THE REFERRAL OF THE CRIMINAL PROSECUTION BODIES IN THE NEW CODE OF CRIMINAL PROCEDURE. NOVELTY REGULATIONS

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Abstract: To understand the practical importance of the referral acts, we must keep in mind the two specific imperative-cumulative characteristics - their provision as legal instruments that inform the judicial authorities of a crime, namely their role as legal means that authorizes the judiciary authorities to trigger the criminal procedural activity. Under this last aspect, the role of this institution is undeniable, regarded as sui generis aspect, in terms of triggering and possibly the subsequent development of the criminal process. In the new Code of Criminal Procedure, the content of the regulations of the institutions circumscribed to the referral acts kept, in large, the old code provisions, but, in accordance with the evolution of society and the need for harmonization of legislation novelty items have also been included, which cannot be understood only through the strict completion of the texts provided in art. 288-294[1].From this point of view, this paper aims to examine the items of a general nature concerning the modes of referral and their differentiation in terms of content and practical importance, as well as the novelty legislative aspects - explained through the general legal framework stipulated in the code, with other criminal procedural regulations and special laws which are in close connection with them and without whom the understanding of the general framework would be incomplete and difficult, if not impossible in some situations.

Keywords: complaint, denunciation, ex officio referral, finding bodies, flagrant offence.

Introduction

The criminal prosecution, as distinct phase of the criminal process is conditioned by the necessity that certain specialized bodies carry out specific activities in order to detect offences, identify and capture the authors with the purpose of sending them to court. As a consequence, these categories of bodies have a long and an essential role in criminal proceedings, since, without their intervention the prosecution and punishment of criminal offenders would not be possible.

In order to be able to ascertain the offences that have been committed or are intended to be committed (in the case of criminal offences whose attempt is punishable) the criminal prosecution bodies must take note of them. The means through which the judicial authority shall be informed about the Commission of an offence shall be called referral notice [1].

Referral can be defined as a procedural act through which the entitled subject addresses the judicial body with the demand to conduct the activities which the law confers on them as functional organisation [2]. Also, it should not be seen only in a limitative way, as a simple notification of the criminal prosecution bodies, because it also represents an empowerment given to those bodies in order to be able to start investigations and carry out the purpose of the criminal prosecution.

Comparatively analyzing the provisions concerning the referral of the criminal prosecution bodies, in force, with the old Code of criminal procedure, it unambiguously follows that the legislature has generally retained the earlier regulations in the field, but introduced a number of novelty items that we will detail below [3].

Criminal complaint

According to article 288, paragraph 1 of the CPC [4] the complaint is listed among the modes of referral of criminal prosecution bodies, alongside denunciation, acts concluded by other investigation bodies and ex officio referral.

The seat of the institution concerned can be found in art. 289 of the CPC. It retains the character of a general form of referral (most commonly found in the juridical practice) which may be made exclusively by the injured party - recognized as the main procedural subject in accordance with article 33, paragraph 1 CPC, by its legal/conventional representative, her representative, one of the spouses for the other spouse or the major child for the parents. The presented mandate must be special and at the same time, must mention the fact that the injured person, for various reasons (illness, lack of time, etc.) has mandated or authorized a third party to file the complaint in its place; the power of attorney must be attached to the complaint. The injured party must clearly define the limits of their mandate, otherwise the mandate will be considered general and it will not give the third party the right to lodge a complaint in the place of the injured party.

The complaint may be made either by an individual and by a legal person, the main elements of the novelty legislation being circumscribed to the mandatory content of this referral act - if it is formulated by a legal person (under the identical administrative sanction of its restitution for filling out the mandatory data), the recognition of the possibility of filing complaints through electronic means (internet) provided that they are certified by an electronic signature, respectively the obligation imposed on the criminal prosecuting bodies to intervene ex officio in cases where the perpetrator also is a legal representative or the person who must approve the documents of the injured party - if the latter is lacking the exercise capacity or has restrained exercise capacity.

The complaints 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. Because the importance of this items was explained in detail in other studies [5] we won't stop on them. What we must stress refers to the penalty applicable where, under formal aspect, the complaint does not contain the dates or any of the above, respectively the restitution of the referral in question, through administrative channels, to the petitioner, in order to supplement with all the elements required by law in accordance with art. 294, paragraph 2. This provision is intended to facilitate the fast sending of the complaint, to the plaintiff, by completing an address on which the complaint is annexed to.

If the complaint is lodged by a legal persona, of a public or private right, it must include the name, head office, sole registration code to the trade register, fiscal identification code issued by the tax authorities, registration number issued by the trade register (in the case of a legal person with a patrimonial purpose) or the entry in the register of legal persons [6]-in the case where the referral is made by a legal person without patrimonial purpose.

According to the article 289, paragraph 5 of the CPC complaint can be filed electronically; however, formally, it is valid only in the event it contains the electronically signature of the applicants, in accordance with the law [7]. The conditioning of the complaint's validity formulated through this method, by the implicit existence of a digital certificate - the only one able to certify the electronic signature must be interpreted in connection with article 289, paragraph 2 relating to the binding contents of the complaints lodged in written form, under the penalty provided for by art. 294, paragraph 2. In practical terms we appreciate that at the moment the procedure is difficult to apply taking into account the infrastructure of communications and informatics existing at the level of the criminal prosecution bodies. Also, the current judicial practice allows the petitioners to fill a criminal complaint via the Internet even without the existence of an electronic signature, in most cases the complaints being directed to the email addresses of the persons designated in the field of public relations of the judicial bodies.

Subsequently, the lack of the initial electronic signature is covered by the declaration made before the investigators.

In our opinion the novelty provision referred to above also has the role of speeding criminal proceedings by conditioning the research only to the complaints made by identifiable persons so that the judicial authorities not to use human and financial resources, in the event of tendentious referrals or made in bad faith or irresponsibility.

Identical to the situation where the referral document does not contain all the elements of form, if the complaint will be filed/ sent to a wrong criminal prosecution body or court, it will have to be sent to the competent judicial body through administrative channels.

The denunciation

The legal nature of the denunciation is identical to that of the complaint. The fundamental difference between them is represented by the holder of the referral in question, that should not be an individual or a legal person aggrieved by the offence, investigation body under article 61, paragraph 1 and article 62, paragraph 1 CPC, criminal prosecution body or person within an authority or public institutions - in accordance with art. 291 CPC - but any other individual or legal person who has knowledge about the commission of an offence.

Unlike the complaint, the denunciation can only be made in person. The regulations relating to content, modes (in written, electronic or oral form), procedure in the case of persons lacking exercise capacity and those with limited exercise capacity, respectively the refund sanction through administrative channels in the absence of any element of form, shown in the case of the complaint are identical, according to the article 290 CPC.

Besides the fundamental distinction in respect with the holder, there are two essential differences between denunciation and complaint:

- the fact that denunciation is not valid if it is formulated through a representative, respectively
- through husband or adult child.

The documents entered into by some investigative bodies

Regulated and recognized for the first time as a general way of referral, this institution has its seat in the General Part of the Code of Criminal Procedure, art. 61 and article 62; its legal nature is reinforced by article 198, paragraph 2, thesis II in conjunction with those of article 288, paragraph 1 of the CPC.

For the beginning it is necessary to delineate these categories of bodies/people from others covered in the Code of Criminal Procedure, so that we can have a clear picture of what these "other bodies of observation" constitute.

The interpretation of the above provisions as well as those of article 34 and article 291 CPC unequivocally show that the investigation bodies in question are the same as the special bodies of investigation specified in art. 34. To the same extent they should not be confused with the criminal prosecution bodies (in particular with the criminal investigation bodies of the judicial police or the special criminal investigation bodies provided for in article 55 of the CPC), but neither with any other person provided for in art. 291. The dispositions of article 61, paragraph 1, as well as some regulations of special laws come in support of the above.

Thus, article 61, paragraph 1, point b) refers to the bodies of state inspections, of other state bodies and authorities or public institutions which by the nature of the function monitor the compliance with the rights and obligations of third parties in relation to them. The tax inspection bodies, construction inspections, labour inspection, customs control, environmental inspections, inspections in the field of forestry, hunting and fishing, the legality of the use of EU funds, etc are included in this category.

A particularly important aspect is the fact that between inspection/control bodies and the controlled ones there is not a direct report of subordination, because they do not function within the same institution, but in different structures. The control bodies are subordinated or

always function within public institutions/authorities, and the control is done based on the prerogatives conferred by the legislation specific to the domain in which checks are carried out.

Unlike those mentioned above, in the situation of article 61, paragraph 1, point b) between the control bodies and those controlled there is always a subordination link arising from a common normative framework (law, Emergency Ordinance, order or decision of the government), as well as from tasks or specific attributes mentioned in the job description of the employees subjected to control. From this point of view, even if there wasn't a direct link in terms of the functional aspect or subordination between the controlled and the bodies carrying out this activity, usually the prerogative of verifications belongs to certain compartments, offices, services, hierarchically superior directions. We can illustrate sui generis – the control bodies of central authorities (ministries and other public authorities) and local (within the decentralized structures of ministries and other public authorities).

Art. 61 point c) provides two fundamental categories for the rule of law, public order bodies or those of national security. As regards the first category, it includes all specialized personnel within the structures carrying out specific activities in the field of maintaining, securing and restoring public order, but which should not be confused with the criminal prosecution bodies. The gendarmes, public safety police and those within the border police which are not part of the judicial police (are not designated and advised in this regard), local policemen, etc. [8] are part of these structures.

As regards the second category, it includes the staff of the State institutions concerned with national security, as regulated by law No. 51/1991. Generally the workers in the information services, specifically those of the Romanian intelligence service, the Foreign Intelligence Service, The Protection and Guard Service, the Directorate of Military Intelligence within the Ministry of National Defence and the Department of Information and Internal Protection subordinated to the Ministry of internal affairs [9] are part of these structures.

According to article 61, paragraph 1 CPC if there is a reasonable suspicion about the commission of an offence, the bodies mentioned above shall be obliged to draw up an official report in which they record their findings.

The reasonable suspicion lies in the formation of the bodies' belief that the data or information obtained during an establishment/control will result in clues regarding the commission of an offence and possibly, in finding the suspected person.

The concluded official report has a double legal value in the sense that it is treated as such and represents both a legal means of referral of the criminal prosecution bodies, as well as an imperative means of proof, and must contain the elements provided for in art. 199 CPC. The final sentence of article 61, paragraph 5 contains the specification that this act shall not be subjected to control by the administrative courts, regulation of this being an effect of the dual legal nature which characterizes the official reports of this type.

The rights and obligations in the task of the investigation bodies referred to are contained in paragraphs 2 to 4 of article 61. They have the right to make searches on vehicles, to catch the offender and present him to the criminal prosecution bodies - but only in the event of an offence in flagrante. In terms of obligations, the bodies provided for shall take measures for the conservation of the place the offence was committed and the material evidence, which, if it is possible they pick up and later deliver to the criminal prosecution bodies. Also, the details and the objections of the suspect and/or of the people present at the place of commission should be recorded in detail in the report.

The commanders of vessels and aircrafts are another category of investigation bodies similar to those stated above. Their rights and obligations are the same in terms of content with the other categories listed above, the only difference being of temporal nature, in the

sense in which the attributes may be exercised only while the vessel or aircraft they command is outside the ports or airports, and the crime was committed on one of the two categories of the stipulated means of transport.

Art. 291 CPC contains obligations with a general character that involves people with leadership positions and/or attributes of control, which in the exercise of their tasks are aware of the commission of a crime for which the criminal proceedings are put in motion ex officio. In such cases, the persons in question shall be obliged to inform the competent criminal prosecution body and conserve the corpus delicti, the offence's traces, the bodies and other evidence. The people engaged in a service of public interest (employees) have the same obligations). In their case they are required only to inform as soon as possible the criminal prosecution body. The sanction for non-compliance with these duties attracts the criminal liability of the persons legally guilty of the offence under the accusation of omission of referral, according to article 267 CPC.

Ex officio referral

In close connection with the former formality principle of the criminal process, taken over by the principle of accountability for implementation and exercise of criminal action (in accordance with art. 7 CPC) ex officio referral has retained the provisions that have consecrated it in the old Code of criminal procedure, representing – in terms of source - the only mod of internal referral. In these situations, according to the article 292 CPC, the criminal prosecution bodies are obliged to draw up ex officio the documents necessary for the development of the criminal process, beginning with the act of notification (official report) and until the complete resolution of the case.

The provisions of articles 294 and 294[1] CPC regulate the immediate effect of referral, which may consist in:

- sending the case to the Prosecutor who exercises supervision or to the competent prosecutor for referral to the judicial body entitled to prosecute, when the requested criminal prosecution body considers that he is not competent to carry out or supervise the investigation, according to article 53 the CPC;
- restitution of referral administratively if the complaint or denunciation (and not the other two ways of referral) does not meet the conditions of form or the description of the deed is incomplete or unclear (if such a thing happens the body will be unable to determine if the act meets the elements of a crime or it could not be classified as such);
- the proposal and subsequent disposition of the referral's ranking, if any of the cases provided for by art. 16 (1) of the CPC exists;
- carrying out prior verifications, if it is necessary, in accordance with article 294[1] CPC;
- commencement of criminal prosecution, according to the article 305 CPC.

Last but not least, art. 293 explicitly consecrates, as a novelty item, the right of bodies of public order and national security (through the staff of the aforementioned structures) to intervene, track and catch an offender in the case of a flagrant crime. The activities developed and the aspects found must be recorded in an official report, which, together with the offender, any corpus delicti, objects or documents found at the crime scene must be handed over to the competent criminal prosecution body. From our point of view, the provisions in question govern a particular mode of referral which must be described, interpreted and appreciated in close correlation with the art. 61, paragraph 1, point c).

Analyzing only the novelty provisions of the Code of criminal procedure in force, the determining element in choosing the theme was based on the fact that the General modes of referral recognises the fundamental right of free access to justice provided for in article 21 of the Romanian Constitution [10]. Without such a right the compliance with the other

fundamental rights enacted in the Pacts and international treaties - in the field of human rights - to which our country is a party of, could not be put into practice and verified.

The importance of regulating institutions - the subject of this work - is fundamental to the Romanian criminal justice system.

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