Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 16(65) Special Issue – 2023
https://doi.org/10.31926/but.ssl.2023.16.65.3.22

THE APPLICATION OF EUROPEAN UNION LAW IN CRIMINAL MATTERS

Cristinel GHIGHECI[1]

Abstract: *The application of European Union law in criminal matters has raised numerous discussions in domestic law. The priority application of European Union law raised the issue of guaranteeing fundamental human rights and freedoms in the event that the internal standard is higher than the European Union standard. The jurisprudence of the Court of Justice of the European Union has established in numerous cases the priority nature of European Union law over domestic law.*

Key words: *European Union law, criminal law*

1. Introduction

The application of the European Union law in criminal matters has primarily raised issues related to the primacy of this law over domestic legislation. If there were no discussions regarding the supremacy of the European Union law over infraconstitutional legislation, this supremacy being unanimously admitted, particularly interesting issues arose in relation to the supremacy of this right over the constitutions of the member states.

"The European Court of Justice (ECJ) is more immune from political correction than the constitutional court of any democratic state. From early on, it has interpreted the Treaty commitment to establish a Europe-wide market and the free movement of goods, persons, services and capital not as a programmatic goal to be realized through political legislation, but as a set of directly enforceable individual rights that will override all laws and institutional arrangements of EU member states." (Scharpf, 2009, p. 8).

The judicial practice in Romania had the opportunity to analyze this aspect following the pronouncement by the Constitutional Court of Romania of some decisions that were later contradicted by the decisions of the Court of Justice of the European Union.

I will present below the main arguments that were considered by the Constitutional Court of Romania and the Court of Justice of the European Union in the judgments issued in criminal matters, which raised discussions regarding the application of the two orders of law.

[1] *Transilvania* University of Braşov, ghigheci.costel@unitbv.ro, corresponding author

2. Decision no. 685 of November 7, 2018, on the request to resolve the legal conflict of a constitutional nature between the Parliament of Romania, on the one hand, and the High Court of Cassation and Justice, on the other.

Through Decision no. 685/2018 (Published in the Official Gazette no. 1021 of November 29, 2018), the Constitutional Court of Romania ruled on a legal conflict of a constitutional nature that concerned the illegal composition of the Panels of 5 judges organized at the level of the High Court of Cassation and Justice. Finding that they were illegally constituted, the decision of the constitutional court had the effect of annulling some decisions pronounced by the High Court of Cassation and Justice in criminal matters.

In justifying this decision, the constitutional court brought the following arguments:

«175. In conclusion, the Court finds that the High Court of Cassation and Justice, by Decisions no. 3/2014 and no. 89/2018 of the Board of Directors, amended, through an administrative act, a law adopted by the Parliament, which denotes an opposition/counteraction of the legislative policy. It follows that, under these conditions, the Board of Directors of the High Court of Cassation and Justice arrogated to itself a competence related to the jurisdictional function of the supreme court, a function that is carried out by means of the court panels, the only ones entitled to decide on the legal composition tiers. Thus, the Management Board of the High Court of Cassation and Justice, through its administrative practice, influenced, in an impermissible way, the judicial practice of the Panels of 5 judges, regarding the aspect of their legal composition, since the Panels of 5 judges acquiesced, tacitly, to an illegal composition, themselves violating Law no. 304/2004, starting from February 1, 2014 and until now.»

[…]

«183. The Constitutional Court also emphasized that, in the absence of an alternative procedural mechanism that would allow the correction of the criticized legal norms, due to the circumstances of the case, the fears of the author of the exception of unconstitutionality are justified in terms of the objective impartiality of the court, which must judge the merits of the case following the acceptance of the relocation request. In this sense, the European Court of Human Rights held that, in the assessment of objective impartiality, appearances play a special role, because in a democratic society the courts must inspire full confidence in the litigants (see in this regard also the Judgment of October 1, 1982 Piersack v. Belgium, paragraphs 28-32, Judgment of 26 October 1984, De Cubber v. Belgium, paragraphs 25-30, or Hauschildt v. Denmark, Judgment of 24 May 1989, paragraphs 46-52).»

[…]

«189. Choosing an attitude contrary to the previously mentioned, the Governing Board of the High Court of Cassation and Justice gave precedence to the management aspects of the Panel of 5 judges, as well as other organizational aspects, compared to the need to respect the random composition of these panels, by drawing lots - as a guarantee of the objective requirements that ensure the impartiality of panels and, thereby, the right to a fair trial. In this context, the Court notes that, by imposing legal

members in the composition of the Panels of 5 judges, through administrative acts, latent pressure can be created on panel members, consisting in the submission of judges to their judicial superiors or, at least, consisting in a hesitation/unwillingness of the judges to contradict them [see, regarding this parameter of analysis, the Judgment of the European Court of Human Rights of 22 December 2009, delivered in the Parlov-Tkalčić case against Croatia, paragraph 91].»

In its Decision No 685/2018, which was delivered on 7 November 2018 on referral from the Prime Minister, the Constitutional Court found that the selection by the drawing of lots of only four of the five members of the five-judge panels of the High Court of Cassation and Justice ruling on appeal was contrary to Article 32 of Law No 304/2004, as amended, and clarified that, with effect from the date of its publication, that decision was applicable to cases pending before the courts and to cases in which a ruling had been given, in so far as the individuals concerned were still within the period for the exercise of the appropriate extraordinary appeals, and that the case-law established in that decision required that all those cases be subject to re-examination on appeal by a panel, all the members of which are selected by the drawing of lots.

3. Decision no. 417 of July 3, 2019 on the request to resolve the legal conflict of a constitutional nature between the Parliament of Romania, on the one hand, and the High Court of Cassation and Justice, on the other.

Through Decision no. 417/2019 (Published in the Official Gazette no. 825 of October 10, 2019), delivered on 3 July 2019 on referral from the President of the Chamber of Deputies, the Constitutional Court of Romania ruled on a legal conflict of a constitutional nature which concerned the non-constitution by the High Court of Cassation and Justice of the specialized trial panels for the trial in the first instance of the offenses provided for in Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption.

The Constitutional Court ruled that the High Court of Cassation and Justice violated domestic law and the European Convention on Human Rights through the way it established the composition of the panels that judged corruption cases.

In justifying this decision, the constitutional court brought the following arguments:

«144. In Romania, if the law established specialized panels, therefore, not special, it means that the judges are also and must be specialized. For this, in the silence of the law, but in its application, it was up to the Superior Council of the Magistracy to draw up a set of rules to guarantee the specific status of these judges, rules which can be mentioned: integrity exam, specific knowledge, specialized professional training, relevant experience in the field, the development of specialized works. However, the Superior Council of Magistracy did not elaborate these criteria. The Court also emphasizes that the lack of professional training courses is not a reason and does not justify the non-establishment of specialized boards. Moreover, such a situation does not occur in the case, as the National Institute of Magistracy, within the continuous training program approved by the Superior Council of the Magistracy, organizes training courses in the field of anti-corruption (see the continuous training programs from 2017- 2019).»

[…]

«149. The establishment by law of the specialized panels took into account the inefficient nature of solving cases related to high-level corruption. If from the perspective of the weight of the files on corruption offenses on the docket of the High Court of Cassation and Justice and from the perspective of the principle of random allocation of files, art. 29 para. (1) from Law no. 78/2000 had become anachronistic/obsolete or there were no mechanisms for its application, the application of art. 27 para. (1) from Law no. 304/2004, according to which "At the end of each year, the High Court of Cassation and Justice, in the United Sections, determines the cases in which it is necessary to improve the legislation and communicates them to the Minister of Justice". Also, the Plenary of the Superior Council of the Magistracy had the possibility to notify the Minister of Justice regarding the necessity of initiating or amending some normative acts in the field of justice [art. 38 para. (5) from Law no. 317/2004]. Moreover, the trial panels had the possibility to raise, ex officio, an exception of unconstitutionality based on art. 146 lit. d) from the Constitution, if they considered that the criticized text violates art. 21 para. (3) of the Constitution regarding the right to a fair trial from the perspective of the alleged normative tension between art. 29 of Law no. 78/2000 and the principle of random allocation of cases, seen as a guarantee of the right to a fair trial. It follows that, in the absence of such actions and in the absence of legislative interventions, the text continues to be part of positive law, so that a refusal to apply it is not justified.»

[…]

«154. The constant refusal of a state authority, be it the High Court of Cassation and Justice, to apply a law does not equate to its falling into obsolescence in the sense that the law would no longer benefit from the authority originally conferred by the legislature, because of its failure to reflect social reality. Therefore, the position of the High Court of Cassation and Justice regarding the interpretation of art. 29 of Law no. 78/2000 outlined a legal paradigm that gives a central role to the interpretation of the norm at the expense of its normative content, which led to the obvious subordination of the norm and, obviously, to the violation of its authority.»

By its Decision No 417/2019, the Constitutional Court ordered that all cases on which the High Court of Cassation and Justice had ruled at first instance prior to 23 January 2019 and in which the decisions given by that court were not final on the date of that decision be re-examined by panels specialised in anti-corruption matters and established in accordance with Article 29(1) of Law No 78/2000, as interpreted by the Constitutional Court. The findings made in Decision No 417/2019 require the re-examination at first instance of all cases which, as at 23 January 2019, were pending on appeal or in which the judgment on appeal was, as at that same date, still open to an extraordinary appeal.

Thus, the need arising from that case-law of the Constitutional Court to re-examine the corruption cases has the effect of prolonging the duration of the corresponding criminal proceedings and risks leading to the fulfillment of the statute of limitations for criminal liability.

4. Judgment of the Court of Justice of the European Union (Grand Chamber) from 21 December 2021

Being notified with a request for a preliminary ruling in relation to these cases, by the judgment of 21 December 2021, the Court of Justice of the European Union (Grand Chamber) hereby rules that:

«1. Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption is, as long as it has not been repealed, binding in its entirety on Romania. The benchmarks in the annex to that decision are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, to the effect that Romania is required to take the appropriate measures to meet those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.

2. [As rectified by order of 15 March 2022] Article 325(1) TFEU, read in conjunction with Article 2 of the Convention drawn up on the basis of Article K.3 of the Treaty on the European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995, and Decision 2006/928 are to be interpreted as precluding national rules or a national practice under which judgments in matters of corruption and value added tax (VAT) fraud, which were not delivered, at first instance, by panels specialised in such matters or, on appeal, by panels all the members of which were selected by drawing lots, are rendered absolutely null and void, such that the cases of corruption and VAT fraud concerned must, as the case may be further to an extraordinary appeal against final judgments, be re-examined at first and/or second instance, where the application of those national rules or that national practice is capable of giving rise to a systemic risk of acts constituting serious fraud affecting the European Union's financial interests or corruption in general going unpunished. The obligation to ensure that such offences are subject to criminal penalties that are effective and act as a deterrent does not exempt the referring court from verifying the necessary observance of the fundamental rights guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, but does not allow that court to apply a national standard of protection of fundamental rights entailing such a systemic risk of impunity.»

To pronounce this judgment the Court (Grand Chamber) argued that:

«200 In that regard, it must be stated that a systemic risk of offences going unpunished cannot be ruled out when the application of the case-law of the Curtea Constituțională (Constitutional Court) established in Decisions No 685/2018 and No 417/2019, in conjunction with the implementation of the national rules on limitation, has the effect of precluding the effective punishment acting as a deterrent of a quite specific category of persons, here those occupying the highest positions of the Romanian State who have been convicted for committing, in the exercise of their duties, acts of serious fraud and/or corruption by judgment delivered at first instance and/or on

appeal by the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice), given that that judgment has nevertheless been the subject of an appeal and/or an extraordinary appeal before that same court.

201 Even though temporal limits do apply to them, those decisions of the Curtea Constituțională (Constitutional Court) may, inter alia, have a direct and general effect on that category of persons, since, by rendering such a judgment convicting an individual and delivered by the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice) absolutely null and void and requiring a re-examination of the cases of fraud and/or corruption concerned, those decisions may have the effect of prolonging the duration of the corresponding criminal proceedings beyond the applicable limitation periods, thus meaning that the risk of that category of persons going unpunished becomes systemic.

202 Such a risk would call into question the objective pursued both by Article 325(1) TFEU and by Decision 2006/928, namely to combat high-level corruption by means of effective penalties acting as a deterrent.»

The Court of Justice of the European Union has often ruled that an irregularity committed during the composition of panels entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the panel composition process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system (Judgments of 26 March 2020, Review Simpson v Council and HG v Commission, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 75, and of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraph 130).

The Court of Justice of the European Union showed in the reasoning of the decision that the application of the Constitutional Court would entail a systemic risk of acts constituting serious fraud affecting the European Union's financial interests or corruption in general going unpunished, in breach of the requirement that provision be made for effective deterrent penalties in order to combat offences of that kind (paragraph 212).

5. Decision no. 358 from May 26, 2022 regarding the exception of unconstitutionality of the provisions of art. 155 paragraph (1) of the Criminal Code

On 1 February 2014, Law No 286/2009 on the Criminal Code of 17 July 2009 (the Criminal Code, Published in the Official Gazette no. 510 of 24/07/2009), entered into force. In its initial version, Article 155(1) of the Criminal Code provided: 'The limitation period for criminal liability shall be interrupted by the performance in the proceedings of any procedural act.'

The Constitutional Court, by its judgment No 297 of 26 April 2018, published on 25 June 2018, upheld a plea of unconstitutionality concerning that provision in so far as it provided for the limitation period for criminal liability to be interrupted by the performance of 'any procedural act'.

After the publication of this decision, the national judicial practice interpreted this legal text in the sense that the limitation period for criminal liability shall be interrupted by the performance in the proceedings of any procedural act which, by law, must be notified to the suspect or defendant.

Constitutional Court, by its judgment No 358 of 26 May 2022 (Published in the Official Gazette no. 565 of 06/09/2022), published on 9 June 2022, upheld a further plea of unconstitutionality concerning Article 155(1) of the Criminal Code. In that judgment, the Constitutional Court clarified that its judgment No 297/2018 had the legal status of a 'simple' judgment of unconstitutionality.

The main arguments of the Constitutional Court for pronouncing this decision were the following:

«71. However, the Court observes that, through the legislator's silence, the identification of cases of interruption of the course of the prescription of criminal liability remained an operation carried out by the judicial body, arriving at a new situation lacking clarity and predictability, a situation that also determined the different application to similar situations of the criticized provisions (a fact confirmed by the discovery by the High Court of Cassation and Justice of the existence of a non-unitary practice). Thus, the lack of intervention from the legislator determined in the task of the judicial body the need to replace it by outlining the applicable regulatory framework in the event of the interruption of the criminal liability statute of limitations and, implicitly, the application of the criminal law by analogy. Or, the Court has consistently ruled, in its jurisprudence, that the provisions of art. 61 paragraph (1) of the Constitution establish that "Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country", and its legislative competence with regard to a certain field cannot be limited if the law thus adopted complies with the requirements of the Law fundamentals (Decision no. 308 of March 28, 2012, published in the Official Gazette of Romania, Part I, no. 309 of May 9, 2012). At the same time, the Court ruled that it allows the one who interprets and applies the criminal law, in the absence of an express rule, to establish the rule according to which he is to solve a case, taking as a model another solution pronounced in another regulated framework, which represents an application by analogy of the criminal law. However, according to the jurisprudence of the European Court of Human Rights and of the Constitutional Court, art. 7 paragraph 1 of the Convention for the Protection of Human Rights and of fundamental freedoms and art. 23 paragraph (12) of the Basic Law, which enshrines the principle of legality, incrimination and punishment (nullum crimen, nulla poena sine lege), in addition to prohibiting, in particular, the expansion of the content of the existing crimes on facts that, previously, did not constitute crimes, also support the principle that criminal law should not be interpreted and applied extensively against the accused, for example, by analogy.»

Following the pronouncement of this decision by the Constitutional Court of Romania, judicial practice returned to the previous orientation and found that the statute of

limitations for criminal liability for all crimes committed prior to the pronouncement of this decision can no longer be interrupted.

Essential for the reorientation of the judicial practice of the criminal courts was the pronouncement of Decision no. 67/2002 of the High Court of Cassation and Justice - The panel for resolving some legal issues,

«Thus, considering the fact that the incomplete form in which the provisions of art. 155 para. (1) of the Criminal Code, subsequent to the Decision of the Constitutional Court no. 297 of April 26, 2018, is not the result of the deliberative process of the legislative body, it does not represent an option of it in relation to the social circumstances and the needs related to ensuring the defense of social values that are important at a given moment in a democratic society, the mentioned provisions do not meet the conditions to be a more favorable criminal law.

At the same time, it is noted that any law must meet certain conditions regarding clarity and unequivocalness, according to the provisions of art. 8 of Law no. 24/2000 regarding the rules of legislative technique for the elaboration of normative acts which provide that the legislative text must be formulated clearly, fluently and intelligibly, without syntactic difficulties and obscure or equivocal passages.

In addition to these general requirements, applicable to any legal text, with regard to criminal laws, the standard defined by the jurisprudence of the Constitutional Court is imposed, which established that a legal provision must be precise, unequivocal and establish clear, predictable and accessible rules, whose application must not allow arbitrariness or abuse, and the legal norm must regulate in a unitary and uniform manner and establish minimum requirements applicable to all its recipients (Decision no. 637 of October 13, 2015, published in the Official Gazette of Romania, Part I, no. 906 of December 8, 2015, paragraph 34).

Considering the provisions of art. 155 para. (1) of the Criminal Code, subsequent to the Decision of the Constitutional Court no. 297 of April 26, 2018, which declared the unconstitutionality of only the phrase "any procedural act", but also the considerations of the Constitutional Court Decision no. 358 of May 26, 2022 from paragraph 74, according to which the reason behind the pronouncement of the Constitutional Court Decision no. 297 of April 26, 2018 was not the removal of the institution of the interruption of the criminal liability limitation period, it is noted that the institution of the interruption of the limitation period was not completely removed from the active legislative fund, but it still does not meet the requirements of predictability in the absence of the indication of the acts interrupting the prescription, for it could be qualified as a more favorable criminal law.»

6. Judgment of the Court of Justice of the European Union (Grand Chamber) from 24 July 2023

In Case C-107/23 PPU [Lin], on the docket of the Court of Justice of the European Union (Grand Chamber) a request was filed for a preliminary ruling under Article 267 TFEU by the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania), carried out by decision of 22 February 2023.

In essence, the Brasov Court of Appeal asks the Court of Justice of the European Union to analyze whether this reorientation of judicial practice that occurred following the decision of the Constitutional Court contravenes European Union law.

In Romanian legislation the principle of the retroactive application of the more lenient criminal law (lex mitior) is laid down in Article 15(2) of the Romanian Constitution, which provides that 'the law shall have legal effect only for the future, with the exception of the more lenient criminal or administrative law'. Therefore, application of the more lenient criminal law (lex mitior) is a matter of substantive law (not procedural law) and is a principle of constitutional rank.

However, the Court of Justice of the European Union (Grand Chamber) ruled by the judgment of 24 July 2023 that it must be held that the national courts cannot, in the context of judicial proceedings seeking to impose criminal penalties for serious fraud offences affecting the financial interests of the European Union, apply the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (lex mitior), in order to call into question the interruption of the limitation period for criminal liability by procedural acts which took place before 25 June 2018, the date of publication of judgment No 297/2018 of the Constitutional Court (paragraph 124).

The main arguments of the Court of Justice of the European Union for pronouncing this decision were the following:

«120 The application of a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (lex mitior) must be distinguished from that of the national standard of protection examined by the Court in the judgment of 5 December 2017, M.A.S. and M.B. (C-42/17, EU:C:2017:936).

121 In that regard, it is apparent from the order for reference that the application of that first national standard of protection is liable to exacerbate the systemic risk that serious fraud affecting the financial interests of the European Union will escape any criminal penalty, in breach of Article 325(1) TFEU and Article 2(1) of the PFI Convention.

122 Contrary to the national standard of protection relating to the foreseeability of criminal law, which, according to the referring court, is limited to neutralising the interrupting effect of procedural acts which occurred during the period from 25 June 2018, the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court), to 30 May 2022, the date on which Decree-Law No 71/2002 entered into force, the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (lex mitior) permits, at least in certain cases, the neutralisation of the interrupting effect of procedural acts which took place even before 25 June 2018 but after the entry into force of the Criminal Code on 1 February 2014, that is to say, during a period of more than four years.»

7. Conclusions

The application in concrete cases of the jurisprudence of the Court of Justice of the European Union must take into account the data of each individual case. The primacy of the law of the European Union over the internal law of the member states has been

established by several decisions of the Court of Justice of the European Union. This does not mean that European Union law could be applied without an effective dialogue between domestic courts and the Court of Justice of the European Union. On the contrary, the multiple nuances of concrete causes often require different solutions in apparently similar concrete cases. As it was shown in the specialized literature "The judicial decision always presupposes a hermeneutic situation. It never operates at the abstract level of legal doctrine. The cognitive moment of judicial activity is essentially interpretative." (MacCormick and Summers, 2016, p. 34).

The national judge must have a coherent theory about the interpretation of European Union law. This is also valid for the interpretation of national law, because "the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers" (Scalia, 1997, p.14).

In the matter of applying European Union law, the experience of the United States of America could be useful regarding the existence of different laws in a territory governed by common rules (Breyer, 2015, p. 265).

References

Breyer, St. (2015). *The Court and the World. American Law and the New Global Realities*. New York: Vintage Books.

MacCormick, D.N. & Summers, R.S. (2016). *Interpreting statutes: a comparative study.* New York: Routledge.

Scalia, A. (1997). *A Matter of Interpretation*. Princeton and Oxford: Princeton University Press.

Scharpf, Fritz W. (2009). Legitimacy in the Multilevel European Polity. *European Political Science Review*. https://doi.org/10.1017/S1755773909000204

Decision no. 685 of November 7, 2018, on the request to resolve the legal conflict of a constitutional nature between the Parliament of Romania, on the one hand, and the High Court of Cassation and Justice, on the other. Published in the OFFICIAL MONITOR no. 1021 of November 29, 2018.

Decision no. 417 of July 3, 2019 on the request to resolve the legal conflict of a constitutional nature between the Parliament of Romania, on the one hand, and the High Court of Cassation and Justice, on the other. Published in the OFFICIAL MONITOR no. 825 of October 10, 2019.

Decision (2022) no. 358 from May 26, 2022 regarding the exception of unconstitutionality of the provisions of art. 155 paragraph (1) of penal Code. Published in the Official Gazette no. 565 of 06/09/2022.

Judgment of the Court of Justice of the European Union (2021) (Grand Chamber) from 21 December 2021.

Judgment of the Court of Justice of the European Union (2023) (Grand Chamber) from 24 July 2023.

Further information may be obtained from the address: ghigheci.costel@unitbv.ro