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REOPENING THE CRIMINAL PROSECUTION TO ENSURE AN EFFECTIVE INVESTIGATION

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Abstract

The respect of the fundamental rights of the person during the criminal judicial proceedings is also conditional on the performance of an effective investigation.

Although, in the current Romanian Code of Criminal Procedure, the principle of the active role of judicial bodies in the conduct of the criminal process is no longer expressly provided for, the need to manifest such an active role, in the sense of carrying out a real, complete, therefore effective criminal investigation, emerges from the content of the provisions art. 5 ("Finding the truth") and art. 306 ("Obligations of criminal prosecution bodies").

The requirement of the effectiveness of the criminal investigation is also reflected in the jurisprudence of the European Court of Human Rights (even if, for now, mainly in relation to articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

In this context, the present study addresses the issue of resuming the criminal prosecution by reopening it, in the situation where the case closure solution was ordered without conducting an effective criminal investigation.

The paper also brings to attention some aspects of judicial practice regarding the confirmation, by the judge of the preliminary chamber, of the ordinance to reopen the criminal prosecution.

The study uses, as research methods: documentation, interpretation and scientific analysis.

The conclusion consists in emphasizing the active role of the criminal prosecution bodies in carrying out, respectively in ensuring the conduct of an effective criminal investigation, in order to avoid the prolongation of the criminal

process as a result of the resumption of the criminal prosecution through the reopening confirmed by the preliminary chamber judge.

Key words: *reopening the criminal prosecution, effective criminal investigation, unitary judicial practice, the active role of criminal prosecution bodies.*

INTRODUCTION

Starting from the European standard, enshrined in the jurisprudence of the European Court of Human Rights, regarding the effective character of the criminal investigation, the present study addresses the issue of resuming the criminal prosecution by reopening it, in the event that the judicial bodies have not carried out a real, effective investigation, in compliance with all the provisions that guarantee the discovery of the truth in the criminal process.

The research methods used in the work are: documentation, interpretation and comparative scientific analysis (including by analyzing jurisprudential solutions from the Romanian judicial practice, related to the jurisprudence of the Strasbourg Court).

This study aims to contribute to the unified interpretation and application of the provisions of the Romanian Code of Criminal Procedure regarding the reopening of the criminal prosecution, drawing attention to the need for an active role of the criminal prosecution bodies (criminal investigation bodies and prosecutor) in carrying out, respectively supervising criminal prosecution activity.

Thus, the first section, after the introductory one, presents the way in which the requirement of the effectiveness of the criminal investigation is reflected in the jurisprudence of the European Court of Human Rights, noting that the practice of the European Court refers to this requirement, especially in relation to the conventional provisions of art. 2 ("Right to life") and art. 3 ("Prohibition of torture").

At the same time, a comparative presentation is made between the approach of the concept of "effectiveness" in the field of legal protection of human rights at the European level and the use of this concept in the field of international law.

In the following section, the importance of conducting an effective investigation is highlighted, as a procedural guarantee of the application of two fundamental principles of the criminal process, expressly provided for in the Romanian Code of Criminal Procedure (the principle of finding the truth and the principle of ensuring the fairness of the process). It is also shown that, with regard to ensuring the fairness of the criminal process, attention has been drawn, both at the international and European level, to the need to comply with this requirement not only in the trial phase, but also during the criminal prosecution (that is, of the procedures carried out prior to the trial phase).

In the section intended to analyze the provisions of the Romanian Code of Criminal Procedure regarding the resumption of the criminal prosecution by reopening it, the emphasis is placed on the procedure of submitting to the

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preliminary chamber judge's confirmation of the ordinance by which the prosecutor orders the reopening of the prosecution.

The penultimate section is devoted to the analysis of some situations that have arisen in judicial practice regarding the confirmation of the ordinance to reopen the criminal prosecution.

The conclusions section emphasizes the need to exercise the active role of criminal prosecution bodies (even if this active role is no longer provided for, as a distinct fundamental principle, in the current Romanian Code of Criminal Procedure), so as to ensure from the initial phase of the criminal prosecution a real, effective investigation.

I. THE EFFECTIVENESS OF THE CRIMINAL INVESTIGATION, ACCORDING TO THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The requirement of the effectiveness of the criminal investigation (in the sense of the necessity of carrying out a real, complete, thorough, effective investigation) is highlighted, in the jurisprudence of the European Court of Human Rights, especially regarding compliance with art. 2 ("Right to life") and art. 3 ("Prohibition of torture") of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Romanian state being convicted in several cases judged by the European Court, as a result of the violation of this requirement.

Thus, in the *Rupa case against Romania* (Judgment of December 16, 2008)¹, the Court held that it was violated art. 3 of the Convention "due to the lack of effective nature of the investigation" and that, to be considered effective, the inquest should have included detailed investigations, leading to the identification and punishment of the perpetrators, and should have allowed the complainant effective access to the investigative procedure. The Court also found that the solution of not starting the criminal prosecution, given in the case under analysis, was based exclusively on the statement of the interested party and on evidence not identified in the procedural act by which this solution was ordered, such an investigation "being far from to comply with the efficiency and effectiveness requirements imposed by art. 3 of the Convention".

In the *Case of Mocanu and others against Romania* (Judgment of September 17, 2014)², the European court assessed that the complainants did not benefit from an effective investigation, in the sense of art. 2 and 3 of the Convention, being "difficult to consider that the procedural obligations arising from art. 2 and 3 of the Convention have been respected if an investigation ends, as in the present

¹ The ECtHR Judgment of December 16, 2008, published in the Official Gazette of Romania no. 562 of August 10, 2010.

² The ECtHR Judgment of September 17, 2014, published in the Official Gazette of Romania no. 944 of December 23, 2014.

case, as a result of the intervention of the prescription of criminal liability, due to the inactivity of the authorities".

The Court also noted in the *Case of Poede against Romania* (Judgment of September 15, 2015)³, a procedural violation of art. 3 of the Convention, appreciating that "the national authorities did not carry out an adequate investigation, which could allow clarifying the issue of whether the use of force by state agents against the applicant was proportionate". Also in this case, the Strasbourg Court emphasized that, in the case of serious allegations of ill-treatment, the investigation must be quick, but also thorough, requiring that the national authorities make real efforts to clarify the factual situation and not "to rely on hasty or unfounded conclusions to conclude the investigation or to base its decision".

In the *Case of Gheorghiuță and Alexe against Romania* (Judgment of May 31, 2016)⁴, the Court recalled that when an individual states that he suffered, from the authorities, treatment contrary to art. 3 of the Convention, it is necessary to carry out an effective official investigation, which "should be carried out quickly and at the same time be thorough".

And in the *Vereș Case against Romania* (Judgment of March 24, 2020)⁵, the Court found a violation of art. 3 of the Convention, considering that "the authorities did not carry out an in-depth and effective investigation regarding the applicant's credible accusation". At the same time, the European Court reminded that the requirement of the effectiveness of the investigation assumes that it "can lead to the identification and punishment of the persons responsible" and that, since it is not "about an obligation of result, but of an obligation of means", it is required that the investigation not be unreasonably hindered by the acts or omissions of the national authorities.

In the field of legal protection of fundamental human rights and the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the concept of "effectiveness" is also used in a more generic framework than that of the expression "effective investigation". Thus, in the legal literature (*Rietiker, 2010, pp.245-277, quoted by Mendez-Pinedo, 2021, p.8*) it has been appreciated that "the Strasbourg Court has developed a specific set of interpretation methods with the aim of making effective the rights enshrined in the European Convention for the Protection of Human Rights"; this means that the provisions of the Convention are to be interpreted in a manner which seeks to ensure that the fundamental rights and freedoms of the individual 'are applied in

³ The ECtHR Judgment of September 15, 2015, published in the Official Gazette of Romania no. 372 of May 16, 2016.

⁴ The ECtHR Judgment of May 31, 2016, published in the Official Gazette of Romania no. 318 of May 4, 2017.

⁵ The ECtHR Judgment of March 24, 2020, published in the Official Gazette of Romania no. 1121 of November 23, 2020.

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ways that are of "practical and effective" use to complainants' (*Rietiker, 2010, pp.245-277, quoted by Mendez-Pinedo, 2021, p.8*), complainants who, in some cases, are even the victims of crimes. In this sense, some authors (*Diaconu, 2022, p.114*) drew attention to the fact that, in the European Union, crime victims cannot yet fully exercise their rights, "although legislative and institutional progress has been made" in the field of legal protection of these victims.

The concept of "effectiveness" is also addressed in the doctrine of international law, in relation to the application of European Union legislation, in the sense of the principle applied by the Court of Justice of the European Union "to ensure the authority of European Union law over national law" (*Mendez-Pinedo, 2021, p.5*). We note that, in this context, the use of the concept of "effectiveness" started from the meaning of "efficiency, effectiveness", i.e. "useful effect" ("*effet util*" / "*practical effect*") (*Mayr, 2012, pp.8-21*), reaching to transcend this meaning (*Mendez-Pinedo, 2021, p.12*) by acquiring new valences; thus, in recent legal literature (*Mendez-Pinedo, 2021, p.27*) it has been shown that "effectiveness" must be examined from several perspectives, one of the meanings being that of a distinct principle, but at the same time, interconnected with other fundamental principles of European law (such as, the protection of the fundamental rights of the person or the principle of legal certainty).

II. CARRYING OUT AN EFFECTIVE INVESTIGATION - GUARANTEE OF THE APPLICATION OF THE PRINCIPLE OF FINDING THE TRUTH AND THE PRINCIPLE OF ENSURING THE FAIRNESS OF THE ROMANIAN CRIMINAL PROCESS

Although, in the jurisprudence of the European Court of Human Rights, the requirement to carry out an effective criminal investigation is mentioned, especially, in relation to the observance of the provisions on the protection of the right to life (art. 2 of the Convention) and those on the prohibition of torture (art. 3 of the Convention), in our more recent jurisprudence it has been appreciated that there is an obligation of the state to carry out an effective investigation also in the case of investigating other types of crimes than those against life or torture or subjecting to ill-treatment.

Thus, in a file submitted to the judge of the preliminary chamber of the High Court of Cassation and Justice⁶ for the confirmation of the order to reopen the criminal investigation, it was decided that, "taking into account the shortcomings of the investigation", it is necessary to resume investigations in a case whose object is the commission of crimes compromising the interests of justice [art. 277 para. (1) Penal Code], influencing statements (art. 272 Penal Code), perjury (art. 273 Penal Code) and misleading judicial bodies (art. 268 Penal Code). The judge of the

⁶ Conclusion no. 211 of June 11, 2020, High Court of Cassation and Justice, Criminal Section, preliminary chamber judge, document available online at http://www.euroavocatura.ro/jurisprudenta/5337/Redeschiderea_urmarii_penale_Confirmare_Lipsa_unei_anchete_efective, accessed on 01.12.2022.

preliminary chamber found that "the reasons that were the basis of the case closure ordinance are summarized in the presentation of some aspects that do not correspond to the elements stated in the referral, in the absence of an effective verification of the petitioner's claims"; the judge also noted the "laconic, superficial, incomplete, almost formal character of the investigations" that led to the issuance of the case closure ordinance, as well as "the lack of an effective, necessary and absolutely mandatory investigation, which required the identification of the factual elements and the conditions in which it is assumed that an act provided for by the criminal law has been committed".

Emphasizing the importance of the effectiveness of investigations, including in *common-law* systems, some authors (Lippke, 2019, p.54) have shown that effectiveness could even be advanced as a fundamental value of criminal procedure.

We note the fact that the requirement to carry out an effective investigation presupposes the manifestation of an active role of the criminal prosecution bodies, in the sense of filing the necessary diligences to clarify, based on evidence, all aspects of the case, therefore, to find out the truth.

Although, in the current Romanian Code of Criminal Procedure (CCP)⁷, the principle of the active role of the judicial bodies in the conduct of the criminal process is no longer expressly enshrined⁸, not being sure whether the change of vision of the legislator regarding the reduction of the active role of the court was an option towards the transition to adversarial reporting to the notion of "truth"⁹ (Ghigheci, 2014, pp.91-92, p.96), the need for an active role of criminal investigation bodies emerges from the content of art. 5 ("Finding the truth") and art. 306 ("Obligations of criminal prosecution bodies").

Moreover, in the legal literature (Mateuț, 2019, p.75) it has been appreciated that the renunciation by the legislator of the regulation of the active role of the judge also means a reduction of the importance given to the principle of finding the truth.

In art. 5 CCP the principle of finding out the truth is regulated, with the following statement:

"(1) Judicial bodies have the obligation to ensure, on the basis of evidence, the truth about the facts and circumstances of the case, as well as about the person of the suspect or defendant.

⁷ Law no. 135/2010, published in the Official Gazette of Romania no. 486 of July 15, 2010, with subsequent amendments and additions (entered into force on February 1, 2014).

⁸ In the Code of Criminal Procedure from 1968, at art. 4 was expressly provided that "*Criminal prosecution bodies and courts are obliged to play an active role in the conduct of the criminal process*".

⁹ in the sense that, in the criminal process, the aim is to find out the "judicial truth", and not the "objective truth"

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(2) *Criminal prosecution bodies have the obligation to collect and administer evidence both in favor and against the suspect or defendant. The rejection or non-recording in bad faith of the evidence proposed in favor of the suspect or the defendant is sanctioned according to the provisions of this code*".

Therefore, all categories of judicial bodies have the obligation to ensure, on the basis of evidence, the discovery of the truth, but as regards the activity of administering evidence both in favor and against the suspect or the defendant, the obligation rests mainly with the bodies of prosecution (Lorincz, 2015, p.36).

This obligation, provided as a principle in art. 5 CCP, is reiterated in the Special Part of the Code of Criminal Procedure (art. 306), among the obligations that the criminal prosecution bodies have to achieve the object of the criminal prosecution. Thus, according to para. (1) of art. 306 CCP, "*the criminal investigation bodies have the obligation, after notification, to search and collect data or information regarding the existence of crimes and the identification of persons who have committed crimes, to take measures to limit their consequences, to collect and administer the evidence*" in compliance with the legal provisions.

Also, "*after the start of the criminal investigation, the criminal investigation bodies collect and administer the evidence, both in favor and against the suspect or defendant*" [art. 306 para. (3) CCP].

Therefore, whenever the criminal prosecution bodies are notified in connection with the commission of a possible crime, they have the obligation to carry out, ex officio, an effective investigation for the timely and complete ascertainment of the respective fact, with a view to drawing to the criminal liability of the guilty persons (Udroiu, Predescu, 2008, p.336).

In the same sense, and in the older doctrine (Pop, 1948, p.49) it was shown that the discovery of both the crimes and the criminals, following the investigation carried out by the state bodies, is a first necessary condition of social defense.

Also as a principle of the application of the criminal procedural law, in art. 8 CCP the fairness (along with the reasonable term) of the criminal process is enshrined: "*The judicial bodies have the obligation to carry out the criminal investigation and the trial respecting the procedural guarantees and the rights of the parties and the procedural subjects, so that the facts that constitute crimes are ascertained in time and completely, no innocent person is held criminally liable, and any person who has committed a crime be punished according to law, within a reasonable time*".

Therefore, carrying out an effective investigation, by ascertaining in time (quickly) and completely the facts that constitute crimes and identifying the perpetrators in order to bring them to criminal responsibility, is also a guarantee of the application of the principle of ensuring the fairness of the Romanian criminal process.

In other words, achieving the objective of the judicial bodies requires "a judicial confrontation of two equally important interests: the interest of society, which

seeks the prompt discovery and punishment of persons who have committed crimes, by fully establishing the facts committed and the guilt of their authors, (...) and the individual interest, which requires that the criminal investigation activity (...) be carried out in accordance with the law, abuses are avoided and rights are guaranteed, the respect of which is likely to guarantee a fair criminal trial" (*Volonciu, Vasiliu, 2007, p.1*).

At the international level, the importance of ensuring the fairness of the process, including in the prosecution phase, was also emphasized at the XVIII International Congress of Criminal Law (Istanbul, Turkey, September 20-27, 2009), the participants of this meeting reiterating the idea that the notion of "fair trial" does not refer only to the trial phase, but to the entire criminal process (*De La Cuesta, Cordero – editors, 2012, p.244*).

And on a European level, in the context of recognizing the relevance of the procedures carried out prior to the trial phase (*pretrial proceedings*), attention was drawn (*Weisser, 2019, p.132*) to the need for a "reinterpretation of the conventional guarantees", in the sense of aligning the jurisprudence of the Strasbourg Court with the "living instrument" character of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The need to adapt the jurisprudence of the European Court of Human Rights to the current requirements is all the more obvious, the more recently theorists (*Ruszkowski, 2020, pp.131-146*) discussed the concept of "multifinality" ("*multifinalité*") to define the future of the European Union; "multifinality" is seen as that multiple and diverse form of the final stage of the European Union (*Ruszkowski, 2020, p.143*), which will certainly entail a unification of the general legislative framework that guarantees respect for fundamental rights and freedoms at the level of the member states; this, given that respect for fundamental human rights (in this case, the right to a fair trial) is an obligation of all states, not only at the domestic level, but also in the context of international judicial cooperation, including with regard to judicial cooperation between the member states of the European Union (*Lorincz, Stancu, 2022, p.413*) a. Besides, the uniform interpretation and application of the provisions in the field of judicial cooperation in criminal matters must be based on the mutual trust of the Member States in their national criminal justice systems (*Lorincz, Stancu, 2022, p.122*) b.

Since, in the doctrine (*Bogdan, Selegean, 2005, p.117*) it was shown that in the European Convention for the Protection of Human Rights and Fundamental Freedoms, "two types of guarantees are provided: some of a material nature and others of a procedural nature", we therefore consider that carrying out an effective criminal investigation represents a guarantee of procedural nature, intended to ensure both the exercise of the material rights enshrined in this convention, as well as the application of the principles of finding the truth and the fairness of the criminal process, as regulated in the current Romanian Code of Criminal Procedure.

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III. THE RESUMPTION OF THE CRIMINAL PROSECUTION BY REOPENING IT IN ORDER TO CARRY OUT AN EFFECTIVE INVESTIGATION

From the content of art. 335 para. (1) and (2) CCP it appears that, in the situation where, after ordering the case closure solution, it is found that the circumstance on the basis of which that solution was given did not exist or has disappeared, the resumption of the criminal prosecution will be ordered by reopening it.

As it was appreciated in the doctrine (*Volonciu, Uzlaşu – coordinators, 2014, p.833*), the "reopening of the criminal prosecution" should not be confused with the "infirming of the criminal prosecution acts", although there are similarities between the two institutions; while the institution of infirming has a broader content, representing a general way of exercising hierarchical control in relation to any procedural act or procedural measure, the institution of reopening criminal prosecution refers only to the disposition of non-referral to the court.

Therefore, the criminal prosecution is ordered to be reopened:

- if the prosecutor hierarchically superior to the one who ordered the solution finds, later, that the circumstance on which the case closure solution was based did not exist and infirm the case closure ordinance;
- in the event that new facts or circumstances have appeared from which it follows that the circumstance on which the case closure solution was based has disappeared and the prosecutor who ordered the respective solution revokes the case closure ordinance.

In both situations, according to art. 335 para. (4) CCP, the reopening of the criminal prosecution is subject to the confirmation of the judge of the preliminary chamber, within no more than 3 days, under sanction of nullity. The judge of the preliminary chamber decides by final reasoned conclusion, in the council chamber, with the participation of the prosecutor and with the summons of the suspect or, as the case may be, the defendant¹⁰, on the legality and validity of the ordinance by which the reopening of the criminal prosecution was ordered.

The term of no more than 3 days, provided in art. 335 para. (4) CCP under the sanction of nullity, it is a peremptory term, which does not include the duration of the procedure for resolving the confirmation request (*Voicu, Uzlaşu, Tudor, Văduva, 2014, p.379*); this term is only the time interval in which the prosecutor must notify the judge of the preliminary chamber with the request to confirm the order to reopen the criminal prosecution.

¹⁰ The provisions "without the participation of the prosecutor and the suspect or, as the case may be, the defendant" contained in art. 335 para. (4) CCP (prior to its amendment by The Government's Emergency Ordinance no. 18/2016, published in the Official Gazette of Romania no. 389 of May 23, 2016) were declared unconstitutional by the Decision of the Constitutional Court no. 496/2015 (published in the Official Gazette of Romania no. 708 of September 22, 2015), considering that it violates the provisions of art. 21 para. (3) and of art. 24 of the Constitution.

At the same time, in the situation where the case closure solution was ordered, the reopening of the criminal prosecution also takes place when the judge of the preliminary chamber admits the complaint against the solution of not sending to court and sends the case to the prosecutor in order to complete the criminal prosecution¹¹; in such a case, the dispositions of the judge of the preliminary chamber are binding for the criminal prosecution body (*Lorincz, 2016, pp.47-48*), and no further confirmation is required.

Also, according to the provisions of art. 335 para. (6) CCP¹², if the prosecutor hierarchically superior to the one who ordered the closing case infirm this solution and orders the reopening of the criminal prosecution prior to the communication of the ordinance containing the solution of not sending to court, the reopening of the prosecution is no longer subject to the confirmation of the judge of the preliminary chamber. Therefore, in order for the disposition to reopen the criminal prosecution to not be subject to the confirmation of the preliminary chamber judge, it is necessary that the infirming of the case closure solution be prior to the communication by the prosecutor of this solution, and not prior to the receipt of the communication by the addressee (*Udroiu, 2014, p.109*).

In the confirmation procedure regulated in art. 335 para. (4) and para. (4)¹ CCP, the control carried out by the judge of the preliminary chamber refers to the legality and validity of the ordinance by which it was ordered the infirming or, as the case may be, the revocation of the case closure solution and the reopening of the criminal prosecution. In this procedure, the judge of the preliminary chamber does not have to rule on the merits of the case, by establishing a juridical framing or a concrete guilt, but to ascertain whether a complete, effective criminal investigation was carried out, which led to the resolution of the case by not sending in trial. If the judge finds that the criminal investigation is incomplete, the criminal prosecution must be resumed to establish the existence of evidence or, on the contrary, its lack or insufficiency¹³.

Only as a result of conducting an effective, complete investigation, in compliance with all legal provisions that guarantee the discovery of the truth and the administration of all existing evidence, it is possible to complete the criminal prosecution and resolve the case by the prosecutor (as it appears from the content of art. 327 CCP).

¹¹ Under this aspect, the Decision of the High Court of Cassation and Justice no. 11/2009 (published in the Official Gazette of Romania no. 691 of October 14, 2009) by which it was established that there is no incompatibility of the person who carried out the criminal prosecution, in the event that the case is sent to the prosecutor in order to reopen the criminal prosecution, maintains its validity.

¹² provisions introduced by The Government's Emergency Ordinance no. 18/2016

¹³ Conclusion no. 211 of June 11, 2020, High Court of Cassation and Justice, Criminal Section, preliminary chamber judge, document available online at http://www.euroavocatura.ro/jurisprudenta/5337/Redeschiderea_urmarii_penale_Confirmare_Lipsa_unei_anchete_efective, accessed on 01.12.2022.

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Moreover, regarding the completion of the criminal prosecution, in the doctrine (*Dongoroz et al., 1976, p.61*) a distinction was made between the "presumptive termination" of the criminal prosecution - which means the assessment of the criminal investigation body that this investigation is finished and that it can pronounce on its results, and "effective termination" of the criminal prosecution - which consists in the assessment made by the prosecutor in order to resolve the case by ordering the legal solution that is required.

IV. ASPECTS OF JUDICIAL PRACTICE REGARDING THE CONFIRMATION OF THE ORDINANCE TO REOPEN THE CRIMINAL PROSECUTION

However, in continental or Romano-Germanic legal systems, jurisprudence is not considered a source of law, although, we are witnessing to a "change of paradigm regarding the role of jurisprudence within the formal sources of Romanian law" (*Oglindă, 2015, p.129*), the importance of judicial practice in the interpretation and application of the law, including in criminal matters, cannot be denied.

In relation to the necessity of submission to the preliminary chamber judge for the confirmation of the solution to reopen the criminal prosecution, in the judicial practice there were different opinions, some prosecutor's offices appreciating that, in the situation where the first prosecutor admits the petitioner's complaint in the procedure provided for in art. 339 CCP (complaint against the acts of the prosecutor), the referral to the preliminary chamber judge to confirm the reopening of the criminal prosecution is inadmissible¹⁴. This problem was discussed on the occasion of several meetings of practitioners¹⁵, the opinion agreed by all participants being that, in the event that the reopening of the criminal prosecution (by infirming the case closure solution) was ordered by the superior hierarchical prosecutor, since the text of art. 335 para. (1) CCP does not distinguish according to the method of reopening, confirmation of the reopening of the criminal prosecution by the judge of the preliminary chamber is mandatory, both in the situation where the case closure solution was infirmed ex officio,

¹⁴ Minutes of the meeting of the chief prosecutors of the criminal prosecution section at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice and the prosecutor's offices attached to the courts (Prosecution Office attached to the High Court of Cassation and Justice, 14-15 May 2015), document available online at address <https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-drept-procesual-penal.pdf>, accessed on 03.12.2022.

¹⁵ Minutes of the meeting of the representatives of the High Court of Cassation and Justice with the presidents of the criminal sections of the appeal courts (Braşov, June 4-5, 2015), document available online at <https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-drept-procesual-penal.pdf>, accessed on 03.12.2022; Minutes of the meeting of the representatives of the Superior Council of the Magistracy with the presidents of the criminal sections of the High Court of Cassation and Justice and the appeal courts (Sibiu, 24-25 September 2015), document available online at <https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-drept-procesual-penal.pdf>, accessed on 03.12.2022.

within the hierarchical control of legality, and in the situation where the infirming of the case closure solution and, implicitly, the reopening of the criminal prosecution were ordered by the superior hierarchical prosecutor following the admission of a complaint formulated against the case closure solution.

In fact, this issue was settled by the supreme court in Romania¹⁶, which, in order to ensure a uniform judicial practice, by issuing a preliminary decision to resolve the question of law in criminal matters, established that: "*The reopening of the criminal prosecution provided for by art. 335 of the Code of Criminal Procedure is subject to the confirmation of the judge of the preliminary chamber, both as a result of the infirming of the prosecutor's solution by the superior hierarchical prosecutor in the procedure provided for by art. 336 et seq. from the Code of Criminal Procedure, as well as in the case of the infirming ordered ex officio*".

In conclusion, only in situations where the referral of the case to the prosecutor in order to resume the criminal prosecution was ordered by the preliminary chamber judge himself (either as a result of the admission of the petitioner's complaint against the case closure solution, or as a result of the rejection of the plea agreement, either as a result of the return of the case to the public prosecutor's office after completing the preliminary chamber procedure), as well as in the situation where the prosecutor hierarchically superior to the one who ordered the case closure solution infirm this solution and orders the reopening of the criminal prosecution prior to the communication of the order that includes the solution of not sending to court, the confirmation of the preliminary chamber judge is no longer necessary.

In this sense, and in the jurisprudence of the European Court of Human Rights (*The case of Stoianova and Nedelcu against Romania, quoted by Rus, 2017, p.262*) it was ruled that the criminal prosecution cannot be reopened unless the reopening is authorized by a judge, who intervenes as a guarantor of the respect of the rights and freedoms of the person, including in the aspect of ensuring the application of the principle of legal certainty, a principle which is closely related to the right to a fair trial (*Rus, 2017, p.262*).

Another interesting aspect reported in practice concerns the solutions that the judge of the preliminary chamber referred to can pronounce in order to confirm the ordinance to reopen the criminal prosecution in the situation where the resumption of the criminal prosecution by reopening it was ordered by an incompetent prosecutor, according to the law, in that cause. Specifically, the hypothesis was put into question¹⁷ in which the chief prosecutor of the public

¹⁶ Decision of the High Court of Cassation and Justice no. 27/2015, published in the Official Gazette of Romania no. 919 of December 11, 2015.

¹⁷ Minutes of the meeting of the representatives of the Superior Council of the Magistracy with the presidents of the criminal sections of the High Court of Cassation and Justice and the appeal courts (Sibiu, 24-25

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prosecutor's office attached to the court ordered the reopening of the criminal prosecution in a case whose object was the commission of a crime by a defendant who, based on the criterion of the quality of the person, attracts the jurisdiction in first instance of the court of appeal.

In a first orientation, it was assessed that the judge of the preliminary chamber of the court of appeal referred to, as the competent court to resolve the case on the merits, must submit the file to the competent prosecutor's office, i.e. the prosecutor's office attached to the court of appeal, in order to dispose of the case.

According to the second orientation, majority, the solution that the judge of the preliminary chamber must pronounce is to infirm the ordinance to reopen the criminal prosecution, in accordance with the provisions of art. 335 para. (4) CCP.

In the unanimous opinion, expressed on the occasion of the meeting of the representatives of the Superior Council of the Magistracy with the presidents of the criminal sections of the High Court of Cassation and Justice and the courts of appeal (Sibiu, September 24-25, 2015), it was considered that the correct solution is to infirm the ordinance of reopening of the criminal prosecution issued by the chief prosecutor of the public prosecutor's office attached to the court, since the only solutions that the judge of the preliminary chamber can pronounce, in application of art. 335 para. (4) CCP, are the confirmation and the infirming of the order to reopen the criminal prosecution, not providing for the solution of returning the case to the prosecutor or forwarding it to the prosecutor's office competent to carry out/supervise the criminal prosecution. At the same time, it was also invoked the fact that the violation of the imperative provisions regarding the competence according to the quality of the person attracts the sanction of the absolute nullity of the acts carried out by an incompetent prosecutor under this aspect.

We consider that the infirming solution is correct, to the extent that the incompetence of the prosecutor's office that ordered the reopening of the criminal prosecution is evident from the works and material of the criminal prosecution file submitted to the court referred to confirm the resumption of the criminal prosecution. If the incompetence of the prosecutor's office that supervised/conducted the criminal investigation emerges in the procedure for resolving the request for confirmation of the ordinance to reopen the criminal investigation, based on the new documents presented according to art. 335 para. (4¹) CCP, we appreciate that the judge of the preliminary chamber should confirm the reopening of the criminal investigation, if it is justified, and then the prosecutor who resumes the criminal investigation should decline his jurisdiction in favor of the competent prosecutor's office in the report with the new aspects of the case.

September 2015), document available online at <https://inm-lex.ro/wp-content/uploads/2021/04/repertoriu-dept-procesual-penal.pdf>, accessed on 03.12.2022.

CONCLUSION

In conclusion, as it emerges from the interpretation of the provisions of art. 327 CCP, the prosecutor can give a solution to solve the case (either by sending to court, or by closing the case or giving up to the criminal prosecution), only when he finds that "the criminal prosecution is complete and there is the necessary and legal evidence administered", being "respected the legal provisions that guarantee finding out the truth", in other words, when an effective criminal investigation was carried out.

If the case prosecutor ordered the closing case in violation of the provisions of art. 327 CCP, the reopening of the criminal prosecution and its resumption is required, precisely to ensure the conduct of an effective investigation by exercising the active role of the criminal prosecution bodies (both criminal investigation bodies and the prosecutor), in application of art. 5 and art. 306 CCP. Such a resumption of the criminal prosecution will, however, have to be subject to the confirmation of the preliminary chamber judge, who will verify the legality and validity of the ordinance to reopen the criminal investigation issued by the superior hierarchical prosecutor, resulting in a prolongation of the criminal process that could have been avoided by carrying out an effective, real, non-formal investigation, from the initial phase of the criminal prosecution.

The active role of the criminal investigation bodies should be manifested both in the cases in which the competence to carry out the criminal investigation rests with them, and in the cases in which the criminal investigation must be carried out by the prosecutor, in the conditions in which, pursuant to art. 324 para. (3) CCP, the performance of some criminal prosecution acts can be delegated to them.

It is also required that the case prosecutor exercise his active role both in the cases in which he is obliged by law (art. 324 CCP) to carry out the criminal prosecution, as well as in the cases in which he has, as the main assignment, supervision of criminal prosecution activity. For example, in situations where the criminal investigation body proposes to close the case, the case prosecutor should not limit himself to a formal check of the report with the proposal of the solution of not sending to court, but it is necessary to establish, in real terms, that this proposal it is motivated and well founded.

Last but not least, the superior hierarchical prosecutor (the head of the prosecutor's office) should have an "active role" not only in the procedure for solving the complaint against the case closure solution, if such a complaint has been formulated, but also by exercising hierarchical control, in the sense of verifying the procedural acts of the lower prosecutor [pursuant to art. 304 para. (2) CCP].

BIBLIOGRAFIE

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1. Bogdan, Dragoș, and Mihai Selegean. *Jurisprudență CEDO – studii și comentarii [ECtHR jurisprudence – studies and comments]*. Bucharest: National Institute of Magistracy, 2005.
2. De La Cuesta, José Luis, and Isidoro Blanco Cordero (editors). "Resoluciones de los Congresos de la Asociación Internacional de Derecho Penal (1926-2009)." ["Resolutions of the Congresses of the International Association of Penal Law (1926-2009)."] *Nouvelles Études Pénales* no. 23 (July 2012), (Toulouse: Éditions Érès): 228-250.
3. Diaconu, Nicoleta, "Legal protection of victims of crime in the European Union. " *International Journal of Legal and Social Order* 1, no. 1 (December 2022): 106-117.
DOI:<https://doi.org/10.55516/ijlso.v1i1>
<https://ijlso.ccdsara.ro/index.php/international-journal-of-legal-a/article/view/69/53>
4. Dongoroz, Vintilă, Siegfried Kahane, George Antoniu, Constantin Bulai, Nicoleta Iliescu, and Rodica Stănoiu. *Explicații teoretice ale Codului de procedură penală român, Partea specială [Theoretical explanations of the Romanian Criminal Procedure Code, Special Part]*, vol. II. Bucharest: Academy Publishing House, 1976.
5. Ghigheci, Cristinel. *Principiile procesului penal în noul Cod de procedură penală [The principles of the criminal process in the new Criminal Procedure Code]*. Bucharest: Universul Juridic Publishing House, 2014.
6. Lippke, Richard L. "Fundamental Values of Criminal Procedure". In *The Oxford Handbook of Criminal Process*, edited by Darryl K. Brown, Jenia I. Turner, Bettina Weisser, 40-60. New York: Oxford University Press, 2019.
7. Lorincz, Anca-Lelia. *Drept procesual penal (conform noului Cod de procedură penală) [Criminal procedural law (according to the new Criminal Procedure Code)]*, vol. I. Bucharest: Universul Juridic Publishing House, 2015.
8. Lorincz, Anca-Lelia. *Drept procesual penal (conform noului Cod de procedură penală) [Criminal procedural law (according to the new Criminal Procedure Code)]*, vol. II. Bucharest: Universul Juridic Publishing House, 2016.
9. Lorincz, Anca-Lelia, and Adriana Iuliana Stancu. "Legal nature of the deprivation measure ordered during the procedure for the execution of the European arrest warrant." *Perspectives of Law and Public Administration* 11, no. 3, (October 2022) a: 405-415.
<https://adjuris.ro/revista/articole/An11nr3/6.%20Lorincz%20Stancu%20EN.pdf>.
10. Lorincz, Anca-Lelia, and Adriana Iuliana Stancu, "Qualification of the request to take over criminal procedure in the context of international judicial

cooperation. " *Proceedings of 9th SWS International Scientific Conference on Social Sciences - ISCSS 2022* 9, no. 1 (2022) b: 115-122.

DOI:<http://dx.doi.org/10.35603/sws.iscss.2022/s02.015>

https://ssalibrary.at/sgem_research_publication_view.php?page=view&editid1=4887

11. Mateuț, Gheorghită. *Procedură penală. Partea generală [Criminal procedure. The General Part]*. Bucharest: Universul Juridic Publishing House, 2019.
12. Mayr, Stefan. "Putting a Leash on the Court of Justice? Preconceptions in National Methodology v. *Effet Utile* as a Meta-Rule." *European Journal of Legal Studies* 5, no. 2 (Winter 2012): 8-21.
https://ejls.eu.eu/wp-content/uploads/sites/32/pdfs/Autumn_Winter2012_2013/PUTTING_A_LEASH_ON_THE_COURT_OF JUSTICE-%20PRECONCEPTIONS_IN_NATIONAL_.pdf.
13. Mendez-Pinedo, M. Elvira. "The principle of effectiveness of EU law: a difficult concept in legal scholarship." *Juridical Tribune* 11, no. 1 (March 2021): 5-29.
<https://www.tribunajuridica.eu/arhiva/An11v1/1.Elvira%20Mendez%20Pinedo.pdf>.
14. Oglindă, Bazil. "The jurisprudence. Formal law source." *Juridical Tribune* 5, no. 1 (June 2015): 120-129.
<https://www.tribunajuridica.eu/arhiva/An5v1/12%20Oglinda.pdf>.
15. Pop, Traian. *Drept procesual penal, Partea specială [Criminal procedural law, Special Part]*, vol. IV. Cluj: National Typography, 1948.
16. Rietiker, Daniel. "The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law - No Need for the Concept of Treaty Sui Generis." *Nordic Journal of International Law* 79, no. 2 (January 2010): 245-277.
https://brill.com/view/journals/nord/79/2/article-p245_2.xml.
17. Rus, Călin-Ioan. "Solving causes by report to the principles of the Strasbourg Court." *Juridical Tribune* 7, Special Issue (October 2017): 250-265.
<https://www.tribunajuridica.eu/arhiva/An7v11/18.%20Rus.pdf>.
18. Ruszkowski, Janusz. "From *finalité politique* to *multifinalité*. Theoretical basis explaining the turn in the process of defining the future of the European Union." *Romanian Journal of European Affairs* 20, no. 2 (December 2020): 131-146.
http://rjea.ier.gov.ro/wp-content/uploads/2020/12/RJEA-vol-20-no-2_Dec-2020_articol-10.pdf.
19. Udrioiu, Mihail, and Ovidiu Predescu. *Protecția europeană a drepturilor omului și procesul penal român [The European protection of human rights*

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EFFECTIVE INVESTIGATION

and the Romanian criminal process]. Bucharest: C.H. Beck Publishing House, 2008.

20. Udroi, Mihail. *Procedură penală. Partea specială [Criminal procedure. The Special Part]*. Bucharest: C.H. Beck Publishing House, 2014.
21. Voicu, Corina, Andreea Simona Uzlău, Georgiana Tudor, and Victor Văduva. *Noul Cod de procedură penală. Ghid de aplicare pentru practicieni [The new Criminal Procedure Code. Application guide for practitioners]*. Bucharest: Hamangiu Publishing House, 2014.
22. Volonciu, Nicolae, and Alexandru Vasiliu. *Codul de procedură penală comentat. Art. 1-61 [The Criminal Procedure Code commented. Art. 1-61]*. Bucharest: Hamangiu Publishing House, 2007.
23. Volonciu, Nicolae, Andreea Simona Uzlău (coordinators), Raluca Moroșanu, Corina Voicu, Victor Văduva, Georgiana Tudor, Daniel Atasiei, Teodor-Viorel Gheorghe, Cristinel Ghigheci, and Cătălin Mihai Chiriță. *Noul Cod de procedură penală comentat [The new Criminal Procedure Code commented]*. Bucharest: Hamangiu Publishing House, 2014.
24. Weisser, Bettina. "The European Convention on Human Rights and The European Court of Human Rights as Guardians of Fair Criminal Proceedings in Europe". In *The Oxford Handbook of Criminal Process*, edited by Darryl K. Brown, Jenia I. Turner, Bettina Weisser, 112-139. New York: Oxford University Press, 2019.



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