THE PRIOR COMPLAINT IN THE NEW CRIMINAL PROCEDURE CODE

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Abstract: Regulated as the provisions of the old code - as an exception to the officialdom principle of the criminal process - and appreciated by the doctrine as having a legal mixed nature [1], the prior complaint is also established in the new Criminal Procedure Code as an impediment in terms of triggering and development of the criminal process.Without forgetting the general aspects relating to the document instituting proceedings, in analysing the provisions of procedural law related with the material right, the paper highlights especially the innovations resulting from the interpretation of the new provisions, in particular those relating to the new term of introducing a prior complaint, the method of calculating it, the effects in a procedural - criminal plan of the non-observance of the term, the obligations of the criminal prosecution bodies, including in the case of flagrant crimes.Also, considering the provisions contained in Law No. 192/2006 on mediation and organisation of the profession of mediator [2], the procedure, from the current jurisprudence practice regarding the suspension of the criminal process, the method of calculation of the subsist period and the solutions that are to be adopted, is highlighted. Last but not least, the provisions from the special part of the new Criminal Code are underlined, by particularly naming the crimes which are prosecuted and judged as a result of a prior complaint. These elements are sufficient in order for his paper to become a profound analysis of the material regarding the interpretation and the practical application of this institution.

Keywords: prior complaint, term, procedure, mediation, flagrant offence.

The need to restore the rule of law and the protection of citizens' rights and freedoms is a topical theme that is found in any democratic State where free access to justice is a fundamental principle that must be regarded as an absolute guarantee incumbent upon the criminal prosecution bodies.

In order to support the previous statements the theme of this paper is circumscribed. It refers to just one of the ways that these bodies may be announced with regard to the offences committed, and, most importantly, empowered or authorized to carry out specific activities provided for by law. As a result, the investment of the criminal prosecution bodies with regard to the start of investigations into a case cannot be made in the absence of complaints, which thus constitutes the legal basis and the starting point in the criminal process.

Referral of the criminal prosecution bodies is governed by the formality principle of implementation of action and exercising criminal action, which establishes the obligation of the judicial bodies to start and carry out their criminal procedural activity on its own initiative, without the request of anyone or without taking into account the will of the persons concerned and to which the law assigns a number of exceptions, which includes the institution of the prior complaint. Thus, in the case of offences expressly stipulated, the judiciary authorities are obliged to act ex officio, being necessary a specific referral whose exercise belongs to the injured person, called prior complaint, without which the initiation and development of the criminal process is not possible due, mainly, to the low degree of social danger of this class of facts.

The seat of the material is included in article 295-298 of the Code of criminal procedure (CPC) [3], articles which govern the method and conditions for the promotion of criminal action on the basis of the prior complaint of the injured person.

From the interpretation of the regulatory framework, and the provisions of the Criminal Code (Cp) [4], it results without equivocation that this institution has preserved its applicability for the acts committed on the territory of Romania, as well as those committed

abroad by foreign citizens or persons without the citizenship who do not reside in the country and who are subject to the principle of universality of the criminal law, in accordance with article 11 of the new Criminal Code, with the exceptions covered by it.

According to the article 295 CPC, the initiation of the action is done only at the preliminary complaint of the person injured, in the case of offences for which the law stipulates that it is necessary for such a complaint. This imperative is doubled by article 157 Cp according to which the lack of this referral act removes criminal liability in the case of offences for which the initiation of the criminal action is conditioned by such a document. Exceptions are specifically stipulated by paragraphs 4 and 5 of the same article, respectively article 298, paragraph 1 of the CPC, and the categories of persons listed are those lacking exercise capacity, those with reduced capacity, legal entities represented by the offender, respectively that injured people who died or liquidated legal entities, just before the term provided by law expiries (for these last two categories). In such situations, the initiation of the criminal action can be made ex officio, with the further possibility of withdrawal of the prior complaint that, in order to have effect, must be also acquired by the Prosecutor, as stated in article 158, paragraph 4 CPC. Also in case of a flagrant offence, the acknowledgement of the act is required, then, depending on the option of the injured person, criminal investigation will be initiated or the case will be closed.

The offences whose prosecution are subject to prior complaint, of the new criminal code are as follows: the threat (art. 206), harassment (art. 208), the simple form of rape (art. 218, paragraph 1 and 2), sexual assault in simple form (article 219, paragraph 1), sexual harassment (article 223), violation of domicile (art. 224), violation of professional office (art. 225), violation of private life (art. 226), disclosure of professional secrecy (art. 227) theft at prior complaint (art. 228-230, reported in article 231), abuse of confidence (article 238), abuse of trust by defrauding creditors (art. 239), simple bankruptcy (art. 240), fraudulent bankruptcy (art. 241), fraudulent management (art. 242), mere destruction (art. 253, paragraphs 1 and 2), the disturbance of possession (art. 256), unfair representation and assistance (art. 284), family abandonment (art. 378) and preventing the exercise of religious freedom (art. 381).

As it was correctly described by the doctrine, the prior complaint is a type of referral to the judicial organs as well as a condition sine qua non for putting in motion the criminal action. Under this last aspect, the prior complaint constitutes an act under which the law enforcement agencies put in motion the criminal proceedings, and not an act containing the implementation of criminal action, because the text of the law provides that the criminal proceedings are put in motion at the prior complaint, and not by the prior complaint [5].

For a complete understanding of this institution the fond and form conditions which characterize it must be explained.

The holders of the prior complained

In accordance with the new criminal procedure regulations of article 295, paragraph 3, also like the simple complaint – as a general mode of referral, the preliminary complaint can be made personally, by the injured person, and by its trustee, on the basis of a special power of Attorney that remains attached to the complaint. Also, the complaint may be submitted by the legal representative, for persons lacking in exercise capacity, and for those with limited exercise capacity, this special mode of referral must be confirmed by persons covered by civil law. If the offender is the legal representative or the person who confirms the complaint, the criminal prosecutor body must refer the matter ex officio.

As stated above, in essence, the right to bring forward a complaint is strictly personal, indivisible and non-transmissible.

Starting from this rule, both in doctrine and in jurisprudence, views were expressed and then introduced in the criminal procedure law, new regulations, according to which the

right to lodge a prior complaint through an agent represents the exception to the characteristics mentioned above, under the condition that the mandate should be particular, the power of attorney should be attached to the complaint, and the two papers should be submitted within the time limit to the criminal prosecution bodies [6]. The injured party must clearly define the limits of their mandate, otherwise the mandate is considered general and it will not give the right to a third party to lodge a complaint in the place of the injured party.

According to some opinions, the mandate does not affect the character of the institution, but is just a way of delegating the exercise of the right to make a prior complaint, in those situations where the holder of the right may not personally submit the complaint for various reasons, such as illness, leaving the country etc [7].

An aspect supported by the previous doctrine and implemented as legislative novelty is that regarding the effect of the death of the injured person or the liquidation of a legal person, which occurred before the expiry of the time provided by law for the introduction of a prior complaint, which generates the possibility of initiating ex officio the criminal action [8].

In addition, if the death is not due to the perpetrator, the lack of manifestation of will is tantamount to lack of prior complaint therefore criminal proceedings can not be instituted.

In this regard, although it is argued that because of his death, the injured party hasn't been unable to manifest the will to introduce a prior complaint it can also be argued that if while he was alive he had not expressed this desire, he had no intention to bring to justice the perpetrator and as such, his will cannot be exceeded. Once the injured party dies, it follows that his interests to condemn the perpetrator no longer exist, so no longer requires the commencement of prosecution ex officio [9], opinions with which we agree.

As concerns the case in which the injured party has died after having entered prior complaint, we appreciate that the criminal proceedings must run its course, meaning that the criminal process must continue, because no other person has the legal right to withdraw the complaint submitted by him.

Another exception from the rule of prior complaint's personal character is a situation in which the injured party is a minor or an incapable, i.e. those persons who are either lacking exercise capacity or have reduced exercise capacity, in which case the complaint should be brought through representation or assistance, as provided for in civil law, i.e. the legal representative for the person who lack the exercise capacity, or have reduced exercise capacity, but in this latest situation only with his legal guardian enforceability.

The legislature has set up a guarantee in order to protect these categories of people according to article 157, paragraph 4) CC. It provides that criminal proceedings may be put in motion even ex officio if the injured is a person without exercise capacity, has reduced exercise capacity or is a legal person represented by an offender.

Therefore, when the prior complaint, which should be made by the legal representatives or protectors, is missing, the criminal prosecution bodies are obliged, ex officio, to establish the offences stipulated by law in the case of prior complaint, committed against these categories of persons and to put in motion the criminal proceedings.

The jurisprudence has held that in the case enunciated above operate both the principle of availability on the criminal action, where the representatives of those protected lodge a prior complaint on their behalf, as well as the principle of formality that manifests itself by putting in motion, ex officio, the criminal action by the judiciary authorities who first found an infringement, in the absence of a complaint or agreement of the representatives of the persons protected. In that regard, according to this rule the judicial bodies are obliged to call on the representatives to inquire if they intend to submit a prior complaint on behalf of people they represent, and only if they do not express any position in this respect, criminal proceedings are going to be put in motion ex officio [10].

The entry term of the prior complaint

Another essential condition that must be respected with regard to prior complaints is that concerning the time limit necessary to bring it to the judiciary authorities. Thus, according to the provisions of article 296 paragraphs 1 and 2 of the CPC, the prior complaint must be lodged to the judicial bodies within three months from the day the injured person or its legal representative (in the case of minors or persons lacking full capacity) learned about the commission of an offence. These provisions are novelty by reference to the old legislation. Also, if the offender is the legal representative of the above persons, the period will begin from the date of appointment of a new representative (in accordance with article 296, paragraph 3 of the CPC).

As it was correctly appreciated by the doctrine, the rationality of regulating such a short period of time is justified by the interest of not letting the perpetrator get away - whether he is real or alleged – under the threat of prior complaint, which could lead to blackmail or terror [11] or by the explanation that the passage of time makes the injured party no longer want and no longer have a reasonable basis for making the prior complaint [12].

This term, however, flows differently; the minor has restricted exercise capacity or is deprived of exercise capacity. Thus, the term of three months in the case of the minor with restricted exercise capacity flows from the moment he found out about the commission of the offence, and not his legal representative, because the latter just authorises the prior complaint of the minor. If the minor is deprived of exercise capacity it is important the moment when the legal representative learned about commission of the deed.

The calculation of the term can be done according to the common rules provided for in art. 269 CPC.

When a prior complaint is introduced after exhausting the time limit laid down by law, the sanction that occurs is the revocation of the exercise of this right and the nullity of the prior complaint, and the measure that is imposed in the dismissal of the case on grounds of article 314, paragraph 1, letter a), in conjunction with article 297, paragraph 1, second thesis in relation to in article 16, paragraph 1, point e) of the CPC.

The prior complaint is considered filed within the period even in the following situations:

- if it was filed within three months at the judicial body that does not have the competence to deal with it;

- in the event the legal classification is changed, if in a case, in which there have been acts of criminal investigation, it is subsequently found that the deed is going to receive a legal classification that requires prior complaint, the criminal prosecution body shall summon the injured person and ask if he will submit a complaint. If the answer is yes the prosecution continues, and otherwise, the juridical body will hand over the case to the Prosecutor with the proposal of closing the case;

- If it was filed within the time limit to the competent/non-competent bodies but was later returned to the injured party to be completed, and the subsequent filling is made after the period expired.

The date which is important is that when the complaint was lodged, meaning its registration, even at the non-competent body and not the moment it was received by the competent authority.

The content of the prior complaint

Because the complaint constitutes a valid referral act and in order for it to produce the effects provided for by law, it must, necessarily, contain all the elements indicated in article 289, paragraphs 2, 4, 5 and 6 of the CPC (according to the reference made by article 295, paragraph 3 of the CPC).

Thus, the complaint made by an individual must mandatory contain the name, surname, social security number, the quality (injured person or a representative, agent etc. as specified above) and living address of the petitioner, namely indication of the perpetrator and the means of proof - if they are known.

If the complaint is made by a legal person, it must mandatory contain the name, head office, sole registration code, fiscal identification code, registration number issued by the trade register or the one registered in the juridical persons registration.

Prior complaint can also be filed electronically, however, and it is valid only if it contains the electronic signature of the applicant.

The penalty applicable in the situation when, under the formal aspect, the complaint does not contain the dates or any of the above dates is the restitution of the act in question to the applicant, through an administrative way, in order to supplement it with all the elements required by law in accordance with art. 294, paragraph 2 CPC.

In the case when the prior complaint is missing some data, or some errors are noticed, the criminal prosecution body may cover or complete them using the subsequent statements made by the injured person.

As regards the form of the prior complaint, it can be made in writing as well as orally, in which case it must be recorded in an official report, containing all the data listed in article 199 CPC.

In the case of offences for which the law conditions the initiation of the criminal action by the existence of the prior complaint; the latter will address the criminal prosecution body or the Prosecutor. These bodies are required to receive and, if you are competent to resolve the complaint. They can decide to close the case (as mentioned above) or to initiate criminal prosecution (in accordance with article 305 of the CPC).

The prior complaint procedure in the event of flagrant offences

Art. 298 of the CPC regulates the obligations of the judicial bodies in case of flagrant offences. In such situations, they need to establish the commission of such an offence, even in the absence of prior complaint.

In the doctrine it was appreciated that this obligation falls to the task of the judicial authorities due to the heightened social danger that the commission of a flagrance offence presents as well as the need for collection and management of evidence at the time of or immediately after this kind of crime is committed, otherwise finding out the truth may be obstructed through the disappearance of evidence [13].

Once the flagrant offence is discovered and established, the criminal prosecution body shall draw up an official report in which he records all the data established on the offence, as well as the suspect' statements and those of the other persons listened, such as eye-witnesses, assistant witness etc. The official report must contain the information set out in art. 199 CPC and must be signed by the ascertaining body, by the suspect and the people questioned.

According to the provisions of article 298, paragraph 2 of the CPC, after establishing the flagrant offence, the criminal prosecution body calls the injured party and if he declares that he will make a prior complaint, the pursuit continues, otherwise, the Prosecutor will close the case.

Lack of prior complaint

Regulated by article 157 CC, this institution with a character derived from prior complaint, can have as a basis the injured person's non-appearance before the judicial bodies to lodge or to manifest the right to not lodge a complaint. Thus, the failure to lodge a prior complaint has as effect the removal of criminal liability. Also, the introduction of a prior complaint after expiry of the period prescribed by law, as well as its formulation by a person

other than the injured party (except for the situations provided above) equals with the lack of referral.

This particular mode of referral produces effects in rem, meaning on the deed committed, and in case of criminal participation the criminal liability of all participants is attracted, even if the complaint has been made or shall be held only for one of them (case of passive indivisibility), or if the offence injured several people, the act attracts criminal liability, even if the complaint has been made or shall be maintained only by one of the injured persons (active indivisibility) as provided for in article 157, paragraphs 2 and 3 CC.

Our criminal code also provides 2 exceptions with regard to the effects of the lack of prior complaint. Thus, according to article 157, paragraphs 4 and 5 CC, if the injured party is a person who lacks capacity of exercise, a person with limited exercise capacity or a legal person represented by an offender, the criminal proceedings can be also put in motion ex officio, therefore there's no need for prior complaint. Also, in case of death of the person injured or liquidation of a legal person, before the expiry of the term stipulated by law for filing a complaint, the criminal action can be put into motion even ex officio.

Withdrawal of the prior complaint

Regulated in the Criminal Code at article 158, this institution resembles, in terms of the effect it produces in its legal form, with the lack of prior complaint, but the major difference lies in the fact that it actually represents a return on the initial manifestation of will expressed by introducing prior complaint.

According to article 16, paragraph 1, letter g) CPC, the withdrawal of the prior complaint, together with the reconciliation of the parties and conclusion of a mediation agreement form the cases which prevent the exercise of criminal action, under the condition that it should intervene until the definitive judgment of conviction. This term is important because it produces an irrevocable effect; the injured party can no longer revert to it, as it can no longer make a complaint for the same deed.

Withdrawal of complaint has a strictly personal effect in the sense in which it removes the criminal liability only for the person for which it intervenes, and not for any other participants that are not expressly mentioned. Also, in the case of persons lacking exercise capacity, the withdrawal is made only by the representatives. The persons required by law are the only ones who can accept the withdrawal of the complaint, for those with restricted exercise capacity. If the criminal action was set in motion ex officio, the withdrawal must be acquired by the public prosecutor in order to take its effects.

The preliminary complaint and mediation.

According to article 67 of the Law no. 192/2006 on mediation in criminal cases, this procedure applies only in the case of offences for which the withdrawal of complaint or reconciliation of the parties removes criminal liability (implicitly in the case of crimes due to prior complaint).

Art. 69 of the same normative act provides that if the mediation takes place before the commencement of the criminal process (so of the criminal prosecution), the term of 3 months for the introduction of a prior complaint is suspended during the course of the mediation (so until completion of the mediation procedure, but not more than 3 months after the commencement date of this procedure, in accordance with article 70, paragraph 2, final thesis).

Also, under the terms of article 70, paragraph 1 of the law no. 192/2006, in conjunction with article 312, paragraph 3 of the CPC, if the mediation is conducted after the beginning of criminal prosecution, the duration will be the one previously mentioned.

Appreciated by the majority of the doctrine as having the value of a special, necessary, indispensable and exclusive referral, the preliminary complaint remains even under the new Criminal procedure code, a fundamental institution in the development of the criminal process.

Bibliography

[1] I. Neagu , Treaty of Criminal Procedure. The special part, Second edition, Legal Publishing House, Bucharest, 2010, p 73;

[2] Law no. 192/2006 on mediation and the organization of the mediator profession, published in Official Gazette no. 441 of May 22, 2006, amended and completed;

[3] Law no. 135/2010 on the Code of Criminal Procedure, published in Official Gazette no. 486 of July 15, 2010, amended by Law no. 255/2013 for the implementation of Law no. 135/2010, published in Official Gazette no. 515 of August 14, 2013 and by O.U.G. no. 3/2014 for taking some necessary measures to implement the application of Law no. 135/2010, published in Official Gazette no. 98 of February 7, 2014 ;

[4] Law no. 286/2009 on the Criminal Code, published in Official Gazette no. 510 of July 24, 2009, amended by Law no. 27/2012 amending and supplementing the Criminal Code of Romania and Law no. 286/2009, published in Official Gazette no. 180 of March 20, 2012, Law no. 63/2012 amending and supplementing the Criminal Code of Romania and Law . 286/2009, published in Official Gazette no. 258 of April 19, 2012, Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code , published in Official Gazette no. 757 of November 12, 2012;

[5] M.C. Bogea, Referral of the criminal prosecution bodies, Hamangiu Publishing House, Bucharest, 2012, p 63;

[6] Timis County Court, decision no. 1713/1971, the Romanian Journal of Law no. 2/1973, p 167;

[7] Idem [5], p.64;

[8] E.V. Ionăşeanu, Procedure for initiating criminal prosecution, Military Publishing House, Bucharest, 1979, p 123;

[9] Idem [8], p 125;

[10] Court of Bucharest, Section II, Decision no. 782/1976, in R.R.D. no. 1/1977; Supreme Court Decision guidance no. 6/1973, Collection of Decisions in the year 1973, p. 37-54; Suceava County Court, decision no. 161/1978, unpublished; Supreme Court, Criminal Section, Decision no. 1640/1976, in Papadopol V., Popovici M., Alphabetical repertory of juridical practice in Criminal Matters in the years 1976-1980, Scientific and Encyclopedic Publishing House, Bucharest, 1982, p 39;

[11] Idem [5], p 72;

[12] T. Pop, Criminal Procedure Law, Volume IV, National Printing House, Cluj, 1948, p 31-32;

[13] Idem [1], 94