

The Institution of 'Waiver of Criminal Prosecution' - Some Controversies

Professor **Carmen Silvia PARASCHIV**¹

Abstract

The "waiver of criminal prosecution" institution was introduced into Romanian criminal procedural legislation by Law no. 135/2010 on the Code of Criminal Procedure. It appears as an exception to the principle of the legality of the criminal process - regulated by the Romanian legislator in favor of the principle of expediency. The legislator opted for the introduction of this institution in the legislation, considering the costs involved in the activity of criminal investigation and trial in the case of certain crimes. The appearance of this institution "justifies", to some extent, the non-taking over by the legislator in the new provisions of the content provided by art. 18¹ of the former Criminal Code (1969). The provisions included in the content of art. 18¹ of the previous Criminal Code (1969) allowed the judicial bodies to find that some acts provided for by the criminal law did not present the social danger of a crime, which allowed the application to the perpetrator of an administrative measure provided for in Article 91 of the previous Criminal Code (1969).

Keywords: criminal prosecution, solution, prosecutor, waiver of criminal prosecution, principle of expediency, reduction of costs, reduced degree of social danger.

JEL Classification: K14, K42

1. Introductory considerations - between old and new

In the current criminal procedural legislation, the institution of waiving criminal prosecution was introduced with the entry into force of the new Code of Criminal Procedure² (C. Proc. Pen.) and represents an application of the principle of the opportunity of criminal prosecution, regulated in art. 7 para. (2) C. Proc. Pen., principle adopted as a limitation of the obligation of criminal action and, at the same time, as a manifestation of the criminal policy option for the purpose of an appropriate use of human and material resources.

Unlike the previous legislation, in which the legality of the accusation represented a mandatory principle, through the new code of criminal procedure the legislator changed his conception and switched to the principle of the opportunity of the accusation - specific to Anglo-Saxon law - as a middle solution to the problem of overloading the judicial bodies with criminal files regarding crimes that do not require the prosecution of criminals, a conclusion that can be reached in relation to the circumstances of a case that, in relation to the de facto elements, presents a low gravity³.

The reason for this legislative amendment can be found in the statement of reasons of the new Code of Criminal Procedure, where it is stated that in order to avoid criminal proceedings in minor cases, in which there is no public interest, the obligation to exercise the criminal action was mitigated, by introducing the subsidiary principle of opportunity, based on which, in such cases, the prosecutor will be able to waive the exercise of the criminal action, under the conditions provided by law. It is also shown that a direct consequence of this new principle, which has been operating for several years in Germany, Italy, France, Spain, Serbia, Slovenia, Bulgaria, will be the reduction of the volume of criminal cases before the judicial bodies.

Another immediate consequence of the adoption of the institution of the waiver of criminal prosecution is the speedy conduct of criminal trials and the defense of the interests of those injured by crime, especially those involving damage to patrimony or persons, because after the finalization of this solution, the injured persons will be able, if applicable, to open separate civil actions for the

¹ Carmen Silvia Paraschiv - Faculty of Law, „Titu Maiorescu” University of Bucharest, Romania, paraschivcrmn@yahoo.com.

² Law no. 135/2010 regarding the new Criminal Procedure Code, entered into force on February 1, 2014, and was published in the Official Gazette no. 486 of July 15, 2010.

³ For a comparative view see Ospina-Pedraza, A.M., Benavides-Vanegas, F.S., Bonilla-Montenegro, J.D., „Keys to Interpreting the International Cooperation of the EU for the Special Jurisdiction for Peace”. In: Pérez de Armiño, K. (eds) European Union Support for Colombia's Peace Process. Rethinking Peace and Conflict Studies. Palgrave Macmillan, Cham. 2023, https://doi.org/10.1007/978-3-031-24797-2_10.

recovery of material or moral damages caused by the facts regarding which the criminal prosecution was ordered to be abandoned.

As a consequence, the institution of the fact that does not present a social danger of a crime (previously regulated in art. 18 of the Penal Code 1968) was removed, as well as the procedural solution that the prosecutor could pronounce in this case - removal from prosecution criminal based on the provisions of art. 10 para. 1 letter b) C. proc. pen. of 1968⁴.

Along this line of thinking, in art. 318 para. 1 of the new C.proc.pen. it is stipulated that in the case of crimes for which the law provides a penalty of a fine or a prison sentence of no more than 7 years, the prosecutor can abandon the criminal investigation when he finds that there is no public interest in the prosecution of the act. In paragraphs 2 and 3 of the same article, the objective and subjective criteria to which the prosecutor must refer in ordering the solution are provided.

2. Regulation of the institution of waiver of criminal prosecution: original form vs. current form

Initially, in the regulation of the new Code of Criminal Procedure, the order by which it was decided to abandon the criminal prosecution is communicated, in a copy, to the person who made the notification, the suspect, the defendant or, as the case may be, other interested persons. People dissatisfied with the solution could file a complaint with the superior prosecutor according to art. 339 C. proc. pen. and, subsequently, to the preliminary chamber judge according to art. 340-341 C. proc. pen.

Less than two years after the entry into force of the institution of the waiver of criminal prosecution, it was declared unconstitutional by Decision no. 23 of January 20, 2016 of the Constitutional Court⁵. The Court held that the criticized provisions contravene the principle of legality, provided by art. 1 paragraph (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 the law. These legislative provisions were subject to the constitutionality control of the Constitutional Court, following its referral through the exception of unconstitutionality.

In the reasoning of the previously mentioned decision, the Court found essentially that, by the prosecutor's competence to waive the criminal prosecution according to art. 318 Penal Code, prior to the beginning of this procedural stage or during it, with the consequence of not sending the suspect or the defendant to trial and waiving *ab initio* the application of a punishment, places him in the situation of "saying" the right (*iuris dictio*) and to give a judgment capable of being executed, giving it the prerogatives of *jurisdictio* and *imperium* specific to courts of law.

In this way, the Court held that, by applying the provisions of art. 318 of the Code of Criminal Procedure, the prosecutor performs, directly, an act of justice, evading the courts to judge the cases. However, justice must be carried out in a transparent way, by resolving cases according to the principles of criminal procedural law regulated regarding the conduct of court hearings. At the same time, the Court found that, imposing the obligations provided for in art. 318 para. (3) of the Code of Criminal Procedure, the prosecutor takes the position of judge of the cases, applying measures similar to punishments, through an act that is neither administrative nor jurisdictional.

Therefore, the Court found that, by regulating the institution of the waiver of criminal prosecution, in the manner provided for in art. 318 of the Criminal Procedure Code, the legislator did not achieve an adequate balance between the application of the principle of legality, specific to the continental law system, existing in Romania, and the application of the principle of expediency, specific to the Anglo-Saxon law system, giving precedence to the latter, to the detriment to the first,

⁴ N. Volonciu, S. Uzlău (coord.), *New Commented Criminal Procedure Code*, 2nd edition, Hamangiu Publishing House, Bucharest, 2016. See Simona Grossi, „The Waiver of Constitutional Rights”, 60 *Houston Law Review* 1021 (2023), available here: <https://houstonlawreview.org/article/77689-the-waiver-of-constitutional-rights>, accessed on 21.03.2023. View also Lippke, Richard L., „Waiver Rewards and Trial Penalties”, *The Ethics of Plea Bargaining*, Oxford Monographs on Criminal Law and Justice (online edn, Oxford Academic, 19 Jan. 2012), <https://doi.org/10.1093/acprof:oso/9780199641468.003.0002>.

⁵ Published in the Official Gazette no. 240 of March 31, 2016.

by regulating among the prosecutor's attributions certain acts specific to the judicial power. Thus, according to the provisions of art. 318 of the Code of Criminal Procedure, the prosecutor has the possibility to waive the criminal investigation and, consequently, to substitute himself for the court, in the execution of the act of justice, in the case of a number of approximately three-quarters of the total crimes provided for in the Criminal Code and in the special laws in force.

Thus, the Court held that the renunciation of the criminal prosecution by the prosecutor, without it being subject to the control and approval of the court, is equivalent to the exercise by him of some powers that belong to the sphere of the powers of the courts, regulated in art. 126 para. (1) of the Constitution, according to which justice is carried out through the High Court of Cassation and Justice and through the other courts established by law.⁶

As a result of the regulation of the obligation to go through the jurisdictional procedure to finalize the decision to abandon the criminal prosecution, with respect to the principles of adversariality and orality, through the amendments brought by the Emergency Ordinance of the Government (O.U.G.) no. 18/2016, the possibility of filing a complaint against the decision to waive criminal prosecution was removed from the Code of Criminal Procedure, and the provisions of art. 340-341 C. proc. pen., which will continue to be applicable only with regard to classification solutions.

3. The controversial aspects of the conditions and assessment criteria on the notion of public interest, in the light of the provisions of art. 318 of the Criminal Procedure Code

According to art. 318 C. proc. pen (amended by art. 102 point 210 of Law no. 255/2013) it is possible to waive criminal prosecution as a solution issued by the prosecutor in the case of crimes for which the law provides for a fine or a prison sentence of up to 7 years, if in relation with the content of the deed, with the manner and means of commission, with the purpose pursued and with the concrete circumstances of commission, the consequences produced or that could have been produced by the commission of the crime, it is found that there is no public interest in its prosecution.

It should be noted that the waiver of criminal prosecution can be total or partial. It can be ordered only with regard to some of the suspects or defendants - whether they are natural or legal persons -, if there are several participants in the commission of the crime, or only with regard to some facts, in the situation where several facts are the subject of the same case. By Government Emergency Ordinance no. 18/2016, the content of art. 318 was practically rewritten of the Criminal Procedure Code. However, the new provisions also carry various inconsistencies regarding the procedural framework in which the waiver of criminal prosecution can be ordered.

In the initial version, art. 7 para. (2) C. Proc. Pen. refers to the waiver of the exercise of the criminal action, from which, apparently, it would result that in the regulation prior to the changes made by O.U.G. 18/2016, the possibility of using the institution of renunciation appears only after the initiation of the criminal action.

Skipping the analysis of the objective criteria in relation to which the legislator imposes the analysis of the public interest, provided by para. (2) of art. 318 C. Proc. Pen. and going further in the reading of the text we will notice in para. (3) that the legislator indirectly states that this solution can also be ordered with regard to the unknown author. This meaning derives from the phrase used at the beginning of the sentence in para. (3) namely "when the perpetrator of the act is known..." and continues with specifications regarding the assessment of the public interest, it being necessary to take into account the person of the suspect or defendant, his conduct prior to the commission of the act and his efforts to remove or reduce the consequences of the crime.

⁶ For some particularities see Duff Peter, „The limitations on trial by jury”, *Revue internationale de droit pénal*, 2001/1-2 (Vol. 72), pp. 603-609. DOI: 10.3917/ridp.721.0603. URL: <https://www.cairn.info/revue-internationale-de-droit-penal-2001-1-page-603.htm>; Stewart, David P., Review of the book „The Right to a Fair Trial in International Law. By Amal Clooney and Philippa Webb. Oxford, UK: Oxford University Press, 2020. Pp. Cxx, 900. Index." *American Journal of International Law* 116, no. 3 (2022): 664-68. doi:10.1017/ajil.2022.23.

Thus, from the provisions of art. 318 para. (2) from the Code of Criminal Procedure - the form prior to the amendments - it is unequivocally clear, applying the reasoning *per a contrario*, that the assessment of the public interest in order to order the abandonment of the criminal investigation can be done even if we do not have a suspect in the case, resulting therefore that the first condition that must be met when we talk about the admissibility of the disposition by ordinance on the abandonment of the criminal prosecution is to have at least one ordinance to start the criminal prosecution in rem.

A *pari rationae*, art. 314 para. (1) letter b) from the same Code as amended by O.U.G. no. 18/2016, provides for the possibility of ordering the waiver of the criminal prosecution when there is no public interest in the continuation of the criminal prosecution, from which it emerges, as in the previous regulation, the possibility of the prosecutor to order the waiver only after the start of the criminal prosecution in rem.

With regard to paragraph (3), from the same legal text, which provides for the possibility (but not the obligation) for the case prosecutor to order the defendant (or the suspect) to fulfill some subsidiary obligations to the solution of dropping the criminal prosecution, some aspects of interpretation arise.

These result, obviously, from the phrase "the prosecutor can order", which leads to the conclusion that the analysis of the opportunity to order or not, in the charge of the suspect or defendant, the fulfillment of one or more obligations provided by law, belongs exclusively to the representative To the Public Ministry if the circumstances of the case or the person of the suspect/defendant require such a measure or not.

The middle sentence of para. (3) of art. 318 C. Proc. Pen. gives way to a different interpretation and application of this kind in practice. Thus, in practice, the phrase "after consulting the suspect or the defendant" was interpreted as a condition of his agreement to fulfill the obligations, and in other situations this matter was considered just an information from the suspect (or the defendant) regarding some aspects that belong to his person, in relation to the content of each obligation.

Regarding the legal nature of these obligations, it should be emphasized that they are not criminal law sanctions, not being found in the strict and limiting assumptions provided in art. 2 Criminal Code.

Therefore, this does not mean that the prosecutor will impose a certain obligation only when the suspect or the defendant agrees, the consultation having the significance of requesting a point of view, not the consent of the investigated. It represents, closer to the truth, the determination of the obligations by the prosecutor in full freedom of decision and within the legal limits, and then questioning the perpetrator on the circumstances if he understands to comply with these obligations. In the hypothesis in which the defendant or the suspect shows from the very beginning his intention not to obey the established obligations, the public interest will no longer be that of abandoning the criminal investigation, but of ordering, possibly, the referral to court.

On the contrary, in the specialized literature we also find the opinion according to which even if the suspect or defendant mentions that he will not fulfill a certain obligation, in the situation in which it will be imposed on him, the prosecutor can abandon the criminal investigation and fix that obligation, there being the possibility for the defendant to revise his attitude within the established term. Specifically, the suspect may categorically state that he will not attend any counseling program, but later does so, realizing that otherwise the waiver of prosecution will be revoked and he will be sent to court⁷.

In relation to those presented, as we have shown, we believe that the public interest is inextricably linked to the attitude of the suspect or the defendant, the notion of consultation found in the content of para. (6) of the article in question not having the meaning of a so-called negotiation between the judicial bodies and the perpetrator.

As an example, the prosecutor can proceed to "consultation" regarding the possibility and, in

⁷ See some details in Elena Maculan, Alicia Gil, „The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts”, *Oxford Journal of Legal Studies*, Volume 40, Issue 1, March 2020, pp. 132–157, <https://doi.org/10.1093/ojls/gqz033>.

fact, the availability of the defendant or the suspect to conclude with the civil side a way to repair the damage, or about his state of health, in the sense of being able or not to perform unpaid work for the benefit of the community (in the situation where, due to health reasons, proven by medical documents, he would not be able to fulfill such an obligation).

Of course, in each individual case it is necessary to take into account the provisions provided by art. 318 para. (1) C. Proc. Pen. by which it is concluded that there is no public interest in the prosecution of the crime.

In order for the imposed obligations to have the intended purpose, the legislator provided in para. (4) and the need to insert in the device of the prosecutor's order a term of maximum 9 months for the fulfillment of the orders.

It is explicable the reason why the legislator used as the deadline for fulfilling the obligations as at most 6 months or at most 9 months, the latter actually referring to one or two of the obligations contained in letter a) from paragraph (3) of art. 318 C. Proc. Pen., taking into account, specifically, the removal of the consequence of the deed or the conclusion of an agreement with the injured person (through a mediation agreement) regarding the way to repair the damage caused.

In the other cases, it is obvious that the term imposed by law must not exceed 6 months from the notification of the prosecutor's order. As a consequence, the prosecutor orders the fulfillment of the obligation or obligations within a period of up to 6 or 9 months, under the conditions set out previously.

The penalty for non-fulfilment by the former suspect or defendant of the obligation legally ordered by the prosecutor leads to the expiration of the mentioned term, the revocation of the ordinance and the implementation of the provisions of art. 335 para. (3) from the new Criminal Procedure Code (N. C. pr. pen). According to this legal text, when the prosecutor finds that the suspect (defendant) has not fulfilled the established obligations in bad faith, he "revokes the order and orders the reopening of the criminal investigation".

This "self-reopening" of the criminal prosecution in question is subject to confirmation by the judge of the preliminary chamber within 3 days, under penalty of nullity.

The mentioned result from the provisions of art. 335 para. (4) N. C. pr. pen and lead to the conclusion that once the criminal investigation is reopened, in the first stage by the prosecutor, it becomes definitive by the conclusion of the judge of the preliminary chamber, an aspect expressly mentioned by the final sentence of para. (4) from art. 335 N. C. pr. pen.

Regarding the reopening of the prosecution of the case prosecutor, it should be noted that it is imperative that this procedure be used only in the conditions where "bad faith" can be proven in the non-fulfilment of obligations, an aspect that is not mentioned in the text waiving criminal prosecution (art. 318), but only in that of the resumption in case of re-opening of the criminal prosecution (art. 335 N. C. pr. pen.).

4. The procedure for verifying the decision to waive the criminal prosecution

In order to align the provisions found unconstitutional with the rigors of the Constitution, by O.U.G. no. 18/2016, a procedure was regulated to confirm the decision to drop the criminal prosecution, which goes through two mandatory stages: an "internal" procedure at the level of the Public Ministry, on a hierarchical scale, to verify the legality and the validity of the decision to drop the criminal prosecution and a jurisdictional, adversarial procedure, before the judge of the preliminary chamber, to verify the legality and validity of the decision to abandon the criminal prosecution previously confirmed in the internal procedure.

4.1. Verification of the legality of the decision to abandon the criminal prosecution by the superior hierarchical prosecutor ("internal" procedure)

Art. 318 para. 10 C. pr. pen, introduced by O.U.G. no. 18/2016, stipulates that the ordinance ordering the abandonment of the criminal investigation is checked for 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 this, the verification is done by the superior hierarchical prosecutor. When it was drawn up by a prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice, the ordinance is verified by the head prosecutor of the section, and when it was drawn up by him, the verification is done by the general prosecutor of this prosecutor's office.

As it follows from the expression of the legislator, the internal procedure for verifying the decision to abandon the criminal prosecution is mandatory and is triggered *ex officio*, not requiring notification of the superior hierarchical prosecutor, unlike the jurisdictional procedure for finalizing the solution - which takes place later, upon notification the case prosecutor.

Applying the principle of hierarchical subordination specific to the Public Ministry, the procedure for hierarchical verification of the decision to abandon criminal prosecution - ordered by ordinance or by indictment - falls under the functional competence of the hierarchical prosecutor superior to the one who ordered the solution, similar to the procedure for verifying the legality and validity of the indictment.

Since the criminal investigation is not completed until the preliminary chamber judge confirms the waiver, the internal verification procedure borrows two of the essential features of this mandatory phase of the criminal process – non-public and non-adversarial character, so it is not necessary to summon the interested persons from the file criminal case in which the non-prosecution solution was ordered.

From the interpretation of the provisions of art. 318 para. 12 C. proc. pen., it follows that the internal procedure must be carried out within a period of no more than 10 days (recommendation period) from the date of issuance of the ordinance or of the disposition to abandon criminal prosecution included in the indictment. The non-completion of the internal verification procedure or the denial of the waiver solution by the senior prosecutor in this phase, lead to the inadmissibility of the referral to the judge of the preliminary chamber with the request to confirm the solution of not sending to court. Likewise, only the act of the superior prosecutor establishing the legality and validity of the decision to abandon the criminal prosecution cannot be the subject of the jurisdictional procedure.

The superior hierarchical prosecutor will check whether the ordinance/indictment by which the criminal prosecution was ordered to be abandoned was drawn up in compliance with art. 318 para. (1)-(8) C. proc. pen. (the legality of the solution), by reference to all of the administered evidentiary material and the criminal investigation documents carried out in the file (the merits of the solution) and confirms the decision to abandon the criminal prosecution or, by ordinance, invalidates the ordinance/provision in the indictment for illegality and/or groundlessness regarding the solution to abandon the criminal prosecution and return the case to the case prosecutor for the restoration or completion of the criminal prosecution regarding the investigated crime and, as the case may be, the person against whom the solution of not sending to court was ordered

It should be emphasized that the decision to abandon the criminal prosecution - confirmed in the internal procedure - can no longer be appealed to the judge of the preliminary chamber, the parties, the main procedural subjects and the other interested persons being able to criticize exclusively in the oral and adversarial procedure carried out before to the judge of the preliminary chamber in the court that has the substantive competence to judge the case in the first instance.

Equally, it should be taken into account that, in the event of the rejection of the decision to abandon the criminal prosecution by the superior hierarchical prosecutor, there is a case of reopening the criminal prosecution regarding which - according to art. 335 para. 6 C. proc. pen., introduced by O.U.G. no. 18/2016 – is not subject to the confirmation of the judge of the preliminary chamber even under the conditions of art. 318 para. (12)-(16) C. proc. pen. because the procedure no longer continues with the notification of the judge of the preliminary chamber, nor under the conditions of art. 335 para. 4 C. proc. pen. because the superior hierarchical prosecutor *ex officio* verifies the solution before communicating the order to the one who made the referral, the parties, the suspect, the injured person and other interested persons.

4.2. Verification of the legality of the decision to abandon the criminal prosecution by the judge of the preliminary chamber

A) Procedural aspects. After establishing in the internal procedure, the legality and merits of the decision to withdraw from the criminal investigation, ordered by ordinance or indictment, the mandatory judicial procedure to verify the solution, which is carried out by the judge of the preliminary chamber of the court of law. which, according to the law, would have the competence to judge the case in the first instance, in relation to the legal framework retained by the prosecutor when ordering the settlement.

Receiving the request, according to art. 318 para. 13 C. proc. pen., the judge of the preliminary chamber sets a deadline for resolution, with notification to the prosecutor, and orders the summoning of the person who made the notification (the injured person and/or his/her legal representatives), the person against whom it was ordered to drop the criminal prosecution (suspect or defendant)⁸, of the other parties as well as other interested persons in the case, if the latter can be identified. The non-appearance of the legally summoned persons does not prevent the resolution of the case at the set deadline.

According to art. 318 para. 14 C. proc. pen., the court hearing regarding the verification of the decision to abandon the criminal prosecution by the preliminary chamber judge, is non-public (in the council chamber), adversarial, oral and with the mandatory participation of the prosecutor under penalty. of absolute nullity [art. 281 para. 1 letter d) C. proc. pen.].

Regarding the evidence to be accepted, art. 318 para. 15 C. proc. pen. stipulates that the judge of the preliminary chamber verifies the legality and validity of the decision to abandon the criminal investigation based on the works and materials from the criminal investigation file and the new documents presented at this court term, documents that are obviously not found among the documents that make up the case file. The hearing prosecutor and the persons summoned and present on time cannot ask for the approval of the administration of other evidence apart from the new documents, nor the re-administration of the evidence administered during the criminal investigation.

The judge of the preliminary chamber resolves the request to confirm the decision to abandon the criminal prosecution formulated by the prosecutor through a final reasoned conclusion, which is given and pronounced in the council chamber. After the deliberation, it is mandatory to draw up the minutes of the decision in two original copies.

Unlike the complaint procedure against ranking solutions regulated in art. 341 C. proc. pen., in the procedure provided by art. 318 C. proc. pen., the legislator no longer provided for the fact that the cited persons or the prosecutor are notified of the right to submit written notes regarding the subject of the procedure. However, in addition to the unrestricted possibility of presenting oral conclusions before the judge, nothing prevents the cited persons - who were previously notified of a copy of the prosecutor's act of renunciation of the prosecution, from also submitting written conclusions regarding legality and grounds of the solution of not sending to court.

B) Solutions that the preliminary chamber judge can procure. In the procedure of analysis and deliberation at the request of the prosecutor to confirm the decision to abandon the criminal prosecution, regardless of the stage of the criminal prosecution - *in rem* or *in personam* (with suspect and/or defendant), the judge of the preliminary chamber can order by final conclusion the following solutions:

1) admits the request made by the representative of the Public Ministry and, as a consequence, confirms the decision to abandon the criminal prosecution, noting that the solution is legal and well-founded;

2) rejects the request made by the representative of the Public Ministry and, as a consequence, abolishes the solution of not sending to court and sends the file to the prosecutor with

⁸ If there is a suspect/accused in the case, otherwise the waiver of the criminal prosecution can be ordered and if the criminal prosecution is started only *in rem* (conclusion that can be deduced from the *per a contrario* interpretation of art. 318 paragraph 3 C. proc. pen.) and, despite the efforts made by the criminal investigation bodies, the perpetrator of the crime was not detected.

reasons for:

- the initiation or completion of the criminal prosecution started in rem and, as the case may be, the initiation of the criminal prosecution *in personam* – against the suspect (case of resumption of the criminal prosecution).

This solution can be ordered when the judge finds that the conditions provided by art. 318 C. proc. pen., respectively when the prosecutor prosecutes the deed (for example, in the case of a crime against patrimony, the damage is high and the investigation by the criminal investigation bodies is incomplete).

Also, if from the evidence administered in the file it appears that there is evidence from which there is a reasonable suspicion that a certain person committed the act for which the criminal investigation in rem was previously initiated, and this person is identified or identifiable but the criminal investigation body has not begun criminal prosecution against it, the judge of the preliminary chamber can send the case to the prosecutor to order the further execution of the criminal prosecution *in personam*. The judge of the preliminary chamber does not have the functional competence to order the initiation of the criminal investigation, this attribute belongs exclusively to the criminal investigation body according to art. 305 C. proc. pen.

It should be noted that art. 318 para. (15) letter a) from the C. proc. pen., with subsequent amendments, provides for the possibility of the judge of the preliminary chamber to reject the request for confirmation of the order to abandon the criminal prosecution with the referral of the case in order to start the criminal prosecution, resulting as a consequence - at least theoretically - the possibility the ordering of the abandonment of the criminal prosecution by the prosecutor even after the analysis of the notification act, so before the start of the criminal prosecution in rem.

- initiating the criminal prosecution against the suspect, who becomes the defendant and completing the criminal prosecution (case of resuming the criminal prosecution).

The judge of the preliminary chamber does not have the functional competence to order the further carrying out of the criminal investigation against a person or to set in motion the criminal action - practically, he does not have the competence to assign the status of suspect or defendant to a person, this attribute belonging exclusively to the prosecutor according to art. 309 C. proc. pen.

Equally, in both scenarios analyzed previously, the judge cannot change the legal classification of the offense retained by the prosecutor, nor can he order the reopening of the criminal investigation. Following the abolition of the decision to abandon the criminal prosecution, the disposition of the reopening of the criminal prosecution will be ordered by the prosecutor in accordance with the law and is not subject to a new confirmation by the chamber judge, the procedure provided by art. 335 para. 4 C. proc. pen. not being applicable in this case.

The prosecutor has the obligation to take into account and to comply with the conclusion of the judge of the preliminary chamber, except for the hypothesis that between the time the decision remains definitive and the date of receipt of the file by the prosecutor's office, new circumstances have arisen that require the adoption of a classification solution (of example, the death of the suspect/accused intervenes). Thus, the prosecutor is obliged to proceed with the administration of the evidence indicated by the judge as necessary to be administered for the completion of the criminal prosecution, except in the situation where this is no longer objectively possible (for example, a witness who should have been heard has died or is away abroad and his new address is unknown).

3) rejects the request of the prosecutor, cancels the decision to abandon the criminal investigation and orders the closure of the case.

Regulated in art. 318 para. 15 letter b) C. proc. pen., the analyzed legislative solution takes over the judicial practice contained in Decision no. 33/2015 of the High Court of Cassation and Justice, having as its object the resolution of some legal issues, respectively in Decision no. 733/2015 of the Constitutional Court.

Thus, referring to the arguments contained in Decision no. 44/2008 of the United Sections of the High Court of Cassation and Justice, the panel for resolving some legal issues in criminal matters assessed that the provisions of art. 341 para. (6) letter c) C. proc. pen. must be interpreted in

the sense that when there is a complete criminal investigation, the judge of the preliminary chamber entrusted with the resolution of a complaint against the decision to abandon the criminal investigation can order the admission of the complaint and the change of the decision to abandon the criminal investigation in the classification solution.

5. Conclusions

The institution of the waiver of the criminal prosecution must be viewed both from the perspective of the demands implied by the right to a fair trial that the suspect or the defendant should benefit from, as well as from the perspective of the legal consequences produced by the deficient character of this legislative construction.

In the light of the legislative vices of this institution and the deficient character of this legislative construction (as it is drafted at this moment) the waiver of the criminal prosecution remains only a form without substance that inverts the principle of opportunity and, in some places, may even lead to the violation of guarantees regarding the right of the suspect/defendant to a fair trial.

The significant effects that this institution has in terms of criminal procedural law (which lead to different interpretation approaches, with direct consequences on the criminal process as a whole) are profoundly unfair and depart from the will of the legislator who wanted to materialize the principle opportunity, abandoning the criminal prosecution in violation of the constitutional provisions on the right to defense and the guarantees established by the European Convention of Human Rights.

Bibliography

1. Decision no. 23 of January 20, 2016 of the Constitutional Court, published in the Official Gazette no. 240 of March 31, 2016.
2. Duff, P., „The limitations on trial by jury”, *Revue internationale de droit pénal*, 2001/1-2 (Vol. 72), pp. 603-609. DOI: 10.3917/ridp.721.0603. URL: <https://www.cairn.info/revue-internationale-de-droit-penal-2001-1-page-603.htm>.
3. Emergency Government Ordinance no. 18/2016 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, Law no. 135/2010 regarding the Code of Criminal Procedure, as well as for completing art. 31 para. (1) from Law no. 304/2004 regarding the judicial organization, published in the Official Gazette no. 389 of May 23, 2016.
4. Grossi, S. „The Waiver of Constitutional Rights”, 60 *Houston Law Review* 1021 (2023), available here: <https://houstonlawreview.org/article/77689-the-waiver-of-constitutional-rights>, accessed on 21.03.2023.
5. Law no. 135/2010 regarding the new Criminal Procedure Code, entered into force on February 1, 2014 and was published in the Official Gazette no. 486 of July 15, 2010.
6. Lippke, R. L., „Waiver Rewards and Trial Penalties”, *The Ethics of Plea Bargaining*, Oxford Monographs on Criminal Law and Justice (online edn, Oxford Academic, 19 Jan. 2012), <https://doi.org/10.1093/acprof:oso/9780199641468.003.0002>.
7. Maculan, E., Gil, A., „The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts”, *Oxford Journal of Legal Studies*, Volume 40, Issue 1, March 2020, pp. 132–157, <https://doi.org/10.1093/ojls/gqz033>.
8. Ospina-Pedraza, A. M., Benavides-Vanegas, F. S., Bonilla-Montenegro, J. D., „Keys to Interpreting the International Cooperation of the EU for the Special Jurisdiction for Peace”. In: Pérez de Armiño, K. (eds) *European Union Support for Colombia's Peace Process. Rethinking Peace and Conflict Studies*. Palgrave Macmillan, Cham. 2023, https://doi.org/10.1007/978-3-031-24797-2_10.
9. Stewart, D. P., Review of the book „The Right to a Fair Trial in International Law. By Amal Clooney and Philippa Webb. Oxford, UK: Oxford University Press, 2020. Pp. Cxx, 900. Index.” *American Journal of International Law* 116, no. 3 (2022): 664-68. doi:10.1017/ajil.2022.23.
10. Volonciu, N., Uzlău, S. (coord.), *New Commented Criminal Procedure Code*, 2nd edition, Hamangiu Publishing House, Bucharest, 2016.