THE CRIMINAL CHARGE

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Abstract

The process of criminal prosecution against a particular individual is ordered by the prosecutor or law enforcement investigator by ordinance. After the decision to carry on with the criminal investigation, the suspected person, the perpetrator acquires a legal standing which allows a full spectrum of rights and obligations stipulated by law. This project is focused on the link between our national criminal law regulation regarding the criminal investigation and the demands of the European Convention for human rights.

Keywords: *criminal prosecution; European Convention on Human Rights, criminal law, reasonable suspicion, criminal charge.*

1. Introduction

The start of the criminal investigation proceedings has undergone significant changes under the provisions of the new Criminal Procedural Code over the old regulations of 1968.

Thus, according to art. 305 of the Criminal Procedural Code, "when the preliminary criminal complaint fulfils the conditions stipulated by law, the investigator begins criminal proceedings regarding the committed or prepared illicit act, even if the author is indicated or known".

Compared with the provisions of the Criminal Procedural Code of 1968, which in art. 228 stated that " the investigator notified by resolution, begins criminal proceedings when from the content of the complaint or from the preliminary investigatory acts does not result any legal impediment stipulated in art. 10" we may ascertain the occurrence of two major changes in the national criminal policy.

2. Content

Firstly, according to the Former Criminal Procedural Code, after notification the prosecution could commence proceedings regarding both the offense (*in rem*), and on one particular person (in personam). Nowadays, authorities are required to begin with the in rem phase, even if in the complaint the offender is indicated or enough information exists to allow his identification in order to concentrate the investigation on a particular individual prosecution (initiation of the in personam phase).

The new Procedural Code thus establishes the obligation of the prosecution to be initiated only regarding an offense, so initially it can capitalize only on the *in rem* part of the process.

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Secondly, the prosecutors are obligated to initiate in rem proceedings every time they were seized legally and have established the document meets the form and substance and in the case self-notification. Consequently, the new Code of Criminal Procedural vision has eliminated the Preliminary acts of criminal prosecution, previously covered by art. 224 of the old C.p.p.

The immediate start, quasi-automatic prosecution after formulating a notification enables the creation of a procedural framework necessary for the investigators can effectively manage the evidence relevant to verifying the merits of the complaint and, further on, to identify and prove the act was committed by the perpetrator. Thus, the message stemming from the start of the criminal investigation concerning a crime means that the investigators have been lawfully notified, are legally invested and are currently analysing evidence to verify the complaint[1].

In order to indict after receiving the complaint, the criminal investigator (prosecutor or law enforcement official) should first verify their competence, in accordance with art. 294 C.p.p. In case they consider that they are generally, materially and territorially competent, they then proceed to check the notification act (criminal complaint, denunciation, acts signed by other authorities) in terms of form and content. During this "regulatory" stage the alleged criminal complaint is verified if it is described in a clear and sufficient manner, and if not it shall be resent to the complainant, in order to be completed.

By analyzing art. 305 par. 1 C.p.p., as amended by Ordinance No. 18/2016, one can notice the elimination of the condition that none of the cases that prevent the criminal action stipulated by art. 16 par. 1 C.p.p. should be applicable[2].

The elimination of this negative condition is useful because at the beginning of *in rem* investigations, an analysis of legal impediments to the criminal indictment related to a person's criminal liability is not necessary. This condition was apt to lead to difficulties at the start of investigations, especially in cases in which criminal action was conditional upon prior complaint of the victim who was in a physical or moral impossibility to formulate preliminary the complaint (as an example road accidents which caused a bodily injury leading to a period in which the victim was unconscious and in intensive care, given that the offense provided by art. 196 penal Code, the criminal proceedings required the previous complaint the injured person to be set in motion)[3].

However, judicial practice has provided cases in which even if the criminal complaint met the content and form conditions, the prosecutor found evidence of one of the cases stipulated by art. 16 par. (1) C.p.p., certain situations which require the dismissal of a case, without the criminal proceedings *in rem* can be identified.

Also, if the investigator finds nonessential errors that can be corrected by

[1] Nicolae Volonciu, Andreea Simona Uzlau, Noul Cod de procedura penala, Bucuresti, Editura Hamangiu, 2014, p. 765.

[2] According to art. 16 para. (1) C.p.p., criminal action cannot be set in motion, and if it was set in motion cannot be exercised if: a) the act does not exist; b) the act is not provided by criminal law or was not committed with guilt established by law; c) there is no evidence that a person has committed the offense; d) there is an explanatory; e) lack of preliminary complaint, authorization or notification by the competent body or another condition stipulated by law, required in support criminal action; f) amnesty or prescription, the death of the suspect or accused person or suspect legal termination in a case of a business; g) withdrawn prior complaint, so that criminal liability is removed, reconciliation, agreement or mediation under the law; h) legal impediment to punishment; i) there is res judicata; j) transfer procedure with another state.

[3] Mihail Udroiu, Procedura penala.Partea speciala, Editura C.H. Beck, Bucuresti, 2016, p. 37.

complainant, he may decide to return it for completion. In case the deficiencies are major, essential and cannot be rectified, the case is to be closed, in accordance with art. 315 par. 1 letter. a C.p.p.

After verification of the formal conditions of the notification act and upon establishing their competence, the *in rem* phase can commence. In this regard it should be noted that in the process of finding the applicable law, the investigator is not bound by initial complaint.

From a procedural standpoint, the criminal investigation shall be ordered by the law enforcement investigator or by the prosecutor by ordinance. The procedural act of commencement of prosecution *in rem* must include the particulars set out in art. 286 par. (2) letter a-c and g: name of the prosecutor's office and date of issue; full name and position of the person making it; the object of the prosecution, the applicable legal frame, data on the suspect or accused person; signature of the person who wrote it.

By analyzing art. 286 par. 2 letter a, C.p.p., in relation to art. 305 par. 1 C.p.p., a mismatch can be found. Thus, considering that the order of commencement of prosecution *in rem* must be made by the law enforcement investigator (be it by the police as part of the structures of the judicial police or special criminal investigation unit), the name of the police unit in which the law enforcement official is enrolled should also be mentioned.

Therefore, in the vision of the New Penal Code, the law enforcement investigator is not obliged to submit the ordinance for confirmation by the prosecutor who supervises the activity, but merely to inform the prosecutor, as stated in art. 300 par. (2) C.p.p .: " the law enforcement investigation units are required to inform the prosecutor concerning ongoing or future activities."

Even if the in rem stage is quasi-automatic, it should be subjected to thorough analysis and legal rigor, as required by art. 5 C.p.p., which states that the authorities have the obligation to find the truth concerning the facts and circumstances of the case, and also regarding the suspect or accused person, but by reference to art. 97 and art. 100 C.p.p. we can conclude that the process of finding evidence should be conducted after creating the necessary procedural framework. There are of course exceptions to this rule, such as art. 111 par. (10) which states that the injured person's statement provided during a hearing conducted immediately after registration of the complaint, constitutes evidence even if it is administered before the start of in rem criminal proceedings.

After starting the in rem criminal investigation, authorities may proceed to administering evidence in order to achieve the objectives under art. 285 C.p.p.

Thus, according to art. 285 par. 1 of the C.p.p., "the prosecution is to gather the necessary evidence regarding the existence of the crime, to identify those who have committed a crime and to establish criminal liability, in order to assess whether or not it should be sent to trial ".

When concerned in conducting research that there is evidence proving the reasonable suspicion that a particular person has committed the offense for which prosecution has begun and there is one of the cases mentioned in art. 16 par. 1 C.p.p., the criminal investigation shall order, under art. 305 par. 3 C.p.p., making further prosecution against the suspect (*in personam*).

The process of criminal prosecution against a particular individual is ordered by the prosecutor or law enforcement investigator by ordinance.

The ordinance of the law enforcement investigator against the suspect is subject to confirmation by the prosecutor within three

days from the date of issue. The procedural term stated in art. 305 par. 3 is not mandatory.

However, the confirmation act by the prosecutor is of particular importance. Thus, if the law enforcement investigators administer evidence which requires the existence of a suspect in the case (reconstruction[4] or hearing of the suspect), in case later on the prosecutor overseeing the prosecution cancels the ordinance, this will entail the exclusion of the evidence outside the procedural framework as unlawfully. In addition, after further criminal investigation, law enforcement investigators have apprehended the suspect and the case prosecutor cancels the ordinance, the revocation of detention is also a direct consequence. According to art. C.P.P. 209, in conjunction with art. 203 par. 1 and art. 202 par. 4, letter a, C.p.p., the arrest can be done only against the suspect or defendant, which requires the confirmation by the prosecutor. If the prosecutor should cancel the ordinance, under art. 304 par. 1 C.p.p. the positive condition instituted by art. 209 par. 1 C.p.p. is no longer fulfilled, which stipulates that law enforcement investigators may make an arrest if the conditions of Art. 202 C.p.p. are met. art. 202 C.p.p. stipulates that preventive measures can be arranged if there is evidence or reasonable suspicion that a person has committed a crime, as a minimal standard of proof that would lead to a reasonable charge against the suspect or defendant.

After the decision to carry on with the criminal investigation, the suspected person, the perpetrator acquires a legal standing[5] which allows a full spectrum of rights and obligations stipulated by law.

Thus, in accordance with art. 77 C.p.p. and art. 83 C.P.P., the suspect has the following rights:

a) the right not to give any statement during trial, bearing in mind that should he refuse to testify, he will not suffer any negative consequences, and he should give statements, it can be used as evidence against him;
b) the right to be informed of the offense of which he is suspected of and its legal qualification;
c) the right to see the file, in a accordance with the law;
d) the right to have a lawyer of his choice, and if should not not designate one, in cases of compulsory legal assistance the right to be appointed one;
e) the right to propose evidence in accordance with the law, to raise exceptions and draw conclusions;
f) the right to make any other claims related to the settlement of civil and criminal side of the case;
g) the benefit of an interpreter free of charge when he does not understand, isn't able to express himself well or cannot communicate in Romanian;
h) the right to appeal to a mediator in cases permitted by law;
i) the right to be informed of his rights;
j) other rights provided by law.

The legal doctrine has stressed out the importance of this particular stage in which the prosecution efforts are confirmed which has the significance of formulating a criminal charge against a person when the prosecutor or the law enforcement

[4] According to art. 193 par. 1 of the C.p.p., the investigator or the court, if it is necessary for the verification and accurate data or to determine circumstances which are important to solving the case, can reconstruct, in whole or in part, the manner and conditions in which the offense was committed.

[5] Art. 33 C.p.p. states that the main subjects in the criminal proceedings are the suspect and the injured person.

investigator, after evaluating the existing evidence in question comes to a reasonable suspicion that a particular person committed the act stipulated by criminal law[6].

The term criminal charge is an autonomous one, judicially established by the E.C.H.R.[7]. This means any official notification, issued by a competent authority, which is attributed to a person committing a crime, is able to bring forth significant repercussions on the rights and freedoms of the individual.

We appreciate that the disclosure of the criminal charge should not be confused with the disclosure to the accused that he is a suspect, the criminal act that he is suspected of and the legal classification under art. 307 C.p.p.

The E.C.H.R. ruled that the notion of the "formal notification" is in direct correspondence to the moment when the accused person becomes liable for prosecution (for example when a house search is carried, which under art. 158 of the C.P.P. can be performed even in the in rem stage of the criminal proceedings[8]).

It is essential to accurately establish the time of the criminal charge, because from that moment on the rights and guarantees provided by art. 6, E.C.H.R. become applicable.

The Criminal Procedural Code established in Article 307 the obligation of the prosecution to bring to the attention of the suspect before his first hearing, the procedural capacity he has acquired, the act he is suspected of, it's legal classification and the procedural rights he is entitled to.

However, in judicial practice interpretations differ substantially regarding the moment of the prosecution is confirmed, with the disclosure of the accusation and the actual time when the criminal charge against a person is brought forth in the autonomous meaning established by the E.C.H.R..

To analyse the importance and effects of these issues we shall endeavour to address some cases with a proven applicability of the concept.

Thus, the moment at which the prosecution is confirmed against a person he consequently becomes the suspect indicated in art. 305 par. 3 C.p.p., which states that when the law enforcement investigator considers that there is enough evidence leading to a reasonable suspicion that a person has committed a crime, further investigation may be carried out.

Although there isn't a strict and rigorous method of separating the in rem stage and the in personam phase, the prosecutor and law enforcement investigators must, when there is evidence leading to a reasonable suspicion of an offense by a determined subject to confirm the criminal proceedings. This obligation stems from the wording of the law itself, which does not provide an option for the law enforcement investigator, but firmly establishes it as a rule by using the imperative verb "has" and not "may"[9].

However, in order to come to this particular stage, enough evidence should be administered, thus establishing a factual basis for prosecution of a person, since the criminal complaint itself has no probative value.

That way in which the evidence was administered during the stages of the criminal prosecution in rem stage has a

[6] Mihail Udroiu, op. cit., p. 46.

[7] ECHR ruled in the Engel v. The Netherlands case, para. 81, three alternative criteria in order to ascertain the concept of the criminal charge: qualification as a crime by the domestic law, the nature of the offense and the severity of the sanction that can be applied to the defendant.

[8] ECHR, Rulling Hozze c. Pays-Bas, 25.05.1998.

[9] See in this regard the decision of the Constitutional Court of Romania, no. 236 19.04.2016, published in O.M. no. 426 of 07/06/2016.

significant bearing on the rights granted in this stage and the fairness of the criminal investigation.

In support of this statement, there are instances where the very nature of offenses for which criminal proceedings have been triggered may maintain a balanced procedural process and ensure a fair trial, the right to defense of the person suspected, but nonetheless involves certain difficulties.

For example, the case of injury committed by a doctor. At first in rem proceedings shall commence, by administering preliminary evidence. Most times, the evidence necessary for building a reasonable suspicion of an unlawful medical fault is limited to the hearing of the injured, witness testimony and an expert report which establishes malpractice. But in this case the prosecutorial in rem efforts are directed against a particular person, the only one that could have committed the crime under investigation. Even so, the person under investigation (perpetrator), not until the confirmation of the investigation can he participate effectively in the administration of evidence. The right to propose evidence and the right to hire a lawyer become functional only after the *in personam* stage. Moreover, the right to see the file of the criminal investigation, granted pursuant to art. 83 par. 1 letter b C.p.p. may be exercised by the suspect and not the perpetrator. If he should formulate requests for the administration of evidence or to consult the file, they can be easily dismissed after a purely formal interpretation of the legal provisions that stipulate the necessity of acquiring the quality of the suspect in order to enjoy the rights and guarantees.

Also, in such cases it is necessary that the authorities to weigh in very carefully the evidence, so that the in rem stage isn't prolonged more time than necessary. Infringement of this obligation once the evidence leading to a reasonable suspicion of committing a crime by a particular individual may cause injury of the right to a fair trial, which may attract in case of real and substantial harm, the cancelation of procedural acts and procedural samples obtainted after this time.However, it should be stressed that to establish a possible injury to the right of the accused persons to defense, the proceedings must be examined in their entirety[10].

After confirmation of the in rem prosecution, the suspect may propose more evidence. The European Court of Human Rights determined that the admissibility of evidence is primarily based on nation law and appreciation about the usefulness of evidence remains the attribute of the investigators with the added necessity to motivate their decision.

Another vulnerability stems from the existence of an unusual lag time between the start of the investigation and the disclosure of the accusation. Although art. 307 C.p.p. does not set a time frame, but merely states that the obligation must be fulfilled until the first hearing of the suspect, considering the fact that in some cases the evidence should be taken expeditiously, the authorities must inform the suspect in the shortest possible time. Only this way can he understand the charge, prepare his defense and in doing so the process does not stagnate or threaten the administration of evidence[11].

Doctrine has encountered another potential problem, namely the examination of a witness with the right to refuse to testify[12]. Namely, the husband and former spouse, relatives up or down in a direct line, brothers and sisters of the suspect or persons as nominated by art. 117 par. 1 C.p.p.

[10] Case of Van Mechelen c. Olandei, ECHR rulling 23.04.1997.
[11] See also Penal Decision no. 242 of 12/03/2012 of the High Court of Cassation and Justice.
[12] Nicolae Volonciu, op. cit. p. 767.

Strictly procedurally speaking, these people do not have the right to refuse to testify in cases when a criminal investigation is underway in order to document the alleged criminal activities of a specified perpetrator, but during the in rem stage.

3. Conclusions

In conclusion, it should be noted that both the prosecutor but also the law enforcement investigators have the difficult task of administering the evidence in order to establish the judicial truth and to carefully weigh in on the value of the evidence to meet the obligation of confirming the investigation without undue delay .

We appreciate that between the notion of confirmation of the investigation and the criminal charge is a part-whole relation, the second incorporating the first one both in terms of extended warranties provided and, in some cases, from the perspective of the occurance during the criminal trial.

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