

Romania, Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice), 450/07.09.2023, supreme instance, appeal in cassation

Member State

 Romania

Topic

Rule of law, independence, impartiality

Sector

Role of national higher courts; Primary of EU Law, Judicial Independence

Deciding Court Original Language

Înalta Curte de Casa?ie ?i Justi?ie

Deciding Court English translation

High Court of Cassation and Justice

Registration N

450

Date Decision

07.09.2023

ECLI (if available)

Not available ECLI

National Follow Up Of (when relevant)

N/A

EU legal sources and CJEU jurisprudence

Art. 2, art. 19 (1) and (3) letter b), art. 67, art. 267, art. 325 (1) TFUE, art. 49 (1), art. 52 (3) and (4) of the EU Charter, art. 2 of the Convention for the protection of the financial interest of the European Communities

Decision 107-C/24.07.2023, Decision C-158/21 as of 31.01.2023, EU:C:57 Puig Gordi and other,

Decision C-100/21 as of 21.03.2023 Mercedes-Benz Group, EU:C:2023:229, Decision C-42/17 as of 05.12.2017, Decision C-614/14 as of 05.07.2016, Ognyanov, EU:C:2016:514, Decision C-72/15 as of 28.03.2017, Rosneft, EU:C:2017:236, Decision C-156/21 as of 16.02.2022 Hungary/Parliament and Council, EU:C:2022:97, C42/17 Taricco 2, C-310/16 as of 17.01.2019, Dzivev and others, EU:C:2019:30, Decision C-357/19 as of 21.12.2021 Euro Box Promoton and others, Decisions C-378/19, C-547/19 and C-840/19, EU:C:22021:1034, Decision C-115/17/07.08.2018, Clergeau and others, EU:C:2018:651, Decision C-218/15/06.10.2016, Paoletti and others, EU:C:2016:748, Decision C-387/02 as of 03.05.2005, Berlusconi and others, Decision C-391/02 and C-403/02, EU:C:2005:270, C-39/16 as of 26.10.2017 Argenta Spaarbank EU:C:2017:813,

ECtHR Jurisprudence

art. 7 of ECtHR

Decision Del Rio Prada against Spain, Grand Chamber, Kokkinakis against Greece, Vasiliuskas against Lithuania MC, Jamil against France, M against Germany, Gurguchiani against Spain, Scoppola against Italy, Maktouf and Damjanovic against Bosnia and Herzegovina, Cantoni against France, Kafkaris against Cyprus, Ruban against Ukraine (CE: ECHR:2016:0712JUD000892711), Dragptoniu and Militaru-Prodhorni against Romania

Subject Matter

Limitation period for criminal liability – Judgment of a constitutional court invalidating a national provision governing the grounds for interrupting that period – Protection of fundamental rights - Principle of the retroactive application of the more lenient criminal law (lex mitior) – National standard of protection of fundamental rights

Legal issue(s)

Two decisions of the Romanian Constitutional Court no. 297/2018 and 358/2022 ruled that the provisions establishing the interruption of the limitation period for criminal liability from the Romanian Criminal Code were not constitutional, thus during 2018 – 2022 the Romanian law did not provide the cases for interruption of the limitation period for criminal liability due to and only as of 30 May 2022, that the Romanian Criminal Code provided again the case of interruption of the limitation period for criminal liability. The lack of regulation on interruption of the limitation period for criminal liability was considered a more lenient criminal law, and as a consequence it retroacted since the date of the criminal deed, so it cannot be considered the new case of interruption new provided in the law.

Request for expedited/PPU procedures

NO, request for expedited/PPU procedures

Interim Relief

NO, Interim relief

National Law Sources

Art. 181 (1) of Law no. 78/2000 on prevention, discovery and sanctioning of corruption deeds, Art. 16 alin. (1) lit. f), art. 396 (6), art. 397, art. 580 of Romanian Procedural Criminal Code, Art. 1, 2, 5, art. 25, art. 154 alin. (1) lit. c), art. 153-156, art. 155 (1) of the Romanian Criminal Code, Decisions no. 297/ 26.04.2018, Decision no. 358/26.05.2022, Decision no. 847/08.07.2008, Decision no. 26/03.03.2016, Decision no. 660/04.07.2007, Decision no. 5/09.01.2007, Decision no. 126/03.03.2016, Decision no. 68/2017, Decision no. 846/2008, Decision no. 390/2021, Decision no. 265/2014 of the Romanian Constitutional Court, art. 15 (2), Art. 1 (4), art. 147 (1) of the Romanian Constitution

Facts of the case

Defendants A and company B SRL used incomplete and inaccurate documents in the period March 2011-July 2014 at the County Office of Payments for Rural Development and Fishing (OJPDRP) on the basis of which they obtained financing from European funds in the amount of approximately 1,500,000 euros for a grain storage and oil processing building in Giera commune, Timis county, committing crimes against the financial interests of the European Union. By Criminal Sentence no. 610/PI of 13.12.2022 The Timis Court ordered the termination of the criminal trial against the defendants, taking into account the Decisions of the Romanian Constitutional Court No. 297/2018 and No. 358/2022 regarding the admission of the unconstitutionality of the provisions of the Criminal Code regarding the interruption of the criminal prescription of any act of the procedure in question , in law intervening the statute of limitations of the criminal liability and on the grounds that the injured party has fully recovered the damage. The Public Ministry appealed the decision of the Tribunal, but the Court of Appeal rejected the appeal, therefore the Public Ministry filed an appeal in cassation – which is an extraordinary mean of appeal by which a plaintiff to seek the annulment of definitive judgements in criminal matters when a sentence was pronounced despite the existence of grounds liable to end criminal proceeding - at the High Court of Cassation and Justice, which rejected it as not founded, making an extensive analysis of the jurisprudence of the CJEU and ECHR regarding the protection of fundamental rights, including a special reference to Case C-107/23 PPU of the European Union Court of Justice, which ruled that , but in its own interpretation.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The High Court of Cassation and Justice stated that, as the CJEU highlights "when answering preliminary questions, the Court [of Justice] has the obligation to take into account, in the framework of the distribution of powers between the Union courts and the national courts, the factual and normative context, as defined in the referral decision, in which the respective questions fall" [Judgment of 26 October 2017, Argenta Spaarbank, C-39/16, EU:C:2017:813, point 38, Case C42/17 "Taricco 2"], so in preliminary rulings, the framework set by the referring court is decisive. This conclusion emerges both from the above, and especially from the considerations of the Decision in case C-107/23 of 24.07.2023. In this regard, the Romanian High Court of Cassation and Justice identified and analyzed the omissions and non-compliant information provided by the referring court, with the effect of distortion in the inferential act and, as a consequence, in the interpretation, as a whole, of the norms (correct reasoning from a legal point of view but with factual errors). The Romanian High Court of Cassation and Justice considered that Union law does not require the national court to leave unapplied the Decisions of the Constitutional Court no. 297/2018 and no. 358/2022, nor legal provisions or national practices under any conditions. Observing that, although the CJEU talks about the possibility of giving national law an interpretation in accordance with Union law even by moving away from the jurisprudence of a

higher court, it nevertheless limits this possibility to the prohibition of this being done through interpretations contrary to national law (Judgment of 4 March 2020, *Telecom Italia*, C-34/19, EU:C:2020:148), and Judgment of 4 May 2023, *ANI*, C-40/21, EU:C: 2023:367. The fundamental rights cannot be less important than the financial interests of the EU. In other words, the Union's financial interests cannot be protected at the cost of violating fundamental rights, the primary principles of Romanian criminal law and international law. Also, the rights protected by the Charter of Fundamental Rights of the EU cannot be interpreted by the supreme court in a way that restricts their content. The Romanian High Court of Justice considered that cannot apply a double standard of sanctioning regime to people who commit crimes, because it would be incompatible with the principles on which the rule of law is founded. Moreover, the possibility to choose and/or combine the law that it prefers in case of a succession of criminal laws over time, is prohibited to the judge, Decision no. 265/2014 of the Constitutional Court, prohibiting, under penalty of unconstitutionality, the creation of a *lex tertia* through such a procedure. The internal standard for the protection of fundamental rights does not endanger the supremacy, unity and effectiveness of Union law. The first argument resides in the identity of the values protected by the ECHR, the DFUE Charter, the jurisprudence developed on their side and those of domestic law. Also, through the limitation periods provided by domestic law (of 8 or 10 years), even without reference to the special prescription, as well as through the prison sentence limits prescribed by the legislator, the objectives provided for in the PIF Directive are protected. According to them, in the case of crimes against the financial interests of the Union, states must provide levels of sanctions with a "dissuasive effect", respectively "appropriate norms regarding the prescription necessary to combat illegal activities at the expense of the financial interests of the Union", requirements, in full, satisfied. Even in the conditions of the removal of criminal liability by applying the general prescription, there is no question of the total absolution of liability of the defendants, in the conditions in which, in all cases, civil liability is incurred in order to recover damages. At the same time, in such cases, the confiscation measures of the instruments and proceeds of the crime or the goods resulting from them remain incidental, a perspective from which it cannot be said that the public interest is neglected. The Supreme Court is required to, when solving cases related to the fight against fraud against the financial interests of the EU, fully respect the law of the Union in all its components, both from the perspective of art. 325 para. (1) of the TFEU, as well as compliance with the DFUE Charter, which has no lower value. In fact, the PIF Directive itself emphasizes, in the introductory part that substantiates it (points 28, 31), that "the deterrent effect pursued by the application of criminal sanctions requires special attention in terms of respect for fundamental rights. This Directive respects fundamental rights and the principles enshrined, in particular, by the DFUE Charter, especially the right (...) to a fair trial, the principles of legality and proportionality of crimes and punishments". Regarding the respect of fundamental rights, the High Court of Cassation and Justice found that the protection standard of the application of the more favorable criminal law (*mitior lex*), assigned to domestic law by Decision C-107/23 of 24.07.2023, is, in reality, and the standard of protection of fundamental rights in Union law, as well as the standard of protection of the ECHR, as it results from the jurisprudence invoked, circumscribed by the constitutional traditions of those states that qualify the prescription of criminal liability as an institution of substantive law. This principle is recognized at the treaty level, art. 67 of the TFEU stipulating that "the Union constitutes an area of freedom, security and justice, with respect for fundamental rights and the various legal systems and legal traditions of the member states". At the same time, art. 52 para. (4) of the Charter provides that "To the extent that this Charter recognizes fundamental rights, as they result from the constitutional traditions common to the member states, these rights are interpreted in accordance with the said traditions". Balancing the need to protect the financial interests of the EU and the respect of fundamental rights, as recognized in Union law and revealed by the aforementioned jurisprudence, without leaning in favor of one to the detriment of the other, also in relation to the legal provisions and jurisprudence mandatory from domestic

law, which respects the letter and spirit of the PIF Directive, the Convention, as well as the EU treaties and the Charter, the High Court of Cassation and Justice will retain the impact of Decisions no. 297/2018 and no. 358/2022 of the Constitutional Court, respectively Decision no. 67/2022 pronounced by the supreme court - The panel for resolving some legal issues in criminal matters. This conclusion is all the more necessary since, even without the application of penalties, the supremacy, unity and effectiveness of Union law remain safeguarded in the case, in relation to the concrete data of the present case, respectively: (i) from the date of the facts (March 2011-July 2014) until the court was notified with the indictment (December 2020), the criminal investigation bodies needed 6 years and 5 months to carry out the criminal investigation, an unreasonable term in relation to the complexity (reduced) of the cause; (ii) the damage caused to the Union budget was recovered in full, the defendants submitting proof of payment of the amount of 1,318,671 RON and interest in the amount of 48,239 RON, calculated by ANAF; (iii) the 8-year statute of limitations applied in the case was sufficient to ensure the necessary respite for judicial bodies in order to effectively combat illegal actions and prevent a risk of impunity in the case of a crime against the financial interests of the EU. Summarizing the facts of the case to the highlighted aspects, within the mentioned procedural limits and respecting the lines of interpretation drawn by European law through the jurisprudence of the CJEU, respectively of the ECtHR, the High Court found that the arguments invoked by the prosecutor's office in support of the appeal in cassation are unfounded and rejected the cassation appeal.

Relation of the case to the EU Charter

Yes, the EU Charter was invoked in the arguments of the Romanian High Court of Justice as a legally binding parameter.

Relation between the EU Charter and ECHR

The Romanian High Court of Justice considered that both the EU Charter and the ECHR are providing the same law principles.

Use of Judicial Interaction technique(s)

Consistent interpretation, disapplication of national law in favour of EU law under certain circumstances, comparative reasoning with the decisions of the EU Charter and ECHR

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The Romanian High Court of Cassation and Justice considers applicable the Decision of the High Court of Cassation and Justice no. 67/2022 and invokes the applicability of the Decisions of the Romanian Constitutional Court no. 297/2018 and 358/2022. The decision did not cite the jurisprudence of a foreign constitutional court.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The Romanian High Court of Cassation and Justice criticized the interpretation brought by the national referring court in the request for a preliminary ruling that has as consequence Decision 107-C/24.07.2023 and analysed several decisions of the European Court of Justice and the European Court of Human Rights, also the Decisions of the Romanian Constitutional Court no.

Strategic use of judicial interaction technique (purpose aimed by the national court)

The scope pursued by the Romanian High Court of Cassation and Justice when using judicial interaction techniques, was to solve a conflict of norms and of the judicial interpretation involving fundamental rights enshrined in the EU Charter and the decisions of the European Court of Justice.

Impact on Legislation / Policy

No

Notes on the national implementation of the preliminary ruling by the referring court

The Romanian High Court of Cassation and Justice applied the decision of the CJEU in the case C-107/24.07.2023 in his own principles of interpretation, and not embracing the arguments of the national referring court in the case, and in the end interpreted the decision of the CJEU in the case C-107/24.02.2023 as allowing priority to domestic sources of protection if they do not jeopardize the European legal order.

Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

Yes, the Romanian High Court of Cassation and Justice cited several case laws of the CJEU/ECtHR that are indicated in the European law resources and ECHR jurisprudence.

Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

No, the Romanian High Court of Cassation and Justice did not quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports.

Did the national court take into account national case law on fundamental rights?

N/A

If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information

The Decision of the Romanian High Court of Justice is the last instance court.

Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?

The Decision of the Romanian High Court of Justice is the last instance court.

Impact on national case law from the same Member State or other Member States

N/A

Connected national caselaw / templates

N/A

Other

N/A

(Link to) full text

[https://www.scj.ro/en/1093/Jurisprudence-
details?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=210144#highlight=##](https://www.scj.ro/en/1093/Jurisprudence-details?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=210144#highlight=##)

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History of the case: (please note the chronological order of the summarised/referred national judgments.)

N/A
