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COMPLETION OF CRIMINAL PROSECUTION

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Summary

The article focuses on the prosecution completion process, a crucial stage in the criminal procedure. In this sense, the completion of the criminal investigation is not a formality, but is the result of a preliminary analysis of the evidence, the legality of obtaining it and the respect of the rights of the parties involved in the process. This stage is fundamental because it decides whether there is enough evidence to send the case to court.

The analysis of the subject brings into discussion the imperfections of the criminal procedural legislation, which, in some cases, does not fully meet the procedural requirements. Furthermore, an important aspect addressed in the article is the presentation of the materials of the criminal case to the parties involved in the process. It would be essential the rights of the parties to be always respected in accordance with Article 6 of the European Convention on Human Rights, ensuring their free and fair access to justice.

Through the recommendations and proposals made in this context, the aim is to clarify the legal procedures and improve the actions of criminal investigation bodies and prosecutors, in order to comply with European quality standards and to ensure a fair criminal trial that respects human rights.

Keywords: criminal trial, rights, criminal prosecution body, prosecutor, completion of criminal prosecution, access of the parties to the materials of the criminal case.

Introduction. At first sight, the completion of the criminal prosecution is a stage of closing of the crime investigation and documentation activity.

Completion of the criminal investigation, as a distinct stage, does not equate to the exhaustion of the criminal investigation phase, in other words, the closing of any procedural activities by the criminal investigation body or the prosecutor.

We support this reasoning, considering that after informing the parties about the end of the criminal investigation and the presentation of the file materials, the prosecutor *ex officio* or at the request of the parties is entitled to personally carry out the procedural actions to complete the criminal investigation or to restore the actions carried out in violation of the legal provisions, as well as to return the case to the criminal investigation body for the same purpose.

"The closing of the criminal prosecution does not correlate with the end of the criminal investigation phase, which implies the end of the last procedural activities of this phase (for example, sending of the criminal investigation file in which the indictment was issued to the competent court)" [1, p.840].

"The procedural activities that take place between the start of the criminal prosecution and the moment of its presumptive completion represent the stage of the criminal investigation, and those that take place between the moment of the presumptive completion of the criminal prosecution and the moment of the actual (so-called) closing of the prosecution form the stage of sentencing" [2, p.84].

The essence of this stage is that the criminal investigation officer and the prosecutor, com-

pleting the examination of the criminal case, make certain conclusions based on the results of their activities, evaluate the administered evidence if it reveals objectively, completely and under all aspects the circumstances of the case and if they are sufficient and teeming to make the decision final in the criminal case.

Methods and materials applied. The respective research has been developed by applying several scientific investigation methods specific to criminal procedural theory and doctrine: logical method, comparative analysis method, systemic analysis, etc. The applicability of the theoretical, normative and empirical material was the basis for the elaboration of the aforementioned article.

The purpose of the research consists in analysis, study and the impact of the domestic normative framework, doctrine and jurisprudence with reference to the completion of criminal prosecution.

Discussions and results obtained. Finding that the administered evidence is sufficient to complete the criminal prosecution, the criminal investigation body submits the file to the prosecutor accompanied by a report, in which it records the result of the criminal investigation, with the proposal to order one of the following solutions:

indictment of the perpetrator and filing of the accusation according to the provisions of Art. 281 and 282 of the Criminal Procedure Code with the condition that he was not charged during the criminal investigation. This solution is proposed when it appears from the case materials that the detected act is incident to criminal liability, that the perpetrator has been found and he bears criminal liability;

– completion of the criminal investigation, closing of the criminal case or removing the person from the investigation.

– The criminal investigation officer's report must include:

– the deed that served as the basis for starting the criminal investigation;

– information about the person of the suspect or the accused;

– the legal framework of the deed;

– information about the criminal bodies and the measures taken regarding them, as well as their location;

– precautionary measures taken during the criminal investigation;

– legal expenses;

– preventive measures applied or proposed.

If the criminal prosecution in the same case is carried out regarding several acts and several persons (perpetrators), the report will include information on all the accused, the legal framework of the deed and the administered evidence.

The report will also include the information regarding the deeds or the persons against whom the completion of the criminal prosecution was ordered, removal of the person under investigation.

The prosecutor, within no more than 15 days after receiving the file sent by the criminal investigation body, checks the materials of the file and the procedural actions carried out, ruling on them. Cases involving arrested persons or minors have priority and are urgently resolved.

In accordance with the provisions of Art. 290 of the Criminal Procedure Code, if the prosecutor finds evidence obtained contrary to the provisions of the criminal procedural law and in violation of the rights of the suspect, the accused, by reasoned ordinance, excludes this evidence from the file materials [3]. Evidence excluded from the file is kept under the conditions of Art. 211 paragraph (2) of the Criminal Procedure Code.

"...Article 290 of the Code regulates the verification by the prosecutor of the file materials and procedural actions carried out within the received case and does not directly refer to the examination of requests or approaches" [4].

Finding that the criminal investigation is complete, that there is sufficient and legally admin-

istered evidence; the prosecutor indicts the perpetrator (suspect), if he was not indicted during the criminal investigation, then prepares the indictment by which he orders the case to be sent to court. If the perpetrator was indicted during the criminal investigation, draws up the indictment ordering the referral of the case to court.

The prosecutor can order by reasoned ordinance the completion of the criminal investigation, the classification of the criminal case or the removal of the person from investigation, in cases where the existence of the legal grounds and conditions for such decisions is established (Art. 291 of the Criminal Procedure Code).

If the prosecutor finds that the criminal investigation is not complete or that the legal provisions were not respected when conducting the investigation, he returns the case to the body that carried out the criminal investigation or sends the case to the competent body or another body, for the completion of the criminal investigation or, as the case may be, for the elimination of the violations committed by the legal provisions.

The restitution or referral of the case is made by an ordinance in which the procedural actions, which must be carried out or redone, of the facts and circumstances to be ascertained, the means of evidence to be used and the deadline for follow-up are indicated.

"The return of the case or its referral to the competent body or to another body is partially done by severing the case if it is necessary to eliminate some violations or to complete the criminal investigation regarding a minor, a person against whom coercive measures of a medical nature must be applied or in a complex case regarding an act committed by the accused if for most of the criminal acts and of the other accused the prosecution is complete and legal" [5, p.448].

If he deems it necessary, the prosecutor, within a reasonable period of time, personally carries out the procedural actions to complete the criminal investigation or to restore the actions carried out in violation of the legal provisions, after which he decides to terminate the criminal investigation.

If the prosecutor returns the case or sends it to another criminal prosecution body, he is obliged to rule, in the manner provided by law, on preventive measures and other coercive procedural measures.

After the prosecutor's verification of the case materials and the indictment of the person, if this was not previously done, the prosecutor informs the accused, his legal representative, the defender, the injured party, the civil party, the civilly responsible party and their representatives; as well as the procedural successor about the completion of the criminal investigation, the place and the term in which they can learn about the materials of the criminal investigation. With regard to informing the trial participants about the end of the criminal investigation, a report is drawn up in accordance with the provisions of art. 260, 261 of the Criminal Procedure Code.

Art. 6 paragraph (1) of the ECHR requires the prosecuting authorities to disclose to the defense all material evidence in their possession against the accused [6].

The Criminal Procedure Code of Romania "no longer imposes on the criminal investigation body the obligation to present the criminal investigation material, as ensuring the defendant's effective defense during the criminal investigation phase is achieved in the new concept by regulating the general law of the suspect, the defendant/his lawyer to assist in the execution of the majority of investigative documents and by the detailed provision of their right to consult the file throughout the criminal process" [1, p. 841].

The ECtHR ruled in the case of *Beraru v. Romania* that the "facilities" that must be provided to any accused in the context of Art. 6 paragraph (3) letter b) from the Convention include the possibility of being informed, for the preparation of his defense, about the result of the investigations carried out during the trial [7].

The ECtHR held that the plaintiff's lawyers could not obtain direct access to the case file until a late stage; initially, they were not provided with any copy of the indictment. Furthermore,

they were unable to obtain a copy of the wiretap transcripts or a recorded copy of the intercepted telephone conversations used as evidence in the case. The ECtHR concludes in this case that the trial in litigation, as a whole, did not comply with the requirements of a fair trial, that none of the irregularities found in the criminal investigation phase and the trial phase in the first instance were not remedied by the hierarchically superior courts [7].

Acquaintance with the materials of the file is a right for the parties, except for the defender, who is also obliged to study the parts of the file. According to Art. 68 paragraph (1) point 10) of the Criminal Procedure Code, at the request of the defender, the possibility will be offered to make copies of the documents in the file, including the information in digital format.

In order to facilitate the work of the defense, the defendant cannot be prevented from obtaining a copy of the relevant documents from the file, nor from taking notes or using them *(Rasmussen v. Poland*, §. 48-49 [8]; *Moiseyev v. Russia*, §. 213-218 [9]; *Matyjek v. Poland*, §. 59 [10]; *Seleznev v. Russia*, §. 64-69 [11]).

The civil party, the civilly responsible party and their representatives are presented for their familiarization only the materials related to the civil action to which they are a party. The injured party is aware of all criminal investigation materials.

The materials of the criminal investigation are brought to the attention of the arrested accused in the presence of his defense counsel, and at the request of the accused – to each of them, separately.

In the case of Öcalan *v. Turkey* of 12.03.2003 (§. 122), the ECtHR found that the provisions of Article 6 paragraphs (1), (2) and (3) of the Convention, due to the restrictions and difficulties the applicant had to face in terms of the assistance of his counsel, access – both by him and by his lawyers – to the case file, as well as his lawyers' access to the entire prosecution file [12].

The materials of the criminal investigation are presented sewn into the file, numbered and recorded in the registration form. The numbering and the registration form will be done for each volume [13, p.714], in case there are several. At the request of the parties, the crime bodies will also be presented, the audio and video recordings will be reproduced, except for the cases provided for in Art.110 of the Criminal Procedure Code (special ways of hearing the witness and his protection).

The non-disclosure to the defense of some material evidence that contains elements that can exonerate the accused or reduce his punishment can be considered a refusal to grant the facilities necessary to prepare the defense and, therefore, a violation of the right guaranteed by Art. 6 paragraph (3) letter d) of the Convention. However, the accused may be required to give specific reasons for his request, and national courts may examine the merits of these reasons [14]. In order to ensure the preservation of state secrets, commercial or other official information with limited accessibility, as well as in order to ensure the protection of the life, bodily integrity and freedom of the witness and other persons, the investigating judge, according to the prosecutor's approach, may limit the right to take acquaintance with the materials or data regarding their identity [15]. The approach is examined under conditions of confidentiality, in accordance with the provisions of Art.305 of the Criminal Procedure Code.

Directive No. 2012/13/EU establishes in Art. 7 paragraph (4) that access to certain materials can be refused, if such access could lead to the serious endangerment of the life or fundamental rights of another person or if the refusal is strictly necessary for the defense of an important public interest, such as for example in cases where access may prejudice an ongoing investigation or seriously affect the internal security of the Member State where the criminal proceedings are taking place [16].

The right to disclosure of relevant evidence is not an absolute right. In order to ensure that the accused has a fair trial, any difficulties caused to the defense by a limitation of his rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities at the later stages of the trial [17].

In some cases, it may be necessary to withhold certain defense evidence to preserve the

fundamental rights of another person or to protect an important public interest. However, only such measures restricting the rights of the defense which are strictly necessary are permitted under Article 6 § 1 (see ECtHR Judgment Van Mechelen and Others v. Netherlands of 23.04. 1997, §. 54, 58) [18].

If the criminal file has several volumes, they are presented simultaneously in order to learn about the respective materials so that the person who learns about them can return to any of these volumes several times.

According to the doctrine, no time standards are established when the parties are aware of the file materials, and there is no jurisprudence.

"In most cases in practice, the standard of 10 pages per hour is used – a standard taken from other fields" [19, p.832].

The term for taking cognizance of the materials of the criminal investigation cannot be limited, but if the person who takes cognizance of the materials abuses his situation, the prosecutor fixes the manner and term of this action, based on the volume of the file [20].

After they have become aware of the materials of the criminal investigation, the persons who have become aware can make new requests regarding the criminal investigation, which are resolved according to the provisions of Art.245-247 of the Criminal Procedure Code (submission, examination deadlines and resolution of approaches and requests).

The criminal procedural law does not provide for a term in which the parties, after studying the criminal file, would have the right to submit requests.

"Limiting or not granting a deadline, upon completion of the criminal investigation for the submission of requests, would place the person in a situation of uncertainty and would naturally affect the substance of the right, this right becoming an illusory one. Therefore, starting from the importance of the requests that can be submitted at the end of the criminal investigation, the parties must have a sufficient and reasonable deadline for the submission, and the lack of it would affect the essence of the right" [21].

After the presentation of the criminal investigation materials, a report is drawn up indicating the number of volumes and the number of pages in each volume of the file that was taken into account, the criminal bodies, the reproduced audio and video recordings. The time of the start and end of the review of the file for each day must be recorded in the minutes.

The minutes record the requests submitted for this action, and the written requests are attached to the minutes and this is mentioned in it. Regarding the presentation of the file materials, a separate report is drawn up for each person participating in the process (For example: if there are several defendants in a criminal case, all materials from the file are presented to each one, as well as in the case of injured parties, civil parties, civilly responsible parties and their representatives). The prosecutor examines the requests submitted after the materials of the criminal investigation have been made known immediately and, by reasoned ordinance, their admission or rejection is ordered within 15 days at most, and within 24 hours, the respective ordinance is brought to the attention of the persons who submitted them.

"We consider it appropriate to expressly include in Art. 293 paragraph (6) the provision according to which the refusal of the criminal investigation body to carry out additional procedural actions can be challenged in accordance with Art. 298 and 299 of the Criminal Procedure Code. The lawyer can challenge the refusal to hear the witness at any stage of the criminal investigation" [22, p.379].

The Constitutional Court *mentions that after the end of the criminal investigation, the accused has the right to learn about all the materials of the case and submit requests to complete the criminal investigation [see Article 66 paragraph (2) point 22 of the Code]. The given requests are examined by the prosecutor in accordance with the provisions of the Code of Criminal Procedure, and the rejection by the prosecutor of the respective request or approach does not deprive the person who submitted them of the right to submit them later in court [see Article 295 paragraph (4) of the Code]* [23].

... The Criminal Procedure Code does not contain provisions that would allow the prosecutor to ignore the requests submitted by the defense and send the criminal case to trial. On the contrary, the law obliges the criminal investigation body to examine the requests and approaches of the participants in the process and other interested persons [see Article 278 of the Code] [23].

In this context, we agree that "The practice of submitting the file to the court without examining the request is unjustified, with a subsequent answer, according to which the person can benefit from his right provided for in paragraph (4) of Article 295, to submit the request to the court" [19, p.837].

If the prosecutor orders the admission of the requests, he also orders, in necessary cases, the completion of the criminal investigation, indicating the additional actions that will be carried out and, as the case may be, submits the file to the criminal investigation body for execution, with the establishment of the execution deadline.

After completing the criminal investigation, the additional criminal investigation materials are presented to the parties in the process in the order provided by Art.293 of the Criminal Procedure Code. In this case, if desired, the parties could take cognizance of the materials that supplemented the criminal investigation, given that they know the content of the other procedural documents.

If the accused is evading prosecution or refrains from appearing in order to learn about the materials of the case and receive the indictment, the prosecutor will present the materials to the defender elected or appointed "*ex officio"*, with the attachment to the file of the proof of notification of the accused regarding the completion of the criminal investigation and the possibility of studying the file [24].

The European Court held that the presentation of criminal investigation material is a right rather than a legal obligation, finding arbitrary the forced bringing for this purpose [25].

Non-appearance of the accused, his legal representative, the defender, the injured party, the civil party, the civilly responsible party and the procedural successor to take cognizance of the materials of the criminal case, informed according to the order established in the law about the termination of the criminal prosecution as well as about the time and place coordinates for the realization of this right, does not prevent the prosecutor from proceeding with the drawing up of the indictment.

Analysis of the provisions of Art. 291 and 293 of the Criminal Procedure Code allows to establish that the presentation of the materials of the investigation file is done not only in the case of the decision to send the file to court with an indictment, but also in cases where the prosecutor decides to withdraw from the criminal investigation, the termination of the criminal investigation or the classification of the criminal process. This deduction is in accordance with ECtHR jurisprudence on the matter [26].

Completion of the criminal investigation when the accused evades the criminal investigation was included as a procedure distinct from the competence of the investigating judge under Law No. 189 of 17.07.2022, by supplementing the Criminal Procedure Code with Art. 291/1 and Art. 305/1.

In the event that the accused evades prosecution or his location is not established following search investigations or it was not possible to file charges in accordance with the provisions of Art. 282/1 of the CPC; the prosecutor, by a reasoned ordinance, *ex officio* or at the request of the criminal investigation body, orders the completion of the criminal investigation in the absence of the accused, with the information of the chosen defender or the lawyer who provides legal assistance guaranteed by the state, and submits an approach to the judge of instruction requesting consent to complete the criminal investigation.

To complete the criminal investigation in the absence of the accused, Art. 291/1 paragraph (2) of the Criminal Procedure Code, imposes finding the cumulative meeting of the following 4 conditions:

1) in respect of the person, an indictment was issued for committing one or more serious, particularly serious or exceptionally serious crimes according to the Criminal Code;

2) the accused evades the criminal investigation or his whereabouts are not established and his presence before the criminal investigation body was not possible;

3) search investigations were ordered regarding the accused;

4) the person charged is not a minor.

Completion of the criminal investigation in the absence of the accused is not allowed in the case of accusations of committing light or less serious crimes, except in cases where the crimes are incriminated by the same persons who evade the criminal investigation or whose whereabouts have not been established and in search investigations have been ordered regarding them, and dissociation will adversely affect the full and objective conduct of the criminal prosecution and judicial investigation.

When in the same criminal case there are several defendants, one of whom is wanted and is accused of committing one of the serious, particularly serious or exceptionally serious crimes, the prosecutor can order the completion of the criminal investigation in the absence of the accused that is wanted. The criminal prosecution against the other accused continues according to the general procedure.

The approach regarding the authorization of the completion of the criminal investigation in the absence of the accused is examined in a closed session within no more than 5 days, with the mandatory participation of the prosecutor and the defender elected or appointed *ex officio*.

"The European Court noted that a person accused of committing a crime is not deprived of the right to be defended by a lawyer just because he did not appear in the court. On the other hand, the Court mentions that, although the presence of the accused in the court session is of particular importance for the fairness of the procedure, the legislator must discourage unjustified absences and ensure the rapid and effective conduct of the process. The lack of reaction from the accused must not paralyze the court proceedings (DCC No. 124 of 30 October 2018, § 23)" [27].

The prosecutor must point the following in the request: the deed that is the object of the accusation, the legal provisions in which it falls and the punishment prescribed by law for the crime committed, the circumstances, accompanied by relevant evidence, from which there is a reasonable suspicion that the accused committed the deed, the circumstances that confirm that the accused evades prosecution or that his whereabouts have not been established, the measures taken to find the accused accompanied by relevant evidence, the circumstances justifying the continuation of the criminal prosecution in the absence of the accused, the factual arguments and circumstances and the list of evidence in support of the action, including the list of witnesses to be heard regarding the circumstances that would confirm or deny the evasion of the criminal prosecution or the impossibility of establishing the whereabouts of the accused.

"The Constitutional Court observes that Article 305/1 paragraphs (2) and (4) of the Criminal Procedure Code requires the prosecutor to indicate in the procedure relating to the authorization of the completion of the criminal investigation in the absence of the accused both the circumstances that result from the reasonable suspicion that the accused committed the act, as well as the circumstances that justify the continuation of the criminal prosecution in the absence of the accused" [27].

In the procedure for examining the approach, the investigating judge has the right, *ex officio* or at the request of the parties, to hear witnesses, examine the requests of the parties or examine other relevant materials in order to ascertain whether all the necessary measures have been taken in order to identify the location of the accused and that he evades prosecution or that his whereabouts are not established.

After examining the approach and the materials presented, the investigating judge adopts a reasoned conclusion regarding the rejection of the prosecutor's approach, if the legal requirements are not met or if it has not been proven that the accused is evading criminal prosecution

and he was advertised as wanted, or regarding the admission of the prosecutor's approach. In the conclusion of the investigating judge, the factual and legal reasons cited for rejecting or accepting the prosecutor's approach are indicated.

*"Although the author of the exception states that the law does not provide what are the "legal requirements" that must be met in order to be able to authorize the completion of the criminal investigation in the absence of the accused, the Court notes that the legislator regulated in Article 291/10 paragraph (2) the conditions that must be met cumulatively in order to complete the criminal investigation in the absence of the accused (*for example: *the gravity of the offense committed, the accused must not be a minor, etc.). However, the Court notes that it actually raises a problem of interpretation and application of the criminal procedural law*" [28].

Repeated addressing with a motion to request authorization to complete the criminal investigation in the absence of the accused regarding the same person in the same case, after the rejection of the previous motion, can only be admitted if new circumstances appear that serve as a basis for finding that the accused is evading the criminal investigation and that it was not possible to identify his whereabouts.

The conclusion of the investigating judge in this case can be challenged with an appeal within 15 days from the date of the ruling, which will be examined in accordance with the provisions of the criminal procedure rules in Title II Chapter IV section 2 §.2 of the Special Part of the Criminal Procedure Code.

Conclusions. We are of the opinion that at the closing of the criminal investigation, until the parties are informed about it and the materials of the criminal case are presented, the prosecutor is obliged to draw up an order ordering the completion of the criminal investigation. This ordinance, in addition to the conditions provided for in Art. 255 of the Criminal Procedure Code, must include the analysis of the evidence (*each piece of evidence is to be evaluated from the point of view of its relevance, conclusiveness, usefulness and veracity, and all the pieces of evidence as a whole – from the point of view of their corroboration*), if this evidence was obtained by complying with the provisions of the Criminal Procedure Code, if the criminal investigation is complete and if there is legally administered evidence. The arguments in this sense are dictated by the fact that, in principle, the prosecutor decides to complete the criminal investigation, and this decision does not include the materialized aspect (this is a characteristic feature of criminal prosecution – the preponderance of the written form). The prosecutor at this stage only draws up a report informing the parties of the end of the criminal investigation.

At the same time, this view is also argued by the phrase "he has one of the following solutions" used in Art. 291 of the Criminal Procedure Code. Accordingly, the prosecutor is obliged to order by ordinance the completion of the criminal investigation, then to resolve the other aspects of the law.

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