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CRIME – BETWEEN CONCEPT AND DEFINITION IN THE EUROPEAN UNION

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Abstract

The present paper presents itself as a comparison between criminal legislation that exist within the EU territory, as well as a theoretical analysis of some criminal law institutions which entails reverberations in the criminal procedural law as well. But these follow-ups go beyond these aspects.

The theoretical steps that were assumed by this paper also knows profound practical implications, thus going beyond the abstract realm of theory and into practice, proving once again how important it is to posses the neccesary knowledge when it comes to compared law and not only that, but also the importance of that knowledge.

The legislator cannot and should not remain indifferent regarding the signaled situations alongside this paper thus imposing the need to straighten, where neccesary, the impossible or contradictory situations.

Key words: *member states, crime, criminal code, criminal procedural code, institution.*

INTRODUCTION

The European Union is a unique project worldwide in regards to administrative organization, uniqueness that finds its foundation, among other things, in the way the EU is organised and functions. This is one of the outcomes of the Treaty of the European Union (the TEU) and the Treaty of the Functioning of the European Union (the TFEU). Thus, on one side, there are common visions of the member states that the TEU defines as “common values” [art. 2 of the TEU states that “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common* (n. a. – M.S.) *to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men*

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prevail’], accepted at a European level by all the European states, both that are member states and that want to become member states and, as such, they apply to become member states, and, on the other hand, each member state is sovereign regarding the politics that it sees fit and that are in accordance with its own principle of opportunity, the treaties (the TEU and the TFEU) stating that there are exclusive competencies [art. 2 parag. (1) of the TFEU], shared competencies [art. 2 parag. (2) of the TFEU] and backup competencies (M. Patraus, 2018, p. 64). Thus, the EU does not present itself neither as a federation of states (<https://dexonline.ro/definitie/federa%C8%9Bie>), nor a confederation of states (<https://dexonline.ro/definitie/confedera%C8%9Bie/definitii>). However, it cannot be stated, without being wrong, nor the fact that there is no collaboration or cohesion between the Member States, especially since the EU gained judicial personality [ever since the Treaty of Lisbon came into force, that modified the previous EU treaties The Treaty of Lisbon | Fact Sheets on the European Union | European Parliament (europa.eu)], the Member States politics being constantly guided towards the same goals, circumstance that is specific rather to a federation or a confederation than to a republic or a monarchy.

One of the union principles that present a great interest in my opinion is the one that outlines the Judicial system within the inner borders of the EU territory. This is highly relevant hence it sends important signals within the entire social spectrum, thus possessing the knowledge of the conduct to be followed in a certain timeframe is necessary (if not essential, these aspects becoming real through legal relations which include the commodities that can be converted into money and, sometimes, even one’s freedom) in order that those to which the legal norm addresses can adapt their conduct to the judicial norms that apply to each and every circumstance.

1. CRIME WITHIN THE EU BORDERS

Regarding the crime hierarchy within the EU, as well as the idea that any such antisocial action requires an adequate punishment the EU Member States are unanimously in their decision.

However, in regards to the sanctions that should be applied to a person that committed a crime or the way that the sanctions should be individualised, as a legal institution is different from one Member State to another. Thus, circumstances that some legal institutions and criminal law norms that seem alike apply in a different manner, as well as those different applications in some Member States have different outcomes than in other Member States. So, there are Member States that have, within their criminal legal system, a definition for the crime, the definition that each Member State provided for this fundamental institution being, in my opinion, the core from which those Member States started creating their own criminal politics; other Member States limit themselves by stating that the crime is the offense that is inserted within the criminal law [art. 17

parag. (1) from the Austrian Republic Criminal Code that states “*The crime is the offense inserted in the criminal law and is punished by life in prison or more than 3 years of prison*”], emphasizing mainly on the offenses that are crimes and describing them; finally, there are Member States that do not offer a definition for the crime, but it stands out from the way the criminal legislation is applied within its borders. As an example, the criminal legislation of certain Member States such as Cyprus, Finland, Denmark or Croatia do not know a definition for the institution of the crime, rather than it stakes out from the way they created their criminal politics.

Romania is one of the Member States that have (and use) a definition for the crime. Romania is a Member State since the 1st of January 2007. So, according to art. 15 parag. (1) from Act no. 286/2009 regarding the Romanian Criminal code (published in the Official Journal of Romania, no. 514 since 24.07.2009), considering the changes that occurred meanwhile up to present day, “*the crime is the offense inserted within the criminal law, committed with guilt, that cannot be justified and can be imputed to the person that did it*”. When first encountering this definition, one might say that the definition provided by the Romanian legislator does not have the character that it would be able to rise any issues whatsoever, the fact that the crime must have these essential traits is a given, otherwise the offense is not a crime, but a different form of illicit. However, following this, I will try to demonstrate that this definition, that is offered by the Romanian legislator is, in fact, a very complex one, and that complexity is due to the effects that it produces and the conditions that it is tied to. Reminder, the Romanian Criminal code is in force since the 1st of February 2014.

2. THE CRIME FROM THE ROMANIAN’S LEGISLATOR POINT OF VIEW

As shown above, art. 15 parag. (1) in the Romanian Criminal code offers the definition of the crime and it does so by stating the crimes essential features, the article’s marginal name being *the essential features of the crime*. In the existing relevant literature, the authors unanimously accept the thesis regarding that (*Mirişan, V., Domocoş, C. A., 2019, p.113*), if one of the essential features is missing [there is a debate whether there are 3 or 4 essential features (*for a comparative analysis, please consult Mirişan, V., Domocoş, C. A., 2019 p.113, on one hand and Udroi, M., 2018, p. 83*, where the second author makes an analysis regarding the reason he opines that guilt should not be considered an essential feature of the crime)], the offense is not a crime. From my point of view, the essential features of the crime are 4, not 3, because I consider that the legislator is pointing out each and every one of them. Moreover, from the way they are stipulated by the law, in my opinion they can’t be only 3. From here onward, a few important aspects emerge that, in order to be better understood, must be pointed out, and those are:

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a) if the offense is not inserted in the criminal law, it is not a crime [this is a result from the interpretation “*on the contrary*” of the 1st thesis from art. 15 parag. (1) from the Romanian Criminal code]; worth mentioning, here, would be that the Romanian legislator also defines what is to understand whenever the “*criminal legislation*” syntagm is being used, in art. 173 Romanian Criminal code, meaning “*by <<criminal legislation>> is to be understood any injunction with criminal characteristics encountered within organic laws, emergency ordinances or other legislative Acts that, when were adopted, were legally equal to the law*”, so, for the 1st condition to be met is necessary that the offense (specifically) to be committed in such a manner that it folds perfectly to the abstract model inserted by the legislator within a criminal law (in the sense offered by the art. 173 of the Romanian Criminal code, thus not only the crimes that are to be find within the Romanian Criminal code); if the offense, specifically, does not exist, it will be a one of the grounds that will prevent the setting in motion of the criminal action against one or the impossibility for it to be exercised against one, according to art. 16 parag. (1) let. a) of the Romanian Procedural Criminal code.

b) if the offense is not committed with the guilt established by the law, it is not a crime; this premise is because of the art. 15 parag. (2) corroborated with the text found in art. 16 parag (1) the Romanian Criminal code. Art. 16, in the parag. (3) – (5), continues by explaining what is one to understand, from a criminal law perspective, when reading intent, by mistake, in how many parts they are divided, as well as what is one to understand through exceeded intention; so, if the committed offense is inserted within the Criminal law, but it is not committed with the guilt established by the law [direct/indirect intent, mistake (when the law establishes that is the case) or exceeded intent], it is not a crime;

c) if there is any of the justifying reasons provided by the law, the offense is not a crime; this is something that the Romanian Criminal code states specifically in the art. 18 parag. (1); that means that if a person committed a offense inserted in the criminal law, with the guilt established by the law, but it was committed in a circumstance provided by the justifying reasons special/general justifying reasons), that offense is not a crime; the general justifying reasons can be found in the Romanian Criminal code, and the special ones can also be found in other criminal laws.

d) if there is any of the non-imputability reasons provided by the law, the offense, even if it is inserted in the criminal law, committed with the guilt provided by the law and in an unjustified manner, it will not be a crime, circumstance that is inserted in art. 23 parag. (1) Romanian Criminal code.

An important note needs to be made here: even though both the justifying reasons and the non-imputability reasons mean that the offense committed is not a crime, the justifying reasons are causes that exert upon the offense, while the non-imputability ones exert upon the offender with one exception, the fortuitous case, that is, just as the justifiable reasons, a cause that exerts upon the offense.

Because this paper is not about to analyze the required steps that need to be made in order for an offense that occurred by mistake or a temptation to commit such a deed is a crime, I will resume it only to the purposes of pointing them out when needed, in order to better understand some of the things that make the subject analysis of this paper. Thus, the Romanian criminal law reveals that the attempt, [as shown in the art. 33 parag. (1) of the Romanian Criminal code] as well as the offenses committed by mistake [as art. 16 parag. (6) of the Romanian Criminal code reveals] are to be punished only if they are provided so/stipulated as such by the law, the rest of the offenses having as an established ground rule that they are committed with (direct/indirect) intent. As such, by using the “*on the contrary*” interpretation method, in regard with these legal provisions ensues is possible to exist [and actually exist, the relevant literature showing important aspects in this matter (*Bodea, R., Bodea, B., 2018, p. 198, as well as Udroi, M., 2018, p. 244*)] offenses inserted within the Romanian Criminal code, committed by mistake, that are not crimes.

The Romanian Criminal code also defines, among other things, what should one understand when they encounter “*committing a crime*” throughout the entire criminal law, in art. 174 of the Romanian Criminal code as “*the committing of any of the offenses that the law punishes as a consumed crime or as an attempt, as well as the participation of one when committing them as a co-author, an instigator or an accomplice*”.

In the doctrine, as well as in the Romanian Constitutional Court’s jurisprudence, has been shown, in a legally fashion, that the law is to be understood and applied as a whole, and not in an isolated manner, by fractions, taking into consideration only some aspects, or only some legal institutions. As such, by example, in a case however, the Romanian Constitutional Court’s Decision no. 265/2014 (regarding the fact that art. 5 of the Criminal code is presumed to be unconstitutional) states that the more favorable criminal law is the one that **as a whole** (n. n. – M.S.), proves to be more favorable for the accused and not the application of laws following one another by autonomous legal institutions. But this principle also exerts from art. 1 parag. (5) of the Romanian Constitution that states “*in Romania, the abiding of the Constitution, its supremacy and the laws is compulsory*” (the Romanian Constitution). By giving efficiency to the Constitutional provisions, the legal paragraphs stated above must also be read throughout art. 4 parag. (1) in the Romanian Criminal Procedural code according to which “*any person is to be considered innocent till their guilt is established through a criminal definitive decision*”, art. 550-552 Romanian Criminal Procedural code showing the cases in which a verdict stated by the criminal courts becomes definitive. Following the same train of thoughts, art. 103 parag. (2) of the Romanian Criminal Procedural code reveals that “*when taking a decision regarding **the existence** (n. n. – M.S.), of the crime as well as the guilt, **the Court** (n. n.) issues a motivated verdict (...)*”. From the legal texts above, in

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my opinion, results that it is up to the Court to decide whether there is a crime or not, and when making that decision, the Court must have as a ground rule the evidence that legally exist within the file. As such, I consider the Court as being the only one that has legal competence (and not other judicial agents/organs) to decide whether an offense is a crime or not through its existence, on one hand, as well as when it comes to establish if there is a guilt provided by the law when the offense occurred, on the other hand. This decision belongs only to the Court, and it concerns both the existence of the crime and the existence of the guilt the offender had when committing it; basically, if the committed offense was not committed with the guilt provided by the law [the way that art. 16 parag. (1) in the Romanian Criminal code demands], it is not a crime. This means that the other judicial agents, meaning the prosecutor, the rights and freedom judge, the preliminary Court judge can't decide regarding the existence/inexistence of a crime, thus they can't talk about the concept of a "crime" as a whole, that has all 4 essential features; they may be able to talk about the "offense provided by the criminal law" concept, or the "criminal case regarding an alleged crime" that is the purpose of that cause. This means that, before a definitive decision issued by the Court exists, one cannot say, without making a mistake, that a person committed a crime, because one of the essential features is missing and that is the guilt, that is established only by a legally invested Court. Even more so, we need to add that the Romanian legislator both offers a definition and reveals the types of ruling recognized by the Romanian Criminal Procedural code within the art. 370, the starting point in this matter being that all the rulings (in the sense offered by the Romanian legislation) are issued by the Court, which implies that no other judicial organs can (legally) issue that act. In other words, the prosecutor can't issue a ruling (in the sense provided by art. 370 Romanian Criminal Procedural code) regarding a cause that they have, this being an attribute reserved only for the Courts. The prosecutor, however, can issue other acts that they have competence to issue. Nonetheless, a prosecutor will never be able to (legally) issue a ruling. This paper is not about an analysis regarding the differences between the document issued by the Court and those issued by the prosecutor's office and so I will not pursue this matter, the doctrine explaining very well (in my opinion) the subject in the matter. Besides, art. 286 parag. (1) in the Romanian Criminal Procedural code stipulate that "*the prosecutor orders upon the documents (...) and provides a **solution** to the cause, by issuing an **ordinance** (n. n. – M.S.) if the law doesn't stipulate otherwise.*" From this text follow a few consequences: mainly, the prosecutor doesn't get to determine whether the offense was a *crime* or not, because, in this stage, as shown above, I think that there is no crime, meaning that not all 4 (or 3, depending on perspective) essential features are met; then, the prosecutor doesn't get to decide regarding the crime, but *provides a solution* for the causes in which they are legally invested; finally, the document issued by the prosecutor's office is an ordinance, not a ruling.

Likewise, according to art. 1 parag. (2) Romanian Criminal code, “*no person can be criminally sanctioned for an offense that was not inserted in the criminal legislation at the time it was committed*”. This is a recognition of the Latin adage “*nulla poena sine lege*” within the Romanian Criminal code. The Romanian Criminal code distinguishes between punishments (art. 53), educational measures (art. 115) and safety measures (art. 108), all of these being sanctions that can be applied to the persons that committed a crime or an offense provided by the Criminal code, the three possible sanctions representing 3 different ways to establish a criminal penalty for a person, sanctions that apply different, in accordance with several criteria. In art. 2 of the Romanian Criminal code, it is shown that “*the Criminal law sets the **punishments** (n. n. – M.S.) and the **educative measures** that can be taken against the persons that committed **crimes** (n. n. – M.S.), as well as the **safety measures** that can be taken against the persons that committed **offenses stipulated by the Criminal law** (n. n. – M.S.)*”. This legal text stands by the idea that not every offense stipulated by the Criminal law is a crime. It also sends the message that the safety measures can be taken against a person that did not commit a crime, but only an offense inserted within the Criminal law, which implies the existence only of the 1st essential feature, and not of all 4. Moreover, art. 107 parag. (3) state that “*the safety measures can be taken against the **offender** (n. n. – M.S.), even if a punishment does not apply*”. Thus, in order for a safety measure to be taken against offender, the 1st essential feature of the crime is all it takes, the legal text above implicitly making the distinction between offender and criminal.

1. SOME CONTROVERSIAL ASPECTS REGARDING THE DEFINITION OF THE CRIME ALONGSIDE THE ROMANIAN CRIMINAL CODE AND CRIMINAL PROCEDURAL CODE

1.1. The crime, in accordance with the waiving the penalty institution and the postponing the application of the penalty institution

In the relevant doctrine it is claimed that neither the waiving the penalty institution (*Udroiu, M., 2018, p. 450*), nor the postponing the application of the penalty institution (*Udroiu, M., 2018, p. 461*), are not, in fact, convictions. When claiming this thesis, it is brought to the public attention, among other legal texts, the text stipulated in art. 82 parag. (1) of the Criminal code that states, “*the person towards the waiving of the penalty was established is not the subject of any lapse, prohibition or incapacity that could result from the committed crime*”, provision that can also be found inserted in art. 90 parag. (1) Criminal code. However, I consider that, like the Czech Republic legislator [Subdivision 2, section 46, parag. (3) from the Criminal code of the Czech Republic], if that was really what the Romanian legislator wanted, for more clarity regarding the text, this would have been the formality under which the text would have been stipulated. In order to support this thesis, both art. 8 parag. (4) from the Act no. 24 since 27.03.2000

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regarding the legislative technic norms for development of the normative acts (published in the Romanian Official Journal no. 260 from 21.04.2010) updated, that show that “*the legislative text must be clear, fluently and intelligible, with no grammar difficulties and dark or obscure passages (...)*” and the legal provisions above, hence the legislator did not assume such a thesis. This situation, in my opinion, leads to the conclusion that the legal text in art. 82 parag. (1) stated above is unclear and has obscure passages, thus making it hard for one to understand whether this really was the legislator’s intention or not.

Therefore, according to art. 80 parag. (2) in the Criminal code, “*it cannot be applied the waiving of the penalty institution if:*

*a) the criminal has suffered **another** (n.n.–M.S.) conviction, except (...)”.*

As stated above, in the relevant doctrine regarding this matter, it is claimed that neither the waiving of the penalty, nor the postponing of the application of the penalty does not constitute convictions. Both regarding the waiving of the penalty as well as the postponing of the application of the penalty, the legislator shows that if, during the surveillance term it is discovered that the person had committed yet another crime [case in which, in my opinion, considering the essential features of a crime stipulated in art. 15 parag. (1) in the Criminal code, the Romanian legislator wrongfully suggests the idea that there must be a definitive conviction regarding this second crime that he mentions, meaning, in fact, the first crime on the time axis], for which a punishment was established (in regards to the institution of waiving the penalty)/ a conviction to prison was set (in regards to the institution of postponing the penalty) (...), the waiving/postponing is cancelled, therefore applying, for each case, the legal provisions concerning a contest of the crimes, relapse or intermediate plurality of crimes [for more information, please consult the provisions offered by art. 82 parag. (3) in regard to the waiving, or art. 89 parag. (1) in regard to the postponing, both articles from Act no. 286/2009 regarding the Romanian Criminal code, published in the Official Journal of Romania no. 510 since 24.07.2009, updated].

Concerning the Romanian grammar, when one uses a construction resembling the one used by the Romanian legislator as showed above “*another*”, it presumes that both elements involved have the same significance, the two elements have the same value. Basically, the action determined by the verb used repeats itself. Specifically, by the way that art. 80 parag. (2) let. a) is edited, when the text makes a reference to the criminal, that he must have suffered **another** (n. n. – M.S.) conviction, in my opinion, the legislator establishes the judicial regime that this legal institution has and that is that the waiving of the penalty is yet another form of conviction, even though its effects are not similar to a conviction. Following the same train of thoughts, art. 8 parag. (4) of the Act no. 24 since 27.03.2000 regarding the legislative technic norms for developing the normative acts, that were stated above. In the same register are also listed the provisions offered by art. 25 of the Act. No.24/27.03.2000, that states “*in the frame*

regarding the foreseeable legislative solutions, an explicit configuration of the concept and notions used in the new regulation must be achieved, that have a different meaning than they usually have, thus ensuring the correct understanding of the notions used and the misinterpretations to be avoided”, but the Criminal code does not define in any other way the phrase “*the criminal suffered another conviction*” which leads us to the conclusion that this phrase must be understood the way it is understood in the common language and not in any special way. The situation is the same in regards to art. 83 parag. (1) let. b) from the Criminal code provisions.

It is also true that the Romanian legislator does not explicitly stipulate that waiving the penalty is not a conviction, however I think that is not abundantly clear that it is a conviction, which materializes in confusions when interpreting it.

But let’s go back to the provisions of the art. 80 Criminal code for a moment, because I consider that the legislator does not establish the effects that the waiving of the penalty has, but rather it determines its judicial character. If one of the conditions in which the waiving of the penalty is not possible is that the criminal should not have **another** (n. n. – M.S.) previous conviction, this translates to the fact that the waiving of the penalty is yet a conviction. On the same register, I consider right to remind now that there are also other EU Member States that have within their criminal legislation the waiving institution, but within their legislation, their national legislator stipulates without a shadow of a doubt that waiving the penalty is not the equivalent of a conviction [alongside the Czech Republic’s Criminal code provisions, there are also the provisions regarding the same matter in the Slovakian Republic’s Criminal code provisions as well, in art. 40 parag. (2) of the last-mentioned Criminal code].

At the same time, one must not forget that the waiving of the penalty, the postponing of the penalty, as well as the suspension of the execution of the penalty institutions are a materialization of the principle of opportunity (Udroui, M., 2018, p.449) that the Court is entitled to when establishing a verdict in regard to a cause that is brought to justice, under the provisions of the law. Nonetheless, there are also EU Member States that have not inserted within their Criminal legislative codes the institutions mentioned above. As an example regarding this matter, I’d like to point out that Belgium, Cyprus, Estonia, Italy, Luxembourg and so on, none of these Member States’ Criminal laws are acquainted to the criminal legal institutions of waiving the penalty or postponing the penalty.

Art. 396 parag. (3) of the Romanian Criminal Procedural code states that waiving the penalty is determined by the fact that *the Court finds, beyond any reasonable doubt, that the offense exists, it is a crime and* (n. n. – M.S.) *it was committed by the offender, under the provisions of the art. 80-82 of the Criminal code* (n. n. – M.S.). A few aspects need to be clarified here, in my opinion. Thus, first of all, as a result of analyzing of all the evidence existing on the file, the Court, at this pending moment during the trial, *finds* that the *offense* (n. n. – M.S.)

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exists, thus the finding of a crime is made moments before a decision is made regarding the case; in another manner of speaking, the Court, as a result of administrating of all the existing evidence within that file, finds that the offense exists, afterwards the Court determines that that offense exists based on the evidence administered by the judicial organs; slightly different put, at this moment of the trial, the offense of which the offender is accused exists within its materiality; follow, that this offense, that exists, **is a crime** (n.n. – M.S.); as shown above, in order for an offense to be considered a crime, the essential features of a crime must be met cumulatively as stated by the art. 15 of the Criminal code, that is that the offense should be inserted within the Criminal legislation, to be committed with guilt, of an unjustified manner and non-imputable to the person that committed it. I consider this to be the key moment in which the Court decides whether the offender is guilty or not guilty by the committing the offense he stands accused of; thirdly, ***the offense was committed by the offender*** (n. n. – M.S.); it is asked from the Court to establish the casual relationship between the offense, on one side, under the self-implied condition for the offense to be inserted within the Criminal legislation and the author, meaning the offender, on the other side; if the Court finds, based on the administered evidence up until before the moment of the pronouncing the decision that the offense was committed by the offender, will issue a verdict in that direction; if not, the verdict issued will be acquittance or stopping of the criminal trial based on what the evidence indicate; then, all of these things must be find by the Court, ***beyond any reasonable doubt*** (n. n. – M.S.), which means, among other things, that it must be established by a non-bias and an independent Court.

These conditions must be fulfilled cumulatively, which results from the circumstance that the legislator used when conceiving this grammar construction of the art. 396 of the Criminal Procedural code the simple coordinating conjunction “and” (in the Romanian grammar, the word “and” can be understand in various ways; for a brief analysis of what they are, please visit https://www.academia.edu/8203811/CUVINTE_CU_VALORI_MORFOLOGICE_MULTIPLE). The major point of interest of art. 396 parag. (3) from the Criminal Procedural code regarding this paper, in my opinion, is the phrase “*under the provisions of art. 80-82 from the Criminal code*”, phrase through which, basically, the legislator underlines the importance of the abovementioned articles.

Another worth-mentioning aspect I consider to be the provisions offered by art. 81 parag. (1) from the Criminal code: “(1) *When pronouncing the waiving of the penalty, the Court applies a warning to the criminal*”. I think this syntagm is extremely useful because it basically empowers the concept that the waiving of the penalty seems rather like a conviction than anything else. Moreover, even if it is not stipulated as a criminal sanction, I think that the warning that art. 81 states about that is to be applied to the criminal can also be framed in the criminal sanction category, but this sanction can only be applied when the criminal and the

crime fits into the conditions stipulated by art. 80-82 from the Criminal code, the legislator strictly limiting the possibility of applying it when a waiving is set. If the waiving of the penalty is to be applied to a person, and, as such, a warning is applied to that person, one cannot say, without making a mistake, that the waiving of the penalty is not resembling with a conviction because, I consider that the Court does not apply warnings to innocent people, but to persons whose guilt was proved to the Court; at this moment during the criminal trial, the discussion is not about the effects that the principle of opportunity can have regarding the fact that waiving of the penalty is matching that principle, but merely a comparison between waiving the penalty as a criminal legal institution, on one hand, and other criminal institutions, on the other hand; sustaining the same idea, the Romanian legislator uses the word “criminal” in the phrase “*the Court applies a warning to the criminal* (n. n. – M.S.)”.

But a criminal is a person that committed a crime, not an offense inserted within the Criminal law. A criminal is not to be mistaken to a suspect or to an accused person, because the last two are steps taken during the unfolding of the criminal process. The essential features of a crime are the above-mentioned ones; thus I think it is not possible to apply the waiving penalty criminal institution to an innocent person, art. 396 parag. (3) and (4) from the Criminal Procedural code stating, basically, the conditions that need to be fulfilled in order for the waiving of the penalty or postponing of it can be enforced.

On the same register, the Romanian legislator stipulates that in the matter at hand the discussion is about a criminal, not an offender, the criminal being the person that committed a crime, whilst the offender is a person that committed an offense, whether is a criminal one or not is yet to be established by the Court. Also, the phrase “*waiving to the penalty*” is not explained anywhere within the Criminal code, which can only mean that it has the same meaning that is has when using the common language. As so, *ubi lex non distinguit, nec nos distinguere debemus.* Thus, I consider that in order for the Court to be able to apply the waiving of a penalty, firstly, it must be set, and then, after it was set, if the cause fits within the boundaries set by the legislator in order for the waiving of the penalty to be applied, the Court should apply it; if not, in my opinion, a rename of the marginal name given for the section must be enforced.

I consider that both waiving the penalty and the postponing of the penalty, are, in fact, convictions, because, although a criminal sanction was not established to the person in the matter, that is due to the application of the principle of opportunity by the Court, on one side, and to the mercy of the judge, on the other hand, the person tried not being an innocent person (in order for the Court to be able to pronounce the acquittal), but rather a guilty one, from the evidence within the file resulting that the person is guilty and not innocent. Only the objective and subjective conditions stipulated in art. 80-82 (regarding the waiving of the penalty) or 83-90 (concerning the postponing of the penalty) in which the offense

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was committed, as well as the way the judge sees fit to act upon the principle of opportunity lead to the materialization of the criminal institutions stated above to the detriment of a conviction, from the administrated evidence resulting that, as stated in art. 396 “*the Court find, beyond any reasonable doubt, that the offense exists, it is a crime and it was committed by the offender*”.

Art. 80 parag. (1) of the Criminal code shows that the Court “*can decide*” to waive the penalty under certain circumstances. In this case, I think that there is not a contradiction with the Criminal Procedural code, but rather a special judicial norm, that is derogatory from the general one. As stated above, the conditions for waiving a penalty are both objective and subjective ones (*Udroiu, M., 2018, p. 450*). But returning for a moment to the provisions of art. 396 from the Criminal Procedural code, it stipulates in parag. (1) that “*the Court determines in regard to the accusation that is brought to the defendant by pronouncing (...)*” and then continues to explain what conditions are to be met in order for the Court to be able to pronounce a conviction [parag. (2)], waiving the penalty [parag. (3)] postponing the penalty [parag. (4)], acquittance [parag. (5)] and the termination of the criminal trial [parag. (6)]. What can be easily noticed is that there is a perfect overlap up to a point between the conditions that are to be met when the Court is to pronounce a conviction, on one hand, and when is to pronounce the waiving of the penalty and the postponing of the penalty, on the other hand. Thus, “*if the Court finds, beyond any reasonable doubt, that the offense exists, it is a crime and it was committed by the offender*” represent the similarities among the 3 legal institutions, similarities that can be found within the parag. (2) – (4) of the 396 art. Of the Criminal Procedural code, the difference being made by the phrase “*under the provisions from within art. 80 – 82 from the Criminal code*” when it comes to the waiving of the penalty, whilst for the postponing of the penalty, the phrase “*under the provisions from within art. 83 – 90 from the Criminal code*”; regarding the legal institution of the conviction, there are no such sending.

Likewise, if we are to refer to the moment that we are during the criminal trial, that being before the Court had the chance to pronounce itself regarding the cause in which it was invested, a special relevance I consider the phrase “*the Court determines in regard to the accusation that is brought to the defendant by pronouncing*” to have. Thus, I consider that at this moment in the timeframe allocated for the criminal trial, the legislator uses “*accusation*” and not “*decision*”, “*defendant*” and not “*criminal*”, “*the Court*” and not “*the judicial organs*”, as well as “*the Court determines*” and not “*the Court finds*”, thus resulting that it did not existed up to that moment (this being the moment in which it comes into existence and the Court being the one that decide regarding it), one cannot bring into discussion, without making a mistake the term “*crime*”, because it lacks, as shown above, one of the essential features of a crime, mainly, the guilt of the person responsible.

1.2. The crime, in comparison with other legal institutions within the Romanian Criminal code and Romanian Criminal Procedural code

In accordance with what was stated above, there are numerous legal texts alongside the Criminal code and the Criminal Procedural code where, in my opinion, in a misfortunate manner, the legislator uses “*crime*” instead of “*offense inserted within the criminal legislation*”, “*criminal case*” or any other resemblant construction. As an example, I’d like to remind some of them: art. 35-42 from the Criminal Procedural code, where the legislator states about the different competences of the Courts. According to art. 35 parag. (1) from the Criminal Procedural code, “*the Court judges as a first-degree court all the crimes, except the ones that are given, by law, to other courts*”. However, as shown above, as a result of the fact that the Romanian legislator assumed the essential features of a crime in art. 15 parag. (1) of the Criminal code, the Court cannot judge a crime, because when the word “*crime*” comes up to the table, according to the provisions of the Criminal code, the 4 essential features of a crime already are in place, meaning an offense inserted within the Criminal law, committed with guilt, unjustified **and** (n. n. – M.S.) imputable to the person that committed it.

Nevertheless, by the time the court is invested to rule upon the case, one cannot also have the ruling of that court, without violating the right to a fair trial. According to the Romanian language rules, the word “and” means more than one thing. In my opinion, here, “and” is used as a simple coordinating conjunction. This means that if one of the elements given within a succession of elements is not met, then neither is the outcome; this is also why the 4 essential features of a crime must be met simultaneously, otherwise, the offense cannot be a crime. Likewise, as shown above, art. 4 from the Criminal Procedural code states that until a person is declared guilty by a court in a definitive manner, that person is to be considered not guilty. In other words, a person against whom there isn’t any final verdict cannot be criminally sanctioned without violating his/her fundamental rights. There is also a wide judicial practice that stands by this thesis. I think that, when the legislator uses the word “crime” (as well as any other word, for that matter) throughout the entire legislation should manifest constancy and contradictorily and to assume the coexistence of all 4 essential features.

Also, art. 103 parag. (2) from the Criminal Procedural code states that the court is the one to decide whether the crime exists or not, as well as the defendant is guilty or not for committing it. I think that, just the way that the crime is the only basis for the criminal responsibility to be triggered, so is the fact that the court is the only one that can state regarding the existence/nonexistence of one’s guilt. So, I think that not even when the offense is tried by the first Court there can’t be a crime committed, because one of the key elements is missing, that of the establishment of guilt of the accused person by an independent and objective court, legally invested with the ruling upon the case.

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To be noted here is the fact that parag. (2) of art. 35 states that “(2) *The Court is solutioning other criminal cases, too*” in this parag. the legislator making, thus, a distinction between “criminal cases” and “crimes”. Following the same logic, parag. (3) of art. 36 from the Criminal Procedural code makes the same distinction regarding, however, the competence of the Law Court, art. 37 parag. (2) makes this difference according to the military Law Court, whilst art. 38 parag. (4) does it regarding the Court of Appeal.

Not even at the beginning of the Appeal, after a judgement had been delivered regarding the case (more precisely, a sentence), could one say, without mispronouncing himself, that the trial can be grounded on a crime (however, one could argue that it was based on a certain criminal case that implied investigating whether the alleged crime had been committed), given the fact that formulating and submitting the appeal suspends the execution of the penalty when there is no definitive sentence to stipulate on the existence/inexistence of guilt.

We find it necessary to restate the fact that neither being considered a suspect, nor being considered a defendant is not to be mistaken with being considered a criminal. In some cases, not even being a convict equals being a criminal, because it is possible for the decision of conviction issued by the Court or the trial court to be appealed, resulting in the juxtaposition of two statuses: that of a convict (due to the judgement delivered by the Court/trial court) who ought to be considered innocent (hence, not a criminal), because, at this point during the trial, there is no definitive judgement regarding the case, and, implicitly, regarding the innocence/ guilt of the person.

Only when the judgement is or becomes final (according to the legislation that regulates this issue), could one argue that the state of being convicted equals the state of being a criminal, this being the exact moment when it was proven, beyond a reasonable doubt, that “*the offense is a crime and was committed by the defendant*”, as art. 396 of the Criminal Procedural Code, for an appeal calls for a new judgment on the legal background. According to art. 77 of the Criminal Procedural Code, “*a person in respect of whom, from the data and evidence existing in a case, there exists a reasonable suspicion that they committed an offense stipulated by the criminal law, is a suspect*”. This legal text underlines that a suspect is someone in whose case the prosecution continued, based upon the current evidence and data administered up until that point during the trial, but in whose case an independent and impartial court has not delivered a judgement on the crime, on the essential features of the crime, whether it is a crime or not (a consequence of the phrase: an act stipulated by the criminal law).

As we have already mentioned, we argue that *crime* does not equal an act stipulated by the criminal law, for the latter is one of the essential features of the first. Thus, at this point of the trial, one cannot appeal to the existence of a crime, only to the existence of an offense inserted within the criminal legislation. Moreover, according to art. 82 of the Romanian Criminal Procedural Code, “*a*

person against whom criminal action was initiated becomes a party to criminal proceedings and is called a defendant"; therefore, the evidence administered by the judicial agents give a person the status of suspect in a case. Then, art. 48, using unfortunate wording, states: "*When the jurisdiction of a court is established based on the capacity of a defendant (...) even if the defendant, after having committed the crimes*"; or, as we have previously shown, we argue that a defendant could not have committed a crime, for, when one talks of a crime, one must have all 4 essential features fulfilled, including guilt, in the form stipulated by law, upon which a final judgement of a competent and legally vested court must have been delivered.

But, at the point of the trial art. 48 refers to, the guilt of the defendant has yet to be established, hence the capacity of a defendant, not of a convict (that would be equal to the capacity of a criminal, as we have shown before). Moreover, we argue that a crime (as the Romanian Criminal Procedural Code defines this institution) can no longer be tried (with a few exceptions), the guilt having already been established through a definitive sentence.

Establishing an act in a penal cause as a crime, in my opinion, means solving of the penal action by the Court of Appeal during the penal process. When one is said to have been committed a crime, according to Romanian legislation, one's guilt ought to be established, or the presumption of innocence is infringed upon.

Following the same pattern (in my opinion, contradictory), the Romanian legislator, in art. 62 par. (1) of the Romanian Criminal Procedural Code, shows that: "*Ship and aircraft commanders have the jurisdiction to conduct bodily or vehicle searches and to inspect objects held or used by perpetrators (...) and in respect of crimes committed on such ships or aircrafts*" (n.n. – M. S).

We argue that, if at the beginning of art. 62 par. (1) the legislator correctly uses the term "*perpetrators*" due to the lack of meeting the essential features of the crime (at this point of the process – the moment the commanders take note of the act, the term perpetrator being used correctly, for there is focus on the act, not on the crime), the latter thesis of par. (1) wrongly makes use of the term "crime". Given the previously shown circumstances, the term "crime" leads to a contradictory conclusion: does art. 62 par. (1) refer to a perpetrator or to an criminal? Can there be a committed crime when the act is discovered by the ship and aircraft commanders? Are they competent in the matter of establishing the guilt/ innocence of a person so that they could deliver a definitive judgement?

The way in which the Romanian legislator states the cases in which the prosecutor or, as applicable, the court can decide upon offering the vulnerable witness status is not shielded from criticism. Thus, the stipulations of art. 130 par. (1) of the Romanian Criminal Procedural Code show: "*The prosecutor or, as applicable, the court may decide to grant the status of vulnerable witness to the following categories of persons: a) witnesses who suffered a trauma as a result of*

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the committed crime or of the subsequent behavior” (n.n. – M. S.). I reaffirm that at this time during the process (witness hearing – gathering of evidence to establish the guilt or innocence of a person) one cannot discuss of the existence or inexistence of a crime, and thus the wording chosen by the Romanian legislator is incondite: the crime, as a penal law institution, cannot exist before the establishment of the existence or inexistence of all its essential features, not just some of them.

Moreover, art. 157 par. (1) of the Romanian Criminal Procedural Code shows that “*a home search or a search of goods found in a residence may be ordered if there is a reasonable suspicion that a **person committed a crime***” (n.n. – M. S). Again, at this point of the trial, one cannot accurately talk of a crime, for the home search takes place before the court delivers a definitive judgement on the case.

This type of approach (in my opinion, scarce) of the institution of the crime made by the Romanian Criminal Procedural Code can be found in other stipulations throughout the Romanian Criminal Procedural Code, for instance: art. 159 par (12), art. 161 par. (1) letter g), art. 162 par. (1), art. 170 par. (1) and so on.

Art. 293 of the Romanian Criminal Procedural Code offers a definition regarding the criminal crime “in the act”. Thus, par. (1) shows that “*a crime is “in the act” when found at the moment it is being committed or immediately after commission*”, and par. (2) shows that “*also considered “in the act” is a crime whose **perpetrator**, immediately after commission, is chased by the public order and national security bodies, by the victim, by eye-witnesses or public outcry, or displays signs that justify probable cause to suspect they **have committed the crime**, or is caught close to the crime scene carrying weapons, instruments or any other objects of a nature to implicate them in the crime*” (n.n. – M.S).

I argue that a crime, as it is defined by art. 15 and 16 of the Criminal Code, cannot be “in the act”, for, as we have shown in this paper, the essential features of a crime are not met in that time and space, for the moment an crime is committed cannot physically coincide (in my opinion) with the moment of the delivering of a definitive judgement on the case.

I believe that an opposite hypothesis would render ineffective, among others, the stipulations of art. 3 of the Romanian Criminal Procedural Code and all its inherent consequences.

CONCLUSIONS

The European Union, according to the stipulations of the union treaties, has exclusive competence to legislate in certain social areas. In other areas, this competence is divided. Justice is not one of the areas where the European Union has exclusive competence, but a divided one [art. 4 par. (2) letter j), TFUE]. Thus, where the Union does not intervene through normative acts with the force of law, the member states have absolute freedom in legislating [art. 2 par. (2) TFUE]. In

the aforementioned cases, the competence to legislate comes to the member states, namely to the Romanian state, given the fact that the European Union has not issued normative compulsory documents regarding the issues debated in this paper.

The examples where the Romanian legislator wrongly used, in the Criminal Code and the Criminal Procedural Code the term “crime” are numerous, and this paper aims, among other things, at emphasizing that these misused terms exist, not at exhaustively presenting them.

*Given the aforementioned discrepancies, I argue that there is a need for alteration throughout the whole Romanian legislation regarding the institution of the crime, regarding the other institutions, as well as in other cases where the intervention of the *ferenda* law is necessary, so that the addressees of the law could adapt their behavior according to the existing legal stipulations. In my opinion, the criminal investigation bodies’ use of the term “crime” before the court delivers a definitive judgement amounts to a pre-pronunciation with regards to the existence of guilt (meaning that it exists) as one of the essential features of the crime, which undoubtedly leads to a breach, in the procedural acts made by the judicial organs (with the exception of the Court of Appeal) of the presumption of innocence as both an internal and an external principle.*

Thus, I believe that an intervention in the legislation is required, either one that focuses on the essential features of the crime (changing them so that the discrepancies underlined by this paper would no longer exist), or one that focuses on making punctual changes to the other institutions, agreeing to what a crime is by definition; such a change ought to be made so that criminal legislation is in accordance to the stipulations of Law 24 from 27.02.2000 regarding legislative technique norms.

Another equally efficient (although more intrusive, in my opinion) possibility would be the intervention of the Union legislator in this area (given the existence and significance of a divided competence in this field). The implications of this latter possibility would be major, bearing consequences that I think should be carefully analyzed before being coming into effect. On the one hand, a cohesion between the member states could be established (thesis assumed by the member states), but, on the other hand, the sovereignty of the member states would drastically diminish which could lead to the materialization of a federation or confederation of states.

The legislation must be known and understood in its entirety, but this entails, among other things, clarity, predictability and quality. If the law is unclear or ambiguous, it generates difficulty in understanding it, and thus it generates disobedience. Nonetheless, respecting the supremacy of the law in a democratic society is absolutely compulsory, or the concept of “state law/rule of law” becomes devoid of meaning.

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