Scientia Moralitas International Journal of Multidisciplinary Research
ISSN 2472-5331 (Print) | ISSN 2472-5358 (Online) | Vol. 6, No. 2, 2021
DOI: 10.5281/zenodo.5804958

Waiver of Prosecution

Bogdan Buneci
Lecturer PhD, Ecological University of Bucharest, Law School, Romania
bogdanbuneci@yahoo.ro

ABSTRACT: The institution renouncing the prosecution was a novelty element introduced in the Code of Criminal Procedure, which entered into force on 1 February 2014 for the relief of the criminal courts with various minor cases. Initially, it was provided for the waiver of the prosecution ordered by the prosecutor under the conditions laid down by the law, and subsequently because of the decision of the Constitutional Court No 23/2016 on the admission of the exception of the non-constitutionality of the provisions of Article 318 of the Code of Criminal Procedure, the legislation has been amended to the effect that the order ordering the waiver of criminal proceedings after it has been verified by the superior prosecutor of the prosecution where the measure was ordered is confirmed by the judge of the chamber of first judges who would be responsible to him according to the law, jurisdiction to hear the case at first instance. The judge of the pre-trial chamber may accept or reject the prosecutor's proposal that the prosecution be dropped, the judge's conclusion being final and a further waiver can no longer be ordered for any reason.

KEY WORDS: prosecution, order, public interest, prosecutor, judge of the pre-trial chamber, suspect or accused

General concepts

The waiver of prosecution is a new institution, introduced by the legislator in the Code of Criminal procedure which entered into force on 1 February 2014, with the aim of relieving the courts of the possibility of settling criminal cases relating to acts provided for by the criminal law which do not present a high social danger, implementing the procedural criminal law specific to the anglo-saxon law system on the principle of opportunity in this way.

Moreover, in addition to separating judicial functions in criminal proceedings (prosecution function; person's function of disposition of fundamental rights and freedoms in the prosecution phase, function of verifying whether or not he is sent to court; office of trial) the principle of mandatory automatic release and prosecution has been introduced where there is evidence of a criminal offense and there is no legal way of preventing the criminal proceedings from being conducted.

In the cases and under the conditions expressly provided for by law, the prosecutor may waive the exercise of the criminal proceedings if, in relation to the factual elements of the case, there is no public interest in the realization of the subject matter of the case. Thus, according to Article 318 Code Penal procedure *in the case of offenses for which the law provides for the penalty of a fine or sentence of imprisonment of 7 years at the most, the prosecutor may give up criminal prosecution when he finds that there is no public interest in pursuing the deed.*

This procedure is next to the filing (where the criminal proceedings are not exercised or, where applicable, the criminal proceedings are extinguished if there is one of the cases provided for in the Code of Criminal procedure), one of the solutions for non-prosecution and non-referral to court where the prosecutor may dispense with the prosecution.

The classification may be ordered when one of the following situations is found: The act does not exist; the act is not provided for by criminal law or was not committed with the guilt provided for by law; there is no evidence that a person committed the offense; there is a justification or no imputability; the prior complaint, authorization or referral to the competent body, or any other condition provided for by law, necessary for bringing the criminal action in motion; the amnesty or prescription, the death of the suspect or defendant natural person, or the removal of the suspect or defendant legal person has been ordered; the prior complaint has been withdrawn in the case of offenses for which the withdrawal of the complaint disclaims criminal liability, reconciliation has occurred or a mediation agreement has been concluded under the terms of the law; there is a cause of non-punishment prescribed by law; there is a judge; there was a transfer of procedures with another state, according to the law (Code of criminal procedure, 2010, Article 16).

The waiver of the criminal prosecution is made only after the administration of evidence which would show that the act is committed by the suspect or accused, having fulfilled the conditions laid down in Article 318(1) and (2) Code of penal procedure.

In Romania, when a person is sent to court, in the resolution of the criminal action, the court rules on the accusation against the defendant, by pronouncing, where appropriate, the sentence, the renunciation of the penalty, the postponement of the penalty, the acquittal or the termination of the penal trial.

The waiver of the penalty is done by the court in accordance with Articles 80 to 82 of the Penal Code if the following conditions are met: the offense committed is of low severity, having regard to the nature and extent of the consequences, the means employed, the manner and circumstances in which it was committed, the reason and purpose for which it was committed; in relation to the person of the offender, the conduct before the offense was committed, the efforts made by the offender to remove or mitigate the consequences of the offense and its possibilities of rectification, the court considers that the imposition of a penalty would be inappropriate because of the consequences it would have on his or her person; the penalty laid down by law for the offense committed is a prison term of no more than 5 years.

Postponing the application of the penalty is pronounced if the court, beyond any reasonable doubt, that the deed exists, constitutes a criminal offense, was committed by the defendant, applying the conditions laid down by Articles 83 to 90 of the Penal Code, that is: The established penalty, including in the case of the contest of offenses, is a fine or imprisonment of up to 2 years; the offender has not previously been sentenced to prison terms, except where the acts are no longer provided for by criminal law or the offenses have been amnesty or rehabilitation has taken place; the offender has agreed to provide unpaid work for the benefit of the community; in relation to the person of the offender, the conduct before the offense was committed, the efforts made by the offender to remove or mitigate the consequences of the offense and its possibilities of rectification, the court considers that the immediate enforcement of a penalty is not necessary, but that its conduct should be supervised for a specified period; the punishment prescribed by law for the crime committed is imprisonment of up to 7 years.

The evolution of the institution of renunciation of prosecution

After the entry into force of the Code of Criminal procedure in 2014, the provisions of article 318 concerning the waiver of prosecution contained seven paragraphs in which the prosecutor could order the waiver of the prosecution of offenses for which the law provided for the penalty of a fine or imprisonment of 7 years at the most, in relation to the content of the deed, the manner and means of the commission, for the purpose pursued and with the actual circumstances of the commission, the consequences which were or could have been caused by the commission of the crime, it found that there was no public interest in pursuing it.

When the offender was known, the person of the suspect or defendant, the conduct prior to the offense, and the efforts made to eliminate or mitigate the consequences of the crime were taken into consideration in the assessment of the public interest. The prosecutor could order that the suspect or defendant fulfill certain obligations, and if he did not fulfill them within the established term, the order to waive the criminal investigation would be revoked, and no further waiver would be possible.

This new institution could be applied to a number of 198 offenses out of a total of 236 offenses regulated by the Criminal Code, as well as many other offenses regulated by special laws, which was the consequence of implementing in the criminal procedure legislation the principle of opportunity, taken over and in the system of continental law in the jurisprudence of the European Court of Human Rights for reasons of streamlining the work of the judiciary.

In order to comply with the law on criminal proceedings, the quality of the legal provisions must meet certain conditions, including predictability, which must specify with sufficient clarity, the extent and manner of exercising the discretion of the authorities in this area, taking into account the legitimate aim pursued, in order to provide the person with adequate protection against arbitrariness. As for the institution giving up the penal prosecution, the Romanian Constitutional Court was referred to it in order to verify the constitutionality of this Article, the criticism concerning the term 'public interest' which was judged to be ambiguous and not defined in the Code of Criminal procedure or the Criminal Code, Being in contradiction with the

principle of the legality of the penal trial, regulated in Article 2 of the Code of Criminal procedure and with the provisions of Article 1(5) of the Constitution which provide for the obligation of observance in Romania of the Constitution, its supremacy and laws.

In the recitals of Decision No 23/2016 on the admission of the exception of non-constitutionality of the provisions of Article 318 of the Code of Criminal procedure, published in the Official Gazette of Romania, Part I No 240 of 31 March 2016, it is shown that the criminal prosecution is regulated in the provisions of Articles 285 to 341 Code of Criminal procedure, And the prosecutor has the powers provided for in Article 55(3) of the Code of Criminal procedure (supervises or conducts the criminal prosecution; refers the matter to the judge of rights and freedoms and the court; exercises the criminal action; exercises the civil action, in the cases provided for by law; concludes the agreement to recognize the guilt, under the conditions of the law; has the power to direct and control directly the prosecution of the criminal police and special criminal investigation bodies, provided for by law and to carry out any prosecution in the cases it conducts and supervises.

The stage of the trial is provided for in Articles 349 – 4771 of the Code of Penal procedure, having as its purpose the resolution of the substance of the penal case. In that respect, the Court found that the determination of the defendant's guilt and the application of criminal penalties fall within the competence of the court, which enjoys exclusive jurisdiction from juristico and the imperium, i.e. the power to 'state' the right and to impose the enforcement of criminal penalties by means of criminal decisions.

The Court has therefore found that, by regulating the institution giving up criminal proceedings in the manner provided for in Article 318 of the Code of Criminal procedure, the legislator has not achieved an appropriate balance between the application of the principle of legality specific to the system of continental law in Romania and the application of the principle of opportunity, specific to the anglo-saxon law system, giving priority to the latter, to the detriment of the former, by regulating in the powers of the prosecutor certain acts specific to the judicial power. Thus, according to the provisions of Article 318 of the Code of Criminal procedure, the prosecutor has the possibility to waive the criminal prosecution and, consequently,

to replace the court in the execution of the act of justice, In the case of approximately three-quarters of all offenses provided for in the Penal Code and in the special laws in force.

Moreover, the Court also found that the prosecutor can give up prosecution for more serious acts (with prison sentences of up to 7 years), as opposed to a judge who can give up the sentence for less serious acts with prison sentences of up to 5 years.

In the same sense, the Court also found that the agreement on the *recognition of guilt*, covered by Article 478-488 of the Code of Criminal procedure, which, like the waiver of prosecution, also constituted a form of negotiated justice based on the principle of opportunity, It can also be concluded with regard to offenses for which the law provides for the punishment of a fine or prison of 7 years or less (now 15 years), according to Article 480(1) of the Code of Criminal procedure, but, unlike the waiver of prosecution, it, on the one hand, It is subject to the control of the court which would have jurisdiction to judge the case in substance, and on the other hand it always involves the application of a penalty, even if its enforcement is individualized, in accordance with the provisions of Article 80-106 of the Penal Code.

The Constitutional Tribunal has also found that the waiver of prosecution by the public prosecutor, without being subject to the control and the consent of the court, is equivalent to the exercise by him of powers which fall within the scope of the courts' competences, Regulated in Article 126(1) of the Constitution, according to which justice is carried out by the High Court of Cassation and Justice and by the other courts established by law. For that reason, the Court finds that the waiver by the prosecutor of the penal prosecution, under the conditions laid down in Article 318(1) of the Code of Criminal procedure, is contrary to the previously stated constitutional rule.

Following the decision of the Constitutional Court, by Emergency Ordinance No 18/2016 to amend and supplement Law No 286/2009 on the Penal Code, Law No 135/2010 on the Code of Criminal procedure, as well as to supplement Article 31(1) of Law No 304/2004 on the judicial organization, Published in the Official Gazette of Romania, Part I No 389 of 23 May 2016, the provisions on the institution giving up the penal

prosecution have been amended, providing for the way public interest is analyzed, and the order by which the waiver of the criminal prosecution was ordered should be checked in terms of the legality and the validity not only of the prosecutor of the prosecutor's office, but also of the judge of the pre-trial chamber, who decides by reasoned conclusion on the legality and the validity of the solution to give up the criminal prosecution.

The procedure for waiving prosecution

a. Order waiving prosecution

The institution of renunciation of the criminal prosecution shall apply to offenses for which the law provides for a penalty of a fine or a penalty of a maximum of 7 years, where the prosecutor finds that there is no public interest, as provided for in Article 318(2) Code of Criminal procedure.

The public interest is viewed from an objective point of view, by the following criteria: The content of the deed and the actual circumstances of the deed; the manner and means of the deed; the purpose pursued; the consequences which were or might have occurred through the Commission of the offense; the efforts of the prosecution bodies necessary for the conduct of the criminal proceedings by reference to the seriousness of the offense and the time elapsed since the offense was committed; the legal attitude of the injured person; the existence of a clear disparity between the costs involved in carrying out criminal proceedings and the seriousness of the consequences caused or likely to have occurred through the commission of the crime.

From the point of view of subjective criteria, in situations where the perpetrator of the offense is known, the person of the suspect or defendant, the conduct which was taken prior to the offense, is also taken into account in the assessment of the public interest, the attitude of the suspect or defendant after the crime has been committed and the efforts made to remove or mitigate the consequences of the crime.

The legislator also provided the situation in which the offender is not identified, and then it is possible to order the waiver of the criminal prosecution by reference to the content of the deed and the concrete circumstances of the deed being committed; the manner and means of committing the deed; the efforts of the prosecuting bodies necessary to

carry out the criminal proceedings in relation to the seriousness of the offense and the time elapsed since the offense was committed; the existence of a manifest disproportion between the costs involved in carrying out the criminal proceedings and the seriousness of the consequences which were or might have occurred through the commission of the offense.

This procedure is exempted, even for offenses that are punishable up to 7 years but have resulted in the death of the victim (example: The offense of willful killing provided for by Article 192 Penal Code, the offense of killing or injuring the new born committed by the mother as provided for by Article 200 Penal Code, the harm to the unborn child provided for by Article 202 Penal Code if it resulted in the death of the child).

Renouncing the prosecution involves starting criminal prosecution of the act committed when the perpetrator of the act is not known, and if he is known to continue the criminal prosecution against the suspect or even to bring the criminal action into motion when the suspect becomes the defendant in question and a party to the trial. Here the institution of renunciation of the criminal prosecution shall be different from the classification, where, according to Article 294 Code of Criminal procedure, upon receipt of a complaint of the Commission of a criminal offense, if it meets the legal conditions for admissibility, but within that, any of the cases of impeding the criminal proceedings result, the criminal investigation bodies submit the acts to the prosecutor together with the proposal for classification, which has the *ranking order*.

If the offender is identified, the prosecutor may, after consultation with the suspect or defendant, order that the offender fulfill one or more of the following obligations: To remove the consequences of the criminal offense or repair the damage caused, or to agree with the civil party a way of repairing it; publicly apologize to the injured party; to perform unpaid work for the benefit of the community for a period of between 30 and 60 days, unless, because of his state of health, the person is unable to do so; to attend an advisory program, setting a time limit within which they are to be fulfilled, which may not be more than 6 months or be 9 months in respect of obligations under a mediation agreement with the civil party, which shall run from service of the order. This consultation of the prosecutor with the suspect or defendant must be seen in the sense that it is the prosecutor who

establishes the obligations, without negotiating anything with the suspect or defendant, and the latter must be subject to the obligations established by the prosecutor by the order, because otherwise the prosecutor will order the submission to court.

The order waiving the prosecution must include the provisions of Article 286(2) Code of penal procedure (name of the prosecutor's office and date of issue; name, forename and capacity of the person who draws it up; the act which is the object of the criminal prosecution, its legal classification and, where appropriate, the data relating to the suspect or defendant; the subject-matter of the procedural document or measure or, where appropriate, the type of solution and the reasons in fact and law; where applicable, an indication of the appeal available, stating the time limit within which it may be exercised; Data on the precautionary measures, the medical safety measures and the preventive measures taken during the prosecution; other notices prescribed by law; signature of the person who prepared it), the obligations imposed by the prosecutor according to Article 318 Code of penal procedure against the suspect or defendant, particulars of the lifting or maintenance of protective measures, the return of lifted property or security, if any of the security measures provided for by law have been taken, particulars of the termination of the preventive measures if the case has been ordered, the time limits within which the obligations ordered by the prosecutor and the costs of legal proceedings in question must be fulfilled.

Any failure to fulfill in bad faith the obligations ordered by the prosecutor within the period prescribed by law, he may revoke the order, and the proof of fulfillment of the obligations or presentation of the grounds of non-fulfillment shall be the responsibility of the suspect or defendant.

After the order in question renouncing the criminal prosecution has been issued, it shall be subject to verification as to the legality and validity of the first prosecutor of the prosecutor's office or, where appropriate, of the Prosecutor-general of the prosecutor's office of the court of Appeal, and when it has been drawn up by him, the verification shall be done by the superior prosecutor. When it was drawn up by a prosecutor from the Prosecutor's Office of the High Court of Cassation and Justice the order is checked by the chief prosecutor of the department, and when it was drawn up, the check is made by the general prosecutor of this prosecutor.

As there is also a structure of prosecution departments established by special laws (national Anti-corruption Directorate; organized crime investigation and terrorism Directorate), the order for the waiver of prosecution is verified according to the hierarchy of functions within that structure.

An order ordering the waiver of prosecution after having been verified shall be communicated in copy, as the case may be, to the person making the complaint, to the parties, to the suspect, to the injured party and to other persons concerned, and shall be transmitted, for confirmation, within 10 days of the date on which it was issued, *the judge of the chamber of first instance of the court* to which it would be entitled under law to hear the case at first instance.

As regards the 10-day time limit, the question has been raised in practice whether this is a limitation period (within which the act must be effected, under the sanction of revocation of the right in the event of failure to do so within a period of time), by a recommendation (within which an act must be effected, however, the failure to do so may not have consequences for the act) or a prohibitive period (in the sense that the act can only be fulfilled after the expiry of the time limit). As it emerges from the practice of law, the legal nature of this term, starting from the fact that the solution of waiving the prosecution is favorable to the suspect or defendant, and on the other hand, having regard to the solutions which the Judge of the Chamber of first instance may give if he rejects the confirmation of the order waiving the prosecution, i.e. those referred to in Article 318(15)(a) and (b) of the Code of Criminal procedure, it follows that this term is a recommendation and not a revocation term. Moreover, the text of the law does not provide for the application to be rejected as a belated one (High Court of Cassation and Justice - Decision No 11/2018 on a preliminary ruling for the settlement of a point of law in principle, published in the Official Gazette, Part I, No 907, of 29 October 2018).

b. Confirmation of the order waiving prosecution by the judge of the preliminary chamber

After receipt of the order waiving the prosecution, the judge of a preliminary ruling shall fix the time limit for the settlement by quoting all the persons

to whom the order has been communicated, where the prosecutor will also participate.

The non-presentation of the legally cited persons does not prevent the settlement of the request for confirmation (the participation of the prosecutor is mandatory according to the law - Article 281(1)(d) Code of Criminal procedure), and the judge by reasoned termination in the Council Chamber (without the presence of the public), it will decide on the legality and the soundness of the solution to give up criminal prosecution. This check is made on the basis of the works and material in the prosecution file, as well as new documents if submitted and, by termination, allows the request to confirm the solution (if sent to a non-competent court it will decline the case of the competent court) or reject the confirmation request made by the prosecutor.

It should be made clear that legal assistance must be provided when the suspect or defendant is a minor, admitted to a detention center or educational center, detained or arrested, even in another case, when the measure of safe medical admission has been ordered to him, even in another case, as well as in other cases provided for by law; where the judicial body considers that the suspect or defendant could not defend himself; Legal assistance is also compulsory where the injured party or the civil party is a person with no exercise capacity or limited exercise capacity.

With regard to the documents submitted (resulting in facts or circumstances which could contribute to the truth being known), the legislator refers only to that document and not to other means of evidence which would constitute new elements with regard to the confirmation of the order giving up the criminal proceedings.

According to Article 318(15) Code of penal procedure, if it rejects the request for confirmation of the order, the judge of the pre-trial chamber: A) disbanes the solution of giving up the penal prosecution and sends the case to the prosecutor in order to start or complete the criminal prosecution. We note that where the judge of the Chamber of first Judges considers that they are evidence which requires the criminal proceedings to be brought and the criminal proceedings to be completed, he shall reject the request for confirmation of the solution, And the prosecutor should be subject to these provisions since, as set out in Article 335 Code of Criminal procedure in case of reopening of the criminal prosecution, the provisions of the judge of

a preliminary chamber are binding on the prosecution body and in this case they must be binding. The decision to refuse the application shall be notified to the High Court of Justice of the European Union. (B) abolish the solution of waiving prosecution and order the classification in the event of any of the situations referred to in Article 16 of the Code of Criminal procedure.

The termination by which one of the solutions provided for in paragraph 15 of Article 318 Code of Criminal procedure has been given is a final solution, and in situations where the Judge has rejected the request for confirmation of the solution, no further waiver may be ordered whatever the reason invoked.

Comparative law issues

The institution of renunciation of prosecution is also covered by other legal systems or by the legislation of other European States.

Similar to in Romania, in Germany, the Code of Criminal procedure shows that the prosecutor's office can give up prosecution with the consent of the court competent to judge the main procedure, but only in situations where the offender's guilt is minor and there is no public interest in his prosecution. In the same country, the waiver of court proceedings and the termination of proceedings where there is no public interest in the criminal prosecution are regulated as the institution of renunciation of the sentence in Romania.

In the French Code of procedure, in order to apply the principle of opportunity, we have a kind of justice negotiated through criminal composition which is an intermediate institution between the agreement on the recognition of guilt and the waiver of prosecution (in order to apply this institution, the offender must recognize the offense before the criminal action is brought into action.) By applying the institution of the criminal composition, the prosecutor has the power to order security obligations and to order a fine in question, without a judge having verified those matters. Also, in France, when there are circumstances of serious crime, the personality and material situation of the accused, and financial resources, a transaction can take place with the perpetrator of the crime.

In Belgium, according to the judicial Code, it is the prosecutor of the King who decides on the appropriateness of prosecution, *whereas in Finland*

it is only the prosecutor who can decide whether to refer the case *"unless the public or private interest requires it"*.

Public interest considerations can also be found in the *Netherlands Code of Criminal procedure*, when such a non-prosecution decision can be taken, and in the Austrian Criminal Code criminal prosecution can be waived if certain conditions are met, Similar to those provided for in Article 318 of the Romanian Code of Criminal procedure.

In the United Kingdom of Great Britain and Northern Ireland, when a decision is taken on the charge, it is provided in the Code for Crown prosecutors that they, the police or other investigating agencies, decide whether the accusation for a perpetrator is taken on the basis of the public interest and the possibility of taking evidence leading to a possible conviction.

This is also the case in *Canada*, as in the English procedure, where the initiation and conduct of criminal proceedings on behalf of the crown also refers to the reasonable likelihood of conviction based on evidence that could be administered in question and whether a prosecution would best serve the public interest.

Similar chameers looking at the public interest are found in the United States of America, where in the Justice Manual at 9-27.230 — initiation and decrease commissions — Substantial federal interest (*Principles of federal persecution*), it is stated that in order to determine whether a criminal prosecution would serve a substantial federal interest, the government lawyer should weigh all relevant considerations, including:

- Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
- The nature and seriousness of the offense;
- The deterrent effect of prosecution;
- The person's culpability in connection with the offense;
- The person's history with respect to criminal activity;
- The person's willingness to cooperate in the investigation or prosecution of others;
- The person's personal circumstances;
- The interests of any victims; and
- The probable sentence or other consequences if the person is convicted.

Nature and Seriousness of Offense. It is important that limited federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant to this consideration. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim(s). The nature and seriousness of the offense may also include a consideration of national security interests.

The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature and what the public attitude may be toward prosecution under the circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute whether on substantive grounds, or because of a history of non-enforcement, or because the offense involves essentially a minor matter of private concern and the victim is not interested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or the attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that is not supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

Conclusions

The principle of opportunity specific to Anglo-Saxon law has also been taken up by continental law in the case-law of the European Court of Human Rights and in the law of other States. The Romanian legislator, when adopting the current Code of procedure, considered that in order to

avoid criminal proceedings in *minor cases* where there is *no public interest*, the obligation to pursue the criminal action was alleviated by introducing the subsidiary principle of opportunity, on the basis of which, in such cases, the prosecutor will be able to waive criminal proceedings under the conditions laid down by law.

A direct consequence of this new principle, which has been operating for several years in Germany, Italy, Spain, France, Serbia, Slovenia, and Bulgaria would have led to a reduction in the volume of criminal cases pending before the judiciary.

Prior to the adoption of Decision, no 23/2016 of the Constitutional Court, as well as the legislative changes ordered by the UG no 18/2016, there were sufficient legal provisions to control the prosecutor's solution of waiving the prosecution by the judge of the pre-trial chamber.

Thus, according to Article 319 Code Penal procedure, prior to the modification, regarding the continuation of the penal prosecution at the request of the suspect or defendant, this could be done also in case the prosecutor's renunciation of the penal prosecution within 20 days after the receipt of the copy of the order for the settlement of the cause, continue prosecution.

Since any person could make a complaint against the measures taken or acts performed by the prosecutor, there was in Article 339(4) Code of penal procedure, prior to the modification, their right to make a complaint within 20 days of the communication of the act by which the waiver of the penal prosecution was ordered. There was also a situation where, if this complaint was rejected by the Prosecutor of the prosecutor's office, the person should address the case within 20 days of communication to the judge of the Chamber of first Instance of the court which, according to the law, would have jurisdiction to judge the case at first instance.

Since the prosecutor is the holder of the prosecution, *exercising his function of prosecution*, he alone is able to judge as to the waiver of criminal proceedings, where there is no public interest, we consider that there were sufficient legal provisions for the existence of judicial control over the acts of the prosecutor, in such a way that the application of the principle of appropriateness is exercised in accordance with legal provisions.

References

Code of Criminal Procedure 2010, published in the Official Gazette of Romania, Part I, no. 486 of 15 July 2010, with the last amendment on 27 August 2021.

Decision no. 11/2018 of the High Court of Cassation and Justice on the examination of the application lodged by the Suceava Court in case no. 824/86/2018, by which, pursuant to Article 476(1) of the Code of Criminal procedure, Article 475 of the same Code, The High Court of Cassation and Justice is required to give a preliminary ruling in order to dislink a point of law as a matter of principle 2018, in the Official Gazette of Romania, Part I, no. 907 of 29 October 2018.

Decision of the Romanian Constitutional Court no. 23/2016 on the admission of the exception of non-constitutionality of the provisions of Article 318 of the Code of Criminal procedure 2016, published in the Official Gazette of Romania, Part I, no. 240 of 31 March 2016.

Penal Code 2009, published in the Official Gazette of Romania, Part I no. 510 of 24 July 2009, with the last amendment on 27 August 2021.

U.S. Department of Justice, *Principles of Federal Persecution*. Available from https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution. [29 November 2021].