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CJEU Decision C-107/23 PPU: Protection of the EU Financial Interests and the National Principle of "Lex Mitior"

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Abstract: *The **CJEU** decision **C-107/23 PPU** of July 24, 2023 creates two large categories of legal problems: a first category from the perspective of Union law and a second category from the perspective of domestic law.*
The European perspective is of less interest for the present analysis, but at least two elements that are closely related and which we will develop on another occasion should be emphasized: (i) the amplification of the tendency to relax the conditions necessary to recognize the direct effect of European norms and (ii) the assumption by the CJEU of a role of judicial review. From the perspective of national law, the Lin judgment seems impossible to implement.
The substance of the opposition to the national law system or a significant part of it comes, most likely, first from considerations intrinsic to the decision and only then from reasons related to the limits of the supremacy of EU law.
Recently, a similar solution was adopted by the CJEU through the Ordinance of 9 January 2024 in case C-131/23, the only difference from case C-107/23 being that the interpretation of the CJEU took into account Decision 2006/928/EC of The Commission of December 13, 2006 establishing a cooperation mechanism and verifying the progress achieved by Romania in order to achieve certain specific reference objectives in the field of judicial system reform and the fight against corruption.

Keywords: *more favourable criminal or administrative law, supremacy of the Constitution, autonomous EU standard of the principle of legality of offences and penalties, EU and national standards of protection of fundamental rights and procedural guarantees.*

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Context

The preliminary questions according to **CJEU Decision C-107/23 PPU**

Without considering that the CJEU acted ultra vires, establishing within the mechanism of the preliminary reference the way in which the decisions of the constitutional courts are applied within the national law systems, it only remains to note that the judgment was based on a wrong premise exposed by the referring court , that the national protection standard regarding the predictability of the criminal law, (...), 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 (Lin, point 122).

However, on the one hand, the CJEU has not ruled on this issue, nor would it have the competence to do so. On the other hand, common law courts, such as the referring court, do not have the competence to establish the effects and limits of the application of CCR decisions, the only competent authority in the matter being the Constitutional Court.

Regarding the effects of decisions of unconstitutionality, the Constitutional Court held that: (…) the decision establishing unconstitutionality will be applied to the legal relations that will arise after its publication in the Official Gazette - facta futura, however, considering the fact that the exception of unconstitutionality is, in principle, a prejudicial matter, a legal problem whose resolution must precede the resolution of the litigation with which it is connected (…) (see Decision no. 660 of July 4, 2007, published in Monitorul Oficial al României, Part I, no. 525 of August 2, 2007) and a means of defense that does not call into question the merits of the claim deduced from the judgment (in this sense, see Decision no. 5 of January 9, 2007, published in the Monitorul Official Journal of Romania, Part I, no. 74 of January 31, 2007), the Court held that it cannot constitute only an instrument of abstract law, by applying decisions establishing unconstitutionality only to legal relationships that are to be born, that is to certain situations hypothetical futures, as it would lose its essentially concrete character. Therefore, the Court established that the future application of its decisions covers both the legal situations to be born - facta futura, as well as pending legal situations and, exceptionally, those situations that have become facta praeterita.

Reaching aspects extrinsic to the Lin decision, the principle of the supremacy of EU law carries, in turn, limitations.

It has never been clear whether the EU rules take precedence over the constitutions of the member states or only in relation to domestic law, the approach to the constitutional conflict being a monistic one from the perspective of the CJEU - which has constantly affirmed that supremacy is manifested even when in discussion there is a fundamental constitutional norm – and two-dimensional from the perspective of the majority of member states, whose courts locate the authority of EU law in the national legal order, within the national constitution

The dividing point is that in which the CJEU, without any substantive explanation, relativizes the mitior lex, defining the national standard of protection as intolerable in relation to the risk of impunity, a standard that it seems to attribute to the jurisprudence of the ÎCCJ, and not to the Romanian Constitution, although the application retroactive of the milder law in criminal matters is imposed by art. 15 para. (2) of the Basic Law.

But who ultimately has the authority to determine which standard applies? Is it enough for the CJEU to impose the abandonment of the national standard of protection and departure from the Constitution? Does the Union court have this competence, to evaluate the conformity of the Constitution with EU law?

At the same time, according to art. 20 para. (2) of the Constitution: If there are inconsistencies between the pacts and treaties regarding fundamental human rights, to which Romania is a party, and the internal laws, international regulations take precedence, unless the Constitution or internal laws contain more favorable provisions.

Therefore, the applicable standard is the one conferred by the Constitution or the decisions of the CCR whenever a treaty would confer a lower standard, so that EU law could never prevail in the matter of fundamental rights against constitutional norms.

Similar answers to the issue under discussion have been offered over time by the courts of other member states, the basis being almost every time art. 5 para. (2) TEU according to which the Union acts within the limits conferred by the member states.

Around the constitutional definition of the concept of more favorable criminal law - *lex mitior* [1], regulated by art. 15 para. 2 of the Romanian Constitution, it seems that numerous ideas are being debated in recent jurisprudence and doctrine, which attempt a rational and credible integration of the most recent decisions of the Court of Justice of the European Union, respectively decisions of the Constitutional Court of

Romania on the topic of special prescription in the matter criminal and the extent of its effects in the past, in the connotation that derives from the decision of the Constitutional Court no. 297/2018, followed by the decision of the Constitutional Court no. 358/2022. With regard to their effects, there are two main directions of interpretation[2].

According to the first guideline, the special prescription is "eliminated" from the date of the decision of the Constitutional Court no. 297/2018 with effects only "for the future", by reference to the date of the ruling of the Constitutional Court (starting with the date of 26.04.2018). This meaning is derived from the provisions of art. 147 para. 4 of the Constitution, according to which the decisions of the Constitutional Court "apply only for the future", from the date of their publication in the Official Gazette of Romania. In this interpretation, the effects of the decision of the Constitutional Court no. 297/2018 (considered individually or, above all, in tandem with the decision of the Constitutional Court no. 358/2022) are produced only until the year 2018, on the date of publication of the respective decision of the Constitutional Court, in consideration of the provisions of art. 147 para. 4 of the Constitution. The constitutional text does not allow for an extensive interpretation, being an unequivocal, express, clear and predictable legal norm. This interpretation emerges all the more from the examination of art. 147 para. 1 (both theses) of the fundamental law, which indicates the effects for the future of the decision of the Constitutional Court which finds the unconstitutionality of a text of a law or a law as such in its entirety[3].

The second interpretation is more favorable to the persons/defendants who are on trial or, even more so, during the criminal prosecution, because it retroactively carries the effects of the decision of the Constitutional Court no. 297/2018 until the date of entry into force of both codes that regulate criminal matters, given the combined legal effects, obviously with the main focus on the special prescription regulated by the new criminal code, a prescription that is completely eliminated for the duration of the existence of the new criminal code , in this second current of interpretation. The source of this interpretation comes from art. 11 and art. 20 of the Constitution. It has, of course, a real corollary in the regulatory framework conferred by art. 15 para. 2 of the Constitution. As arguments, some considerations from certain decisions of the Constitutional Court on the subject of the extent of the effects of the decisions of the Constitutional Court and in a retroactive sense, i.e. before the date of the pronouncement

of the respective decision for the consideration of direct application to the pending case[4] are brought.

The rigorous definition of the notion "lex" or the spirit of the interpretation resulting from art. 20 of the Constitution correlated with art. 7 of the ECHR? Where are the provisions of art. 148 para. 2 and 3 of the Romanian Constitution in this picture?

It is difficult to answer, in a context charged with public emotion, expectations of the "actors" from the criminal trials pending before the courts and contradictory case solutions (elimination of the special prescription and acquittal for the intervention of the general prescription, respectively sentencing solutions retaining it is known that the special prescription was not affected even before 2018, the effects of the aforementioned Constitutional Court decision ending on the date of its publication in the Official Gazette, in April 2018).

The subject, as is well known in the public space, at least for the broad community of lawyers, has also generated jurisprudence of the Court of Justice of the European Union[5], and jurisprudence of the High Court of Cassation and Justice, many of the solutions pronounced being in contrast (at least in appearance or in the speech of some jurists) in relation to the decisions pronounced by the Constitutional Court on this subject[6].

In the meantime, a careful (natural, logical) preoccupation regarding the constitutional dimension of the concept of "national/state sovereignty" has emerged through the prism of the relations between the Constitutional Court and the Court of Justice of the European Union, but also between the High Court of Cassation and Justice and Court of Justice of the European Union[7].

In the logic of art. 15 para. 2 of the Romanian Constitution, only the law can be applied retroactively, and this only happens if it is more favorable in the segments of criminal (and contraventional) law. In criminal matters, only through the law (viewed in its normative economy through the prism of the legal force of the normative act in the analysis/hypothetical incident) can a legal effect of the type regulated by art. 15 para. 2 of the Constitution, i.e. retroactive application if it is more favorable. In other words, referring to the legal force of the law, it is not limited to the provisions of art. 15 para. 2 only the law in its official definition, given by the Constitution, respectively the assimilations expressly established by the Constitution for other normative acts having the legal force of law.

What does "law" mean in constitutional terminology? Art. 73 of the Constitution lists the categories of laws, as a legal act of the Parliament, which, according to art. 61 para. 1 the second sentence of the Constitution, is "the sole legislative authority of the country". The assimilations regarding a legal force similar to that of the law can be found in the content of art. 115 of the Constitution, regarding the legislative delegation granted by the constituent to the Government, namely the government's ordinances (simple ordinances and emergency ordinances). There is another category of normative acts equal in legal force, by the will of the constituent, to the law, namely the Regulations of the Parliament, which are found in the Constitution in the sense of a source of law at the level of the law. Their relevance for the subject mitior lex is small. Therefore, only these categories of normative acts listed by the Constitution, mentioned above, can be considered "law" within the meaning of art. 15 para. 2 of the Constitution, so that they can be private as a "more favorable criminal law" in any concrete hypothesis with legal effects in terms of criminal liability and, implicitly, within a criminal trial.

In favor of the contrary opinion, which considers that the effects of the unconstitutional declaration in 2018 of the provisions of the Criminal Code regarding the special prescription are applied retroactively until the entry into force of the new Criminal Code (year 2014), which we observe in the jurisprudence of some courts, including at the level of the High Court of Cassation and Justice, in an interpretation decision for the unification of practice (High Court of Cassation and Justice, Panel for resolving certain legal issues in criminal matters, decision no. 67 of October 22, 2022), are mainly the provisions of art. 11 and art. 20 of the Constitution regarding the rules of interference between domestic law and supranational law, especially in the matter of fundamental human rights and freedoms. [8]

Art. 20 para. 1 of the Constitution provides that "the national constitutional provisions regarding the rights and freedoms of citizens must be interpreted and applied in accordance with the Universal Declaration, pacts and other treaties to which Romania is a party", and if there are inconsistencies between domestic law and supranational law, it applies primarily those regulations, whether domestic or international, that contain more favorable provisions. And by para. 2 of the same article thus enshrines the prevalence of reasonings that place fundamental human rights and freedoms in the foreground, ensuring their pre-eminence over other values protected by the fundamental law and, implicitly, enshrined by the regional or international regulations to which Romania is a party. It follows that, in

this logic, drawn up by art. 20 para. 2 of the Constitution, the provisions regarding the interference between European law and national law must also be interpreted, the principle regulation of which can be found in art. 148 of the fundamental law. The subject benefits from a wide debate in doctrine and jurisprudence in recent years. In the European space, it is far from being uniformly defined in doctrine, but especially difficult to harmonize in judicial and institutional practice[9].

This view is consistent with the general pattern of application of human rights norms, in that a certain prevalence of human rights must be given. It was argued that the margin of interpretation favorable to fundamental human rights and freedoms must be prioritized, as this is a universal principle in the matter of human rights, as well as that the interpretation of the criminal law cannot be done against the accused person[10]. Also, from a combined interpretation of art. 11 and art. 20 of the Constitution, the same conclusion emerges. This point of view distances itself from the reasoning set out above regarding the extent and applicability of mitior lex in art. 15 para. 2 of the Constitution. On the other hand, the Constitutional Court itself[11] specified that "courts cannot remove the effects of the decision of the Constitutional Court expressly indicated in its body". This orientation seems to lead to the idea that the first opinion we referred to above, in point 5, although argued with express constitutional norms, is still not adopted by the majority in the recent jurisprudence of the courts. The High Court of Cassation and Justice appreciated[12], that "courts must not interpret the effect of the decision, but apply that decision in a way according to its considerations". Most courts have followed this interpretation[13].

On the other hand, the application of the decisions of the Constitutional Court does not refer to the application of these decisions as if they were laws, but the "application" of the text of the critical law by the Constitutional Court refers to the application of the law itself, but in its form consistent with the Constitution, that is, in case, the application of art. 155 Criminal Code, without the part regulating the causes of interruption. In other words, the declaration of a text of law as unconstitutional does not per se constitute a new law, which would produce effects only for the future, because the legal provision destroyed by the Constitutional Court - as being contrary to the Constitution - has the effect of the non-existence of that text of law , as if it did not exist[14], although the limits of art. 147 para. 4 of the

Constitution are restrictive, providing that the solutions of the Constitutional Court apply only for the future.

Conclusions

In conclusion, the procedural manner of applying a conclusion favorable to the principle of the effectiveness of fundamental rights and freedoms is contrary, in terms of effects, to the principle of respecting the constitutional norms in their hierarchy (including that European law must be correctly interpreted and applied internally[15], in the margin of art. 148 par. 2 and 3 of the Constitution), also raising the issue of the applicability of art. 7 of the ECHR. The law is alive[16].

The favorable interpretation of the application of the principle of the effectiveness of fundamental rights and freedoms seems to prevail, but there remain important question marks to which doctrine and jurisprudence must respond in a balanced way, taking into account both the principle of the supremacy of the Constitution and that of the application of European law in light of the provisions of art. 148 of the Constitution, as well as the corollary of the incidence of art. 7 par. 1 sentence two of the ECHR ("...no more severe punishment can be applied than that which was applicable at the time of the commission of the crime"). A restrictive and only sequential interpretation of the entire legal picture runs the risk of being reductionist, one-sided, incomplete, i.e. incorrect and not legally rigorous.

Compared to the decisive provision in art. 147 para. 4 of the Constitution - "only for the future" - in balance/contrast with the effects of the decision of the Constitutional Court on "termination of the legal effects of the unconstitutional law" and by bringing into the interpretive equation the provisions of art. 16 of the Constitution regarding equality before the law, a discriminatory effect of "effects only for the future" is identified to the detriment of those who were in legal proceedings (other than the pending one) for assumptions prior to the date of publication of the decision of the Constitutional Court (for example in relation to Decision of the Constitutional Court no. 297/2018). This discriminatory effect willy-nilly brings back into question the significance and limits of the application of art. 20 para. 2 of the Constitution and especially art. 7 par.1 sentence two of the ECHR.

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