Legal Regulations Concerning Some Measures Taken To Accelerate The Settlement Of The Processes In Romania

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Abstract

The small reform represented a significant step in the dynamics of the Romanian legal life. The amendments of the civil and criminal law prefigured the long waited big reform of the national legislation, to identify the mechanisms needed to accelerate the settlement of the processes as an essential coordinate of the constitutional state.

The Law no. 202 from October 25, 2010 concerning some measures to accelerate the settlement of the processes brought in actuality several problems the activity of interpretation and law enforcement, of bridging modifying provisions with the existing ones in the Code of Civil Procedure and the Code of Criminal Procedure, at that time, but also concerning the application in time.

Keywords: reform, mediation, offense.

1. Criminal regulations

It is necessary to clarify that the Law no. 202/2010 deserves its name of small reform and that is because of the changes of the Criminal Code. Thereby, in the Art. XX of the mentioned regulatory document, only three interventions were operating on the Penal Code:

- In the Art. 18^1 par. (2) and (3) the Penal Code modifies;
- After the Art. 74 a new article is introduced, art. 74^1;
- In the Art. 184, after par. (5) a new paragraph is introduced, par. (6).

Throughout the former Criminal Code, the Law no. 202/1010 concerning some measures to accelerate the settlement of the processes, the legislator operated two modifications in the Art. 18^1 of the old Penal Code, one at the par. (2), introducing the phrase " if known", referring to the person and the behaviour of the perpetrator, and the other one is referring to the par. (3), replacing the obligation of applying the administrative sanction with the faculty of applying it.

Regarding the first change, that of the par. (2), the new form theoretically allows incidental finding of the Art. 18^1 in the old Penal Code even when the identity of the perpetrator is not established.

Personally, I believe that the legislator should not have operated changes regarding the Art. 11 of the CrPC as well, concerning the solutions that can be given during the penal trial when there is one of the cases in which the criminal action is set in motion or the prosecution is hung.

According to the Art 10^1 p. b) of the old CrPC the fact that the crime does not represent a social action of inaction, represents such a cause of estoppels.

It is normal to wonder: what solution can find the criminal investigation body when, according to the Art. 18^1 old Penal Code, the act is not dangerous enough to be considered an offense, but the perpetrator is unknown?

By applying the provisions of the old Criminal Procedure Code, in the prosecution phase, the concrete lack of social danger of a crime attracts weather the inaction of the prosecution, or the discontinuation of the prosecution. These solutions were conditioned by the determination of the identity of the perpetrator. When the identity was unknown, the solution was ranking[3].

Therefore, at a procedural level, a conflict of legal norms arose generated precisely by the possibility of retaining the applicability of the Art. 18^1, old Penal Code, even if the perpetrator's identity was unknown.

This change has added another reason to criticize this controversial institution of criminal law, along with the existing number of critics.

It should be noted that determining the specific social danger is related to the cumulative analysis of some objective factors (the manner and means of committing the crime, the circumstances in which the crime was committed or the result produced or which could have been produced) but also of subjective factors (not only the behaviour and the perpetrator, but also the purpose).

The purpose, as an element that characterizes the subjective side of the offense, cannot be determined in the absence of the identity of the perpetrator. The person or the behaviour of the perpetrator, likewise, sometimes can be the key factor in determining that the fact is not "manifestly irrelevant", especially in the case in which a perpetrator has a criminal record, or he is freshly released from prison, or is a person who committed the crime while she was on release pending trial.

Furthermore, if the perpetrator is not found, it cannot be determined whether he has the age of criminal responsibility or if he has discernment, a situation that would lead to another procedural solution.

Categorically, through the possibility to assign the label "crime that does not present the social danger of an infraction", it did not contributed to a committing crime prevention, it did not come to a speedy criminal trial, but to a high degree of subjectivity of the prosecuting authorities to chose the test cases of the Art. 18^1 old Penal Code and maybe even the temptation to close, in this manner, some criminal files of unknown persons.

The second modification of the Law 2020/2010 regarded the Art. 74^1, the old Penal Code "in case of perpetration of fraudulent management infraction, fraud, embezzlement, maladministration, abuse of office against public interest, abuse of office in qualified form and negligence in office, stipulated in this Code, or of some economic crimes stipulated in special laws, wherethrough caused a damage, if during prosecution or trial, until the case solving in the first instance, the accused or the defendant fully cover the damage caused, the penalty limits provided by law for the offense committed is reduced by half. If the damage caused and recovered under the same conditions is up to 100.000 Euros, in the equivalent to the national currency, fine penalty may apply. If the damage caused and recovered under the same conditions is up to 50.000 Euros, in the equivalent to the national currency, administrative sanction may apply, which is recorded in the criminal record.

The dispositions provided in the par. (1) and (2) are not applicable if the perpetrator has committed an offense of the same gender, provided by this Code, within 5 years of the deed wherefore he benefited of the provisions of par. (1) and (2)"

I want to clarify that the text entered does not match the new Criminal Code provisions. From my point of view, the provisions of this legal text are objectionable and that's because there's a risk to produce unpleasant effects, far worse than those anticipated by modifying in this way the Criminal Code. Thereby, a first observation is that the mentioned article was allowing , by a *post delictum* conduct - the acquittal of the damage caused, without necessarily signifying an admission of guilt – for example, to impose an administrative penalty for fraud with particularly serious consequences – (penalty from 10 to 20 years).

It is important to specify that in terms of the old Criminal Code terminology, the expression "administrative penalty" did not exist. The Article 91 of the old Penal Code regarded "penalties of an administrative nature", making, in this way, the distinction between these sanctions under the criminal law and the "administrative sanctions" specific to administrative law liability.

The text of the Art. 74^1 of the old Penal Code, was referring to the amount of damage caused by the offense and recovered, amount determined in Euro, although Romania's national currency in the Leu. Reporting to the Euro could have caused problems when applying the provisions, because one and the same damage based on the exchange rate at the time of the offense or at the time of judgement, could determine the classification and, where applicable, the amount could not fit with the provision of the Art. 74^1 par. (1) or (2) of the old Penal Code.

Another important modification of the Law no. 202/2010 could be found in the contents of the Art. 184 of the old Penal Code. Thereby, after the paragraph (5), a new paragraph has been introduced, the paragraph 6, as follows: "For the crimes from par. (2) and (4), reconciliation of the parties removes criminal liability."

This addition concerns the Art. 184 the old Penal Code, with the marginal designation of "serious bodily harm". By the addition to the mentioned article, for the serious bodily harm crime whereby has generated any of the consequences set in the Art. 182 of the old Penal Code (serious bodily harm), the prosecution is exercised ex officio, but the parties could reconcile, reconciliation leading to the removal of criminal liability of the offender.

As a result, referring to the serious bodily harm, the only situations where the Law does not accept the right of the parties to reconcile and to stop the criminal proceedings were those where the crime was committed under the conditions of the Art. 184 par. (4) old Penal Code, and that means by a person in inebriety.

Being a more favourable law – if the parties have wanted to reconcile – the provisions of the Art. 184 par. (6) of the old Penal Code found their applicability and the pending trials at the inurement of the Law no. 202/2010, even in the cases in appeal or the appeal stage, after the inurement of a more favourable law.

1. Criminal procedure regulations

Unlike the old Penal Code, the old Code of Criminal Procedure suffered, by the inurement of the Law no. 202/2010, substantial changes, including those who were in the contents of the Art. 10 par. (1) p. h). Thereby, the Article 10, paragraph (1), point h) modified and it had the next content: "h) prior complaint was withdrawn or the parties have reconciled or a mediation agreement was concluded under the law, the offenses for which the withdrawal of the complaint or the reconciliation of the parties removes criminal liability"

The Article 10, p. h) of the old CrPC concerns one of the cases in which the criminal proceedings may not be set in motion or if it was set in motion, could not be exercised, leading to the completion of criminal proceedings by not proceeding with the criminal prosecution or by stopping it – in the stage of the criminal prosecution or in the stage of stopping the criminal trial – in the trial stage. Basically, it was within two cases that were eliminating a penal responsibility, namely the withdrawal of the prior complaint and the reconciliation of the parties.

Concerning point h), the mentioned article was completed by introducing the term of a mediation agreement as a procedural impediment in the initiation or continuation of criminal proceedings, together with the withdrawal of the preliminary complaint or with the reconciliation of the parties. (1), p. g), of the new CrPC.

The new text introduced had correspondent in the provisions of the Art. 16, par (1), p. g) of the new CrPC. The conclusions of such a mediation agreement, leading to the said solution, had to intervene only in case of offense for which the withdrawal of the complaint or the reconciliation of the parties removes criminal liability.

Moreover, the provisions on mediation effects about the sanctioned crimes upon the complaint of the victim (or the reconciliation of the parties removes the criminal liability) were introduced solely in the criminal settlement without modifications or additions of the old Penal Code concerning the causes that were eliminating the criminal responsibility. Therefore, I believe that "the conclusion of a mediation agreement" is not a new cause for removing the criminal responsibility, but a particular way of reconciliation of the parties.

The new introduced procedural regulation must be correlated with the provisions of the Law no. 192/2006 on mediation and mediator profession organization and here I am considering, on the one hand, the provisions of Chapter VI, entitled "Special provisions on conflict mediation", Section 2 "Special provisions on mediation in criminal cases" but also the other provisions of the law on mediation, including those of the Art. 56 on how to complete the mediation process.

Thereby, according to the Art. 56 of the Law 192/2006, the mediation procedure closes, if applicable:

a) Through an arrangement between the parties after the conflict settlement,
b) The finding of the mediator of the failure of the mediation
c) By deposing the mediation contract by one party

As regards a concluded arrangement, the same text provides that it can be a part of a partial agreement.

The mediation agreement referred to in Art. 10, par. (1), p. h) of the old CrPc – As a situation that leads to the ending of the criminal prosecution or criminal proceedings – should be understood as the agreement wherewith the mediation procedure is complete and not as an agreement of the parties to conduct the mediation procedure.

Thereby, according to the Art. 58, par. (1) of the Mediation Law, "When the warring parties have reached an agreement, can be drawn a written agreement that will include all the clauses consented by it and which is equivalent to a document under private signature. Usually, the agreement is drawn up by the mediator, excepting the situations where the parties and the mediator agree differently":

The mentioned general provisions complemented with the special provisions of the Art. 70, par. (5) of the Mediation Law, the mentioned agreement, to produce effects in criminal matters must be drafted in writing and, where appropriate, to be authenticated by a public notary or to be presented to the judicial body by the mediator, in final form (under private signature) and to be confirmed personally by the parties, before the judicial body. To solve criminal cases under the agreement concluded as a result of mediation, the parties are obliged to submit to the judicial agreement, the authentic form of the agreement or to present it to the judicial body to take note of their will". Personally, I think that to take note of the intention of the parties and to dispose over the solution of stopping the prosecution or, where appropriate, of criminal proceedings, the penal judicial body had the obligation to verify the contents of the document presented to determine whether the intention of the parties have as a result the complete reconciliation (both criminal and civil sides) the unconditional nature and its finality.

Moreover, the solution of ceasing the criminal prosecution or the criminal trial was to be headed down by the judicial authority and if the plurality of the accused or of the defendants but only for those who signed the mediation agreement with the injured party, considering that reconciliation of the parties produces effects in person.

Regarding the completion of the Art. 10, par. (1), of the old CrPC, some observations are required. The modification of the mentioned legal text was not linked to the intention of speeding up processes in criminal matters, as aimed the initiator of the law, the Ministry of justice, but to take advantage of promoting the law modifying the Code of Criminal Procedure to resolve other incidental legal issues.

The introduction of provisions on "mediation agreement" was done in order to make it functional, in criminal matters, the mediation institution, given the fact that the Mediation Law is active since May 25, 2006, but its provisions were not applicable in criminal matters over four years after adoption due to lack of correlation with the Code of Criminal Procedure.

The modification of the Art. 10, par. (1), p. h) was welcomed all the more so as the achievement of reconciliation of the parties through mediation procedure allows them not only to be better informed about the advantages of such procedure (through mediation services provided by an authorized mediator), but to guarantee the right to legal assistance during mediation, according to the Art. 68, par. (1) of the Law no. 192/2006.

But the legislature did not operate with all the necessary correlations between Mediation Law and the Code of Criminal Procedure so that they remained inapplicable, for example, the provisions of the Art. 70, par. (1), (2) and (4) of the Law no. 192/2006 regarding the suspension up to three months of the criminal proceedings if the mediation procedure was initiated (the contract of mediation was concluded) after the commencement of the criminal proceedings.

Thus, the provisions of the Art. 239 and the Art. 303, of the old CrPC which provide the possibility for suspension of criminal proceedings, in the prosecution phase or during the trial, remained unchanged. Another modification of the old Code of Criminal Procedure is found after the Article 16, introducing a new Article, the Article 16^1, as follows: "During the criminal trial, on civil claims, the defendant, the civil party and the party responsible for the civil party can enter into a transaction or a mediation agreement, according to the Law. The defendant, with the civil consent, may recognize, as a whole or partially, the claims of civil party, on the chance of the recognition of the civil claims, the court requires to pay damages to the extent of recognition. The civil claims are not recognized, evidence can be administered."

The text of the Art. 16^1 of the old CrPC had identical content with the regulation contained in the Art. 23 of the New CrPC. The new attached article regarded the ways of sustaining a civil action when it is joined to the criminal one in a penal trial, instituting the possibility of the parties to reach an agreement on the amount and on the manner of the payment of civil claims, resulting from the offense, the claims representing both material and/ or moral prejudices.

The text introduced 3 new possibilities of solving the civil action – through transaction, mediation or by recognition of civil claims by the defendant (full or partial recognition). The first two ways – the transaction and the mediation – consist of agreements between the civil party, the defendant and the accused, while the recognition constitutes a unilateral act of will.

Regarding the transaction, in a formal way, the possibility of fighting the civil action (exercised within the criminal process) exists since 1864, after the adoption of Romanian Civil Code. According to the Art. 1707 of the Civil Code, "it can act on a civil action arising from a criminal offense". In the absence of some correlative provisions in the old Code of Criminal Procedure, the transaction in civil matters, in criminal proceedings was inapplicable.

The new legal text of the Art 16^1, the old CrPC. Specifically was introducing the possibility of fighting the civil law, but it shows, in my opinion, important shortcomings in the thinly regulation provided for the applicability of this institution in the criminal proceeding.

From how to regulate the Art. 161, par. (1) of the old CrPC, results that the transaction in the penal trial might be concluded on the criminal prosecution (after the initiation of the penal trial – as long as the transaction may be concluded by the defendant) or during the trial.

A first series of questions that arose, were related to aspects of form and effects of the transaction – which is how the transaction appears in front of the judicial body , if it must be in writing, if it is enough to be under private signature or if it is required an authentic document, if the parties must appear in person before the judicial body to confirm it, what are the effects of the transaction in the criminal prosecution stage – finished with a solution of not indicting or its effects when the case is sent to court – does the transaction previously completed remain valid, can it be changed, can it be denounced before the conclusion of the debates?

I want to clarify that the new text that was introduced is poor in explanations and the will of the initiator of the law could not be found in the explanatory memorandum to the draft of this law when submitted to the Parliament, either.

If the transaction is the result of the mediation, the provisions of the Law no. 192/2006 can provide satisfactory answers to some of these questions. In the other cases, it was jurisprudence's task to provide solutions in the application of the legal text. Similarly with the regulations of the transaction in the civil proceedings, I consider that the transaction must always be made in writing or a document under private signature – that must be completed by the personal presentation (or by a legal representative or by a conventional representative with a proxy) of the parties before the judicial body and the confirmation of the transaction – or by deposing the authentic transaction to the judicial body, in which case the presence of the parties in the same time and place (at the judicial body) would not be necessary.

Regarding the effects of the transaction, if the prosecution stage ends with the solution of not indicting, the prosecutor, although he noted the intention of the parties in stopping the civil action, using the transaction, he would not have been ruled by ordinance, on the settlement of the civil action, in this way, while the criminal procedural regulation of the abandonment of the

prosecution and of the removal from under the criminal prosecution did not offer to the criminal investigation body, the opportunity to solve the civil action.

Regarding the effects of the transaction made during the prosecution concluded with the indictment, it keeps its legality, but its effects will be produced only by a final decision wherewith the court notes the transaction of the parties.

As regards the possibility of the parties to modify the content of the previous transaction closed, I believe that, respecting the principle of the availability that governs the solving of the civil action in the penal trial, the parties had the possibility to modify the type of transaction until the beginning of the debates, through the agreement.

As regards the possibility of the unilateral denunciation of the previous transaction signed and confirmed before the judicial body (the contract or the transaction has to be submitted in original), I believe that an unilateral modification (including denunciation) of a contract could not have had any effects.

3. The regulations of civil nature

It is known the fact that the old CrPC had to suffer, once with the inuring of the Law no. 202/2010, there are many changes in what follows, but I will limit myself to present the changes brought to the Art. 720^1 of the old Penal Code.

The modification of the Art. 720^1, of the old Criminal Procedure, consist in recognising the character of the prior procedure in commercial disputes assessable in money matters and in mediation procedure.

The provisions of the Art. 720^1 par. (1) of the old CrPC are correlated with those of the Art. 43 par. (2^1) of the Law no. 192/2006 regarding the mediation and the mediator profession, introduced by the Art. 1, p. 21 of the Law no. 370/2009, according to which, in the processes and the application and the civil and commercial applications, before the entering of the application of the proceedings, the parties can try to resolve the dispute through mediation.

Thus, the warring parties may present themselves along with the mediator. If only one party is present, the mediator, at its request, will address to the other party a written invitation, to inform and to accept the invitation, with a deadline in this regard.

Derogating from the provisions of the Art. 43, par. (1) of the Law no. 192/2006 that provides the fact that the deadline set by the mediator must be of 15 days, when the mediation procedure is used as a prior procedure, the deadline has to be kept, provided by the Art. 720^1, par. (4) in the old CrPC., meaning a minimum of 15 days. The invitation was transmitted by any means that assure the confirmation of receiving the text. The applicant shall provide the data necessary to contact the other party. The mediator has the obligation to do the other legal steps that are considered to be necessary for the invitation of the party at the mediation, in compliance with the Law no. 192/2006.

In case of impossibility of presenting any of the convened parties, the mediator will be able to determine, at its request, a new date to inform and accept the mediation. In case of acceptance of the mediation, the parties that are disputing and the mediator will sign the mediation agreement.

If one party refuses, in writing, the mediation or to respond to the invitation mentioned in par. (1) or does not appear twice in row on the dates set for signing the mediation, the mediation is considered to be unaccepted.

The proof of the prior mediation procedure was done with the report made by the mediator regarding the refusal of the mediation, developed under the conditions of the Art. 43, par. (3) of the Law no. 192/2006. In this case, the dispositions of the Art. 720^1, par. (5) of the old CrPC must have been respected, the party could address to the court only after a period of 30 days from the date of communication of the invitation to the mediation.

If the parties concluded a contract of mediation but the mediation procedure does not end with the subscription of an agreement, under the conditions of the Art. 60 of the Law no. 192/2006, or because it does not reach an agreement under the conditions of the Art. 58 of the same law, of the same regulatory document, the proof of getting through this procedure is done with the report of

the failure of the mediation, made out under the conditions of the Art 56, par. (1), p. b) and the Art. 57 of the Law no. 192/2006. In this situation, the interested party had the possibility to compass immediately the competent court, without being necessary for the period of 30 days, provided by the Art. 720^1, par. (5) of the old CrPC, to pass.

In the Art. 720^1, after the par. (1), a new paragraph was introduced, the paragraph 1^1, as follows: "The limitation period for prescriptive of the right to act for the litigious right submitted to mediation, shall be suspended during the procedure, but no more than 3 months since it began."

This new text introduced in the old Code of Civil Procedure addressed to the situations where one of the parties appealed to the mediation procedure as a prior procedure to the notification of the court to solve a commercial litigation assessable in money.

The 3 months term in which the course of the term of the material right to action was suspended, started to run from the date when the mediation was signed. If a prior conclusion of the mediation was fulfilled, the term of prescription of the material right to action was not suspended, because the procedure of the mediation starts only when the mediation contract is signed, according to the Art. 44, par. (1) of the Law no. 192/2006.

It is important to specify that the text presents a derogation from the provisions of the Art. 49 of the Law 192/2006, according to which, the limitation of the right of action for the litigious right submitted to the mediation shall be suspended starting with the date when the mediation contract was signed, until procedure of mediation is closed in any other ways provided by the law.

In commercial matters, the provisions of the Art. 720^1, par. (1^1) of the old CrPC were more injunctive, ensuring the recess of the prescription course of the material right to action only for a period of 3 months. If this term in which the course of the material right to action was passing and the prescription restarted, in case there were a risk of its fulfilment, the only way they had available was to denounce the mediation contract, according to the Art. 60, of the Law no. 192/2006 and to address to the court.

Therefore, it was recommended to proceed to the elimination of this article, with its application effect and in commercial matters of the provisions of the Art. 49 of the Law no. 192/2006.

4. Conclusions

In addition to the changes imposed by the necessity of implementing the provisions of European Legislation, such as those related to mediation, the Law regarding the measures to accelerate the settlement of the process included the regulations that were taking over a number of institutions in the new CrPC and of the new CrPC, making their application avant la lettre and also creating some jurisprudential rules, even if sometimes they were created through a matchlessly practice.

References

The old Code of Criminal Procedure, The Article 230.
The old Code of Criminal Procedure, The Article 11, p. 1.b.
The Code of Criminal Procedure, The Article 11, p. 1.c.
The Code of Criminal Procedure, The Article 131, par. 2.
The Code of Criminal Procedure, The Article 132.
The Law no. 192/2006, The Article 70, par. 5.
Ministerul Justiției (Ministry of Justice) http://www.just.ro/

Monitorul Oficial no. 831 from December 3rd, 2009.