

## Recent ECJ judgement sparks controversies on the Romanian statute of limitations for criminal liability



### I. The Romanian regulatory context

In recent years, the statute of limitations for criminal liability in Romania has been the subject of numerous debates among legal scholars and practitioners.

This is because in 2018 the Romanian Constitutional Court rendered a binding decision declaring as unconstitutional, in part, the provisions of the Criminal Procedure Code on interrupting the statute of limitations for criminal liability. The Constitutional Court issued this binding decision because the Romanian legislator had failed to amend the respective provisions, and as a result has divided the jurisprudence of Romanian criminal courts into two camps of interpretation, namely: **(i)** one camp stating that the statute of limitations cannot be interrupted, and **(ii)** another camp stating that it falls to the Romanian criminal courts to decide, on a case-by-case basis, whether the statute of limitations has been interrupted or not.

This debate was further fuelled in 2022 by a second decision of the Romanian Constitutional Court declaring as unconstitutional the part of the provisions of the Criminal Procedure Code that remained in force following the 2018 Constitutional Court decision. After this second decision, the Romanian stepped in and amended the respective provisions.

However, this legislative fix did not put to rest the debate that started in 2018, as many Romanian legal scholars and practitioners argued that the provisions of the Criminal Procedure Code on the topic of interrupting the statute of limitations that were in force in the period between the date of the first decision of the Romanian Constitutional Court in 2018 and the corresponding 2022 legislative fix **(i)** enshrined in essence no cases for interrupting the statute of limitations for entailing the criminal liability, **(ii)** represent the more lenient law and, consequently, **(iii)** need to be applied retroactively (*mitior lex*). The stakes of this debate were very high, as it could lead to the termination of a large number of criminal cases that were pending both before Romanian prosecutors and Romanian criminal courts.

The debate was ultimately settled by the Romanian High Court of Justice in 2022 through a binding decision stating, in essence, that in the period 2018–2022, the Criminal Procedure Code did not enshrine any cases in which the statute of limitations for criminal liability was interrupted and, consequently, that the provisions of the Criminal Procedure Code in force in the period 2018–2022 with regards to the statute of limitations represents the more lenient law that must be applied retroactively (*mitior lex*).

Needless to say, the High Court of Justice's binding decision reverberated throughout the entire Romanian judicial system and generated substantial criticism because of the "systemic risk of impunity", as the binding decision led to the termination of thousands of Romanian criminal cases, including criminal proceedings involving high-profile Romanian politicians and businessmen.

In this context, the Romanian criminal investigative bodies, in particular the National Anticorruption Directorate (DNA) and the Directorate for Investigating Organised Crime and Terrorism (DIICOT), decided to submit before Romanian courts of law, for each criminal proceeding, requests for referral to the European Court of Justice (ECJ). Some of these requests have been dismissed by the Romanian criminal courts, while others have been admitted and consequently, the ECJ has been vested with analysing the compatibility of the two binding decisions of the Romanian Constitutional Court and of the subsequent binding decision of the Romanian High Court of Cassation and Justice with EU Law.

## II. The ECJ Judgement dated 24 July 2023

On 24 July 2023, following a request for referral granted by the Braşov Court of Appeal, the ECJ ruled as follows:

*"1. Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on the European Union on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995, must be interpreted as meaning that the courts of a Member State are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability.*

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

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

This ECJ Judgement dated 24 July 2023 is grounded on the following pillars:

▣ **The principle that criminal offences and corresponding penalties must be defined by law.** The legal principle that enshrines the requirements of the foreseeability and precision of criminal law needs to be protected and applied by the national courts, even if it would have as a consequence the termination of a considerable number of criminal cases, including cases relating to criminal offences of serious fraud affecting the financial interests of the European Union, because the statute of limitations for criminal liability has lapsed.

□ **The principle of retroactive application of the more lenient criminal law (*lex mitior*)**—the national standard of protection cannot be applied by the national courts in order to call into question the interruption of the limitation period for criminal liability by procedural acts that took place before 25 June 2018 in Romanian criminal cases involving serious criminal fraud offences affecting the financial interests of the European Union, in view of the legal obligations of EU Member States **(i)** to combat fraud or any illicit activity affecting the financial interests of the EU - Article 325 Paragraph 1 of the TFEU and, respectively, **(ii)** to take the necessary measures in order to ensure that any acts that would represent a criminal fraud offence affecting the financial interests of the EU are punishable by effective, proportionate and dissuasive criminal penalties— Article 2 Paragraph 1 of the Convention on the Protection of the European Communities' Financial Interests (the PFI Convention).

In other words, the ECJ Judgement dated 24 July 2023 seems to suggest the following main rules:

□ The procedural acts carried out by the Romanian criminal investigation bodies **prior to 25 June 2018** (*i.e.*, the date on which the first decision of the Romanian Constitutional Court was published in the Romanian Official Gazette) **have interrupted the statute of limitations for criminal liability**.

□ The procedural acts carried out by the Romanian criminal investigation bodies **in the period 26 June 2018–30 May 2022** (*i.e.*, the date on which the Romanian modified the provisions of the Criminal Procedure Code in accordance with the decisions of the Romanian Constitutional Court) **have not interrupted the statute of limitations for criminal liability**.

□ The **more lenient criminal law** on the topic of the statute of limitations for criminal liability that existed in **the period 26 June 2018–30 May 2022 cannot be applied retroactively**, contrary to what the Romanian High Court of Cassation and Justice decided through its binding decision.

### **III. The status quo following the ECJ judgement dated 24 July 2023**

The ECJ Judgement rendered on 24 July 2023 has sparked another round of debates and criticism.

Many Romanian legal scholars and practitioners are debating the scope of the ECJ judgement, with some arguing that it is applicable only in Romanian criminal cases regarding serious criminal fraud offences affecting the financial interests of the European Union (as defined by Article 1 of the PFI Convention), while others argue that the ECJ judgement is applicable to all Romanian criminal cases.

On one hand, the ECJ judgement appears to be quite clear, as it is applicable only in criminal cases regarding serious criminal fraud offences affecting the financial interests of the European Union. On the other hand, it is quite hard to legally understand why a national standard of protection that ought to govern all criminal proceedings, irrespective of their object, is applicable for some criminal offences and not applicable for others.

It remains to be seen what the opinion most embraced by the Romanian criminal courts will be. In any event, it seems that the position of the National Anticorruption Directorate is that this judgement of the ECJ is applicable to all criminal cases and not only the cases regarding criminal offences directly affecting the budget of the EU.

It is also interesting to note that some Romanian criminal courts seem to disregard the ECJ judgement and have rendered solutions

terminating criminal cases after 24 July 2023 on the ground that the statute of limitations for criminal liability has lapsed, arguing that the failure to apply the legal principle of retroactive application of the more lenient criminal law (*lex mitior*) would amount to a breach of the provisions of the Romanian Constitution and of the Romanian Criminal Code.

As seen from the above, even after this judgement of the ECJ, there is a lot of uncertainty with regards to applicability of the statute of limitations for criminal liability, with many arguments pro and contra that might be considered valid for each opinion.