

THE STATUTE OF LIMITATION FOR CRIMINAL LIABILITY – A FRESH DECISION OF THE ROMANIAN CONSTITUTIONAL COURT THAT BLOWS UP THE CRIMINAL TRIALS

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ABSTRACT

*A regulatory deficiency in the new Romanian Criminal Code, in what regarding the ways of interrupting the course of the general term for the statute of limitation of the criminal liability, determined, in June 2018, a decision of the Constitutional Court which clarified the situation. Surprisingly, after 4 years from the moment this decision has been issued, during which the jurisprudence has complied with, another Constitutional Court decision upon this subject was issued in May, 2022. The later decision blows up the entire judiciary because clarify its first decision, in the sense, it is not an interpretative one but shows that due to the legislator's passivity in amending the unconstitutional text from Article 155 of the Criminal Code within 45 days, in the criminal legislation in Romania, there was no provision regulating the interruption of the general term of the statute of limitation for criminal liability during this period, of June 26, 2018 - May 30, 2022, and accordingly, no longer have been a special term for the statute of limitation in Romanian criminal legislation. This decision of the CCR manages to stir up a real storm in the Romanian courtrooms because hundreds of criminal cases, many of them involving large damages or high-ranking accused people from politics or administration, have been closed or are about to be closed, based on the *lex mitior* principle.*

KEYWORDS: *The statute of limitation of the criminal liability, general term, special term, interruption of the term, interpretative decision, performing a procedural act, mitior lex principle.*

INTRODUCTION

In Romanian criminal law, there has always been a substantial legal regulation regarding the *statute of limitation for criminal liability* of the persons who have not been investigated and tried within a certain time, that is, *the general term*, established distinctly for each crime according to its punishment limits. The statute of limitation for criminal liability operates in a double sense: as a tool to sanction judicial authorities who fail to fulfill their duties within a reasonable time; a leniency towards the person suspected of having committed a crime, in the sense that, after certain time in which he has not committed other crimes, he is presumed to be socially rehabilitated, without the need for punishment.

Another aspect regulated in the Criminal Code is that which provides that the *general term* for statute of limitation is interrupted in certain situations, namely when the judicial bodies fulfill any kind of procedural acts. In the old Criminal Code, adopted in 1968, there was a provision stating that these procedural acts interrupt the term for statute of limitation only if they are brought to the attention of the suspect or accused person. If the term for statute of limitation is interrupted, a new term runs from that date. Both the old and the new criminal code provide that however many interruptions may operate in a criminal case, after *the special term* for statute of limitation has passed (one and a half general terms, in the old criminal code and 2 general terms, in the new

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criminal code), the suspect or accused person can no longer be prosecuted. The regulatory difference in the new Criminal Code, which entered into force on February 1, 2014, consists in the fact that *the general term* of the statute of limitation is interrupted by the fulfillment of any procedural act, therefore, it was not expressly provided that that act be brought to the attention of the suspect or the accused person.

1. BRIEF CONSIDERATIONS REGARDING THE JURISPRUDENCE

Starting to this point, by its Decision no. 297/2018, the Constitutional Court of Romania (CCR) decided that the new regulation is not constitutional because it lacks predictability and is contrary to the principle of the legality of incrimination because the suspect and the accused cannot know that the term for the statute of limitation has been interrupted¹.

In justifying its decision, the CCR showed that the regulation from the old Criminal Code (which stipulated the condition that the procedural act that interrupted the statute of limitation had to be brought to the attention of the suspect or accused) satisfied all the constitutional requirements².

It is necessary to specify that in CCR jurisprudence there are two ways to decide upon the unconstitutionality of an article or provision of the law: (i) a declaration of unconstitutionality, simply, which implies that the article or provision no longer produces its effects and the legislator, within of 45 days, must comply with the decision of the CCR and adopt a new text of law in accordance with the requirements of the CCR; (ii) an assessment of compliance with the constitutional provisions only in case the legal text would be interpreted in a specific way, specified in the CCR decision, in which case, it is assessed as an interpretative decision of the CCR. In the latter case, it is not necessary for the legislator to intervene in order to replace or modify the text of the law.

In the case of Decision C.C.R. no. 297/2018, no measures were taken to initiate a legislative amendment within the 45-day period by the Romanian Government or the Romanian Parliament, most likely because this decision was considered to be an interpretive one. Moreover, after Decision no. 297/2018, judicial practice, in accordance with the European Court of Human Rights (E.C.H.R.) jurisprudence³, removed doubts regarding the interpretation of Article 155 of the

¹ Paragraph 31 of Decision no. 297/2018: *"For these reasons, the Court considers that the provisions of Article 155 paragraph (1) of the Romanian 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, supposes even documents that are not communicated to the suspect or accused, not allowing him/her to know the aspect of the interruption of the statute of limitation period and the beginning of a new period of statute of limitation for his criminal liability."*

² The paragraph 34 of the Decision no. 297/2018: *"Considering the considerations presented above, the Court finds that the previous legislative solution, provided for in Article 123 paragraph 1 of the Criminal Code from 1969, meets the conditions of predictability imposed by the constitutional provisions analyzed in this case, because it provided for the interruption of the general term for statute of limitation of criminal liability only by performing an act that, according to the law, had to be communicated, in the case in which the person concerned had the capacity of being accused."*

³ The decision-making role given to the courts aims precisely to remove the doubts that persist when interpreting the rules, the progressive development of criminal law through jurisprudence as a source of law being a necessary and well-rooted component in the legal tradition of the Member States. Therefore, Article 7 paragraph 1 of the Convention cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability through judicial interpretation from one case to another, provided that the result is consistent with the substance of the crime and is reasonably foreseeable (Judgment of November 22, 1995, pronounced in the *Case of S.W. v. the United Kingdom*,

Criminal Code (which regulated the statute of limitation) and it has been uniformly applied to the effect that the interruption of the general term of the statute of limitation for the criminal liability is produced by the performance of an act which must be communicated to the suspect or accused.

After 4 years in which the jurisprudence of the ordinary courts crystallized in the sense depicted above⁴, absolutely surprisingly, by its Decision no. 358/2022, C.C.R. analyzed again the same Article 155 of the Criminal Code, and showed, once in addition, that the text of the law is unconstitutional, showing that there is still an unpredictability in its interpretation, as long as the conditions for interrupting the course of the *general term* of the statute of limitation have been established by jurisprudence and not by the legislator. Moreover, despite the jurisprudence consistent with the interpretation of the CCR, in the reasoning of Decision no. 358/2022, CCR shows that due to the legislator's passivity in amending the unconstitutional text from Article 155 of the Criminal Code within 45 days from the issuance of the C.C.R. Decision. no. 297/2018, i.e. from the date of June 26, 2018, in the criminal legislation in Romania, there was no provision regulating the interruption of the *general term* of the statute of limitation for criminal liability until the date of May 30, 2022, with the issuance of Emergency Government Ordinance (E.G.O.) no. 71/2022. (the latter amended Article 155, paragraph 1 of the Criminal Code in the sense that the term for the state of limitation is interrupted by the fulfillment of any procedural act in question, which, according to the law, must be communicated to the suspect or accused). Moreover, from the reasoning of its Decision no. 358/2022, is noted the Constitutional Court opinion that there would no longer have been a *special term* for the statute of limitation in Romanian criminal legislation during this period, of June 26, 2018 - May 30, 2022.

Grace of this later CCR's decision, the jurisprudence of the ordinary courts recorded many different opinions upon this subject, even upon the legal nature of the term for the statute of limitation (substantial or procedural act?), and therefore, the High Court of Cassation and Justice (H.C.C.J.) was called to decide on this controversy through a Preliminary Ruling. By Decision no. 67 of October 25, 2022, the H.C.C.J. decided that " *The legal provision relating to the interruption of the general term for the state of limitation is belonging to the material (substantial) criminal law, and it is a subject from the perspective of application of the principle of criminal law activity, with the exception of more favorable criminal provision, according to the mitior lex principle* ".

The removal of the applicability of the *special term* for the statute of limitation, for almost 4 years, in all those criminal cases instrumented in this time, as a result of Decision no. 358/2022 of the C.C.R., is likely to create a systemic risk of impunity at the national level, and not only for corruption, tax evasion and money laundering crimes, but for all crimes except those that do not have a statute of limitation.

The criminal proceedings related to corruption offences, for example, involve some complex and cumbersome investigations, especially due to the fact that, often, the judicial bodies are notified many years after the moment of the commission of such acts. The duration of the

paragraph 36, *Dragotoniu and Militaru-Pidhorni v. Romania*, paragraphs 36 and 37, Judgment of February 12, 2008, pronounced in the *Case of Kafkaris v. Cyprus*, paragraph 141, Judgment of October 21, 2013, delivered in *Del Rio Prada v. Spain*, paragraphs 92 and 93).

⁴ Decision of the High Court of Cassation and Justice no. 174/RC/ May 15, 2019; Decision of the High Court of Cassation and Justice no. 251/RC/ June 20, 2019; Decision of the High Court of Cassation and Justice no. 285/A/ October 31, 2018 etc.

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procedure for prosecution and trying before the courts is of such a nature, in this type of cases, that impunity in fact would not constitute an exceptional case in Romania, but the rule⁵.

We note that this removal of the *special term* for the statute of limitation does not represent the will of the legislator but is a consequence of the Decision of the C.C.R., an institution located outside the judicial system, whose members are appointed in proportion of 2/3 by the legislative power and 1/3 by the president, therefore, with a strong political imprint in the decisions.

2. CONNECTIONS WITH COMMUNITY JURISPRUDENCE

In this sense, we refer to those already ruled by the Court of Justice of European Union (C.J.E.U) in the case of Euro Box Promotion and others (C 357/19, C 379/19, C 547/19, C 811/19 and C 840/19): *"The Article 2 and Article 19 (1) second paragraph of the Treaty of European Union (TEU), and the Decision 2006/928 must be interpreted in the sense that they do not oppose a national regulation or practice according to which the decisions of the national constitutional court are binding on common law courts, provided that national law guarantees the independence of the said constitutional court in particular from the legislative powers and executive as required by these provisions. Instead, these provisions of the TEU and the said decision must be interpreted in the sense that they oppose a national regulation according to which any non-compliance with the decisions of the national constitutional court by the national common law judges is likely to engage their disciplinary liability"*.

The connection of the case with EU law it is given by its object, namely the commission of corruption crimes at the highest level, which Romania is obliged to fight against, through the treaties to which it became a party upon joining the European Union.

In this respect, in the case of Euro Box Promotion and others (C 357/19, C 379/19, C 547/19, C 811/19 and C 840/19) C.J.E.U. ruled that *"as far as Romania is concerned, the obligation to fight corruption that harms the financial interests of the Union, as it results from Article 325 paragraph (1) of the Treaty of Functioning of European Union (TFEU), is complemented by the specific commitments that this member state assumed at the conclusion of the accession negotiations on December 14, 2004"*. Indeed, in accordance with point I (4) of the Annex IX to the Act of Accession, the said Member State undertook, among other things, to *"considerably speed up the fight against corruption, in particular against high-level corruption, by ensuring a rigorous application of the anti-corruption legislation"*. This specific commitment was later made concrete by the adoption of Decision 2006/928, by which reference objectives were established in order to remedy the deficiencies noted by the Commission before Romania's accession to the Union, especially in the field of the fight against corruption. Thus, the annex to this decision, in which the respective reference objectives are set out, provides in point 3 the objective of *"continuing professional and impartial investigations regarding high-level corruption allegations"*, and in point 4, the objective of *"adopting measures additional measures to prevent and fight corruption, especially in local administration"*(par. 188).

At the same time, C.J.E.U. also showed in paragraph 169 that *"the reference objectives that Romania has thus undertaken to achieve are binding for this member state, in the sense that it is subject to the specific obligation to achieve the respective objectives and to take the appropriate*

⁵ In this regard, regarding the systemic risk of impunity, *mutatis mutandis*, see the Decision of High Court of Cassation and Justice no 41/April 7, 2022, file 3089/1/2018.

measures in order to achieve them in the shortest possible time. Also, the said Member State has the obligation to refrain from implementing any measure that would risk compromising the achievement of the same objectives. However, the obligation to fight effectively against corruption and especially high-level corruption, which derives from the reference objectives presented in the annex to Decision 2006/928 in conjunction with the specific commitments of Romania, is not limited only to cases of corruption that harm the financial interests of the Union".

CONCLUSIONS

The need to interpret European Union law results from the impossibility of ensuring compliance with the reference objectives that Romania has undertaken to achieve (referred to above) in the context of the application of Decision no. 297/2018 in the manner imposed by Decision no. 358/2022, a fact that would lead to the creation of a systemic risk of impunity in all criminal cases, including high-level corruption cases.

At the same time, in the Judgment of July 15, 1964, Costa (6/64, EU:C:1964:66, p. 1158-1160), the Court established *the principle of the supremacy of Community law*, understood in the sense in which it enshrines the prevalence of this right over the law of states members. In this regard, the Court found that the establishment by the EEC Treaty of a legal order of its own, accepted by the member states on the basis of reciprocity, has as a corollary the impossibility of the mentioned states to prevail against this legal order, a subsequent unilateral measure or to oppose to the right born from the EEC Treaty norms of national law, regardless of their nature, otherwise there is a risk that this right will lose its community character and that the legal foundation of the Community itself will be called into question.

However, in this factual and normative context, it is necessary to know whether a possible non-application of Decision no. 358/2022 of the C.C.R. would be in accordance with Community law and if leaving the national provisions in the matter of statute of limitation, will violate Article 49, paragraph 1, last sentence of the Charter of Fundamental Rights.

Romania must provide for effective and dissuasive sanctions not only in cases of fraud affecting the financial interests of the Union, but also in cases of corruption, especially at the higher levels.

In conclusion, we note that a decision of the CCR manages to stir up a real storm in the Romanian courtrooms because hundreds of criminal cases, many of them involving large damages or high-ranking accused people from politics or administration, have been closed or are about to be closed, based on the *lex mitior* principle. This is the reason why, the opinion is emerging that the CCR would have given a masked amnesty for white-collar criminals by its decision, an inadmissible aspect for the judicial system and for all the citizens of the country. For this reason, the voices calling for a deep reform of the Constitutional Court in the sense of removing as much as possible the arbitrariness and political influence from its decisions, have multiplied.