A. Refusal to apply the judgments of the Court of Justice of the European Union (judgment of 24 July 2024 in case C-107/23 Lin (PPU) and ordinances of 9 January 2024 in cases C-75/23 and C-131/23)

1. Cases in which the relevant judgments of the Court of Justice were not applied without any kind of motivation

Thus, by way of example, in such a criminal decision – issued in a case involving tax evasion crimes with damage of approx. 40,000 euros and whose trial had even been suspended until the settlement of the cases pending before the Court of Justice – no reference is made to the Lin judgment or to the subsequent ordinances related to it, ordering the termination of the criminal proceedings, as a result of the occurrence of the time-barring of criminal liability, by invoking the decisions of the constitutional court in the matter (***criminal decision no. 47/23.01.2024 Alba Iulia Court of Appeal;*** see, for the same purpose, ***criminal decision no. 697/04.08.2023 Alba Iulia Court of Appeal*** regarding crimes provided for by Art. 18^1 par. 1 of Law no. 78/2000 with a damage of over 50,000 euros).

Further, some of these courts have held that ***the relevant judgments of the Court of Justice are inapplicable in domestic law during the criminal trial, since "there is no mandatory Community legislation in the matter of statute of limitations" to be interpreted by the Court of Justice and that "tax (VAT) evasion offenses cannot be considered to be likely to directly harm the financial interests of the Union".***

In this regard, these courts held that "The decision does not concern the compatibility of Union Law with the application of the statute of limitations in the case of tax evasion, corruption or in the case of crimes under the PIF Directive" and that "The judgment of the Court of Justice of the Union European does not interpret the mandatory Community legislation for the Member States in terms of limitation (provision by treaty, regulation, directive, decision), since such a Community provision does not exist, it cannot be applied to the detriment of decisions no. 297/2018 and no. 358/2022 of the Constitutional Court, which interpreted the rules of domestic law in the matter of limitation and which are strictly regulated by national legislation, without interference with Community law, as shown above.".

Moreover, in the same domestic decision, it was noted that "The judgment delivered under the preliminary ruling procedure regulated by Art. 267 of the Treaty on the Functioning of the European Union is binding for the Member States only in the situation where it interprets the relevant Community law to the domestic situation that is the basis of the dispute that was brought to trial before the national courts. In this case, Decision no. 297/2018 and Decision no. 358/2022 of the Constitutional Court and Decision no. 67/2022 of the High Court of Cassation and Justice are applicable, considering that the limitation of criminal liability is not the subject of a mandatory and unitary regulation at the Community level so as to be applied in our domestic legislation and jurisprudence in relation to the provisions of Art. 291 par. 1 of the Treaty on the Functioning of the European Union, which stipulates that "the Member States shall adopt all measures of national law necessary to implement legally binding Union acts", which is not the case here, as there is no contradiction between the national legislation and the legislation of the European Union in the matter of time-barring of criminal liability, which is only the subject of national regulation. Therefore, the procedural documents drawn up between 1 February 2014 and 25 June 2018 interrupted the time-barring of criminal liability, but this is not relevant, if the Criminal Code in force between 25 June 2018 and 30 May 2022 represents the more favourable criminal law. Consequently, we consider that the CJEU judgment should not in any way impact the application of the Criminal Code reconfigured by Decisions no. 297/2018 and 358/2022 of the Constitutional Court, nor the interpretation of Decision no. 67/2022 of the High Court of Cassation and Justice." (***criminal decision no. 925/26.10.2023 Timişoara Court of Appeal***).

In the same regard, by another domestic decision, it was held that tax evasion crimes do not affect the financial interests of the EU, noting that "the defendants are accused of committing tax evasion crimes (VAT) as a result of operations considered fictitious (regarding purchases of goods

and supply of services) based on invoices issued by "ghost" companies and which, recorded in the accounting, constituted deductible expenses, for the purpose of evasion by the beneficiary companies of fulfilling their fiscal obligations owed to the Romanian state. As such, these acts cannot be considered to be likely to directly damage the financial interests of the Union." (***criminal decision no. 25/15.01.2024 Oradea Court of Appeal***).

In the same way, it was argued that ***tax evasion offenses regarding the VAT regime do not affect the financial interests of the EU, invoking the lack of a sufficiently clear connection with the EU law and the possibility to recover the damages anyway by settling the civil action.***

These courts thus held that "under these coordinates, the change in the field of interpretation and application of the phrase 'crimes affecting the financial interests of the European Union' and its extension to tax evasion crimes that are not generated by fraudulent behaviour that damages or could prejudice the Union's financial interests would clearly lack the necessary precision to avoid arbitrariness and, thus, would be incompatible with the standards of a rule of law. (…)

The court of appeal considers, however, that in the cases regarding tax evasion crimes of an exclusively domestic nature, which target only the budget of the Member State, including in the form of non-payment of the VAT owed, there is not a sufficiently clear connection with the European Union law.

Thus, the Court finds that in all the CJEU judgments cited by the Public Ministry (Euro Box Promotion and others, Judgment of 5 December 2017, M. A. S. and M. B, Judgment of 5 June 2018, Kolev and others, Taricco 1 and 2, etc.), the Court of Justice of the European Union referred in its analysis only to fraud and any other illegal activities affecting the financial interests of the Union, or to corruption crimes, in general.

Under these circumstances, the court of appeal finds that the crimes of tax evasion, including those regarding the non-payment of VAT, which affect exclusively the financial interests of the Member State, obviously, are neither likely to affect the financial interests of the European Union, nor do they constitute corruption offences. (…)

As it follows from the circumstances held by the CJEU, the appeal court finds – in this case – that *in order to hold that a measure regarding tax evasion crimes against the financial interests of the Member State also affects the financial interests of the European Union,* it is required that *the said measure prevents the effective and full collection of own resources*. (…).

However, strictly related to tax evasion crimes consisting in non-payment of VAT, it is found that, although the criminal liability for committing the crime is time-barred, the civil part of the case remains within the jurisdiction of the criminal court, which can order the defendant, if the legal conditions are met, to pay compensation to the state.

As such, the fact that criminal liability has expired for the crime of tax evasion does not prevent the criminal court from ordering the defendant to pay the VAT due to the state and subsequently, the tax authorities have the possibility to recover the amounts of money in question, by any means, including enforcement.

Consequently, in essence, *the time-barring of criminal liability does not prevent the Romanian state from recovering the damage caused to the general budget through the fraudulent non-payment of VAT*." **(*criminal decision no. 1627/14.11.2023 Bucharest Court of Appeal*).**

The same argument, in the sense that ***tax evasion crimes regarding the VAT regime do not affect the financial interests of the EU,*** was held with the specification that "the defendant was investigated for committing tax evasion crimes, crimes which, although they concern the VAT regime, appear to have been committed prior to the adoption of the PIF Directive. Also, the investigated crimes caused damage exclusively to the national budget. The court cannot accept the interpretation that any crime affecting the state budget or, lato sensu, a public patrimony, indirectly also affects the financial interests of the European Union, such an extensive interpretation disregarding the limits of applicability of the principle of supremacy European Union law" (***criminal decision no. 1463/24.11.2023 Bucharest Tribunal*).**

In a decision of inapplicability, it was also held that "since the CJEU did not impose the obligation to disapply the decisions of the Constitutional Court by which the national legislative

provisions regulating the causes of interruption of the limitation period in criminal matters were invalidated, it means that these decisions will be applied by the national courts, this reasoning being reinforced by the statements at the end of the reply" (***criminal decision no. 1242/20.12.2023 Constanța Court of Appeal***; the same argument can also be found, for example, in ***criminal decision no. 1372/13.09.2023 Cluj Court of Appeal***).

Finally, such ***courts invoked, in the light of the principle of the legality of criminal offences, that the application of the Court of Justice's judgments only in certain matters (for protecting the financial interests of the EU and fighting corruption) determines a discriminatory treatment against other persons accused of other crimes subject to the state of limitations.***

They showed that "the legality of criminal offences guarantees that, for similar cases, by applying the criminal law, there will be no discrimination or unequal legal treatment.

It is found that, by capitalizing on some causes of interruption of the limitation period of criminal liability only in the matter of corruption, the premises are created for the different application of the legal treatment of the concurrence of criminal laws over time, depending on the nature of the crime.

However, the nature of the crime is capitalized, in terms of the hierarchy of the damaged social values and the seriousness of the damage caused to them, by the rules of the special substantive criminal law, the institutions of general criminal law being common to all crimes, and the exceptions to this rule are established by the legislator (e.g., the non-applicability of statutory limitation of certain crimes).

To give a different solution to a concurrence of criminal laws over time, considering the nature of the crime, but in the absence of a legal provision, which is the fruit of a criminal policy of the state, means jurisprudentially applying a different legal treatment to recipients of the law in identical situations.

However, according to Art. 14 of the ECHR, a citizen must be guaranteed the right to a fair trial (protected by Art. 6 ECHR) and the observance of the principle of the legality of the penalty (protected by Art. ECHR) regardless of the nature of the crime committed." ***(criminal decision no. 143/A/12.02.2024 Bucharest Court of Appeal***).

2. <u>Cases of refusal to restrict the application of the national standard regarding *mitior lex*</u>

In a jurisprudential orientation, ***the national standard regarding mitior lex cannot be restricted, so that Art. 155 par. 1 of the Criminal Code cannot be interpreted in the light of preliminary rulings, as preventing the application in its more favourable form, retroactively in favour of the accused, as a more favourable criminal law (mitior lex).***

Under this aspect, ***some courts have expressly ruled that they refuse to apply the Lin judgment during the criminal trial as they cannot disapply the national standard of protection, considering the principle of the legality of criminal offences and penalties, as protected in Romanian law, under the aspect of its requirements regarding the predictability of the criminal law, including the regime of limitation of criminal liability.***

These courts held that "The judgment of 24 July 2023, issued in case C 107/23 PPU, the Court of Justice of the European Union conditions the application of the rule resulting from the content of the judgment, on the fact that the national courts ensure the observance of the fundamental rights of the defendants arising from the principle of the legality of criminal offences and guaranteed penalties.

However, as it follows from the above, the constitutional tradition of Romania is in the sense that the *institution of the limitation of criminal liability was qualified as belonging to the substantive criminal law, being considered an institution of substantive law and, as it produces effects on the regime of criminal liability, it is subject to the requirements deriving from the principle of the legality of criminal offences and penalties.*

Therefore, the national standard of protection falling within the requirements deriving from the principle of the legality of criminal offences and penalties is superior to that established by the ECtHR

jurisprudence, including in the scope of the principle of legality of criminal offences and penalties and the rules on the limitation of criminal liability.

Consequently, the court of appeal, *by majority*, finds that in order to ensure the observance of the fundamental rights guaranteed by Art. 49 of the Charter of Fundamental Rights of the European Union, respectively of the principle of legality, in the scope of which the institution of the limitation of criminal liability falls, it is necessary to apply the national legislation in the existing form as a result of decisions no. 297/2018 and no. 358/2022 of the Constitutional Court, as well as Decision no. 67/2022 of the High Court of Cassation and Justice." (***criminal decision no. 988/A/25.10.2023 Pitești Court of Appeal***, in majority opinion).

Further, other courts have similarly pointed out that "in the ongoing criminal trial (unsettled by a final decision), the interpretation according to which the legal procedural documents carried out until 25 June 2018 interrupt the limitation period for criminal liability infringes the principle of the legality of criminal offences and penalties, as protected in the Romanian law, under the aspect of its requirements regarding the predictability and precision of the criminal law, including the regime of limitation of criminal liability", a context in which it was mentioned that "The judgment of 24 July 2023 maintains the same jurisprudential line" with the Taricco II Judgment, thus concluding that "it cannot comply with the obligation mentioned in the operative part of the CJEU judgment of 24 July 2023, in the *Lin* case, in the sense of removal of the national standard of protection regarding the principle of the retroactive application of the more favourable criminal law that allows the calling into question of the interruption of the limitation period for criminal liability through procedural documents occurring before the date of 25 June 2018, when the Constitutional Court decision no. 297/2018 was published", considering that "if it would disapply the national standard of protection regarding the principle of retroactive application of the more favourable criminal law (*lex mitior*) which allows the calling into question of the interruption of the limitation period of criminal liability through procedural documents occurring before the date of 25 June 2018, it would infringe the principle of the legality of criminal offences and penalties, therefore it cannot comply with such an obligation, even if it involves maintaining a national situation that is incompatible with EU law" (***criminal decision no. 1263/18.12.2023 Constanţa Court of Appeal***).

Finally, among the arguments of legal practice – in a concurring opinion – ***the application of the Lin judgment was refused on the grounds that the Bosphorus presumption was violated due to the obviously deficient nature of the protection of the right provided by Art. 49 of the Charter of Fundamental Rights of the European Union in relation to the standard in Art. 7 of the European Convention of Human Rights.***

In this concurring opinion, it was held that "in accordance with the conventional block, the rules regarding the limitation periods do not define the crimes and related penalties so that possible legislative changes that extend a limitation period that has not expired, are not considered as a violation of Art. 7 of the Convention. Such a violation is nevertheless applicable when the criminal liability was "*reactivated*" after the expiry of the initial limitation period, considering that, in such situations, the requirements of legality (*nullum crimen, nulla poena sine lege*) and foreseeability are disregarded.".

Concretely, in the criminal case, with regard to the "***reactivation of criminal liability***", it was held that "the application of the Judgment delivered on 24 July 2023 in the case C-107/23 PPU the Court of Justice of the European Union in this case would lead to the delivery of a decision to convict the defendants, given that the defendant A.M., when he requested the continuation of the criminal trial, according to Art. 18 of the Criminal Procedure Code, assumed one of the two potential decisions allowed by Art. 396 par. (7), (8) of the Criminal Procedure Code, respectively a decision of acquittal or of termination of the criminal proceedings, and the defendant Ionescu M.A. did not request such a continuation. It is true that the taking of evidence as a result of the request to continue the criminal proceedings can lead to the establishment of a different factual situation, with consequences regarding the legal classification of the act and thus of the duration of the limitation period for criminal liability, therefore the delivery exclusively of the two previously mentioned solutions is not guaranteed, but in

this case, neither the factual situation, nor the legal classification of the act referred for judgment have undergone changes." (***143/A/12.02.2024 Bucharest Court of Appeal***).

Within the same type of solution, some domestic courts have concluded that the ***principle of legality of criminal offences and penalties requires in domestic law the retroactive application of the more favourable criminal law, without any exception.***

These courts emphasized that "European Union law does not require the national court not to apply the Constitutional Court Decisions no. 297/2018 and 358/2022, which are not likely to lead to a violation of the obligations assumed by the Romanian state. The legality of criminal offences and penalties is a fundamental principle both in domestic law and in the European Union law and in the jurisprudence of the European Court of Human Rights. This implies accessibility and predictability requirements regarding the definition of the criminal offences and the establishment of the penalty (par. 104 of the CJEU Judgment – 107/23 of 24 July 2023; ECHR cases Cantoni v. France, par. 29, Kafkaris v. Cyprus, par. 124, Del Rio Prada v. Spain, par. 91)." (***criminal decision no. 25/15.01.2024 Oradea Court of Appeal***) or that "the principle of legality requires the judge to proceed with the strict interpretation of the criminal law and not to apply retroactively the provisions of the substantive criminal law, except for the more favourable criminal law." (***criminal decision no. 652/29.11.2023 Tg. Mureș Court of Appeal***; in the same sense, ***criminal decision no. 107/29.01.2024 Bucharest Court of Appeal***).

Further, it was pointed out that "in the ongoing criminal trial (unsettled by a final decision), the interpretation according to which the legal procedural documents carried out until 25 June 2018 interrupt the limitation period for criminal liability infringes the principle of the legality of criminal offences and penalties, as protected in the Romanian law, under the aspect of its requirements regarding the predictability and precision of the criminal law, including the regime of limitation of criminal liability. Thus, in Romanian law, in doctrine and jurisprudence, the limitation of criminal liability with all its components (period, interruption, suspension) is considered to be an institution of material criminal law and is therefore governed by the principle of the more favourable criminal law, provided for in Art. 15 par. (2) of the Romanian Constitution." (***criminal decision no. 75/19.01.2024 Bucharest Court of Appeal***; in the same sense, also see, for example, ***criminal decision no. 836/19.09.2023 Iaşi Court of Appeal***; ***criminal decision no. 1684/20.10.2023***; ***criminal decision no. 1322/06.09.2023 Bucharest Court of Appeal***; ***criminal decision no. 1753/26.10.2023 Craiova Court of Appeal***).

In conclusion, these courts pointed out that if they received the request "*to return to the practice before the Constitutional Court issued decision no. 358/09.06.2022, it would cause the collapse of all the principles governing the criminal trial regarding the legality of the penalty, the binding effect of the Constitutional Court decisions, the equality before the law of all those who are tried in criminal trials, etc."* (***criminal decision no. 139/08.02.2024 Bucharest Court of Appeal*).**

Other courts have considered that the ***duration of the general limitation periods in domestic law meet the European standard in the matter anyway, so it is not necessary to apply the national legal provisions containing special periods (cases of interruption of the limitation period), which were declared unconstitutional.***

In this regard, it was shown that "considering the duration of these limitation periods, it cannot be considered that, by applying the principles of the more favourable criminal law following the Constitutional Court Decisions and admitting a duration almost double as compared to the minimum Union standard, this leads to a violation of the European Union law" (***criminal decision no. 652/29.11.2023 Tg. Mureş Court of Appeal***; in the same sense, also see, for example, ***criminal decision no***. ***836/19.09.2023 Iaşi Court of Appeal***; ***criminal decision no. 1603/20.11.2023 Suceava Court of Appeal***; ***criminal decision no. 107/29.01.2024 Bucharest Court of Appeal***).

Next, there were ***solutions that addressed all these arguments and concluded – in the light of "omissions and non-compliant information" from the preliminary reference in the Lin case "on the component of the effects of the Constitutional Court decisions" – in the sense of the impossibility of a contra legem interpretation of the domestic law.***

Thus, these courts decided as follows:

"The Court considers that, in this case, the arguments invoked by the High Court of Cassation and Justice regarding the applicability of the Judgment issued by the Court of Justice of the European Union in case C-107/23 PPU (Lin) in the case settled by decision no. 450/RC of 7 September 2023, are entirely applicable.

Indeed, from the considerations of this decision of the Luxembourg court, it follows that the information and explanations of the referring court contained omissions and non-compliant information that influenced, as a whole, the process of interpretation on the component of the effects of the Constitutional Court decisions, respectively (i) the explanations regarding the effects produced by a decision of unconstitutionality in domestic law (par. 105-106, 113 of the request for a preliminary ruling); (ii) offering its own interpretation, isolated and contrary to the mandatory jurisprudence of the High Court of Cassation and Justice (decision no. 67/2022) and of the Constitutional Court, which denied the nature and legal regime of the analysed situation, as being a succession of criminal laws over time, with the inherent application of the *more favourable criminal law* (par. 95-06, 105, 121 of the request for a preliminary ruling); (iii) the omission to provide all the elements that configure the nature and regime of the rules regulating the legality of criminal offences and penalties in our law.

Also, the High Court of Cassation and Justice held, with applicable effects in this case, that:

(i) the effects of the decisions of the Constitutional Court are applied not only to the legal relations to arise after their publication in the Official Gazette (*facta futura*), as explained by the referring court, but also to *pending* legal situations, as the constitutional court has constantly held in its jurisprudence, a decision admitting the objection of unconstitutionality applying to the cases pending before the courts at the time of its publication, in which the provisions in question are applicable (...), since what is relevant is that the legal relationship governed by the provisions of the law that was declared unconstitutional is not definitively consolidated*;*

(ii) the non-compliant information provided by the referring court regarding the qualification of the rules that regulate the legality of criminal offences and the legality of criminal penalties, the activity of the criminal law and the adjacent principles, also led to ignoring the effect of the extractive (ultraactive/retroactive) application of the more severe criminal law, basic principles of the EU law and the jurisprudence of the European Court of Human Rights.

Thus, between 25 June 2018 – the date of publication in the Official Gazette of decision no. 297/2018 of the Constitutional Court, whereby the provisions of Art. 155 par. (1) of the Criminal Code regarding the interruption of the limitation period was declared unconstitutional and the date of 30 May 2022 – the date of publication in the Official Gazette of the Government Emergency Ordinance no. 71/2022, *de lege lata* there was no case of interruption of the criminal liability limitation periods, therefore the provisions of Art. 155 par. (1) of the Criminal Code, as amended by the Government Emergency Ordinance no. 71/2022, can only be applied in relation to the acts committed starting from the date of publication of this emergency ordinance in the Official Gazette, namely 30 May 2022, because these provisions have the nature of a more severe criminal law, therefore they cannot be applied retroactively.

In the jurisprudence of the Court of Justice of the European Union, it has been held that the *principle of legal certainty* requires, on the one hand, that the rules of law be clear and precise and, on the other hand, that their application be predictable for litigants, especially when they can produce unfavourable consequences (the judgments delivered in cases C-72/15, C-156/21), in case C-42-17 (Tarrico 2) being held that the principle of non-retroactivity of the criminal law specifically prevents a court from being able, in the course of a criminal procedure, either to penalize behaviour that is not prohibited by a national rule adopted before the imputed crime was committed, or aggravate the regime of criminal liability of those who were the subject of such proceedings. At point 60 of the recitals of the latter decision, it was noted that, by fulfilling the obligation to disapply the provisions of domestic law that allowed the establishment of the statute of limitations (the obligation previously established by the CJEU in the Tarrico 1 case), the principle of the legality of criminal offences is violated, so that *penalties might be imposed on those persons which, in all likelihood, would not have been imposed if those provisions had been applied. Those persons could thus be made subject,*

retroactively, to conditions of criminal liability that were stricter than those in force at the time the infringement was committed.

Also, Article 7 of the European Convention of Human Rights and Fundamental Freedoms absolutely prohibits the retroactive application of criminal law when it is done to the disadvantage of the person in question, as was shown in the judgment issued in the *Scoppola v. Italy* case, the obligation to apply, from several criminal rules, the one whose provisions are more favourable to the accused person, constitutes a clarification of the rules regarding the succession of criminal laws, which is in accordance with another essential element of Art. 7, namely the predictability of penalties.

Moreover, in the Judgment issued in the Taricco II Case, the CJEU showed that "it is the legislature's task to ensure that the national rules on limitation in criminal matters... are not more severe for accused persons in cases of fraud affecting the financial interests of the Member State concerned than in those affecting the financial interests of the European Union". Therefore, the protection of the financial interests of the European Union is considered to be fulfilled when the national law provides for equal limitation periods for criminal offences affecting national interests and criminal offences affecting the financial interests of the European Union.

As such, the Court considers that it cannot disapply legal provisions or mandatory decisions of the Constitutional Court or of the High Court of Cassation and Justice, as it cannot give its own legal value or actual content to notions such as a *systemic risk of impunity*, or *serious fraud against the financial interests of the European Union*, or *cases whose complexity requires longer investigations by the authorities* if they do not have a legal regulation, because in such a situation, the path to arbitration would be opened, by applying a double standard of sanctioning regime, which would be incompatible with the principles on which the rule of law is based.

This conclusion is all the more necessary since, even without the application of penalties, the supremacy, unity and effectiveness of European Union law remain safeguarded in the case, in relation to the concrete data of the present case, respectively from the date of the facts (*November 2007-November 2008*) and until the indictment was sent to the court (*May 2018*), the criminal prosecution bodies needed approximately 10 years to carry out the criminal investigation, an unreasonable period in relation to the complexity of the case which did not require the performance of longer procedural acts.

Also, the 8-year limitation period applied in the case was sufficient to ensure the necessary time for judicial bodies in order to effectively combat the illegal actions and prevent the risk of impunity in the case of a crime against the financial interests of the European Union.

In other words, the Court considers that a general limitation period of 8 years, as in this case, could not entail a systemic risk of impunity that would justify the removal of the national legislation, since it is a period that is otherwise compatible with the effective protection of financial interests of the European Union, in relation to Article 325 paragraph (1) TFEU and Art. 12 of the (EU) Directive of the Parliament and the Council of 5 July 2017.

Acting in accordance with the request from the prosecutor's office, namely maintaining the decision to terminate the criminal proceedings with regard to the tax evasion crimes, provided for in Art. 8 par. (1) of Law no. 241/2005, because, according to the 1969 Criminal Code, the special limitation period for criminal liability has expired and applying the new law in the case of the crime of money laundering would combine provisions from two successive laws.

At the same time, the Court rules, on the one hand, that the non-application in this case of decisions no. 297/2018 and no. 358/2022 of the Constitutional Court and no. 67/2022 of the High Court of Cassation and Justice – Panel for the settlement of legal issues in criminal matters only with regard to money laundering crimes, and not also tax evasion crimes, provided for by Art. 8 par. (1) of Law no. 241/2005, although the latter affected the common VAT system, would lead, paradoxically, to an arbitrary solution.

On the other hand, the Court considers that, in this case, we cannot speak of a systemic risk of impunity given that the national legislation provides for a criminal liability limitation period of 8 years and 10 years, respectively, which are much longer than minimum periods provided by Art. 12

of the PIF Directive (5 years, which can be reduced to 3 years provided that it can be interrupted or suspended in the case of specific acts), and the accused persons are ordered to pay the damage caused.

The Court considers that European Union law does not require national courts to disapply Decisions no. 297/2018 and no. 358/2022 of the Constitutional Court, or legal provisions or national practices under any circumstances, the Court of Justice of the European Union, although it accepts the possibility of giving national law an interpretation in accordance with European Union law, even by moving away from the jurisprudence of a higher court, limits this possibility, however, to the prohibition that this is done by *contra legem* interpretations of national law. However, as it was shown, a decision of the Constitutional Court declaring Art. 155 of the Criminal Code unconstitutional is a *legislative amendment* also in the sense of the European Union law." (***criminal decision no. 24/A/15.01.2024 Oradea Court of Appeal***).

Finally, there were courts that claimed that ***the application of European law affects the sovereign and independent nature of the Romanian state.***

Thus, it has been held that "the application of the European law could not lead to the violation of the Romanian Constitution, the observance of which ensures, in fact, the sovereignty of the Romanian state, therefore the application of the constitutional principle of legality, correlated with the principle of the application of the more favourable criminal law, the principle of equality before the law and, respectively, the principle of applying the higher protection standard of human rights to the detriment of the European one, is required, as previously emphasized, precisely in consideration of the need to observe the sovereign and independent nature of the Romanian state" (***criminal decision no. 107/29.01.2024 Bucharest Court of Appeal***).

3. <u>Refusal to assess the systemic risk of impunity</u>

In an orientation of judicial practice, it was held that ***the systemic risk of impunity cannot be assessed by the court or must be assessed concretely by each court for each case brought for judgment.***

In order to assess in this way, some national courts have established ***the general non-existence of a systemic risk of impunity***, noting that "the systemic risk of impunity of the corruption acts can only be found at the level of statement" (***criminal decision 1343/01.09.2023 Cluj Court of Appeal***).

Other courts have specified that ***there are no "preestablished criteria" for assessing the systemic risk of impunity***, thus ruling that "as long as the law does not contain preestablished criteria that define the notions of <*systemic risk of impunity*>, <*significant number of cases*>, which the CJEU judgments consider as a prerequisite situation for disapplying the Constitutional Court decisions, the person accused of committing a criminal act is not specifically allowed to know the extent of their criminal liability, respectively under what conditions the limitation period is interrupted, for the simple reason that, ante factum, the citizen cannot foresee what is the limitation period for criminal liability, in case of committing certain crimes.

These notions are, therefore, external and subsequent to the behaviour of the addressee of the rule and, concretely, the passivity of the state and the vulnerability of a system cannot be imputed to the citizen, nor can an interpretation of these notions be offered to the disadvantage of the accused person. The determination of these notions that have effects in terms of the extent of criminal liability must be carried out by using a common and accessible language (both for the addressee of the rule and for the courts required to apply it), so as to avoid the risk of extension of law by analogy and by misunderstanding the rules of incrimination or prosecution. If technical terms are used or terms with a different meaning from the common one or even sufficiently vague or interpretable depending on elements that are external to the addressee's behaviour or the discretion of the case judge in a specific case, the legislator must establish its scope. In the absence of these criteria that ensure the standard of <understanding> and predictability of the rule and the notions that must be taken into account by the courts, according to the ECHR constant jurisprudence, the violation of Art. 7 of the Convention is established.

According to Article 371 of the Criminal Procedure Code, judgment is limited to the acts and the persons shown in the referral to the court. The notion of <acts and persons shown in the referral>

does not include the assessment of a systemic risk of impunity. This assessment requires access to data and information that are not subject to the case.

The notion of <systemic risk of impunity> can involve the analysis of the potential danger that a certain conduct of a legal system can represent for the system itself, therefore, it is a relative notion, the extent of which can vary depending on multiple factors, such as <the significant number of cases> or the evolution of a judicial practice over a certain period of time. Viewed in this way, the assessment of the notion of <systemic risk of impunity>, in a concrete case, exceeds the limits and the subject of the referral to the court, and the conduct of the courts required to define such a variable and vague notion, with the consequence of disapplying the rules established by law (regarding, for example, the conditions of criminal liability and its limitation) is inconsistent with the Constitution since it violates the principle of separation of powers, established by Article 1(4) of the Romanian Constitution, as well as the provisions of Article 61(1), according to which the Parliament is the only legislative authority of the country.

By virtue of the Constitution, the Parliament and, by legislative delegation, under the conditions of Article 115, the Government, have the power to establish, amend or repeal legal rules with general application. Courts do not have such competence, as their constitutional mission is to achieve justice – Article 126(1) of the Basic Law, i.e. to settle, by applying the law, disputes between legal subjects regarding the existence, extent and exercise of their subjective rights.

It is found that, assessing that there was a cause for the interruption of the criminal liability limitation period as a result of the <*systemic risk of impunity*>, the legitimization of the interruption of the limitation period through documents that are not communicated to the suspect or the defendant leads to the creation of a state of perpetual uncertainty for the addressee of the criminal law, due to the impossibility of a reasonable assessment of the time interval in which they can be held criminally liable for the acts committed.

Thus, the desideratum of avoiding the creation of a <systemic risk of impunity> by leaving some categories of crimes unsanctioned (the scope is also difficult to establish, given the wording used – crimes that affect the financial interests of the Union or <corruption, in general and especially high-level corruption, especially within local administration>) will essentially lead to the creation of a certain result and not just a risk, the result being a systemic violation of fundamental human rights." (***criminal decision no. 143/A/12.02.2024 Bucharest Court of Appeal***).

Furthermore, other courts ***have concretely assessed the systemic risk by referring to the sufficiency of the general limitation periods and to exceeding the reasonable duration of the trial***, specifying that "The Court of Justice of the European Union establishes a faculty, and not an obligation, for the national courts, and it is up to the latter to assess concretely whether the systemic risk of impunity was caused by the previously presented decisions of the Constitutional Court and the High Court of Cassation and Justice" (***criminal sentence no. 1463/24.11.2023 Bucharest Tribunal***). Thus, these courts held that the "systemic risk of impunity mentioned by the Prosecutor's Office and referred to by the ECHR requires an assessment in concreto and not in abstracto. Equally, it should be taken into account that, according to the ECHR jurisprudence, a criminal trial, in which the criminal prosecution lasted 6 years (2015-2021) and the limitation period for the crime of abuse of office is 8 years, does not meet the requirement of a reasonable term as a guarantee of the right to a fair trial." (***criminal decision no. 1555/27.09.2023 Craiova Court of Appeal***) and that "the duration of the limitation periods is double the minimum Union standard" (***criminal decision no. 1603/20.11.2023 Suceava Court of Appeal***; also see the ***criminal decision no. 107/29.01.2024 Bucharest Court of Appeal***; ***criminal decision no. 112/29.01.2024 Bucharest Court of Appeal***; ***criminal decision no. 652/29.11.2023 Tg. Mureş Court of Appeal***; ***836/19.09.2023 Iaşi Court of Appeal***; ***criminal decision no. 1684/20.10.2023 Craiova Court of Appeal***; ***criminal decision no. 1322/06.09.2023 Bucharest Court of Appeal***; ***criminal decision no. 1627/14.11.2023 Bucharest Court of Appeal***).

Other courts considered that ***the systemic risk of impunity cannot be assessed due to the lack of evidence regarding the multitude of solutions issued in such cases***, ruling that "the evidence submitted in the pending case is not such as to allow the Court of Appeal to know all the criminal

cases and final decisions covered by the criminal legislation in question, as it was reformed by the two decisions of the constitutional review court and, even less, to establish the existence of a risk of impunity at the level of the entire national judicial system" (***criminal decision no. 1242/20.12.2023 Constanţa Court of Appeal***).

> In the same sense, the risk of impunity was assessed in concrete terms in the case in question, noting that "the concrete circumstances of the case, while noting that, although in the present case, seven defendants were sent to court for committing VAT tax evasion crimes and the general limitation period for criminal liability expired only for one of them, the court of appeal, *by majority*, finds that there is no risk, in the present case, for the application of Decisions no. 297/2018 and no. 358/2022 of the Constitutional Court, as well as Decision no. 67/2022 of the High Court of Cassation and Justice, to have the effect of prescribing criminal liability in a large number of cases" (***criminal decision no. 988/A/25.10.2023 Pitești Court of Appeal***, in majority opinion).

In conclusion, it was also concluded by these courts that ***the systemic risk of impunity can be assessed in the entire specific legislation, but only by referring to the need to respect fundamental human rights***, in the sense that "there are sufficient instruments available to the judicial bodies to fulfil the objectives of removing a systemic risk of impunity in cases that are of interest to the EU, namely those of corruption or fraud affecting the financial interests of the Union, but which entail the observance of all recognized human rights and fundamental freedoms. In other words, the fulfilment of a national or regional, or even European criminal policy strategy cannot justify the violation of some fundamental principles and individual rights, such as the principle of legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), which also integrates the institution of limitation" (***criminal decision no. 1372/13.09.2023 Cluj Court of Appeal***).

4. Erroneous application of the Lin Judgment of the Court of Justice depending on the value of the damage

In an orientation of the jurisprudence, it was held that the ***Lin Judgment of the Court of Justice applies only in the case of fraud with a threshold of more than 50,000 euros, provided for by Art. 2 par. 1 of the PIF Convention.***

In order to assess this way, some national courts have held that ***the serious crime within the meaning of the PIF Convention is only the one incriminated under the law of the Member State having a damage of more than 50,000 euros.*** Thus, it was mentioned that "with regard to the notion of serious fraud, it is found that this must be established, taking into account the considerations of the mentioned CJEU judgment (paragraph no. 85 of the judgment), by referring to the provisions of Art. 2 of the Convention on the protection of the European Communities' financial interests, according to which each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1 (1), are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition, it being understood that *serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding 50,000 [euros]."* (***criminal decision no. 990/22.12.2023 Braşov Court of Appeal***; as well as ***criminal decision no. 885/Ap/23.11.2023 Brașov Court of Appeal; criminal sentence no. 339/15.11.2023 Argeş Tribunal***).

5. Erroneous application of the Ordinance of 01.09.2024 of the Court of Justice in case C-131/23 regarding the interpretation of Commission Decision 2006/928/EC of 12.13.2006 (CVM)

In an orientation of judicial practice, it was held that ***the CVM decision no longer applies considering that it was abrogated and that the order of the Court of Justice is only applied in cases involving European funds and high-level corruption, and not in any causes of corruption.***

Thus, there were ***some courts that considered that the incidental judgments of the Court of Justice do not apply in corruption cases that do not involve European funds.***

In order to consider this way, the national courts held that "the acts of corruption allegedly committed by the defendant in submitting for approval to the Municipal Commission for Systematization of Traffic the request for the issuance of access authorizations for heavy vehicles within the area of the Baia Mare municipality, did not affect the financial interests of the European Union, having no relation to the general budget of the Union" (***criminal decision no. 1942/29.12.2023 Cluj Court of Appeal***).

Similarly, there were courts that specified – in cases regarding abuse of office crimes assimilated to corruption crimes, provided by Article 297 par. of the Criminal Code in relation to Article 13 ind. 2 of Law no. 78/2000, with application of Article 5 of the Criminal Code (regarding acquisitions of products by civil servants within a local public administration) – that "the damage caused by the acts of abuse of office in this case, does not affect the financial interests of the European Commissions, having no relation to their budget, and the Judgment of the Court (Grand Chamber) dated 24 July 2023 is not applicable in this case, considering the strict application and interpretation of the CJEU Judgments, as the effects of such a decision cannot be extended to other cases that do not concern crimes regulated in international law, for which Romania assumed the obligation to protect them according to international standards" (***criminal decision no. 45/01.02.2024 Timişoara Court of Appeal***).

Other such courts have considered that ***the incidental judgments of the Court of Justice do not apply in corruption cases because the CVM Judgment was abrogated.***

In this regard, it was mentioned that "it is also necessary to mention that, with the entry into force of Decision 2023/1786 dated 7 October 2023, the Decision 2006/928/CE dated 13 December 2006 establishing a mechanism for cooperation and verification CVM ceased to have effects" (***criminal decision no. 1942/29.12.2023 Cluj Court of Appeal***).

Likewise, these courts considered that the ***order of the Court of Justice does not apply to corruption crimes in general, but only to high-level corruption crimes***, thus ruling that:

"However, an interpretation of the Commission Decision 2006/928/EC of 13 December 2006 was offered by the CJEU, after the court of appeal postponed the ruling, through the Order of the Luxembourg Court, in the case C-131/23.

However, the Luxembourg Court was also not very generous with the nature of the crimes covered by the Union acts, considering that, even if it is crimes of bribery, influence peddling and abuse of office committed in connection with public procurement procedures carried out in Romania, this is not enough to conclude that the financial interests of the Union were affected, which is why the interpretation of Art. 325 par. 1 TFEU and Art. 2 par. 11 of the PIF Convention was not made, but only the interpretation of the Commission Decision 2006/928/EC of 13 December 2006.

Also, in the recitals of this Ordinance, paragraph 62, it was specified that "The Decision 2006/928 establishes Romania's obligation to effectively combat corruption in general and especially high-level corruption, in particular within the local administration."

However, in the pending case, even if the National Anticorruption Directorate had jurisdiction to carry out the criminal prosecution, it can be noted that we cannot talk about high-level corruption, and even more so, within the local administration, the defendant being accused that, between 25.01.2013 – 08.01.2014, he claimed and received, based on the same criminal resolution, amounts of money from a number of 16 patients, totalling 25,230 euros, for performing surgical interventions in the Clinical Emergency Hospital of Plastic Surgery and Burns in Bucharest, where he worked as a surgeon, the claims for money being prior to the interventions, and the receipt of money – prior or subsequent to the interventions, acts that meet the constitutive elements of the crime of bribery." (***criminal decision no. 139/08.02.2024 Bucharest Court of Appeal***).

In an intermediate opinion, it was held that, ***although the CVM order of the Court of Justice does not apply as it was abrogated, nevertheless "for identity of reason", the 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union applies.***

Thus, these courts showed that "although the Commission Decision 2006/928/EC of 13 December 2006 was repealed by the Commission Decision (EU) 2023/1786 of 15 September 2023, so that the norm interpreted by the Ordinance issued on 9 January 2024, in the case C-131/23 can no longer be taken into account by the judicial review court, we can note that the relevant text of the EU law, respectively Art. 5 (1), in relation to Art. 2 of the 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union addressing certain acts of corruption involving such officials at a general level, for identity of reason, must be interpreted similarly, being thus a clarified act." (***143/A/12.02.2024 Bucharest Court of Appeal***).

B. Correct interpretation and application of the CJEU judgments

The CVM Decision applies to acts committed during the period in which it was in force, and the CJEU Ordinance of 9 January 2024 in the case C-131/23 applies including in cases involving European funds and irrespective of the field or level of corruption that is the subject of the case.

In order to rule in this way, some national courts have held, for example, the following arguments in the sense of the application of the CVM Decision for the acts committed during the period when it was in force:

"Although, currently, Decision 2006/928 (CVM), invoked in the CJEU Judgment of 21 December 2021, is abrogated, this does not mean that it can no longer be invoked in the settlement of some cases.

First of all, the Decision was in force at the time when the acts in this case were committed (year 2013), and, as it follows from its jurisprudence, the Luxembourg Court always refers to the acts in force at the time when the act was committed.

Secondly, Romania's commitment to fight against corruption was undertaken through the EU Accession Treaty, and only elaborated upon in Decision 2006/928.

Thirdly, the abrogation of this decision produces effects only on the monitoring to which Romania was subject. But this decision also allowed Romania to implicitly accede to all the conventions and treaties that the Union concluded up to the time of Romania's accession. The abrogation of this decision could not eliminate such effects as well.

Fourthly, the objectives set in this decision: the existence of an independent and efficient judicial system, the fight against corruption, etc. have been adopted in the jurisprudence of the CJEU (CJEU Judgment of 21 December 2021), an integral part of EU law and as such, produce their effects directly due to the primacy of Union law.

In conclusion, since in this case, the defendants are being prosecuted for crimes of corruption and money laundering, the High Court finds that the CJEU Judgment of 24 July 2023 is, in principle, applicable in this case." (***criminal decision no. 22/A/30.01.2024 High Court of Cassation and Justice***).

Further, through the same solution of judicial practice, it was held that the ***Court of Justice judgments in the matter are not limited only to corruption cases affecting the financial interests of the Union and are applied in corruption cases, in general.***

Thus, the following were held in this regard:

"In the Judgment of 21 December 2021 (par. 188-192), the Grand Chamber of the CJEU underlined that <as regards Romania, the obligation to fight corruption affecting the European Union's financial interests, which follows from Article 325(1) TFEU, is supplemented by the specific commitments accepted by this Member State when accession negotiations were completed on 14 December 2004. Indeed, in accordance with point I(4) of Annex IX to the Act of Accession, the mentioned Member State undertook, inter alia, to *considerably step up the fight against corruption and in particular against high-level corruption*, by ensuring a rigorous enforcement of the anti-corruption legislation. This commitment was subsequently given concrete expression by the adoption

of Decision 2006/928>. <The benchmarks that Romania has thus committed to achieve are binding on this Member State, in the sense that Romania is subject to the specific obligation to achieve those objectives and to adopt the appropriate measures with a view to achieving them as soon as possible. In addition, the obligation to combat corruption and, in particular, high-level corruption effectively, which stems from the benchmarks set out in the annex to Decision 2006/928, read in conjunction with Romania's specific commitments, ***is not limited merely to cases of corruption affecting the European Union's financial interests***.> **(**The CJEU Judgement of 21 December 2021, par. 188).

It is Romania's responsibility to ensure that its rules of criminal law and criminal procedure allow for the effective punishing of fraud offenses affecting the Union's financial interests **and corruption, in general.*"*** (***criminal decision no. 22/A/30.01.2024 The High Court of Cassation and Justice***).

The CVM Decision is applicable to the acts committed during its period of activity, regardless of whether the acts concern European funds, including corruption offences, in general.

Thus, *the legal regime of the CVM Decision can be found in the Euro Box Promotion Judgment, C-357/19, pt. 156*, which specifies:

"156. It must be recalled from the outset that *Decision 2006/928 is an act adopted by an EU institution, namely the Commission, on the basis of the Act of Accession, which falls within the scope of EU primary law, and specifically constitutes a decision within the meaning of the fourth paragraph of Article 288 TFEU.* As regards the Commission reports to the European Parliament and to the Council, drawn up under the CVM established by that decision, they must also be regarded as acts adopted by an EU institution, having as their legal basis EU law, namely Article 2 of that decision (judgment of 18 May 2021, Asociaţia Forumul Judecătorilor din România and Others, C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19, EU:C:2021:393, paragraph 149). (*emphasis added*)" (***CJEU Judgment Euro Box Promotion, of 21 December 2021, in the case C-357/19, par. 156)***.

Thus, Art. 288 TFEU regards the legal acts of the Union and lists them as regulations, directives, decisions, recommendations and opinions, context in which, according to par. 4, it is stipulated that "A decision shall be binding in its entirety.". Therefore, the CVM Decision has the common law legal regime of a decision of the Union institutions, provided by Art. 288 par. 4 TFEU and it applies to the situations that it covered while it was in operation, similarly to the other legal acts of the Union, listed in the same article (regulations, directives, etc.), with which it is associated from this perspective (*noscitur a sociis*).

Moreover, ***the obligations contained in the CVM Decision remain identical, without being regressive, and continue to be subject to the Rule of Law Mechanism***, as mentioned in the Commission Report on the CVM dated 6 August 2021:

"This report takes stock of the progress under the CVM since October 2019. Whilst some of the recommendations were formulated in terms specific to the moment of their adoption, their intent remains clear and all remaining recommendations should be implemented, while ***those already implemented still need to be taken into account to avoid backsliding.*** The Commission encourages Romania, its government and Parliament, to meet the commitments made under the CVM and to pursue actively the fulfilment of all the remaining CVM recommendations. ***This would allow the CVM to come to an end, and rule of law issues in Romania would continue to be followed under the rule of law mechanism, applicable to all Member States*** *(emphasis added). (Report from the Commission to the European Parliament and the Council on the progress made by Romania under the Cooperation and Verification Mechanism*, of 8 June 2021 COM(2018) 370 final, pt. 1 par. Penultimate, available at: *https://commission.europa.eu/document/download/4fffb4e1-d68b-4e95-80bc-22c5a1911385_ro?filename=com2021370_ro.pdf*).

Finally, ***the obligations included in the CVM Decision also arose from the Union's primary law, based on which the Commission's Decision was adopted, respectively the Treaty on European Union and the Treaty of Accession of Romania and Bulgaria to the EU, therefore they also exist according to this primary legislation.***

Continuing, ***the CVM Decision is applicable regardless of whether the acts of corruption concern European funds, as expressly mentioned in the Ordinance of 9 January 2024.***

Under this aspect, by the Court Order of 9 January 2024, the questions regarding the regulations for the protection of the European Union's financial interests, provided by Art. 325 (1) TFEU and Article 2 (1) of the PIF Convention, were expressly removed from the interpretation, as inadmissible, with the reasoning that they do not apply in the main national case, a context in which it can only be concluded that the *Court's order is applied in domestic cases, even if the rules regarding the protection of the financial interests of the Union are not applicable:*

"47. In the present case, the first question addressed by the referring court concerns, inter alia, the interpretation of Article 325(1) TFEU and Article 2(1) of the PIF Convention, which have as subject the protection of the financial interests of the European Union.

48. It is necessary to show that the main litigation concerns, as it appears from the content of point 16 of this Order, offences of bribery, influence peddling and abuse of office committed in connection with public procurement procedures carried out in Romania.

49. However, unlike the corruption offenses referred to in some of the disputes under discussion in the case in which the Judgment of 21 December 2021, Euro Box Promotion and Others was issued (C357/19, C379/19, C547/19, C811/19 and C840/19, EU:C:2021:1034), which had been committed in connection with public procurement procedures partially financed by European funds, ***no element of the case available to the Court tends to indicate that the financial interests of the European Union were affected by the offences that are the subject of the main dispute.***

50. More precisely, the fact that VAT was applied in the public procurement procedures in question cannot be sufficient to consider that the financial interests of the European Union have been affected. Also, the fact evoked by the referring court, that the offences committed could cause damage to the national budget, which could influence the amount of Romania's contribution to the Union budget, cannot be sufficient.

51. It follows from the above that the first question, insofar as it concerns the interpretation of Article 325(1) TFEU and Article 2(1) of the PIF Convention, has no relation to the reality or to the subject matter of the main dispute. Therefore, it is, to that extent, clearly inadmissible." (*emphasis added.*)" (CJEU Order of 9 January 2024, C-131/23, par. 47-51).

Finally, the ***CVM Decision is applicable regardless of the level of corruption of the acts concerned.***

Thus, paragraph 4 of the Annex of the CVM Decision, stipulates as benchmark "take further measures to prevent and fight against corruption, in particular within the local government", *without providing any circumstances regarding the field or level of corruption.*

In fact, in the Court Order of 9 January 2024, this aspect was expressly outlined as follows:

"61. The benchmarks provided in the annex to the Decision 2006/928 include "continu[ing] to conduct professional, non-partisan investigations into allegations of high-level corruption, based on the progress already made" (the third benchmark), as well as "tak[ing] further measures to prevent and fight against corruption, in particular within the local government"." (the fourth benchmark).

62. From these benchmarks, which are binding for Romania, it results that the Decision 2006/928 establishes Romania's obligation to effectively combat corruption ***in general*** and especially high-level corruption, in particular within the local administration. In this regard, it appears from the referral decision that C.A.A. held an important management position within a local public administration authority in Romania. (*emphasis added*)" (CJEU Order of 9 January 2024, C-131/23, par. 61 and 62).

Finally, ***the Commission's reports – which must be properly taken into account, under the principle of loyal cooperation provided for in Article 4(3) TEU, according to the jurisprudence of the Court of Justice in the case of Euro Box Promotion SRL (C-357/19) – have as their object corruption offences from all areas of social life and regardless of the level of seriousness of the corruption offences.***

As an example, ***the 2015 CVM Report*** noted the following regarding corruption in the field of healthcare:

"4.4.2 Healthcare

Corruption in the health sector appears to be widespread. The practice of informal payments is still frequent, especially in smaller towns or villages, and therefore is difficult to eradicate. (…)

In the area of health, corruption is addressed on two levels: higher level corruption [132] – in the field of public procurement – and petty corruption in the field of informal payments for medical services. Projects in both areas have been pursued in 2014. (…)

In addition, the HCCJ established in December 2014 that any doctor employed in a Health Minister's unit is considered a public official and is thus punishable according to the Criminal Code for bribe taking." (***Technical Report accompanying the document REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the progress made by Romania under the Cooperation and Verification Mechanism /* SWD/2015/0008 final */, par. 4.2.2.***).

The Court of Justice judgments on the matter are fully applicable in domestic cases concerning crimes against the financial interests of the European Union and crimes of corruption, regardless of the procedural stage.

Thus, some courts have held that "with regard to the applicability of the preliminary ruling by reference to the procedural stage of the domestic case, the Court considers that the preliminary ruling issued in the case is applicable not only in extraordinary appeals, but also in all pending cases, considering that no express differentiation is made in its content in terms of the procedural stage of the main case, and the reference to finally settled cases is made only *inclusively* (see par. 124 of the Lin judgment)" (***criminal decision no. 962/Ap/15.12.2023 Braşov Court of Appeal;*** also see ***the criminal decision no. 989/Ap/21.12.2023 Brașov Court of Appeal***).

Moreover, in the recent practice of the Supreme Court, it was held that the preliminary ruling applies to pending cases, expressly mentioning in the recitals of such a ruling – which entered the power of res judicata, forming an integral part with the decision issued in the case – that it "operates exclusively in cases pending at the date of its issuance…" (***criminal decision no. 615/RC/12.10.2023 High Court of Cassation and Justice***).

According to these judicial practice solutions, ***the provisions of Union law have direct effect in domestic cases considering that they are formulated in clear and precise terms and are not accompanied by any conditions, as the European court itself specified in the Lin judgment.***

Thus, these courts have shown that "as regards the *manner of application of the rules of Union law relevant to the case*, Article 325(1) TFEU and Article 2(1) of the PIF Convention are formulated in clear and precise terms and are not accompanied by any conditions, therefore they have a direct effect in the present case, as the Court of Justice expressly established:

- par. 96: "In the present case, Article 325(1) TFEU and Article 2(1) of the PFI Convention are formulated in clear and precise terms and are not subject to any conditions, and they therefore have direct;
- par. 97: "It is, in principle, for the national courts to give full effect to the obligations under Article 325(1) TFEU and Article 2(1) of the PFI Convention and to disapply national provisions which, in connection with proceedings concerning serious fraud affecting the financial interests of the European Union, prevent the application of effective and deterrent penalties in order to counter such offences".

Thus, in the case, the Court finds *that the defendants will be held criminally liable based on the article providing for the offence in domestic law, by reference to Art. 155 of the Criminal Code (which becomes applicable in the light of the limitation of criminal liability, as an institution of material law), with the direct application of the applicable Union law, provided by Art. 325 TEU and Art. 2 of the PIF Convention, as interpreted by the decision of the Court of Justice, which states exactly this – the direct applicability and full effect of the applicable Union provisions.*

The Court rejects the argument of the defence regarding *the impossibility of applying by analogy some provisions of material criminal law,* considering that, hypothetically, the finding of the lack of applicability of a rule of law whose purpose is to fill a legal gap, which does not exist in the present situation, precisely because of the *direct* applicability of the provision of European law.

In fact, finding the applicability of analogy – obviously prohibited in the material criminal law – for the application of Union law in this situation, would make it objectively impossible to apply the interpretation from the preliminary ruling, a solution that would contravene the very rationale of any jurisdictional decision, issued in order to be applied and to have a useful effect. (*actus interpretandus est potius ut valeat quam pereat*)." (***criminal decision no. 962/Ap/15.12.2023 Braşov Court of Appeal***).

Other courts have underlined that ***there is no hierarchy between the CCR and CJEU decisions, and the Romanian state has assumed certain obligations that it must comply with, including through the judiciary, with the accession to the EU.***

According to this jurisprudence, "In relation to the above, it is held that the legal issue unlocking the limitation in this case is not the order/hierarchy of the application of the decisions of the Constitutional Court, the High Court of Cassation and Justice and the CJEU, which were delivered in the matter of the limitation of criminal liability, respectively on Art. 155 par. 1 of the Criminal Code; the legal issue under discussion is whether the Judgment of 24 July 2023, issued in case C 107/23 PPU, is applicable in the case in relation to the principle of applying the more favourable criminal law guaranteed by Art. 5 of the Romanian Criminal Code and Art. 15 par. 2 of the Constitution of Romania (The law provides only for the future, with the exception of the more favourable criminal or contravention law.)

In the case, in relation to the subject of the case, Art. 325 of TFEU and the PIF Convention and, consequently, the CJEU Judgment of 24 July 2023 issued in the case C 107/23 PPU, are directly applicable for the interpretation of these supranational rules.

In the event that the application of Article 325 TFEU and of the rules implementing it is deficient, in Romania, there is a systemic risk of impunity, the European Union can hold the Romanian state economically and legally liable; given that, on the date of acquiring the membership of the European Union, it acquired a series of rights, but also assumed certain obligations that it must fulfil, including through the judiciary.

From the above, the provisions of Art. 5 of the Criminal Code regulating the principle of applying the more favourable criminal law cannot be interpreted and applied in contradiction with the supremacy, unity and effectiveness of Union law.

According to what was previously shown in the jurisprudence of the Constitutional Court, it follows that the jurisdiction to interpret and apply the national law rests with the courts, which have the obligation to ensure the supremacy of the application of the Community law rules, including the obligation to apply the CJEU Judgments, when they refer to infraconstitutional rules. On the other hand, the principle of applying the more favourable criminal law is not an absolute right, just as the principle of the legality of criminal offences and penalties is not an absolute one either; both principles may suffer interferences if higher interests demand it.". **(*criminal decision no. 857/A/13.10.2023 Timișoara Court of Appeal***).

In the same sense, these courts also considered that ***the Lin judgment applies in the cases regarding tax evasion offences related to the VAT regime, considering that both the subject of the domestic case consisted of such offences (the case in which the reference for a preliminary ruling was made by the Braşov Court of Appeal), as well as compliance with the established jurisprudence of the Court of Justice (Judgment Court, Grand Chamber, of 26 February 2013, in case C617/10, Åkerberg Fransson, point 24-31), context in which it cannot be assessed that "there is no sufficiently clear connection with European Union law", as stated in the contrary opinion* (*see, above, the criminal decision no. 1627/14.11.2023 Bucharest Court of Appeal*).**

Such courts have expressly found that "***the present case has as its subject tax evasion offences*** regarding the value added tax (VAT), which determines the direct applicability of the European Union law provisions which state the need to combat fraud against the financial interests of European Union. In this regard, in addition to the mentions in the Court of Justice Judgment, at point 79-86, The Court of Appeal refers, as it did in the case and in the request for a preliminary ruling, to the Judgment of the Court (Grand Chamber) of 26 February 2013, in case C617/10, ***Åkerberg Fransson***, in which it was held that ***in the cases regarding non-compliance with***

declaration obligations in the field of value added tax, the Union's own resources, which include revenues from application of a uniform rate to the harmonized VAT assessment bases, determined according to European Union rules are affected, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (point 24-31).".

Moreover, the courts emphasized that ***the Lin judgment is applied in the cases regarding tax evasion offences related to the VAT regime remaining in the attempt phase – according to the express provisions of Art. 2 par. 1 PIF Convention – therefore contra legem the contrary opinion emerges, with the argument that "the time-barring of criminal liability does not prevent the Romanian state from recovering the damage caused to the general budget through the fraudulent non-payment of VAT" (***see, cited above, ***criminal decision no. 1627/14.11.2023 Bucharest Court of Appeal).***

Thus, some courts have expressly indicated that, according to 325 TFEU par. 2 "Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests" and according to ***Art. par. 1 of the PIF Convention,*** *"*each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or ***attempting*** the conduct referred to in Article 1 (1), are punishable by effective, proportionate and dissuasive criminal penalties", circumstances in which it was found that "the preliminary ruling concerns the interpretation of the rules of Union law, provided by Art. 325 TFEU and Art. 2 par. 1 PIF Convention, … including conduct such as participating in, instigating or attempting the conduct, as expressly provided for in Art. 2 par. 1 first sentence, of the PIF Convention", so that "in relation to the subject of the present case, which *concerns offences against the Union budget, with a damage of over 190,000 euros, in the attempt phase and in the form of joint perpetration and participation, the Court concludes that the preliminary ruling is fully applicable in the case"* (***criminal decision no. 962/Ap/15.12.2023 Braşov Court of Appeal***).

Further, these courts emphasized that ***the application of the judgments of the Court of Justice does not have a discriminatory effect – in the sense of treating similar situations differently without an objective and reasonable justification – since, on the one hand, the situations are not similar because they have different offences as subject and, on the other hand, their eventual different treatment derives from the binding nature of the judgments of the Court of Justice, which was referred to only in the fields in question.***

In this regard, judicial practice has shown that ***"in the case, it does not admit the violation of the principle of equality before the law***, which requires equal treatment of all persons in similar legal situations, so that they are equal in rights, without privileges and without discrimination (see Decision No. 368/2022 of the Constitutional Court, point 9), in the light of a possible non-unitary practice in the matter, which would have created a more favourable situation for other litigants than for the appellants in the present case, considering, on the one hand, that the judgment of the Court of Justice is binding, and on the other hand, the similar natures of the invoked legal situations was not demonstrated in the case either (indicating cases in other procedural stages and in other criminal fields) (***criminal decision no. 728/Ap/22.09.2023 Braşov Court of Appeal***).

Other courts have emphasized that ***the judgments of the Court of Justice must be applied in similar cases as a legal precedent.***

In this regard, the courts have underlined the following practice and doctrine considerations:

"As for the *effects of the preliminary judgments issued by the Court of Justice of the European Union in cases other than those in which the court was referred*, it is found that they were shown by the European court itself in the case C283/81 – Cilfit and Others – "*13. It must be remembered in this connection that, in its judgment in the case of Costa (...), the Court ruled that although the last paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law to refer to the Court every question of interpretation raised before them, the authority of an interpretation under art. 177 already given by*

the Court may deprive the obligation of its purpose and thus empty it of its substance; such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.

14. The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 177, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical."

The Braşov Court of Appeal considers that, in this case, the rulings of the Court of Justice of the European Union in the judgment issued in case C-107/23 PPU on 24 July 2023 must be taken into account." (***criminal decision no. 16/A/11.01.2024 Braşov Court of Appeal***).

The application of the internal mitior lex standard can be restricted, including according to the practice of the constitutional court and the supreme court, so that Art. 155 par. 1 of the Criminal Code can only be interpreted in the light of preliminary rulings, which prevent the application in its more favourable form, in an extractive manner in favour of the accused, as a more favourable criminal law (mitior lex), as a result of a "necessary balancing" of the concurrent standards, the Bosphorus presumption being in no way violated.

In order to rule in this way, some of the national courts have held as follows:

"The Court considers that *the application of the preliminary ruling cannot violate the accused's fundamental right regarding the application of the more favourable criminal law (mitior lex).*

In this regard, the Court emphasizes that *the analysis regarding the accused's rights has already been done by the judgment of the European Court itself, so that it is no longer necessary to repeat it in the national court, especially since it is related to the essence of the reasoning of the adopted decision,* as it is mentioned in the case:

- par. 123 "In such circumstances, in view of the need to weigh the latter national standard of protection against the provisions of Article 325(1) TFEU and Article 2(1) of the PFI Convention, the application of that standard by a national court 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, must be regarded as being liable to compromise the primacy, unity and effectiveness of EU law, within the meaning of the case-law referred to in paragraph 110 above (see, to that effect, judgment of 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 212).".

- par. 124 "Consequently, 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),* as referred to in paragraph 119 above, 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.".

Moreover, the same type of analysis was very well established in HP 67/2022, being therefore recognized and applied in domestic law, even in our hypothesis. "In this context, if the court of appeal examined the applicability of the provisions relating to the time-barring of criminal liability, it is necessary to ***balance the principles*** of the authority of res judicata and the security of legal relations with regard to the court judgments that remained final after the publication of the Constitutional Court Decision no. 297/2018 and until the publication of the Constitutional Court Decision no. 358/2022 with the existence of a generalized judicial practice regarding the manner in which the institution of the interruption of the limitation of criminal liability was examined in the light of the effects of the first decision of the constitutional court (*emphasis belongs to the court of appeal*)".

In its jurisprudence, the Constitutional Court itself did so by *Decision no. 511/2013* regarding the objection of unconstitutionality of the provisions of art. 125 par. 3 of the Criminal Code, which declared that crimes against peace and humanity and crimes against life committed with intent or

praeter intentionem cannot be subject to statutory limitation, holding that "*beyond doctrinal controversies regarding the legal nature of the institution of statutory limitation... and... regardless of how the legislation or doctrine qualifies the institution of statutory limitation, this, by its finality, is the same in all European legal systems*... In such a situation, ***the legislator had to choose between the principle of legal certainty and legal equity, which are both fundamental components of the rule of law.*** Since it is the legislator's duty to decide which principle it gives precedence, the legislator, without arbitrarily intervening and taking into account the primary value of the right to life enshrined in Art. 22 par. (1) of the Romanian Constitution, opted for the immediate application of the more severe provisions in the matter of statutory limitation, including for offences committed previously, for which the limitation period for the execution of the punishment has not yet expired (*emphasis belongs to the court of appeal*)".

To the same effect, the Court of Appeal holds that ***the European standard for the protection of human rights was taken into account by the very preliminary ruling of the Court of Justice.***

Thus, as it is known, according to Art. 52 par. 3 of the Charter of Fundamental Rights of the European Union, "their meaning and scope are the same as those laid down by the European Convention for the Protection of Human Rights and Fundamental Freedoms".

Furthermore, the European Court of Human Rights (ECHR), by its rich jurisprudence in the matter of EU law, applies the so-called ***Bosphorus presumption***, *according to which the protection of fundamental rights offered within the EU system is at least equivalent to that provided for in the European Convention on Human Rights, unless it is shown to have been manifestly deficient.* However, it could thus be concluded that the protection of human rights in this case was by no means clearly deficient, since the national courts, by reference to the judgment of the Court of Justice, did nothing but proceed to achieve a fair balance between the rights of the accused person and the need to protect the interest public and the rights of the victim. From the same perspective, ***the Court of Appeal does not disapply the decisions of the constitutional court and of the supreme court in the matter (Decision no. 297/2018 and no. 358/2022, respectively Decision no. 67/2022),*** considering that the decisions of the constitutional court did not mention anything about their method of application in this situation, and the reasoning of the European court in the preliminary ruling – which examined distinctly the principle of legality in terms of the predictability of the law (considered by the Constitutional Court) and the principle of the more favourable criminal law in matters of substantive criminal law regarding the time-barring of criminal liability – does not affect the solutions of national courts and can be interpreted in accordance with them.

In conclusion, ***the Court of Appeal finds that the potential restriction of the scope of application of the principle of the more favourable criminal law can only be the result of the balancing process between the concurrent principles, such as the principle regarding the protection of the financial interests of the European Union, carried out by the Court of Justice, as the Constitutional Court itself and the High Court of Cassation and Justice previously proceeded in the same matter by the decisions mentioned above.***

For all these reasons, the Court of Appeal – in accordance with its jurisprudence – will proceed to apply the relevant legal text provided for by Art. 155 par. 1 of the Criminal Code regarding the interruption of the limitation period of criminal liability, as it was interpreted by the binding decisions of the national and European courts, mentioned above, and ***will not take into account only the acts of interruption of the limitation period carried out during the period of time when the security of the domestic law was affected in terms of its predictability***, respectively the period between 25 June 2018, the publication date of Decision no. 297/2018 of the Constitutional Court, and 30 May 2022, the date of entry into force of the Government Emergency Ordinance no. 71/2022 (see, as judicial practice, Decision no. 914/2023 dated 4 December 2023 of the Braşov Court of Appeal)." (***criminal decision no. 962/Ap/15.12.2023 Braşov Court of Appeal***).

In the same sense, some courts have pointed out the ***priority in application of EU law over domestic law, invoking the jurisprudence of the Constitutional Court and the Court of Justice:***

"Preliminarily, regarding the applicability in this case of the decision of the European court, the Court considers that, according to Art. 148 par. 1 and 2 of the Constitution of Romania, *Romania's*

accession to the constitutive treaties of the European Union, in order to transfer some powers to the Community institutions, as well as to jointly exercise with the other Member States the powers provided for in these treaties, is done by a law adopted in the joint session of the Chamber of Deputies and the Senate, with a two-thirds majority of the number of deputies and senators. As a result of the accession, the provisions of the constitutive treaties of the European Union, as well as the other binding Community regulations, have priority over the contrary provisions of the national laws, in compliance with the provisions of the document of accession.

The cited constitutional provision does nothing but enshrine, at the highest legislative level, the *principle of primacy of European Union law*, assumed by Romania upon its accession to the European Union in 2007.

The principle of primacy of European Union law over national law, developed by the Court of Justice of the European Union based on the provisions of the European Community treaties, is unequivocally explained in the judgment issued in *Case 6/64 – Flaminio Costa/ENEL*, from which we note in particular the following considerations:

"*by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves; (...)*

it follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the community itself being called into question;

the transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail". (***criminal decision no. 914/Ap/04.12.2023 Braşov Court of Appeal***).

See, for details, webpage https://www.iccj.ro/wp-content/uploads/2024/05/sesizare-RIL-1094-1-2024.pdf