

# **Not to Indict and non Arraignment Solutions, Adopted by the Prosecutor**

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## **Abstract**

*In this paper are shown not to indict solutions adopted by the prosecutor as set out in the New Code of Criminal Procedure, which amended substantially old regulation.*

*We intend to analyze the dismissal and the withdrawal of the criminal proceedings as decisions adopted by the prosecutor according to art. 315-316 and 318 of the New Code of Criminal Procedure.*

*According to the New Criminal Procedure Code, the termination of the criminal prosecution represents the moment when all the investigating actions are fulfilled and the file is to be forwarded to the Prosecutor.*

*By using the expression "termination of the criminal prosecution" we understand that it is the decision of the bodies in charge with it regarding the fulfillment of all procedures necessary for the case solution, in order to forward the file to the Prosecutor.*

**Key words:** prosecutor, degree, dismissal, withdrawal of the criminal proceedings.

**Classification J.E.L.:** K4

## **1. Chapter 1 - The not to indict and non arraignment decisions according to the New Criminal Procedure Code**

According to provisions of Chapter IV on criminal prosecution procedure and Section 3 of the New Criminal Procedure Code, the not to indict and non arraignment decisions adopted by the prosecutor on the request of the criminal prosecuting body or ex officio are as follows:

a) dismissal, when there is no criminal action or, depending on the situation, termination of the criminal proceedings, given the fact that the case is among those provided by art.16 paragraph 1 of the New Criminal Procedure Code;

b) withdrawal of the criminal proceedings as the defendant criminal prosecution bears no public interest.

Therefore we can see that the New Criminal Procedure Code simplifies the system of the no to indict decisions that can be pronounced at the end of the criminal prosecution.

In terms of the existence of a legal obstacle to start the criminal action, the prosecutor shall decide, by order, the dismissal, which represents a legal impossibility to start the criminal prosecution, caused either by the irregular character of the accusation, or by the incidence of an obstacle to start it.

The New Criminal Procedure Code has introduced the principle of subsidiarity of the opportunity, clearly set by art. 7 paragraph 2, regarding the cases where the prosecutor can elect to withdraw the criminal proceedings if, according to the case facts, there is no public interest in achieving its objective.

## **2. Chapter 2 – Dismissal of the criminal proceedings**

During the criminal procedure, the prosecutor reviews the evidence of the criminal prosecution step in order to establish whether they justify or not the arraignment of the defendant.

The New Criminal Procedure Code stipulates that the criminal prosecution consists of three

clear phases: crime investigation, defendant investigation and the case solution provided by the prosecutor.

This solution provided by the prosecutor represents not only the arraignment, which is one way to solve the case in the stage of criminal prosecution and the main way to carry out the objective of the criminal prosecution. (Dongoroz, 2003, 150)

Besides arraignment, there are solutions for not to indict measures and the agreement to plead guilty.

Arraignment can be decided by the prosecutor provided, after reviewing the evidence, there is a crime and its materiality, and provided it has been committed by the defendant who is legally bound.

So, the prosecutor decides the arraignment only if he considers carried out certain conditions, in a cumulative way, such as the findings regarding the observance of the legal provisions, a guarantee in finding the truth, whether the criminal prosecution is complete, and whether the existing evidence are sufficient, edifying, pertinent and legally administrated.

The indictment represents the final action of the criminal prosecution where the Court is informed on the criminal acts which are object of the trial and on the persons who are to be held criminally responsible for them.(Antoniou, 2011, 231)

We already mentioned that this stage also contains the not to indict solution, adopted if the legal provisions for arraignment are not observed, case where the prosecutor shall decide by order, dismissal of the case or withdrawal of the criminal proceedings.

So, if the prosecutor realizes there is a legal obstacle to start the criminal prosecution procedure, he shall order the dismissal.

In terms of obstacles to the beginning of the criminal prosecution, these are either circumstances with clear status, such as, amnesty or prescription, or others, temporary, such as the lack of the previous complaint, the lack of the authorization or information of the competent body. So, the absence of the criminal action object leads to the material and legal impossibility to carry out the objective of the criminal action, of the criminal liability in fact. No matter the obstacle, it leads to the same solution – dismissal.

Dismissal is always decided by order no matter the procedure stage of the case.

Case dismissal is adopted any time we have one of the cases provided by art 16 of the New Criminal Procedure Code and we don't have a suspect or a defendant in the case.

The absence of the suspect can mean that either the culprit is not known or the situation is not the result of a human being. (Neagu and Damaschin, 2015, 70)

If the culprit is not identified, dismissal cannot be adopted until the end of the term the criminal liability prescription.

Dismissal is regulated in detail by the provisions of art 315 of the Criminal Procedure Code.

Dismissal, as not to indict solution, replaces, in the New Criminal Procedure Code, solutions for removal of criminal prosecution, for cessation of the criminal prosecution or dismissal provided by the old law, representing an exclusive prerogative of the prosecutor and can be adopted either by order and by indictment, when arraignment is adopted for some of the acts of the criminal prosecution, while dismissal is adopted for others. (Alexandru, 2015, 33-34)

The dismissal order contains the prosecutor's mentions regarding the returning the restitution property or the decision to inform the Preliminary Chamber Judge on the proposition for total or partial elimination of a written document.

On the other hand, when found necessary, the prosecutor shall have the right to inform the Court on the proposal to rule the forced hospitalization measure according to special provisions on mental health matter.

In case of a dismissal proposition drawn up by criminal investigating bodies, and if the prosecutor acquiesces to the arguments of the written document, he shall not elaborate another argumentative act for the dismissal order.

According to art 316 paragraph 1 of the Criminal Procedure Code, the dismissal order is communicated to the informer, meaning the victim, the denouncer or the findings competent bodies, and also to the suspect, the culprit or other interested persons.

### 3. Chapter 3 - The withdrawal of the criminal proceedings

As we already saw, the New Criminal Procedure Code introduced the principle of opportunity, based on which the prosecutor can abandon the exercise of the criminal action, unless there is public interest in fulfilling its objective.

This new criminal procedure institution called abandon of the criminal prosecution replaces the provisions of the old Criminal Procedure Code which, through art. 10, emphasized the lack of the social danger level of the criminal action, meaning the replacement of the criminal liability.

The New Criminal Procedure Code offers detailed provisions at art 318 on regulation of the abandon of the criminal prosecution institution.

The waiver of the criminal prosecution is a not to indict solution, an exclusive prerogative of the prosecutor and can be adopted either by order and by indictment, provided certain conditions are fulfilled such as: the criminal prosecution has started, it envisages a crime punished by fine or prison time for maximum 7 years, the prosecutor finds that the act bears no public interest, given the way and means, the purpose and the person of suspect or culprit.

The abandon of the criminal prosecution is a solution for solving the case when the criminal prosecution has not begun, and also when during it, the prosecutor establishes that it bears no public interest, being similar to the dismissal in a way that it can be adopted not to begin the criminal prosecution.

The abandon of the criminal prosecution “in rem” is adopted when the crime author is not known, both before and after beginning the criminal prosecution.

The existent conditions for establishing whether there is or not a public interest, are a clear subjective element at the disposal of the prosecutor, both “in rem”, and especially “in personam”. (Udroiu, 2014, 70)

According to art 318 of the New Criminal Procedure Code, the main condition is that the solution is applied for the crimes punished by fines or by maximum 7 years prison time and there is not public interest in pursuing the matter. The law maker took into account the maximum for the prison time provided for the crime committed in consumed way, without taking into account the causes for punishment reducing or increasing. We understand from this provision that the withdrawal can be adopted by complying with two conditions at the same time, a positive and a negative one.

In terms of positive condition, we can see that the law maker doesn't make the difference between crimes according to their guilt forms; this way, we can have withdrawal of the criminal proceedings for crimes committed by fault, intentionally or *praeter intention*.

Therefore, given the maximum limits of the punishment established by the Criminal Code for some crimes, we can say that the application area of this solution, in the criminal prosecution stage, is rather large.

The public interest represents the essence of the negative condition that must be fulfilled in order to have withdrawal of the criminal proceedings. To establish the lack of the public interest we have to consider two different categories, depending on the way to carry out the criminal prosecution. (Bratulea, 2014, 71)

The law maker decides that the public interest depends on the content of the criminal act and on the clear circumstances of committing the crime, the way and means, the purpose, the resulted consequences or the possible ones, the efforts of the prosecuting bodies in carrying out the criminal procedure, by reference to the criminal act gravity and the time passed since then, the victim procedure attitude, the existence of a clear disproportion between the trial costs and the gravity of the resulted consequences or that could have been produced by committing that crime.

Nevertheless, the withdrawal of the criminal proceedings shall never be adopted in cases where the victim ended up dead.

In case of identified crime perpetrator, the assessment of the public interest takes into account also the person of the suspect or culprit, his behavior before committing the crime, the suspect or the culprit's attitude after having committed the crime and the efforts deployed to eliminate or reduce the criminal act consequences.

The lawmaker provided with the possibility that the prosecutor impose the defendant or culprit fulfillment of some obligations, secondary to the solution for withdrawal of the criminal

proceedings. These obligations can or cannot be decided by the prosecutor if the other conditions are complied with requested by the procedure of the withdrawal of the criminal proceedings. Therefore, these obligations are hypothetical, their application being left to the prosecutor's choice. (Tătar, 2014, 173)

After discussing with the suspect or defendant, the prosecutor can order that he observe one or several of the following obligations, such as elimination of the criminal act consequences or repair of the produced damage or finding a way to bring remedy for the prejudice.

The prosecutor can force the suspect or defendant to publically ask for pardon from the victim, to do unpaid work for community services between 30 -60 days, except for the cases where the health of the person doesn't allow him/her to do such work.

In practice, the expression "after discussing with the suspect" has been interpreted in different ways, meaning that on one hand it was thought as an agreement condition of the suspect or the defendant for complying with the obligations, and on the other hand, it was seen as a simple informing action of the suspect or defendant.

When the suspect/defendant refuses to do the unpaid work for community service by claiming health problems, these should be confirmed by a specialist MD .

The prosecutor's decision might take into account one or several obligations set by law.

The law maker foresaw the necessity to have a 9 month term for fulfillment of the prosecutor's decisions put into his decision.

Thus, if we have a refusal from part of the ex suspect/defendant in complying with the prosecutor's decision, the term ends up and the order is revoked together with the provisions of art 335 paragraph 3 of the New Criminal Procedure Code.

According to these regulations, when the prosecutor finds out that the suspect/defendant didn't fulfill with mala fide his obligations, he revokes the order and decides to begin the criminal prosecution again.

The suspect/defendant has the duty to prove the compliance with the set obligations or the present the motivation for the absence of such compliance.

The order stipulating the withdrawal of the criminal proceedings is thoroughly reviewed by the Chief Prosecutor of the Prosecutor's Office or, where appropriately, by the General Prosecutor of the Prosecutor's Office upon the Court of Appeal; when the order was issued by this one, the review is done by his hierarchic superior.

When the order is adopted by a Prosecutor from the Prosecutor's Office upon the High Court of Cassation and Justice, the order is reviewed by the Chief Prosecutor of the Department.

The order regarding the withdrawal of the criminal proceedings shall be communicated to the informing person, to the parties, and also to other interested persons and is forwarded for confirmation to the Judge of Preliminary Chamber of the Court considered competent try the case in first instance, according to law. It is a 10 day confirmation term.

The Judge of Preliminary Chamber sets the solution term and at the same time decides the summons procedure for the informing person, the parties, the suspect, the victim and other interested persons.

The Judge of Preliminary Chamber sets, by means of a well grounded decision, the legality and the substance of the solution called withdrawal criminal proceedings.

Absence of the summoned persons doesn't prevent the solution of the confirmation request.

The Judge of Preliminary Chamber, by his conclusions, admits or rejects the confirmation request after verifying the legality and thoroughness of the solution of withdrawing the criminal proceedings based on the case material and the criminal prosecution file and on the new documents presented and drawn up by prosecutor.

If the Judge of the Preliminary Chamber rejects the confirmation request, eliminates the solution of withdrawing the criminal proceedings and sends the case to the prosecutor to begin or complete the criminal procedure or to start the criminal procedure or complete it.

Also, in case of rejection of the confirmation request, the Judge of the Preliminary Chamber can eliminate the solution of withdrawing the criminal proceedings and order the dismissal.

The conclusion which rules one of these solutions is final. If the request for confirmation of the solution of withdrawing the criminal proceedings is rejected by the Judge of Preliminary Chamber, a new such solution cannot be ordered, no matter the reason brought forward. (Governmental

Emergency Order, 2016)

#### **4. Conclusions**

The New Criminal Procedure Code has brought significant changes regarding to the not to indict solutions

We found it necessary to show that the dismissal of the case is a solution ordered by the prosecutor, when he ascertains the existence of a legal obstacle to start the criminal action, as set out in art. 16 of the New Code of Criminal Procedure.

As a consequence of the subsidiary principle of opportunity, the withdrawal of the criminal proceedings is a new institution under the New Code of Criminal Procedure, under which, in cases regarding minors, the prosecutor can waive the exercise of criminal action, aiming to avoid the conduct of criminal trials there is no public interest.

#### **5. Bibliography**

1. Alexandru M., “*University Course on Criminal Procedure. General part*”, Pro Universitaria Publishing House of Bucharest, 2015, pp 33-34;.
2. Antoniu G., *Dictionary of Criminal Law and Criminal Procedure*, Hamangiu Publishing House of Bucharest, 2011, p.231;.
3. Bratulea D., “Dismissal and Withdrawing the Criminal Proceeding”, *Pro Lege Magazine* no 4/2014, p.71;.
4. Dongoroz V., *Theoretical Explanations on the New Romanian Criminal Procedure Code*, All Beck Publishing House of Bucharest, 2003, p. 150;.
5. Governmental Emergency Order nr.18/18<sup>th</sup> of May 2016.
6. Neagu I. Damaschin M., “Treaty on Criminal Procedure. Special Part”, *Universul Juridic* Publishing House of Bucharest, 2015, p 70.
7. Tătar D.C “Aspects on withdrawing the criminal proceedings according to the new procedure” *Pro Lege Magazine* no 3/2014, pp.173;
8. Udriou M., *Criminal Procedure*, C.H. Beck Publishing House of Bucharest, 2014, p.70.