PRESCRIPTION OF CRIMINAL LIABILITY IN NATIONAL LAW IN LIGHT OF CJEU DECISION C-107/23PPU/LIN OF JULY 24, 2023

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Abstract: *The study starts from the idea of an apparent collision between a decision of the Romanian court of constitutional control in the matter of the prescription of criminal liability and the C.J.U.E Decision C-107/23PPU / Lin of July 24, 2023 which justifies an at least tangential approach to the effects it can produce at the level of national court jurisprudence. From the point of view of the approach in specialized literature, the prescription of criminal liability appears as a legal institution having effects both on the level of substantive criminal law, failure to meet the deadline being a condition of no punishment, and on the level of criminal procedural law, being a condition of procedure, fulfillment of the limitation period preventing the exercise of the criminal action.*

If a national regulation, specific to another legal system, considers that the prescription of criminal liability belongs to procedural law, not to substantive law, it will be possible to modify that rule in order to extend the limitation period in respect of crimes for which it has not already been fulfilled, this term at the time of modification.

From the perspective of stability, predictability and legislative coherence, of the effectiveness of combating criminality of all types in a logical and coherent structured way, from the perspective of criminological phenomena in contemporary Romanian society and the legal security needs of citizens and society as a whole, as well as the need the protection of democratic values in a context in which democracies are subjected to a test of resistance both within each democratic country and in a regional and global context, a rethinking of criminal policy and a "reset" of legislative measures regarding the Criminal Code is required and the Code of Criminal Procedure, but only on the basis of an in-depth analysis of the legislative developments described above, as well as with the consultation of all relevant actors within the judiciary, legal academia, the legal professions and civil society.

Key words: *criminal liability; the C.J.U.E Decision C-107/23PPU/Lin of July 24, 2023; Romanian law; criminal action; time limit; legislative coherence; the preeminence of European law.*

1. Brief considerations of the effects of a preliminary ruling by the Court of Justice of the European Union

An apparent collision between a decision of the Romanian Court of constitutional control in the matter of the prescription of criminal liability and the C.J.U.E Decision C-107/23PPU / Lin of July 24, 2023 justifies an at least tangential

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approach to the effects that the CJEU decision can produce at the level of the national court's jurisprudence. At the time of February 1, 2014, respectively, at the date of entry into force of the Criminal Code, according to art. 155 para. (1) of this normative act, the course of the criminal liability limitation period could be interrupted by fulfilling **any** procedural act in question.

On April 26 2018, the Constitutional Court of Romania issued Decision 297[2], by which it found that "*the legislative solution providing for the interruption of the course of the limitation period for criminal liability by performing any procedural act in question*", contained in the provisions of art. 155 paragraph (1) of the Criminal Code, "*is unconstitutional*". At the same time, in the context of this reasoning, within the last paragraph (34), the Constitutional Court considered that the legislative solution provided by the 1968 Criminal Code, which stipulated for the interruption of the general limitation period the fulfilling of any procedural act that *was to be communicated to the accused or the defendant*, was in accordance with the provisions of the Constitution. Decision 297/2018 became mandatory for all judicial bodies from the date of publication in the Official Gazette of Romania, namely June 25, 2018. Also, in its constant jurisprudence, the Constitutional Court has established that its decisions are generally binding both in terms of the *disposition part* of the judgement and in terms of its considerations.

Following this decision, the practice of the courts has known several approaches regarding the effects of Decision no. 297/2018, reason why some courts have requested the High Court of Cassation and Justice, according to the art. 475 of Criminal procedure code, the interpretation of the provisions of art. 155 paragraph 1 of Criminal Code, in the light of the decision of the Constitutional Court. By decision no. 5/2019 of March 21, 2019, the *Panel for resolving some legal issues* within the High Court of Cassation and Justice rejected as inadmissible the interpretation requests made by the national Courts, appreciating that they exceed the High Court powers because in fact it was requested *an interpretation* of the decision of the Constitutional Court.

Furthermore, both in jurisprudence and in specialized doctrine, an opinion became the majority, almost unanimously accepted, in the sense of the application of Decision no. 297/2018 of the Constitutional Court as an *interpretative decision* whose main effect was the obligation of the judicial bodies to adapt their practice in accordance with the interpretation given by the Constitutional Court to the rule provided by art. 155 para. 1 of Criminal Code, respectively the one contained in paragraph 34 of the decision, according to which the causes for interrupting the course of the general limitation period from the old regulation which operated by fulfilling any procedural act that *had to be communicated* to the accused or the defendant, were in accordance with the provisions of the Constitution. Applying this interpretation, the courts considered as acts of interrupting the course of the general limitation period, *all the acts that had to be communicated to the suspect or the*

[2] Published in Official Gazette nr. 518 from 25.06.2018.

accused (these being the analogous qualities to those provided by the Criminal Code from 1968, respectively *suspect or accused*).

On May 26, 2022, the Constitutional Court ruled again on the constitutionality of the provisions of art. 155 par. 1 of the Criminal Code by Decision no. 358, which became mandatory to the judicial bodies from the date of publication in the Official Gazette of Romania no. 565 on 09.06.2022. By this decision, the Constitutional Court found the unconstitutionality of the provisions of art. 155 par. 1 of the Criminal Code. In essence, in the statement of reasons, the Constitutional Court explained the legal nature of its previous decision (no. 297/2018), in the sense that *this was not an interpretive one*, but a *simple decision of unconstitutionality* which, together with the unconstitutional declaration of the phrase „*any procedural act in question*" from the content of art. 155 paragraph 1 of the Criminal Code, obliges the Legislator to intervene actively to clarify the legal norm. The Constitutional Court also pointed out that the inaction of the Legislator determined the judicial bodies to replace the Legislator role and to identify *themselves* the causes of the interruption of the course of the general limitation period, which generated a new situation, defined as "*without clarity*" and impossibility to apply the provisions of art.155 par.1 Criminal code after the publication of Decision 297/2018.

In conclusion, the Constitutional Court established that "*under the conditions of establishing the legal nature of Decision no. 297/2018 as a simple/extreme decision, in the absence of an active intervention of the Legislator, mandatory according to art. 147 of the Constitution, for the period between the date of publication of that decision and until the entry into force of a regulatory act clarifying the rule, by expressly regulating cases capable of interrupting the limitation period, the active fund of criminal law does not contain any (general) provision allowing the interruption of the limitation period of criminal liability*" (paragraph 73).

Following the finding set out in paragraph 73 of Decision 358/2022, in most cases concerning corruption offenses, fraud in connection with European funds or VAT, the defendants requested that the general limitation period for criminal liability *be established*, since within the period between the two judgments of the Constitutional Court, the Romanian law (through its Legislator) did not provide for any case of its interruption. At the same time, the issue was also raised in the cases finally settled, by way of extraordinary attack of a final judgment: the appeal for annulment based on the provisions of art. 426 let. b of the Code of Criminal Procedure, the appellants requesting the abolition of the final conviction decisions, the retrial of the cases and the order of termination of the criminal proceedings following the fulfillment of the general limitation period of criminal liability.

As a result of a recent jurisprudence of the CJEU, several national courts of last jurisdiction addressed the CJEU, with the aim of establishing whether a possible *non-application of Decision no. 358/2022 of the Constitutional Court of Romania*

would be in accordance with Community law, especially since that through the answer to question no. 4 in the Euro Box Promotion[3] case, the CJEU showed that "*the principle of the supremacy of Union law must be interpreted in the sense that it opposes to a regulation or a national jurisprudence according to which the national common law courts are bound by the national Constitutional Court's decisions and cannot, for this reason, and with the risk of committing a disciplinary offence, leave unapplied ex officio the jurisprudence resulting from the mentioned decisions, even if they consider, in the light of a decision of the Court, that this jurisprudence is contrary to Article 19 paragraph (1) the second paragraph of the TEU, Article 325 paragraph (1) TFEU or Decision 2006/928*".

In this sense, in the case of Euro Box Promotion and others[4] (C 357/19, C 379/19, C 547/19, C 811/19 and C 840/19) C.J.E.U. it was ruled that "*as far as Romania is concerned, the obligation to fight corruption that harms the financial interests of the Union, as it follows from Article 325 paragraph (1) TFEU, is completed by the specific commitments that this member state assumed at the conclusion of accession negotiations on December 14, 2004*". Indeed, in accordance with point I (4) of Annex IX to the Act of Accession, the said Member State undertook, among other things, to "*considerably speed up the fight against corruption, particularly the fight against high-level corruption, by ensuring the rigorous application of anti-corruption legislation*". This specific commitment was subsequently implemented by the adoption of Decision 2006/928, which set benchmarks in order to address the shortcomings identified by the Commission before Romania's accession to the Union, especially in the fight against corruption. Thus, the annex to this decision, in which the respective reference objectives are set out, provides at point 3 the objective of "*continuing professional and impartial investigations regarding high-level corruption allegations*", and at point 4, the objective of "*adopting additional measures to prevent and fight corruption, especially in local administration*".

At the same time, the CJEU also showed that "the reference objectives that Romania has thus undertaken to achieve are binding for this member state, in the sense that it is subject to the specific obligation to achieve the respective objectives and to take the appropriate measures in order to achieve them in the shortest possible time. Also, the mentioned Member State has the obligation to refrain from implementing any measure that would risk compromising the achievement of the same objectives. Or, the obligation to fight effectively against corruption and especially high-level corruption, which derives from the reference objectives presented in the annex to Decision 2006/928 in conjunction with the specific commitments of Romania, are ***not*** limited only to cases of corruption that harm the financial interests of the Union".

[3] https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-357/19&jur=C
[4] https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-357/19&jur=C

At the same time, the CJEU also showed that the reference objectives that Romania has thus undertaken to achieve are binding for this member state, in the sense that it is subject to the specific obligation to achieve the respective objectives and to take the appropriate measures in order to achieve them in the shortest possible time. Also, the said Member State has the obligation to refrain from implementing any measure that would risk compromising the achievement of the same objectives. However, the obligation to fight effectively against corruption and especially high-level corruption, which derives from the reference objectives presented in the annex to Decision 2006/928 in conjunction with the specific commitments of Romania, is *not* limited only to cases of corruption that harm the financial interests of the Union.

Answering the questions asked by the referring national court, by ***Decision C-107/23PPU/Lin of July 24, 2023, the CJEU established that***:

"*Article 325(1) TFEU and Article 2(1) of the Convention drawn up pursuant to Article K.3 of the Treaty on European Union on the protection of the financial interests of the European Communities, signed in Brussels on July 26, 1995 and annexed to the Council Act of July 26, 1995, must be interpreted in the sense that the courts of a member state are not obliged to leave unapplied the decisions of the constitutional court of this member state by which the national legislative provision regulating the causes of interruption of the limitation period in criminal matters is invalidated due to the violation of the principle of legality of crimes and punishments, as protected in national law, in terms of its requirements regarding the predictability and precision of the criminal law, even if these decisions result in the termination, as a consequence of the prescription of criminal liability, of a considerable number of criminal trials, including trials relating to serious fraud offenses affecting the financial interests of the European Union.*

Instead, the mentioned provisions of Union law must be interpreted in the sense that the courts of this Member State are obliged to leave unapplied a national standard of protection relating to the principle of retroactive application of the more favorable criminal law (lex mitior) which allows for reconsideration, including within of appeals directed against definitive judgments, of the interruption of the limitation period of criminal liability in such trials through procedural acts intervened before such invalidation.

Also, the principle of the supremacy of Union law must be interpreted in the sense that it is opposed to a national regulation or national practice according to which the national common law courts of a member state are bound by the decisions of the constitutional court, as well as those of the supreme court of this member state, and they cannot, for this reason and with the risk of disciplinary liability of the judges in question, leave unapplied ex officio the jurisprudence resulting from the mentioned decisions, even if they consider, in the light of a decision of the Court, that this jurisprudence is contrary to some provisions of Union law which have a direct effect."

In the event of a contradiction between the decisions of the Constitutional Court and the solution of the European Union Court of Justice, considering that the Treaty establishing the European Economic Community, signed in Rome on March 25, 1957, entered into force on January 1, 1958, does not include any references to the authority and the effect of the interpretation of Community law on national courts, in the matter of preliminary rulings, the answer to this problem was first developed in the Praetorian way, being gradually developed by the European Court of Justice.

Although initially the existence of binding precedent could not be supported, a starting point for the development of judicial precedent can be identified in the Court's jurisprudence. In this sense, through the Judgment of July 15, 1964, Costa (6/64, EU:C:1964:66, p. 1158–1160), the Court established the principle of the *supremacy of Community Law*, understood in the sense that it enshrines the prevalence of this Law over the law of the member states. In this regard, the Court found that the establishment by the EEC Treaty of a legal order of its own, accepted by the member states on the basis of reciprocity, has as a corollary the impossibility of the mentioned states to prevail against this legal order, a subsequent unilateral measure or to oppose to the law born from the EEC Treaty norms of national law, regardless of their nature, otherwise there is a risk that this law will lose its community character and that the legal foundation of the Community itself will be called into question.

This theory of judicial precedent, although it was also built by reference to other cases – Milchkontor[5], Cilfit[6] in which the Court states: "(…) *Finally, the correct application of Community law can be imposed in such an obvious way that it leaves no room for any reasonable doubt as to how to solve the question asked. Before concluding that this is such a situation, the national court must be convinced that this aspect is imposed in an equally and obvious way to the national courts of the other member states and the Court of Justice. Only if these conditions are met, the national court will be able to refrain from referring this question to the Court of Justice and assume the responsibility of resolving it itself (pt. 16). However, the existence of such a possibility must be evaluated according to the characteristics of Community law and the specific difficulties presented by its interpretation (point 17). Firstly, it must be considered that texts of Community law are drawn up in several languages and that the various language versions are equally authentic; thus, an interpretation of a provision of Community law involves a comparison of the linguistic versions (point 18). It should also be noted that Community law uses its own terminology, even when there is a complete agreement between the language versions. Moreover, it should be emphasized that legal notions do not necessarily have the same content in Community law and in the national law of different member states (point 19). Finally, each provision of Community law must be placed in its*

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0136
[6] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0283

context and interpreted in the light of all the provisions of this law, its purposes and the stage of its evolution at the date when the said provision must be applied (point 20)", International Chemical Corporation[7], Fotofrost[8] – CJEU does not consider itself bound to follow previous case law.

A preliminary ruling is binding to the national court that requested such a solution. E.C.J. decided that "*the purpose of the preliminary ruling is to decide on the law, and this ruling is binding for the national court in terms of the interpretation of the community provision and the community act in question*". (52/76, Benedetti v. Munari, 1977 ECR 163). The national court is bound by a preliminary ruling by the Court, regarding the interpretation or validity of the acts of the Union institutions in question, in order to resolve the main dispute[9]. However, once the national court referred the matter to the Court of Justice on a preliminary basis, in order to resolve the dispute with which it was referred, it is obliged to comply with the interpretation of the provisions in question given by the Court[10]. National courts of first instance are not obliged to follow the decisions of the supreme court of the Member State regarding the interpretation of Community law: (6/1971, Rheinmuhlen Dusseldorf v. Eifuhr und Vorattstelle fur Getreide und Futtermittel, 1977 ECR 823)[11]. Even in the situation where the Supreme Court of a member state obtains a preliminary judgment issued by the CJEU, the court of first instance will be bound by the preliminary judgment, not by the decision of the national Supreme Court. Therefore, the Court's Judgment is not only binding on the referring court, but it is binding on all national courts, including any court of appeal, seized with an appeal against the judgment of the referring court[12].

In the case of M.A.S C 42/17 (Taricco II) the CJEU ruled that "Article 325 paragraphs (1) and (2) of the TFEU must be interpreted in the sense that it ***requires the national court*** that, in a criminal proceeding having as its object offenses concerning the VAT, to leave unapplied internal provisions on prescription that fall under national substantive law and that oppose the application of effective and dissuasive criminal sanctions in a considerable number of cases of serious fraud

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[7] As pointed out in the judgment of 13 May 1981 (International Chemical Corporation, 66/80, EU:C:1981:102), the powers granted to the Court under art. [267 TFEU] mainly aims to ensure the uniform application of Union law by national courts. This requirement of uniformity is absolutely necessary when it comes to the validity of a Community act. The divergences between the courts of the member states regarding the validity of Union acts would be likely to compromise the very unity of the legal order of the European Union and would affect the fundamental requirement of legal security" (point 15).

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0314

[9] Judgment of 3 February 1977, Benedetti, 52/76, EU:C:1977:16, point 26; ordinance of 5 March 1986, Wunsche Handelsgesellschaft, 69/85, EU:C:1986:104, point 13; the decision of 14 December 2000, Fazenda Publica, C-446/98, EU:C:2000:691, point 49; the judgment of October 5, 2010, Elchinov, C-173/09, EU:C:2010:581, point 29; judgment of 16 June 2015, Gauweiler and others v Deutscher Bundestag, C-62/14, EU:C:2015:400, paragraph 16.

[10] Elchinov Judgement, supra, n. 12, pct. 30

[11] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A1974%3A3

[12] Morten Broberg, Niels Fenger, *The procedure of the preliminary reference to the European Court of Justice,* Ed. Wolters Kluwer Romania, Bucharest, 2010, p. 406.

affecting the financial interests of the European Union or that provide shorter prescriptions terms for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless such non-application causes a violation of the principle of legality of offenses and punishments, due to a lack of precision of the applicable law or for the reason of the retroactive application of a legislation that imposes more severe criminalization conditions than those in force at the time of the commission of the crime".

At the same time, the CJEU also showed the fact that the national court invested is the one that has the competence to assess whether by not applying some provisions of the domestic legislation, the principle of legality of crimes and punishments would be violated.

However, in the jurisprudence of the CJEU, the issue of the standard to which the national judge refers when analyzing whether the failure to apply a national provision results in a violation of the principle of legality of crimes and punishments has not been clarified.

In principle, the interpretation given by the CJEU applies to the legislation from the moment it enters into force, becoming incident also in the case of legal relationships existing before the decision. A provision declared by the CJEU to be invalid must be considered as such from the moment of entry into force.

In the case of Skov Aeg v. Bilka[13], although through written observations, the Danish Government and the parties of the domestic dispute requested the CJEU to limit the temporal effects of the judgment, in the sense of applying only from the date of the judgment, the Court rejected this request, reiterating that, in principle, a preliminary ruling clarifies and defines the purpose of Community law, as it should be understood from the moment the act whose interpretation was requested enters into force[14]. Therefore, the right interpreted by the CJEU must be applied by the national court to legal relationships *born before the preliminary ruling is delivered*.

However, in the situation where the Constitutional Court rules on the constitutionality of some legal provisions, arguing, among other things, that the case-law of the national courts is in the sense that applying them in a certain interpretation is contrary to the principle of the legality of crimes and punishments, the national courts are put in the impossible situation to respect, on the one hand, the Romanian Constitutional Court decisions that finds a possible violation of the principle of the legality of crimes and punishments, and on the other hand, to directly apply Community law that allows some national rules to be left unapplied (respectively the two Romanian Constitutional Court decisions to which we have referred), except in the situation where this violates the same principle.

[13] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0402

[14] Only exceptionally, in the application of the general principle of legal security, inherent in the legal order of the Union, the Court may be determined to limit the possibility of invoking a provision that it has interpreted. In order to be able to impose such a limitation, it is necessary to meet two essential criteria, namely the good faith of those interested and the risk of serious disturbances" (point 33), Nisipeanu Judgment, C-263/10, judgment of July 7, 2011, ECR 2011 p. I–97*, Summ. pub., EU:C:2011:466, point 32 et seq.

The effects[15] of the preliminary ruling were retained in Romanian law by Decision no. 1039/2012[16] of the Constitutional Court which established that "*the legal effects of the preliminary judgment of the Court of Justice of the European Union have been outlined through jurisprudence*. Thus, the Court of Luxembourg ruled that such a decision, bearing on the interpretation or validity of an act of the European Union, is binding for the jurisdictional body that formulated the action in issuing a preliminary decision, and the interpretation, making common body with the European provisions which it interprets, it is also vested with authority *vis-à-vis* the other national courts, which cannot give their own interpretation to those provisions. At the same time, the effect of preliminary rulings is a direct one, in the sense that nationals of the member states have the right to invoke European rules directly before national and European courts, and retroactively, in the sense that the interpretation of a rule of European Union law within a preliminary reference clarifies and specify its meaning and scope, from its entry into force".

In conclusion, it is necessary to establish with certainty whether the national court in its assessment on the effects of a possible non-application of the Constitutional Court Decision nr. 358/2022 regarding the principle of legality of crimes and punishments, refers to this mandatory decision or must refer to the Community standard. Although the answer to such a problem seems seemingly simple, we believe that to provide a coherent solution, it is necessary to approach the way in which the Romanian constitutional control court itself has settled the relationship between the national law system and the rules of EU law.

2. The preeminence of European Union law in the jurisprudence of the Romanian constitutional court

Beyond the fact that the two decisions of the constitutional review court that we previously referred to justified the approach of some national courts to address the CJEU with questions regarding the prescription of criminal liability, we consider that the principle of the supremacy of European Union law provides the mandatory nature of the decisions of the Court of Justice of the European Union, which prevail over national legislation, as provided in art. 148 para. (2), (4) of the Constitution.

Therefore, a contrary conclusion of the national court in a specific case, which would call into question the interpretation of domestic law, in accordance with the requirements of EU law, would distort the function of the Court of Justice of the European Union and constitute a violation of EU law that can generates by the European Commission an action to ascertain the non-fulfillment of obligations by the respective member state, according to art. 258 TFEU.

As we anticipated at the first point of the paper, by Decision no. *1039/2012*, the Constitutional Court held, in essence, that, in order to comply with art. 11

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[15] D. Șandru, *The binding character of the preliminary decision issued by the Court of Justice of the European Union for national courts and authorities,* Romanian Journal of European Law, no. 4/2019, p. 7.

[16] Official Gazette nr. 61 from 29 January 2013.

paragraph (2) and art. 148 para. (2) and (4) of the Constitution, but also with the constant jurisprudence of the Court of Justice of the European Union, there must be means to ensure the uniform application of Union Law, as it should have been interpreted since its entry into force, otherwise, the obligation assumed by the Romanian state through the accession to the Union is violated, the obligation listed in art. 10 para. (2) of the Treaty establishing the European Community and guaranteed by art. 148 para. (4) of the Constitution, because this guarantee is imposed in the charge of both the legislative and judicial powers.

Also, the decision of the Constitutional *Court expressly refers to the principle of priority of the application of European Union law over internal laws*, principle regulated by art. 148 para. (2) and notes that disregarding this principle would practically mean, including disregarding art. 148 para. (4) of the Constitution, which imposes on the state authorities, therefore including the judicial authority, the task of guaranteeing the fulfillment of the obligations resulting from the act of accession and from the principle of priority of application of European Union law, the right to a fair trial assuming *eo ipso* the presumption of compliance of the normative acts (Laws) interpreted and applied by the court in the act of administration of justice with the priority to legislation of the European Union.

In the same sense, it is also shown that, art. 4 para. (3) of the Treaty on the European Union, published in the Official Journal of the European Union series C no. 83 of March 30, 2010, regulates the principle of loyal cooperation between the Union and the member states and provides, at the same time, the positive obligation of the member states to adopt any general or special measure to ensure the fulfillment of the obligations arising from the treaties or resulting from the acts of the Union institutions.

In the same decision, the Constitutional Court shows that the same text enshrines the *negative obligation* of the member states to refrain from any measure that could endanger the achievement of the objectives of the Union, and as far as competence is concerned to ensure the interpretation of Union law for the purpose of uniform application at the level of all member states, it belongs to the Court of Justice of the European Union, which, as the jurisdictional authority of the Union, pursuant to art. 19 para. (3) lit. b) of the Treaty, decides with a preliminary title, at the request of the national courts, regarding the interpretation of the Union law or the validity of the acts adopted by the institutions, the legal effects of the preliminary decision of the Court of Justice of the European Union being outlined by jurisprudence.

Also, the Constitutional Court retained what was ruled by the Court of Luxembourg, namely that such a decision, bearing on the interpretation or validity of an act of the European Union, is binding for the jurisdictional body that formulated the action in pronouncing a preliminary decision, and the interpretation, forming a common body with the European provisions that it interprets, is also vested with authority *vis-à-vis* the other national courts, which cannot give their own interpretation to those provisions.

At the same time, the Constitutional Court emphasized in this decision that the effect of the preliminary rulings is a direct one, in the sense that the nationals of the member states have the right to directly invoke the European norms before the national and European courts even ***retroactively***, in the sense that the interpretation of a norm of European Union law within a preliminary reference clarifies and specifies its meaning and field of application, since its entry into force (*in this sense, see point 1 of the provision of the Decision of February 5, 1963 pronounced in Case 26/62 , Van Gend en Loos v. Nederlandse Administratie der Belastingen, taken from the Judgment of 27 March 1963 pronounced in joined cases 28, 29 and 30/62, Da Costa and others v. Nederlandse Belastingadministratie or the Judgment of 24 June 1969 pronounced in Case 29/68, Milch, Fett-und Eierkontor GmbH v. Hauptzollamt Saarbrucken, paragraph 3).* In conclusion, the Court of Justice of the European Union, having the competence in interpreting the law of the European Union (see, in this regard, the decision of the Constitutional Court no. ***383 of March 23, 2011***, published in the Official Gazette of Romania, Part I, no. 281 of April 21, 2011), its preliminary rulings being binding *erga omnes*, at the level of all member states, subject to the request at a later time, by the national courts, of additional clarifications on the respective interpretation of the Court.

A second decision of the Romanian court of constitutional control that we would like to refer to in order to emphasize the opinion of the constitutional judges regarding the recognition of the preeminence of EU law is **Decision no. 390/2021**[17] of the Constitutional Court, regarding the exception of unconstitutionality of the provisions of art. 88^1–88^9 of Law no. 304/2004, regarding the Judicial Organization, as well as the Government Emergency Ordinance no. 90/2018 regarding some measures for the operationalization of the Section for the investigation of judicial crimes.

Regarding the interpretation of the "supremacy of Union law" principle in the sense that it opposes to a regulation, which has constitutional rank, of a member state, as interpreted by its constitutional court, according to which a lower court is not authorized to leave unapplied *ex officio* a national provision that it considers to be contrary to Union law, the Constitutional Court in the aforementioned decision pointed out and reiterated those established by Decision no. 80 of February 16, 2014, paragraph 456, according to which the Constitution of the State – *is the expression of the will of the people, which means that it cannot lose its binding force only through the existence of an inconsistency between its provisions and the European ones, the state's membership of the European Union not being able to affect the supremacy of the national Constitution over the entire legal order*.

In this context, the Constitutional Court found that the relationship between national law and international law is established in the Romanian Constitution in the content of art. 11 and 20, and from the corroborated interpretation of the two constitutional norms, the following principles emerge:

[17] Published in Official Gazette nr. 612 of 22.06.2021.

(i) the commitment assumed by the Romanian state to fulfill properly and in good faith its obligations from the treaties to which it is a party;

(ii) through the ratification of international acts or treaties by the Romanian Parliament, they become national norms of internal law;

(iii) the supremacy of the Romanian Constitution in relation to international law: Romania cannot ratify an international treaty that includes provisions contrary to the Constitution; this can be done only after the prior revision of the National Fundamental Law (the Constitution);

(iv) the interpretation and application of the constitutional provisions regarding the rights and freedoms of citizens is carried out in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party;

(v) in the matter of human rights, the conflict between an international treaty to which Romania is a party and domestic law is resolved in favor of the international treaty only if it includes more favorable norms.

The Constitutional Court also held a special regulation in the Romanian Constitution, namely the relationship between national law and European Union law, which is established in art. 148 para. (2) and (4), according to which: "*(2) As a result of the accession, the provisions of the constitutive treaties of the European Union, as well as the other binding community regulations have priority over the contrary provisions of the internal laws, in compliance with the provisions of the act of accession. [...] (4) The Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfillment of the obligations resulting from the act of accession and from the provisions of paragraph (2).*"

Thus, the Constitutional Court held, the clause of accession to the European Union subsidiarity includes a clause of compliance with EU law, according to which all national organisms of the state are obliged in principle to implement and apply EU law, which is also valid for the Constitutional Court, which ensures, by virtue of art. 148 of the Constitution, the priority of application of European law. Referring to this priority of application, the Constitutional Court held that it should not be perceived in the sense of removing or disregarding the national constitutional identity, enshrined in art. 11 paragraph (3) in corroboration with art. 152 of the Fundamental Law, as a guarantee of a basic identity core of the Romanian Constitution, which should not be relativized during the process of European integration. In virtue of this constitutional identity, it is also stated in the justification, that the Constitutional Court is empowered to ensure the supremacy of the Fundamental Law on the territory of Romania (*see mutatis mutandis the Decision of June 30, 2009, 2 BvE 2/08 etc., pronounced by the Constitutional Court Federal Republic of Germany*).

According to the compliance clause included in Article 148 of the Constitution, the Constitutional Court has further stated that Romania cannot adopt a legislative act contrary to the obligations it has undertaken as a member state (see Decision

No. 887 of December 15, 2015, published in the Official Gazette of Romania, Part I, No. 191 of March 15, 2016, paragraph 1375). However, the aforementioned is subject to a constitutional limit based on the concept of "*national constitutional identity*" (see Decision No. 683 of June 27, 2012, published in the Official Gazette of Romania, Part I, No. 479 of July 12, 2012, or Decision No. 64 of February 24, 2015, published in the Official Gazette of Romania, Part I, No. 286 of April 28, 2015, Decision No. 104 of March 6, 2018, published in the Official Gazette of Romania, Part I, No. 446 of May 29, 2018, paragraph 81).

However, on the other hand, the Constitutional Court has indicated that even Article 4, paragraph 2 of the TUE (Treaty on European Union), explicitly stating that the Union respects the "*equality of member states under the treaties*," their "*national identity*," and "*essential state functions*," incorporates the concept of "*national identity*". This concept is "inherent in the fundamental political and constitutional structures" of the member states and signifies that the process of constitutional integration within the EU is limited precisely by the fundamental political and constitutional structures of the member states.

Referring to the judicial authority, in its reasoning, the Constitutional Court noted that a judicial body is empowered to analyze the compliance of a provision "in domestic laws", belonging to domestic law, with the provisions of European law through the prism of Article 148 of the Constitution. In cases where it finds inconsistency, it has the competence to give priority to the provisions of Union law in disputes involving the subjective rights of citizens. This is because, in all cases, by the notions of "domestic laws" and "national law", the Constitution exclusively refers to sub-constitutional legislation, preserving its hierarchically superior position in virtue of Article 11, paragraph (3).

The Constitutional Court ruled that when a judicial court establishes that "*the provisions of the constitutive treaties of the European Union, as well as other mandatory community regulations, take precedence over contrary provisions in domestic laws"*, article 148 of the Constitution does not grant priority of application to European law over the Constitution of Romania. Therefore, a national court does not have the authority to analyze the conformity of a provision from domestic law, found to be constitutional under Article 148 of the Constitution, with European law.

Essentially, in their capacity as a judge of a member state of the European Union, the national judge is undoubtedly the link between the principle of institutional autonomy of the member states on the one hand, and the limits of this principle contained in the notion of the practical effect of community law, in procedural non-discrimination, and in respecting the requirements or rules of community procedures, on the other hand.

On this basis, specific responsibilities emerge for the national judge.

The loyal cooperation with the institutions of the community constitutes, according to Article 5 of the Treaty on European Union (formerly Article 5 of the Treaty establishing the European Community), one of the supreme obligations of the

national judge. This cooperation consists in the direct and special connection of the community institutions with the judicial authorities of the member states, tasked with overseeing the application and observance of community law in the national legal order.

The principle of interpreting national procedural law in accordance with community law constitutes the corollary of the obligations of the national judge in applying community norms. National jurisdiction is obliged to interpret its national law in light of the text and purpose of the directive in order to achieve the result aimed by Article 288 of the Treaty on the Functioning of the European Union (formerly Article 249 of the Treaty establishing the European Community).

Applying the specific consequences of this principle in a more delicate case, the Court of Justice has highlighted, in response to the decision of the court of first instance and the Spanish investigating judge, that the latter should have refrained from applying a Spanish law from 1951 regarding the legal regime of anonymous societies, which was incompatible with Council Directive No. 68/1951 on Company Law.

The imperative duty of the national judge not to apply national procedural rules contrary to community law is one of the specific responsibilities of the judge, illustrated as a principle in the Simmenthal[18] judgment of March 9, 1978, by the Court of Justice. By virtue of the *principle of the priority of community law*, the provisions of the Treaty, and the directly applicable acts of the institutions, have the effect, in relation to the domestic law of the member states, not only of rendering any conflicting provision in existing national legislation inapplicable by full right but also of integrating these provisions and community acts as an integral and prioritized part of the legal order applicable within the territory of each member state, thereby preventing the valid formation of new national legislative acts to the extent that they would be incompatible with community norms.

Therefore, in principle, any national judge within their competence has the obligation to fully apply the provisions of European law and to protect the rights that it confers to individuals, making inapplicable any provisions, possibly conflicting, of national law, whether prior or subsequent to the community rule. The national judge faced with a question of incompatibility between an internal norm and a norm of European law (primary or secondary) must ***directly*** resolve it by giving priority to the European norm, regardless of the rank of the internal norm in the hierarchy of national norms[19].

In the end, the Court firmly decided (in the Simmenthal case, mentioned above) that the national judge, tasked with applying the provisions of European law within their competence, is obliged to ensure the full effect of these norms, leaving, if necessary, any contrary provision in national legislation, even if subsequent,

[18] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A61977CJ0106

[19] B. Andrieșan-Grigoriu, *Procedura hotărârilor preliminare*, Ed. Hamangiu, București, 2010, p. 39.

inapplicable through their own authority, without being bound by its prior elimination through legislative means or any other constitutional procedure.

The Court of Justice acknowledged the specific nature of the Community (now replaced by the European Union) as an entity created for an indefinite duration, endowed with its own powers, personality, and legal capacity, with the ability for international representation, and most notably, with real powers derived from a limitation of the competences of the member states or a transfer of their responsibilities to the Union[20].

3. The need for congruence between the protection regulated by Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud affecting the Union's financial interests through criminal law means and the incrimination under Romanian law of behaviors affecting these interests.

With specific reference to financial interests, it's important to note that as early as 1995, a convention was adopted aiming to protect, through specific criminal law measures, the financial interests of the EU and its taxpayers. This refers to the Council Act of 26 July 1995 establishing the Convention on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, pp. 48–57)[21].

Over the years, the Convention on the protection of the European Communities' financial interests has been supplemented by a series of protocols. Without delving into regulatory details, the decisive role of the Convention and its protocols is to establish a harmonized legal definition of fraud and to compel the signatory parties to adopt criminal sanctions for fraud. EU countries are required to introduce *effective, proportionate, and dissuasive criminal sanctions* concerning fraud that impacts the financial interests of the EU.

Among the examples of *fraud* related to expenditures are any intentional acts or omissions such as: using or presenting false, incorrect, or incomplete statements or documents that result in the improper receipt or retention of funds from the EU budget; failure to disclose information, breaching a specific obligation, with the same effect; or diverting such funds for purposes other than those for which they were initially granted.

Among the examples of fraud related to *revenues* are any intentional acts or omissions such as: using or presenting false, incorrect, or incomplete statements or documents that result in the illegal reduction of resources from the EU budget; failure to disclose information, breaching a specific obligation, with the same effect; or diverting a benefit obtained legally (for example, abusing legitimately obtained tax payments) with the same effect.

[20] Claudia Antonela Susanu, *Judecătorul național, primul judecător al dreptului uniunii. Rolul său în interpretarea și aplicarea normelor de dreptul ale uniunii, în scopul asigurării efectului deplin al acestora*, Analele Științifice ale Universității „Alexandru Ioan Cuza" din Iași Tomul LXIV, Științe Juridice, 2018, Nr. I.

[21] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A1995%3A316%3ATOC

In cases of serious fraud, these sanctions must include custodial sentences that may lead to *extradition* in certain situations. The first protocol to the convention, adopted in 1996, distinguishes between "*active*" and "*passive*" corruption of public officials. Additionally, it defines the notion of "*officer*" (both at national and EU levels) and harmonizes sanctions for corruption offenses.

Each EU country must adopt laws allowing for the criminal liability of individuals in top positions within enterprises or those with decision-making authority or control within a company (*i.e*., legal persons). The second protocol, adopted in 1997, contains additional clarifications regarding the application of the Convention concerning the criminal liability of legal persons, asset confiscation, as well as the offense of money laundering.

In 1996, a protocol was adopted that granted the European Court of Justice (ECJ) the competence for interpretation. This protocol allows national courts, when they have doubts about the interpretation of the convention and its protocols, to request the Court of Justice of the European Union to render a preliminary ruling. Each EU country must take the necessary measures to establish jurisdiction over the offenses they have identified in accordance with the obligations arising from the convention.

On July 5, 2017 (OJ L 198/29), *Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud affecting the Union's financial interests through criminal law (hereinafter referred to as the PIF Directive)* was adopted. According to the provisions of Article 17(7), this directive must be transposed into national law by July 6, 2019.

This directive replaces, starting from July 6, 2019, the Convention established under K.3 of the Treaty on European Union concerning the protection of the financial interests of the European Communities from 1995 (hereinafter referred to as the PIF Convention). This convention was transposed into Romanian law by introducing the Section 4^1 – "*Offenses against the financial interests of the European Communitie*s" in Law no. 78/2000[22] on the prevention, detection, and sanctioning of corruption. The legal framework was further supplemented by Law no. 161/2003[23] *on certain measures to ensure transparency in the exercise of public dignities,* public functions, and in the business environment, as well as the prevention and sanctioning of corruption, published in the Official Gazette of Romania, Part I, no. 279 of April 21, 2003.

Through the provisions of a separate section, ***Section*** $\boldsymbol{4^1}$, new acts were criminalized, such as: the use or presentation of false, inaccurate, or incomplete documents or statements resulting in the unfair acquisition of funds from the general budget of the European Communities or budgets administered by them or on their behalf, or leading to the illegal reduction of resources from these budgets. Additionally, it criminalizes knowingly withholding the data required by law to

[22] Official Gazette no. 219 from 18 May 2000.
[23] Official Gazette no. 279 from 21 April 2003.

obtain funds from the general budget of the European Communities or budgets administered by them or on their behalf. By aligning with the provisions of the PIF Directive, it became necessary to make specific interventions, particularly to update the language in the texts of Law no. 78/2000 on the prevention, detection, and sanctioning of corruption. Thus, the national legislature intervened to make changes to offenses against the financial interests of the European Union.

A detailed analysis of the changes made to Law no. 78/2000 will demonstrate that Romania has fulfilled the obligations set out in Article 325(3) of the Treaty on the Functioning of the European Union. This means that Romania has adopted measures to protect the EU budget similar to those taken to protect the national budget. Additionally, Romania collaborates effectively with other member states to combat fraud, corruption, and other illegal activities that affect the financial interests of the European Union.

For example, the national legislature, regarding the content of Article 18^1 of Law no. 78/2000 (which transposes Article 1(a) first line of the PIF Convention), was analyzed and modified concerning Article 3 points 2(a) to (i) of the Directive. Thus, the text of the PIF Convention provided the following: "*(1) For the purposes of this Convention, fraud affecting the financial interests of the European Communities shall mean: a) in relation to expenditure, any intentional act or omission concerning: – the use or presentation of false, incorrect, or incomplete statements or documents resulting in the unfair receipt or retention of funds from the general budget of the European Communities or budgets managed by the European Communities or on their behalf;* (...)". The text of the PIF Directive provides the following: "*(2) For the purposes of this Directive, the following shall be considered fraud affecting the financial interests of the Union: a) in relation to non-procurement expenditure, any action or omission concerning: (i) the use or presentation of false, incorrect, or incomplete statements or documents resulting in the improper diversion or retention of funds or assets from the Union budget or budgets managed by the Union or on its behalf;* (...)."

The previous domestic regulation was considered more general, not conditioning the differentiation between revenues/expenditures related to procurement.

In light of this, the following modifications were proposed for Article 18^1, paragraph (1):

a) Adding a corresponding notion in the national legislation for the term "assets", namely the term "active".

b) Removing the phrase "in bad faith".

The latter is imposed by a correct transposition of European requirements, as neither the 1995 PIF Convention nor Directive No. 2017/1371 specify a qualified form of guilt in the form of direct intent. Moreover, for other offenses against the financial interests of the European Union, such an additional requirement regarding the subjective aspect is not provided, as they can be committed with direct or indirect intent (as per Article 18^2, paragraphs (1), (2) of Law No. 78/2000).

Furthermore, in Law No. 241/2005 for the prevention and combating of tax evasion, no additional requirements were found concerning the subjective aspect for the offenses specified in Article 8 and Article 9 of the law, nor for the other offenses that typically overlap with Article 18[1], paragraph (1) of Law No. 78/2000, such as various forms of forgery. Additionally, similar offenses in the Penal Code, like Article 306 regarding "*Illegal Obtaining of Funds*" and Article 307 concerning "*Misappropriation of Funds*", do not have such an additional subjective requirement.

Using the term "***Union budget***" because the Directive uses this term, unlike the previous phrase found in the PIF Convention, which referred to the "***general budget of the Union***."

An aspect not regulated in the PIF Convention pertains to unlawful acts related to the VAT regime. For the first time, aspects regarding the *prescription periods of criminal liability* were regulated through Article 12 in the PIF Directive.

We believe this regulation was a consequence of analyses of carousel frauds involving multiple shell companies operating in several member states. The transnational nature of this type of criminal activity, along with the number of participants involved, combined with ensuring the right to an effective investigation, demonstrates that the investigative stage in such cases becomes quite lengthy. Often, the use of joint investigation teams is necessary.

Conforming to the conclusions of Advocate General Yves Bot presented on July 18, 2017, in Case C-42/17, in paragraphs 86, 94, and 95: "*In cases of this nature, the time limit imposed for criminal investigation and judicial procedures appears manifestly insufficient, and various reports at national and international levels demonstrate the systemic nature of the observed incapacity. The risk of impunity in this case cannot be attributed to delays, complacency, or negligence of the judicial authorities but to an inadequate legislative framework for sanctioning VAT fraud. The national legislator has established an unreasonably short and inflexible deadline, which, despite all efforts, does not allow the national court to impose the appropriate sanction for the committed acts.*"

108. Considering all of these elements and in line with the principle retained by the Court in the Taricco and others judgment, we consider that Article 325 paragraphs (1) and (2) TFEU must be interpreted in the sense that it requires the national court, acting as a common law court of the Union, to remove the absolute limitation period resulting from the provisions set forth in Article 160, last paragraph, in conjunction with those of Article 161, second paragraph of the Criminal Code, in the event that such a regulation prevents the application of effective and dissuasive sanctions in case of serious fraud which affects the financial interests of the Union or provides for longer limitation periods for cases of serious fraud affecting the financial interests of the Member State than for those affecting the financial interests of the Union.

109. Furthermore, in our opinion, the concept of interruption of prescription should be considered an autonomous notion within Union law and should be defined

such that each act of criminal prosecution, as well as any act representing its necessary extension, interrupts the prescription period. This act triggers the start of a new period, identical to the initial one, effectively nullifying the elapsed prescription period.

We note that prior to the reference made by the Romanian court, the CJEU pronounced in case C-105/14 on September 8, 2015, specifically regarding the applicability of the statute of limitations for criminal liability concerning offenses prosecuted under Italian legislation as crimes against the financial interests of the European Union. In the case brought to trial in Italy, several individuals were indicted for offenses related to the formation of a criminal group aimed at committing VAT-related crimes. Essentially, the accused were charged with using a shell company and issuing false documents to purchase goods without paying VAT, enabling another legitimate company to acquire goods at a price lower than the market value.

Due to the complexity of the case, the investigative stage lasted extensively. The first-instance court, Tribunale di Cuneo, in a preliminary hearing, was in the position of ruling for the termination of the criminal proceedings against one of the accused individuals based on the prescription of criminal liability. A decision to proceed with the trial for the other defendants would not have allowed for the analysis of subjective typicity conditions, as there remained the possibility that a termination of the criminal proceedings would also be decided for the remaining defendants due to the expiration of the statute of limitations for criminal liability.

In these circumstances, the Court concluded that a national regulation concerning the prescription of criminal liability, such as that provided for in Article 160, last paragraph of the Penal Code, as amended by Law No. 251 of December 5, 2005, combined with Article 161 of this code, which, at the time of the facts in the main dispute, stipulated that the interruptive act occurring during criminal proceedings regarding serious VAT fraud would only extend the prescription period by one-third of its initial duration, might conflict with the obligations imposed on Member States by Article 325, paragraphs (1) and (2) of the TFEU if such national regulation would prevent the imposition of effective and dissuasive sanctions in a considerable number of serious fraud cases affecting the financial interests of the European Union. Additionally, if it established longer limitation periods for cases of fraud affecting the financial interests of the targeted Member State than for cases of fraud affecting the financial interests of the European Union, it could potentially be at odds with those obligations. This verification falls under the competence of the national court.

In the view of the CJEU, it is the responsibility of the national court to ensure the full effect of Article 325 paragraphs (1) and (2) of the TFEU, leaving, if necessary, national law provisions unapplied if they would have the effect of preventing the member state concerned from complying with the obligations imposed on it by Article 325 paragraphs (1) and (2) of the TFEU.

Moreover, in the judgment of June 5, 2018, Nikolay Kolev and others, C-612/15, ECLI:EU:C:2018:392, the Court of Justice of the European Union unequivocally reiterated that the internal rules of criminal procedure of member states must be disregarded by national courts if these rules result in a *de facto* impunity for individuals committing offenses that harm the financial interests of the European Union.

In this case pending before the courts in Bulgaria, although the prosecutor summoned Mr. Kolev and Mr. Kostadinov on several occasions, they still failed to ensure the lawful communication of the established charges as well as the elements of the investigation. Therefore, the accused individuals and their lawyers repeatedly indicated that they could not appear on the scheduled dates for various reasons, including travel abroad, medical and professional grounds, as well as the prosecutor's failure to comply with the three-day legal deadline for communicating the elements of the investigation. As a result, the referring court, through the order of May 22, 2015, considered that the prosecutor had not yet remedied the breaches of fundamental procedural rules previously identified and had committed new violations, as the procedural rights of Mr. Kolev, Hristov, and Kostadinov were once again violated, and the inconsistencies in the indictment were not entirely eliminated.

Therefore, also highlighting the possibility that these three individuals and their lawyers might have abused their rights and acted purely dilatory to prevent the prosecutor from concluding the preliminary phase of the criminal procedure and remedying the mentioned violations within the set deadlines, the Bulgarian court considered that the conditions for closing this procedure were met, and this closure, therefore, occurs automatically concerning the mentioned individuals. Despite acknowledging a vexatious procedural conduct from the accused individuals, the Bulgarian court ruled for the dismissal of the case.

Both the prosecutor, arguing that no violation of fundamental procedural rules had occurred, and Mr. Hristov, who believed that the referring court had erroneously failed to close the respective criminal procedure, filed an appeal against this dismissal decision. Through an order dated October 12, 2015, the court hearing the appeal considered that the referring court should have proceeded with this closure in accordance with Article 368 and 369 of the Bulgarian Code of Criminal Procedure and, for this purpose, referred the case for retrial to the latter court.

However, the referring court, aware of the position taken by the Court of Justice of the EU in the Taricco I case, decided that it was appropriate to ask the Luxembourg Court whether the judgment of September 8, 2015, Taricco and others (C-105/14), pronounced by the Court while the case was pending before the appellate court, does not raise doubts about the compatibility of Articles 368 and 369 of the Bulgarian Code of Criminal Procedure with Union law, especially regarding the obligation of member states to ensure the effectiveness of prosecuting offenses that harm the financial interests of the Union.

In case of an affirmative response, the referring court raised the issue of the consequences that should be drawn from such an incompatibility. In this regard, while indicating that it would be their responsibility to set aside, if necessary, the articles in question, this court requested to establish the specific measures that should be taken to ensure the full effect of Union law, while simultaneously guaranteeing the protection of the rights of defense and the right to a fair trial for Mr. Kolev, Hristov, and Kostadinov.

The referring court argued that it could have decided not to apply the deadlines set out in Article 369 of the Bulgarian Code of Criminal Procedure and, consequently, to grant the prosecutor longer deadlines to remedy the irregularities found in drafting the indictment and in communicating the charges and case elements to the accused persons before referring the case for trial again. However, this court raises the issue of specific measures it should take to safeguard these individuals' right to a trial within a reasonable time, as provided for in Article 47, paragraph two, of the Charter of Fundamental Rights of the European Union (hereinafter referred to as “the Charter”).

To respond to the referring court's request, the Court recalled, referring to the decisions in the Taricco and M.A.S. and M.B. cases, that Article 325, paragraph (1) of the Treaty on the Functioning of the European Union (TFEU), requires member states to combat fraud and any other illegal activity harming the financial interests of the Union through effective and deterrent measures. Undoubtedly, the collection of revenue derived from duties related to the Common Customs Tariff is a significant component of the EU's financial interests. Therefore, the Court of Justice of the European Union (CJEU) indicates that member states must ensure that their domestic criminal procedural rules allow for the effective sanctioning of offenses related to this matter.

Deciding that Bulgarian law prevents, in certain cases, the effective sanctioning of individuals committing offenses harming the financial interests of the EU, the Court ruled that 'Article 325, paragraph (1) TFEU must be interpreted as precluding national regulations that establish a procedure for closing criminal proceedings, such as that provided for in Articles 368 and 369 of the Nakazatelno protsesualen kodeks (Code of Criminal Procedure), to the extent that this regulation applies in proceedings opened in cases involving serious fraud or other serious illegal activities harming the financial interests of the European Union in customs matters.

The national court is entrusted with ensuring the full effect of Article 325, paragraph (1) TFEU by setting aside, if necessary, the mentioned regulation while simultaneously ensuring the respect of the fundamental rights of the accused individuals. According to the consistent case law of the CJEU, Directive (EU) 2017/1371 of the European Parliament and of the Council concerning the fight against fraud affecting the financial interests of the Union through criminal law measures not only requires EU countries to introduce effective, proportionate, and deterrent criminal sanctions regarding fraud that affects the financial interests of the

EU but also obliges them to take all necessary measures to ensure that these measures do not become ineffective. However, regardless of the limit of punishment set by national legislators considering the gravity of such acts, the expiration of the criminal liability due to the complexity of the investigations required in cases brought before the CJEU would effectively render the prescribed penalties meaningless.

In conclusion, we consider that ensuring effective measures to protect the financial interests of the European Union requires the national legislator to adopt appropriate forms of punitive treatment. However, according to the CJEU, the deterrent effect of the penalties provided by law for such acts largely depends on the possibility of holding individuals accountable. *Therefore, if the adoption of solutions leading to the termination of proceedings due to a very short statute of limitations in relation to the seriousness of the criminal acts is allowed, it cannot be argued that the criminal sanction is effective.*

Proving the extremely complex evidence, often involving technical expertise, the involvement of numerous individuals, or the use of "shell" companies as a transnational element, when juxtaposed with the necessity of ensuring the right to a fair trial, represents aspects with a pronounced time-consuming nature, which many accused individuals will exploit to meet the statute of limitations for criminal liability before a conviction becomes final. However, regulations or jurisprudence that shorten the statute of limitations in such highly complex cases are nothing but contrary to the need for establishing effective criminal sanctions.

4. The concept of “serious fraud affecting the financial interests of the Union” and the necessity of an extensive interpretation concerning the charges specified in national law

In attempting to find a legal definition of the term “serious fraud affecting the financial interests of the Union”, in Chapter 6 of the Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union, we'll encounter detailed regulations concerning specific anti-fraud policies.

Article 325 (formerly Article 280 TEC) states that both the Union and its member states combat fraud and any other illegal activities that harm the financial interests of the Union through measures taken in accordance with this article. These measures are designed to discourage fraud and provide effective protection in member states, as well as within the institutions, bodies, offices, and agencies of the Union.

To combat fraud that harms the financial interests of the Union, member states adopt the same measures they take to combat fraud that harms their own financial interests. Without prejudice to other provisions of the Treaties, member states coordinate their actions, aiming to protect the Union's financial interests against fraud. For this purpose, member states, together with the Commission, organize close and continuous cooperation between competent authorities.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Court of Auditors, adopt the necessary measures in the field of preventing fraud that harms the financial interests of the Union and combating such fraud, to provide effective and equivalent protection in member states, as well as within the institutions, bodies, offices, and agencies of the Union. The Commission, in cooperation with the member states, annually presents to the European Parliament and the Council a report on the measures taken to implement this article.

Thus, at the European level, safeguarding the financial interests of the EU stands as a priority for the European institutions. The European Union combats fraud and any other illegal activities that undermine the financial interests of the Union through measures that deter fraudulent behavior and offer effective protection within the member states. A specialized office in the fight against fraud is the European Anti-Fraud Office, responsible for protecting the financial interests of the EU by combating fraud, corruption, and other illegal activities. It safeguards the reputation of European institutions by investigating serious cases of professional misconduct among their members and supports the European Commission in developing and implementing fraud prevention and detection policies. Since its establishment, OLAF has conducted over 3500 investigations resulting in the recovery of over 1.1 billion euros to the EU budget and convictions leading to imprisonment.

In Romania, there is a specialized structure for detecting and investigating crimes against the financial interests of the EU – the Department for Anti-Fraud Fight. This department ensures, supports, and coordinates the fulfillment of the country's obligations regarding the protection of the financial interests of the European Union, in accordance with the provisions of Article 325 of the Treaty on the Functioning of the European Union.

The main sources of income for the EU are primarily: member state contributions; import duties on products from outside the EU; a new contribution based on non-recycled plastic packaging waste; fines imposed on companies that do not comply with EU regulations.

Without delving into further fiscal details, it can be asserted that there is certainly an interdependence between the EU budget and national public budgets. The EU budget is funded through sources determined within national budgetary laws, and each budget of an EU member country receives allocations of sums determined in the European budget. Furthermore, the consequence of such a mathematically demonstrable reality lies in the implicit impact on the consolidated public budget, precisely through actions of fraud that harm the financial interests of the EU. In other words, since the financial resources allocated from the EU budget are part of the national budget, any illicit act that affects European financial resources could also impact the national budget.

The decision of the *CJEU C-107/23PPU / Lin from July 24, 2023* uses the notion of “proceedings related to serious fraud offenses affecting the financial

interests of the European Union", which cannot be strictly related to specific legal categories within national law. Essentially, the CJEU uses terminology specific to sources of European Union law, not offenses defined in national legislation. Aligning Romanian legislation with EU requirements is primarily the responsibility of the legislator and, secondarily, of the national judiciary.

Law no. 283/2020 amends Law no. 78/2000 concerning the prevention, detection, and sanctioning of corruption deeds and other measures for the implementation of Directive (EU) 2017/1371 of the European Parliament and of the Council of July 5, 2017, regarding the fight against fraud affecting the financial interests of the Union through criminal law means. This amendment applies measures to implement Directive (EU) 2017/1371 of the European Parliament and of the Council of July 5, 2017, targeting the combat of fraud against the financial interests of the Union using criminal law means.

Conforming to the new regulation, Article 18^1, paragraphs (1)-(2) are modified and will have the following content:

"(1) Using or presenting false, inaccurate, or incomplete documents or statements, if the act results in the unjust acquisition or retention of funds or assets from the budget of the European Union or budgets managed by it or on its behalf, is punishable by imprisonment from 2 to 7 years and the prohibition of exercising certain rights.

(2) The punishment stipulated in paragraph (1) applies to the omission, knowingly, to provide the required data according to legal provisions for obtaining or retaining funds or assets from the budget of the European Union or budgets managed by it or on its behalf if the act results in the unjust acquisition or retention of these funds or assets."

Given these legislative changes resulting from the transposition of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud affecting the Union's financial interests through criminal law measures, the CJEU Decision C-107/23PPU / Lin of July 24, 2023 doesn't refer explicitly to any offense specifically regulated by Law 78/2000 or any other particular legislative act. Instead, it addresses the concept of "serious fraud affecting financial interests" without pinpointing specific offenses outlined in national law. This aligns more with the broader notions and definitions found within EU regulations, encompassing a wider scope of fraud.

Indeed, such an approach doesn't support the idea that the CJEU decision of July 24, 2023, applies exclusively to certain categories of offenses regulated by domestic law, specifically by Law no. 78/2000. Serious fraud affecting financial interests cannot solely encompass offenses explicitly mentioned in Law no. 78/2000. Even in a concise analysis of the internal normative provisions concerning the constitutive content of certain offenses incriminated by Law 78/2000, we have to note that the incriminating norm, enacted to protect the financial interests of the EU, encompasses specific objective typicality conditions for multiple offenses. This has

led to issues in interpreting and correctly applying the law. In this regard, by the referral made by the Iasi Court of Appeal, Criminal Section and for Cases Involving Minors in File No. 5.916/99/2016, the High Court of Cassation and Justice was asked to resolve the following legal issue:

"*In the case of the offense provided by Article 18[1] paragraph (1) of Law No. 78/2000 for the prevention, detection, and sanctioning of corruption, committed in the alternative mode of using or presenting false documents in bad faith, provided that these documents are writings under private signature, it constitutes a complex offense that absorbs within its content the offense of forgery of writings under private signature, when the forgery is committed (in the form of perpetration or instigation) by the same person who uses these writings and subsequently obtains, unfairly, funds from the general budget of the European Union or from budgets administered by it or on its behalf. Both offenses maintain autonomy, establishing a real concurrence of offenses between the offense of forgery of writings under private signature and the offense provided by Article 181 paragraph (1) of Law No. 78/2000 for the prevention, detection, and sanctioning of corruption*".

Responding to these questions raised by the Court of Appeal Iași, through Decision no. 3 dated January 20, 2020, the High Court of Cassation and Justice established that "*the fraudulent use or presentation of falsified private signature documents, leading to the unjust acquisition of funds from the European Union's budget or budgets administered by it or on its behalf, committed by the same person who, as an author or secondary participant, contributed to the forgery, encompasses the offenses of fraudulent use or presentation of false, inaccurate, or incomplete documents or statements, as provided by Article 181 paragraph (1) of Law No. 78/2000 for the prevention, detection, and sanctioning of corruption, and forgery of private signature documents, as provided by Article 322 paragraph (1) of the Criminal Code, in real concurrence*".

In the considerations of this decision, the High Court of Cassation and Justice noted that, regarding the typicity conditions of the offense provided by Article 181 paragraph (1) of Law No. 78/2000, these requirements are met regardless of whether the documents or statements used or presented are falsified (meaning that the documents have undergone prior actions of counterfeiting the writing or subscription or any form of alteration, and the statements are untrue), inaccurate (that is, without being falsified, they were not correctly drawn up), or incomplete (when they do not contain all the necessary data and information for the correct assessment of the factual situation).

Therefore, for the existence of the offense, it is irrelevant whether the documents or statements used or presented are false, inaccurate, or incomplete. The action will constitute the analyzed offense whenever the specific action, involving such documents, resulted in obtaining funds from the budget of the European Union or the budgets administered by it or on its behalf, provided that the perpetrator acted in bad faith.

Consequently, considering these particularities of the objective side of the analyzed offense, it can be concluded that the legislator deemed that, in the abstract, accessing community funds by using documents or statements that do not fully reflect reality presents a sufficiently high degree of social risk in itself to characterize the act as an offense, without distinguishing whether those documents or statements were falsified or not.

This statement essentially points out that the act of using incomplete or inaccurate documents, leading to the unjust acquisition of community funds, falls within the objective aspect of the offense outlined in Article 18^1 paragraph (1) of Law no. 78/2000, under similar conditions as using false documents. This implies that the falsification of these documents isn't crucial to the analyzed offense; rather, it represents only one of the alternative normative methods in which this type of fraud can be committed. Therefore, there isn't a dependency between the offense of forgery (regardless of the type of documents) and the offense detailed in Article 18^1 paragraph (1) of Law no. 78/2000. The former isn't necessary for the existence of the latter, which can occur even without forgery. Therefore, in the relationship between the falsification of private signature documents and fraud that harms the financial interests of the European Union, one of the requirements for the legal unity of the complex offense is not identified: the necessary nature of the absorption of falsification for the existence of the fraud offense in accessing community funds.

The conclusion remains the same regardless of whether the documents are official or under private signature. The legislator did not make such a distinction when criminalizing this type of fraud. The circumstance that, according to Article 322 of the Penal Code, the crime of forgery of private documents absorbs the act of using the forgery (when the author of the forgery uses the document) does not lead to the conclusion that when using the forged document in the circumstances provided by Article 18^1 paragraph (1) of Law no. 78/2000, even by a participant in the prior act of forgery, the crime of forgery of private documents would absorb the fraud related to community funds. The incrimination found in the provisions of Law no. 78/2000 has a specific nature in relation to the act of using a forgery found in criminal law and mainly targets a form of fraud that affects financial interests, only secondarily being characterized as an act of using a forgery motivated by a *specific purpose*.

Even though the existence of a real concurrence between the offense of knowingly using or presenting false, inaccurate, or incomplete documents or statements, in bad faith, as stipulated in Article 18^1(1) of Law No. 78/2000 on preventing, discovering, and sanctioning corruption acts, and the offense of forgery of private signature documents, as per Article 322(1) of the Penal Code, might be considered, from the perspective of CJEU Decision C-107/23PPU / Lin dated July 24, 2023, as well as the terminology used: "proceedings relating to serious fraud affecting the financial interests of the European Union," it cannot lead to the conclusion that the offense of forgery is not included in the notion of serious fraud referred to by the CJEU.

As long as the crime of forgery of documents constitutes an intermediate offense and the offense specified in Article 18[1] paragraph (1) of Law no. 78/2000 constitutes the ultimate offense, both being involved in a real concurrence with consequential connection, considering the autonomous notion of serious fraud affecting the financial interests of the European Union, we do not believe that the CJEU ruling on obliging national courts to set aside a national standard of protection regarding the principle of retroactive application of more favorable criminal law that allowed reopening discussions on the interruption of the statute of limitations for criminal liability, would lead to a decision of engaging criminal liability only in terms of the offense specified in Law no. 78/2000, while regarding the intermediate offense, a decision to terminate the criminal proceedings due to the incidence of the statute of limitations for criminal liability would be pronounced.

Therefore, the concept of fraud affecting the financial interests of the European Union should encompass all those activities through which the financial interests were affected, regardless of the legal classification given to these acts by domestic laws. Of course, in the case of indictments that only involve one offense as stipulated in Law No. 78/2000, such an issue might not be apparent, as the national judge is presented with one of the acts qualified by domestic law as a form of fraud against the financial interests of the EU. For instance, in the indictment dated October 18, 2021, prepared by the Public Ministry – Prosecutor's Office attached to the High Court of Cassation and Justice – National Anticorruption Directorate – Anti-Corruption Department, in case no. 44/P/2020, registered with the Bucharest Tribunal – Criminal Section I under no. 31649/3/2021, the defendant A.B. was indicted for committing the offense of changing the destination of funds obtained or retained from the budget of the European Union or those administered by it, without adhering to legal provisions, as outlined in article 182 paragraph 1 of Law no. 78/2000. The indictment relates to A.B., acting as an executive manager and authorized person on the accounts of Organization X, altering the destination of the total amount of 1,583,400 lei, received as an advance from the Agency for Rural Investment Funding based on non-reimbursable funding contract no. C 0430I000061582300065. The funds, meant for eligible and non-eligible expenses specified in the approved budget attached to the funding contract, were redirected to other purposes totaling 1,378,799.49 lei.

If, under the conditions of such a potential modality of the act, the retention of a serious fraud offense affecting the financial interests of the European Union would not constitute a subject of controversy regarding the application of the CJEU Decision of July 24, 2023, considering that the offense provided for in Article 182 paragraph 1 of Law no. 78/2000 would constitute a predicate offense for a money laundering offense, it could be argued that the CJEU decision cannot be applied with reference to the offense provided for in Article 49 paragraph (1) letter a) of Law no. 129/2019, as it is not an offense classified by domestic law as a serious fraud offense affecting the financial interests of the European Union.

So, in a restrictive interpretation, it could be argued that the predicate offense, namely the offense from which the money subjected to money laundering originates, represents a form of affecting financial interests, while the subsequent criminal activity through which the money is laundered and reintroduced into the legal circulation for profit, is not included in what the CJEU identifies as serious fraud affecting the financial interests of the European Union. Therefore, the decision of July 24, 2023, would not be applicable.

Even if in such a context it cannot be argued that money laundering is the main legal object protecting the financial interests of the EU, as it is not a crime specified in Law no. 78/2000, it would be very challenging to support the idea that subsequent actions of profiting from criminal activities would not harm the financial interests of the EU. Given that not only the punishment of the behavior stipulated in Article 182 of Law no. 78/2000 is crucial but also the recovery of the damages caused, we believe that in such a scenario, any hindrance in remedying the damage caused to the EU must be interpreted extensively, in the spirit of the autonomous notion of serious fraud affecting the financial interests of the European Union.

A potential conviction for the offense outlined in Article 18^{2} of Law no. 78/2000, coupled with a cessation of criminal proceedings due to the expiration of the statute of limitations regarding the money laundering offense, would in this case precisely represent the application of a national standard related to the principle of retroactive application of the more favorable criminal law (*lex mitior*), allowing for the reconsideration of the interruption of the statute of limitations in such cases of criminal liability. A sanction applicable for committing the predicate offense, regardless of its nature or severity, might not have the dissuasive effect mentioned in the CJEU Decision of July 24, 2023, if precisely the subsequent activity of laundering and profiting from the proceeds of crime were to fall under the statute of limitations for criminal liability.

In essence, even by pronouncing a conviction for what domestic law would qualify as a crime affecting EU financial interests, if the judicial authorities do not also ensure the neutralization of the criminal proceeds, giving the accused and subsequently convicted person the opportunity to benefit from the product obtained by affecting the financial interests of the EU, it cannot be claimed that the necessary measures have been taken to combat a serious fraud affecting the financial interests.

Of course, in terms of national legislation, such an extensive interpretation of an autonomous notion used by the CJEU in justifying the decision of July 24, 2023 could generate a violation of the constitutional principle of the equality of citizens before the law, the limitation period for criminal liability for a crime of money laundering and, implicitly, the existence of a cause of interruption being established in consideration of the nature of the "predicate" crime, so for some citizens, for a crime with the same punishment limits, the statute of limitations for criminal liability would be incident, while for those in charge of which the predicate crime apprehended is a crime expressly mentioned as a crime affecting the financial

interests of the EU in Law no. 78/2000, liability for the crime of money laundering would not be prescribed.

We believe that such a risk of evading the principle of equality before the law, consisting in the different application of the criminal liability statute of limitations for crimes with the same penalty limits, could be avoided either through a uniform interpretation of the criminal liability statute of limitations for all categories of cases, as a result of the decision of the CJEU of July 24, 2023, or through an intervention of the national legislator in the matter of the legal regime of the prescription of criminal liability.

As we stated previously, given the congruence between the EU budget and the national budget, any criminal activity that harms the financial interests of the EU will implicitly harm the national budget, so the means of protection of European and national financial resources should not to differ from the point of view of the way in which the prescription of criminal liability acts, it is not admissible that for frauds brought to national financial resources the prescription should operate and for the frauds referred to by the CJEU, the national protection standard referring to the principle of retroactive application of the criminal law more favorable not to operate.

We do not consider that it would be fair as for a crime provided for in art. 9 of Law no. 241/2005 regarding the prevention and combating of tax evasion, the prescription of criminal liability pursuant to the Constitutional Court Decision no. 358/2022 while for a similar deed, but directed against the financial interests of the EU, the limitation period should not be considered fulfilled precisely as a result of the special legal object of the crime.

The decision of the CJEU (Court of Justice of the European Union) C-107/23PPU / Lin from July 24, 2023, must be applied within the domestic legal order, respecting the principle of the supremacy of European Union law. There is also the possibility of applying the decision to other categories of cases besides those in which criminal offenses affecting the financial interests of the EU have been brought to trial. The statement used: "*the courts of a Member State are not obliged to disregard the decisions of the constitutional court of that Member State invalidating the national legislative provision regulating the grounds for the interruption of the prescription period in criminal matters*" does not imply the obligation to apply Decision No. 358/2022 of the Constitutional Court, but it allows the court to analyze the grounds for interrupting the prescription period by referring to the stage of the procedure and respecting other specific principles established, including at the level of the European Union. For example, the principle of res judicata or the manner in which the decisions of the Romanian constitutional control court are applied over time. An equitable application of the prescription of criminal liability would involve the judge verifying all causes that would justify interrupting or suspending the prescription period. However, such competence might be given to the national judge only if the legislator chooses to regulate the prescription of criminal liability as an institution of criminal procedural law, rather than substantive law.

5. An invitation addressed to the national legislature to ensure the supremacy, unity, and effectiveness of Union law – regulating the prescription of criminal liability as an institution of procedural law.

From the perspective adopted in specialized literature, the prescription of criminal liability emerges as a legal institution that has effects both in substantive criminal law, where the expiration of the term is a condition for the enforceability of penalties, and in procedural criminal law, where it constitutes a condition for prosecution, with the expiry of the prescription term hindering the exercise of criminal action.

If a specific national regulation within another legal system considers that the prescription of criminal liability belongs to procedural law rather than substantive law, it might be possible to modify that rule in order to extend the prescription period concerning offenses for which the term has not yet expired at the time of the modification. Thus, through the ruling of June 22, 2000, in the Coëme and Others v. Belgium case, §§ 147–149, the Strasbourg Court stated that extending the prescription period does not imply a violation of the rights guaranteed by Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. If the national law of a state regards a rule in criminal prescription matters as more procedural than substantive, then it might be feasible to modify that rule to extend the prescription period for offenses that have not yet reached their expiration at the time of the amendment.

The prescription of criminal liability produces effects *in rem*, not *in personam*, differently for each participant involved[24]. It can be stated that the expiration of this term results in the forfeiture of judicial authorities from their right. It is natural that the completion of any procedural act regarding committed deeds has the effect of initiating a new prescription period concerning the entirety of the acts that, together, form the pursued offense, until the expiration of the special prescription term, as per Article 155 paragraph (4) of the Criminal Code.

Considering that prescription is an institution of criminal law, in the majority opinion, national courts have held that rules regarding the more favorable criminal law concerning both time limits and causes of interruption or suspension will be applied regarding the prescription of criminal liability. According to this majority orientation of national jurisprudence, the general prescription term of criminal liability was not suspended, in accordance with Article 156 paragraph 1 of the Criminal Code, during the 60 days of the state of emergency from March 16, 2020, to May 14, 2020, with the effect provided in Article 156 paragraph 2 of the same code, as a result of the Decrees of the President of Romania No. 195/2020[25] and No. 240/2020[26] (approved by Resolutions of the Romanian Parliament No. 3/2020 and No. 4/2020, respectively).

[24] Decision of Romanian Constitutional Court nr. 443 from 22 June 2017, Official Gazette nr. 839 din 24 October 2017, §§ 23–25).

[25] Official Gazette nr. 212/16 March 2020.

[26] Official Gazette nr. 311/14 April 2020.

In support of this opinion, it has been held that, according to Article 156 paragraph 1 of the Criminal Code, the course of the prescription term of criminal liability is suspended during the time when a legal provision or an unforeseen or insurmountable circumstance prevents the initiation of criminal proceedings or the continuation of criminal proceedings. The two aforementioned decrees do not fall within the notion of a legal provision to constitute a cause for suspending the course of the general prescription of criminal liability, considering their qualification by the Constitutional Court, through the considerations of Decision No. 152/2020[27], respectively that of normative administrative acts subsequent to the law and having a legal force lower than the law, which cannot derogate from, replace, or add to the law.

Under the conditions of this traditional conception, enshrined in legislation and jurisprudence, the CJEU solution requested by the Brașov Court of Appeal *requires that the mentioned provisions of Union law be interpreted in the sense that the courts of this member state are obliged to leave unapplied a national standard of protection regarding the principle of application retroactive effect of the more favorable criminal law (lex mitior) which allows the questioning, including within some appeals directed against definitive judgments, of the interruption of the limitation period of criminal liability in such trials through procedural documents intervened before such a invalidation.*

However, at the constitutional level, in Romania the principle of applying the more favorable criminal law is enshrined, of course with reference to the substantive criminal law, so a direct application of the CJEU decision in the jurisprudence of the national courts could be considered as a form of evading a constitutional principle. Beyond the aspects developed when we approached the notion of the preeminence of European Union law, we appreciate that the CJEU Decision of July 24, 2023 can also represent a reason for reflection for the national legislator in the sense of the possibility of regulating the prescription of criminal liability as an institution of procedural law.

According to the position of the Ministry of Justice made public through a press release: "*The criminal policy of the state is at a crossroads. Since the adoption of the new criminal codes, hundreds of interventions have been made on the initial drafts, since the parliamentary debate phase and until now, the criminological phenomenon has evolved, the challenges to which the law enforcement institutions must respond have diversified*".

That is why, from the perspective of stability, predictability and legislative coherence, of the effectiveness of combating criminality of all types in a logical and coherent structured way, from the perspective of criminological phenomena in contemporary Romanian society and the legal security needs of citizens and society as a whole, such as the need to protect democratic values in a context in which democracies are subjected to a test of resistance both within each democratic country and in a regional and global context, a rethinking of criminal policy and a "reset" of

[27] Official Gazette nr. 387/13 May 2020.

legislative approaches regarding to the Criminal Code and the Code of Criminal Procedure, but only on the basis of a deep analysis of the legislative developments described above, as well as with the consultation of all relevant actors within the judicial authority, the legal academic environment, the legal professions and civil society.

Therefore, to the extent that there is an intention to make a significant change to the criminal and criminal procedural legislation, we do not believe that the text of Article 15 paragraph (2) of the Constitution "*The law shall govern only for the future, except for criminal or contravention laws that are more favorable*" – could be considered an impediment for the legislator to confer upon the prescription of criminal liability the legal nature of a procedural institution in criminal law. Such a legislative model is recognized in other countries of the European Union with a democratic tradition, countries that have achieved notable success in combating economic and financial crime.

An extremely eloquent example that the national legislator could consider is, as in the case of some of the most significant legislative works in modern history, the French legislation. In this regard, it should be noted that French criminal law regulates the prescription of public action in the Code of Criminal Procedure, in articles 7–10, as a formal (procedural) legal institution. According to French criminal regulations, prescription is considered as a mixed institution, a criminal law institution when it refers to the prescription of the execution of the penalty and as a formal criminal law institution when it refers to the prescription of public action. The basis of prescription lies in the presumed 'forgetting' of the unprosecuted offense, which releases the defendant from the obligation to suffer the consequences of the act[28].

French criminal law makes a distinction between the prescription of public action in the case of committing a crime and the prescription in the case of committing a misdemeanor. In the case of committing a crime, public action prescribes in 10 years from the day the crime was committed, if no prosecution act has been initiated within this period. The prescription period is interrupted if a prosecution act is initiated, starting a new term. The interruption has an effect on all participants. Similar to Romanian criminal law, the penalty considered by the French legislator is the one provided by law, not the one applied, which varies depending on the applicable mitigating circumstances. Regarding the commission of a misdemeanor, according to Article 8 of the French Code of Criminal Procedure, the duration of the prescription period is 3 years. This term is also subject to interruption.

French law establishes shorter periods of prescription for public action compared to Romanian criminal law. Another difference lies in the various methods through which the prescription period can be interrupted in French law. Any act of prosecution and investigation can interrupt the prescription period, whereas

[28] Philippe Conte, P.M. Du Chambon, *Procédure Pénale,* 3e édition, Armand Collin, Paris, 2001, p. 114.

Romanian criminal law conditions the interruption of the prescription period on the communication of prosecution acts to the suspect or the accused.

We believe that regulating the prescription of criminal liability as a procedural legal institution could involve considering the specific perspective of legal systems found in common law areas. In this regard, the national legislator could establish a reasonable timeframe for the prescription of criminal liability for a certain category of offenses. Subsequently, the judge, informed by the investigating body, would assess whether the activities conducted within this timeframe were capable of interrupting the prescription period, leading to the granting of a new prescription period, identical in duration to the initial one, or whether there was only an apparent investigative activity.

Of course, such a concept would have the disadvantage of presenting investigative acts to a judge, especially at a stage when the investigative activities might be secretive. However, the law could establish a non-public procedure for such judicial verification. This way, in a category of cases involving numerous *in rem* criminal investigation acts, there wouldn't be a risk of the prescription term being fulfilled during the trial in the first instance or on appeal. Instead, the prescription period could be interrupted by a judicial decision made during the investigative phase.

In the context of a criminal case involving multiple individuals, with some criminal effects occurring in other countries, necessitating investigations into complex financial networks and bank deposits in tax havens, it's natural to conduct lengthy inquiries without promptly proceeding with criminal prosecution against a specific individual. However, such an approach could potentially cause irreparable harm in the effort to identify all participants and neutralize the criminal proceeds.

Or, in the conditions of cases of such complexity, one of the possibilities to avoid the termination of the criminal process before the court, is the verification by a specifically appointed judge of the suitability of the investigative documents carried out in rem, to interrupt the course of the prescription of criminal liability and therefore to be able to offer a new reasonable term for the completion of the investigation through his decision. The existence of such a reasoned decision even during the course of the criminal investigation, would also represent a predictable regulatory method, because during the judicial investigation phase the quality of criminal investigation documents to interrupt the limitation period of criminal liability could no longer be challenged.

The national legislator could abandon the express and limiting establishment of acts that interrupt the limitation period of criminal liability, being known that the law can only make such an assessment in an abstract way, and the reality of some cases in which transnational fraud with European funds is investigated or frauds like “carousel” type, demonstrate the difficulty with which an efficient and dissuasive training of the criminal liability of guilty persons could be ensured under the conditions of the qualification only by the legislator of those acts with an interruptive effect of prescription.

An exemplary enumeration of the judicial acts that may have the effect of interrupting the prescription of criminal liability and giving the possibility to the judge to assess whether the activity of the investigative body up to a certain stage of the procedure corresponds to the notion of "effective investigation" and therefore it is really necessary to continue investigative activity, could remove with greater chances of success the risk of non-punishment of persons guilty of committing serious crimes for which a substantial period of time is required to be investigated.

Last but not least, we believe that such a regulation would also contribute to the remodeling of the procedural behavior adopted by the accused persons in the situation where, during the judicial investigation, knowing that the limitation period will soon expire, which is why various requests are made through because the accused wants to postpone the trial, regardless of the consequences. Or, a legal provision that would allow the judge to classify a procedural act as having the effect of interrupting the prescription of criminal liability (of course to a different judge than the one seized to judge the case) would be able to remove the possibility of formulating this kind of requests with an essentially dilatory effect.