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THE APPEAL REGARDING THE LENGTH OF CRIMINAL PROCEEDINGS

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Abstract

Among the innovations brought by the new Criminal Procedure Code in force as of February 1, 2014, they included the appeal regarding the length of criminal proceedings, appeal by means of which the parties and the main subjects of proceedings may request the acceleration of the development of proceedings during prosecution and judgment. The new procedure is meant to provide persons who exercise or against whom a legal action is exerted an effective tool to ensure the celerity of criminal proceedings so that the number of cases in which Romania is convicted of violations of the parties' right to resolve their case in a reasonable time decreases. The main aim of this paper is to present the new regulation and to highlight the weakness of the regulation which may lead to consider the appeal regarding the length of criminal proceedings as an ineffective remedy.

Keywords:

Appeal regarding the length of criminal proceedings, effective remedy, reasonable time of criminal proceedings, acceleration of criminal proceedings.

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Pamfil, M. L. (2015). The appeal regarding the length of criminal proceedings. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 141-148.

Among the innovations brought by the new Criminal Procedure Code in force as of February 1, 2014, they included the appeal regarding the length of criminal proceedings, appeal by means of which the parties and the main subjects of proceedings may request the acceleration of the development of proceedings during prosecution and judgment. The new procedure is rooted in the desire of the legislature to provide persons who exercise or against whom a legal action is exerted an effective tool to ensure the celerity of criminal proceedings so that the number of cases in which Romania is convicted of violations of the parties' right to resolve their case in a reasonable time decreases.

It should be noted in this regard that before the entry into force of the new Criminal Procedure Code it was possible to formulate a request to speed up the resolution of the case or complaints to delay the resolution of the case, although there is no explicit texts that provide these rights. Thus, starting from the provisions of Article 275 paragraph 1 of Criminal Procedure Code 1968 which provides that "any person may file a complaint against the measures and acts of prosecution, if through them a harm of the legitimate interests had occurred" such complaints were deemed admissible during the prosecution and were solved by the prosecutor under the provisions laid down in Articles 275-278 Criminal Procedure Code of 1968. For the trial phase there was no legal text allowing parties to complain about the duration of procedure. The lack of procedures and of a jurisdiction to which the person concerned may address to denounce the excessive length of proceedings was criticized by European Court of Human Rights which has consistently held that Article 13 of ECHR guarantees an effective remedy before a national court by which the person is able to complain about a breach of the obligation laid down in Article 6 paragraph 1 regarding the judging of cases within a reasonable term. It was therefore necessary to create a tool that works during the criminal trial, which would be the competence of an independent and impartial magistrate (attributes which, according to the ECHR jurisprudence the prosecutor does not have) and likely to lead to respect of the rights of the parties to resolve their case in a reasonable time.

The source of the matter for appeal regarding the duration of criminal proceedings lies in Title IV of the Special Part of the Criminal Procedure Code, reserved to the Special Procedures, Chapter I[1], art. 488[1]-488[6].

According to Article 488[1] paragraph1, if the activity of criminal prosecution or the trial is not met within a reasonable time, an appeal may

Pamfil, M. L. (2015). The appeal regarding the length of criminal proceedings. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 141-148.

be filed, requesting the acceleration of the procedure. The text does not refer to the activity performed before the preliminary room, since, unlike the stage of criminal prosecution and of trial, the duration of which is influenced by many factors, so that a universally valid term cannot be established, for the preliminary room procedure duration is limited by law or by Article 343 to a maximum of 60 days from the date of registration of file at the court.

Art. 488[1] paragraph 2 gives the right to make an appeal against the main parties of the proceedings, namely the defendant, the civil party, the civilly liable party, the injured person and the suspect, and for the trial stage against the prosecutor. The holders of the appeal are therefore mainly those people whose rights and legitimate interests are subject to the procedure plus the prosecutor who represents within the judicial activity the general interests of the society. Logically, if the person against whom the offense was committed does not participate in the trial as injured party or civil party, it has no right to make no appeal concerning the length of criminal proceedings. The person who lodged an appeal may withdraw it at any time until its settlement. Once the appeal is withdrawn, the person loses the right to make an appeal regarding the duration of the procedure in that procedural stage.

Although, as shown above we cannot establish a universally valid duration for the development of the criminal proceedings or for the trial, the legislature has provided certain periods of time after the passage of which we can raise the problem of overcoming a reasonable term. Thus, according to Article 488[1] paragraph 1 the appeal may be worded as follows:

a) after at least one year from the start of prosecution, for the cases in prosecution;

b) after at least one year from arraignment, for the cases in first court trials;

c) after at least 6 months after the notification of the court through a remedy for cases under ordinary or extraordinary remedies.

However, these terms do not concern all criminal cases pending prosecution or trial, but only those that were recorded after February 1, 2014. In this regard, Article 105 of Law no. 255/2013 for the implementation of Law no. 135/2010 on the Criminal Procedure Code provides that the provisions of Articles 488^1 – 488^6 apply only to criminal proceedings initiated after the entry into force of the new Criminal Procedure Code. Appeals made by the parties or by man subjects of the proceedings, regarding the cases brought before the court before this time will be subject to verification, Article 488^6 paragraph 8 providing that the

Pamfil, M. L. (2015). The appeal regarding the length of criminal proceedings. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 141-148.

appeal made by noncompliance with the terms provided for in this chapter shall be returned to the petitioner in an administrative way. Despite this provision, some courts to which appeals regarding the duration of prosecution in cases registered prior to the entry into force of the new code have been filed, have wrongly rejected the appeals as inadmissible, noting that the cases are not subject to the appeal procedure.

The form conditions of appeal form are indicated in Article 488[3] according to which the appeal must be made in writing and contain the following particulars:

a) name, surname, domicile or residence of the individual, or the name and registered office of the legal entity and the quality in the case of the natural or legal person who prepares the application;

b) the name and quality of the person who is the party in the trial, and in case of representation by a lawyer, his/her name and business address;

c) mailing address;

d) the name of the court and prosecutor's office and case number;

e) the factual and legal grounds on which the appeal is based;

f) the date and signature.

The Criminal Procedure Code does not provide any penalty for the lack of any of these mentions, nor the possibility of the judge seized with the settlement of the appeal of the to restore it to the petitioner administratively for its completion, while any omissions may be supplemented later by the petitioner, before the court (as it happens, for example, in case of the appeal. There is also the possibility that the lack of mentions in the appeal prevents the identification of the cause the duration of which the petitioner complains about (ie. the petitioner does not indicate the number of the prosecution case or of first court case), a situation not covered by the law that will force the judge either to restitute the appeal administratively or to make additional checks to identify the cause.

To prevent the premature formulation of unfounded or repeated appeals, the Criminal Procedure Code provided that the abuse of law consisting in the formulation consisting in bad faith of an appeal is sanction with a judiciary fine from 1,000 lei to 7,000 lei and with the payment of legal costs incurred.

The jurisdiction for the settlement of the appeal belongs, according to Article 4882, to the Judge of rights and freedoms of the court which has the power to hear the case submitted to a lower court, if the excessive length of prosecution is mentioned, and to the higher court before which the case

Pamfil, M. L. (2015). The appeal regarding the length of criminal proceedings. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 141-148.

is pending, if the excessive duration of the judgment in a lower court or in remedies, ordinary or extraordinary, is mentioned. When the judicial proceeding against which the appeal is made comes before the High Court of Cassation and Justice, the jurisdiction for the settlement of the appeal belongs to a different panel within the same department.

The settlement of the appeal involves the premises of the request of the case file and informing the court before which the case is pending and of the parties and of the main subjects of the proceedings about the wording of the appeal. The Judge of rights and freedoms or the court shall inform the prosecutor or the court before which the case is pending, on the appeal brought before the court by also communicating the period in which they can formulate an opinion on the duration of the procedure. Also, the judicial body before which the case is pending will be requested to send within 5 days the file or a certified copy of the case file by the prosecutor or the court before which the case is pending. The Code also provides for the obligation of the judge or of the court seized with the settlement of the appeal to inform about its submission the other parties or the procedure subjects who will be communicated that they are entitled to express their views on the duration of the procedure and the term established for exercising this right. If the suspect or the accused is deprived of freedom, in the case concerned, or in another case, and the appeal was made by another party or by the injured person, the information will be made both to him/her and to his/her lawyer chosen or appointed ex officio.

Failure to exercise the right to formulate and submit an opinion on an appeal filed by the prosecutor or the court before which the case is pending or to the parties does not prevent the settlement of the appeal.

The appeal shall be settled not later than 20 days after registration, by authentication, in the council camera, without the participation of the parties and of the prosecutor.

By settling the appeal, the judge of rights and freedoms or the court checks the duration of proceedings based on the works and material in the case file and on the viewpoints presented. Article 488^5 paragraph 2 states that in assessing the reasonableness of the length of the judicial proceedings, the following elements should be taken into account:

a) the nature and scope of the case;

b) the complexity of the case, including by considering the number of participants and the difficulties of evidence administration;

c) cross-border elements of the case;

Pamfil, M. L. (2015). The appeal regarding the length of criminal proceedings. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 141-148.

d) the trial phase in which the cause finds itself and the duration of the previous trial phases;

e) the conduct of the appellant in the judicial proceedings reviewed, including in terms of the exercise of the processual and procedural rights and from the perspective of fulfilling its obligations in the light of the trial;

f) the behaviour of other participants concerned, including of the authorities concerned;

g) intervention of certain legislative amendments applicable to the case;

h) other factors likely to influence the duration of the proceedings.

When it appreciates the appeal as unfounded, the judge of rights and freedoms or the court admits the appeal and sets the period within which the prosecutor has to resolve the cause, namely the court and the period of time during which a new appeal cannot be lodged. In all cases, the judge or the rights and freedoms or the court that resolves the appeal cannot provide guidance or may not offer dispensations on issues in fact or law able to anticipate the way of solving the trial or interfere with the liberty of the judge of the case to decide according to the law on the solution to be given to the trial, or, where appropriate, the freedom of prosecutor to decide on the solution that it considers lawful and thorough.

Admission of appeal in a trial phase does not prevent the submission of a new appeal if the prosecutor or the court fails to comply with the deadline set by the judge. At the settlement of the new we shall consider only the reasons arising after the previous appeal.

By settling the appeal, the judge or the court will decide if the appeal is rejected and on the legal expenses incurred and on the possible bad faith of the petitioner, sanctioning with judicial fine the petitioner's abuse of right. What is the procedure where the main procedural subject makes the appeal regarding the length of criminal proceedings prior to the deadline set by the judge of rights and freedoms or by the court through the authentication by means of which it admitted the previous appeal? If we take into account the provisions of Article 488^6 paragraph of the 8, according to which the appeal formulated with the noncompliance of the terms provided for in this chapter shall be returned administratively, the appeal lodged should be refunded administratively. Proceeding in this way, however, the judge or the court could neither find nor sanction the abuse as of right. Furthermore, the verification of the observance of terms involves performing acts such as acviration (attachment) of the file whose excessive duration is criticized or of the case file in which the previous appeal has been solved, so that the

Pamfil, M. L. (2015). The appeal regarding the length of criminal proceedings. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 141-148.

solution of the administrative refund of the appeal is not the best one. For this reason, we consider that the text of paragraph 8 should be changed, meaning that it was expected that the appeal lodged with noncompliance with the terms provided for in this chapter shall be rejected, as appropriate, as inadmissible (for example when it was made with reference to criminal proceedings initiated after the entry into force of the new Criminal Procedure Code or formulated by a person other than the parties, main subjects of the proceedings, or prosecutor) or premature (namely when it was brought before reaching the deadlines of 1 year from the start of criminal prosecution or from the arraignment and 6 months after the notification of the court by means of a remedy or before the deadline set by the court for the reiteration of the appeal). The solution of inadmissibility was used for legal practice, as shown above. The restitution hypothesis in an administrative way of the appeal may be provided, in our opinion, for the case in which the appeal does not contain the particulars prescribed by law according to the rules already used in matters of appeal and denunciation.

The authentication by means of which the judge of rights and freedoms or the court settled he appeal shall be reasoned within 5 days from the delivery and shall be communicated to the appellant and forwarded for information to all parties or main subjects of proceedings in the case file, which are required to meet the deadlines contained in this one. The authentication is not subject to any remedy. The file is returned to the judicial body where the court it pending on the motivation day in court, together with a copy of the authentication so that the prosecutor or the court comply with the deadline set for the resolution or settlement of case.

The appeal on the duration of criminal investigation is an important step in the Romanian legislation for ensuring the rights of people to get their cases resolved within a reasonable time, giving them the opportunity to complain about the excessive length of proceedings pending. The establishment of this procedure is likely to empower the judicial bodies on regarding the observance of deadlines in the judicial activity, even if currently the legislation does not provide any sanction for the prosecutor or court which does not observe the settlement or resolution term of the case established by means of which an appeal concerning the length of criminal proceedings was resolved, because the non-observance, in bad faith and repeatedly of the deadlines of performing the acts represents both for prosecutors and judges, disciplinary misconduct. The future legal practice will show if the legislator has succeeded in creating an effective appeal

Pamfil, M. L. (2015). The appeal regarding the length of criminal proceedings. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 141-148.

regarding the length of the criminal proceedings or if the new regulation will have no acceleration effect of the development of proceedings.

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Pamfil, M. L. (2015). The appeal regarding the length of criminal proceedings. Jurnalul de Studii Juridice, Year X, No. 1-2/2015, 141-148.