

ECJ ruling impacts Romanian statute of limitations in certain criminal cases

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This article discusses the interplay between the primacy of European Union law and the expected new practice in criminal law cases in Romania.

The following article aims to briefly introduce the ruling of the European Court of Justice (the "ECJ") regarding, among other things, the applicability of the statute of limitation in the Romanian criminal judiciary sector, after the ECJ was referred by the Brasov Court of Appeal for a preliminary ruling in this respect. Considering the recent ruling by the ECJ, the statute of limitations provisions should not apply to offences that seriously affect the financial interests of the EU, and the decisions of ECJ should apparently prevail over national law. The article highlights possible outcomes of this recent ECJ ruling by presenting certain situations in which Romanian courts or Prosecutors' offices are considering extraordinary appeals against final rulings by national courts. It remains to be seen how national courts and prosecutorial authorities will act on the ECJ ruling in question, as the whole matter is developing. Currently, the possibility of, for example, the reopening certain closed cases, the expansion of ongoing criminal cases or other different rulings and actions by the Romanian authorities appears quite high as there is yet no interpretation by the High Court of Cassation and Justice of the effects of the ECJ's ruling. In this respect, our team will closely monitor and keep track of further developments of Romanian practice in criminal law cases.

For almost a year now, Romanian criminal courts have been facing a new challenge concerning the applicability of shorter terms with regard to the statute of limitation in criminal trials, with several prosecutorial or criminal court cases becoming unprosecutable due to said shorter terms. In short, the triggering factor for this new challenge is a decision of the Romanian Constitutional Court in 2022 and a related interpretation decision of the High Court of Cassation and Justice issued towards the end of 2022. This caused some confusion and led to several interpretations in the judiciary sector from prosecutors, judges, lawyers and other participants to the justice act. Very briefly, from a practical perspective, the High Court of Cassation and Justice considered the Romanian Constitutional Court's decision as allowing for a more favourable criminal law to be applicable in the criminal cases, which led to many such cases being closed on these grounds.

Due to the fact that not all Romanian criminal courts decided to stop pending criminal trials, the Brasov Court of Appeals decided to refer some questions to the ECJ regarding a preliminary ruling on how national courts would be bound by rulings of the Romanian Constitutional Court in the interplay with the primacy of European Union law and whether national judges can be sanctioned in cases of alleged non-compliance with rulings of the Romanian Constitutional Court.

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In this respect, towards the end of July, the ECJ issued its ruling. The ECJ has specified, among others things, those situations where statutes of limitation should not apply, namely crimes concerning fraud that seriously affect the EU's financial interests, when there is a risk of impunity and with regard to the closure of a large number of lawsuits on this subject. These are the situations provided for in the PFI Directive on the protection of the EU's financial interests. Apparently, this ECJ decision does not apply to other offences under, for example, the Romanian Criminal Code or special laws, nor does it apply to purely local corruption cases. The ECJ rejected, as inadmissible, the Brasov Court of Appeal's request to give an answer on corruption offences or an interpretation of the effects of the former Cooperation and Verification mechanism Romania was subject to. The ECJ's decision also states, apparently contradictorily, that the decisions of the Constitutional Court on the statute of limitation regarding criminal liability (from 2018 and 2022) must be applied in full, regardless of the consequences, even when those consequences are the prescribing of a considerable number of criminal trials due to the statute of limitations on criminal liability.

One of the key, material points in the ECJ's decision, relevant not only for Romania, is that which relates to the statute of limitation provisions not applying for offences that seriously affect the financial interests of the EU, thus confirming the apparent prevalence of EU over national law.

There have been various immediate reactions, opinions or other echoes following this recent ECJ decision, which were probably more intense and to a greater extent than would have been expected only a month after July-August. Hence, we will briefly summarise some of these main reactions and opinions herein, together with related practical consequences and possible next steps.

For example, the specialised Anticorruption Prosecution Office in Romania has confirmed that it will continue exercising extraordinary remedies against national courts' rulings that apply the statute of limitation as a cause for the discontinuance of criminal proceedings. Furthermore, the Anticorruption Prosecution Office has stated that it salutes the ruling by the ECJ, which basically confirms that anticorruption prosecutors have acted within optimal parameters and encourages Romanian prosecutors to continue acting with determination in their cases.

At the same time, the ECJ's decision will also impact ongoing cases. Furthermore, there are also those who believe the national courts will extend the recent ECJ's ruling to crimes other than those affecting the EU's financial interests as well. Should this come to pass, it could lead to inconsistent interpretations and possibly contradicting court decisions.

Moreover, certain parties are of the opinion that the ECJ decision would have no effect on the cases that are ultimately closed based on the expiration of the statute of limitation, regardless of their subject matter (including those affecting the EU's financial interests). Additionally, there is no consensus among the various opinions regarding the application of the ECJ decision and whether decisions by Romanian criminal courts in finalized cases could possibly be subject to extraordinary appeals.

While considering possible new interpretations and procedural actions in tandem, several prosecutorial offices have declared they are analysing various options and remedies under the recent ECJ decision. For example, the Prosecutor's office attached to the High Court of Cassation and Justice recently declared that they will challenge one of the finalised court rulings in the case of an official accused, among other things, of corruption offences. The criminal trial was terminated due to the expiration of the statute of limitation. Also relevant in this context, prosecutors of the specialised Anticorruption Prosecution Office have declared that they are looking for ways to file extraordinary appeals, following the ECJ's recent decision on the statute of limitation.

Meanwhile, and also relevant, following the ECJ's ruling, the Prosecution Office attached to the High Court of Cassation and Justice referred the matter to the High Court of Cassation and Justice for a ruling on how national

courts should apply the ECJ's decision regarding the statute of limitation in criminal cases. Such a clarificatory ruling is expected to contribute to the development of a consistent practice on how national courts rule on this issue, thus avoiding inconsistent and possibly contradicting practices.

As preliminary conclusions at this stage, it can already be seen that one of the points raised by the ECJ decision concerns, looking forward, cases involving offences against the EU's financial interests (such as those involving EU funds). In this area, until a clarificatory ruling is issued, a divergent practice in criminal courts cannot be overruled, as these courts may apply, for example, (i) the generally valid principles of legality and more favourable criminal law (also recognized by the ECJ in its ruling) and will consider that during certain periods between 2014 and 2022, there was no special statute of limitation (this being the more favourable criminal law theory), while (ii) other courts may apply the principle of supremacy of EU law and the ECJ decision (which sets forth, in essence, that in cases involving offences against the financial interests of the EU there was an interruption of the statute of limitation period between 2014 and 2018). One of the practical consequences would be different ways of calculating the expiration of the statute of limitation.

Such matters and related points are to be assessed further, based on evolving opinions and new contemplated practices from both prosecutorial offices and relevant courts looking into these different angles. Our team has already seen some of such angles in certain cases these months. Such different angles definitely merit monitoring. As such, *the state of play* in this regard is to be continued...

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