

Exemption from Criminal Liability on Probation. Grounds for Dismissal

Iurie ODAGIU¹, Olesia CREȚU²

¹ “Ștefan cel Mare” Academy of the MIA, Chisinau. Republic of Moldova/ Dunarea de Jos University of Galati, Romania. ORCID: 0000-0002-2474-5299

² Doctoral School “Criminal Sciences and Public Law” of the “Ștefan cel Mare” Academy of the MIA Chisinau. Republic of Moldova. ORCID: 0000-0001-8643-9089

Abstract

According to the legislation, one of the priority purposes of the criminal trial is that the person guilty of committing the crime is punished according to their guilt.

Criminal liability is an ineluctable consequence of the commission of a crime. However, we cannot consider this harsh rule to be absolute, which is why the legislator, guided by the principle of humanism, has foreseen certain situations when the perpetrator can be liberated of criminal responsibility.

The exemption from criminal liability is the release of the person who committed a crime, that has therefore lost its prejudicial degree under circumstances provided by the criminal law. One form of exemption from criminal liability is conditional release.

This study is dedicated to the regulatory and interpretation aspects of the institution of termination of criminal proceedings at the stage of criminal prosecution under conditional release.

Keywords: criminal trial, ordinance, prosecution, termination of criminal prosecution, removal from prosecution, classification of criminal proceedings, Criminal Code, parole

Introduction

The reduction of the criminal phenomenon cannot be achieved only by enforcing criminal liability and applying criminal sanctions. They must also be combined with other legal-criminal measures that represent the trust that the state grants to the person, who, although having violated the criminal law, can be corrected without incurring the “detrimental” effects of criminal penalties [6, p.2]. Among these measures, an alternative to criminal liability is conditional release.

The termination of the criminal investigation under conditional release is necessary to be examined both in the light of criminal law and criminal procedural law, both in respect of the individual [1, art.59, 2, art.510-512] and of the legal entity [1, art.591, 2, art.520-523⁷].

The removal of criminal liability does not lead to the removal of the criminal character of the act, but only to the removal of the application of a penalty.

The exemption from criminal liability is possible until the actual liability arises, i.e., until the court issues the sentence of conviction with the determination of the penalty to be executed. This excludes the recognition of the person as culpable, and their exemption from criminal liability also means total exemption from a possible punishment [3, p.405].

The notion of exemption from liability must include two moments: the existence of circumstances that would allow the deduction regarding the possible existence of legal liability, thus qualifying the act as unlawful, however, at the same time, some circumstances justify the release of liability. Thus, exemption from liability could be defined as the exclusion of the

This work is licensed under a Creative Commons Attribution-Non-Commercial 4.0. International License

negative consequences of the lawful application of the state law for the subject who committed the illicit act [4, p.29].

Methods and materials

In this study, the methods of analysis, synthesis, statistics, and comparison were widely used. The materials used are limited to relevant normative acts and scientific publications in the field.

Findings

For the person charged with a small or less serious crime, who admits their guilt and does not present a social danger, the prosecution may be suspended conditionally, with the subsequent exemption from criminal liability under the criminal procedure, should the correction of this person be possible without the application of a criminal penalty [1, art.59].

This rule applies only to private individuals. Concerning the legal entity, the legislator has recently introduced an amendment by supplementing the Criminal Code with the norm on the conditional release of the legal entity and the Criminal Procedure Code with the rules governing the procedure and the way of conditional release of the legal entity.

The conditions for the exemption from criminal liability of the individual regarding the conditional release are:

- the person has committed a small or less serious crime;
- the person was put under accusation;
- the person acknowledges his guilt;
- the person does not present a social danger;
- the correction of this person is possible without the application of a criminal penalty.

These conditions are cumulative and not alternative [5, p.1047].

According to Article 16 [1], it is considered a slight offence the act for which the criminal law provides as a maximum penalty the punishment of imprisonment for a term of up to 2 years inclusively, and less serious - the act for which the criminal law provides the maximum penalty of imprisonment for a term of up to 5 years inclusively.

The person acquires the status of the accused by the order of impeachment issued by the public prosecutor ex officio or at the proposal of the criminal investigation officer. The conditions for lodging the accusation are laid down in Article 281 [2] "The prosecutor, after drawing up the order for impeachment, immediately but not later than 48 hours, or as soon as it was brought before the prosecutor brings it to the attention of the accused".

The presentation of the accusation is made in the presence of the defender, after which the defendant has been explained the rights and obligations he has in the new procedural position.

At the same time, the accused is explained the right not to confess against themselves, and the fact that making statements about their actions is interpreted as an acknowledgement of guilt.

Whether or not the person presents a social danger is appreciated by the prosecutor or by the court, taking into account the peculiarities that characterize them, their way of life, their behaviour before and after the crime, etc. [3, p.419].

The prosecutor, in addition to examining the presented evidence, also appreciates whether the correction of the accused is possible without the application of a criminal penalty.

This work is licensed under a Creative Commons Attribution-Non-Commercial 4.0. International License

The conditional release has an essential feature: the revocable character. That is to say, the admission of the person who committed an offence to liberation from criminal liability is subject to compliance with certain obligations laid down for them for one year.

Criminal procedural legislation provides for people against whom a conditional suspension of prosecution cannot be applied with subsequent release from criminal liability, namely:

- 1) having a criminal record;
- 2) addicted to alcohol or drugs;
- 3) with liable positions, who have committed the crime by abusing the position;
- 4) who have committed offences against the security of the State;
- 5) who have not repaired the damage caused by the crime.

A person with a criminal record is considered one who has been previously tried with the issuance of a sentence of criminal conviction, which was not lifted or annulled under the law.

About whether the person is addicted to alcohol or drugs, the judicial body asks for information from the Republican Dispensary of Narcology.

According to Art.123 para. (1) [1]., "A person with a liability function means the person to whom, in an enterprise, institution, state organization or local public administration, or a subdivision thereof, it is granted, permanently or provisionally, by the stipulation of the law, by appointment, election or under a commission, certain rights and obligations to exercise the functions of the public authority or administrative actions of mood or economic organization" [1].

If the person meets the conditions of conditional release, the prosecutor shall first issue an order for the conditional suspension of criminal prosecution for one year. The term is legal and fixed. No deviations from this term are allowed, by increasing or decreasing it. This period shall start to run from the date specified in the order for conditional suspension of prosecution. The given order is in force from the moment of its signature by the prosecutor, the accused, his defender, as the case may be, and the legal representative. In the same ordinance, the prosecutor is to motivate the necessity of applying the restrictions [5, p.1048].

The public prosecutor may apply one or more of the following obligations [2]:

- 1) not to leave the locality where he has his domicile except under the conditions established by the prosecutor;
- 2) to communicate to the criminal investigation body, as the case may be, any change of domicile;
- 3) not to commit crimes or offences;
- 4) to continue their work or studies;
- 5) to participate in a special treatment or counselling programme to reduce violent behaviour;
- 6) to participate in probation programmes;
- 7) not to frequent certain places.

The accused against whom the conditional suspension of the prosecution is ordered receives a copy of the order.

This work is licensed under a Creative Commons Attribution-Non-Commercial 4.0. International License

At the same time, the prosecutor is obliged to send a copy of the order of suspension conditional to the criminal investigation body and, if necessary, to the probation body.

During the mentioned period, the prosecutor may request the responsible bodies from the territorial area where the accused resides to verify compliance with the imposed restrictions.

With the expiration of the one-year term, the criminal investigation body or, as the case may be, the probation body, within 5 days informs the case prosecutor about the execution of the suspension order.

If the accused complied with the conditions set by the prosecutor, the latter orders, after 1 year, the release of criminal liability by order. The release order conditional on criminal liability shall indicate the material rules [1, art.59] and procedural rules [2, art. 510-512], on the basis of which it was issued [5, p.1049].

If the accused violates the established obligations, the prosecutor may resume the criminal investigation by submitting the case in an instant in the general order. If during the suspension the accused committed other offences, the cases may be joined.

From the above mentioned, we deduce that the legislator has regulated the procedure for the termination of the criminal investigation actions only regarding the person and not the criminal trial. The prosecutor, at the expiration of the 1-year term, presents a solution both regarding the person and the criminal trial, all while not having regulated legal support.

According to the criminal procedural law, „criminal prosecution and trial of cases concerning crimes committed by legal persons are carried out according to the usual procedure, with the derogations and completions covered by the procedure on criminal prosecution and adjudication of cases concerning offences committed by legal persons” [2].

It is worth noting that “criminal prosecution and adjudication of the case against the legal person is carried out with the participation of its legal representative” [2]. The legal representative of the legal entity is meant to represent the interests of the legal entity and to represent it throughout the criminal process when performing procedural actions.

According to Art.591[1], “In respect to the legal entity with which a judicial agreement of public interest was concluded, confirmed by the court, the criminal investigation may be suspended conditionally, with the subsequent release of criminal liability in accordance with the criminal procedure, if the terms of the agreement were met by the legal entity and the monitoring period fixed in the agreement expired.”

What does “the judicial agreement of public interest” presume?

With the amendment of the Criminal Procedure Code, by completing Chapter VI of the special part, with section 2 “Procedure on the judicial agreement of public interest”, for legal persons, an alternative procedure was introduced for criminal prosecution and justice.

According to art. 523¹ [2], “The judicial agreement of public interest is a public transaction concluded between the prosecutor and the legal representative or the designated representative of the legal person, by which the latter acknowledges the fact of the offence, the legal classification of the facts and undertakes to enforce the obligations set out in the judicial agreement of public interest in exchange for the dismissal by the prosecutor of the transmission of the criminal case in the court.”

The legal representative of the legal entity in the criminal proceedings is the natural person empowered by the power of attorney issued by the administrator to act in the interests of the legal entity.

The representative of the legal person is the person who manages the legal person, for whom a criminal trial is not conducted, appointed by the conclusion of the investigating judge

This work is licensed under a Creative Commons Attribution-Non-Commercial 4.0. International License

at the request of the prosecutor or the court, if the legal entity has not appointed a legal representative.

Until the end of the criminal investigation, the representative of the legal entity may submit to the prosecutor an action regarding the conclusion of the judicial agreement of public interest. The legal agreement of public interest concluded between the legal entity and the prosecutor is not a basis for the release of criminal liability of individuals guilty of committing the crime.

The conditions of the judicial agreement of public interest and the release of criminal liability of the legal entity are:

- the representative of the legal entity acknowledges the fact of committing the offence;
- the legal entity has not previously signed a judicial agreement of public interest;
- the legal person is charged with committing the offences referred to in Articles 243, 244, 325, 326, 334 of the Criminal Code;
- the legal entity assumes the fulfilment of the obligations imposed by the prosecutor and agrees with the limits of the fine of public interest set by the hierarchically superior prosecutor;
- the representative of the legal entity has actively contributed to the determination of all circumstances of the fact of committing the crime;
- the judicial agreement of public interest is concluded until the end of the criminal investigation.

The following cumulative obligations towards the accused legal person are established by the public interest judicial agreement [2]:

- “1) to pay a fine of public interest in the state budget, the size of which is set within the limits of 3 minimum fines provided for the committed offence up to 30% from the average annual turnover calculated over the last 3 years until the date of initiation of the criminal investigation;
- 2) be subject to a monitoring programme for a maximum period of 3 years under the supervision of the responsible institution;
- 3) to bear the expenses for the experts or qualified persons who will assist the institution responsible for monitoring the accused legal entity, as well as the expenses for conducting legal, financial, tax and accounting analyses required for the monitoring mission;
- 4) not to commit other offences during the monitoring period;
- 5) remove from administration persons who participated in the commission of the offence;
- 6) to refund the illicit profit obtained by committing the crime and to repair the damage caused by the crime”.

The judicial agreement of public interest after signing by the parties and the prosecutor and approval by the hierarchically superior prosecutor shall be submitted for confirmation to the court.

The prosecutor by an appeal, which contains information about the committed act and its legal classification, the amount of the fine of public interest to be paid and the obligations to be executed by the legal entity, presents to the court the judicial agreement of public interest.

This work is licensed under a Creative Commons Attribution-Non-Commercial 4.0. International License

The appeal of the prosecutor and the judicial agreement of public interest shall be examined in the presence of the prosecutor, the representative of the legal entity and the defender in a public hearing.

When examining the judicial agreement of public interest, the court checks whether the legal conditions for concluding this agreement have been complied with, and whether the amount of the fine in the public interest has been fixed within the legal limits. The court also checks the proportionality of the obligations established in relation to the advantages of the judicial agreement of public interest [2]. If the court does not identify any irregularities regarding the conclusion of the judicial agreement of public interest, it will issue a confirmation of the judicial agreement of public interest.

It is worth mentioning that the judicial agreement of public interest does not imply the recognition of guilt by the legal entity. The conclusion of the court on the confirmation of the agreement is not susceptible to attack, it is final.

After confirmation, the judicial agreement of public interest is published on the official website of the prosecution and the court responsible for monitoring the legal entity, and the prosecutor issues the order for conditional suspension of criminal prosecution for a period of up to 3 years.

Within the period of conditional suspension, the legal entity is monitored for the performance of the obligations set out in the agreement. Enforcement of obligations removes the criminal liability of the legal entity.

Upon expiry of the period of conditional suspension, if the legal entity has fulfilled the obligations set out in the judicial agreement of public interest, the prosecutor shall order the termination of the criminal investigation by an order. After the end of the criminal investigation, the parties have access to the criminal case materials.

If the court does not confirm the judicial agreement of public interest or the legal entity has waived its conclusion, all documents are returned to the prosecutor for the continuation of the criminal investigation [7].

If the legal person has not fully fulfilled the obligations set out in the judicial agreement of public interest, the prosecutor orders the resumption of the criminal investigation and immediately informs the representative of the legal entity about the complete non-performance of the established obligations. In this case, the legal entity is refunded the fine of public interest paid on the account of the state budget [2].

For both private individuals and legal persons, the term of conditional release is not included within the limitation period.

Reiterating the above, it is necessary to delineate the content of the expressions “conditional release” and “conditional suspension”. We highlight the difference from the lexical definition of the terms “release” and “suspension”. Suspension involves failure to be held liable under certain conditions, which, if not respected, lead to criminal liability and the application of punishment. At the same time, the release implies the non-attraction of criminal liability and the subsequent non-execution of the penalty. Conditional exemption from criminal liability is a consequence of conditional suspension.

Conclusions

Correction of the person who conflicts with the law is possible using measures and solutions unrelated to the constraint of the state. Therefore, to encourage the post-criminal behaviour of the person who committed the crime, the legislator has extensively established the institution

This work is licensed under a Creative Commons Attribution-Non-Commercial 4.0. International License

of the liberation from criminal liability. This institution makes it possible for the person who committed the crime, out of recklessness, in a state of affect or from little life experience, without being held criminally liable, to return to normal life.

Conditional suspension of criminal prosecution with subsequent exemption from criminal liability is nothing more than a chance to start over but with the lesson learned.

References

1. Criminal Code, Law nr. 985, from 18.04.2002 // Monitorul Oficial al Republicii Moldova nr. Nr. 72-74 din 14.04.2009. https://www.legis.md/cautare/getResults?doc_id=109495&lang=ro.
2. Criminal Procedure Code, Law nr. 122-xv din 14 martie 2003 // Monitorul Oficial al Republicii Moldova nr. 104-110/447 din 07.06.2003. https://www.legis.md/cautare/getResults?doc_id=138876&lang=ro#.
3. Botnaru, S., Șavga, A., Grosu, Vl., Grama, M., *Drept penal. Partea generală*, vol. I. Chișinău: Cartier Juridic, 2005, ISBN 9975-79-329-0 <https://ebin.pub/drept-penal-partea-general-a-ii-anbsped-9975793290.html>.
4. Dobînda, V., *Unele considerente referitoare la liberarea de răspundere a subiectului răspunderii juridice la diferite etape de manifestare a acesteia*, Revista „Legea și viața”, octombrie/noiembrie 2020, CZU-343.28/.29.
5. Dolea, Ig., *Codul de procedură penală (comentariu aplicativ)*, Ed. Cartea Juridică, Chișinău 2016, ISBN 978-9975-3111-3-7, CZU 433.13(478)(094.4).
6. Gladchi, Gh., Bucur, C., *Natura juridică a condamnării cu suspendarea condiționată a executării pedepsei*, Revista Națională de Drept, nr.2, 2011, ISSN 1811-0770, https://uspee.md/wp-content/uploads/2016/08/RND_nr_2-2.pdf
7. Cernomoreț S., Nastas A. *Comparative Analysis of Cybercrime in the Criminal Law System*, Monografie, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary 2023, p.44.