ECJ: EU Law Protecting the Union's Financial Interests Prevails over National Fundamental Rights

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News

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In its judgment in *Lin* (Case C-107/23 PPU) of 24 July 2023, the ECJ clarified the obligations of Member States arising from the need to combat fraud affecting the financial interests of the Union and the need to respect fundamental rights protected by EU law and national law.

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Background of the case and AG's opinion

The ECJ had to rule on a reference for a preliminary ruling from the Romanian Court of Appeal in Brașov. In 2010, the appellants in the main proceedings had failed to declare commercial transactions and income relating to the sale of diesel fuel, thereby causing a loss to the state budget. In June 2020, the Court of Appeal sentenced the concerned persons to terms of imprisonment for tax evasion and the setting up of a criminal organisation. In addition, they were ordered to pay €3.2 million in compensation.

In their appeal, the concerned persons argued that a conviction was no longer possible because the limitation period for criminal liability of the offences had expired. They based their appeal on the principle of the retroactive application of the more lenient criminal law (*lex mitior*). Specifically, provisions pertaining to the limitation period for criminal liability had been declared unconstitutional by the *Curtea Constituțională* (Constitutional Court) in judgment No. 297/2018 as they violated the principle of legal certainty of criminal offences and penalties. This was upheld in judgment No. 358/2022 in light of the inaction of the Romanian legislature. In consequence, Romanian law lacked applicable grounds for the interruption of the limitation period for criminal liability, i.e. by procedural acts or decisions. Following this interpretation, the ten-year limitation period provided for in the Romanian Criminal Code would have expired before the concerned persons' convictions had become final. This would mean that the criminal proceedings would have to be discontinued and that the concerned persons could not be sentenced.

In essence, the Romanian Court was asking whether this interpretation, which would have the effect of exonerating the concerned persons from criminal liability for serious fraud to the detriment of the Union's financial interests, is compatible with EU law. It also posed the question whether it might be obliged to declare the judgments of the Romanian Constitutional Court inapplicable in the event that an interpretation in conformity with EU law were not possible. However, under Romanian law, judges who disapply case law of the Constitutional Court of their own motion risk committing a disciplinary offence.

In his opinion of 29 June 2023, AG *Sánchez-Bordona* advised that the EU's financial interests should not be protected at the expense of fundamental rights, such as the principle of retroactivity of the most favourable criminal law. Therefore, the referring court should not have to disapply the case law of the Constitutional Court in order to ensure conformity with Art. 325(1) TFEU and Decision 2006/928. This ensures compliance with the principle of criminal legality and the requirements of foreseeability and precision of the applicable criminal law.

The ECJ's ruling

The ECJ took a different approach to the balance between the protection of the Union's financial interests and fundamental rights than the AG. Following the case law in *Euro Box Promotion and Others (*C-357/19, et al.), the Court emphasised that a systemic risk of impunity is incompatible with the requirements of Art. 325(1) TFEU and Art. 2(1) of the PIF Convention. The Constitutional Court cases of 2018 and 2022, following which the national legislature has failed to remedy the situation for a period of almost four years, constitute such a risk, since numerous cases of serious fraud to the detriment of the EU's financial interests will remain unpunished because of the expiry of that limitation period. Therefore, in principle, the national courts are required to disapply judgments No. 297/2018 and No. 358/2022 of the Romanian Constitutional Court. It follows that Romanian law does not provide for any grounds for interrupting the limitation period for criminal liability between 2018 and 2022. Although such a result would lead to a restriction of the national standard of protection (*lex mitior*), the application of these rules would undermine the primacy, unity, and effectiveness of EU law. As a consequence, EU law should therefore be given priority and the rulings of the Romanian Constitutional Court should not be applied.

On the judges fears of facing consequences for disregarding the Constitutional Court, the ECJ ruled that the non-application of the Constitutional Court's rulings may not lead to disciplinary proceedings against the judges. This would *ipso facto* violate the judgment and the principles it addresses.

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