



ANNEX 8

Potential obstacles with regard to the investigation and prosecution as well as to sanctions applied in high corruption cases (e.g. rules on immunity of politicians, procedural rules, statute of limitations on criminal liability, pardon/amnesty)

As we have shown, these decisions affect all the prosecution work carried out in cases concerning acts committed prior to them, but the most serious effect of these decisions is, in our opinion, in relation to the criminal trials concerning high-level corruption offences and the criminal trials in complex cases, which have required time for all the necessary evidence to be gathered.

Bearing in mind that the role of the Public Ministry and its functioning are enshrined in the fundamental law, in order to ensure unity of action by prosecutors, with a view to achieving a unified fulfilment of the constitutional role of defending the general interests of society, the Prosecutor General issued guidelines to its subordinate prosecutors' offices regarding the prosecution and participation in the trial of cases, by address no. 1470/C/1364/III-13/2022 of 10.06.2022, these recommendations targeting various types of cases.

In cases currently being prosecuted or tried concerning **offences affecting the financial interests of the European Union** (the offences provided for in section 4<sup>1</sup> of Law no. 78/2000, the offence of tax evasion when it concerns the evasion of VAT and the offence of smuggling), the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice has informed the prosecutors' offices that the primacy of Union law requires prosecution or trial to continue in cases where the general statute of limitations has expired, as long as the special statute of limitations has not yet expired. The arguments of this opinion are based on the case law of the CJEU<sup>1</sup> and explain how it can be applied to the present situation in Romania.

Also, the prosecutors were reminded of the clear case law developed by the CJEU which shows that in the case of corruption offences, national courts may disregard decisions of a constitutional court under certain conditions<sup>2</sup> (Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Euro Box Promotion).

For the **cases in which the criminal prosecution has not been finalised**, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice has ordered the carrying out of criminal prosecution acts with interrupting effect of the limitation periods, the verification of the cases in which the prosecutor carries out the criminal prosecution and those in which the prosecutor supervises the investigations, taking into account the existing working tools (record of cases older than 5 years), verification of cases with underage perpetrators (limitation periods are reduced by half) and cases involving offences with small penalties, for which the general statute of limitations is 3 years.

<sup>1</sup> CJEU judgment in Case C-105/14, *Ivo Taricco and Others (Taricco I)* and CJEU judgment in Case C-42/17, *MAS. and M.B. (Taricco II)*

<sup>2</sup> Article 325(1) TFEU in conjunction with Article 2 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995, and Decision 2006/928 are to be interpreted as opposing a national rule or practice under which judgments on corruption and value added tax (VAT) fraud which have not been handed down in ECLI:EU:C:2021:1034 61 JUDGMENT OF 21.12. 2021 - RELATED CASES C-357/19, C-379/19, C-547/19, C-811/19 AND C-840/19 EURO BOX PROMOTION AND OTHERS at first instance by specialised VAT courts or, on appeal, by courts whose members have all been chosen by drawing of lots are absolutely void, so that the cases of corruption and fraud in the field of VAT at issue must, where appropriate, following an extraordinary appeal against final judgments, be retried at first instance and/or on appeal, **in so far as the application of that national legislation or practice is liable to create a systemic risk of impunity for activities constituting serious offences of fraud affecting the financial interests of the Union or of corruption in general**. The obligation to ensure that such offences are subject to criminal penalties which are effective and dissuasive does not exempt the referring court from verifying the necessary compliance with the fundamental rights guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, without that court being able to apply a national standard of protection of fundamental rights involving such a systemic risk of impunity.

In **court cases pending**, in order to verify particular situations regarding the date of the act interrupting the statute of limitations, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice recommended prosecutors participating in hearings to request adjournments to the appeal proceedings and to formulate written conclusions. The Prosecutor General also recommended that remedies (appeals, challenges) should be declared against first instance decisions (substantive cases or cases incidental to enforcement), which will be dealt with by assessing the interruption of the limitation period in relation to Decision no. 358/2022, and that extraordinary remedies should be declared against final decisions which may be appealed by way of cassation, at the level of the prosecutor's offices participating in the hearing of the appeals.

For **categories of offences other** than those affecting the financial interests of the European Union, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice has asked the prosecutors' offices to request preliminary references questioning the incompatibility of the reduction of the limitation period with the general objectives of the Union in the Area of Freedom, Security and Justice, giving the grounds that may be invoked (i.e. Article 67 (3) TFEU, which provides for the Union's obligation to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia - see the areas<sup>3</sup> in Article 83 (1) TFEU) or arguments relating to judicial cooperation in criminal matters, in particular as regards mutual recognition of judgments, the argument being that the reduction of the limitation periods weakens all these measures.

After the publication of the Decision of the High Court of Cassation and Justice No. 67 of 25 October 2022, at the meeting on 21.12.2022, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice once again transmitted to the participants (Prosecutors General of the Prosecutor's Offices attached to the Courts of Appeal, First Prosecutors of the Prosecutor's Offices attached to the Courts, Chief Prosecutors heads of sections within the Prosecutor's Office attached to the High Court of Cassation and Justice) the necessary measures regarding the management of the cases, restating the arguments previously expressed.

The First Instance Court of Câmpina referred the matter to the Court of Justice of the European Union by its decision of the sitting of 01.07.2022, pursuant to Article 267 (3) of the TFEU, for a preliminary ruling on the following question: *"The principle of supremacy of the Union law must be interpreted as allowing national courts of common law to leave unapplied ex officio the decisions of the national constitutional court whereby, in conjunction with the passivity/inaction of the legislature (Parliament) to comply with the case law resulting from the said decisions and to bring the provisions declared unconstitutional into line with the provisions of the Constitution by means of legislation, a criminal rule can be created which has the effect of removing the criminal liability of the perpetrators by restricting the effects of the statute of limitations on criminal liability and an effective mechanism of systemic impunity for any and all acts constituting offences, regardless of their nature and seriousness, through the closure of judicial proceedings, if they consider that this case-law is contrary to Article 3 (2) of the Treaty on European Union, Article 67 (1) and (4) of the Treaty on the Functioning of the European Union or Decision 2006/928"*.

The reference for a preliminary ruling was made in a case concerning the offence of driving a vehicle without a driving licence, an offence provided for and punishable under Article 335 (1) of the Criminal Code, and concerns in practice the compatibility with the European Union law of the effects of Decision No. 358 of 26 May 2022 of the Constitutional Court.

Furthermore, by its decision of 7 December 2022, the First Instance Court of Bistrita referred the following question to the Court of Justice of the European Union for a preliminary ruling: *"What if Article 3 (2) of the Treaty on the European Union, Article 67 (1) of the Treaty on the European Union and Decision 2006/2009 must be interpreted as opposing a case-law of the Constitutional Court*

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<sup>3</sup> (1) The European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may establish minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them using a common basis. These crime areas are: **terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, cybercrime and organised crime.**

*according to which national provisions governing the interruption of the limitation period for criminal liability become inapplicable in so far as the application of that case-law is liable to create a systemic risk of impunity for acts constituting offences, irrespective of their nature?"*

This reference for a preliminary ruling also concerned a case involving non-specific offences other than those covered by the TFEU.

The National Anti-corruption Directorate has requested the courts to refer cases to the CJEU where the referral was issued by the Directorate, but none of its requests have been admitted. Also, no decisions to close the case for corruption or money laundering offences based on the lapse of the statute of limitations for criminal liability have been taken in this Directorate as a result of the three decisions.