

MITIOR LEX IN NATIONAL AND INTERNATIONAL CASE-LAW – (SECOND-HAND) FUNDAMENTAL PRINCIPLE OF CRIMINAL LAW?

DOI:10.47743/rdc-2023-2-0002

Associate Professor **Norel NEAGU**
Associate Professor at the Romanian-American University, Bucharest, Romania.
E-mail: norel.laurentiu.neagu@rau.ro.

Abstract

Several recent rulings by the Court of Justice of the European Union, the Romanian Constitutional Court and the High Court of Cassation and Justice raise the issue of the supremacy/primacy of European Union law over national law, especially with regard to criminal or constitutional provisions in respect to mitior lex principle and its influence over criminal responsibility towards crimes against the financial interests of the European Union. The national courts supported the view that the legality and mitior lex principles constitute fundamental principles of constitutional law and also criminal law, barring, when applicable, prosecution irrespective of crime. However, the European Court ruled that limitation period has no connection whatsoever with these principles at EU level and as national standards, only the legality principle outweighs the effectiveness of criminal law measures in combating fraud against the financial interests of the European Union, while the mitior lex principle, despite being recognised as a fundamental principle stemming from the common traditions of Member States and also the Charter of Fundamental Rights of the European Union, falls short in comparison. In the following we will analyse the evolution of the problem, but also possible solutions.

Keywords: *mitior lex, ECJ case law, Romanian Constitutional Court case law, Romanian supreme court case law, protection of financial interests of the European Union.*

1. Facts

1.1. Situation in Romania and decisions of Romanian Courts

Recent judicial practice in the matter of the incidence of limitation period (time barring) has been reconfigured by two decisions of the Constitutional Court and a binding decision of the High Court of Cassation and Justice.

Thus, upon the adoption of the new criminal legislation, the interruption of the limitation period and the special limitation period were regulated in Article 155 of the Criminal Code. According to this legal text, the course of the limitation period for criminal liability is interrupted by the fulfilment of **any procedural act in the case**.

1.1.1. Constitutional Court's decisions

Considering that the text of the law is unpredictable in application, the Constitutional Court declared unconstitutional the phrase "any procedural act in the case",¹ leaving the text of the law incomplete and without practical applicability.

Through the aforementioned decision, the Constitutional Court held that among the principles governing criminal liability, the principle of the **legality of incrimination and punishment**, provided for in Article 23 para. (12) of the Constitution and Article 1 of the Criminal Code, according to which the acts that constitute crimes and the penalties applicable in case of their commission are provided by the criminal law, is relevant in the case. The same principle can be found, indirectly, in Article 15 para. (2) of the Criminal Code, according to which the crime is the only basis for criminal liability. The principle of the legality of criminal liability is supplemented by the principle of its personal character, according to which criminal liability can be engaged only with respect to the person who committed a crime and the participants in its commission.

Finally, another principle applicable to criminal liability is that of the **time-barring of criminal liability**. According to the latter, the state's right to prosecute persons who commit crimes expires if it is not exercised within a certain period of time. The time-barring of criminal liability is based on the idea that, in order to achieve its goal, that of achieving the legal order, criminal liability must intervene promptly, as close as possible to the time of the commission of the crime, since only in this way can general or special prevention be realised. Also, on the one hand, the feeling of security of the protected social values, and, on the other hand, trust in the authority of the law, can be thus created. The more criminal liability is retained later than the date of the commission of the crime, the more its effectiveness decreases, the social resonance of the commission of the crime diminishes, and the establishment of criminal liability for the commission of the crime no longer appears to be necessary, because its consequences could have been removed or deleted. At the same time, in the time interval that has passed since the commission of the crime, its author, under the pressure of the threat of criminal liability, can correct oneself, without the need to apply a punishment.²

That being the case, the time-barring of criminal liability consists of extinguishing the conflicting criminal legal report between the state and the offender, and, through this, of extinguishing the right of the state to hold criminally liable the person who

¹ Constitutional Court, decision no. 297/2018, published in Official Gazette no. 518 from 25 June 2018.

² Constitutional Court, decision no. 297/2018, par. 14.

commits a crime, after the passage of a certain period of time from the date of its commission, respectively after expiry of the limitation period. In this sense, the limitation periods are regulated in Article 154 of the Criminal Code, depending on the nature and severity of the penalties provided by law for the crimes to which it applies.³

The Court also held that, in order to have the effect of removing criminal liability, **the limitation period must run without the intervention of any act likely to bring back to the public consciousness the committed facts.** In other words, any activity that has the effect of bringing the fact of the commission of the crime back to society's attention interrupts the course of the limitation period and postpones the production of its effects. In this sense, Article 155 para. (1) of the Criminal Code provides for the interruption of the limitation period for criminal liability by fulfilling any procedural act in the case, and, according to the provisions of para. (2) of the same Article 155, after each interruption a new limitation period begins to run.⁴

The institution of the time-barring (limitation period) of criminal liability must be analysed from a double perspective, as it establishes, on the one hand, a period of forfeiture of the judicial bodies from the right to prosecute persons who commit crimes, and, on the other hand, a term, appreciated by the legislator as being long enough, for society to forget the criminal acts committed and their effects, as a result of the gradual reduction of their impact on social relations. Thus, the time-barring of criminal liability is, from the point of view of its legal nature, a cause of extinguishment of criminal liability and, therefore, of the action of criminal liability, a cause determined and justified by the effects of the passage of time on society's need to prosecute and convict the offender. This, since, after the passage of a certain period of time, from the moment of committing the crime, the application of a criminal penalty no longer contributes to the achievement of the purpose of the criminal law, as the social-political necessity that determines the legal mechanism of engaging criminal liability no longer exists.⁵

That being the case, the analysis of the legal provisions that regulate the interruption of the criminal liability limitation period must be done from the same double perspective, it representing, on the one hand, a legal solution to reinstate the judicial bodies in a new, full limitation period, in which its active role, conferred by the provisions of Article 5 of the Code of Criminal Procedure, can be exercised, establishing the truth in criminal cases, based on the evidence administered, and, on the other hand, a way in which society, through state bodies, informs the suspect or defendant that the alleged criminal offense he committed did not lose the social resonance it had at the time of its commission.⁶

³ Constitutional Court, decision no. 297/2018, par. 15.

⁴ Constitutional Court, decision no. 297/2018, par. 16.

⁵ Constitutional Court, decision no. 297/2018, par. 22.

⁶ Constitutional Court, decision no. 297/2018, par. 23.

Through the lens of this last aspect, the interruption of the criminal liability limitation period becomes effective, producing its effects, in a complete manner, only under the conditions of the existence of legal levers to inform the person concerned about the start of a new limitation period. Such a notification procedure can consist precisely in the communication of those acts carried out in the case, which have the effect of running a new limitation period for criminal liability.⁷

Moreover, by Decision no. 1,092 of December 18, 2012, the Court ruled that the statute of limitations belongs to the substantive criminal law, and not to the criminal procedural law, and that, being so, the statute of limitations is a cause for the removal of criminal liability. By the same decision, the Court held that, by removing the criminal liability, the criminal action is also removed, but this is a derivative, procedural effect, arising from the first effect, from the removal of criminal liability, a material effect. Therefore, the Court concluded that the statute of limitations of criminal liability appears as a cause of removal of criminal liability and, by way of consequence, as a **cause of removal or non-imposition of punishment**, the cause that determines the ending of the right to pursue criminal liability and its corresponding obligation.

The Court found that the provisions of Article 155 para. (1) of the Criminal Code establishes a legislative solution of a nature to create for the person who has the capacity of suspect or defendant an **uncertain legal situation** regarding the conditions of his being held criminally liable for the committed acts.⁸

For these reasons, the Court held that the provisions of Article 155 para. (1) of the Criminal Code are **unforeseeable** and, at the same time, **contrary to the principle of the legality of incrimination**, since the phrase "any procedural act" in their content also includes documents that are not communicated to the suspect or defendant, not allowing him to know the aspect the interruption of the limitation period and the beginning of a new limitation period of his criminal liability.⁹

The Court did not condition its finding of the unconstitutionality of the phrase "any procedural act in the case", rendering a simple/extreme decision. Moreover, in the considerations of the decision, this also shows the way of interpretation: "the provisions of criminal law that regulate the interruption of the limitation period are interpreted as **carefully defined exceptions** and, therefore, do not lend themselves to extended interpretations; therefore, **ordinary courts cannot, on their own responsibility, develop the law by analogy**".¹⁰

However, judicial practice continued to apply this legal text, interpreting the decision of the Constitutional Court as allowing the interruption of the limitation period by any act that must be communicated to the suspect or defendant.

⁷ Constitutional Court, decision no. 297/2018, par. 24.

⁸ Constitutional Court, decision no. 297/2018, par. 30.

⁹ Constitutional Court, decision no. 297/2018, par. 31.

¹⁰ Constitutional Court, decision no. 297/2018, par. 33.

Under these conditions, the constitutional court was referred again to verify the predictability of the text of the law indicated in Article 155 para. (1) C. pen. The Constitutional Court intervened again, declaring (again) this law text unconstitutional.¹¹

The Court showed that although it sanctioned the legislative solution provided by Article 155 para. (1) of the Criminal Code because it provided that the limitation period can be interrupted by performing procedural acts that are not known to the suspect or the defendant, by communication or by his presence when they are performed, the Court did not impose that all the acts that are communicated to the suspect or the defendant or all the acts that presuppose the participation of the suspect or the defendant to be regarded as acts that are capable of interrupting the course of the limitation period of criminal liability, their **establishment** falling within the **competence of the legislator**, with the essential condition that they meet the requirements mentioned by the constitutional court.¹²

The Court highlighted the benchmarks of the constitutional behaviour that the **legislator, and not the judicial bodies**, had the obligation to appropriate, based on Article 147 of the Constitution, being obliged to intervene legislatively and to establish clearly and predictably the cases of interruption of the criminal liability limitation period.¹³

Thus, the Court observed that, **due to the legislator's silence**, the identification of cases of interruption of the criminal liability statute of limitations remained an **operation carried out by the judicial body**, reaching a **new situation lacking clarity and predictability**, a situation that also determined the **different application to similar situations** of the criticized provisions (fact confirmed by the finding by the High Court of Cassation and Justice of the existence of a non-unitary practice). Thus, the lack of intervention by the legislator determined the **need for the judicial body** to replace it by outlining the applicable normative framework in the event of the interruption of the criminal liability statute of limitations and, implicitly, the **application of the criminal law by analogy**.¹⁴

The conclusion was that under the conditions of establishing the legal nature of Decision no. 297 of April 26, 2018 as a simple/extreme decision, **in the absence of the active intervention of the legislator**, mandatory according to Article 147 of the Constitution, **during the period between the date of publication of the respective decision and until the entry into force of a normative act that clarifies the norm**, through the express regulation of cases able to interrupt the course of the limitation period of criminal liability, **the active fund of the legislation does not contain any case that allows the interruption of the criminal liability limitation period**.¹⁵

¹¹ Constitutional Court, decision no. 358/2022, published in the Official Gazette no. 565 from 9 June 2022.

¹² Constitutional Court, decision no. 358/2022, par. 68.

¹³ Constitutional Court, decision no. 358/2022, par. 70.

¹⁴ Constitutional Court, decision no. 358/2022, par. 71.

¹⁵ Constitutional Court, decision no. 358/2022, par. 73.

At this moment, however, the delegated legislator intervened through a normative act that clarified the norm found in Article 155 para. (1) C. pen. through (Emergency Ordinance) GEO no. 71/2022,¹⁶ which amended Article 155 para. (1) C. pen. in the following sense: "The course of the limitation period of criminal liability is interrupted by the fulfilment of any procedural act in the case which, according to the law, must be communicated to the suspect or defendant".

Therefore, **in the period between 25.06.2018** (date of publication in the Official Gazette of the Constitutional Court decision no. 297/2018) **and 30.05.2022** (date of publication in the Official Gazette of O.U.G. no. 71/2022) in the active fund of the legislation, there was no regulation providing for the cases and conditions for interrupting the course of the criminal liability limitation period, and any procedural acts performed during this period did not produce the effect envisaged by Article 155 para. (1) of the Criminal Code.

Under these conditions, the question arises of the **interpretation** and **effects** of the decisions of the Constitutional Court regarding the interruption of the limitation period. Is this institution a substantive law institution, subject to the principle of the **more favourable criminal law** or a procedural institution, which produces effects only during the period indicated by the Constitutional Court – 2018-2022? In other words, the acts of interruption before 2018 and after 2022 have the effect of interrupting the course of the limitation period of criminal liability, with the consequence of the incidence of the institution of the special time barring, or the provisions of the period 2018-2022, which only provide for the incidence of the general limitation periods, constitute a criminal law more favourable and applies to all acts committed prior to the entry into force of GEO no. 71/2022?

1.1.2. Supreme Court's decision

In order to clarify this situation, a guidance mandatory decision was adopted by the Supreme Court.¹⁷ There were three problems addressed: (1) the criteria for delimitation of substantial criminal law provisions from the procedural ones, (2) establishing whether the institution of interruption of limitation period has a substantial criminal law character or a procedural one, and (3) the incidence of the legality of incrimination principle and the *mitior lex* principle in responding to the question addressed.

As regards the first problem, by analysing the case law of the Constitutional Court, the Supreme Court held that the criteria for delimitation between substantial criminal law provisions and the procedural ones are the object of regulation, the purpose and the result on the criminal liability of the mentioned norm.

¹⁶ Published in the Official Gazette no. 531 from 30 May 2022.

¹⁷ High Court of Cassation and Justice, the panel for solving some legal issues in criminal matters, dec. no. 67/2022, published in Official Gazette no. 1141 of 28 November 2022.

Consequently, applying the said criteria to the interruption of limitation period, the Court held that

"- The regulatory object of the rule is a hypothesis that prevents the fulfilment of the general term of the limitation period of criminal liability, respectively its interruption. The norm regulates the cause - the procedural act, which determines the effect - the interruption of the limitation period. The regulatory object of the norm does not include the conditions of legality and/or grounds for drawing up the procedural document, nor other issuing procedures or its procedural effects. At the same time, the attribution of the interruptive effect in terms of the expiration of the limitation period does not have the significance of regulating any procedure for issuing or drawing up the procedural act and does not produce effects regarding its validity or on the conduct of any phase of the criminal process;

- The purpose of the rule is to regulate the way in which the limitation period for criminal liability runs if it is not possible to establish an unjustified passivity of the judicial bodies in fulfilling their duties. The purpose of the norm is not to regulate any obligation/faculty in charge of the judicial bodies, nor to establish any rule regarding the conduct of the criminal process;

- The result, to which the rule leads, consists in preventing the fulfilment of the general term of the limitation period of criminal liability. The effect of the rule consisting in interrupting and determining the running of a new limitation period occurs directly on the regime of criminal liability, by extending the time interval in which the state, through the judicial bodies, can impose a punishment on the offender and correlatively, by preventing the finding that criminal liability has been removed."

Consequently, in respect to the second issue, the Supreme Court held that the interruption of the limitation period constitutes a rule of material criminal law, and not a rule of criminal procedure.

As regards the third problem, the Supreme Court analysed the incidence in the case of the legality and *mitior lex* principles.

As regards the legality principle, the Supreme Court observed that the **limitation period** was **expressly linked** by the Constitutional Court to the **legality of incrimination**:

*"In Romanian law, according to the mandatory jurisprudence of the Constitutional Court shown above, the limitation period of criminal liability is considered an institution of **substantive law** and, as it produces **effects on the regime of criminal liability**, it is subject to the **requirements deriving from the principle of the legality of incrimination**. Concretely, by Decision no. 297/2018, the Constitutional Court explicitly included in the scope of the principle of the legality of incrimination and punishment the rules that regulate the prescription of criminal liability, showing that "the criminal law, as a whole, is subject to both the requirements of the quality of the law, imposed by the constitutional provisions of art. 1 paragraph (5), as well as those of the principle of the legality of incrimination and punishment, as it is regulated in art. 23 paragraph (12) of*

the Constitution...which impose not only the **clear, precise and predictable regulation** of the facts that constitute crimes, but also of the **conditions in which a person can be held criminally liable** for their commission. However, the institution of the time-barring (limitation period) of criminal liability is also part of the set of regulations that aim to impose criminal liability, whose legal mechanism is subject to the same requirements of the principle of legality and the quality standards of the law, including the aspect, analysed above, of the legal mechanisms through which the suspect or defendant is informed about the persistence over time of the social effects of the criminal acts he committed" (paragraph 26). Moreover, with reference to the interruption of the limitation period of criminal liability, the Court held that "the provisions of Article 155 paragraph (1) of the Criminal Code are devoid of predictability and, at the same time, contrary to the principle of the legality of incrimination, since the phrase "any act of procedure" from their content also considers documents that are not communicated to the suspect or defendant, not allowing him to know the aspect of the interruption of the limitation period and the beginning of a new limitation period of his criminal liability" (paragraph 31)."

Also, in respect to mitior lex principle, the Supreme Court held that the Constitutional Court expressly forbade the combination of provisions from different subsequent laws (the creation of *lex tertia*) and that the principle of the **more favourable criminal law has a constitutional rank**, being provided for in Article 15 para. (2) from the Constitution of Romania. The Court held as a conclusion that:

*„In relation to the aspects shown previously, with regard to the first question of law invoked by the referring courts, the High Court of Cassation and Justice - the Panel for resolving certain questions of law in criminal matters finds that in Romanian law the rules relating to the interruption of the course the limitation period are **rules of material (substantial) criminal law**, subject from the perspective of their application in time to the **principle of criminal law activity** provided by Article 3 of the Criminal Code, with the **exception of more favourable provisions**, according to the **mitior lex principle** provided by Article 15 para. (2) of the Constitution and Article 5 of the Criminal Code. (...)"*

As the supreme court showed by Decision no. 67/2022, according to the *mitior lex* principle, the text of the law that provides only the general limitation period is applicable both retroactively and ultra actively (in the sense that it is applied after its exit from force to acts committed previously or while the law was in force, and not to acts committed after this moment).

1.2. Facts as presented and understood by the European Court and its decision

However, this interpretation did not satisfy some judicial bodies, which made requests to refer to the Court of Justice of the European Union, asking for the interpretation of European law and invoking its supremacy in the matter of frauds

affecting the financial interests of the European Union, in this field being provided by the constitutive treaties the obligation of the member states to apply effective and dissuasive sanctions. Through the interpretation given to the national legislation by the Constitutional Court and the Supreme Court, it was assessed that a systemic risk of impunity for acts committed in the field of the European Union's financial interests is created.

The European court issued a decision in this regard in the *Lin* case,¹⁸ establishing that in the matter of serious fraud affecting the financial interests of the European Union, national courts are obliged to apply the decisions of the Constitutional Court regarding the unpredictability of the legal text of Article 155 para. (1) Penal Code, but must leave unapplied the Supreme Court's decision no. 67/2022.

Firstly, the European Court reaffirmed the supremacy of European law, stating that the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, where it is unable to interpret national law in compliance with the requirements of EU law, to give full effect to the requirements of EU law in the dispute brought before it, by disapplying, as required, of its own motion, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means.¹⁹

However, in a second step, the European court had to determine whether the obligation to disapply such judgments conflicts, in a situation such as that at issue in the main proceedings, with the protection of fundamental rights.²⁰

Thus, the European court showed that the obligation to guarantee an efficient collection of Union resources does not exempt national courts from the need to **respect the fundamental rights guaranteed** by the Charter and the general principles of Union law, since the criminal proceedings opened for VAT offenses constitutes an implementation of Union law, within the meaning of Article 51 paragraph (1) of the Charter.²¹

The European court shows that the relevant national jurisprudence in the main litigation is based on two distinct principles, namely, on the one hand, with regard to Decisions no. 297/2018 and no. 358/2022 of the Constitutional Court, on the principle of the **legality of crimes and punishments**, in terms of its requirements regarding the predictability and precision of the criminal law, as well as, on the other hand, regarding Decision no. 67/2022 of the High Court of Cassation and Justice, on the principle of **retroactive application of the more favourable criminal law** (*lex mitior*), including final convictions pronounced after June 25, 2018.²²

¹⁸ ECJ, Case C-107/23, *Lin*, ECLI:EU:C:2023:606.

¹⁹ ECJ, Case C-107/23, *Lin*, par. 95.

²⁰ ECJ, Case C-107/23, *Lin*, par. 100.

²¹ ECJ, Case C-107/23, *Lin*, par. 101.

²² ECJ, Case C-107/23, *Lin*, par. 102.

The Court also showed that in the legal order of the Union, the principle of the legality of crimes and punishments and the principle of retroactive application of the more favourable criminal law (*lex mitior*) are enshrined in Article 49 paragraph (1) of the Charter, but also that **the rules governing the limitation period in criminal matters does not fall within the scope of Article 49(1) of the Charter**.²³ Consequently, the obligation of national courts to leave unapplied Decisions no. 297/2018 and no. 358/2022 of the Constitutional Court, as well as Decision no. 67/2022 of the High Court of Cassation and Justice is not likely to affect either the principle of predictability, precision and non-retroactivity of offenses and punishments, nor the principle of retroactive application of the more favourable criminal law (*lex mitior*), as guaranteed in Article 49 paragraph (1) of the charter.²⁴

However, the Court specified that when a court of a member state is called upon to check the conformity with fundamental rights of a provision or a national measure which, in a situation where the action of the Member States is not entirely determined by Union law, puts in implementing this right within the meaning of Article 51(1) of the Charter, national authorities and courts are **free to apply national standards of protection of fundamental rights**, provided that such application does not compromise the level of protection provided by the Charter, as was interpreted by the Court, nor the supremacy, unity and effectiveness of Union law.²⁵

The European court showed that the **national standards for the protection of fundamental rights are not**, in the present case, **likely to compromise the level of protection provided by the Charter**. In these circumstances, the Court decided that a national standard of protection which sought to enshrine the requirements of predictability, precision and non-retroactivity of the criminal law, including the statute of limitations relating to offences, could oppose the obligation incumbent on national courts under Article 325 paragraphs (1) and (2) TFEU to leave inapplicable the national provisions that regulated the statute of limitations in criminal matters, and this although the application of those national provisions was likely to prevent the application of effective and dissuasive criminal sanctions in a considerable number of cases of serious fraud which harmed the financial interests of the Union.²⁶

The conclusion was that the Romanian courts are not obliged to leave unapplied the national jurisprudence mentioned in point 111 of the judgment,²⁷ according to article 325 paragraph (1) TFEU and article 2 paragraph (1) of the PIF Convention, despite the existence of a systemic risk of impunity of serious fraud offenses affecting the

²³ ECJ, Case C-107/23, *Lin*, par. 103 and 108.

²⁴ ECJ, Case C-107/23, *Lin*, par. 109.

²⁵ ECJ, Case C-107/23, *Lin*, par. 110.

²⁶ ECJ, Case C-107/23, *Lin*, par. 112 and 116.

²⁷ Decisions no. 297/2018 and 358/2022 of the Constitutional Court, as well as Decision no. 67/2022 of the High Court of Cassation and Justice, in so far as they rely on the principle of legality of incrimination.

financial interests of the Union, **insofar as these decisions are based on the principle of the legality of offenses and punishments**, as protected in national law, in terms of its requirements regarding predictability and precision in criminal law, including the statute of limitations for crimes.²⁸

The Court distinguishes between the principle of legality and the principle of retroactive application of the more favourable criminal law. Thus, it shows that from the explanations provided by the referring court it appears that Decision no. 67/2022 of the High Court of Cassation and Justice would also be based on the principle of retroactive application of the more favourable criminal law (*lex mitior*), which derives from Decisions no. 297/2018 and no. 358/2022 of the Constitutional Court. According to the interpretation given by the referring court to Decision no. 67/2022 of the High Court of Cassation and Justice, the latter would have found that this principle would allow the effects of the lack of causes to interrupt the limitation period of criminal liability in Romanian law arising from these two decisions of the Constitutional Court to retroactively apply to procedural documents intervened before June 25, 2018, namely the date of publication of Decision no. 297/2018 of the latter court.²⁹ Also, the application of a national standard of protection referring to the principle of retroactive application of the more favourable criminal law (*lex mitior*) must be differentiated from that of the national standard of protection based on the principle of the legality of crimes and punishments.

Contrary to the national protection standard regarding the predictability of the criminal law, which, according to the referring court, is limited to neutralizing the interruption effect of the procedural acts carried out in the period between June 25, 2018, the date of publication of Decision no. 297/2018 of the Constitutional Court, and May 30, 2022, the date of entry into force of GEO no. 71/2002, the national standard of protection regarding the principle of retroactive application of the more favourable criminal law (*lex mitior*) would allow, at least in certain cases, to neutralize the interruption effect of some procedural acts carried out even before June 25, 2018, but after the entry into force of the Criminal Code on February 1, 2014, respectively for a period longer than four years.³⁰

In such circumstances, taking into account the **necessary balancing** of the latter **national protection standard**, on the one hand, and the **provisions of Article 325(1) TFEU** and Article 2(1) of the PIF Convention, on the other part, the application by a national court of the mentioned standard to **bring back into question** the interruption of the limitation period of criminal liability through procedural documents intervened before June 25, 2018, the date of publication of Decision no. 297/2018 of the

²⁸ ECJ, Case C-107/23, *Lin*, par. 118.

²⁹ ECJ, Case C-107/23, *Lin*, par. 119.

³⁰ ECJ, Case C-107/23, *Lin*, par. 122.

Constitutional Court, must be considered as **likely to compromise the supremacy, unity and effectiveness** of Union law.³¹

Consequently, the European court decided that the courts of a member state are **not obliged to leave unapplied** the decisions of the constitutional court of this member state which invalidate the national legislative provision that regulates the causes of interruption of the limitation period in criminal matters due to the violation of the principle of the legality of crimes and punishments, as it is 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 result of the time-barring of criminal liability, of a considerable number of criminal proceedings, including proceedings concerning 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 favourable criminal law** (*lex mitior*) which allows for reconsideration, including within appeals directed against definitive judgments, of the interruption of the limitation period of criminal liability in such processes through procedural acts intervened before such invalidation.

2. *Mitior lex* in international instruments and case law

Given the conclusion of the European Court, in the following I will analyse the *mitior lex* principle in European and international law, as well as its practical implementation by European and international courts.

2.1. *The European Union's Charter of Fundamental Rights and the case-law of the European Court of Justice*

Article 49 of the Charter, entitled “Principles of legality and proportionality of criminal offences and penalties” is worded as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

³¹ ECJ, Case C-107/23, *Lin*, par. 123.

3. *The severity of penalties must not be disproportionate to the criminal offence.*"

Until the Lin decision, the European Court of Justice ruled on the *mitior lex* principle in several other cases.

In the case of Berlusconi and Others, the Court of Justice of the European Communities held that the principle of the **retroactive application of the more lenient penalty** formed part of the **constitutional traditions common to the Member States**.³² The Court also stated that this principle must be regarded as forming **part of the general principles of Community law** which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law.³³

The European Court upheld this interpretation in several other decisions. Thus, in a case from 2015 regarding Italian nationals having organised the illegal entry into Italy of Romanian nationals, acts carried out **before** the accession of Romania to the European Union, the Court stated that, as provided for in Article 6(3) TEU, **fundamental rights recognised by the ECHR constitute general principles of EU law**. Article 52(3) of the Charter provides, moreover, that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR.³⁴

Also, the **principle of retroactivity of the more lenient criminal law**, as enshrined in Article 49(1) of the Charter, is part of **primary EU law**.³⁵ Even before the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal value as the treaties, the Court held that that principle followed from the constitutional traditions common to the Member States and, therefore, had to be regarded as forming part of the general principles of EU law, which national courts must respect when applying national law.³⁶ Moreover, the court established that the mere fact that **the acts in the main proceedings took place** during 2004 and 2005, that is to say **before the entry into force of the Treaty of Lisbon** on 1 December 2009, therefore **does not preclude the application, in the present case, of Article 49(1) of the Charter**.³⁷ Also, in another case, the Court held that even if the offending conduct at issue in the main proceedings took place from 1987 to 1992, that is to say, before the entry into force of the Treaty of Lisbon on 1 December 2009, this does not preclude, as such, the application, in the present case, of the principle of the retroactive application of the more lenient criminal law, enshrined in the third sentence of Article 49(1) of the Charter.³⁸

³² ECJ, Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, ECLI:EU:C:2005:270, par. 68.

³³ ECJ, Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, ECLI:EU:C:2005:270, par. 69.

³⁴ ECJ, Case C-218/15, *Paoletti*, ECLI:EU:C:2016:748, par. 21.

³⁵ ECJ, Case C-218/15, *Paoletti*, ECLI:EU:C:2016:748, par. 25, Case C-116/17, *Clergeau and Others*, ECLI:EU:C:2018:651, par. 26.

³⁶ See, to that effect, ECJ, Case C-299/95, *Kremzow*, ECLI:EU:C:1997:254, par. 14.

³⁷ ECJ, Case C-218/15, *Paoletti*, ECLI:EU:C:2016:748, par. 26.

³⁸ ECJ, Case C-116/17, *Clergeau and Others*, ECLI:EU:C:2018:651, par. 27.

As a general rule, the application of the more lenient criminal law necessarily involves a succession of laws over time and is based on the conclusion that the legislature changed its position either on the criminal classification of the act or the penalty to be applied to an offence.³⁹

Given this line of arguing, the findings of the ECJ in respect to a national standard based on the *mitior lex* principle can be labelled at least as surprising.

2.2. European Convention of Human Rights and ECtHR case law

Article 7 of the ECHR establishes both the legality principle and the *mitior lex* rule:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

Article 7 only refers to non-retroactivity of heavier criminal penalties, but not explicitly to applying the more lenient criminal law retroactively. This step was taken by the European Court in Scoppola case.⁴⁰

In this decision, the Court changed its previous case-law, concluding that since its previous case law **a consensus has gradually emerged in Europe and internationally** around the view that **application of a criminal law providing for a more lenient penalty**, even one enacted after the commission of the offence, has become a **fundamental principle of criminal law**.⁴¹

The Court recognised that Article 7 of the Convention does not expressly mention an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence. It was precisely on the basis of that argument relating to the wording of the Convention that the Commission rejected the applicant's complaint in its previous case law (e.g., the case of X v. Germany). However, taking into account the developments mentioned above, the Court could not regard that argument as decisive. Moreover, it observed that in prohibiting the imposition of “a heavier penalty... than the one that was applicable at the time the criminal offence was committed”, **paragraph 1 in fine of Article 7 does not exclude granting the accused the benefit of a more lenient sentence**, prescribed by legislation subsequent to the offence.⁴²

³⁹ ECJ, Case C-218/15, *Paoletti*, ECLI:EU:C:2016:748, par. 27, Case C-116/17, *Clergeau and Others*, ECLI:EU:C:2018:651, par. 33.

⁴⁰ ECtHR, Case *SCOPPOLA v. ITALY* (No. 2) (Application no. 10249/03), Judgment from 17 September 2009.

⁴¹ ECtHR, Case *SCOPPOLA v. ITALY*, par. 106.

⁴² ECtHR, Case *SCOPPOLA v. ITALY*, par. 107.

Thus, in the Court's opinion, it is consistent with the principle of the rule of law, of which Article 7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean **applying to the defendant's detriment the rules governing the succession of criminal laws in time**. In addition, it would amount to **disregarding any legislative change favourable to the accused which might have come in before the conviction** and continuing to impose penalties which the State – and the community it represents – now consider excessive. The Court noted that the obligation to apply, from among several criminal laws, **the one whose provisions are the most favourable to the accused** is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties.⁴³

In the light of the foregoing considerations, the Court decided that it was necessary to depart from the case-law established by the Commission in the case of X v. Germany and affirm that Article 7 § 1 of the Convention guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, and **implicitly, the principle of retroactivity of the more lenient criminal law**. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant.⁴⁴

2.3. The statute of the International Criminal Court and ICTY case-law

The statute of the International Criminal Court has the broadest provisions in respect to *mitior lex*. Thus, under the terms of Article 24 § 2 of the Statute of the International Criminal Court,

*“In the event of a **change in the law** applicable to a given case prior to a final judgement, **the law more favourable** to the person being investigated, prosecuted or convicted **shall apply.**”*

The *mitior lex* principle was analysed also in the case-law of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“the ICTY”), where the ICTY concluded that the principle of the applicability of the more lenient criminal law (*lex mitior*) applied to its statute.⁴⁵

⁴³ ECtHR, Case *SCOPPOLA v. ITALY*, par. 108.

⁴⁴ ECtHR, Case *SCOPPOLA v. ITALY*, par. 109.

⁴⁵ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case no. IT-94-2-A, Dragan Nikolic, par. 81. See for a more detailed analysis, ECtHR, Case *SCOPPOLA v. ITALY*, par. 41 and following.

*“The principle of *lex mitior* is understood to mean that, **if the law relevant to the offence of the accused has been amended, the less severe law should be applied.** It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the international tribunal is subsequently changed to a more favourable law by which the international tribunal is also obliged to abide.”*

2.4. The United Nations Covenant on Civil and Political Rights

The principle of legality and *mitior lex* principle are also regulated in Article 15 of the International Covenant on Civil and Political Rights:⁴⁶

*“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, **provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.***

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

2.5. The American Convention on Human Rights

The principle of legality and *mitior lex* principle are regulated in Article 9 of the American Convention on Human Rights:⁴⁷

*“No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the **offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.**”*

3. Analysis of the pending cases – the way forward for Romanian courts

In analysing the constitutional decisions of the European Court, I have always found something to praise in the approach of the court: its boldness in respect to

⁴⁶ International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations in Resolution 2200 A (XXI) of 16 December 1966, which entered into force on 23 March 1976.

⁴⁷ American Convention on Human Rights, which was adopted on 22 November 1969 at the Inter-American Specialised Conference on Human Rights and came into force on 18 July 1978.

jurisdiction in criminal law,⁴⁸ its approach in aiding national courts and its flawless arguing,⁴⁹ its approximation and autonomous interpretation of criminal law provisions.⁵⁰

However, after the Taricco decision,⁵¹ I had some doubts on the direction of interpretation of the European Court, which were eventually put to rest by its reversal in Taricco 2.⁵² These doubts have appeared again after the Lin decision. In the following I will address the balance of principles, the direct effect of EU law, the hierarchy of fundamental principles, the effect of retroactive harmonisation of criminal law provisions at EU level, and also the way forward for Romanian courts after the ECJ 's Lin decision.

3.1. Challenging reasoning of the ECJ

3.1.1. (Im)balance of principles – is mitior lex a (second-hand) fundamental principle?

When deciding in favour of the supremacy of EU law in the detriment of the *mitior lex* principle, the European Court has balanced the national protection standards of legality and *mitior lex* with the effectiveness of protecting the financial interests of the European Union provided for in Article 325 (1) TFEU.

While the standard of legality passed the ECJ scrutiny (same as in Taricco 2 case), the *mitior lex* standard fell short in comparison. In balancing the principle of *mitior lex* with the effectiveness of protecting the EU's financial interests, the European court decided in favour of the latter.

The ECJ refused to recognise the limitation period provisions either in respect to the legality principle, or the *mitior lex* principle, stating that the rules governing the limitation period in criminal matters does not fall within the scope of Article 49(1) of the Charter.⁵³

While deciding so, the ECJ also stated that national authorities and courts are **free to apply national standards of protection of fundamental rights**, provided that such application does not compromise the level of protection provided by the Charter, as was interpreted by the Court, nor the supremacy, unity and effectiveness of Union law.⁵⁴

However, the ECJ established (at least) two hierarchies in fundamental rights principles: the legality principle, which, in its opinion, surpasses the effectiveness of

⁴⁸ Norel Neagu, *Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law*, 15(4) *European Law Journal* (2009), 536-551.

⁴⁹ Norel Neagu, *A Need for Change: The Romanian Supreme Court's Approach to 'Appeals in the Interest of Law'*, 35(3) *Review of Central and East European Law* (2010), 293-305.

⁵⁰ Norel Neagu, *The Ne Bis in Idem Principle in the Interpretation of European Courts: Towards Uniform Interpretation*, 25(4) *Leiden Journal of International Law* (2012), 955-977.

⁵¹ ECJ, Case C-105/14, *Taricco*, ECLI:EU:C:2015:555.

⁵² ECJ, Case C-42/17, *M.A.S. and M.B.*, ECLI:EU:C:2017:936.

⁵³ ECJ, Case C-107/23, *Lin*, par. 103 and 108.

⁵⁴ ECJ, Case C-107/23, *Lin*, par. 110.

protecting the financial interests of the EU, and the *mitior lex* principle, which is an inferior national standard when in balance with the European money.

There seem to be two conclusions to draw from the ECJ decision: the first one is that a notion of a **second-hand fundamental principle** was introduced in EU law. There are layers of fundamental principles: primary ones, which can stand scrutiny when balanced against effectiveness of criminal law provisions (irrespective of their scope), and second-hand principles, which can be applied when is convenient, and do not affect too much the investigation, or trial of alleged perpetrators.⁵⁵ The *mitior lex* principle seems to be in the latter category, even if recognised as stemming from the constitutional traditions common to the Member States,⁵⁶ and even if a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty.⁵⁷

As a European and international standard, this principle is enshrined in the European Union's Charter of Fundamental Rights, in the United Nations Covenant on Civil and Political Rights, in the statute of the International Criminal Court, in the American Convention on Human Rights and also recognised in the case law of the ECtHR implicitly. As a national standard, however, albeit a constitutional one, this principle has a limited importance, to put it mildly.

The second conclusion is that **fundamental principles**, in the form of national constitutional standards, can be bought, if sufficient money is at stake. When balancing the European money versus *mitior lex* principle, the ECJ found that EU financial interests are a fundamental social value (Rechtsgut or legal good) which must be protected at all costs, even if the national constitutional standard of *mitior lex* is breached.

3.1.2. Direct effect and statute of limitation period

The European court held that Article 325(1) TFEU and Article 2(1) of the PIF Convention are formulated in clear and precise terms and are not subject to any conditions, and they therefore have direct effect.⁵⁸ Consequently, it is, in principle, for the national courts to give full effect to the obligations under Article 325(1) TFEU and Article 2(1) of the PFI Convention and to disapply national provisions which, in connection with proceedings concerning serious fraud affecting the financial interests of the European Union, prevent the application of effective and deterrent penalties in order to counter such offences.⁵⁹

⁵⁵ This unfortunately reminds me of a declaration of a Romanian politician: 'Respecting fundamental rights is a luxury we cannot afford in Romania'. This statement was highly criticized afterwards.

⁵⁶ ECJ, Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, ECLI:EU:C:2005:270, par. 68, Case C-218/15, *Paoletti*, ECLI:EU:C:2016:748, par. 25, Case C-116/17, *Clergeau and Others*, ECLI:EU:C:2018:651, par. 26.

⁵⁷ ECtHR, Case *SCOPPOLA v. ITALY*, par. 106.

⁵⁸ ECJ, Case C-107/23, *Lin*, par. 96. See also, to that effect, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, par. 253 and the case-law cited.

⁵⁹ ECJ, Case C-107/23, *Lin*, par. 97.

I have nothing against applying directly provisions of European law when national law clashes with the former. However, when applying European law, which has direct effect, my understanding is that the national provisions are set apart and the European ones take their place. I found nothing in Article 325(1) TFEU or Article 2(1) of the PIF Convention on the limitation period, neither interruption, nor terms or provisions on special limitation period. How can then these dispositions replace the national ones and be applied directly? It seems to me that what is applied is a selection of provisions from national law, creating two different law regimes: the one regarding the protection of EU financial interests, and the rest of the crimes. Thus, in Romanian law, national standards in respect to fundamental principles apply to all crimes, with the exception of European money.

This doesn't seem to be a fair standard, nor a fair application of direct effect of European law. This method of 'pick and choose' between national provisions for the ones that might suite the goal established at European level is questionable. Whether the European law is clear and precise and can replace national law, or national law should be applied in full. There shouldn't be a middle ground, where, based on European principles, national provisions are disapplied and nothing is put in their stead. This is the path towards imprecise and unclear law provisions, which paves the way for the breach of the legality principle.

Also, when dealing with the provisions regarding limitation period at European level, the European court does not have a convincing argument. Thus, the court held that under Article 16 of the PIF Directive – in respect of which the referring court seeks an interpretation of Articles 2 and 12 in its first question – that directive replaces the PFI Convention with effect from 6 July 2019. The acts giving rise to the dispute in the main proceedings were committed in 2010. Accordingly, that directive is clearly not applicable to that dispute, with the result that the interpretation of that directive does not appear necessary for the resolution of that dispute.⁶⁰ By this finding, the Court conveniently did not analyse the European law in force at the moment of the decision, referring to the European law at the moment of committing the offence. In conjunction with its finding that the rules governing the limitation period in criminal matters does not fall within the scope of Article 49(1) of the Charter,⁶¹ the European court seems to say that **limitation period provisions** are not subject to **retroactive application** of more lenient criminal law and also that they seem to be of a **procedural nature** at EU level.

I do not have a problem with this line of arguing, as long as it is consistent. The court already decided on the temporal application of procedural provisions at EU level, when facing national standards regarding fundamental principles in Melloni.⁶² Thus,

⁶⁰ ECJ, Case C-107/23, *Lin*, par. 64.

⁶¹ ECJ, Case C-107/23, *Lin*, par. 103 and 108.

⁶² ECJ, Case C-399/11, *Melloni*, ECLI:EU:C:2013:107.

the European court held that procedural rules are applicable to the (...) proceedings (...) still pending.⁶³ According to settled case-law, **procedural rules** are generally **held to apply to all proceedings pending** at the time **when they enter into force**, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force.⁶⁴

Applying these rules in the current proceedings in Lin, there are two possible outcomes: either limitation period provisions are of a substantial criminal law nature, thus subject to *mitior lex* principle, and in this case, if the PIF Directive has more lenient provisions on limitation period, it can be applied retroactively, or limitation period provisions are of a procedural nature, and also applicable to pending cases, as stated by the European court. In both situations, the provisions of the PIF Directive are applicable in the case, and not the other way around.

Why are these provisions so sensitive to the present case and why were they avoided at all cost? Because, when analysing the **provisions of the limitation period in European law**, which are clear, precise, and not subject to any conditions, they seem to **establish a lesser standard than** the one established **at national level** in the present case.

Let me explain this: at European level, the law in force at the moment of Lin decision was Article 12 of Directive 2017/1317.⁶⁵ According to Article 12(1-3),

*„1. Member States shall take the necessary measures to provide for **a limitation period that enables** the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 3, 4 and 5 for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively.*

*2. Member States shall take the necessary measures to enable the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 3, 4 and 5 which are punishable by a maximum sanction of at least four years of imprisonment, for a period of **at least five years** from the time when the offence was committed.*

*3. By way of derogation from paragraph 2, Member States may establish a limitation period that is shorter than five years, but **not shorter than three years**, provided that the period **may be interrupted or suspended** in the event of specified acts.”*

We can observe that Article 12(1) is in line with the direct applying provisions established by the European Court (Article 325 TFEU and Article 2 of the PIF Convention).

⁶³See, by analogy, ECJ, Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis*, ECLI:EU:C:2004:401, par. 20, and Case C-296/08 PPU, *Santesteban Goicoechea*, ECLI:EU:C:2008:457, par. 80.

⁶⁴ ECJ, Case C-399/11, *Melloni*, par. 32. See, inter alia, Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others*, ECLI:EU:C:1981:270, par. 9; Case C-467/05 *Dell’Orto*, ECLI:EU:C:2007:395, par. 48; and Case C-296/08 PPU, *Santesteban Goicoechea*, ECLI:EU:C:2008:457, par. 80.

⁶⁵ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *OJ L 198*, 28.7.2017, p. 29-41.

Also, paragraphs 2 and 3 shed a light on the **actual** European standards with direct effects on limitation period: when no interruption or suspension of limitation period is possible (as is the case in the current proceedings), the term should be of at least **five years**, and when interruption or suspension are possible, the limitation period should be of at least **three years**. Thus, a minimum threshold of 5 years satisfies the European conditions of an effective period that enables the investigation, prosecution, trial and judicial decision of criminal offences in the field of protection the EU's financial interests. These provisions are clear and unconditional, having direct effect.

Let's look at the Romanian legislation in the main proceedings. The European court held that the limitation period in Romanian national law (which is deemed as an insufficient standard) is 10 years.⁶⁶ Consequently, the Court urged the national instances to disregard a mandatory decision of the Supreme Court, stating that a term of 10 years for limitation period is an insufficient guarantee at European level, while the current European legislation provides for a 5 years limitation period. Why disrupt national fundamental principles of criminal law in this situation? I find myself at a loss to provide a good answer, as I will develop below.

3.1.3. Romanian systematic judicial problems in respect to effectiveness

When issuing the first Taricco decision, the PIF Directive was in the process of negotiation, which was not moving forward due to the refusal of some Member States to recognise VAT fraud as affecting the EU's financial interests. The ECJ's Taricco decision solved that problem, and the negotiations resumed. Thus, a superior reason for disrupting a national law system (the adoption of an European law instrument), was deemed reasonable at the time by the European court.

No such European problems can be gleamed in the Lin case. The PIF Directive is in force and nothing at European level suggests problems in need of solving.

Why then did the ECJ decide to disapply national standards such as the *mitior lex* principle, a fundamental constitutional principle in Romanian national law?⁶⁷ The court offers the reasoning of a systemic risk of impunity in criminal cases. The limitation period is a criminal law institution which guarantees, when the terms are fulfilled, that criminal liability will not be retained. It is not a risk of impunity, it is a guarantee, and is inherent to the institution. If looked upon as a procedural institution, it is a sanction of the judicial bodies for not being able to solve the pending cases in the term provided for by the law.

The **legitimate question** arises: **why didn't the Romanian judicial bodies finish the cases regarding the EU's financial interests in the 10 years term provided for by the law?** Was it because of the accused, or because of the Romanian judicial system?

⁶⁶ ECJ, Case C-107/23, *Lin*, par. 10 and 37.

⁶⁷ According to Article 15(2) of the Romanian Constitution, "*The law provides only for the future, with the exception of the more favourable criminal or contravention law.*"

Do we have enough specialised prosecutors and judges to finish these cases in time? If yes, the blame lies with the judicial bodies; if not, with the Romanian executive, which could not provide a successful reform of judicial bodies in order to tackle crime in Romania. There is no scenario where the blame can be transferred to the accused person.

Unfortunately, if the ECJ decision applies in the sense that national fundamental standards are disappplied and criminal liability is held after 10 years of investigation, prosecution, and trial, this transferral seems to take place. When balancing the effectiveness of criminal law with fundamental principles and when the blame lies with the state, and not the accused, for the lack of effectiveness, the balancing in favour of the effectiveness does not seem right to me.

3.1.4. *Blind faith in the referring court*

The European court held in all its decisions so far that in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the ECJ, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law.⁶⁸

As I stated elsewhere,⁶⁹ the European court is bound by the factual situation described by the referring court, which is responsible for what it describes, and **sometimes this factual situation is not described correctly**, irrespective of its cause (e.g., in this case the European court does not seem to realise that the Romanian Supreme Court decisions also relies heavily on the legality principle, as cited above). The principle of loyal cooperation is fundamental in relationship between courts, but I believe that minimal inquiries must be made by the ECJ in order to establish correctly the factual situation.

3.2. *Scope of the ECJ decision*

As regards the scope of the ECJ decision, the European Court has recently stated that *“the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to EU provisions”*.⁷⁰

⁶⁸ ECJ, Case C-107/23, *Lin*, par. 76, Case C-158/21, *Puig Gordi and Others*, ECLI:EU:C:2023:57, par. 61, and Case C-100/21, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, ECLI:EU:C:2023:229, par. 59.

⁶⁹ Norel Neagu, *Primacy of EU Law – Constitutional Principle and its Limits in Romania*, *Constitutional Law Review* 1, 2022, at 34.

⁷⁰ See in this respect ECJ, Case C-430/21, *RS*, ECLI:EU:C:2022:99, par 68-78, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, C-824/18, *Eurobox*, ECLI:EU:C:2021:1034, par. 162-263.

In the Lin case, this line of reasoning was extended also to decisions issuing from the Romanian Supreme Court.⁷¹

These decisions state in no unclear terms that national courts cannot disapply mandatory decisions of the Constitutional Court or the Supreme Court in any circumstances, on their own authority, but only **as a consequence of a judgment of the European Court**, stating that the national provisions or decisions in question are contrary to EU law. Without such a decision, national courts are bound by mandatory decisions of superior instances.

When such decisions of the European court are issued, the question arise of the scope of application of the decision. Does it establish a general application of its ruling in any field of criminal law previously harmonised at European level, or only in respect to the question addressed by the referral court?

When analysing the European court's decisions, we observe that their scope is limited by the referral questions and the situations of the case. In Lin case, the European Court stated that the scope of the decisions is limited to cases relating to offences of **serious fraud affecting the financial interests of the European Union**, and the European provisions with direct effect are Article 325(1) TFEU and Article 2(1) of the PIF Convention.⁷² Moreover, the court, when analysing the admissibility of the referred questions, stated that since, according to the information brought to the Court's attention, the acts at issue in the main proceedings do not constitute corruption, it is clear that the interpretation of Decision 2006/928 is also irrelevant for the purposes of the answer to be given to the first and second questions referred for a preliminary ruling.⁷³

Extending the scope of the criminal offences subject to the balancing between the effectiveness and *mitior lex* principle is likely to **breach the legality principle**, in its components of clarity and foreseeability, and to lead to analogy in disfavour of the accused, which is not permitted either at national,⁷⁴ or at European level.⁷⁵

3.3. Possible solutions of national courts

When trying to apply the decision of the European court in the relevant cases at national level, three possible solutions may occur: accepting and applying the ECJ ruling, rejecting the ECJ ruling, and interpreting the said ruling according to circumstances of the cases before the national courts. I will analyse all three possibilities in the following.

⁷¹ ECJ, Case C-107/23, *Lin*, par. 137.

⁷² ECJ, Case C-107/23, *Lin*, par. 125.

⁷³ ECJ, Case C-107/23, *Lin*, par. 65.

⁷⁴ Constitutional Court, decision no. 297/2018, par. 33, decision no. 358/2022, par. 71.

⁷⁵ ECtHR, Case *VASILIAUSKAS v. LITHUANIA* (Application no. 35343/05), Judgment from 20 October 2015, par. 154, Case *KOKKINAKIS v. GREECE* (Application no. 14307/88), Judgment from 25 May 1993, par. 52.

3.3.1. Accepting and applying the ECJ ruling

The first possible outcome is applying the ECJ ruling. The European court held that limitation period provisions, as interpreted by the Constitutional Court's decisions, do not apply to the period before 2018, when the rules on interruption of limitation period were in force.

The national courts need to apply this decision at national level, while respecting the national law standards and principles, with the exemption of *mitior lex*. The difficulty arises in providing for a legal base for applying the provisions on interruption of the limitation period within the framework of Romanian legislation, which considers these dispositions as substantial, material criminal law provisions.

The fact that these provisions are considered procedural ones at European level is of no consequence in this case. The European decisions sheds light on the interpretation of European law and has no power to change the nature of national provisions from substantial provisions to procedural ones. This is a matter solely for national legislator and national courts. The European court can order the direct appliance of European law and the removal from applying of some national provisions.

However, in this case the European court did not show the national courts **what provisions should be applicable instead of the ones disapplied and on what legal basis**. Being material criminal law provisions, in order to apply the provisions from 2014 onwards and not those from 2018 onwards means that a more unfavourable criminal law is to be applied in the pending cases.

This is not consistent with Romanian law tradition, nor with constitutional requirements. This is why I foresee many problems for the national courts willing to apply the ECJ decision and different solutions, which give rise to unforeseeability and ultimately to a breach of the legality principle.

3.3.2. Rejecting the ECJ ruling

While the ECJ ruling may be clear in its requirements (to disapply a Supreme Court decision based on the *mitior lex* principle), it is in clear conflict with constitutional provisions in national law.

The European court held that its decisions are mandatory and supersede those of the Romanian Constitutional Court. However, the latter has a different opinion:

*"By interpreting the principle of the 'primacy of European Union law' in the sense that it precludes a rule of constitutional status of a Member State, as interpreted by its constitutional court, according to which a lower court is not authorized to leave unenforceable ex officio a national provision which it considers contrary to Union law, the Constitutional Court reaffirms that **the establishment of the organization, functioning and delimitation of powers between the various structures of criminal prosecution bodies falls within the exclusive competence of the Member State...** the essence of the Union is the **conferral by member states of competences - more and***

more in number - for the achievement of their common objectives, of course, **without**, in the end, **prejudicing**, by this transfer of competences, **the national constitutional identity**" and that,

*"On this line of thinking, Member States **retain competences that are inherent in order to preserve their constitutional identity**, and the transfer of powers, as well as the rethinking, emphasis or setting of new guidelines within the competences already assigned, fall within the constitutional margin of appreciation of the Member States. The accession clause to the European Union contains in the alternative a clause of conformity with EU law, according to which all national bodies of the state are in principle obliged to implement and apply EU law. This is also valid for the Constitutional Court, which ensures, by virtue of Article 148 of the Constitution, the priority of applying European law. But this priority of application must not be perceived in the sense of removing or disregarding the national constitutional identity, enshrined in Article 11 para. (3) in conjunction with Article 152 of the Fundamental Law, as a guarantee of a fundamental identity nucleus of the Romanian Constitution and which must not be relativized in the process of European integration. By virtue of this constitutional identity, **the Constitutional Court is empowered to ensure the supremacy of the Fundamental Law** on the territory of Romania. According to the compliance clause contained in the text of Article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations to which it has committed itself as a member state, but the ones shown above know of course a constitutional limit, based on the concept of "national constitutional identity".⁷⁶*

In short, the Romanian Constitutional Court shows that in principle there is an obligation to comply with Union law, by virtue of the principle of loyal cooperation, but that Union law is not superior to the Constitution (being a rule between domestic law and constitutional law), and in case of conflict regarding the national constitutional identity, the constitutional court is empowered to ensure the primacy of the Constitution.

While gaining relevance at global level, the *mitior lex* principle is enshrined in Romanian criminal law for over 60 years and it is provided for in the Romanian Constitution, being part of the national constitutional identity. There is no way that this principle may be breached on the account of the effectiveness of judicial investigations, when the blame lies with the Romanian legislator or the Romanian judiciary.

When offered a dilemma whether to apply an European court's decision in breach of fundamental principles or reject its application, national courts may follow in the footsteps of their correspondents from other countries, which reserve the right to submit to their own constitutional review Union normative acts, including their interpretation given by the Court of Justice of the European Union, if they consider

⁷⁶ CCR, Decision no. 390/2021, published in the Official Gazette no. 612 from 22 June 2021, par. 79-81.

that the latter acted *ultra vires*, in breach of its powers, in particular with regard to respect for fundamental rights.⁷⁷

Given that the European decision is likely to affect fundamental rights of the accused, which are guaranteed by the Romanian Constitution, and no legal basis is offered for this breach, there is a distinct possibility for Romanian courts to reject the ECJ ruling, as interfering with fundamental rights enshrined in Article 15(2), Article 20(2) and Article 11(3) of the Romanian Constitution.⁷⁸

3.3.3. Interpreting the ECJ ruling

While those two solutions above are more straightforward, there is a possibility for national courts to interpret the ECJ ruling in accordance with national and constitutional traditions.

A first possibility is to interpret the European decision restrictively, even for the courts which are willing to apply this decision in spite of the Romanian constitutional provisions. The European decision was given in relation to a case where an extraordinary remedy was filed against a final judgment. It is a distinct possibility to interpret the ECJ decision as referring only to this type of cases, where there is not possible, in the context of **appeals brought against final judgments**, to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity. *Per a contrario*, in other cases (such as the pending ones), there can be called into question the interruption of the limitation period.

Another possible interpretation relates to the **validity of the European decision** based on its **erroneous factual situation** described by the referral court. Thus, the European decision is valid as long as its premises on which is based are valid. If the situation is not the one retained by the referral court, the European decision in itself is not applicable.

There are at least two assumptions in the decision, as described by the national referral court, which are questionable.

The first one is that the Supreme Court decision is based on the *mitior lex* principle in respect to the interruption of limitation period before 2018 (especially

⁷⁷ **Francesco Vigano**, *Supremacy of EU Law vs. (Constitutional) National Identity*, EuCLR, vol. 7, 2/2017, pp. 103-122; **Sharifullah Dorani**, *The Supremacy of EU Law over National Law: The ECJ's Perspectives*, Political Reflection vol. VI, 1/2020, pp. 15-21, **Sharifullah Dorani**, *The Primacy of EU Law over French Law: EU Law Takes Precedence over National Law?*, Political Reflection vol. VII, 2/2021, pp. 48-56, **Sharifullah Dorani**, *EU LAW vs UK LAW The Primacy of EU Law over National Law: Great Britain's Response*, Political Reflection vol. VI, 3/2020, pp. 25-39, **Sharifullah Dorani**, *The Supremacy of EU Law over German Law: EU Law vs National Law*, Political Reflection vol. VII, 1/2021, pp. 44-55, **Simon RöB**, *The Conflict Between European Law and National Constitutional Law Using the Example of the European Arrest Warrant*, European Public Law, vol. 25, 1/2019, pp. 25-41.

⁷⁸ Article 15(2) provides for the *mitior lex* principle, Article 20(2) provides in the sense of the priority application of international regulations, unless the Constitution or domestic laws contain more favourable provisions, and art. 11 par. (3) which states that, if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification may take place only after the revision of the Constitution.

with regard to the 2014-2018 period). This is a false presumption, built upon the argument that the Supreme Court decision is not based on the legality principle. I have provided above extensive passages from the Supreme Court decision on the clarity and foreseeability of the limitation period provisions. It is clear from the wording of the Supreme Court decision that the legality principle was analysed and relied upon in its judgment. Being a false presumption, it will inevitably lead to false conclusions.

The second one is that, according to Romanian law, the interruption of limitation period before 2018, the date of the decision of the Constitutional Court, is based on the *mitior lex* principle and not on the legality principle. This assumption is also wrong. In 2018 there was a declaration of unconstitutionality, having effect in **all pending cases**. That does not mean that the law was constitutional until 2018 and unconstitutional after that period of time. The **unforeseeability** of the norm **existed from the beginning**, the decision of the court being declarative, and not constitutive.

That is, if a court is called for analysing the provisions of interruption of limitation period under the new legislative provisions⁷⁹ after 2018, it cannot apply a provision considered unconstitutional and unforeseeable, only because prior to 2018 it had the **appearance of legality**. This appearance was dispelled in 2018, when the Constitutional Court decided that the provision from the criminal code in respect to the interruption of the limitation period was in breach of the legality principle. How can today, after this decision was published and its effects are part of Romanian law, an unconstitutional provision in breach of the legality principle be still applied? The European court has expressly forbidden this interpretation, both in the Taricco 2 case and also in the Lin case.

This is why the current European decision may have a practical limited impact in national case law, any other solution contrary to those already adopted at national level being susceptible of a breach of the legality principle.

4. Conclusions

When applying the balancing of principles (i.e. the effectiveness of protection of EU financial interests versus fundamental principles), a careful consideration of fundamental rights should be performed, especially in relation to old cases not finished because of the fault of national legislator or national judiciary. The fault of lack of effectiveness cannot be transferred from the state to the accused person, in breach of fundamental principles.

The direct effect of EU law should mean that the national provision in breach of EU law should be disregarded and European law should apply directly in its stead. The

⁷⁹ The new Romanian Criminal Code and the Criminal Procedural Code entered into force on the 1st of February 2014.

method of ‘pick and choose’ between national provisions for the ones that might suite the goal established at European level is questionable. If the European law is clear and precise, then it can replace national law. Otherwise, national law should be applied in full. There shouldn’t be a middle ground, where, based on European principles, national provisions are disapplied and nothing is put in their stead. This is the path towards imprecise and unclear law provisions, which paves the way for the breach of the legality principle.

When clear provisions are in force at European level (e.g., the limitation period minimum harmonised limit), a compelling reasoning should be provided for their non-appliance. Otherwise, when ruling about the supremacy of EU law and its direct effect, the ECJ should rule that the EU provisions in force at the time of decision should be applied directly.⁸⁰

Also, when acting *ultra vires*, in breach of its powers, in particular with regard to respect for fundamental rights, ECJ decisions can be superseded by national constitutional standards in respect to fundamental rights.

It is very possible that the ECJ decision in the Lin case may have a practical limited impact in national case law, create confusion, and lead to contrary solutions, thus being susceptible of a breach of the legality principle (as in Taricco 2).

⁸⁰ In this case, I do not think that the Romanian judicial bodies are going to be happy to apply a 5 years limitation period as an European standard, instead of the national standard of 10 years.