

THE CONSTITUTIONALITY OF DECISIONS DELIVERED BY THE FULL COURT ON POINTS OF LAW

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Abstract

Decisions rendered by the Supreme Court in the framework of the mechanism for unification of judicial practice may be subject to the assessment of the Constitutional Court. The intervention of the constitutional court is aimed exclusively at the text of the law criticized in relation to the interpretation offered within the mechanism of unification of judicial practice, without declaring unconstitutional the legal provision itself, with consequences on the rule of law under review, but only by giving a constitutional meaning to the text of the law as interpreted.

The present research aims to identify the judgments handed down by the High Court's Criminal Matters Panel that were invalidated by the constitutional review court and to what extent the law under review was or was not amended after the intervention of the constitutional court.

At the same time, we consider the following methodological means: literature review, comparative method, research and interpretation.

Keywords: *unification of judicial practice, preliminary ruling*

I. Preliminary considerations

The institution of preliminary rulings on points of law was introduced in order to facilitate dialogue between the courts with a view to contributing to the formation of a unified jurisprudence on controversial issues. Although they allow for a uniform interpretation of the law, these rulings are not without criticism.

Even if these judgments are binding on all courts, as magistrates are obliged to respect and apply the interpretation given by the High Court to the provisions evaluated, regardless of their own convictions, and even if there is a question of a possible impairment of the principle of the independence of the judge and his or her submission only to the law, the ruling given may give rise to criticism in several respects.

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In addition to the criticisms inherent in a solution that unravels a particular legal issue, which often take the form of scholarly articles or doctrinal works on the rule under evaluation, offered by legal professionals, the most important criticisms relate to the constitutionality of the rule interpreted under this mechanism.

It is undeniable that the High Court has the role of interpreting and applying the law in a uniform manner, a role enshrined in Article 126(2) of the EC Treaty. (3) of the Constitution, but this does not automatically lead to an "immunity" of the interpretation made within the framework of a unification mechanism. This role, assigned to the highest court, is exercised only within the limits of its jurisdiction, and there is the possibility of overturning certain interpretations if they do not comply with the constitutional framework.

The decision attributed by the Supreme Court to questions of law which are the subject of the referral in the procedure imposed by the two mechanisms of unification of judicial practice, even if it is binding on the courts from the date of publication of the decision in the Official Gazette of Romania, Part I, may be submitted both by the litigants and by the courts, ex officio, to the analysis of the Constitutional Court by criticising the interpretation made of the legal text by the decision pronounced in the procedure of unification of judicial practice.

Although initially the possibility of verifying the constitutionality of the interpretations given by the supreme court in this procedure was questioned, as the constitutional review court was reluctant to subject these decisions to evaluation, the evolution of case law has led to an acceptance of this role and has included these decisions within the scope of a constitutionality review. The evolution of the Constitutional Court's case law in the case of interpretations made under the only mechanism for unifying practice that existed before the preliminary ruling was introduced, namely the appeal in the interest of the law, shows that the Constitutional Court has shown a progressive, evolutionary attitude, within the limits of the Constitution¹. Without making an exhaustive analysis of this evolution, we limit ourselves only to observing that, starting from the impossibility of assessing such judgments², the evolution of case law has led to the admission of such exceptions, thus opening the way to a new case law which allows effective constitutional control of the decisions delivered within the framework of the mechanism for unification of judicial practice. The debut of this jurisprudence was achieved by Decision no. 206 of 29 April 2013³, in which the Constitutional Court found that the "resolution of the

¹ Claudia Krupenschi, *"Evolution of case law on the constitutionality review of a legal provision in the interpretation given by a decision rendered in an appeal in the interest of the law"*, available at www.ccr.ro, consulted on 10 March 2023.

² Decision No 409 of 4 November 2003, published in the Official Journal of Romania, Part I, No 848 of 27 November 2003, available at www.lege5.ro, consulted on 10 March 2023.

³ Published in the Official Journal of Romania, Part I, No 350 of 13 June 2013, available at www.ccr.ro, consulted on 10 March 2023.

questions of law adjudicated" by the Decision of the High Court of Cassation and Justice – United Sections no. 8 of 18 October 2010⁴, is unconstitutional, contrary to the provisions of Article 1 par. (3), (4) and (5), Article 126 par. (3), Article 142 par. (1) and Art. 147 par. (1) and (4) of the Constitution and the Decision of the Constitutional Court no. 62 of 18 January 2007. This decision was perhaps the most forceful intervention, the Constitutional Court noting that "the exception of unconstitutionality raised in the present case The exception of unconstitutionality raised in the present case presents, in the context of the examination of the constitutionality of Article 4145(4) of the Code of Criminal Procedure, an interpretation of the legal provisions relating to the appeal in the interest of the law which led, as indicated, to the reversal of a decision of the Constitutional Court. Since, in the light of the constitutional text of Article 126(3), the phrase 'the resolution of questions of law that have been adjudicated upon', contained in Article 4145(4) of the Code of Criminal Procedure, can only concern the interpretation and uniform application of the content of legal provisions by the courts, the interpretation of that phrase reached by the High Court of Cassation and Justice in Decision No 8/2010 is unconstitutional, in contravention of the constitutional provisions of Article 1 of the Constitution. paragraphs (3) and (5) which enshrine the principle of legal certainty, Article 1(4) on the principle of separation and balance of powers – legislative, executive and judicial – in constitutional democracy, Article 126(3) on the role of the High Court of Cassation and Justice, Article 142(1) according to which "the Constitutional Court is the guarantor of the supremacy of the Constitution" and Article 147(1) and (4) on the effects of decisions of the Constitutional Court. In making this interpretation, the High Court of Cassation and Justice has set itself up as a court of judicial review of Decision No 62/2007 of the Constitutional Court. Since that precedent seriously undermines legal certainty and the role of the Constitutional Court, any interpretation of the provisions of Article 4145(4) of the Code of Criminal Procedure, which governs the mandatory nature of rulings on questions of law decided by the High Court of Cassation and Justice by way of appeal in the interest of the law, in such a way as to enable that court, by virtue of an infra-constitutional rule, to give binding rulings which are contrary to the Constitution and the decisions of the Constitutional Court, must be penalised"⁵.

Subsequently, following the assessment of some of the legal texts criticised in relation to the interpretation given by the Supreme Court within the framework of the mechanisms for unification of judicial practice, the Constitutional Court has found in several cases that the interpretation given by the High Court is not in line with the constitutional provisions.

⁴ Published in the Official Journal of Romania, Part I, no. 416 of 14 June 2011, available at www.lege5.ro, consulted on 10 March 2023.

⁵ Turodrel Toader, Mareieta Safta, Constitutional litigation, 2nd edition, revised and updated, Ed. Hamangiu, Bucharest, 2020, p. 420.

Thus, without combating or interfering with the constitutional role of the High Court of Cassation and Justice provided for in Article 126 par. (3) of the Constitution, to ensure the uniform interpretation and application of the law by the other courts, the Constitutional Court has had to intervene when the interpretation offered by the Supreme Court has led to violations of constitutional provisions.

It is worth recalling that the intervention of the constitutional court, in these cases, is aimed exclusively at the text of the law criticised in an indissoluble relationship with the interpretation offered within the mechanism of unification of judicial practice, without declaring the legal provision itself unconstitutional, with consequences on the rule of law under review, but only by giving a constitutional meaning to the text of the law as interpreted.

This intervention of the Constitutional Court has been labelled as "judicial activism" and has been criticised in the doctrine. In this sense, it was considered that the Constitutional Court becomes the supreme court in the Romanian state insofar as it can control even the decisions of the High Court of Cassation and Justice. The possibility of declaring them null and void also completes a state of affairs that is nowhere explicitly regulated, but which seems possible even by virtue of the recent activist jurisprudence of the constitutional jurisdiction⁶.

The present approach aims to highlight the prerogatives of the Supreme Court in the exercise of its constitutional power of uniform application of the law in relation to the role of the constitutional review court as guarantor of the Fundamental Law, by presenting decisions handed down by the Constitutional Court which have overturned the interpretation made by the High Court in the preliminary ruling in criminal matters, as well as decisions with certain particularities.

II. Decisions of the Constitutional Court finding the unconstitutionality of legal norms as interpreted by way of preliminary rulings on points of law in criminal matters

The rules governing preliminary rulings once again enshrine the generally binding nature of the decisions handed down by the Constitutional Court, establishing that the effects of the decisions of the High Court of Cassation and Justice handed down in this procedure cease if the unconstitutionality of the legal provision which gave rise to the legal issue being decided is established.

At this point of analysis, it is necessary to identify and analyse the decisions rendered by the Constitutional Court in which the exceptions of unconstitutionality of

⁶ Mihail Udroiou (coordinator), Code of Criminal Procedure. Comments on articles, 2nd edition, C.H.Beck Ed., Bucharest, 2017, p. 1900.

legal norms are admitted in the interpretation given by the High Court in the resolution of the preliminary ruling in criminal matters.

Decision No 265 of 6 May 2014 on the admission of the exception of unconstitutionality of the provisions of Article 5 of the Criminal Code

In the context of the entry into force of the new Criminal Code and the regulation of the new mechanism for the unification of judicial practice, this decision was an important moment in the case-law of the Court of Constitutional Review, representing, on the one hand, the first decision reviewing the interpretations made by the Supreme Court in the preliminary ruling and, on the other hand, the first decision upholding the exception of unconstitutionality of the provisions which were subject to interpretation by the Supreme Court under this mechanism. This is all the more so since the invalidated decision was the second decision handed down by the High Court under this mechanism since the entry into force of the new criminal codifications.

By Decision No 2 of 14 April 2014⁷, the Supreme Court in its preliminary ruling established that in application of Article 5 of the Criminal Code, the statute of limitations on criminal liability is an autonomous institution from the institution of punishment.

In its analysis, the Supreme Court, referring to its long-standing case-law, the opinions established in the literature prior to 1991, in particular by indicating certain aspects held prior to the entry into force of the new Criminal Code, in which the possibility of combining more favourable provisions contained in different laws was admitted, when they concern institutions that may be applied autonomously, held, finally, that 'the new Criminal Code provides for penalty limits and a different method of calculating limitation periods from the old Criminal Code, in a first stage the more favourable criminal law will be determined with regard to the penalty and, in a second stage, the more favourable criminal law will be determined in the case of the autonomous institution of limitation of criminal liability, a situation which will require all the relevant provisions to be observed within the same law.

At this point of analysis, it is useful to recall that the jurisprudence of the Constitutional Court in relation to the application of criminal law in transitional situations has been extremely dynamic⁸: until 2011, it held that the criminal law is assessed in the framework of autonomous institutions (Decision no. 214/1997), in 2006, it emphasized that one does not combine favourable provisions in a law concerning the grounds for non-punishment with favourable provisions concerning incrimination (Decision no. 932/2006), decisions rendered in 2011, speak about *lex tertia* and global

⁷ Published in the Official Journal, Part I, No 319 of 30 April 2014, available at www.iccj.ro, consulted on 10 March 2023.

⁸ Georgina Bodoroncea, Valerian Cioclei, Irina Kuglay, Levinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca Maria Vasile, George Zlati, *Penal Code, Commentary on Articles*, 3rd edition, Ed. C.H.Beck, Bucharest, 2020, p. 23.

application of the law in the case of an institution with a mixed nature of criminal law and criminal procedural law (Decision no. 1483/2011, Decision no. 1470/2011⁹), and in 2014, it speaks of the more favourable criminal law with reference to an institution (extended confiscation: "Analysing the content of the entire regulation on extended confiscation in the Criminal Code, the Court finds that the principle of the more favourable criminal law is applicable also to this institution"¹⁰) and with reference to the global application (concerning the concurrence of offences, the continuing offence and the limitation of criminal liability) (Decision no. 78/2014).

Subsequent to the Supreme Court's determination of the application of the more favourable criminal law by autonomous institutions, the Court of Constitutional Review issued Decision No 265 of 6 May 2014, finding that the provisions of Article 5 of the Criminal Code are constitutional insofar as they do not allow the combination of provisions of successive laws in determining and applying the more favourable criminal law.

Assessing the existing opinions in doctrine and judicial practice, including at the level of the Supreme Court, the intention of the legislature, with references also to the practice of the Strasbourg Court, the Constitutional Court found, in essence, that the provisions of Article 5 of the current Criminal Code, in the interpretation which allows the courts, in determining the most favourable criminal law, to combine the provisions of the 1969 Criminal Code with those of the current Criminal Code, contravene the constitutional provisions of Article 1(4) on the separation and balance of powers in the State, and Article 61(4) of the Constitution. (1) on the role of Parliament as the sole law-making authority of the country, and only the interpretation of Article 5 of the Criminal Code to the effect that the more favourable criminal law applies in its entirety is capable of removing the unconstitutionality defect.

Finally, the Constitutional Court, reiterating its case law on the possibility of assessing the rules interpreted by the Supreme Court in the context of unification of practice and their limits, established that the constitutional framework and the effects of its decisions, which are generally binding and have force only for the future, must

⁹ The Constitutional Court referred to this decision in the recitals of Decision No 265/2014 to justify the fact that it was an isolated case that did not change the case law, noting that "The fact that, prior to the advent of the new Criminal Code, the Constitutional Court had sanctioned on specific points an interpretation contrary to the principle of more favourable criminal law in the case of certain substantive criminal law institutions (see in this regard Decision No 1.092 of 18 December 2012, published in the Official Journal of Romania, Part I, no.67 of 31 January 2013 - on special prescription, Decision no.1.470 of 8 November 2011, published in the Official Journal of Romania, Part I, no.853 of 2 December 2011 - on the plea agreement) does not contradict the above arguments, because, in those decisions, the more favourable rule was integrated into the content of the same normative act, without changing the overall vision of the regulation" (para. 38).

¹⁰ Decision No 78 of 11 February 2014 on the exception of unconstitutionality of the provisions of Article 2(e) and Article 16 of Law No 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided for by the legislation in force, and the provisions of Article 1182 para. (2) letter a) of the Criminal Code of 1969, published in the Official Gazette no.273 of 14.04.2014, available at www.ccr.ro consulted on 11 March 2023.

be respected, noting that the interpretation offered by Article 5 of the Criminal Code has acquired unconstitutional valence, and, with the publication of the decision in the Official Gazette of Romania, the effects of Decision No. 2 of 14 April 2014 of the Supreme Court cease in accordance with the provisions of Article 147 para. (4) of the Constitution and those of art.477¹ of the Code of Criminal Procedure.

Moreover, this point was subsequently upheld by the High Court of Cassation and Justice – Panel for the resolution of questions of law, in Decision No 5 of 26 May 2014¹¹, reiterating the considerations of the Constitutional Court on the termination of the effects of Decision No 2 of 14 April 2014 and holding that "consequently, in view of the above, in applying Article 5 of the Criminal Code in force, the High Court of Cassation and Justice takes into account the criterion of the overall assessment of the more favourable criminal law. The High Court will therefore find that it is not permissible to combine provisions of successive laws in determining and applying the more favourable criminal law with regard to the conditions for the existence and punishment of the offence in continuous form".

Without denying the usefulness and importance of this decision, which settled the "dispute" in favour of the court of constitutional review, we believe that the way in which judicial practice changed in a very short time with significant effects on legal relationships, led to the emergence of a non-uniform jurisprudence that created the risk of violation of Article 7 ECHR.

Decision No 732 of 16 December 2014 on the exception of unconstitutionality of the provisions of Article 336(1) and (3) of the Criminal Code

While Decision No 2 of 14 April 2014 of the High Court provided the necessary framework for the fulfilment of the role of the constitutional review court as guarantor of the Fundamental Law and paved the way for case-law on the reversal of decisions rendered in the unification of practice by way of preliminary ruling, the following decision rendered in this procedure was also invalidated by a finding of unconstitutionality of the provisions as interpreted by the Supreme Court.

By Decision No 3 of 12 May 2014¹², the High Court of Cassation and Justice - Criminal Matters Division established that in application of Article 336 paragraph (1) of the Criminal Code, in the case of a double taking of biological samples, the result of the blood alcohol level with criminal relevance is the result of the first taking, holding, in essence, that in the new regulation the legislator chose to give criminal relevance to the value of the blood alcohol level at the time of taking the first biological sample, a moment located in the immediate time, following the action of driving a vehicle on public roads.

¹¹ Published in the Official Journal No 470 of 26 June 2014, available at www.iccj.ro consulted on 11 March 2023.

¹² Published in the Official Journal, Part I, No 445 of 18 June 2014, available at www.iccj.ro consulted on 12 March 2023.

The Constitutional Court went on to review the legal provisions as interpreted by the Supreme Court in the preliminary ruling, invalidating that interpretation as well.

In this regard, by Decision no. 732 of 16 December 2014¹³, it found that the phrase "at the time of taking biological samples" in the provisions of Article 336(1) of the Criminal Code is unconstitutional.

The Constitutional Court held that, in the new legislation, the text of the criminal code did not take over the same text of the law which previously criminalised driving under the influence of alcoholic beverages provided for in Article 87(1) of Government Emergency Ordinance No 195/2002, but modified the conditions necessary for the constituent elements to be met in relation to the moment at which the existence of alcohol in the blood is required, namely at the time of taking the biological samples.

It has been stated that "alcoholic intoxication is determined by toxicological analysis of biological samples taken at a time more or less distant from the time of the commission of the offence, which is when the driver is detected in traffic. The requirement that the alcoholic strength of more than 0.80 g/l of pure alcohol in the blood be present at the time of taking the biological samples thus places the commission of the offence at a time subsequent to its commission, whereas the essence of dangerous offences is that they are committed at the time they are committed" (paragraph 26). In this regard, it was held that the new way of criminalising which allows criminal liability to be incurred on the basis of the blood alcohol level at the time of taking the biological samples does not allow the addressees of the criminal rule to foresee the consequences of not complying with it, given that they should have a clear picture of the constituent elements of the offence they are about to commit so as to be able to adapt their conduct.

For that reason, it was held that the phrase in question lacks predictability in the incrimination rule, in the context of the legislature's obligation to legislate by means of clear and precise texts, and that it infringes the constitutional provisions of Article 1(5) on the principle of respect for the law and Article 20 on the pre-eminence of international human rights treaties over domestic laws, in relation to the provisions of Article 7(1) on the legality of criminalisation of the Convention for the Protection of Human Rights and Fundamental Freedoms.

This end to the interpretation made by the Supreme Court following the intervention of the Constitutional Court was subsequently also noted by the High Court, which, in another referral in the preliminary ruling procedure, concerning the constitutive content of the offence provided for in Article 336(2) of the Criminal Code, referred to the Court of Justice in the judgment of the Court of First Instance. (1) of the Criminal Code has reconsidered its position on this point.

¹³ Published in the Official Gazette no.69 of 27.01.2015, available at www.ccr.ro consulted on 12 March 2023.

Thus, by Decision No 24 of 8 October 2015¹⁴, the Panel for the resolution of questions of law in criminal matters held expressly verbis that the effects of the interpretation of the text of the law made by the decision of the Supreme Court had ceased, noting that "in the context of the publication of the decision of unconstitutionality, the preliminary ruling found in Decision No 3 of 2014 of the High Court of Cassation and Justice does not currently give rise to difficulties in the interpretation of Article 336(1) of the Criminal Code". (1) of the Criminal Code, such as to legitimise a new preliminary ruling, implicitly clarifying the relationship between these two decisions. Such a relationship is expressly regulated by the legislation, in Article 4771 of the Code of Criminal Procedure, according to which the effects of the decision given in the preliminary ruling procedure cease by operation of law, inter alia, in the event of a finding that the provision which gave rise to the legal issue in question is unconstitutional. However, given that Decision No 732 of 2014 of the Constitutional Court declared unconstitutional the phrase 'at the time of the taking of the biological samples', Decision No 3 of 2014 of the High Court of Cassation and Justice - Panel for Deciding Questions of Law in Criminal Matters ceased to have effect on 27 January 2015, after which date, until future legislative amendments, the interpretation of the criminal provision in question is to be made in the light of the considerations of the decision finding it unconstitutional.

Decision No 397 of 15 June 2016 on the exception of unconstitutionality of the provisions of Article 67 of Law No 192/2006 on mediation and the organisation of the profession of mediator, as interpreted by Decision No 9 of 17 April 2015 of the High Court of Cassation and Justice - Panel for Deciding Questions of Law in Criminal Matters, and of Article 16(1)(g), final sentence, of the Code of Criminal Procedure

Another interpretation offered by the Supreme Court which was evaluated with the consequence of removing its effects was Decision no. 9 of 17 April 2015¹⁵, by which the High Court established, on the one hand, that in application of the provisions of Article 67 of Law no. 192/2006 on mediation and the organisation of the profession of mediator, the conclusion of a mediation agreement constitutes a sui-generis cause that removes criminal liability, distinct from reconciliation, and on the other hand, that the conclusion of a mediation agreement under the terms of Law No. 192/2006 on mediation and the organisation of the profession of mediator may intervene throughout the criminal proceedings, until the final outcome of the criminal judgment.

¹⁴ Published in the Official Journal, Part I, No 869 of 20 November 2015, available at www.iccj.ro consulted on 12 March 2023.

¹⁵ Published in the Official Journal, Part I, No 406 of 9 June 2015, available at www.iccj.ro consulted on 12 March 2023.

The High Court held, in essence, that the distinction between the two cases which remove criminal liability, namely the conclusion of a mediation agreement and reconciliation, in relation to their nature, the manner in which their existence is acknowledged, the separate regulation in Article 16(2) of the Mediation Act and the separate provision in Article 16(3) of the Mediation Act, are not relevant. (1)(g) of the Code of Criminal Procedure, argues that such a procedure, which is regulated in Law No 192/2006 on mediation and the organisation of the profession of mediator, may be conducted throughout the criminal proceedings.

This interpretation was overturned by the Constitutional Court, by Decision No 397 of 15 June 2016¹⁶, which found that the provisions of Article 67 of Law No 192/2006 on mediation and the organisation of the profession of mediator, as interpreted by Decision No 9 of 17 April 2015 of the High Court of Cassation and Justice – Panel for Deciding Questions of Law in Criminal Matters, are constitutional insofar as the conclusion of a mediation agreement on the offences for which reconciliation may occur is effective only if it takes place before the reading of the act of referral to the court.

The Constitutional Court took into account the fact that, by interpreting the mechanism for unifying practice, the defendant was given the possibility of circumventing the intended purpose by setting the last moment by which the parties may reconcile. In this regard, it was noted that for offences where the possibility of reconciliation is provided for, and implicitly, a final moment up to which reconciliation can take place, represented by the reading of the act of referral to the court, as provided for in Article 159 (3), second sentence, of the Criminal Code, the defendant and the injured party/civil party, although they can no longer reconcile before the court, the conclusion of a mediation agreement leads the court, irrespective of the procedural stage of the trial, whether substantive or appellate, to take note of this agreement with the consequence of terminating the criminal proceedings.

In view of the last moment up to which reconciliation may take place, which is intended to limit the uncertainty in the course of legal relations, it was considered that circumventing this moment infringes Article 124(2) of the Constitution, which enshrines the uniqueness, impartiality and equality of justice.

Subsequently, by Article II of Law no. 97/2018 on some measures for the protection of victims of crime, Article 67 of Law no. 192/2006 on mediation and the organisation of the profession of mediator, was amended in the sense established by the Constitutional Court, introducing paragraph (1) of Article 67 of Law no. 192/2006 on mediation and the organisation of the profession of mediator. 22, which provides that the conclusion of a mediation agreement in the criminal side of a crime, according to para. (1), constitutes a sui-generis case which removes criminal liability. The

¹⁶ Published in the Official Journal no.532 of 15.07.2016, available at www.ccr.ro consulted on 13 March 2023.

conclusion of a mediation agreement on the criminal side, under the terms of this Act, may take place before the reading of the act of referral to the court.

As far as we are concerned, without denying the existing differences between reconciliation and mediation, we consider that, being regulated in Art. 16 para. (1) (g) of the Code of Criminal Procedure as cases that prevent the initiation and exercise of criminal proceedings, a different moment of termination of criminal proceedings cannot be imposed in terms of procedural law. We consider that it is difficult to explain how the court cannot take note of the will of the parties as a result of the intervention of reconciliation, but at the same time can order the termination of the criminal proceedings by taking into account the mediation agreement. In other words, in this case, the parties cannot make their will known to the judge, but they can require the same judge, by means of mediation, to accept the agreement reached.

Decision No 418 of 19 June 2018 on the exception of unconstitutionality of the provisions of Article 29 para. (1) lit. c) of Law No. 656/2002 on the prevention and punishment of money laundering and on the introduction of measures to prevent and combat the financing of terrorism, as interpreted by the Decision of the High Court of Cassation and Justice No.16 of 8 June 2016 on the delivery of a preliminary ruling for the resolution of certain questions of law relating to the offence of money laundering

Another binding interpretation given by the Supreme Court which was subject to constitutional review was Decision No 16 of 8 June 2016¹⁷, which established that the actions listed in Article 29 para. (1) letters a), b) and c) of Law no. 656/2002 for the prevention and punishment of money laundering and for the establishment of measures to prevent and combat the financing of terrorism, namely the exchange or transfer, concealment or disguise, acquisition, possession or use are alternative modalities of the material element of the single offence of money laundering, the fact that the active subject of the money laundering offence may also be the active subject of the offence from which the proceeds originate, and that the money laundering offence is a stand-alone offence and is not conditional on the existence of a conviction for the offence from which the proceeds originate.

It was held that, given that there is no provision in Law 656/2002 which prevents the offence of laundering and the offence of money laundering from being held against the active subject of the offence from which the assets originate, such a combination of offences is theoretically possible, but 'the offence of money laundering must not automatically be held against the perpetrator of the offence from which the proceeds originate, simply because one of the actions which is a material element of

¹⁷ Published in the Official Journal, Part I, No 654 of 25 August 2016, available at www.iccj.ro consulted on 14 March 2023.

the offence of money laundering was also carried out in the course of his criminal activity, because that would deprive the offence of money laundering of its individuality. It is for the judicial authorities to decide in specific cases whether the offence of money laundering is sufficiently well defined in relation to the offence from which the proceeds originate and whether it is appropriate to find a combination of offences or a single offence".

By Decision No 418 of 19 June 2018¹⁸, it was found that the provisions of Article 29(1)(1)(b) of the Treaty on European Union, as amended by Decision No 418 of 19 June 2018, provide that the provisions of Article 29(1)(b) of the Treaty on European Union, as amended by Decision No 418 of 19 June 2018, are not applicable. (c) of Law 656/2002, as interpreted by the Decision of the High Court of Cassation and Justice No 16 of 8 June 2016 on the delivery of a preliminary ruling, with regard to the active subject of the offence (paragraph 2 of the operative part), are unconstitutional.

The Constitutional Court criticised the decision, first of all, for failing to distinguish between the alternative forms of the offence when it established that the active subject of the offence of money laundering may also be the active subject of the offence from which the assets originate, pointing out that the acquisition, possession or use of assets is not directly aimed at concealing the origin of assets which the perpetrator of the offence knows originate from the commission of offences.

It was held that this interpretation means that the offender is liable for the offence from which the property originates and for the offence provided for in Article 29(1)(1) of the Criminal Code. (c) of Law No. 656/2002, requires violation of the *ne bis in idem* principle. It was held that the interpretation of those provisions by the Supreme Court infringed the requirements of clarity, precision and foreseeability arising from the principle of the rule of law.

The text of the law under review was also subject to a review by the Constitutional Court with reference to the same interpretation, but, given that the application for the exception of unconstitutionality was made prior to the delivery of Decision No 418 of 19 June 2018, and the provisions of Article 29(3) of Law No 47/1992 on the organization and functioning of the Constitutional Court, the exception was rejected as inadmissible¹⁹.

In the present case, it should be noted that the provisions of Article 29 of Law no. 656/2002 were repealed by the entry into force of Law no. 129/2019 on preventing

¹⁸ Published in the Official Journal No 625 of 19.07.2018, available at www.ccr.ro consulted on 14 March 2023.

¹⁹ Decision No 646 of 17 October 2019 on the exception of unconstitutionality of the provisions of Article 29(1)(c) of Law No 656/2002 on the prevention and punishment of money laundering and on the introduction of measures to prevent and combat the financing of terrorism, as interpreted by Decision No 16 of 8 June 2016 delivered by the High Court of Cassation and Justice – Panel for the resolution of questions of law in criminal matters on the delivery of a preliminary ruling for the resolution of questions of law relating to the offence of money laundering, published in the Official Gazette no. 116 of 14.02.2020, available at www.ccr.ro consulted on 15 March 2023.

and combating money laundering and terrorist financing, as well as amending and supplementing certain legislative acts, and the new legislative amendments implemented the decision of the Constitutional Court mentioned above.

Thus, the new provisions, in Article 49 para. (1) lit. c) the fact of acquiring, possessing or using property by a person other than the active subject of the offence from which the property originates, knowing that the property originates from the commission of an offence.

Decision No 242 of 8 April 2021 on the exception of unconstitutionality of the provisions of Article 551 of Law No 254/2013 on the execution of sentences and measures of deprivation of liberty ordered by judicial bodies in the course of criminal proceedings, as interpreted by Decision No 7 of 26 April 2018 of the High Court of Cassation and Justice - Panel for Deciding Questions of Law in Criminal Matters

The Panel for the resolution of certain questions of law in criminal matters established by Decision No 7 of 26 April 2018²⁰ that in interpreting the provisions of Article 551 of Law No 254/2013, for the determination of the remainder of the sentence not served for the purposes of applying the penalty treatment under Article 104(2) in conjunction with Article 43 paragraph (1) of the Criminal Code, the period actually served of the sentence from which conditional release was ordered prior to the entry into force of Law no.169/2017 must be recalculated – from 24.07.2012 – by considering as additionally served the days calculated as served in view of the inadequate conditions of detention.

In the considerations of this decision, the Supreme Court, noting that the provisions of Article 551 of Law no. 254/2013 do not distinguish between persons deprived of liberty serving a prison sentence at the time of the entry into force of Law no. 169/2017 and persons released on parole, and that the application of these provisions is not limited to persons deprived of liberty serving a prison sentence at the time of the entry into force of the aforementioned law, considered that in the absence of a legal basis it cannot determine the exclusion of persons previously released on parole from obtaining this benefit.

On the other hand, the Constitutional Court, by Decision No 242 of 8 April 2021²¹, found that the provisions of Article 551 of Law No 254/2013 on the execution of sentences and measures of deprivation of liberty ordered by judicial bodies in the course of criminal proceedings, as interpreted by Decision No 7 of 26 April 2018 of the High Court of Cassation and Justice – Panel for Deciding Questions of Law in Criminal Matters, are unconstitutional.

²⁰ Published in the Official Journal, Part I, No 548 of 2 July 2018, available at www.iccj.ro consulted on 15 March 2023.

²¹ Published in the Official Journal No. 677 of 08 July 2021, available at www.ccr.ro consulted on 15 March 2023.

In essence, the Constitutional Court held that the text of the law under review, since it is regulated in the area of enforcement of sentences, does not constitute a rule of substantive criminal law such as to require the application of the more favourable criminal law and a recalculation of the sentence deemed to have been served. He considered that that aspect was tantamount to a review of the judgment ordering conditional release, in breach of the principle of the certainty of legal relationships. Moreover, it considered that the knowledge of the date on which the sentence was to be regarded as having been served by the sentenced person on conditional release would lead to compliance with the principle of the certainty of legal relationships and the foreseeable application of the law, whereas if that date was uncertain, the sentenced person would not be able to regulate his conduct or determine its criminal consequences. In that regard, the Constitutional Court held that the interpretation of the Supreme Court had rendered the legal provisions in question unpredictable in relation to the person in respect of whom conditional release was ordered.

It is important to note, in this situation, that subsequent to the decisions of the two courts, by Article II, paragraph 2 of Law No. 240/2019 on the repeal of Law No. 169/2017 on the amendment and completion of Law No. 254/2013 on the execution of sentences and measures of deprivation of liberty ordered by judicial bodies in the course of criminal proceedings, as well as on the amendment of Law No. 254/2013 on the execution of sentences and measures of deprivation of liberty ordered by judicial bodies in the course of criminal proceedings, Article 551 of Law No. 254/2013 was repealed.

III. Specific issues of some decisions rendered by the Constitutional Court in relation to the rulings made by the High Court of Cassation and Justice by way of preliminary ruling

Decision No 224 of 4 April 2017 on the exception of unconstitutionality of the provisions of Article 335(1) of the Criminal Code and Article 6(6), second sentence, of Government Emergency Ordinance No 195/2002 on traffic on public roads, as opposed to Decision No 11 of 12 April 2017 delivered by the High Court of Cassation and Justice – Panel for the resolution of questions of law

An assessment of these decisions leads to the conclusion that the two courts, a few days apart, have reached diametrically opposed solutions in relation to the criminal liability of driving an agricultural or forestry tractor on public roads without a driving licence.

Thus, we note that the order in which the two decisions were handed down was reversed, with the Supreme Court deciding the case in the preliminary ruling procedure, after the ruling of the Constitutional Court, but before the publication of the decision in the Official Gazette.

By Decision No 224 of 4 April 2017²², the Constitutional Court found that the legislative solution contained in Article 335(1) of the Criminal Code, which does not criminalise the offence of driving an agricultural or forestry tractor on public roads without a driving licence, is unconstitutional.

Very shortly afterwards, by Decision No 11 of 12 April 2017²³, the Supreme Court, in the framework of the mechanism for unification of judicial practice, established that, in interpreting the concept of "motor vehicle", provided for in Article 334 para. (1) of the Criminal Code and Art.335 para.(1) of the Criminal Code, in relation to Art.6 para.6 and para.30 of O.U.G. no.195/2002, amended and supplemented by OG no. 21/26.08.2014, the driving on public roads of an agricultural or forestry tractor that is not registered/unregistered according to the law or by a person who does not have a driving licence does not meet the conditions of typicality of the offences provided for in Art.334 para. (1) of the Criminal Code, respectively, Art. 335 para. (1) of the Criminal Code. On the basis of the definition of those terms and the concepts expressed in the relevant legislative framework, the contradictory case-law on the subject, the case-law of the European Court of Human Rights and of the Constitutional Court of Romania on the accessibility, clarity and foreseeability of the rules criminalising offences, the Supreme Court held that the act of driving an agricultural or forestry tractor on public roads without a driving licence cannot give rise to criminal liability.

On the other hand, the Constitutional Court stated that 'in accordance with Article 4(4) of Directive 2006/126/EC, the legislative solution contained in Article 6(6) of Government Emergency Ordinance No 195/2002, currently in force, excludes agricultural or forestry tractors from the category of motor vehicles' and that 'according to the second sentence of Article 6(6) of Government Emergency Ordinance No 195/2002, an agricultural or forestry tractor is not considered to be a "motor vehicle"', and in Article 335(2) of Directive 2006/126/EC, the legislative solution contained in Article 6(6) of Government Emergency Ordinance No 195/2002, currently in force, excludes agricultural or forestry tractors from the category of motor vehicles'. (1) of the Criminal Code, the legislative solution does not also refer to agricultural or forestry tractors, the act of driving such a vehicle on public roads, without having a driving licence, does not fall within the normative hypothesis

²² Published in the Official Journal No 427 of 9 June 2017, available at www.ccr.ro consulted on 15 March 2023.

²³ Published in the Official Journal, Part I, No 479 of 26 June 2017, available at www.iccj.ro consulted on 15 March 2023.

provided for by Article 335(1) of the Criminal Code", stating that the practice in the matter confirms this aspect, including by referring to Decision No 11 of 12 April 2017, delivered by the High Court of Cassation and Justice, a decision which was not written at the time of writing by the constitutional court.

However, taking into account the mismatch between Article 335(1) of the Criminal Code and the second sentence of Article 6(6) of Government Emergency Ordinance No 195/2002, the Constitutional Court held that it was necessary to find that there was a defect of unconstitutionality in relation to the failure to regulate agricultural or forestry tractors as the material object of the offence of driving a vehicle on public roads without a driving licence.

It also held that that omission constituted a decriminalisation of the offence of driving an agricultural or forestry tractor on public roads without a driving licence, with direct consequences for the social values protected by road traffic offences and for the life and physical integrity of persons.

At the same time, it held that in this circumstance, the solution generates discrimination, as there is no rational argument why the perpetrator who has a driving licence, but for a category other than agricultural or forestry tractors, by driving such a vehicle on public roads can acquire the status of an active subject of the offence provided for in Article 335(2) of the Criminal Code, compared to the person who does not have a driving licence at all and drives an agricultural or forestry tractor on public roads for which criminal liability cannot be incurred.

In this matter of law, we note that within the framework of a subsidiary mechanism of unification of judicial practice represented by the meetings held by the presidents of the criminal divisions of the courts of appeal and the High Court of Cassation and Justice, which took place at the Court of Appeal of Iasi, on 18-19 May 2017, the view was expressed that the agricultural or forestry tractor can be assimilated to a "motor vehicle" even if art. 6, item 6 of GEO no. 195/2002 does not define it as such, when it circulates on public roads, the arguments supported referring to the considerations of the Constitutional Court decision.

However, the participants in the meeting unanimously concluded that, although the issue raised had been settled by the Constitutional Court decision, as long as the agricultural tractor is not a "motor vehicle" within the meaning of Article 6(6) of GEO 195/2002 and Article 334(2) of the EC Treaty, the Commission should not be obliged to consider the tractor as a "motor vehicle". (1) and Art. 335 para. (1) expressly refer to driving on public roads 'of a motor vehicle', the agricultural or forestry tractor cannot be assimilated to a motor vehicle, and driving it on public roads does not constitute one of the offences referred to in Article 334(1). (1) and Art. 335 para. (1) of the Criminal Code, even if the tractor is not registered or the driver does not have a driving licence. The participants considered that the legislator

should intervene in order to criminalise offences of the type under consideration, committed with an agricultural or forestry tractor²⁴.

In this analysis it is useful to note that the legislator has not yet intervened to amend the rule in accordance with the decision of the constitutional court.

Decision No 67 of 25 October 2022 delivered by the High Court of Cassation and Justice – Full Bench for the resolution of questions of law

As Decision No 405 of 15.06.2016²⁵, on abuse of office, produced a great interest turning it into a "star" of the public space, it was the turn of another decision to lead to a wave of reactions and divergent opinions, especially in the judiciary.

As a consequence of the Constitutional Court's two different decisions on the interruption of the limitation period, the Supreme Court has been "assailed" by petitions asking it, to a greater or lesser extent, to interpret the Constitutional Court's decision.

The response of the High Court came in the form of Decision No 67 of 25 October 2022²⁶, which established, on the one hand, that the rules relating to the interruption of the limitation period are rules of substantive criminal law subject, from the point of view of their application over time, to the principle of the operation of criminal law laid down in Article 3 of the Criminal Code, with the exception of more favourable provisions, in accordance with the principle of *mitior lex* laid down in Article 15(1) of the Criminal Code. (2) of the Constitution and Art. 5 of the Criminal Code, and, on the other hand, that the court deciding the appeal for annulment, based on the effects of the decisions of the Constitutional Court No 297/26.04.2018 and No 358/26.05.2022, may not reconsider the prescription of criminal liability, if the appellate court has discussed and analysed the incidence of this cause of termination of criminal proceedings in the course of the proceedings prior to the latter decision.

Without denying the complexity of this referral, as it is the first case under the unification mechanism provided for by the preliminary ruling, in which 16 cases have been brought together, with almost every court of appeal in the country making a referral, we would like to make a brief assessment of the ruling given, as this subject could always be the subject of a separate investigation in which an exhaustive assessment of the legal issue can be made.

²⁴ Minutes of the meeting of the Presidents of the Criminal Chambers of the High Court of Cassation and Justice and the Courts of Appeal, available at https://inm-lex.ro/fisiere/d_2441/Minuta%20intalnire%20presedinti%20sectii%20penale%20lasi%2018-9%20mai%202017.pdf.

²⁵ on the exception of unconstitutionality of the provisions of Article 246 of the Criminal Code of 1969, Article 297(1) of the Criminal Code and Article 132 of Law No. 78/2000 on the prevention, detection and punishment of corruption, published in the Official Journal No. 517 of 08.07.2016, available at www.ccr.ro consulted on 15 March 2023.

²⁶ Published in the Official Journal, Part I, No. 1141 of 28 November 2022, available at www.iccj.ro consulted on 16 March 2023.

In order to better understand the problem that generated the non-uniform practice, it is useful to recall that, initially, by Decision no. 297 of 26 April 2018²⁷, concerning the exception of unconstitutionality of the provisions of Article 155 paragraph (1) of the Criminal Code, the Constitutional Court found that the legislative solution that provides for interrupting the course of the limitation period of criminal liability by performing "any procedural act in question", in the provisions of Article 155 paragraph (1) of the Criminal Code, is unconstitutional.

This decision has led to the emergence of two opinions, a minority opinion, which considers that the decision of the Constitutional Court is a simple (extreme) one, which has the effect, following the declaration of unconstitutionality of the provisions of Article 155(1) of the Criminal Procedure Code, of declaring that the provisions of Article 155(1) are unconstitutional. (1) of the Criminal Code, the lack of regulation of a cause for interrupting the limitation period of criminal liability, and another majority decision, in which it was held that the decision is interpretative and that the limitation period of criminal liability is interrupted by the performance of procedural acts only in the case of any procedural act which, according to the law, must be communicated to the suspect or defendant.

Moreover, the interpretation of Article 155 para. (1) of the Criminal Code was the subject of both a referral to the Supreme Court to resolve legal issues in this regard, rejected as inadmissible by Decision No 5 of 21 March 2019²⁸, and an appeal in the interest of the law following the uneven jurisprudence imposed by the two crystallised opinions referred to above, also rejected as inadmissible by Decision No 25 of 11 November 2019²⁹. The considerations taken into account in both decisions concerned the fact that the aim was to determine the effects of Decision No 297 /2018 of the Constitutional Court on the text of the law at issue, which is contrary to the case law of the Supreme Court.

We note that, after Decision No 297/2018, as in many other cases, the legislator did not intervene to clarify the content of the rule and to bring the legal text into line with the Basic Law and the considerations given by the Constitutional Court, which is why, by Decision No 358 of 26 May 2022³⁰, the Constitutional Court found that the provisions of Article 155(1) of the Criminal Code are unconstitutional. It was held, in essence, that the legislature's lack of reaction and diligence led to an uneven practice in applying the legal provisions in question to similar situations, which created a situation lacking clarity and predictability.

²⁷ Published in the Official Journal No 518 of 25 June 2018, available at www.ccr.ro consulted on 16 March 2023.

²⁸ Published in the Official Journal, Part I, No 381 of 15 May 2019, available at www.iccj.ro consulted on 16 March 2023.

²⁹ Published in the Official Journal, Part I No. 86 of 06/02/2020, available at www.iccj.ro consulted on 16 March 2023.

³⁰ Published in the Official Journal No. 565 of 09 June 2022, available at www.ccr.ro consulted on 16 March 2023.

Thus, it was established that "in the conditions of establishing the legal nature of Decision No. 297 of 26 April 2018 as a simple/extreme decision, in the absence of active intervention by the legislator, mandatory under Article 147 of the Constitution, during the period between the date of publication of that decision and the entry into force of a normative act clarifying the rule, by expressly regulating the cases capable of interrupting the course of the limitation period of criminal liability, the active substance of the legislation does not contain any case that would allow interrupting the course of the limitation period of criminal liability" (para. 73).

This decision, and more specifically this last paragraph, has led to this wave of referrals to the Supreme Court on this decision, with the High Court answering only two of the 16 questions referred to it.

Subsequently, the text of the law was amended by Emergency Ordinance No 71/2022 amending Article 155 para. (1) of Law No. 286/2009 on the Criminal Code, in the sense established by judicial practice by interrupting the limitation period for criminal liability in the event of the performance of any procedural act in the case which, according to the law, must be communicated to the suspect or defendant.

The High Court of Cassation and Justice is obliged, in its interpretation of the law, to respect the decisions of the Constitutional Court, which, according to Article 147(2) of the EC Treaty, is required to give effect to the decisions of the Constitutional Court. (4) of the Constitution, are generally binding from the date of publication in the Official Gazette of Romania. Although the dismissed petitions sought to establish the effects of the decisions of the Constitutional Court and the impossibility of interpreting them by way of preliminary ruling, we consider that by the solution offered to the other two petitions, the High Court sets the limits of application of the decision of the Constitutional Court, interpreting that decision, contrary to its own case-law. In this regard, we are of the opinion that by Decision No 67 of 25 October 2022, the Supreme Court substituted itself for the Constitutional Court, reversing the roles and attributing to this decision the value of an "interpretative decision", although it had neither the possibility nor the competence to do so.

As established in the judicial practice, we consider that the effects of these decisions were to hold that in the above-mentioned period of time, there were no cases in the substantive criminal legislation to interrupt the course of prescription of criminal liability, with the consequence of the exclusive incidence of the general limitation periods provided for in Article 154 of the Criminal Code.

Likewise, from the perspective of the effects produced by the prior judgment, we note that the ruling provided in the second paragraph of the decision on the appeal for annulment, based on the effects of Constitutional Court decisions no. 297/26.04.2018 and no. 358/26.05.2022, confirms the interpretation made by the Complex for the resolution of questions of law in criminal matters, by Decision no. 10 of 29 March 2017³¹.

³¹ Published in the Official Journal No 392 of 25 May 2017, available at www.icj.ro consulted on 16 March 2023.

At this point of analysis, we limit ourselves only to observing the difference made between the error of judgment relating to the erroneous assessment by the courts of the incidence of a ground for termination of the criminal proceedings and the procedural error relating to the failure of the courts to rule on the incidence of a ground for termination of the criminal proceedings and the solution proposed in the resolution of this question of law. We find it difficult to explain how, in similar cases, for defendants in identical situations, the diligence of a defendant in making defences materialised in invoking the incidence of the cause for termination of the criminal proceedings, represented by the prescription of criminal liability, leads to the impossibility of obtaining the procedural remedy requested, whereas the lack of reaction of a co-defendant who has not made defences in this respect, opens the way to an appeal for annulment with the consequence of obtaining a solution for termination of the criminal proceedings. Moreover, that situation may even be absurd where the perpetrator has pleaded the limitation of criminal liability in the course of the criminal proceedings and the co-perpetrator or accomplice, who are in the same situation and who participated in the same offence, have not requested that benefit, and it may subsequently be held, by way of an extraordinary appeal, that, in the case of the latter, the failure to assess the grounds for the termination of the criminal proceedings means that the termination of the criminal proceedings may be ordered by way of an action for annulment, whereas that benefit is refused to the perpetrator.

We also argue that, despite the violation of the role of the Supreme Court, this decision has not fully clarified matters, but on the contrary, has complicated them, which has led to the Supreme Court being asked further preliminary questions, and several applications in this regard have recently been registered with the Complex for the Resolution of Questions of Law in Criminal Matters.

Without wishing to criticise the decision in question, it is interesting to see whether this interpretation will pass the test of constitutionality in the eventual and imminent referral to the Constitutional Court.

Conclusions

An assessment of all the decisions handed down by the Constitutional Court on the rules interpreted by the High Court's Committee for the Resolution of Questions of Law shows that the statistics reveal an impressive number of referrals to the Constitutional Court, which led to the admission of only 10 exceptions of unconstitutionality, half of them in criminal matters, and the rejection of 106 exceptions of unconstitutionality in relation to this procedure, many of them as inadmissible.

The usefulness of the preliminary ruling, which is designed to prevent the emergence of a non-uniform practice in the application of the law by the courts, has also made it necessary to check the interpretations made by this mechanism.

The assessment of the constitutionality of the decisions delivered under this mechanism for unifying practice reflects the fact that the existence of a real conflict between the High Court of Cassation and Justice and the Constitutional Court of Romania cannot be justified. Their decisions express different competences with binding force for the courts, and the interpretations offered lead to a consolidation of judicial practice.

The case law mentioned highlights both the role of the Supreme Court in ensuring its constitutional role of interpreting and applying the law in a unified manner, and above all the role of the Constitutional Court as guarantor of the Fundamental Law, which gives it the possibility of verifying the legal norms in the interpretation offered by the mechanisms of unification of judicial practice within the exclusive competence of the High Court.