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SOME ASPECTS REGARDING THE INSTITUTION OF WAIVING CRIMINAL PROSECUTION

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Abstract: *Among the four phases of the criminal process, the criminal investigation occupies a special place as a pre-trial activity, strictly necessary in terms of protecting the innocent against unjustified coercion. According to the legal provisions, the criminal investigation is a mandatory phase in all criminal cases, having a strict delimitation both in terms of its development in time and in terms of the activities carried out during it. Given that the initial limit is determined by the aspect of the beginning of the procedural legal relations between the subjects participating in solving the criminal case and corresponds to the initiation of the criminal process, the final limit is represented either by the referral to court - a moment marked by the indictment given by the prosecutor, or by the solution of not sending to court, a situation in which the prosecutor issues an order classifying or ordering the abandonment of the criminal prosecution.*

Keywords: *the defendant; the criminal prosecution; the waiver of the criminal prosecution; the prosecutor; the judge of the preliminary chamber*

1. General context

In the current context, the provisions contained in the Code of Criminal Procedure sought to respond to some requirements regarding the need to speed up the duration of criminal procedures, to simplify them and to create a unified jurisprudence, in accordance with the jurisprudence of the European Court of Human Rights.

Thus, we note the fact that in his approach, the legislator started from the critical analysis of some problems arisen in the judicial practice, among which we mention the overloading of the prosecutor's offices and the courts, the excessive duration of the procedures and the unjustified procrastination of the cases, problems that generated solutions revealed by provisions that regulate the solution of renouncing the criminal prosecution and at the same time the introduction of the principle of the opportunity of the criminal prosecution, a fact that generated the transition from a mandatory prosecution system (the principle of the legality of the accusation) to one of prosecution based on the principle of the opportunity of the accusation[2].

The desired transition was, of course, based on the need to offer a solution that would simplify and determine the avoidance of the overloading of the courts for the facts that present a low gravity, all the more since the institution of the fact that did not present was removed from the provisions of the Criminal Code the degree of social danger of a crime, contained in

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the provisions of art. 18^1 of the former Criminal Code, and, as a consequence, the solution to remove from criminal prosecution, according to the provisions of art. 10 para. (1) let. b^1 of the former Code of Criminal Procedure.

2. Some considerations regarding the disposition of the decision to waive the criminal prosecution

As it results from the provisions of art. 17 para. (1) of the former Criminal Code, for an act to have been considered a crime, it had to meet three essential features: to present a social danger, to be committed with guilt and to be prescribed by the criminal law.

In order for the deed to constitute a crime, it had to present a social danger.

Considered dangerous for society, in the sense of the criminal law, were the acts that harmed or endangered the most important values protected by the criminal law, such as the security of the state, patrimony, the person and his rights, the economic system and other social values protected by law.

The provisions of art. 18 of the former Criminal Code they were completed with art. 18^1, which referred to "the act that does not present the social danger of a crime" and which represented "a cause that removes the criminal nature of the act", by removing the social danger of the crime, a fact that causes the prosecutor or the court to apply, according to Art. 91 of the former Criminal Code, one of the administrative sanctions, respectively: reprimand, reprimand with warning or fine from 10 lei to 1000 lei.

In order to assess the concrete social danger of the deed, some criteria were used that the judicial bodies had to take into account, when they had to solve such cases.

These were: the manner and means of committing the deed, the purpose pursued by the perpetrator, the circumstances in which the deed was committed, the consequences produced or that could have been produced, the person and the conduct of the perpetrator.

Currently, through the provisions of the Criminal Code, some changes have been made, being removed from the content of art. 15 of the Criminal Code, the social danger, as an essential feature of the crime, disappearing at the same time the provisions that regulated the lack of social danger of the crime.

This had as a consequence the application of an administrative sanction, cumulatively with the disappearance from the content of art. 10 of the former Criminal Procedure Code of the cases provided for in para. (1) let. b^1) and letter i), namely the lack of the degree of social danger of a crime, respectively the substitution of criminal liability.

At the same time, however, through the provisions of art. 318 of the Criminal Procedure Code the solution of renouncing the criminal prosecution was regulated, a method by which the principle of the opportunity of the criminal prosecution provided by the provisions of art. 7 of the Criminal Procedure Code.

3. The procedure for discontinuing the criminal prosecution

Analyzing the provisions of art. 318 of the Criminal Procedure Code, it follows that, in order to order the solution of waiving the criminal prosecution, it is necessary to cumulatively meet the following conditions:

a) the punishment prescribed by law for the crime committed is a fine or a prison sentence of no more than 7 years;

b) to state that there is no public interest in carrying out the criminal investigation.

Admitting in this context the existence of the principle of opportunity enunciated in art. 7 of the Criminal Procedure Code, the legislator's assessment of the abstract social danger of the crime is made according to the deed that is the object of the criminal investigation for which the punishment provided by law is a fine or a prison sentence, the maximum of which should not exceed 7 years.

It is not possible to order the abandonment of the criminal prosecution for crimes that resulted in the death of the victim.

Also, the prosecutor will decide whether or not it is appropriate to proceed with the criminal investigation, assessing the existence of a public interest in the prosecution of the act.

The assessment of the public interest of the committed deed will be done according to the following criteria: the content of the deed and the concrete circumstances of its commission; the manner and means of committing the act; the intended purpose; the consequences produced or that could have been produced by committing the crime; the efforts of the criminal prosecution bodies necessary for carrying out the criminal process by reference to the seriousness of the act and the time elapsed since its commission; the procedural attitude of the injured person; the existence of a clear disproportion between the expenses that the criminal process would involve and the seriousness of the consequences produced or that could have been produced by committing the crime.

Also, when the perpetrator of the crime is known, the public interest will also be assessed according to the following criteria: the person of the suspect or defendant; conduct prior to committing the crime; the attitude of the suspect or defendant after committing the crime; the efforts made to remove or reduce the consequences of the crime.

In the situation where the perpetrator of the deed is not identified, the solution of renouncing the criminal prosecution may be ordered only depending on: the content of the deed and the concrete circumstances of its commission; the manner and means of committing the act; the efforts of the criminal prosecution bodies necessary for carrying out the criminal process by reference to the seriousness of the act and the time elapsed since its commission; the existence of a clear disproportion between the expenses that the criminal process would involve and the seriousness of the consequences produced or that could have been produced by committing the crime.

In order to verify the fulfilment of these criteria, it is necessary for the case file to have thoroughly administered means of evidence, which allow the prosecutor to establish, beyond any doubt, the existence of the act and the circumstances of its commission or, as the case may be, the identity of the perpetrator and the elements that allow judgments of guilt, motive and purpose.

The decision to abandon the criminal prosecution can only be ordered by the prosecutor, by ordinance. The prosecutor can order the decision to abandon the criminal investigation and through the indictment by which he orders, with regard to other facts or with regard to other persons, the solution of referral to court. According to art. 318 para. (10) of the Criminal Procedure Code, the ordinance by which the prosecutor ordered the decision to drop the criminal prosecution is verified in terms of legality and grounds by the chief prosecutor of the public prosecutor's office or, as the case may be, by the general prosecutor of the public prosecutor's office attached to the court of appeal, and when it was drawn up by him, the verification is done by the superior hierarchical prosecutor.

If the order to abandon the criminal investigation was drawn up by a prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice, the order is checked by the chief prosecutor of the section, and when it was drawn up by him, the check will done by the general prosecutor of this prosecutor's office.

The ordinance by which it was ordered to abandon the criminal investigation, verified according to the above-mentioned, is transmitted, for confirmation, within 10 days from the date on which it was issued, to the judge of the preliminary chamber of the court to which it would belong, according to the law, the competence to judge the case in the first instance.

The preliminary chamber judge is obliged to verify the legality and validity of the decision to abandon the criminal prosecution based on the works and material from the criminal prosecution file and the new documents presented.

It will be pronounced by conclusion. The solutions of the preliminary chamber judge can be the following: admit the request for confirmation made by the prosecutor or reject the request for confirmation made by the prosecutor, and the conclusion by which the judge of the preliminary chamber pronounces is final.

4. Conclusions

Under the conditions in which the provisions of art. 318 of the Criminal Procedure Code were declared, considering that they contravene the principle of legality, provided by art. 1 para. (5) of the Constitution, as well as the provisions of art. 124 para. (1) in conjunction with art. 126 para. (1), according to which justice is carried out in the name of the law and is carried out through the courts established by law, The Court found that by expanding the prosecutor's authority to waive criminal prosecution, according to art. 318 of the Criminal Procedure Code, prior to the beginning of this procedural stage or during it, with the consequence of not sending the suspect or the defendant to court and the waiver *ab initio* of the application of a penalty, the prosecutor is given the prerogatives of jurisdiction and imperium specific to courts of law.

Thus, we understand that in this situation the Court considered that by ordering the prosecutor to abandon the criminal prosecution, he "carries out criminal justice", although he does not have the capacity of a court of law[1].

We currently accept that the solutions that will be found by the legislator will concern the fact that if the prosecutor finds that the conditions provided by art. 318 of the Criminal Procedure Code will propose to the judge of the preliminary chamber the solution of renouncing the criminal prosecution, thus being in agreement with the provisions of art. 3 para. (6) of the Criminal Procedure Code, but contravening the provisions of art. 3 para. (3) of the Criminal Procedure Code, according to which the function of verifying the legality of sending or not sending to court is compatible only with the function of court, and not with that of criminal investigation.

REFERENCE

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