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THE STATUTE OF LIMITATION: THE EVOLVING LANDSCAPE OF CRIMINAL LIABILITY IN THE LIGHT OF THE CJUE DECISION C-107/23PPU/LIN OF 24 JULY 2023

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Abstract

Under the principle of the supremacy of Union law, a preliminary ruling of the Court of Justice is binding on the national court as regards the interpretation of Union law for the resolution of the particular dispute. The national court may not be prevented from applying Union law in a manner consistent with the decision or the case-law of the Court, if necessary by overruling national case-law which constitutes an obstacle to the full effectiveness of that law and the protection of public safety.

In this study, we will focus our attention on the institution of the statute of limitation of criminal liability and how it has been going through the national legislative architecture starting February 1, 2014, the date of entry into force of the current Penal Code and until now, analysing what is left of this institution after two decisions of admission by the Constitutional Court of Romania, a decision of the Court of Justice of the European Union and an Emergency Ordinance.

Key words: *limitation of criminal liability; legal certainty; Decision No 297 of 26 April 2018; Decision No 358 of 26 May 2022; CJEU Decision C-107/23PPU/LIN of 24 July 2023; Decision No 2/2020 of the High Court of Cassation and Justice; G.E.O. No 71/2022.*

INTRODUCTION

In order to understand exactly the institution of the prescription of criminal liability, its role and how a defective regulation of the institution act can lead to a vulnerability of the judicial system and implicitly of public safety, a historical analysis doubled by a legal analysis must be carried out.

Prescription, an institution of substantive law, has an extinguishing effect on the criminal legal relationship and intervenes at a later date after the commission of the crime, having the effect of extinguishing the right of the state to apply sanctions or to enforce them.

The institution of prescription was also regulated in the Penal Code from 1969, in article 121, being a cause of removal of criminal liability, having the practical role of sanctioning the passivity of the judicial bodies which, within the term provided by the law in relation to the crime pursued, had the obligation to finalize the procedures, the investigative activities and finally bring the accused person to criminal responsibility, otherwise, no punishment could be ordered against him in terms of the criminal side of the case.

The constitutional court by Decision no. 650/2018 defines the institution of the prescription of criminal liability as an institution with a dual role, because *primo*, its incidence makes a statute of limitations operative, which is why judicial bodies can no longer impose criminal liability against people who have committed crimes, and, *secondo*, the legislator considers that a sufficiently long term is sufficient for the committed deed and its effects to be forgotten by the members of society, the social danger being diminished. Indeed, if the punishment is not applied and executed as soon as possible after the commission of the crime, society is not given any satisfaction due to the lack of promptness and effectiveness of the action of the judicial bodies, and the safety and confidence in the way the judicial authorities the activity is carried out is called into question.

The definition of prescription in the current regulation finds its legislative precedent in the old Criminal Code. In the current regulation, however, there are elements of differentiation regarding the imprescriptibility of certain crimes, the limitation periods of criminal liability and the causes of its interruption.

If regarding the duration and calculation of the terms, things were clear in judicial practice, the application of this institution being carried out strictly on the basis of mathematical calculation rules, the same cannot be said about the causes of interruption of the prescription, as Criminal Code provided as a cause of interruption the fulfillment of any procedural act, the extension of the scope of the causes of interruption generating significant divergences in the interpretation and application of the new rules, which finally determined, relatively recently, the intervention of the legislator in the sense of changing the content of art. 155 paragraph (1) Criminal Code (*G.E.O. no. 71/2022*).

The legislator before December 1989 appreciated that only an act communicated to the accused has the ability to interrupt the course of the statute of limitations, which is why in the content of art. 123 of the Criminal Code provided, as in the current regulation, after the amendment that occurred last year, the same conditions for the incidence of the prescription, the procedural document being circumstantial to documents communicated to the suspect or the defendant during the criminal trial.

It is found that, in a paradoxical way, the post-December legislator chose a different legislative route, and from 01.02.2014, through the provisions of art. 155, the scope of causes of interruption was extended by assigning the interruptive effect to any procedural acts.

In essence, this fine but substantial difference was the trigger of a wave of legal problems and for which it was necessary to pronounce two decisions of the Constitutional Court of Romania (hereinafter C.C.R.), a C.J.U.E. decision. and publication in the Official Gazette on the date of 30.05.2022 of the above-mentioned Emergency Ordinance, and most likely things will not stop here as the current norm is not sheltered from the point of view of constitutionality criticism either.

I. DECISIONS OF THE CONSTITUTIONAL COURT OF ROMANIA REFERRING TO THE STATUTE OF LIMITATIONS FOR CRIMINAL LIABILITY

The sensitive issue of the content of the text regarding the prescription was the subject of the analysis of the Constitutional Court (CCR).

By Decision No 297 of 26 April 2018 on the objection of unconstitutionality of the provisions of Article 155 para. (1) of the Criminal Code, the Constitutional Court admitted the exception of unconstitutionality and found that the legislative provision which provides for interrupting the limitation period of criminal liability by performing *"any procedural act in question"* in the provisions of Art. 155 para. (1) of the Criminal Code, is unconstitutional, considering the lack of predictability and the violation of the principle of the legality of incrimination since the regulation is too extensive, which is why the suspect or the defendant who has not been notified of an act is unable to find out aspects related to the interruption of the limitation period, following the start of a new limitation period of his criminal liability.", which affects the safety of the persons in respect of whom legal proceedings are taking place.

Then, by Decision no. 358 of May 26, 2022 C.C.R. established that the text of art. 155 para. (1) from C. pen. is unconstitutional, in its entirety the Court ruled that, by the aforementioned decision, the "legislative solution" contained in art. 155 paragraph (1), this decision having the legal nature of a simple/extreme decision, pronounced in the absence of the legislator's obligation to legislate in order to clarify the norm.

After this moment, the question of the qualification of the institution of prescription, respectively of the rules that govern the interruptive effect of prescription of procedural acts, was raised in judicial practice, in the sense of whether in this situation we are dealing with rules of substantive law, because of the possible intervention of to them belongs the right of the state to apply a sanction and to compel the convicted person to carry out the punishment or

procedure, which implies the immediate application of the new law based on the *"tempus regit actum"* principle.

The High Court, by HP Decision no. 67/2022 held that the rules regulating the interruption of the prescription are considered rules of material (substantial) criminal law and are subject, from the point of view of their application in time, to the principle of the activity of the criminal law according to article 3 of the Penal Code, except situations in which there are more favorable provisions, in accordance with the "mitior lex" principle provided by article 15 para. (2) from the Constitution of Romania, republished, and article 5 C.pen. Therefore, the rule that leads to the removal of criminal liability must be qualified as a rule of substantive law and is subject to the principle of non-retroactivity of the criminal law.

Of course, including doctrine (*G. Bodoroncea et al., 2020, p. 573 and 589; M. Udroiu, 2020, p. 900*), as well as jurisprudence (*Criminal Sentence no. 45/2022 of 13.01.2022 pronounced by the Cluj-Napoca Court in file no. 4007/211/2020; D.P. no. 350/A/2022 of 22.06.2022 pronounced by the Oradea Court of Appeal in file no. 2440/177/P/2018; Criminal decision no. 1090/2022 dated 31.08.2022 pronounced by the Cluj Court of Appeal in file no. 13208/211/2022*), have opined since before Decision no. 67 HCCJ-HP, that the prescription has the character of substantial law, consideration for which the rules regarding the interruption of the course of the prescription of criminal liability are also of substantial criminal law. The reason why the intervention of the High Court was needed is, on the one hand, justified by the non-unitary practice (some courts appreciating that the rules governing the interruption of the limitation period are of procedural law), and on the other hand, to confer judicial stability in in the face of the wave of annulment appeals (under this aspect, there were courts that suspended the judgment of annulment appeals until the pronouncement of Decision no. 67 HCCJ-HP - as an example the Conclusion of 16.09.2022 pronounced in file no. 735/33 /2022 of the Cluj Court of Appeal and of the files that had to be resolved on the merits either by classifying the statute of limitations for criminal liability as expired, or by terminating the criminal process for the same reason.

In other words, the High Court of Cassation and Justice intervened in order to restore public security since, as we have shown, the *de facto* and *de jure* return to the old regulation destabilised legal relations, generating discussions both on the interpretation and legal nature of the Constitutional Court's Decision No 358 of 26 May 2022 and on the nature of the rules on the interruption of the limitation period for criminal liability. The phenomenon of public insecurity is very nicely analysed in order to be understood through a *per a contrario* interpretation, *"In order to perceive public safety and to have a sense of peace in the public space, and not only, it is necessary to know the concerns of specialists in several fields"*. (Elena-Ana Iancu, 2021, p. 633).

Thus, this classification of the institution of criminal statute of limitation as one of substantive law is relevant because, following Decision No 358 of 26 May 2022, until 30 May 2022, when Government Emergency Ordinance No 71/2022 was adopted, in criminal matters, the period of criminal liability was not interrupted, a legal situation which has produced effects in more favourable conditions in ongoing cases. The limitation period for criminal liability under Government Emergency Ordinance No 71/2022 is limited to crimes committed after 30 May 2022, since the principle of retroactivity is not applicable in cases where the criminal investigation is still ongoing, in other words it does not have the legal nature of a more favorable criminal law.

The European Court of Human Rights (ECHR) adopted a similar perspective, arguing that Article 7 of the Conv. The EDO absolutely forbids the "retroactive application of the criminal law to the detriment of the accused person", as it is a jurisprudential consecration of the right of any accused in this sense, correlative to the obligation of the bodies (This enshrines a fundamental right), (judiciary) to respect it. (*ECHR, Del Rio Prada v. Spain*).

II. DECISION OF THE CJUE C-107/23PPU/LIN OF 24 JULY 2023

On 22.02.2023, the Court of Appeal of Braşov made a reference for a preliminary ruling under Article 267 TFEU.

The referring court requested the interpretation of art. 325 paragraph (1) TFEU from the economy of which results the obligation of the member states to combat fraud that harms the financial interests of the EU, but also art. 49 paragraph (1) of the Charter of Fundamental Rights of the European Union (CDFEU) regarding the rule of non-retroactivity of laws and punishments, the guarantees resulting from the principle of legality and proportionality of crimes and punishments. At the same time, the national court asked the European Court of Appeal to provide clarifications regarding the scope of application of the principle of the supremacy of EU law, in the sense of whether it opposes a regulation or an internal practice according to which the courts must strictly comply with the decisions of the Constitutional Court and the Court supreme courts of the Member State concerned, even when these decisions contravene Union law.

The national court had been notified of an appeal for annulment filed by five appellants against a final judgment of conviction for the crime of tax evasion provided for by art. 9 paragraph (1) letter b) and c) and art. 9 paragraph (3) of Law no. 241/2005 and art. 7 related to art. 2 lit. b) point 16 of Law no. 39/2003, citing that he was erroneously convicted even though the termination of the criminal process should have been ordered as a result of the intervention of the prescription of criminal liability. In this context, the Court of Appeal decided to refer the CJEU, showing that it is necessary to clarify the issue of whether those invoked

by the appellants are compatible with Union law, taking into account that it would have the effect of exonerating them from criminal liability for a crime that could affect the budget and interests financial union. Moreover, the referring court revealed that if it were proven that an interpretation in accordance with Union law is not possible in relation to the defenses formulated by the appellant, it would be in a position to leave the jurisprudential solutions of the constitutional court and the High Court of Cassation and Justice of Romania unapplied, with the consequence of sanctioning the judges for this reason.

The Court's response came on 24.07.2023 through the judgment issued in case C-107/23PPU/LIN. In the interpretation of the analyzed European norms, the Court ruled the following:

1) The European legal provision on combating fraud must be interpreted in the sense that the courts of the member states do not have the obligation not to apply the decisions of the constitutional court which found the lack of predictability and clarity of the rule regarding the causes of interruption of the limitation period in criminal matters, on the grounds of violation of the principle of the legality of crimes and punishments, with all the consequences arising from this, such as the termination of a considerable number of criminal processes, even those having as their object serious fraud crimes that affect financial interests of the European Union;

2) National courts have the obligation to leave unapplied a national standard of protection relating to the principle of retroactive application of the more favorable criminal law which allows the questioning, including in extraordinary appeals, directed against definitive judgments, of the interruption of the liability limitation period criminal charges in such processes through any procedural acts that occurred prior to the decisions of the CCR;

3) The supremacy of European norms in relation to constitutional norms, without prejudice to the rights of each member state to legislate in the matter of criminal law, prohibits the adoption of national regulations or practices according to which the national common law courts of a member state are bound by the decisions The Constitutional Court or the supreme court and cannot, for this reason, with the risk of triggering the disciplinary procedure of the judges in question, leave unapplied the directly applicable European norm, as well as the jurisprudence of the CJEU.

In essence, based on the Court's decision, the following conclusions can be drawn:

- national courts can apply the decisions of the Constitutional Court regarding the prescription of criminal liability in cases that must be resolved on the merits of the case, even with the risk of pronouncing the termination of the criminal process in those cases, including in cases involving crimes affecting the financial interests of the EU;

- the courts cannot apply the decisions of the Constitutional Court when they would allow the questioning of the legality of the interruption of the prescription by acts prior to 25.06.2018, because obviously those acts were carried out in compliance with the legal provisions from that time, having an interruptive effect prescriptive;
- the decision of the Luxembourg Court refers only to the crimes that protect the financial interests of the European Union (para. 71-73 of the decision);
- the decision of the CJEU should not apply to corruption offences, as it is stated in para. 70 that the questions are admissible only if they do not concern the interpretation of the PIF Directive and the decision 2006/928 regarding the MCV, and under this aspect we hope that the judicial practice will be unanimously shaped like decision no. 1343 of 01.09.2023 pronounced in file no. 64/84/2016** of the Cluj Court of Appeal. *In this case, the request to change the legal classification of the facts was deemed irrelevant, taking into account the fact that the offense of influence peddling provided for by art. 291 Criminal Code was committed in September 2012, and the statute of limitations for this crime is 8 years, which expired in September 2020. At the same time, it was mentioned that, on June 9, 2022, the CCR decision no. 358/2022, which produces erga omnes effects, with the courts having the obligation to comply with the provisions and considerations of this decision, which is why the court of judicial control in relation to the previously mentioned aspects has the obligation to establish the intervention of the prescription of criminal liability, with the consequence of the termination of the trial criminal. It is necessary to mention the fact that in this case the prosecutor requested the conviction of the defendant and the application of CJEU jurisprudence, as it results from the judgment of July 24, 2023, and the court of judicial review ruled that the said judgment is not applicable in the case, the object of the case being corruption offences. (Criminal decision no. 1343 of 01.09.2023 pronounced in file no. 64/84/2016** of the Cluj Court of Appeal).*

Finally, in relation to how the decision of the Court of Justice will be applied and what will be the national judicial practice, it is most likely *superfluous* to hope for a unanimous practice, but we can conclude that *"(...) the judge or magistrate with jurisdictional powers must enjoy independence in relation to the executive and the parties and resolve any case impartially."* (ECHR, *Assenov vs. Bulgaria*, in M. Pătrăuș, 2019, p. 3).

III. G.E.O. NO. 71/2022

On 30.05.2022, amid media pressure and the chaos in the judicial system created by the publication of Decision no. 358 of May 26, 2022, was published in the Official Gazette a normative act, respectively G.E.O. no. 71/2022 which did nothing but take ad letteram the substance of the provisions of art. 121 Criminal Code from 1969 and introduce them to art. 155 of the current Criminal Code.

Of course, the preferred solution would have been for the Parliament to intervene either in 2018, when the first wave of public insecurity was generated, or in 2022 in order to avoid all the constitutional problems looming over the G.E.O. no. 71/2022.

Moreover, a panel of the HCCJ ordered on 03.06.2022 the referral to the constitutional court (Constitutional Courts) with the exception of the unconstitutionality of the G.E.O. no. 71/2022, on the grounds that it violates the constitutional order, the Government not having the right to regulate in the field of justice by means of emergency ordinances.

It is well known that Government ordinances can be issued in the field that is the subject of organic laws only in exceptional situations.

The whole legal discussion starts from the infamous G.E.O. no. 13/2017 of 31.01.2017, by which also G.E.O. no. 71/2022, an attempt was made to modify some provisions of the criminal codes (of substantive and procedural law), a fact that attracted public opprobrium, which is why on 02/05/2017, the Government also adopted another emergency ordinance for the repeal of G.E.O. no. 13/2017.

As a consequence, on 26.05.2019 a consultative referendum was organized, entitled Referendum on the topic of justice, and through which the population was asked whether they agree, first of all, that acts of corruption cannot be amnestied or pardoned, and secondly , if it agrees that the Government cannot intervene through emergency ordinances in the field of crimes, punishments and judicial organization, questions to which the population voted affirmatively in an overwhelming proportion, over 85%.

Here, then, that G.E.O. no. 71/2022 appears as a successor of O.U.G no. 13/2017, being not only unconstitutional in that it violates the constitutional order, but also violates the will of the population expressed by voting.

CONCLUSIONS

Therefore, it can be easily observed by a layman that all this judicial instability, that all the systemic risk of impunity are just some self-inflicted consequences of the legislator's desire to modify an institution that was extremely well settled and did not require an update under the empire the new law, an aspect also recognized through the lens of the return to the old regulation through the emergency ordinance.

At this moment, strictly from a practical analysis, we appreciate that the initial delirium has disappeared, that Decision no. 67 ICCJ-HP and CJEU Decision C-107/23PPU/LIN, although not revelatory, provide stability and clarity that was needed for practitioners and provide predictability for legal subjects.

However, we can only wonder what will be the fate of the criminal cases in the event that the Constitutional Court decides that the G.E.O. no. 71/2022 is unconstitutional and if at that moment the Parliament decides that it is time to intervene legislatively.

In conclusion, the judicial system is a living organism through all the judicial practice of the national courts, in a continuous evolution and expansion, or such legislative slips only come to destroy the work of generations of professionals who put their shoulder to the perfection of the Romanian judicial system.

From the perspective of the safety of the nationals of the member states, implicitly of the Romanian citizens that the judicial procedures are carried out in compliance with European protection standards, we must emphasize that the phrase "public security" is inextricably linked to the way in which the judicial authorities value the jurisprudence of the CJEU.

The accuracy of the national regulation and the direct applicability of the practice of the European court of contention constitute true premises that fundamental rights and freedoms are respected.

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