Procedural Incidents Appeared When Finalizing the Criminal Accusation Stage

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Abstract. The finalization of the first stage of any criminal case obliges the prosecutor to check up on the legality and the validity of the criminal investigation acts performed by the police authority whose activity is monitorized by him. This obligation considers first the verification of the constituent documents of the criminal accusation – the beginning of the criminal accusation, the start of the criminal action, the presentation of the criminal accusation material of the defendant and the completion of the account containing the proposal to finalize the criminal accusation by the police authority. Within this context, it is verified if the criminal accusation documents have been drawn up with the compliance of the legal stipulations, followed by the finding if all the evidence have been collected, necessary to find the truth in the respective case and if all implying criminal or civil aspects have been elucidated . According to the established deficiencies in the police investigation activity, the prosecutor can entail : the reference to the competent authority, the return of the case with a view to complete or to remake the accusation, the resumption of the criminal accusation. These solutions can be entailed by the prosecutor ex officio or on the occasion of solutioning the complains against criminal investigation documents formulated by those interested due to drawn illegal documents. At the same time, by initiating the procedure of complaining against the prosecutor's acts, the legality and the validity of a solution adopted in the criminal accusation stage can be analyzed by the court.

Keywords: Criminal Procedure Code, trial, criminal law.

1 The Reference to the Competent Authority[1]

When the prosecutor establishes that for one of the offences or the offender shown in the art. 207, art. 208 and art. 209 par. (3) and (4) Criminal Procedure Code the criminal investigation was performed by another authority, other than those stipulated in the mentioned texts[2], he must take measures in order that the investigation should be done by the competent authority. Under these circumstances, the taken insuring measures, the processual documents or measures approved by the prosecutor, as well as the processual documents which cannot be remade stay valid. The criminal investigation authority to which the matter was referred hears the accused or the defendent and taking into account the issues already carried out in the case, entails the degree of remaking the other processual documents and the nature of new documents necessary for the completion of the criminal investigation.

2 The Return of the Case to Complete or to Renew the Investigation

The Criminal Procedure Code[3] regulates the circumstances when the prosecutor returns the case or refers it to another investigation authority in order to complete or renew the investigation, respectively:

[1] Art. 268-269 Criminal Procedure Code

[2] Art. 207 Criminal Procedure Code refers to the competence of the investigation authorities of the judiciary police and art. 208 Criminal Procedure Code refers to the competence of the special criminal investigation authorities. Art. 209 par. (3) and (4) Criminal Procedure Code establishes for which offences the criminal investigation is effected by the prosecutor compulsively.

[3] Art. 265 Criminal Procedure Code

a) when criminal investigation is not complete;

b) when legal dispositions which guarantee the finding of truth have not been observed;

When the completion or the renewal of the criminal investigation is necessary only in reference to certain acts or to certain accused or defendants, and the severance is not possible, the prosecutor entails the return or the reference of the whole case. The return or reference order includes (besides the mention referring to the date and the place of completion, the name ,surname and the quality of the person in charge, the case to be referred, the object of the processual document or measure, its legal basis, the signature of the person who completed it) and:

– the designation of the criminal investigation documents which must be drawn up or renewed;
– the designation of the facts or circumstances which are to be established;
– the designation of the means of probation which are to be used.

3 The Resumption of the Criminal Accusation[4]

The criminal accusation is resumed in the following cases:

a) *cessation of the suspension cause*[5] (the criminal investigation authority which established that the suspension cause ceased, submits the file to the prosecutor in order to entail the resumption. Resumption is entailed by an order);

b) t*he return of the case to the court with a view to renew the criminal accusation*[6] (when the court which entailed the return of the cause with a view to renew the criminal accusation, the accusation is resumed on a basis of the court's decision of resumption);

c) *resumption of the criminal investigation*[7]. The resumption of the criminal investigation is entailed by the prosecutor and takes place under the following circumstances:

– in case when the cessation or the abatement of the criminal accusation has been entailed and subsequently it has been established that the fact which determined the taking of such measure did not exist or the circumstance on which the cessation or the abatement were based disappeared.;
– when the judge admitted the complaint against the order or, in case of a prosecutor's resolution of abating the criminal investigation , in case of ceasing the criminal investigation or stopping and returned the case to the prosecutor with a view to reopen the criminal investigation[8] (in case when the court admitted the complaint against the abandonment of the criminal accusation and sends the case to the prosecutor for filing the criminal accusation, this one entails the start of the accusation under the conditions stipulated by the law and not the reopening of the criminal accusation). In both situations the dispositions of the court are binding for the authority of criminal accusation concerning the facts and circumstances which are to be established and concerning the designated means of probation.

In both cases of reopening the criminal accusation, if on a basis of the file data it is considered necessary the taking of a preventive measure, the prosecutor complies with the procedures concerning the arrest of the accused or of the defendant.The order which entailed the resumption of the criminal accusation mentions the taking of the measures in point. It is specified that none of the above mentioned cases can take place if it is considered that one of the situations stipulated in art. 10 Criminal Procedure Code have ocurred meanwhile.

Concerning the timeframe of the defendant's arrest after the resumption of the criminal accusation, since the cause of suspension ceased or as the criminal accusation reopened, the term referring to the measure of the defendant's arrest flows from the date of this measure, the dispositions concerning the

[4] Art. 270-274 Criminal Procedure Code
[5] Art.271 Criminal Procedure Code
[6] Art. 272 Criminal Procedure Code
[7] Art.273 Criminal Procedure Code
[8] Art.278[1] Criminal Procedure Code establishes the procedure of solutioning the complaint in front of the judge against the resolutions or order of non-arraignment of the prosecutor.

hearing before the arrest are binding[9]. In case when the criminal accusation was resumed, as the cause has been given back to the court with a view to remake the criminal accusation, if the defendant is under arrest and the court maintains the remand, the term of 30 days flows from the date of the sentence, the court being obliged to send the file to the prosecutor within 10 days. The duration of the defendant's arrest can be prolonged according to the conditions stipulated by the law and analyzed in the chapter on the procedure of the prolongation of the remand entailed during criminal accusation[10].

4. The Complaint Against the Criminal Accusation Measures and Documents

The Criminal Procedure Code[11] stipulates the possibility that any person dissatisfied with the documents and measures entailed during the criminal accusation can complain against these, if by these his legitimate interests have been damaged. In other words the complain can refer to the documents of the criminal accusation effected by the prosecutor as well as to the documents of the criminal accusation effected by the authority of the criminal investigation.

4.1. The Complaint Against the criminal Accusation Measures and Documents Effected by the Authorities of Criminal Investigation[12]

The complaint is submitted to the prosecutor who oversees the activity of the criminal investigation authority and is applied either directly to the prosecutor or to the criminal investigation authority. Concernig the term of submitting the complaint, although the law does not specify anything, the literature of speciality[13] appreciated that taking into account that the complain invokes infringements of the dispositions which regulated the development of the criminal case, the stipulations of the art. 275 Criminal Procedure Code must be completed with those of the art.197 par.2 Criminal Procedure Code and the complaint can be formulated in any stage of the criminal accusation. If any other infringements of the law have been invoked, the complaint must be submitted by the entitled person within the conditions of the art. 197 par. 1 and 4 Criminal Procedure Code.

There are cases when the terms of formulating the complaint are stipulated specifically. Thus, in case of a complaint against the measure of detention, the complaint must be submitted within the timeframe of 24 hours[14] and in case of a 14- 16 years old minor's detention, before the expiry date of the terms stipulated by the art.160^{g} Criminal Procedure Code.

In order to avoid the protraction of the solutioning of the cause, art. 275 par. 4 Criminal Procedure Code stipulates that submission of the complain does not suspend the fulfillment of the measure or of the action effected by the criminal investigation authority and which constitutes the object of complaint.

When the complain has been submitted to the criminal investigation authority, this one is obliged to, within 48 hours from its application to handle it ot the prosecutor with the necessary explanations. The prosecutor is obliged to solve the complaint within 20 days from its application and to communicate the result to the person who submitted the complaint.

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[9] Excepting the cases stipulated in art. 150 Criminal Procedure code., when the accused has dissapeared, is abroad or absconds from accusation or from trial or is in one of the situations stipulated by the art. $149^{1\ par.}$ (6) from the same Code (cannot be brought due to his state of health, of major necessity or state of necessity).

[10] According to the art. 155 and art. 159 Criminal Procedure Code

[11] Art. 275 par. (1) Criminal Procedure Code

[12] Art. 275-277) Criminal Procedure Code

[13] N. Volonciu, Al. Ţuculeanu, *Criminal ProcedureCommented, Art.200-286 . Criminal Accusation*, Ed. Hamangiu, Bucureşti, 2007, p.147.

[14] Art. 140^{1} Criminal Procedure Code

4.2. The Complaint Against the Prosecutor's Actions[15]

According to the stipulations of the art. 278 Criminal Procedure Code a complain can be submitted against the following actions of the prosecutor:

- any measures or documents effected by the prosecutor or effected following his dispositions (the complaint against these measures is solved by the first prosecutor of the Prosecutor's Office or by the Prosecutor General of the Prosecutor' Office of the court or,where appropriate, by the Head of Department Prosecutor of the High Court of Cassation and Justice. In case when the measures and documents belong to the first prosecutor or to the Prosecutor General of the Prosecutor's Office of the court or to the Head of Department Prosecutor of the High Court of Cassation and Justice or they have been taken or effected following their dispositions, the complaint must be solved hierarchically by a high ranking prosecutor.);
- the resolution of non-initiating the criminal accusation, the order or where appropriate the stopping resolution, abating the criminal accusation or ceasing the criminal accusation (those competent to resolve the complaint against this type of documents are those mentioned above). The complaint against this type of documents can be made within 20 days from the date of communicatig the order copy or resolution to the persons interested. Accordingly, the resolutions or the orders by which the complains against the resolutions or orders of non-initiating , stopping or abating the criminal accusation or the ceasing of the criminal accusation are resolved have to be communicated to the person who submitted the complaint or to the persons interested.

All the dispositions previously mentioned concerning „the complaint against the measures and documents of the criminal accusation effected by the authorities of criminal investigation" are applied as such in case of a complaint against the prosecutor with the following characteristics:

- the complaint is submitted to the prosecutor whose documents are attacked or to the competent prosecutor ;
- the complaint is submitted either directly to the prosecutor whose documents are attacked or to the competent prosecutor to resolve the complaint;
- the submission of the complaint does not suspend the fulfillment of the measure or the document which makes the object of the complaint;
- when the complain has been submitted to the prosecutor whose documents are attacked, this one is bound to handle it to the competent prosecutor to resolve it, with the necessary explanations, within a timeframe of 48 hours;
- The competent prosecutor is bound to resolve the complaint within a maximum of 20 days from its submission and to communicate the result to the person who submitted the complaint.

We must specify that, by derogation from the stipulations of the art. 275 par. Last Criminal Procedure Code, the introduction of the complaint against the order of abating the criminal accusation by which an administrative fine has been applied suspends the enforcement of the sanction.[16]

In order to contest the applied fine, according to the art. 198 par. 1 let. a and b or par. 4 let. g Criminal Procedure Code, the law stipulates a term of 10 days.[17]

It is to be mentioned that, besides the possibility offered to the persons dissatisfied by the prosecutors' documents to complain according to the art. 278 Criminal Procedure Code, different other dispositions stipulate also the direct attack in court of the various documents or measures of the prosecutor. As an example:

- Against the prosecutor's order which entails the obligation of not leaving the locality or the

[15] Art. 278 Criminal Procedure Code
[16] Art. 249[1] Criminal Procedure Code
[17] Art. 199 Criminal Procedure Code

obligation of not leaving the country, the accused or the defendant can complain within 3 days from the date when the measure has been taken, to the competent court to try the case at first instance.[18]

- Against the taken insuring measure and against the means of its fulfillment, the accused or the

defendant, the civil responsible part,as well as any other person can complain to the prosecutor or to the court at any stage of the criminal case.[19]

4.3. The Judiciary Control over the Solutions Adopted by the Prosecutor Concerning the Non-arraignment

One can also complain against the resolutions or against the order of non-arraignment entailed by the prosecutor at the court acording to the following procedure[20]:

After rejecting the complaint made against the resolution of non-initiating of the criminal accusation or against the order, or where appropriate, against the resolution of stopping, abating or ceasing the criminal accusation (rejection entailed hierarchically by a high ranking prosecutor to the one who gave these solutions), the damaged person as well as any other persons whose legitimate interests are injured can make new complain to the judge of the competent court which tries the case at first instance. The complain can be made against the disposition of non-arraignment included in the indictment, too. The complain will submitted to the court within 20 days from the date of transmitting the resolution of the complaint by the competent prosecutor.

Solutioning the appeal in the interest of the law promoted by the Prosecutor General of Romania, the united departments of the High Court of Cassation and Justice decided that the complaint against the measures or documents effected by the prosecutor or as a result of his dispositions, other than resolutions and orders of non-arraignment,regulated by art. 278^1 par. (1) Criminal Procedure Code, is inadmissible[21].

In case when the competent authority, respectively the first prosecutor of the Prosecutor'office or where appropriate the Prosecutor General of the Prosecutor's Office of the court, the Head of Department Prosecutor from the Prosecutor's Office of the High Court of Cassation and Justice or the hierarchically high ranking prosecutor did not resolve the complaint within the term of 20 days stipulated by the law, the competent judge of the court under whose jurisdiction the case is to be tried at first instance can be addressed from the expiry date of the respective 20 days.

The file will be sent by the Prosecutor's Office to the judge, within a timeframe of 5 days from the reception of the address of request for the file. When the judge resolves the complaint against the prosecutor's resolutions or orders of non-arraignment, the person which was subject of the non-initiation, of abating the criminal accusation or stopping the criminal accusation as well as the person who made the complaint will be cited.The default of such persons legally cited does not prevent the solutioning of the case.When the judge considers the presence of the absent person as absolutely necessary, he will take measures to bring the respective person at court.The prosecutor'presence is obligatory when the complaint is tried.

At the term settled for the trial of the complaint, the judge hears the person who made the complaint, the person who was subject to the non-initiation of accusation and then to the prosecutor.At a fixed term for trying the complaint, the judge hears the person who made the complaint, the person who was subject of non-initiation of the criminal accusation, of abating or stopping the criminal accusation and then the prosecutor.

By resolving the complaint, the judge checks the attacked resolution or order, on a basis of the documents and materials and any other new writings contained by the file of the cause.

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[18] Art.140^2 Criminal Procedure Code
[19] Art 168 Criminal Procedure Code
[20]The procedure is described in the art. 278^1 Criminal Procedure Code
[21] I.C.C.J., United sections, Decision nr. LVII (57)from the 24-of September 2007.

The judiciary practice has often mentioned the problem of the obligatory juridical assistance of the appellees or of the applicants during the trial of a complaint against the solution of non-arraignment given by the prosecutor. Unfortunately, the jurisprudence in criminal matters underlined two orientations concerning this aspect:

– one one hand certain instances considered that juridical assistance is obligatory if the punishment stipulated by the law for the offence which was the subject of non-arraignment is a sentence of 5 years or more, such solution being motivated by the fact that the dispositions of the art. 171 par. (3) and (4) Criminal Procedure Code, which establishes the obligativity of the juridical assistance during the trial,conditionong this obligation by a certain quality of the person who participate in the trial;

– on the other hand, certain instances appreciated that juridical assistance is not compulsory, taking into account that the legal disposition under debate consecrates the obligativity of the juridical assistance only during the trial, and the instance, trying the complaint verifies the attacked resolution or the order on a basis of the materials and documents contained in the file of the cause.

A non-unitary practice in this issue has been resolved on the occasion of solving an appeal in the interest of law declared by the Prosecutor General of Romania, occasion which gave the High Court of Cassation and Justice the possibity of deciding that the juridical assistance is not obligatory for the appellees or the applicants, in causes having as object complains formulated under the conditions of the art. 278^1 Criminal Procedure Code.[22]

The solutions a judge can give in resolving such complaints are[23]:

a) overrules the complaint by a sentence, as belated or inadmissible or where appropriate he ignores it maintaining the attacked resolution or order.

b) admits the complain, by a sentence, dissolves the attacked resolution or order and sends the cause to the prosecutor, with a view to start or to reopen the criminal accusation where appropriate. The judge is obliged to show the reasons for which he sent the cause to the prosecutor, indicating at the same time the facts and circumstances which are to be verified and by which means of probation- aspects which will be specified only in the grounds and not in the disposition.[24]

Since in practice there have been situations when the person who had been the subject of non-arraignment solicited the change of the legal ground of the solution given by the resolution or the order contained in the demand, the United Sections of the High Court of Cassation and Justice, summoned with an appeal in the interest of law, decided that in case of such a complaint formulated on a basis of the art art. 278^1 Criminal Procedure Code in the hypothesis of a complete administration of the evidence, the instance can entail the change of the legal ground of the solution entailed by the prosecutor under the conditions of the art. 278^1 par. 8 let. b from the Criminal Procedure Code.[25] Therefore art.278^1 par.8 let. b from the Criminal Procedure Code, extends also the the hypothesis of a complete evidence, when the reference of the cause to the prosecutor with a view to reopen or to start the criminal accusation is not imposed, the judge having the possibility to change the legal ground of the solution entailed by the prosecutor.

c) admits the complaint, by a conclusion,dissolves the attacked resolution or order and when the existing file evidence are sufficient, he detains the cause to be tried, in a legally constituted chamber, the dispositions concerning the trial at first instance and the remedies being applied appropriately. In this case, the act of summonig the instance is represented by the complaint of the person who addressed to the instance. Given the existing non-unitary practice at the national level concerning the interpretations of the dispositions art. 278^1 par. (8) let. c) Criminal Procedure Code, in case when the object of complain is an act of non-arraignment of the prosecutor founded exclusively

[22] I.C.C.J, United sections, Decision nr. LXIV (64) from the 15-th of October 2007.
[23] Art. $278^{1\ par.}$ (8) Criminal Procedure Code.
[24] I.C.C.J., United sections, Decision nr. 26 from the 2-nd of June 2008.
[25] Î.C.C.J.,United sections Decision nr. 44 from the 13-th of October 2008.

on preliminary documents, The High Court of Cassation and Justice, solving the appeal in the interst of law promoted by th general Prosecutor of Romania, decided that in case in case of a complaint formulated against the resolution,order or disposition from the demand, by which non-initiation or dismissal of the criminal accusation has been entailed, the invested instance cannot give the solution stipulated by the art. 278[1] par. (8) let. c) Criminal Procedure Code.[26]

The sentence of the judge given according to the let. a) and b) can be attacked by appeal by the prosecutor, by the person who made the complaint, by the persom who was the subject of the non-initiation of the criminal accusation, abatement or cessation of the criminal accusation as well as by any person whose legitmate interests are damaged.

In the situation stipulated at let. a), the person for whom the judge, by a definitive sentence, decided that does not qualify to be the subject of starting or reopening the criminal accusation cannot be accused for the same act excepting the case when new facts or circumstances have been discovered which were unknown to the criminal investigation authority and one of the cases stipulated art. 10 Criminal Procedure Code intervened in the cause.

As regards the compatibility of the judge who made the application of the art. 278[1] par. (8) let. c) Criminal procedure Code to solve the cause in substance, the practice of the instances proved to be non-unitary, in the sense that there have been solutions by which it has been established that such a judge is incompatible to participate at the trial of the cause in substance, with the motivation that the admission of the complaint is equal to the expresion of the opinion on the possible solution when trying in substance, which constitutes a presumption of the judge's lack of impartiality, but also solutions which established that he is compatible to try the cause further on since, by the sentence this one has not pronunced himself over substance matters, but only over a fallacious appreciation of the evidence by the criminal accusation authority. Finally, in solving an appeal in the interst of law, The High Court of Cassation and Justice decided that the judge who, by a sentence, admits the complaint, dismisses the atacked resolution or order and detains the case to be tried, appreciating that the existing file evidence are sufficient for the trial of the case becomes incompatible to solve its substance.[27]

The judge is obliged to solve the complaint within 30 days from the submission. In this respect, The High Court of Cassation and Justice decided in the solving of an appeal in the interest of law that in case of withdrawing the complaint formulated on the ground of the art. 278[1] Criminal Procedure Code by the damaged person or by the person whose interests have been damaged, the instance is to take into consideration this manifestation of will. The sentence given as such cannot be the subject of any remedy.[28]

As a conclusion of the facts described in the present paper, we consider that the prosecutor has a great responsibility when verifying the criminal investigation activities and the proposals of the police authority, since in case of non-observance of the errors and infringements, the cause arrived before A judge can return to the prosecutor of the cause which would imply not only a negative appreciation of his activity but also a delay in finalizing the criminal case.

[26] Î.C.C.J., United sections Decision nr. 48 from the 4-th of June 2007.
[27] Î.C.C.J., United sections Decision nr. XV from the 22-th of may 2006.
[28] Î.C.C.J., United sections Decision nr. 27 from the 2-th of June 2008.