

# Time Clash: the Court of Justice Limits the Temporal Scope of *Lex Mitior*

ECJ (Grand Chamber) 24 July 2023, Case C-107/23 PPU, *Lin*

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## INTRODUCTION

In the *Lin* judgment,<sup>1</sup> the ECJ held that the primacy of EU law requires national courts to disapply a national standard of protection of fundamental rights, specifically when the application of *lex mitior* to procedural norms jeopardises the EU obligation to effectively punish offences against EU financial interests. Six years after the *Taricco II* (technically *M.A.S.*) decision, the ECJ used another preliminary reference to clarify – by distinguishing – its previous ruling: primacy is limited by the prohibition of retroactive laws, but not by the retroactive application of more favourable procedural norms. Consequently, national norms of this type must be disapplied when they conflict with EU law obligations. This case note argues that the ECJ has reached this conclusion by juxtaposing *lex mitior* with another rule of law principle – *tempus regit actum* – ultimately denying that the former can limit the primacy of EU law.

An intricate case law development triggered the ECJ's intervention. Two judgments of the Romanian Constitutional Court have declared the national rule of limitation periods unconstitutional for violating the principles of foreseeability

<sup>1</sup>ECJ 24 July 2023, Case C-107/23 PPU, *Lin*.

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and precision of criminal law. A subsequent judgment of the Romanian High Court of Cassation and Justice declared that the Constitutional Court's case law amounted to *lex mitior* – which in Romania also covers procedural law – and should apply retroactively. This would lead to the annulment also of cases adjudicated before the Constitutional Court judgments, conflicting with the EU law obligation under Article 325 TFEU to effectively punish frauds against the EU financial interests, as many convictions for these offences would need to be set aside, resulting in systemic impunity.

The primacy of EU law requires the disapplication of national case law contrary to EU law. The ECJ could have simply pointed out that, as the principle of *lex mitior* at Article 49 EU Charter of Fundamental Rights does not apply to procedural law, any conflict should be resolved in favour of Article 325 TFEU. While the Romanian system offers a higher standard of protection of fundamental rights through the application of *lex mitior* in procedural norms, this must yield to the application of EU law in the name of primacy, unity, and effectiveness of EU law. Nonetheless, the ECJ directly engaged with the question of the scope of *lex mitior*, concluding with a (narrower) understanding of the material and temporal scope of the principle. From the EU perspective, *lex mitior* is not an essential element of the higher principle of the rule of law, or at least not within procedural norms. An unrestricted interpretation of *lex mitior*, as in the Romanian system, might place other rule of law principles at risk. Therefore, disapplying such an interpretation, as required by the primacy of EU law, is not detrimental to the rule of law but rather its accomplishment.

This case note is structured as follows: the first section explains Romanian case law on limitation periods, the nature of the Constitutional Court and Supreme Court judgments, the scope of *lex mitior* in the national framework, and the difficulties in aligning these with EU obligations. The second section analyses the referring court's preliminary questions, the Advocate General's Opinion, and the ECJ's judgment, comparing their views on the compatibility of the Romanian law with EU obligations, and the ECJ's reasoning for requiring disapplication. The third section comments on the judgment, arguing that the ECJ has qualified *lex mitior* as a non-essential element of the rule of law and, through theoretical, practical, and institutional reasoning, has deduced that it may be limited to uphold the principle of the *tempus regit actum*. The conclusion addresses the relevance of this judgment in the definition of the temporal scope of law in the EU.

## THE NATIONAL BACKGROUND OF THE CASE

### *The Romanian legislation and case law on limitation periods*

The ECJ judgment concerns a preliminary reference from the Court of Appeal of Braşov, Romania, in the context of an extraordinary appeal brought by two

individuals seeking to have set aside a judgment convicting them of tax evasion and establishing an organised criminal group.<sup>2</sup> The facts of the case date back to 2010, when the two individuals failed to fully record commercial transactions and income from diesel fuel sales under the excise duty suspension regime, causing losses to the state budget in value added tax (VAT) and excise duty. The Regional Court of Braşov convicted them of tax evasion in judgment no. 38/S of 13 March 2018, and the Court of Appeal of Braşov upheld their convictions in judgment no. 285/AP of 30 June 2020. Meanwhile, the Constitutional Court, in judgment no. 297 of 26 April 2018, declared Article 155(1) of the 2014 Romanian Criminal Code unconstitutional. The Constitutional Court held that the provision, which allowed the limitation period for criminal liability to be interrupted by the performance of ‘any procedural act’,<sup>3</sup> lacked foreseeability and violated the principle that offences and penalties must be defined by law, as it included acts not notified to the suspect or accused person, preventing them from knowing that a new limitation period had begun. The Constitutional Court further ruled that the earlier legislative provision (before 2014) met the foreseeability requirement, as it specified that only acts legally required to be notified to the suspect or accused could interrupt the limitation period for criminal liability.

For several years, the national legislature took no action to replace the unconstitutional provision, and many courts continued issuing judgments based on the law that had been declared unconstitutional. In its 2018 judgment, the Constitutional Court did not explicitly designate its decision as ‘simple/extreme’, which would have rendered the norm inapplicable.<sup>4</sup>

<sup>2</sup>*Lin*, para. 2.

<sup>3</sup>It has to be noted that, since 2014, the Romanian Constitutional Court adopted 80 decisions – 66 relate to the Criminal Procedure Code and 14 to the Criminal Code – declaring various provisions of the Codes unconstitutional, with an impact on the fight against corruption and organised crime (Commission, Report on Progress in Romania under the Cooperation and Verification Mechanism, Strasbourg, 22.11.2022 COM(2022)664 final, p. 11). The Commission has declared that the situation of the rule of law in Romania is worrisome also because of the frequent judicial interventions which make the work of the National Anticorruption Directorate impossible (Commission, Rule of Law Report 2021, Romania, p. 12, and 2022, Romania, p. 14).

<sup>4</sup>The Romanian Constitutional Court has developed various types of judgments: simple admission and intermediate admission, which can be interpretative or manipulative. A simple admission judgment declares a law unconstitutional, suspending its applicability for 45 days, after which it becomes void unless the legislature addresses it. Interpretative judgments declare a constitutional interpretation of a legal provision, excluding any unconstitutional interpretations. Manipulative judgments modify, add to, or remove parts of a contested norm to align it with the Constitution, avoiding full invalidation and preventing a legislative vacuum. See I. Deleanu, *Constitutional Institutions and Procedures, in Romanian Law and in Comparative Law* (Beck 2006); C.T. Pop, ‘The Effects of the Decisions of the Constitutional Court of Romania Regarding the Interruption of the Criminal Liability Limitation Period’, 90 *Curentul Juridic* (2022) p. 90.

This ambiguity regarding the judgment's nature led to different opinions. If the judgment were an interpretative intermediate solution, it would mandate the (only constitutionally possible) interpretation of the norm: its meaning must be inferred from the judgment's recitals, which stated that the limitation period is interrupted by 'any procedural act' which 'must be notified to the suspect or the defendant'. Alternatively, if it were a manipulative intermediate solution, only the phrase 'any procedural act' in the contested legal provision was unconstitutional. In this case, once this phrase was eliminated, the meaning of the legal provision had to be deduced from section 2 of the article, which provided that 'after each interruption, a new limitation period begins to run'. Since the existence of interruption grounds in the regime of limitation was still valid, lower courts *simply* needed to find which procedural acts constituted grounds for interruption. What was ruled out was that 'any' procedural act could interrupt the limitation period, suggesting instead that 'certain' acts could do so. It was thus left to the lower courts to identify these acts, without restricting them to those that must be notified to the suspect or defendant, as would be the case in an interpretative judgment. Some courts viewed the decision as interpretative, mandating a specific interpretation and excluding all others, while others saw it as manipulative, excluding one interpretation but allowing others. As most courts interpreted the norm without following the Constitutional Court interpretation – likely encouraged by the legislature's inaction – the result was a non-homogeneous case law, which undermined the principles of clarity and precision of criminal law.

Several courts sought clarification from the Court of Cassation on how to interpret the Constitutional Court's judgment to identify the grounds for interrupting the limitation periods. Although the Court of Cassation declared the request inadmissible, stating that interpreting a Constitutional Court judgment fell outside of its competencies,<sup>5</sup> it summarised the views of the lower courts, noting that most saw the decision as an interpretative solution.<sup>6</sup> Three law faculties, invited by the Court of Cassation, also concluded by majority that the judgment was interpretative in nature.<sup>7</sup> Additionally, during a meeting with the Presidents of the Court of Cassation, Courts of Appeals, and the National

<sup>5</sup>Art. 126(3) Romanian Constitution; Constitutional Court, 4 July 2018, decision no. 454, para. 62.

<sup>6</sup>Court of Cassation, 21 March 2019, decision no. 5, para. 5.

<sup>7</sup>*Ibid.*, para. 10; Art. 473(5) Romanian Code of Criminal Procedure. The Faculty of Law of 'Alexandru Ioan Cuza' (Iași University) and Faculty of Law 'Babeș-Bolyai' (Cluj University) considered the decision interpretative, but the Faculty of Law 'Nicolae Titulescu' (Bucharest University) considered it simple/extreme.

Institute of the Magistracy, most participants agreed that decision no. 297/2018 was not of a simple/extreme nature.<sup>8</sup>

In response, the Constitutional Court, in judgment no. 358 of 26 May 2022, upheld a further plea of unconstitutionality on the same article, clarifying that its previous judgment was of a ‘simple/extreme’ nature. Emphasising the legislature inaction, this decision held that from judgment no. 297 of 2018 until the legislature established the grounds for interrupting limitation periods, there was no legal basis for interrupting limitation periods for criminal liability within the Romanian legal framework. Subsequently, the legislature finally addressed the issue by enacting a norm outlining grounds for interrupting limitation periods, in line with the Constitutional Court’s remarks.<sup>9</sup> However, on 25 October 2022, the Court of Cassation held that, following the Constitutional Court’s judgments and in line with the principle of *lex mitior*, no procedural acts may be considered to have lawfully interrupted the limitation periods for criminal liability during the years 2014–2022.<sup>10</sup> Notably, this decision extended to offences committed even before the Constitutional Court decision of 2018. What is more, the Court of Cassation also held that a final conviction could, in principle, be subject to an extraordinary appeal based on the effects of the Constitutional Court’s judgments as *lex mitior*.

Following these double case law developments, the two individuals in this case filed extraordinary appeals before the Court of Appeal, seeking the annulment of their criminal convictions.<sup>11</sup> They claimed that they were convicted despite the existence of grounds for discontinuing the criminal proceedings, specifically the expiry of the limitation period for their criminal liability. Considering the date of the alleged offences, the 10-year limitation period stipulated in Article 154(1)(b) of the Criminal Code – the only limitation period remaining after the declaration of unconstitutionality of Article 155(1) – would have expired before the final conviction. This expiration would have led to the discontinuation of their criminal proceedings, thereby precluding their conviction. They argued, in essence, that, as Romanian law lacked specific grounds for interrupting limitation periods, this in itself constituted a more favourable criminal law that should apply to their proceedings.

<sup>8</sup>National Institute of the Magistracy, ‘Minutes of the Meeting of the presidents of the penal sections of the High Court of Cassation and Justice and of the Courts of Appeal’ (16–17 May 2019) p. 41–42.

<sup>9</sup>Government Emergency Ordinance no. 71/2022, 30 May 2022 amending Art. 155(1) of Law no. 286/2009.

<sup>10</sup>Court of Cassation, 25 October 2022, decision no. 67.

<sup>11</sup>Art. 426(b) of Law no. 135/2010 on the Code of Criminal Procedure.

*The temporal scope of lex mitior and constitutional court judgments in the Romanian legal system*

Two issues must then be distinguished: the material and temporal scope of the principle of *lex mitior* and the temporal reach of Constitutional Court judgments within the Romanian legal system. Article 15(2) of the Romanian Constitution determines the temporal scope of the law and, like many international covenants<sup>12</sup> and national constitutions,<sup>13</sup> upholds the principle of non-retroactivity of criminal law.

Similar to other constitutional frameworks, it specifies that this does not apply to the more favourable criminal law (*lex mitior*), which therefore applies retroactively. Thus, the latest norms must be applied if they are more favourable to the accused than the norms in force at the time of the wrongdoing. It should be noted that, generally, *lex mitior* does not apply to procedural rules, which are governed by the principle *tempus regit actum*.<sup>14</sup> This principle entails that a judgment should be formulated having due regard to the law in force at the time when the judgment is made. Thus, any regulation in force applies to all ongoing cases, regardless of whether is more or less favourable to the individual. The Romanian Criminal Code elaborates on the *lex mitior* principle by mandating retroactivity *in favor rei* until a final judgment,<sup>15</sup> thereby excluding *res judicata* from the *lex mitior* scope. Nevertheless, as in other legal systems, the Romanian framework permits an extraordinary appeal – to re-open a *res judicata* – when a defendant has been convicted despite evidence of the existence of a ground for discontinuing the criminal proceedings. In this case, the two individuals have filed an extraordinary appeal relying on the application of *lex mitior*, as the Constitutional Court has declared unconstitutional the limitations under which

<sup>12</sup>E.g. Universal Declaration of Human Rights, Art. 11(2); Covenant on Civil and Political Rights, Art. 15; EU Charter of Fundamental Rights, Art. 49; ECHR, Art. 7(1); American Convention on Human Rights, Art. 9; African Charter on Human and Peoples' Rights, Art. 6; Arab Charter of Human Rights, Art. 15.

<sup>13</sup>E.g. Brazilian Constitution, Art. 5, s. XXXVI and XL; Canadian Charter of Rights and Freedom; German Constitution, Art. 103; Indian Constitution, Art. 20(1); Irish Constitution, Art. 15.5.1; Italian Constitution, Art. 25, c. 2; Japanese Constitution, Art. 39; Mexican Constitution, Art. 14; Norwegian Constitution, Art. 97; Spanish Constitution, Art. 9(3); Turkish Constitution, Art. 38, c. 1; United States Constitution, Art. 1, s. IX.

<sup>14</sup>The Romanian Constitution extends *lex mitior* to administrative law too, which generally follows the principle of *tempus regit actum*. However, this constitutional principle is interpreted as applying only when administrative law assumes a sanctioning character similar to criminal law. In the Romanian legal system these administrative afflictive measures, known as 'contraventions', were originally part of the Romanian Criminal Code and moved to administrative law by Decree 184/1954. See V. Netila et al., *Legislatie Contraventionala Comentata si Adnotata* (Editura Decalog 1997) p. 5.

<sup>15</sup>Art. 5(1) and 6(1)(2) Romanian Criminal Code.

they were convicted. If this regime is no longer applicable, the appellants are entitled to benefit from the more recent and more favourable limitations regime and bring an extraordinary appeal on this basis.

It is then essential to determine whether the Constitutional Court's judgments have indeed modified the national rules on limitations periods in favour of the two individuals. According to Article 147(1) of the Romanian Constitution, laws deemed unconstitutional 'shall cease their legal effects' within 45 days of the publication of the decision if, in the meantime, the legislature cannot align the provisions with the Constitution. During this period, the unconstitutional provisions are suspended *de jure*. Article 147(4) of the Romanian Constitution further states that the Constitutional Court's decisions shall be generally binding and 'effective only for the future'.<sup>16</sup> Thus, these judgments, generally, have only prospective effects – and only if the lawmaker fails to bring the norm into line with the Constitution. The resulting model is of a Constitutional Court with limited and subsidiary power to reframe the legal framework, placing the primary responsibility on the legislature.

Constitutional court judgments generally have retroactive effects, applying to cases initiated under a now outdated legal framework.<sup>17</sup> The overall effect is that, while such judgment also affects cases already initiated and adjudicated (meeting, generally, only the limit of *res judicata*), they would be of no avail when it comes to procedural (and administrative) rules, as *lex mitior* generally applies only to substantive criminal law. Thus, a change in the law, whether by Parliament or the Constitutional Court, does not invalidate procedural rules already applied in a case. Only future adjudications follow the new rules, meaning individuals convicted or still in proceedings cannot benefit from the new provisions. This model (retroactive effect of Constitutional Court decisions and limitation of *lex mitior* to substantive criminal law) is highly beneficial in cases of *abolitio criminis* but very limited for procedural norm changes. The Romanian legal framework works the other way around. Any change in law, whether procedural or substantive, in criminal (and administrative law) affairs, has a retroactive effect in favour of the individual.<sup>18</sup> However, this is counterbalanced by a restraint: when the change results from a Constitutional Court judgment, it generally regulates the future only. Thus, the system (extensive *lex mitior* but limited temporal reach of Constitutional Court decisions) provides relevant effects when a change is

<sup>16</sup>This is confirmed by the law on the Constitutional Court organisation and operation, which states that its rulings are 'generally binding and with effects only for the future': Art. 11(3), law 22 May 1992, no. 47.

<sup>17</sup>E.g. Federal German Constitutional Court (Arts. 78, 82, and 95(2) Federal Constitutional Court Act), French Constitutional Council (Art. 62 French Constitution); Italian Constitutional Court (e.g. 11 January 2024; decision no. 4).

<sup>18</sup>Court of Cassation, 25 October 2022, decision no. 297.



made by the legislature, but not as much when it results from a judgment of unconstitutionality. Even if the new rules favour the individual, this generally will not affect past convictions, because judgments only have a prospective effect.

The problem in this case is that the Constitutional Court's second judgment – of 26 May 2022 – was intended to clarify its first judgment – of 26 April 2018 – and, by 'establishing its juridical nature',<sup>19</sup> was inevitably past-oriented. From the perspective of Romanian constitutional law, the second judgment effectively created a more favourable criminal law, by allowing the limitation period for criminal liability to remain uninterrupted. The retroactivity of this rule became automatic once the Court of Cassation stated that limitation periods could also not be interrupted for offences committed since the enactment of the unconstitutional legislation, covering the years 2014–2022. The Court of Cassation, therefore, relied on the Constitutional Court judgment(s) but extended their temporal reach. In combination with the *lex mitior*, this decision could benefit individuals whose cases have already been adjudicated, including the individuals in questions, as they could argue that the new rule provided grounds for discontinuing the criminal proceedings. By filing an extraordinary appeal, they could seek to have their convictions annulled. In light of the Romanian constitutional law, despite the remarks of some institutions,<sup>20</sup> the application of *lex mitior* in such cases was unavoidable.

## THE ADVOCATE GENERAL AND THE COURT OF JUSTICE ANALYSES

### *The referred questions*

In light of this situation, the Court of Appeal of Brasov noted that applying *lex mitior* in this context would exempt individuals who have committed offences capable of affecting the EU budget, thereby compromising various EU law obligations.<sup>21</sup> Specifically, Article 325(1) TFEU requires the Member States to counter frauds and any other illegal activities affecting the financial interests of the

<sup>19</sup>Constitutional Court, 26 May 2022, decision no. 35, para. 73.

<sup>20</sup>The National Anticorruption Directorate (DNA) stated that following these decisions, 557 criminal cases could be closed, with estimated damages of around €1.2 billion. By May 2023, courts had already terminated 81 cases involving 186 defendants. To mitigate the impact, the DNA has asked to suspend 208 cases where the issue of the statute of limitations was raised (Commission, Rule of Law Report 2023, Romania, 16). The Prosecutors' Section of the Supreme Council of Magistracy also warned that this case law would lead to the termination of criminal proceedings and the removal of criminal liability in a significant number of cases (Commission, Cooperation and Verification Mechanism 2022, Romania, 12).

<sup>21</sup>Art. 2 TEU, Art 19 TEU, Art. 325 TFEU, the Convention on the Protection of the European Communities Financial Interests, Decision 2006/928, and Directive 2006/112.



EU through effective measures.<sup>22</sup> Such measures have to be taken in a way that functions as a deterrent to criminal activity, and for serious fraud that will entail deprivation of liberty.<sup>23</sup> The Romanian case law posed a serious risk of violating the obligation to ensure that behaviours jeopardising the resources of the EU budget are punishable by effective, proportionate, and dissuasive criminal penalties. The referring court also noted that such case law would affect many cases, generating a significant number of violations of EU law obligations. The Court of Appeal of Brasov then asked the ECJ how courts would be bound by the Constitutional Court's rulings if those rulings had the effect of exonerating individuals from criminal liability for serious fraud against EU financial interests.

The first preliminary question sought to clarify whether a decision absolving the appellants of criminal liability for offences that affect EU financial interests undermines the values of the rule of law, the principle of effective judicial protection, the commitment to combat corruption, and the principle of effective and dissuasive penalties for such offences. The second question focused on the situation at hand and aimed to clarify whether EU law prohibits a scenario where convicted appellants, through an extraordinary appeal, attempt to set aside a final judgment in criminal proceedings and request the application of *lex mitior*. The third question inquired whether national judges could face sanctions for alleged non-compliance with rulings of the Constitutional Court as judges who disregard Constitutional Court case law might be subject to disciplinary measures under Romanian law. On several procedural and substantive issues presented by the case, the Advocate General's Opinion<sup>24</sup> and the ECJ's judgment aligned on: the admissibility of the question;<sup>25</sup> the nature of the Romanian case law;<sup>26</sup> the direct

<sup>22</sup>*Lin*, paras. 40 and 79. See ECJ 8 September 2015, Case C-105/14, *Taricco*, para. 38 and ECJ 5 December 2017, Case C-42/17, *M.A.S.*, para. 31. See M. Timmerman, 'Balancing Effective Criminal Sanctions with Effective Fundamental Rights Protection in Cases of VAT Fraud: *Taricco*', 53 *Common Market Law Review* (2016) p. 779.

<sup>23</sup>*Lin*, paras. 81-86. See also ECJ 21 December 2021, Case C-357/19, *EuroBoxPromotion*, para. 181.

<sup>24</sup>Opinion of AG Sánchez Bordona in Case C-107/23, *Lin*.

<sup>25</sup>*Lin*, paras. 61-63; Opinion, para. 46, as the questions referred had EU law relevance and they were not hypothetical.

<sup>26</sup>*Lin*, para. 39; Opinion, paras. 114-115. Art. 73 of the Romanian Constitution lists the categories of laws, including acts of the Parliament, which, under Art. 61(1), is 'the sole legislative authority of the country'. Government's ordinances (both simple and emergency) also hold equal legal force under Art. 115, as do Regulations of the Parliament. Only these acts can be considered 'law' within the meaning of Art. 15(2) of the Romanian Constitution, so that they can enact a *lex mitior*. The referring court noted that the declaration of unconstitutionality of a law does not constitute a new law but merely signifies the non-existence of that legal provision. However, the AG argued that there was no difference between the repeal of a criminal law by a subsequent law and the expulsion from the legal order of that law by a declaration of unconstitutionality.

effect of the EU law provisions;<sup>27</sup> and the disciplinary regime for national judges.<sup>28</sup> The disagreement between the two concerned the core questions regarding the compatibility of the Romanian case law with EU law obligations under Article 325 TFEU, as outlined in the first and second preliminary questions.

### *The Advocate General's Opinion*

The Advocate General began by examining Article 325 TFEU, which is applicable in the case due to serious VAT frauds involved, in connection with Romanian legislation and the case law on statute of limitations. He noted that the EU law obligations were violated: although Romanian criminal norms were theoretically appropriate, the national case law created a 'legal impossibility' for interrupting limitation periods in national courts, potentially leading to the annulment of a significant number of convictions.<sup>29</sup> However, the Advocate General pointed out that this violation might not necessarily result in the disapplication of the conflicting national rules because of EU law primacy. Article 49 Charter establishes the principle of non-retroactivity in criminal law, except *lex mitior*. This norm, central to the EU value of the rule of law, conflicts with the application of Article 325 TFEU. The Advocate General noted that while it is acknowledged that *lex mitior* applies to substantive criminal norms, its application to procedural criminal norms is debated. However, given the variety of national constitutional traditions on the *lex mitior* scope, he argued that the ECJ should establish an independent, high standard of protection<sup>30</sup> which would be diminished if *lex mitior* applied to substantive criminal law provisions only. Consequentially, he suggested that the national case law on limitation periods might be directly protected by the Charter.

Whether the ECJ adopted a narrower understanding of *lex mitior*, the Advocate General indicated that, since the Romanian system applies the principle

<sup>27</sup>*Lin*, paras. 96 and 129; Opinion, paras. 72 and 84. Despite the inherent difficulties in this specific case – since direct effects would be *in malam partem* – the brief analysis of Art. 325 TFEU (concluding that the norm has direct effect for being clear, precise, and not subject to any conditions) seems to indicate that for the ECJ any provision which is subject to objective justiciability is now automatically capable of direct effect. See M. Bonelli, 'Growing Pains: Direct Effect, Primacy and Fundamental Rights after *Lin*', 61 *Common Market Law Review* (2024) p. 1.

<sup>28</sup>*Lin*, para. 137; Opinion, para. 150. The AG and the ECJ agreed that the principle of the primacy of EU law, and the consistent case law on judicial independence, must be interpreted as prohibiting legislation that binds courts to the decisions of higher courts and preventing them, for that reason and at the risk of incurring disciplinary sanctions, to disapply on their motion legislation or case law that violates EU law.

<sup>29</sup>Opinion, paras. 61-64.

<sup>30</sup>Opinion, paras. 90-100.

to procedural norms as well, it should be considered a higher national standard of protection under Article 53 Charter. Given the lack of harmonisation on this topic,<sup>31</sup> such a national standard of protection should not be jeopardised by the Treaty application. The Opinion referred to the *Melloni* case law,<sup>32</sup> which permits the maintenance of higher national higher standards of fundamental rights protection as long as two conditions are met: the protection level guaranteed by the Charter must be preserved, and the primacy, unity, and effectiveness of EU law should not be compromised. In this case, while the first condition for applying a higher national standard was easily met, primacy, unity, and effectiveness of EU law would have been jeopardised.

The Advocate General indicated that the subsequent case law concerning the extent to which the second condition must be respected, as represented by *Taricco II* on one hand, and *Euro Box Promotion* on the other, pointed in two different directions.<sup>33</sup> In the first case, the ECJ allowed a national higher standard to trump primacy, while in the second this possibility was denied. Since, in the Advocate General's view, the situation in the *Lin* case closely resembled *Taricco II*; therefore, the ECJ should let Romania maintain its higher national standard. In the balance proposed, the EU's financial interests – upheld by Article 235 TFEU – should be set aside in favour of protecting fundamental rights, as shielded by Article 49 Charter or the national constitutional system. Consequently, the Advocate General concluded that the protection afforded by *lex mitior* demanded that EU law should not be required to disapply the Constitutional Court and Cassation Court case law, even if this results in perpetrators of offences affecting EU financial interests going unpunished.

### *The Court of Justice judgment*

The ECJ started its reasoning by slightly adjusting the preliminary reference questions, making it if EU law provisions must be interpreted as requiring member state courts to disapply, on one hand, the judgments of the Constitutional Court invalidating the national law on limitation periods in criminal matters due to a breach of the principles of foreseeability and precision of criminal law, and, on the other hand, a judgment of the Court of Cassation, which implies that the rules governing the grounds of interruption for limitation periods, as derived from that constitutional case law, may be applied retroactively. Then, it proceeded to examine whether this case law conflicted with the obligation under

<sup>31</sup>Opinion, para. 107.

<sup>32</sup>ECJ 26 February 2013, Case C-617/10, *Akenberg Fransson*, para. 29; ECJ 26 February 2013, Case C-399/11, *Melloni*, para. 63.

<sup>33</sup>Opinion, para. 139.

Article 325 TFEU to combat EU financial fraud through effective measures. Although Member States can choose their limitation periods for relevant criminal offences, as this has not been yet harmonised by EU law,<sup>34</sup> they must still ensure effective measures of control. The ECJ hinted to the referring court that there were concerns that the Constitutional Court and Court of Cassation combined judgments could affect a significant number of cases, creating then a systemic risk of serious fraud against the EU going unpunished. This outcome would be incompatible with Article 325 TFEU.

Next, the ECJ addressed the obligations of Romanian courts following the declaration of incompatibility between EU and national norms. It referred to the duty of disapplication enshrined in its case law since *Simmenthal*, which requires national courts to disapply national law in conflict with the EU law, and merged this with *EuroBox Promotion*, which has established that Article 325 TFEU can have direct effect.<sup>35</sup> The ECJ also examined possible limitation to this duty. Since the case fell within the scope of EU law, the Charter applies. The Court then had to determine whether disapplying the national case law on the statute of limitations would violate fundamental rights, protected by the principles of legality and *lex mitior* under Article 49 Charter. Here the ECJ brought back the division between the case law of Constitutional Court and the Court of Cassation. As Article 49 Charter enshrined the principles of foreseeability and precision of criminal law, primacy cannot require the application of norms that were deemed to violate these principles in the period (2018–2022) following the Constitutional Court judgment of unconstitutionality. Such principles could preclude the application of the obligation at Article 325 TFEU, even in light of the severe consequences for the number and significance of frauds that would go unpunished.<sup>36</sup> Conversely, the ECJ found no indications in the Charter supporting *lex mitior* in procedural norms, and therefore the Court of Cassation case law on limitation periods – which extend the more favourable procedural norms to the period before the judgment of unconstitutionality (2014–2018) – did not receive protection under Article 49 Charter. Consequently, disapplying the national practice would not breach these EU law principles.

<sup>34</sup>The ECJ clarified that EU rules on limitation periods for criminal offences affecting its financial interests have not been fully harmonised. Therefore, setting these rules remains within the competence of the Member States, which may treat limitation periods as part of substantive criminal law: *Lin*, paras. 81–82 and 117.

<sup>35</sup>ECJ 9 March 1978, Case C-106/77, *Simmenthal*, para. 24; ECJ 24 June 2019, Case C-573/17, *Poplawski*, para. 62; ECJ 22 February 2022, Case C-430/21, *RS*, para. 53; *EuroBoxPromotion*, *supra* n. 23, para. 253.

<sup>36</sup>*Lin*, para. 116.

The ECJ then addressed whether this case law might be interpreted as higher national standards of fundamental rights protection, implicitly referencing the *Melloni* case law, which could limit the duty of disapplication under the conditions described above. Since limitation periods are considered part of substantive criminal law within the Romanian system, this could legitimately be viewed as a higher national standard of protection of fundamental rights. However, with a brief reasoning, the Court of Justice argued that this national standard would exacerbate the risk of impunity, compromising the primacy, unity, and effectiveness of EU law to an intolerable extent. Radically diverging from the Advocate General's Opinion, the Court of Justice concluded that the Romanian law and case law governing the limitation period for criminal liability, when enacting *lex mitior*, has to be disapplied, even if it offers a higher standard of protection of fundamental rights.<sup>37</sup>

## COMMENT

### *Divide et impera: the Court of Justice unpacks the rule of law*

The ECJ utilised certain constitutive elements of the rule of law to favour the primacy of EU law over an incompatible national framework. It distinguished between the case law of the Constitutional Court and that of the Court of Cassation, assigning the protection of the principle of foreseeability and precision of criminal law to the former, and the application of *lex mitior* to the latter.<sup>38</sup> While the Constitutional Court's case law indicated that there were no grounds in national law for interrupting the limitation period for the years 2018–2022, the Court of Cassation's case law allowed the application of the more lenient regime resulting from the Constitutional Court's judgments to procedural acts that occurred before the first Constitutional Court's decision. The primacy of EU law would require the disapplication of both the 2018 and 2022 Constitutional Court judgments and the 2022 Court of Cassation decision based on those judgments.<sup>39</sup> The Constitutional Court created the legal vacuum by eliminating the grounds for interrupting the limitation period, and the Court of Cassation, on this premise, filled it with the *lex mitior*. Both actions are prejudicial to the EU law and create a systemic risk of impunity. However, the ECJ criticised only the Court of Cassation decision, and the principle it proclaimed. The consequences of the Constitutional Court decisions are against the EU law – namely, the Court of Cassation judgment – while the premise – the Constitutional Court judgments – is not.

<sup>37</sup>*Lin*, paras. 119–123.

<sup>38</sup>*Lin*, para. 102.

<sup>39</sup>*Lin*, paras. 98–99.

The ECJ arrived at this conclusion through unorthodox yet intriguing reasoning. It identified the Constitutional Court case law as being based on the principle of foreseeability and precision of criminal law, which were absent in 2018–2022. Therefore, in that period, Romanian criminal law was unconstitutional, and the protection offered by the Constitutional Court against this is significant enough to preclude the application of EU law. In contrast, the Court of Cassation case law, while based on those judgments, was of a different type, because it enforced (and not merely declared) the principle of *lex mitior*, which is not recognised by the EU in the same manner as in Romania, and therefore cannot preclude the application of EU law. According to the ECJ, the principles of precision and foreseeability of criminal law are part of its case law, and *lex mitior* stems directly from the Charter.<sup>40</sup>

However, there is a theoretical distinction between the principles of foreseeability and precision of criminal law, on one hand, and the principle of *lex mitior*, on the other, which might explain the different treatment the ECJ has granted them. All these principles relate to the rule of law, but foreseeability and precision of criminal law operate at a higher level than *lex mitior* and have different theoretical foundations. Foreseeability and precision of law are peremptory and inevitable principles, as they are essential requirements of the rule of law.<sup>41</sup> Specifically, they make perspective legislation possible. In the context of criminal law, they have an additional feature: they prohibit retroactive legislation. The latter is part of the former: to be foreseeable, the law has to be prospective, i.e. non-retroactive. The temporal dimension of the rule of law is therefore inspired by the principle of not interacting with the past.<sup>42</sup> In contrast, *lex mitior* necessarily interacts with the past. Its backward-looking nature is undeniable: if it did not affect the past, *lex mitior* would be meaningless. Its theoretical foundations

<sup>40</sup>Lin, paras. 104–105.

<sup>41</sup>On these rule of law principles, see Commission, ‘A New EU Framework to Strengthen the Rule of Law’, 11 March 2014, COM(2014) 158 final, para. 2 (in terms of legality and legal certainty); ECJ 5 May 2015, Case C-147/13, *Spain v Council of the European Union*, para. 79; ECJ 14 September 2010, Case C-550/07, *Akezo Nobel*, para. 100; ECJ 14 April 2005, Case C-110/03, *Belgium v Commission*, para. 30 (clarity, precision, and predictability of the law); ECJ 17 September 2009, Case C-519/07, *Friesland Campina*, para. 84; ECJ 22 June 2006, Joined Cases C-182/03 and C-217/03, *Forum 187*, para. 147; ECJ 12 November 1981, Case C-212/80, *Amministrazione delle Finanze dello Stato*, para. 10 (legitimate expectations); ECJ 9 January 1990, Case C-337/88, *SAFA*, para. 13; ECJ 10 July 1984, Case C-63/83, *Kirk*, para. 22 (no retroactivity and legal certainty); ECJ 29 April 2004, Case C-496/99, *CAS Succhi di Frutta*, para. 63 (adherence to legality); ECJ 21 September 1989, Case C-46/87, *Hoechst*, para. 19 (legal basis) and para. 64 (effectiveness of the law); ECJ 19 December 2019, Case C-752/18 *Deutsche Umwelthilfe*, para. 37; ECJ 13 February 1979, Case C-101/78, *Granaria*, para. 5 (effectiveness of the law).

<sup>42</sup>J. Elster, ‘Introduction’, in J. Elster and R. Slagstad, *Constitutionalism and Democracy* (Cambridge University Press 1988) p. 3.

rely on the principle of reasonableness and proportionality.<sup>43</sup> It would be unreasonable if individuals who committed the same offence were punished differently merely because they committed the crime at different times, resulting in one being punished while the other is not solely due to the application of *tempus regit actum*. The principle of proportionality of the penalty concerning the gravity of the offence, as perceived at the time of the sanction's application, also argues in favour of the application of *lex mitior*. Retroactive application of the law is an element of the rule of law when it is *abolitio criminis* – a change in substantive criminal law in favour of individuals; not when it changes procedural criminal law. Therefore, while foreseeability and precision of criminal law truly respond to a rule of law necessity, *lex mitior* in procedural law represents a policy within criminal matters.<sup>44</sup> Since these principles are distinct and operate on different levels, it is possible to imagine a different balance when they conflict with other values.<sup>45</sup> While the prohibition of retroactivity against the individual, corollary of the principle of foreseeability and precision, is a rule of law principle that can never be jeopardised, the obligation of retroactivity in favour of the individual might be derogated in light of values such as legal certainty<sup>46</sup> and the related limit of *res judicata*.<sup>47</sup>

In the *Lin* judgment, the principles of foreseeability and precision of criminal law, together with the corollary of non-retroactivity, are framed as expressions of the principle of legal certainty, which is defined as an essential element of the rule of law: this framing places them at the apex of the hierarchy of rule of law principles.<sup>48</sup> In doing so, the ECJ uses these principles as limits to *lex mitior*. The ECJ has stated that Article 49 Charter – prohibiting the retroactive application of the law – applies only to substantive criminal law, similar to Article 7 ECHR. This has been recognised in the case law of both the ECJ<sup>49</sup> and the European Court of

<sup>43</sup>M. Scoletta, 'Principe de retroactivité favorable et illicéité de la *lex mitior* dans la perspective européenne', in A. Zapatero and N. Martín, *European Criminal Law: An Overview* (Ediciones de la Universidad de Castilla-La Mancha 2010) p. 337.

<sup>44</sup>For example, in the Commission Rule of Law Report, the application of *lex mitior*, resulting in downgrading corruption from an offence to a lesser misdemeanour, has been criticised as an attempt against the rule of law. See Commission, Rule of Law Report 2020, Belgium, p. 8; Italy, p. 9; Greece, p. 6; Latvia, p. 7.

<sup>45</sup>Principles like legal certainty and *res judicata* sometimes yield when balanced against the principle of legality. *A fortiori*, *lex mitior* in procedural criminal law could yield as well. See V. Groussot and T. Minssen, 'Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality', 3 *EuConst* (2007) p. 385.

<sup>46</sup>ECtHR 28 June 2007, No. 32978/03, *Perez Arias v Spain*, para. 27.

<sup>47</sup>ECtHR 17 September 2009, No. 10249/03, *Scoppola v Italy* (No. 2), para. a.

<sup>48</sup>*Lin*, para. 114.

<sup>49</sup>ECJ 5 June 2018, Case C-612/15, *Kolev*, para. 75; ECJ 6 October 2016, Case C-218/15, *Paoletti and Others*, paras. 27-35; *M.A.S.*, *supra* n. 22, para. 42; *Taricco*, *supra* n. 22, para. 57.



Human Rights.<sup>50</sup> *Lex mitior* has indeed occasionally been recognised as an EU principle too,<sup>51</sup> but in the substantive criminal law area only. Procedural norms then follow the *tempus regit actum*, and no application of *lex mitior* is provided in similar cases. Consequently, the obligation to set aside the conflicting case law from the national court does not conflict with the Charter, as the duty of disapplication concerns procedural rules such as the grounds for interrupting the limitation periods. This sets aside any problem of application of EU law at the EU level: the principle of *lex mitior* simply does not cover statutes of limitations; it is not an EU constitutional value to apply more lenient procedural criminal law. However, lacking a full harmonisation in this field, the ECJ noted that national systems are free to apply higher standards of protection of fundamental rights, like those inherent to a system that considers *lex mitior* applicable to rules on limitations too, but only to the extent that this does not conflict with primacy, effectiveness, and unity of EU law.<sup>52</sup>

In its case law, the ECJ has accepted<sup>53</sup> – during its confrontation with the Italian Constitutional Court – that, as national legal systems may consider statutes of limitations to be part of substantive criminal law, an exception exists – for courts only – to the obligation of disapplying those national limitation rules that conflict with EU law obligations.<sup>54</sup> However, even in *Taricco II*, where the ECJ engaged with a comprehensive analysis of the principle of non-retroactivity,<sup>55</sup> it did not declare that *lex mitior* encompasses procedural law, maintaining consistency with *Taricco I* in this regard. Interestingly the ECJ never used the term ‘principle of legality’ to define the situation in *Taricco II*. Instead, it referred to the ‘principle that offences and penalties must be defined by law’, and thus accepted that the *Taricco I* rule would have violated that principle. Non-retroactivity is, then, a corollary that offence and penalties must be – prospectively – defined by law, but this has nothing to do with *lex mitior*. Conclusively, in *Taricco II*, there is no obligation of retroactive more lenient treatment but simply a prohibition of retroactive treatment *in peius*.

<sup>50</sup>ECtHR 29 January 2019, No. 45949/13, *Orlen Lietuva Ltd v Lithuania*, para. 97; ECtHR 13 November 2014, No. 50490/99, *Bosti v Italy*, para. 54; ECtHR 12 February 2013, No. 1845/08, *Previti v Italy*, para. 80; ECtHR 22 September 2015, No. 55959/14, *Borcea v Romania*, para. 64; ECtHR 17 September 2009, No. 10249/03, *Scoppola v Italy (No. 2)*, para. 110; ECtHR 22 June 2000, No. 32492/96 et al., *Coeme v Belgium*, para. 149. When the ECHR was adopted, *lex mitior* was not included; the *travaux préparatoires* reveal that its addition was considered but ultimately abandoned. It is considered that Art. 7 ECHR includes the principle of retroactivity of the more lenient criminal law in substantive norms only since *Scoppola v Italy (No. 2)*.

<sup>51</sup>ECJ 2 May 2005, Case C-387/02, *Berlusconi*, paras. 68–69.

<sup>52</sup>*Lin*, para. 109.

<sup>53</sup>*M.A.S.*, *supra* n. 22, paras. 44–45.

<sup>54</sup>*Ibid.*, para. 62.

<sup>55</sup>*Ibid.*, para. 52.

The Advocate General correctly noted similarities between *Lin* and *Taricco II* but erred in identifying the core issue. In *Taricco II*, upholding EU law primacy would have required a retroactive application of a less favourable criminal law, conflicting with a national (and EU) standard prohibiting retroactive laws. In *Lin*, by contrast, upholding EU law primacy precluded the law's retroactivity, opposing a national standard requiring it for more favourable procedural law. While in *Taricco II* EU law was compromising legal certainty, in *Lin* it protected it. The ECJ, therefore, rightly treated the national standards in *Taricco II* and *Lin* as distinct.<sup>56</sup> This judgment is then a clarification of the ECJ case law: the prohibition of law's retroactive application endures, even for procedural norms. However, this does not imply a mandatory retroactive application of more favourable procedural laws. In conclusion, the ECJ has articulated a hierarchy of rule of law principles, prioritising the legal certainty, substantiated by the foreseeability, precision, and non-retroactivity of the law which are recognised by EU constitutional law. As a result, the primacy of EU law may be limited by the application of these principles by national systems. On the same level is the principle of *lex mitior* for substantive norms, which is also part of the rule of law, albeit from a different perspective. Lower in this hierarchy is *lex mitior* in procedural norms, which EU constitutional law does not recognise as a rule of law principle and can be therefore outweighed by the Treaty obligation to protect the EU's financial interests.

### *The Court of Justice's temporal containment of lex mitior*

It must be noted that in the judgment *lex mitior* is not erased: while the EU does not recognise it in procedural norms, a national system is free to articulate the protection of fundamental rights by extending *lex mitior* to them too. The ECJ merely operated a temporal containment of its application, declaring it compatible with the EU law for the period after the Constitutional Court judgment of 2018, but not for the earlier period. This containment is framed around three rationales: the first one is theoretical, the second contingent on the case, and the third institutional, each of them relying on the Romanian case law and aimed at limiting its inherent retroactivity.

The theoretical rationale lies in the ECJ's narrower understanding of the temporal scope of *lex mitior* in procedural norms when compared to that of the Romanian courts. While for the EU the prohibition of retroactivity in criminal law is unlimited, and so *lex mitior* in substantive criminal law, its temporal scope is limited when applied to procedural norms. This is because *lex mitior* is made dependent upon the more important principles of foreseeability, precision, and

<sup>56</sup>*Lin*, para. 120.

non-retroactivity of criminal law which, through the operation of *tempus regit actum*, leads to legal certainty. Specifically, *lex mitior* in procedural norms is temporally bounded to the moment when individuals could not have relied on the foreseeability and precision of the criminal law. In this case, before 2018 the limitation period regime was the law of the country (not yet declared invalid by the Constitutional Court judgment, which operated only for the future) and upheld by the principle of *tempus regit actum*. For this reason, individuals could have relied upon that, being foreseeable, precise, and prospective. However, when the foreseeability and precision of criminal law were lacking, as in Romania during the period 2018–2022, *lex mitior* can also be applied retrospectively.

Therefore, when the legal system is clear and apt to allow foreseeability, the procedural rules remain valid, and a subsequent change cannot compromise the determinations based on that legal framework: the application of *tempus regit actum* and limitation of *lex mitior*. In this case, this means that the more favourable regime of limitation can have retroactive effects, as declared by the Court of Cassation, without conflicting with EU law, only for the years 2018–2022, from the time the legislature was supposed to readdress the issue.<sup>57</sup> Only from the moment when the law was declared invalid could *lex mitior* apply. Solely in this version can *lex mitior*, when supported by higher rule of law principles, enact a legitimate standard of protection of fundamental rights capable of limiting primacy.<sup>58</sup> In the EU system *lex mitior* in procedural norms has a limited, backward-looking aspect: it goes backwards only to the moment when it was proclaimed (and foreseeable) that another treatment would have been delivered. This expectation was true only in 2018 and not before. Whereas this treatment is more favourable, it would have a backward-looking application, but only from the time when the principles of foreseeability and precision were deemed to be violated.

To be compatible with an EU law obligation, the application of *lex mitior* to procedural norms cannot be retroactive; it has merely to be retrospective. When it comes to *lex mitior* it seems the EU allows only a vanilla version of it, as its effects on the past are constrained: it does affect proceedings for facts committed in the past, but starting in the present, under the new (more favourable) legal framework. Only to them is possible to apply the more favourable legislation; for the others, the principle *tempus regit actum* will continue to regulate them. The *lex mitior* works in favour of the individuals only from the moment of the enactment of the new legal framework. While it also affects pre-enactment actions, this only occurs in the post-enactment period.

<sup>57</sup>Lin, paras. 119–120.

<sup>58</sup>See L. Besselink, 'The Parameters of Constitutional Conflict after *Melloni*', 10 *European Current Law* (2014) p. 1169.

The ECJ's judgment also reflects a more practical approach. While the application of the principles of foreseeability and precision of criminal law, unrestrained by EU law primacy, would only affect the years 2018–2022 (neutralising the interrupting effects of procedural acts in the timespan between the first judgment and the law decree redressing the situation), the application of *lex mitior* would have affected procedural acts even before 2018, starting from the adoption of the Criminal Code in 2014 – an additional four years.<sup>59</sup> It was not merely the extended timeframe – and the number of related crimes committed in that time that would go unpunished – that alarmed the ECJ. The concern is a legal one: if the convictions adjudicated in the period 2014–2018 were nullified due to the absence of grounds for interrupting the limitation periods, this would result in the impunity of criminal acts despite the existence at that time of a valid norm which complied with the principles of precision and foreseeability. Such a legal framework was deficient in these terms only in the subsequent period (2018–2022), starting from the first Constitutional Court decision on the matter. Only within that timeframe is the resulting impunity acceptable in the name of the principles of precision and foreseeability of criminal law: this condition was absent for the earlier period (2014–2018), where the limitation periods rules were still in force as the Constitutional Court has not (yet) declared them invalid.

As a paradigmatic example, the two individuals in the case at stake committed the relevant acts in 2010 and were sentenced, in the first instance, in March 2018, before the first Constitutional Court of June 2018.<sup>60</sup> Therefore, the first instance judgment was procedurally correct. This was true for the appeal judgment of 30 June 2022 as well: it was adjudicated after the Constitutional Court decision of 25 June 2018, but being merely a prospective judgment, the Constitutional Court did not mean – nor did the Romanian Constitution permit – that this could influence proceedings already pending. As the Constitutional Court decided its unconstitutionality – dictating for the future how the law should be – the rule on limitation periods at Article 155(1) was still valid, even if it had to be reframed. Moreover, the absence of grounds for interrupting the limitation periods for the years 2014–2018 was not materially foreseeable by the competent adjudicating courts and the criminal prosecutors. This particularly entailed the risk that cases requiring long and complex investigations would remain unpunished.<sup>61</sup>

The ECJ has thus taken the side of the enforcement authorities which could not have foreseen that there would have been a lack of legal grounds for interrupting the limitation period. The application of the higher national standard of protection of fundamental rights – meaning the retroactive erasure of grounds

<sup>59</sup> *Lin*, para. 122.

<sup>60</sup> *Lin*, para. 64.

<sup>61</sup> *Lin*, para. 94.

for interrupting limitation periods – was then possible for the years 2018–2022, despite causing systemic impunity, but impossible for the years 2014–2018, as it would amount to *legal* systemic impunity.<sup>62</sup> The status of legality of the law on limitation periods in the two time slots was indeed slightly different: unconstitutional, but not erased for 2014–2018 (because of the future-oriented nature of judgment no. 297/2018, as mandated by the Constitution); unconstitutional and inapplicable for 2018–2022 (because of the ‘simple/extreme’ nature of judgment no. 297/2018 that the ‘interpretative’ judgment no. 358/2022 clarified).

A third rationale in the ECJ’s judgment is its greater institutional deference to constitutional courts compared to supreme courts. Because most of the resistance against the primacy of EU law has come from constitutional courts,<sup>63</sup> the ECJ has learned to be careful when it has to intervene in sensitive areas, such as criminal law and fundamental rights, and where constitutional courts have already given their views. For this reason, the ECJ has not been overly critical of the Constitutional Court judgments *per se*, as they are interpreted as not directly jeopardising EU law. Indeed, the decision of unconstitutionality no. 297/2018 did not bear any fruit, as the legislature did not remedy the situation, and the lower courts kept applying the contested norm. To corroborate this reasoning, the ECJ noted that the purpose of decision no. 297/2018 was not to remove the limitation periods for criminal liability or to preclude the interruption of those periods, but to bring Article 155(1) of the Criminal Code into line with constitutional requirements – given the ‘simple/extreme’ nature of the judgment of unconstitutionality.<sup>64</sup>

Judgment no. 358/2022 did not pose insurmountable problems from the EU perspective either. The Constitutional Court adopted a second decision which re-stated the unconstitutionality of the law and the absence of grounds for interrupting the limitations periods. The decision, as the Constitutional Court claimed, was not retroactive but merely interpretative of the previous decision. Therefore, there was no violation of the constitutional mandate to issue decisions binding only for the future, from the Romanian law perspective, and no problematic application of *lex mitior*, from the EU law perspective. What might seem like the past from the 2022 point of view – the period 2018–2022 – was simply the future in 2018. Being interpretative, the 2022 judgment was inevitably past-oriented, but only for the purpose of clarifying what had already been stated

<sup>62</sup>*EuroBoxPromotion*, *supra* n. 23, para. 203.

<sup>63</sup>German Constitutional Court, Judgment of 5 May 2020 – Case 2 BvR 859/15; Judgment of 21 June 2016 – Case 2 BvR 2728/13; Italian Constitutional Court, Order 26 January 2017, no. 24; judgment 31 May 2018, no. 115; Poland Constitutional Tribunal decision K-21, 8 October 2021; Constitutional Court of the Czech Republic, 31 January 2012, PL/US 15/12.

<sup>64</sup>*Lin*, paras. 28–29.

in 2018, in response to the inaction of the legislature and the indifference of the judiciary. For this reason, the Constitutional Court could legitimately claim that it was not violating the constitutional provisions.

The ECJ did not address the retroactive nature of the second judgment of the Constitutional Court *per se*, as it covered a period that, from the perspective of the first judgment, was still the future, and therefore did not generate *lex mitior* consequences. It was the Court of Cassation that made this case law retroactive, applying the law of 2018–2022 (no grounds for interrupting statutes of limitations) to the period 2014–2018 as well. This was legitimate from the perspective of Romanian constitutional law, but not from the EU perspective, as it triggered a serious risk of systemic impunity contrary to an EU law obligation.

## CONCLUSIONS

According to the Constitutional Court's decisions, the procedural acts carried out by the Romanian authorities from 26 June 2018 to 30 May 2022 did not interrupt the limitation periods for criminal liability, as the underlying norms violated the principles of foreseeability and precision of criminal law. The ECJ has stated that the consequent more lenient criminal law on limitation periods for criminal liability, however, cannot be applied retroactively, contrary to the Court of Cassation's decision, when it impedes Romania from fulfilling its EU obligations to combat frauds affecting the financial interests of the EU. Romanian courts are then mandated to disapply the case law originated from the Court of Cassation for cases involving serious criminal fraud offences affecting EU financial interests, wherein procedural acts took place before 25 June 2018.

Following the ECJ's judgment, the Criminal Chamber of the Court of Cassation decided that, while applying Constitutional Court decisions 297/2018 and 358/2022, it would adhere to the ECJ's *Lin* judgment regarding the obligation to leave unchanged the procedural acts issued before 26 June 2018.<sup>65</sup> Subsequently, on 18 April 2024, the Bucharest Court of Appeal sentenced two persons to two years' imprisonment for fraud involving EU funds. In its judgment, this court noted that it followed the ECJ decision and disapplied Court of Cassation decision no. 67/2022. However, on 17 June 2024, the Panel for resolving Legal Issues of the Court of Cassation found that the Constitutional Court decision 358/2022 is to be applied retroactively. It also determined that lower courts cannot disregard the earlier judgments of the Court of Cassation that aligned with the Constitutional Court decision no. 67/2022.<sup>66</sup> In this inconsistent case law, it remains to be seen whether national developments will

<sup>65</sup>Court of Cassation, 30 January 2024, decision no. 22/A.

<sup>66</sup>Court of Cassation, 17 June 2024, decision no. 37.

lead to a resistance to the primacy of EU law, or whether the case law will be realigned with the ECJ ruling.

A reading of this judgment might conclude that the outcome is merely the (re-) affirmation of primacy, effectiveness, and unity over national higher standards of protection of fundamental rights. However, another interpretation proposed in this case note is that here the primacy of EU law is applied in the name of the EU rule of law: the temporal containment of the effects of the national protection of fundamental rights hinges on balancing the *lex mitior* in procedural norms and a core principle of the rule of law: *tempus regit actum*. Thus, this judgment also represents a step toward an autonomous EU conception of *lex mitior* and its temporal scope: the EU recognises *lex mitior* but only in the field of substantive criminal law, strictly interpreted. The retroactive scope of *lex mitior* in procedural norms is also limited, applying to facts before the new more lenient law came into force, but only insofar as the relevant adjudication has not yet started.

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