Articles 37 and 38 of the Act of Accession. Recitals 1 to 6 and 9 of that decision are worded as follows:

- '(1) The European Union is founded on the rule of law, a principle common to all Member States.
- (2) The area of freedom, security and justice and the internal market, created by the Treaty on European Union and the Treaty establishing the European Community, are based on the mutual confidence that the administrative and judicial decisions and practices of all Member States fully respect the rule of law.
- (3) This implies for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, inter alia, to fight corruption.
- (4) On 1 January 2007, Romania will become a Member of the European Union. The Commission, whilst noting the considerable efforts to complete Romania's preparations for membership, has identified remaining issues in its Report of 26 September 2006, in particular in the accountability and efficiency of the judicial system and law enforcement bodies, where further progress is still necessary to ensure their capacity to implement and apply the measures adopted to establish the internal market and the area of freedom, security and justice.
- (5) Article 37 of the Act of Accession empowers the Commission to take appropriate measures in case of imminent risk that Romania would cause a breach in the functioning of the internal market by a failure to implement the commitments it has undertaken. Article 38 of the Act of Accession empowers the Commission to take appropriate measures in case of imminent risk of serious shortcomings in Romania in the transposition, state of implementation, or application of acts adopted under Title VI of the EU Treaty and of acts adopted under Title IV of the EC Treaty.
- (6) The remaining issues in the accountability and efficiency of the judicial system and law enforcement bodies warrant the establishment of a mechanism for cooperation and verification of the progress of Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.

...

(9) The present Decision should be amended if the Commission’s assessment points at a need to adjust the benchmarks. The present Decision should be repealed when all the benchmarks have been satisfactorily fulfilled.’

9 Article 1 of Decision 2006/928 provides:

‘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.

The Commission may, at any time, provide technical assistance through different activities or gather and exchange information on the benchmarks. In addition, the Commission may, at any time, organise expert missions to Romania for this purpose. The Romanian authorities shall give the necessary support in this context.’

10 Article 2 of that decision states:

‘The Commission will communicate to the European Parliament and the Council its own comments and findings on Romania’s report for the first time in June 2007.

The Commission will report again thereafter as and when required and at least every six months.’

11 Article 4 of the decision provides:

‘This Decision is addressed to all Member States.’

12 The annex to the decision is worded 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.’

Romanian law

The Romanian Constitution

- 13 Title III of the Constituția României (Romanian Constitution), entitled ‘Public authorities’, includes, inter alia, Chapter VI on the ‘judiciary’, which contains Article 126 of the constitution. That article states:

‘(1) Justice shall be administered by the Înalta Curte de Casație și Justiție [(High Court of Cassation and Justice, Romania; ‘the High Court of Cassation and Justice’)] and by the other judicial bodies established by law.

...

(3) The High Court of Cassation and Justice shall ensure uniform interpretation and application of the law by the other courts, in accordance with its jurisdiction.

(4) The composition of the High Court of Cassation and Justice and its rules of procedure shall be established by an organic law.

...

(6) Judicial review of the administrative acts of the public authorities by means of administrative proceedings shall be guaranteed, with the exception of acts concerning relations with the Parliament and military command acts. The administrative courts shall have jurisdiction to hear and determine actions brought by persons injured, as the case may be, by ordinances or provisions of ordinances declared unconstitutional.’

- 14 Title V of the Romanian Constitution, which concerns the Curtea Constituțională (Constitutional Court, Romania; ‘the Constitutional Court’), contains Articles 142 to 147 of the Constitution. Article 146 provides:

‘The Constitutional Court shall have the following duties:

...

(d) ruling on pleas as to the unconstitutionality of laws and ordinances raised before courts or commercial arbitration tribunals; a plea of unconstitutionality may be raised directly by the Ombudsman;

(e) resolving legal conflicts of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two houses of the Parliament of Romania, the Prim-ministru [(Prime Minister)] or the President of the Superior Council of Magistracy;

...’

Criminal Code

15 Article 154(1) of the Codul penal (Criminal Code) provides:

‘The limitation periods for criminal liability are as follows:

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

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

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

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

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

16 Article 155(4) of that code states:

‘If the limitation periods laid down in Article 154 have been exceeded once again, they shall be regarded as completed regardless of the number of interruptions.’

Code of Criminal Procedure

17 Article 40(1) of the Codul de procedură penală (Code of Criminal Procedure) states:

‘The High Court of Cassation and Justice shall hear and determine, at first instance, crimes of high treason, and offences committed by senators, members of parliament and Romanian members of the European Parliament, members of the Government, judges of the Constitutional Court, members of the Superior Council of Magistracy, judges of the High Court of Cassation and Justice and public prosecutors of the Parchetul de pe lângă Înalta Curte de Casație și Justiție [(Public Prosecutor’s Office at the High Court of Cassation and Justice, Romania)].’

18 As set out in Article 281(1) of that code:

‘Infringement of the provisions concerning the following shall always entail nullity:

...

(b) the jurisdiction *ratione materiae* and *ratione personae* of courts, where the judgment has been delivered by a lower-ranking court than the court legally having jurisdiction;

...’

19 Article 426(1) of that code states:

‘An extraordinary action for annulment may be brought against final decisions in criminal proceedings in the following cases:

...

(d) where the composition of the appeal court was not in compliance with the law or where there was a case of incompatibility;

...’

20 Article 428(1) of that code provides:

‘An action for annulment on the grounds laid down in Article 426(a) and (c) to (h) may be brought within 30 days from the date of notification of the decision of the appeal court.’

Law No 78/2000

21 Article 5 of *Legea nr. 78/2000 pentru prevenirea, descoperirea și sancționarea faptelor de corupție* (Law No 78/2000 on the prevention, detection and punishment of acts of corruption) of 18 May 2000 (*Monitorul Oficial al României*, part I, No 219, of 18 May 2000) provides in paragraph 1:

‘For the purposes of this Law, the offences set out in Articles 289 to 292 of the Criminal Code are corruption offences, including when they are committed by the persons referred to in Article 308 of the Criminal Code.’

22 The articles of the Criminal Code mentioned in Article 5(1) of Law No 78/2000 concern, respectively, the offences of passive corruption (Article 289), active corruption (Article 290), influence peddling (Article 291) and influence peddling in an active form (Article 292).

23 Article 29(1) of that law provides:

‘Specialist panels shall be established to rule at first instance on the offences provided for in this Law.’

Law No 303/2004

24 Article 99 of *Legea nr. 303/2004 privind statutul judecătorilor și procurorilor* (Law No 303/2004 on the rules governing judges and prosecutors) of 28 June 2004 (republished in the *Monitorul Oficial al României*, part I, No 826 of 13 September 2005), as amended by *Legea nr. 24/2012* (Law No 24/2012) of 17 January 2012 (*Monitorul Oficial al României*, part I, No 51 of 23 January 2012) (‘Law No 303/2004’), provides:

‘The following shall constitute disciplinary offences:

...

(o) failure to comply with the provisions relating to the random allocation of cases;

...

(ș) failure to comply with the decisions of the Constitutional Court ...;

...'

25 Article 100(1) of that law provides:

'The disciplinary penalties that may be imposed on judges and prosecutors, in proportion to the seriousness of the offences, are:

...

(e) exclusion from the national legal service.'

26 Article 101 of that law states:

'The disciplinary penalties provided for in Article 100 shall be imposed by the divisions of the Superior Council of Magistracy, subject to the conditions laid down in the organic law governing that body.'

Law No 304/2004

27 *Legea nr. 304/2004 privind organizarea judiciară* (Law No 304/2004 on the organisation of the judicial system) of 28 June 2004 (republished in the *Monitorul Oficial al României*, part I, No 827 of 13 September 2005) has been amended, inter alia, by:

- *Legea nr. 202/2010 privind unele măsuri pentru accelerarea soluționării proceselor* (Law No 202/2010 providing measures for the acceleration of the adjudication of proceedings) of 25 October 2010 (*Monitorul Oficial al României*, part I, No 714 of 26 October 2010);
- *Legea nr. 255/2013 pentru punerea în aplicare a Legii nr. 135/2010 privind Codul de procedură penală și pentru modificarea și completarea unor acte normative care cuprind dispoziții procesual penale* (Law No 255/2013 implementing Law No 135/2010 on the Code of Criminal Procedure and amending and supplementing certain normative acts containing provisions relating to criminal procedure) of 19 July 2013 (*Monitorul Oficial al României*, part I, No 515 of 14 August 2013);
- *Legea nr. 207/2018 pentru modificarea și completarea Legii nr. 304/2004 privind organizarea judiciară* (Law No 207/2018 amending and supplementing Law No 304/2004 on the organisation of the judicial system) of 20 July 2018 (*Monitorul Oficial al României*, part I, No 636 of 20 July 2018);

28 Article 19(3) of Law No 304/2004, as last amended by Law No 207/2018 ('Law No 304/2004 as amended'), states:

'At the beginning of each year, acting on a proposal from the President or the Vice-President of the High Court of Cassation and Justice, the governing council of the High Court of Cassation

and Justice may approve the establishment of specialist panels within the chambers of the High Court of Cassation and Justice, according to the number and nature of cases, the volume of activity of each chamber, the specialisation of the judges and the need to utilise their professional experience.’

29 Article 24(1) of that law provides:

‘The panels of five judges shall hear and determine appeals against decisions given at first instance by the criminal division of the High Court of Cassation and Justice, rule on appeals in cassation against decisions given on appeal by panels of five judges once they have been found admissible, deal with appeals brought against decisions given in the course of trials at first instance by the criminal division of the High Court of Cassation and Justice, and rule on disciplinary cases in accordance with the law and on other cases within the scope of the powers conferred on them by law.’

30 Article 29(1) of that law is worded as follows:

‘The governing council of the High Court of Cassation and Justice shall have the following powers:

(a) approval of the Regulation on the organisation and administrative functioning and of the staffing and personnel tables of the High Court of Cassation and Justice;

...

(f) exercise of the other powers provided for in the Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice.’

31 Article 31(1) of that law states:

‘In criminal matters, the panels hearing cases shall be composed as follows:

(a) in the cases assigned, in accordance with the law, to the jurisdiction at first instance of the High Court of Cassation and Justice, the panel shall consist of three judges;

...’

32 Article 32 of Law No 304/2004 as amended provides:

‘(1) At the beginning of each year, acting on a proposal from the President or the Vice-Presidents of the High Court of Cassation and Justice, the governing council shall approve the number of panels of five judges and the composition of those panels.

...

(4) The judges sitting on those panels shall be selected by drawing lots, during a public sitting, by the President or, in his or her absence, by one of the two Vice-Presidents of the High Court of Cassation and Justice. The members of panels may be changed only on an exceptional basis, in the light of the objective criteria established by the Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice.

(5) The panels of five judges shall be chaired by the President of the High Court of Cassation and Justice, by one of the Vice-Presidents, or by Presidents of Chambers, if they have been appointed under paragraph 4 to sit on the panel concerned.

(6) If none of the above persons has been designated to sit on a panel of five judges, each judge shall chair the panel on a rotating basis, in order of their length of service within the judiciary.

(7) Cases falling within the jurisdiction of panels of five judges shall be allocated randomly using a computerised system.'

33 Article 32 of Law No 304/2004, in the version thereof as amended by Law No 202/2010, stated:

'(1) In criminal matters, two panels of five judges composed solely of members of the Criminal Chamber of the High Court of Cassation and Justice shall be established at the beginning of each year.

...

(4) The governing council of the High Court of Cassation and Justice shall approve the composition of the panels of five judges. The judges sitting on those panels shall be appointed by the President or, in his or her absence, by the Vice-President of the High Court of Cassation and Justice. The members of panels may be changed only on an exceptional basis, in the light of the objective criteria established by the Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice.

(5) The panels of five judges shall be chaired by the President or the Vice-President of the High Court of Cassation and Justice. In their absence, the panel may be chaired by a President of Chamber appointed for that purpose by the President or, in his or her absence, the Vice-President of the High Court of Cassation and Justice.

(6) Cases falling within the jurisdiction of the panels referred to in paragraphs 1 and 2 shall be allocated randomly using a computerised system.'

34 Article 32(1) and (6) of Law No 304/2004, in the version thereof as amended by Law No 255/2013, were worded in almost identical terms to those of the version referred to in the preceding paragraph, whereas Article 32(4) and (5) provided:

(4) The governing council of the High Court of Cassation and Justice, acting on a proposal from the President of the Criminal Chamber, shall approve the number of panels of five judges and the composition of those panels. The judges sitting on those panels shall be selected by drawing lots, during a public sitting, by the President or, in his or her absence, by the Vice-President of the High Court of Cassation and Justice. The members of panels may be changed only on an exceptional basis, in the light of the objective criteria established by the Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice.

(5) The panels of five judges shall be chaired by the President or the Vice-President of the High Court of Cassation and Justice if he or she sits on the panel, in accordance with paragraph 4, by the President of the Criminal Chamber or by the eldest member, as the case may be.'

35 Article 33 of Law No 304/2004 as amended is worded as follows:

‘(1) The President or, in his or her absence, one of the Vice-Presidents of the High Court of Cassation and Justice shall chair the combined chambers, the panel with jurisdiction to hear and determine actions brought in the interests of the law and the panel with jurisdiction to rule on questions of law, the panel of five judges and any panel within the chambers, where he or she participates in the proceedings.

...

(3) The Presidents of Chambers may chair any panel of the chamber, whereas other judges shall chair on a rotating basis.’

36 Article 33(1) of Law No 304/2004, in the version thereof as amended by Law No 202/2010, provided:

‘The President or, in his or her absence, the Vice-President of the High Court of Cassation and Justice shall chair the combined chambers, the panel of five judges and any panel within the chambers, where he or she participates in the proceedings.’

37 Article 33(1) of Law No 304/2004, in the version thereof as amended by Law No 255/2013, provided:

‘The President or, in his or her absence, one of the Vice-Presidents of the High Court of Cassation and Justice shall chair the combined chambers, the panel with jurisdiction to hear and determine actions brought in the interests of the law and the panel with jurisdiction to rule on questions of law, the panel of five judges and any panel within the chambers, where he or she participates in the proceedings.’

Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice

38 Article 28 of the Regulamentul privind organizarea și funcționarea administrativă a Înaltei Curți de Casație și Justiție (Regulation on the organisation and administrative functioning of the High Court of Cassation and Justice) of 21 September 2004), as amended by Hotărârea nr. 3/2014 pentru modificarea și completarea Regulamentului privind organizarea și funcționarea administrativă a Înaltei Curți de Casație și Justiție (Decision No 3/2014 amending and supplementing the Regulation on organisation and administrative functioning) of 28 January 2014 (*Monitorul Oficial al României*, part I, No 75 of 30 January 2014), stated:

‘1. The High Court of Cassation and Justice shall include panels of five judges having jurisdiction laid down by law.

...

4. Panels of five judges shall be chaired, as appropriate, by the President, the Vice-Presidents, the President of the Criminal Chamber or the eldest member.’

39 Article 29(1) of that regulation stated:

‘With a view to establishing panels of five judges in criminal matters, the President or, in his or her absence, one of the Vice-Presidents of the High Court of Cassation and Justice shall select annually, by drawing lots, during a public sitting, four or, where appropriate, five judges from the Criminal Chamber of the High Court of Cassation and Justice for each panel.’

The main proceedings and the questions referred for a preliminary ruling

Case C-859/19

- 40 By a judgment of 17 October 2017 delivered at first instance by a panel of three judges, the Criminal Chamber of the High Court of Cassation and Justice sentenced FX, a public prosecutor at the Parchetul de pe lângă Tribunalul Iași (Public Prosecutor’s Office at the Regional Court, Iași, Romania), to a cumulative term of imprisonment of two years and 11 months and to a fine for offences, committed in the course of 2014 and 2015, of passive corruption, of carrying out financial transactions, as commercial acts, incompatible with his post in order to obtain money, assets or other undue advantages for himself, and of making false statements, while acquitting him of the offence of money laundering. By the same criminal judgment, CS and ND were acquitted of the offence of perjury.
- 41 FX and the Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție (Public Prosecutor’s Office at the High Court of Cassation and Justice – National Anti-Corruption Directorate, Romania) (‘the DNA’) appealed against that judgment. The case in the main proceedings was entered in the list of the five-judge panel of the High Court of Cassation and Justice, operating as a court of appeal.
- 42 On 7 November 2018, while the appeal proceedings were in progress, the Constitutional Court delivered Decision No 685/2018. By that decision, the Constitutional Court, to which the matter had been referred by the Prime Minister pursuant to Article 146(e) of the Romanian Constitution, found, first of all, that there was a legal conflict of a constitutional nature between the Parliament and the High Court of Cassation and Justice, triggered by the decisions taken by the governing council of that court consisting, in accordance with a practice existing during the period concerned, of selecting by the drawing of lots just four of the five members of the panels of five judges ruling on appeal and not all of those members, in breach of Article 32 of Law No 304/2004 as amended; next, it held that the adjudication of a case on appeal by a panel thus unlawfully established entailed the absolute nullity of the decision given; and, finally, it stated that, pursuant to Article 147(4) of the Romanian Constitution, the decision was applicable from the date of its publication to pending cases, to cases which had been ruled upon, in so far as there was still time for individuals to exercise the appropriate extraordinary legal remedies, and to future situations. Following that decision, the case in the main proceedings was removed from the list and allocated randomly to one of the newly established panels of five judges.
- 43 On 3 July 2019, the Constitutional Court delivered Decision No 417/2019, following a referral by the President of the Chamber of Deputies who, at that time, was himself the subject of criminal proceedings in relation to acts falling within the scope of Law No 78/2000 before a panel of five judges of the High Court of Cassation and Justice operating as a court of appeal. By that decision, the Constitutional Court found, first of all, that there was a legal conflict of a constitutional nature between the Parliament and the High Court of Cassation and Justice, triggered by the fact that the

latter had not established specialist panels to hear cases at first instance relating to the offences provided for in Article 29(1) of Law No 78/2000; next, it held that the adjudication of a case by a non-specialist panel entailed the absolute nullity of the decision delivered; and, finally, it ordered that all cases which had been decided by the High Court of Cassation and Justice at first instance prior to 23 January 2019 and which had not become final be re-examined by specialist panels established in accordance with that provision. In its decision, the Constitutional Court held that although, on 23 January 2019, the governing council of the High Court of Cassation and Justice had adopted a decision to the effect that all panels of three judges of that court had to be regarded as specialised in hearing and determining corruption cases, that decision could prevent unconstitutionality only with effect from the date of its adoption and not in relation to the past.

- 44 In support of its request for a preliminary ruling, the High Court of Cassation and Justice, the referring court in the present case, states that the offences at issue in the main proceedings, such as the offences of corruption committed in connection with procedures for the award of public contracts financed mainly by European funds, as well as the offences of money laundering, affect or are liable to affect the European Union's financial interests.
- 45 According to that court, in the first place, the question arises whether Article 19(1) TEU, Article 325(1) TFEU, Article 4 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ 2017 L 198, p. 29) and Article 58 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73), are to be interpreted as precluding a national court from applying a decision delivered by an authority which is not part of the judicial system, such as Decision No 417/2019 of the Constitutional Court, which ruled on the merits of an ordinary appeal by requiring the referral of the cases, with the result that the criminal proceedings are called into question by initiating a retrial at first instance. It argues that the Member States are required to adopt effective deterrent measures to combat illegal activities affecting the European Union's financial interests.
- 46 In that context, it is likewise necessary to establish whether the words 'and any other illegal activities affecting the financial interests of the Union' contained in Article 325(1) TFEU cover corruption offences themselves, in so far in particular as Article 4 of Directive 2017/1371 defines the offences of 'passive corruption' and 'active corruption'.
- 47 According to the referring court, just like in Case C-357/19, *Euro Box Promotion and Others*, the question also arises whether the principle of the rule of law enshrined in Article 2 TEU, as interpreted in the light of Article 47 of the Charter, precludes the course of justice being affected by an intervention such as that which follows from Decision No 417/2019. By that decision, the Constitutional Court established, despite lacking jurisdiction, binding measures that entail the initiation of retrials on account of the alleged lack of specialisation in corruption offences of the panels of the Criminal Chamber of the High Court of Cassation and Justice, even though all judges of that criminal chamber satisfy that condition of specialisation by virtue of their very capacity as judges of that court.

- 48 In the second place, it is necessary, in the light of the case-law of the Court of Justice and of the significance of the principle of legality, to clarify the meaning of the concept of a ‘tribunal previously established by law’ contained in the second paragraph of Article 47 of the Charter, in order to determine whether that provision precludes the interpretation provided by the Constitutional Court concerning the unlawful nature of the court’s composition.
- 49 In the third place, the referring court asks whether a national court is required to disapply Decision No 417/2019 in order to ensure that full effect is given to EU rules. More generally, it is also necessary to determine whether the effects of the decisions of the Constitutional Court that undermine the principle of judicial independence should be disregarded in cases governed exclusively by national law. Those questions are raised in particular because the Romanian disciplinary rules provide for the application of a disciplinary penalty to a judge if that judge disregards the effects of the decisions of the Constitutional Court.
- 50 The referring court is of the view that Decision No 417/2019, which has the effect of setting aside judgments given at first instance prior to 23 January 2019 by three-judge panels of the Criminal Chamber of the High Court of Cassation and Justice, infringes the principle of the effectiveness of criminal penalties in the case of serious unlawful activities affecting the European Union’s financial interests. That decision creates, first, the appearance of impunity and entails, second, a systemic risk of serious offences going unpunished on account of the national rules laying down limitation periods for prosecutions, given the complexity and duration of the procedure leading up to the delivery of a final judgment following a re-examination of the cases concerned. Thus, in the case in the main proceedings, the judicial proceedings, given their complexity, have already been under way for around four years in respect of the first-instance stage.
- 51 It is in those circumstances that the High Court of Cassation and Justice decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Are Article 19(1) [TEU], Article 325(1) [TFEU], Article 58 of [Directive 2015/849] [and] Article 4 of [Directive 2017/1371] to be interpreted as precluding the adoption of a decision by a body outside the judiciary – the [Constitutional Court] – which requires corruption cases decided within a specified period and currently at the appeal stage to be referred back to the court of first instance for re-examination on the ground that there has been a failure to establish, at the level of the supreme court, panels hearing cases specialising in that field, although [that decision] recognises the specialisation of the judges of which those panels were composed?
- (2) Are Article 2 [TEU] and [the second paragraph of] Article 47 of the [Charter] to be interpreted as precluding a body outside the judiciary from finding that the composition of panels hearing cases within a chamber of the supreme court (panels composed of serving judges who, at the time of their promotion, satisfied, inter alia, the specialisation condition required for promotion to the criminal chamber of the supreme court) is unlawful?
- (3) Is the primacy of EU law to be interpreted as permitting a national court to disapply a decision of the constitutional court which has been handed down in a case concerning a constitutional dispute and is binding under national law?’

Case C-926/19

- 52 By a judgment of 30 June 2016 delivered at first instance by a panel of three judges, the Criminal Chamber of the High Court of Cassation and Justice sentenced FV to a term of imprisonment of three years and six months for offences of tax evasion committed in 2010 to 2013, while acquitting him of the offence of VAT fraud, the offence of money laundering and the other offences of which he was accused. By the same judgment, the public prosecutors CS and EU, and DT, a police officer, were sentenced to terms of imprisonment of seven years, two years and four years respectively, in particular for acts of corruption, acts equated thereto or acts linked to corruption, committed from 2010. Finally, again by the same judgment, BR, GW, HX, IY and SC Uranus Junior 2003 SRL were acquitted of the offences of which they were accused.
- 53 BR, CS, DT, EU, FV and GW, as well as the DNA, the Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția de Investigare a Infracțiunilor de Criminalitate Organizată și Terorism – Structura Centrală (Public Prosecutor's Office at the High Court of Cassation and Justice – Directorate for Investigating Organised Crime and Terrorism – Central Structure, Romania) and the Agenția Națională de Administrare Fiscală (National Agency for Fiscal Administration, Romania) appealed against that judgment.
- 54 The case in the main proceedings was entered in the list of the five-judge panel of the High Court of Cassation and Justice, operating as a court of appeal. On 7 May 2018, that panel allowed testimony and documentary evidence in support of the grounds of appeal and summoned the witnesses in order for them to be heard.
- 55 Following the delivery, on 7 November 2018, of Decision No 685/2018 of the Constitutional Court, referred to in paragraph 42 of the present order, the case was reallocated to another panel of five judges. By order of 13 May 2019, that new panel allowed testimony and documentary evidence in support of the grounds of appeal and summoned the witnesses in order for them to be heard.
- 56 Following the delivery, on 3 July 2019, of Decision No 417/2019 of the Constitutional Court, referred to in paragraph 43 of the present order, some of the appellants requested the referring court to declare the judgment of 30 June 2016 absolutely null and void in that it had been delivered by a three-judge panel not specialised in matters of corruption and to remit the case to the court of first instance for re-examination.
- 57 The High Court of Cassation and Justice, the referring court in the present case, raises the question whether Decision No 417/2019 is compatible with Article 2 and Article 19(1) TEU, Article 325(1) TFEU, Article 47 of the Charter and Article 4 of Directive 2017/1371. As regards Article 325 TFEU in particular, it puts forward, in essence, the same arguments as those set out in Case C-859/19. It adds that, in the main proceedings, the criminal proceedings at first instance took more than four years.
- 58 The referring court observes that Decision No 417/2019 established binding procedural measures necessitating the initiation of retrials on account of the lack of specialisation of the panels at first instance so far as concerns the offences provided for by Law No 78/2000. Accordingly, because of that decision, there is a risk of serious offences going unpunished in a considerable number of cases. In those circumstances, the requirement of effectiveness envisaged in Article 325 TFEU and the defendant's fundamental right to be tried within a reasonable period of time are undermined.

59 Likewise, the referring court considers that, as in Case C-859/19, the Court of Justice must be asked about the compatibility of the Constitutional Court's intervention with the principle of the rule of law. Whilst pointing to the importance of compliance with the decisions of the Constitutional Court, the referring court explains that its questions relate not to the case-law of the Constitutional Court in general, but solely to Decision No 417/2019, in which the Constitutional Court put forward its own interpretation in opposition to that of the High Court of Cassation and Justice regarding the differing provisions on the establishment of specialist panels contained respectively in Law No 78/2000 and in Law No 304/2004 as amended and interfered with the powers of the latter court by ordering the re-examination of certain cases.

60 In those circumstances, the High Court of Cassation and Justice decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 19(1) [TEU], Article 325(1) [TFEU], Article 58 of Directive [2015/849] [and] Article 4 of Directive [2017/1371] be interpreted as precluding the adoption of a decision by a body outside the judicial system, the [Constitutional Court], which adjudicates on a procedural objection alleging that the composition of the panel seised of the case is unlawful, in the light of the principle that the judges of the [High Court of Cassation and Justice] must be specialised (not provided for in the Romanian Constitution), and which obliges a judicial body to refer cases which are at the (full-merits) appeal stage for re-examination within the first procedural cycle before the same court?

(2) Must Article 2 [TEU] and [the second paragraph of] Article 47 of the [Charter] be interpreted as precluding a body outside the judicial system from declaring unlawful the composition of the panel seised of the case of a chamber of the supreme court (panel composed of judges in office who, at the time of their promotion, satisfied, inter alia, the specialisation requirement laid down for promotion to the criminal chamber of the supreme court)?

(3) Must the principle of the primacy of EU law be interpreted as permitting a national court to disapply a decision of the constitutional court which interprets a rule of lower ranking than the Constitution, concerning the organisation of the [High Court of Cassation and Justice], contained in domestic legislation on the prevention, detection and punishment of offences of corruption, a rule which has been consistently interpreted in the same way, for 16 years, by a court?

(4) On a proper interpretation of Article 47 of the [Charter,] [d]oes the principle of unfettered access to justice encompass the specialisation of judges and the establishment of specialist panels in a supreme court?'

Case C-929/19

61 The DNA brought criminal proceedings before the High Court of Cassation and Justice against CD, CLD, GLO, ŞDC and the Member of Parliament PVV.

62 The indictment accused them, in essence, of having, between 2007 and 2009, misappropriated considerable sums of money from investment funds intended for the carrying out of technological improvements at power stations in order to reduce their sulphur dioxide emissions in accordance with the environmental requirements imposed at EU level. To that end and in that context, the defendants, according to the indictment, had committed offences of corruption, of tax fraud, in particular in relation to VAT, of money laundering and of forgery of documents.

- 63 By a judgment of 10 May 2018 delivered at first instance by a panel of three judges, the Criminal Chamber of the High Court of Cassation and Justice sentenced CD to a term of imprisonment of four years for offences under public procurement legislation in particular and acts of misappropriation committed between 2007 and 2009.
- 64 CLD, GLO, PVV and ŞDC were acquitted of the offences of which they were accused.
- 65 The DNA, CD and the National Agency for Fiscal Administration appealed against that judgment.
- 66 In the course of the appeal proceedings, the Constitutional Court delivered Decision No 417/2019 of 3 July 2019.
- 67 The High Court of Cassation and Justice, the referring court in the present case, raises the issue of the compatibility of that decision with Article 2 and Article 19(1) TEU, Article 325(1) TFEU, Article 47 of the Charter and Article 4 of Directive 2017/1371. As regards Article 325 TFEU in particular, it puts forward, in essence, the same grounds as those set out in Cases C-859/19 and C-926/19.
- 68 So far as concerns Article 19(1) TEU, the principle of the rule of law enshrined in Article 2 TEU and Article 47 of the Charter, the referring court, in the first place, underlines the political dimension of the appointment of the members of the Constitutional Court and the latter's particular position in the State authorities' architecture.
- 69 In the second place, the procedure for finding that there is a legal conflict of a constitutional nature between the public authorities, as provided for in Article 146(e) of the Romanian Constitution, is in itself problematic since, under that provision, holders of political posts are empowered to initiate the procedure. In addition, there is a particularly fine line between the unlawfulness of an act and the existence of a legal conflict of a constitutional nature, and a limited category of persons can exercise legal remedies parallel to those available before the ordinary courts.
- 70 In the third place, the referring court takes the view that the finding made by the Constitutional Court in Decision No 685/2018 as to the existence of a legal conflict of a constitutional nature between the judiciary and the legislature is problematic. In that decision, the Constitutional Court put forward its own interpretation of legislative provisions in opposition to that adopted by the High Court of Cassation and Justice in the exercise of its jurisdiction, and accused the latter court of a systematic disregard for the will of the legislature, in order to be able to find that such a legal conflict of a constitutional nature exists.
- 71 In the view of the referring court, the question thus arises whether Article 2 TEU, Article 19 TEU and Article 47 of the Charter preclude, in a situation such as that at issue in the main proceedings, the case-law of the High Court of Cassation and Justice from being reviewed and sanctioned by an intervention of the Constitutional Court. The referring court is of the opinion that the intervention of the Constitutional Court, in the form of a review of the legality of the activity of the High Court of Cassation and Justice, which replaces statutory judicial procedures, may have a negative impact on judicial independence and on the very foundations of the rule of law as referred to in Article 2 TEU, since the Constitutional Court is not part of the judicial system and is not afforded powers of adjudication.

- 72 In those circumstances, the High Court of Cassation and Justice decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Are Article 19(1) [TEU], Article 325(1) [TFEU] and Articles 2 and 4 of [Directive 2017/1371] to be interpreted as precluding the adoption of a decision by a body outside the judiciary – the [Constitutional Court] – which provides generally for the re-examination of every corruption case that was decided by the criminal chamber of the supreme court ruling at first instance within a given period (2003 to January 2019) and that is currently under appeal?
- (2) Are Article 2 and [Article] 19(1) [TEU] and [the second paragraph of] Article 47 of the [Charter] to be interpreted as precluding a body outside the judiciary from finding that the composition of panels hearing cases within a chamber of the supreme court is unlawful, contrary to the interpretation supported by the consistent and unanimous organisational and judicial practices of that court?
- (3) Is the primacy of EU law to be interpreted as permitting a national court to disapply a decision of the constitutional court which has been handed down in a case concerning a constitutional dispute and is binding under national law?
- (4) May the expression “previously established by law” contained in [the second paragraph of] Article 47 of the [Charter] be interpreted as including the formal designation of specialist panels distinct from the specialisation of the judges of which those panels are composed?’
- 73 By decision of the President of the Court of 19 May 2022, Cases C-859/19, C-926/19 and C-929/19 were joined for the purposes of the written and oral procedure and the judgment.

The request for an expedited procedure

- 74 The referring court requested the Court to deal with the present cases under the expedited procedure pursuant to Article 105(1) of the Rules of Procedure of the Court of Justice.
- 75 In view of the Court’s decision to rule by reasoned order in accordance with Article 99 of the Rules of Procedure, there is no need to rule on that request (see, to that effect, order of 17 May 2022, *Estaleiros Navais de Peniche*, C-787/21, not published, EU:C:2022:414, paragraph 17 and the case-law cited).

Consideration of the questions referred

- 76 Under Article 99 of the Rules of Procedure, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order where, inter alia, the reply to a question referred for a preliminary ruling may be clearly deduced from existing case-law.
- 77 Since the answer to the referring court’s questions may be clearly deduced from the Court’s existing case-law, in particular the judgments of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034), and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, (C-430/21, EU:C:2022:99), that provision should be applied in the present cases.

The first question in Case C-859/19 and the first and fourth questions in Cases C-926/19 and C-929/19

- 78 By its first question in Case C-859/19 and its first and fourth questions in Cases C-926/19 and C-929/19, which it is appropriate to examine together, the referring court seeks, in essence, to ascertain whether Article 325(1) TFEU, read in conjunction with Article 2 of the PFI Convention, is to be interpreted as precluding national rules or a national practice under which 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 concerned must, as the case may be further to an extraordinary appeal against final judgments, be re-examined at first and/or second instance.
- 79 As a preliminary point, it must be stated that the referring court in those cases draws attention to the significance of the effects that the case-law of the Constitutional Court established in Decisions No 685/2018 and No 417/2019, which relates to the composition of the panels of the High Court of Cassation and Justice, could have on the effectiveness of the proceedings, of the penalties and of the enforcement of the penalties in matters of corruption and VAT fraud such as those to which the defendants in the main proceedings are subject, defendants who include people who occupied the highest positions within the Romanian State at the time of the alleged facts. It is thus asking the Court, in essence, about the compatibility of such case-law with EU law.
- 80 Although the questions which it submits in that regard refer formally to Article 325(1) TFEU, without making reference to Decision 2006/928, that decision and the benchmarks contained in the annex thereto are relevant for the purposes of the answer to be given to those questions. By contrast, although the referring court also refers, in its questions, to the second subparagraph of Article 19(1) TEU, Article 58 of Directive 2015/849 and Articles 2 and 4 of Directive 2017/1371, an examination relating, additionally, to the latter provisions appears unnecessary for the purposes of addressing the queries that underlie those questions. Moreover, as far as concerns those two directives, it should be noted that the relevant period in the cases at issue in the main proceedings is prior to the directives' entry into force and, therefore, to the date on which Directive 2017/1371 replaced the PFI Convention.
- 81 In those circumstances, the questions must be answered in the light both of Article 325(1) TFEU, read in conjunction with Article 2 of the PFI Convention, and of Decision 2006/928.
- 82 In that regard, as recalled in paragraph 180 of the judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034), EU law does not, as it currently stands, provide for rules governing the organisation of justice in the Member States and, in particular, the composition of the panels hearing cases in matters of corruption and fraud. Accordingly, those rules fall, in principle, within the competence of the Member States. However, those States are obliged, in the exercise of that competence, to comply with their obligations deriving from EU law.
- 83 With regard to the obligations under Article 325(1) TFEU, that provision requires the Member States to counter fraud and any other illegal activity affecting the financial interests of the European Union through effective deterrent measures (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 181 and the case-law cited).

- 84 In order to ensure the protection of the financial interests of the European Union, it is for the Member States, inter alia, to adopt the measures necessary to guarantee the effective and comprehensive collection of own resources constituted by the revenue from the application of a uniform rate to the harmonised VAT assessment bases. Similarly, Member States are required to take effective measures to recover sums wrongly paid to the beneficiary of a subsidy funded in part from the budget of the European Union (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 182 and the case-law cited).
- 85 Accordingly, the Court has already held, in paragraph 183 of the judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034), that the concept of ‘financial interests’ of the European Union, within the meaning of Article 325(1) TFEU, encompasses not only revenue made available to the EU budget but also expenditure covered by that budget. That interpretation is supported by the definition of the concept of ‘fraud affecting the European [Union’s] financial interests’, which is contained in Article 1(1)(a) and (b) of the PFI Convention and covers various intentional acts or omissions in relation both to expenditure and to revenue.
- 86 Furthermore, with regard to the phrase ‘any other illegal activities’ contained in Article 325(1) TFEU, it should be recalled that the term ‘illegal activities’ usually denotes unlawful behaviour, and the use of the word ‘any’ indicates the intention to encompass all such behaviour, without distinction. Moreover, 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’ cannot be interpreted restrictively (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 184 and the case-law cited).
- 87 Thus, the concept of ‘illegal activities’ covers inter alia any act of corruption by public officials, or abuse of office by them, which is liable to affect the European Union’s financial interests, in the form, for example, of the unlawful receipt of EU funds. In that context, it is irrelevant whether the acts of corruption take the form of an act or an omission by the public official concerned, given the fact that an omission may be as detrimental to the European Union’s financial interests as an act and be intrinsically linked to such an act, as are, for example, a public official’s failure to conduct the audits and checks required for expenditure covered by the EU budget or the authorisation of inappropriate or incorrect expenditure of EU funds (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 185).
- 88 The fact that Article 2(1) of the PFI Convention, read in conjunction with Article 1(1) of that convention, refers only to fraud affecting the European Union’s financial interests cannot invalidate that interpretation of Article 325(1) TFEU, the wording of which refers expressly to ‘fraud and any other illegal activities affecting the financial interests of the Union’. In addition, as is apparent from Article 1(1)(a) of the Convention, the misapplication of funds from the budget of the European Union for purposes other than those for which they were originally granted constitutes fraud, even though such misapplication may also be the cause or the result of an act of corruption. That effectively shows that acts of corruption may be linked to cases of fraud and, conversely, the commission of fraud can be facilitated by acts of corruption, and therefore financial interests can, in certain cases, be affected as a result of a combination of VAT fraud and acts of corruption, a fact that is confirmed by the Protocol to the PFI Convention, which covers,

under Articles 2 and 3 thereof, acts of passive and active corruption (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 186).

- 89 It must also be recalled that the Court has already held that even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the European Union, with the result that Article 325(1) TFEU may cover not only acts that actually cause a loss of own resources but also attempts to commit such acts (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 187).
- 90 It must be added that, as far as concerns Romania, the obligation to fight corruption affecting the European Union's financial interests, which follows from Article 325(1) TFEU, is supplemented by the specific commitments accepted by Romania when accession negotiations were completed on 14 December 2004. In accordance with point I(4) of Annex IX to the Act of Accession, Romania committed inter alia to 'considerably step[ping] up the fight against corruption and in particular against high-level corruption by ensuring a rigorous enforcement of the anti-corruption legislation'. That specific commitment was subsequently given concrete expression by the adoption of Decision 2006/928, which sets benchmarks for the purpose of addressing the shortcomings observed by the Commission prior to Romania's accession to the European Union, in particular in the area of the fight against corruption. Thus, the annex to that decision, in which those benchmarks are set out, refers, in point 3 thereof, to the objective of 'continu[ing] to conduct professional, non-partisan investigations into allegations of high-level corruption' and, in point 4 thereof, to the objective of 'tak[ing] further measures to prevent and fight against corruption, in particular within the local government' (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 188).
- 91 The benchmarks that Romania thus committed to achieving are binding on it, in the sense that Romania is subject to the specific obligation to achieve those objectives and to adopt the appropriate measures with a view to achieving them as soon as possible. Similarly, Romania is required to refrain from implementing any measure that would risk undermining the attainment of those objectives. The obligation to combat corruption and, in particular, high-level corruption effectively, which stems from the benchmarks set out in the annex to Decision 2006/928, read in conjunction with Romania's specific commitments, is not limited merely to cases of corruption affecting the European Union's financial interests (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 189).
- 92 Furthermore, it follows, first, from the requirements of Article 325(1) TFEU, under which fraud and any other illegal activities affecting the financial interests of the European Union must be countered, and, second, from the requirements of Decision 2006/928, under which corruption must be prevented and combated in general, that Romania must provide for the application of penalties that are effective and that act as a deterrent in the case of such offences (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 190 and the case-law cited).
- 93 While Romania has in that regard a freedom to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two, it must nonetheless ensure, pursuant to Article 325(1) TFEU, that cases of serious fraud and corruption

affecting the financial interests of the European Union are punishable by criminal penalties that are effective and that act as a deterrent. In addition, with regard to offences of corruption in general, the obligation to provide for criminal penalties that are effective and that act as a deterrent stems, in the case of Romania, from Decision 2006/928, since, as stated in paragraph 91 of the present order, that decision requires Romania to combat corruption and, in particular, high-level corruption effectively, irrespective of any adverse effect on the European Union's financial interests (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 191 and the case-law cited).

- 94 In addition, it is for Romania to ensure that its rules of criminal law and of criminal procedure allow for the effective prosecution of offences of fraud affecting the financial interests of the European Union and of corruption in general. Thus, even though the penalties provided for and criminal procedures established in order to counter such infringements fall within the competence of Romania, that competence is limited not only by the principles of proportionality and equivalence, but also by the principle of effectiveness, which requires that those penalties are effective and act as a deterrent. That requirement of effectiveness necessarily covers both the prosecutions of, and the penalties for, offences of fraud affecting the European Union's financial interests and of corruption in general and the enforcement of the penalties imposed, since unless they are enforced effectively penalties cannot be effective and act as a deterrent (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 192 and the case-law cited).
- 95 In that context, it is primarily for the national legislature to take the necessary measures. It falls to it, where required, to amend its legislation and to ensure that the procedural rules applicable to the prosecution of, and the imposition of penalties for, offences of fraud affecting the financial interests of the European Union and offences of corruption in general are not designed in such a way that there arises, for reasons inherent in those rules, a systemic risk that acts that may be categorised as such offences may go unpunished, and also to ensure that the fundamental rights of accused persons are protected (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 193 and the case-law cited).
- 96 As for the national courts, it is for them to give full effect to the obligations under Article 325(1) TFEU and Decision 2006/928 and to disapply national provisions which, in connection with proceedings concerning serious fraud affecting the financial interests of the European Union or offences of corruption in general, prevent the application of effective and deterrent penalties in order to counter such offences (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 194 and the case-law cited).
- 97 As regards, in the present instance, whether application of the Constitutional Court's case-law established in Decisions No 685/2018 and No 417/2019 entails a systemic risk of acts constituting serious fraud affecting the European Union's financial interests or corruption in general going unpunished, it must be pointed out that the Court has already examined this question in paragraphs 195 to 202 of the judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034), on the basis, in essence, of the same information as that contained in the present requests for a preliminary ruling. It is for the referring court to determine whether, having regard to the

considerations set out in those paragraphs, the application of that case-law, in conjunction with the implementation of the national rules on limitation and, in particular, of the absolute limitation period laid down in Article 155(4) of the Criminal Code, entails such a risk.

- 98 It follows that, if the referring court were to conclude that the application of that case-law, in conjunction with the implementation of the national rules on limitation, entails a systemic risk of acts constituting serious fraud affecting the European Union's financial interests or corruption in general going unpunished, the penalties provided for in national law to counter such offences could not be regarded as effective and acting as a deterrent, which would be incompatible with Article 325(1) TFEU, read in conjunction with Article 2 of the PFI Convention, and with Decision 2006/928 (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 203).
- 99 That said, since the criminal proceedings at issue in the main proceedings amount to an implementation of Article 325(1) TFEU and/or of Decision 2006/928 and, therefore, of EU law, within the meaning of Article 51(1) of the Charter, that referring court must also satisfy itself that the fundamental rights guaranteed by the Charter to the persons concerned in the main proceedings, in particular those guaranteed in Article 47 of the Charter, are respected. In criminal law, respect for those rights must be guaranteed not only during the stage of the preliminary investigation, from the moment when the person concerned becomes an accused, but also during the criminal proceedings and in the enforcement of the penalties (see, by analogy, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 204 and the case-law cited).
- 100 In that regard, it must be recalled that the first sentence of the second paragraph of Article 47 of the Charter enshrines the entitlement of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. By requiring that the tribunal be 'previously established by law', that provision seeks to ensure that the organisation of the judicial system is regulated by law emanating from the legislature in compliance with the rules governing its jurisdiction, with a view to preventing such organisation being left to the discretion of the executive. That requirement covers not only the legal basis for the very existence of a tribunal, but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, such as the provisions governing the composition of the panel hearing the case (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 205 and the case-law cited).
- 101 It should be observed that an irregularity committed during the composition of panels 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 giving rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 206 and the case-law cited).

- 102 In the present instance, although the Constitutional Court found, in Decisions No 685/2018 and No 417/2019 at issue in the main proceedings, that the earlier practice of the 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 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 Constitutional Court, constitute a tribunal ‘previously established by law’. As the Court observed in paragraph 208 of the judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034), that assessment is borne out by the decision of the governing council of the High Court of Cassation and Justice of 23 January 2019, referred to in paragraph 43 of the present order, and by the Constitutional Court’s interpretation of that decision.
- 103 Thus, 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 case-law established in Decisions No 685/2018 and No 417/2019 in the present cases (see, by analogy, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 209).
- 104 In the light of the foregoing considerations, the answer to the first question in Case C-859/19 and the first and fourth questions in Cases C-926/19 and C-929/19 is that Article 325(1) TFEU, read in conjunction with Article 2 of the PFI Convention, and Decision 2006/928 are to be interpreted as precluding national rules or a national practice under which 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 concerned must, as the case may be further to an extraordinary appeal against final judgments, be re-examined at first and/or second instance, where the application of those national rules or that national practice is capable of giving rise to a systemic risk of acts constituting serious fraud affecting the European Union’s financial interests or corruption in general going unpunished. The obligation to ensure that such offences are subject to criminal penalties that are effective and act as a deterrent does not exempt the referring court from verifying the necessary observance of the fundamental rights guaranteed in Article 47 of the Charter. The requirements arising from the first sentence of the second paragraph of Article 47 of the Charter do not preclude the non-application of such national rules or such a national practice where the latter are capable of giving rise to such a systemic risk of impunity.

The second and third questions in Cases C-859/19, C-926/19 and C-929/19

- 105 By its second and third questions in Cases C-859/19, C-926/19 and C-929/19, which it is appropriate to examine together, the referring court asks, in essence, whether, first, Article 2 and the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Decision 2006/928, and second, the principle of primacy of EU law in conjunction with those provisions and Article 325(1) TFEU are to be interpreted as precluding national rules or a national practice under which the ordinary courts are bound by the decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on

their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court, that that case-law is contrary to the abovementioned provisions of EU law.

The guarantee of judicial independence

- 106 The referring court is of the view that the case-law of the Constitutional Court established in the decisions at issue in the main proceedings is liable to call into question its own independence and is, therefore, incompatible with EU law, in particular with the guarantees provided for in Article 2 and the second subparagraph of Article 19(1) TEU as well as in Article 47 of the Charter, and with Decision 2006/928. In that regard, it considers that the Constitutional Court, which is not part of the Romanian judicial system, exceeded its powers by delivering those decisions and encroached upon the jurisdiction of the ordinary courts, namely to interpret and apply infra-constitutional legislation. The referring court further states that a failure to comply with the decisions of the Constitutional Court constitutes, in Romanian law, a disciplinary offence, and it therefore raises, in essence, the question whether it can, by virtue of EU law, disapply the decisions at issue in the main proceedings without fearing that its members will be subject to disciplinary proceedings.
- 107 In that regard, as stated in paragraph 82 of the present order, although the organisation of justice in the Member States, including the establishment, composition and functioning of a constitutional court, falls within the competence of those Member States, they are nonetheless required, when exercising that competence, to comply with their obligations deriving from EU law.
- 108 Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 217 and the case-law cited). Specifically, as is confirmed by recital 3 of Decision 2006/928, the value of the rule of law ‘implies for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, inter alia, to fight corruption’.
- 109 The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. In that regard, as provided for in the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and is now reaffirmed in Article 47 of the Charter (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 219 and the case-law cited).
- 110 It follows that, pursuant to the second subparagraph of Article 19(1) TEU, every Member State must ensure that the bodies which are called upon, as ‘courts or tribunals’ within the meaning of EU law, to rule on questions related to the application or interpretation of EU law and thus come

within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection; that provision refers to ‘fields covered by Union law’, irrespective of the circumstances in which the Member States are implementing EU law within the meaning of Article 51(1) of the Charter (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 220 and the case-law cited).

- 111 To ensure that bodies that may be called upon to rule on questions concerning the application or interpretation of EU law are in a position to ensure the effective judicial protection required under the second subparagraph of Article 19(1) TEU, maintaining their independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 221 and the case-law cited).
- 112 That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 222 and the case-law cited). Likewise, as follows *inter alia* from recital 3 of Decision 2006/928 and from the benchmarks referred to in points 1 to 3 of the annex to that decision, the existence of an impartial, independent and effective judicial system is of particular importance in the fight against corruption, in particular high-level corruption.
- 113 The requirement that courts be independent, which follows from the second subparagraph of Article 19(1) TEU, has two aspects to it. The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 41 and the case-law cited).
- 114 Those guarantees of independence and impartiality required under EU law presuppose rules that are such as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 82 and the case-law cited).
- 115 In that regard, it is necessary that judges be protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and to the exercise by them of their duties must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and liable to have

- an effect on the decisions of the judges concerned, and thus be such as to prevent those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 226 and the case-law cited).
- 116 As regards specifically the rules governing the disciplinary regime, the requirement of independence means that, in accordance with settled case-law, that regime must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. To that end, it appears essential 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. The fact that national judges are not exposed to disciplinary proceedings or measures for having exercised the discretion to make a reference for a preliminary ruling to the Court under Article 267 TFEU, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to their independence (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 227 and the case-law cited).
- 117 In addition, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the courts must be ensured in relation to the legislature and the executive (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 42 and the case-law cited).
- 118 Although neither Article 2 nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the relationship and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences, Member States must nonetheless comply, *inter alia*, with the requirements of judicial independence stemming from those provisions of EU law (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 229 and the case-law cited).
- 119 In those circumstances, Article 2 TEU, 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 the constitutional court are binding on the ordinary courts, provided that national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, if national law does not guarantee such independence, those provisions of EU law preclude such national rules or such a national practice, since such a constitutional court is not in a position to ensure the effective judicial protection required by the second subparagraph of Article 19(1) TEU (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 44 and the case-law cited).
- 120 In the present instance, the queries raised by the referring court in the light of the requirement of judicial independence arising from those provisions of EU law concern, first, the same aspects related to the status, composition and functioning of the Constitutional Court – which delivered the decisions at issue in the main proceedings – as those referred to in the cases which gave rise to the judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034). Furthermore, the present requests for a

preliminary ruling contain, in that regard, essentially the same information as that contained in the requests in those cases. As is apparent from the considerations set out in paragraphs 231 to 237 of that judgment, that information is not capable of establishing that the Constitutional Court does not meet the requirements of independence and impartiality, recalled in paragraphs 113 to 119 of the present order, or that the decisions at issue in the main proceedings were delivered in a context giving rise to a reasonable doubt as to the complete compliance of the Constitutional Court with those requirements.

- 121 As regards, second, the disciplinary liability that the judges of the ordinary courts may incur, under the national legislation at issue, in the event of failure to comply with the decisions of the Constitutional Court, it is true that 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 (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 83 and the case-law cited).
- 122 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 (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 84 and the case-law cited).
- 123 Consequently, it is important that the triggering of the disciplinary liability of a judge as a result of a judicial decision should be limited to entirely exceptional cases such as those referred to in paragraph 121 of the present order and be governed, in that regard, by objective and verifiable criteria, arising from requirements relating to the sound administration of justice, and also by guarantees designed to avoid any risk of external pressure on the content of judicial decisions and thus helping to dispel, in the minds of individuals, any reasonable doubts as to the imperviousness of the judges concerned and their neutrality with respect to the interests before them (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 86 and the case-law cited).
- 124 In the present instance, the information contained in the requests for a preliminary ruling does not indicate that the disciplinary liability of the national judges of the ordinary courts as a result of non-compliance with the decisions of the Constitutional Court, as provided for in Article 99(§) of Law No 303/2004, the wording of which does not include any other condition, is limited to the entirely exceptional cases mentioned in paragraph 121 of the present order, contrary to the case-law set out in paragraphs 122 and 123 thereof.
- 125 It follows that Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the constitutional court are binding on the ordinary courts, provided that

national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 242).

- 126 In those circumstances, and given that these are cases in which the national rules or the national practice at issue in the main proceedings constitute an implementation of EU law within the meaning of Article 51(1) of the Charter, a separate examination of Article 47 of the Charter, which could only bear out the finding already set out in the preceding paragraph, appears unnecessary for the purpose of responding to the queries raised by the referring court and for the outcome of the proceedings brought before it.

The primacy of EU law

- 127 The referring court observes that the case-law of the Constitutional Court established in the decisions at issue in the main proceedings, in relation to which the referring court has doubts as to its compatibility with EU law, is, in accordance with Article 147(4) of the Romanian Constitution, binding and must be observed by the national courts, failing which a disciplinary penalty may be imposed on their members pursuant to Article 99(§) of Law No 303/2004. In those circumstances, the referring court is seeking to ascertain whether the principle of primacy of EU law precludes such national rules or such a national practice and allows a national court to disapply case-law of that kind, without that court's members bearing a risk of incurring a disciplinary penalty.
- 128 In that regard, in paragraphs 245 to 248 of the judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034), the Court recalled its settled case-law on the EEC Treaty that established the principle of primacy of Community law as one of the essential characteristics of the Community legal order, and stated that those essential characteristics of the EU legal order and the importance of compliance with that legal order were, moreover, confirmed by the ratification, without reservation, of the Treaties amending the EEC Treaty and, in particular, of the Treaty of Lisbon. It added, in paragraph 249 of that judgment, that Article 4(2) TEU provides that the European Union is to respect the equality of Member States before the Treaties. However, the European Union can respect such equality only if the Member States are unable, under the principle of primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature.
- 129 Following the entry into force of the Treaty of Lisbon, the Court has consistently confirmed the earlier case-law on the principle of primacy of EU law, a principle which requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 50 and the case-law cited).
- 130 Thus, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of

primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law, including constitutional provisions, being able to prevent that (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 51 and the case-law cited).

- 131 In that regard, it must, inter alia, be recalled that, in accordance with the principle of primacy, the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, where it is unable to interpret national law in compliance with the requirements of EU law, to give full effect to the requirements of EU law in the dispute brought before it by disapplying, as required, on its own authority, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 252 and the case-law cited).
- 132 As regards the provisions of EU law referred to in the present requests for a preliminary ruling, it must be recalled that it follows from the Court's case-law that the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU and the benchmarks set out in the annex to Decision 2006/928 are formulated in clear and precise terms and are not subject to any conditions, and they therefore have direct effect (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 253 and the case-law cited).
- 133 In that context, it must be made clear that, in accordance with Article 19 TEU, whilst it is for the national courts and tribunals and the Court to ensure the full application of EU law in all the Member States and to ensure effective judicial protection of the rights of individuals under that law, the Court has exclusive jurisdiction to give the definitive interpretation of that law. In the exercise of that jurisdiction, it is ultimately for the Court to clarify the scope of the principle of primacy of EU law in the light of the relevant provisions of that law; that scope cannot turn on the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with that of the Court. To that end, the preliminary ruling procedure provided for in Article 267 TFEU, which is the keystone of the judicial system established by the Treaties, sets up a dialogue between one court and another, specifically between the Court of Justice and the courts of the Member States, having the object of securing the uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 254 and the case-law cited).
- 134 In the present instance, the referring court states that, under the Romanian Constitution, it is bound by the case-law established in the decisions of the Constitutional Court at issue in the main proceedings and cannot disapply that case-law if its members are not to be at risk of a disciplinary procedure or penalty, even where it is of the view, in the light of a judgment given as a preliminary ruling by the Court of Justice, that the case-law is contrary to EU law.
- 135 In that regard, it must be recalled that a judgment in which the Court of Justice gives a preliminary ruling is binding on the national court, as regards the interpretation of the provisions of EU law in question, for the purposes of the decision to be given in the main proceedings. Accordingly, the national court which exercised the discretion or complied with its obligation to make a reference

to the Court for a preliminary ruling under Article 267 TFEU cannot be prevented from forthwith applying EU law in accordance with the decision or the case-law of the Court, since otherwise the effectiveness of that provision would be impaired. It must be added that the power to do everything necessary, when applying EU law, to disregard national rules or a national practice which might prevent EU rules from having full force and effect is an integral part of the role of a court of the European Union which falls to the national court responsible for applying, within its jurisdiction, the EU rules, and therefore the exercise of that power constitutes a guarantee that is essential to judicial independence as provided for in the second subparagraph of Article 19(1) TEU (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraphs 256 and 257 and the case-law cited).

- 136 Thus, any national rules or practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard a national provision or practice which might prevent directly effective EU rules from having full force and effect would be incompatible with the requirements which are the very essence of EU law (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 63 and the case-law cited).
- 137 National rules or a national practice under which the decisions of the national constitutional court are binding on the ordinary courts, even where the latter are of the view, in the light of a judgment given on a request for a preliminary ruling by the Court of Justice, that the case-law established in those constitutional decisions is contrary to EU law, can prevent those ordinary courts from ensuring that full effect is given to the requirements of EU law; that preventive effect may be heightened by the fact that national law classifies any non-compliance with such constitutional case-law as a disciplinary offence (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 259).
- 138 In that context, it must be observed that Article 267 TFEU precludes any national rules or practice that can prevent national courts, as the case may be, from exercising the discretion or complying with the obligation, laid down in Article 267 TFEU, to make a reference for a preliminary ruling to the Court. Moreover, in accordance with the case-law cited in paragraph 116 of the present order, for national judges, not being exposed to disciplinary proceedings or penalties for having exercised the discretion to make a reference for a preliminary ruling to the Court under Article 267 TFEU, which is exclusively within their jurisdiction, constitutes a guarantee that is essential to their independence. Similarly, if, following the answer given by the Court, a national judge of an ordinary court were prompted to take the view that the case-law of the national constitutional court is contrary to EU law, that national judge's disapplication of that case-law, in accordance with the principle of primacy of EU law, cannot in any way trigger his or her disciplinary liability (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 260 and the case-law cited).
- 139 It follows that the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by the decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that

case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928 (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 262).

140 In the light of all the foregoing considerations, the answer to the second and third questions in Cases C-859/19, C-926/19 and C-929/19 is as follows:

- Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the national constitutional court are binding on the ordinary courts, provided that national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability;
- the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928.

Costs

141 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Sixth Chamber) hereby orders:

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

are to be interpreted as precluding national rules or a national practice under which judgments in matters of corruption and value added tax 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 value added tax fraud concerned must, as the case may be further to an extraordinary appeal against final judgments, be re-examined at first and/or second instance, where the application of those national rules or that national practice is capable of giving rise to a systemic risk of acts constituting serious fraud affecting the European Union's financial interests or corruption in general going unpunished. The obligation to ensure that such offences are subject to criminal penalties that are effective and act as a deterrent does not exempt the referring court from verifying the necessary observance of the fundamental

rights guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union. The requirements arising from the first sentence of the second paragraph of Article 47 of the Charter do not preclude the non-application of such national rules or such a national practice where the latter are capable of giving rise to such a systemic risk of impunity.

2. Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928

are to be interpreted as not precluding national rules or a national practice under which the decisions of the national constitutional court are binding on the ordinary courts, provided that national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability.

3. The principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928.

[Signatures]