Op-Ed: "AG Opinion in Lin (C-107/23 PPU): Insights on the protection of the EU financial interests and the national principle of lex mitior"

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The Opinion of Advocate General (AG) Manuel Campos Sánchez-Bordona in *Lin* (C-107/23 PPU) was eagerly awaited to shed light on the, at least apparently, unsettled case law of the Court of Justice regarding the articulation of the principles of dissuasive penalties in cases of serious fraud affecting the EU's financial interests and the retroactive application of the *lex mitior* (summary of the request available here). Following a palpably tense hearing on 10 May 2023, the Opinion was delivered on 29 June 2023 and responded in a rather contrasted manner to those expectations.

While the Opinion follows an adamantly clear structure of reasoning, grounded on the aim of guaranteeing a very high level of protection of fundamental rights, it fails (most probably refuses) to address directly and unambiguously why and how a potential risk of impunity, liable to arise from the application of the *lex mitior* to the detriment of valid provisions of EU law, could and should be tolerated in some cases. Specifically, the Opinion appears more solution-oriented than methodology-focused. The followed approach seems driven by the concern to avoid a Taricco-type constitutional conflict, especially in a context where the Romanian Constitution Court (RCC) has already made use of radical identity-related arguments. Yet this approach weakens the boldest suggestion of the Opinion: defining an autonomous EU standard of the principle of legality of offences and penalties (Article 49 of the Charter). This Op-Ed will briefly present and comment some aspects of the Opinion, pertaining to the first two questions (for a general presentation see here).

The context

The request came from a Romanian court in the context of an extraordinary appeal against a previous decision of that court, in which the appellants were sentenced to imprisonment and to pay damages for tax evasion and the setting up of a criminal organisation. The extraordinary appeal is a special procedure in Romania and allows a plaintiff to seek the annulment of definitive judgements in criminal matters when a sentence was pronounced despite the existence of grounds liable to end criminal proceedings.

In this case, the appellants argued that their conviction intervened despite the expiry of the limitation period for criminal liability. The expiration of such limitation period has been a contentious issue in Romania. After a first decision of the RCC in 2018, declaring unconstitutional some aspects of the law on the interruption of limitation periods (adopted in the context of structural reforms to fight corruption and meet pre-accession obligations), the national legislator remained inactive. This situation led Romanian courts to adopt non-uniform case law regarding the interruption of limitation periods. To cease the uncertainty, the RCC stressed, in 2022, that the interruption of limitation periods is part of substantive criminal law (not procedural) and is thus covered by the principle of legality and of retroactive application of the *lex mitior*. The RCC drew the conclusion that, following the adoption of its decision in 2018 and the failure of the legislator to put the law in line with that decision, Romanian criminal law should be understood as not providing for any ground of interruption of the limitation periods. As a result, pending criminal

proceedings could be ended if a definitive judgment has not been delivered within the uninterrupted limitation period.

Following the 2022 decision, the Romanian legislator adopted a normative act enumerating the grounds for interruption of the limitation periods. However, *Lin* concerns the effects of the 2022 decision on situations where a person has been convinced by a definitive judgement, but an extraordinary appeal is intended. This is the context in which the referring court stayed proceedings and referred three preliminary questions.

The preliminary questions

The first preliminary question aimed to clarify whether a decision absolving the appellants of criminal liability for offences that affect the European budget undermines the values of the rule of law (Article 2 TEU); the principle of effective judicial protection (Article 19(1) TEU); the commitment to ensure transparency and efficiency in judicial proceeding and to prevent and combat corruption, especially within local government (Decision 2006/928); and the principle of effective and dissuasive penalties for criminal offences which affect the Union's financial interests (Article 325(1) TFEU, Article 2(1) PFI Convention & Articles 2 and 12(1) PFI Directive). Mention has also been made to the principle of loyal cooperation as an overarching principle strengthening the position of the referring court that the answer should be positive.

The second question is similar in substance but more focused on the situation at hand. It aims to clarify whether EU law precludes a legal situation in which the convicted appellants seek, by means of an extraordinary appeal, to set aside a final judgment in criminal proceedings and request the application of the principle of the *lex mitior* as it results from the abovementioned context. For the referring court the response should also be affirmative. In the request, it stresses the generalised consequences of this specific application of the principle of *lex mitior* in the Romanian legal system and raises the risk of impunity as a threat to the rule of law. Curiously, according to the referring court, an affirmative response to the first two questions would be compatible with a consistent interpretation of the decisions of the RCC. In substance, a proportionality-based 'containment' of the effects of those decisions would rely on the one hand, on the communication of an act to the defendant for the interruption of the time-limits and, on the other, on the balancing exercise between the principle of *lex mitior* and the principle of equity and justice. For the referring court, the decision of the RCC could neither have the effect of criminal laws nor erase the balancing exercise between the principle of *lex mitior* and the principle of equity and justice, which should prevail.

The third question departs from the hypothesis that the response to the previous questions was affirmative, but the consistent interpretation of the RCC decisions would be impossible. The question is whether the principle of primacy should be interpreted as precluding national legislation or practice pursuant to which an ordinary judge could not, of their own motion, disapply the case law of the RCC and of the national supreme court, at the risk of facing disciplinary proceedings. The Court of Justice ruled in *R.S.* (C-430/21), that the disciplinary regime of judges in Romania was incompatible with EU law for similar reasons but a modification has been introduced. A Romanian judge can now be subject to disciplinary proceedings in case they perform their duties 'in bad faith or with gross negligence'. However, those conditions could be met in case of disapplying national case law because of its incompatibility with EU law.

The Opinion

At the beginning of the Opinion, the AG observes that the risk of impunity is presumed in the preliminary request. During the assessment of the first two questions, the AG adopts a formalistic approach regarding the existence of

such risk and the role of the national judge. Indeed, the AG expresses doubts on the possibility to interpret consistently the obligations stemming from EU law with the RCC decisions on the interruption of limitation periods, yet he highlights that only the national judge can appraise the feasibility of such interpretation. Also, when assessing the existence of a systemic risk of impunity considering Decision 2006/928, the AG underlines the responsibility of the Romanian legislator. Those elements illustrate a refined analysis, which preserves the respective roles of several actors entrusted with the protection of EU's financial interests. The Opinion refuses to appraise abstractly a systemic risk of impunity and resists the temptation of putting the burden of legislative inaction on the shoulders of national judges. At point 151, the Opinion mentions the infringement proceedings as a more adequate tool to address the violation of EU law, instead of requiring the lowering of a standard of protection of fundamental rights and procedural guarantees. Nevertheless, the fact remains that the specific context of interruption of limitation periods in Romania conflicts with EU law obligations and Romanian judges are called to decide concrete cases on this basis.

The Opinion follows clear methodological steps to provide guidance to the Court on clarifying the articulation of EU and national standards of protection, especially when they differ and when their application raises a systemic risk of impunity. The first step also constitutes a bold suggestion and is the only way to avoid a conflicting interpretation of the RCC decisions with EU law. It relies on the balancing between obligations on the protection of EU's financial interests and Article 49 of the Charter. If Article 49 admits the interruption of limitation periods as it resulted in the Romanian context, the conflict with EU law is prevented, not because of the absence of violation of EU law related obligations but because the protection of fundamental rights (as provided by EU law) prevails. As parts of this step, the Opinion examined whether the interruption of limitation periods could be covered by the principle of legality, whether the decision of a constitutional court could be analysed formally as *law* and whether final criminal judgements should be affected by the *lex mitior* resulting from constitutional decisions.

The Opinion followed the Kelsenian assimilation of a Constitutional Court to a negative legislator, fact that does not raise debate from a positivist standpoint. However, the choice of the AG to analyse a decision of a constitutional court on the interruption of limitation periods as (at least indirect) decriminalisation of an offence raises questions. This choice relies on the non-explicit assumption that limitation periods are inherent part of substantive criminal law. Similar questions are raised regarding the choice to consider that an autonomous EU standard provided for by Article 49 of the Charter could admit the definition of limitation periods both as substantive *and* procedural criminal law, for as long as no harmonisation is provided in EU law. The Opinion suggests that Article 49 should admit that rules on limitation periods are part of substantive criminal law when a Member State adopts such a definition but, also, that those rules are part of procedural criminal law for all other Member States. The non-explicit idea behind is that Article 49 should, at least eventually, follow a substantive definition of limitation periods. However, this choice touches upon the prerogatives of the (positive) legislator. One could suggest that common constitutional traditions might be an instrument legitimating the Court of Justice to follow this path, since such traditions do not require consensus in the laws of all Member States. For the author of this Op-Ed, the sole proclamation of a common constitutional tradition cannot entail or justify such precise legal effects: if EU law does not provide any element for the definition of limitation periods as procedural or substantive, then Article 49 of the Charter should be limited to framing negatively the actions covered by the scope of application of the Charter without touching upon criminal law concepts. Transforming limitation periods into a

Schrödinger's concept of EU law (concomitantly procedural and substantive) does not appear to be a convincing solution.

The following steps provided in the Opinion for the articulation of national and EU standards of protection are more conventional and cover the case in which the Court decides not to follow the suggested interpretation of Article 49. Without recalling the absence of harmonisation at this stage, the Opinion focuses on not compromising the level of protection offered by the Charter and not compromising the primacy, unity, and effectiveness of EU law. Regarding the appraisal of the latter step, a distinction is made between the *MAS* (C-42/17), and *Eurobox* (C-357/19) cases. In the first, the Court admitted that the conflict between a national regime on limitation periods with obligations on the protection of the EU's financial interests does not necessarily require the deployment of the exclusionary effects of the principle of primacy and, as a result, a national judge could apply a higher national standard.

The solution was different in the second case. The AG observes that the criterion justifying this difference was the absence of established practice regarding the higher national standard of protection at stake, yet he argues that such consideration should not be essential in the case at hand. This is where the AG mentions the infringement proceedings and, implicitly, the role of the Commission, to monitor and sanction the risk of systemic impunity regarding the EU's financial interests. Without explicitly mentioning it, the Opinion relies on a rather subjective criterion: the highest level of protection of fundamental rights. Admitting such a criterion could be conciliated with the coherence and consistency of EU law and of the EU judicial system if the Court goes further than this Opinion. Specifically, if such criterion should be accepted, the Court needs to introduce an unambiguous methodology, able to allow the national judges to know when national standards can apply, especially when such standards compromise the effectiveness of EU law. The case law and practice of EU law seem to designate the following criteria:

1. Absence of EU harmonisation on the specific matter
2. Respect of the level of protection of the Charter
3. Proportionality and necessity of compromising the primacy, unity and effectiveness of EU law.

Even with more clarity on the applicable criteria, articulating the principle of dissuasive penalties in cases of serious fraud affecting the EU's financial interests and the principle of retroactive application of the *lex mitior* will remain part of the mission of the national judge. The same applies, more generally, for the articulation (or parallel application) of EU standards of protection of fundamental rights and national standards. Thus, in cases such as *Lin* the Court of Justice should most probably focus on clearing pathways than depicting destinations.

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