

THE EXTENSION OF THE CRIMINAL PROSECUTION

Constantin Ioan GLIGA¹

Abstract: *Criminal prosecution is the first, mandatory and essential, non-public, predominantly written and non-contradictory phase of the criminal proceedings, through which the criminal investigation bodies carry out pre-trial procedural activities. The extension of the criminal prosecution concerns the situation in which it is necessary to modify the procedural framework if, after gathering evidence, the criminal investigation bodies may discover that the person under investigation had committed several acts provided for by criminal law for which the in rem criminal prosecution was not initiated, or that the act under investigation had been committed by several persons who were not considered at the beginning of the investigation. The starting point of this paper is the presentation of the hypotheses, depending on the stage of the procedure in which the procedural framework is modified, as well as the issues that may arise in practice in situations where the prosecution authorities do not proceed with the extension of the criminal prosecution.*

Key words: *criminal prosecution, in rem extension, in personam extension.*

1. The extension of the criminal prosecution – introductory aspects

The activities carried out by criminal prosecution bodies to find out the truth may often lead to the discovery of new facts closely related to those under investigation or may reveal that the investigated offence was committed by more persons than the one(s) initially considered. The institution of the extension of the criminal prosecution is provided for by Art. 311 of the Criminal Procedure Code, and three hypotheses can be identified from the reading of the legal text, depending on the procedural stage of the case (Udroiu, 2017, p. 1346). The first hypothesis envisaged concerns the situation in which the criminal prosecution was initiated *in rem* (concerning the offence), without having ordered further criminal prosecution of a specific person. This situation was encountered at the beginning of the criminal prosecution, taking into account the provisions of Art. 305 para. (1) of the Criminal Procedure Code, which stipulates that when the referral to the criminal prosecution bodies meets the conditions provided by law, the criminal prosecution body shall order the initiation of criminal proceedings in respect of the act even if the perpetrator is indicated or known. In these circumstances, at this stage of the procedure, it will only be possible to order the extension of the criminal prosecution to another act, different from the one initially envisaged when the

¹ *Transilvania* University of Braşov, constantin.gliga@unitbv.ro, corresponding author

in rem criminal prosecution was ordered since there can be no question of extending the criminal prosecution to other persons at this stage. The second hypothesis that we distinguish provides for the situation in which the criminal prosecution body has ordered the criminal prosecution of a specific person - *in personam*. In this case, the extension of the criminal prosecution may be ordered both in respect of another act committed by the same person and in respect of other persons who participated in the act that was reported to the criminal prosecution body. It is important to note that after further criminal prosecution of the person, it is no longer necessary to order the initiation or further criminal prosecution for the new acts or persons under investigation. Thus, by the extension of the criminal prosecution, the person concerned will acquire the status of a suspect and therefore, according to Art. 307 of the Criminal Procedure Code, the criminal prosecution body must inform the person concerned of the act for which he/she is suspected, its legal classification and procedural rights provided for by Art. 83 of the Criminal Procedure Code. The third hypothesis identified concerns the situation where the criminal prosecution body has initiated criminal proceedings. In this situation, new circumstances that were not taken into account at the start of the criminal prosecution and that give rise to the extension of the criminal prosecution do not have the effect of altering the procedural framework initially established, since this institution covers either *in rem* or *in personam* proceedings. What is important to note is that there must be a provision to extend the criminal prosecution concerning the acts or persons investigated before the extension of the criminal prosecution. It should be noted that this condition is met even where the prosecutor orders both the extension of the criminal prosecution and the extension of the criminal proceedings by the same order.

It should be noted that the new factual circumstances leading to the finding of the aggravating variant of the offence for which the *in rem* criminal prosecution was initiated do not require the extension of the criminal prosecution but only the change of the legal classification.

It follows from the above that the extension of the criminal prosecution is ordered when the following conditions are met (Udroiu, 2023, p. 93):

- a) There is a criminal prosecution initiated *in rem* or, as the case may be, continued *in personam*; thus, the order initiating the criminal prosecution/continuation of the criminal prosecution of the suspect delimits the procedural framework to be extended;
- b) To extend the scope of the proceedings to *other acts (in rem)*: new facts are established, which may be autonomous offences (for example, other offences in concurrence with the one for which the criminal prosecution was initiated) but also material acts of the same offence.

In practice, problems have been identified concerning the failure to comply with the legal provisions concerning the extension of *in rem* criminal prosecution, in which context we will deal with the failure of the criminal prosecution body to extend the criminal prosecution regarding the first hypothesis set out above, as well as the consequences arising as a result of this error.

2. Failure to Extend the Criminal Prosecution

By regulating the provisions of Art. 311 of the Criminal Procedure Code, the legislator intended to give the extension of the criminal prosecution the meaning of broadening the procedural framework, which came into being with the initiation of *in rem* criminal prosecution, following the vesting of the judicial body through one of the methods of referral provided by law (Court resolution of the pre-trial chamber judge no. 231/16.02.2016). However, in practice, there are situations in which the criminal prosecution body, although observing from the evidence that the widening of the procedural framework is required, fails to extend the criminal prosecution, which causes a series of violations of the procedural rights of the person under investigation, attracting the sanction of relative nullity under Art. 282 of the Criminal Procedure Code. In practice, these irregularities can be remedied in the pre-trial proceedings. Thus, to see the adverse consequences in the case of violation of procedural rights concerning the failure to extend the criminal prosecution, we will set out a state of facts that can be found in practice. We start from the premise that we are in the first hypothesis within the extension of the criminal prosecution and the *in rem* criminal prosecution was initiated in this case concerning the commission of the offences of trafficking in persons and rape. After carrying out investigations, the criminal prosecution body found that it was necessary to extend the *in rem* criminal prosecution to include the offence of forming a criminal group. Subsequently, from the investigations carried out, although the criminal prosecution body found that it was necessary to order the extension of the criminal prosecution for a larger number of offences, it omits this fact and, given that there are reasonable suspicions about the person who committed the offences, it orders the criminal prosecution of the defendant X, both in respect of the offences for which it was notified, in respect of which it was ordered to extend the *in rem* criminal prosecution, in respect of the offences for which it failed to order the extension, and then to order the criminal proceedings to be initiated and the indictment to be submitted to the Pre-Trial Chamber Judge. In these circumstances, we find ourselves in a situation in which the functional ability of the criminal proceedings initiated is impaired in such a way that it cannot be exercised to ensure the legal indictment of the accused person. We say this because, since the *in rem* criminal prosecution was conducted only in respect of certain offences, we practically find that the conduct of investigations at the stage of the prosecution did not cover the acts for which the extension was not issued, by omitting to extend the criminal prosecution. Consequently, if we do not have an act investigated, how can we have a suspect, then a defendant and, last but not least, an indictment for uninvestigated acts? Moreover, in addition to the fact of failure to extend the *in rem* criminal prosecution, we observe more and more often the tendency of the criminal prosecution bodies to present a significant part of the evidence during the *in rem* criminal prosecution phase, which leads to the violation of the provisions of Art. 305 para. (3) of the Criminal Procedure Code, producing direct effects also on the criminal proceedings initiated, and the functional ability to prosecute being thus deprived of functionality. Thus, violating the positive procedural obligation provided by Art. 305 para.(3) of the Criminal Procedure Code and carrying out the *in rem* criminal prosecution beyond the time at which an accusation could reasonably be made in

criminal matters will implicitly lead to an impairment of the right to a fair trial for the accused person, such as to entail the incidence of the sanction of relative nullity in the case, under the conditions of Art. 282 of the Criminal Procedure Code, concerning judicial procedures or evidence presented after that time. (DCCR no. 633/2018)

Concerning the **time interval separating the initiation of the *in rem* criminal prosecution from the initiation of the *in personam* criminal prosecution**, although it is not expressly provided for, the law specifies that the prosecutor shall order that criminal proceedings continue to be brought against a person when the acts and evidence in the file show reasonable indications that he or she has committed the act in respect of which criminal proceedings have been initiated, a provision which loses its safeguarding character if the vast majority of the criminal investigation proceedings are carried out at this stage, without allowing the suspect to be informed of the stage of the proceedings, the evidence and depriving him or her of the fair right to give evidence to counterbalance the accusation.

In this context, it is necessary to invoke the *unlawful presentation of evidence* during the criminal prosecution based on the fact that a fundamental principle of the criminal proceedings was violated, namely the presentation of evidence, of a significant fraction, the majority of it, before the accused person acquires the status of suspect, thus the **imperative rule** that the presentation of evidence must take place during the *in personam* prosecution being unjustifiably violated. As long as the criminal prosecution body only presented evidence about the defendant X, the reasonable suspicion concerning him/her is certain, so that, under both the ECHR case law and the provisions of Art. 77 of the Criminal Procedure Code, in conjunction with the provisions of Art. 305 para. (3) of the Criminal Procedure Code, **the prosecutor was obliged to establish the existence of a criminal accusation, to order the continuation of the criminal prosecution against suspect X** and to inform him/her of this right. Moreover, the ECHR has rightly held that **a person acquires the status of a suspect, which gives rise to the fundamental guarantees laid down in Art. 6 of the Convention, not from the moment when that status is brought to his/her knowledge, but beforehand, from the moment when the national authorities had plausible grounds for suspecting him/her of having committed a criminal offence** (ECHR, Brusco v. France, Application no. 1466/07). Thus, by how the prosecutor chooses to present the essential evidence during the *in rem* criminal prosecution phase, the defendant will be practically deprived of the exercise of the rights guaranteed by Art. 83 of the Criminal Procedure Code, namely to be able to make use of the provisions of Art. 92 para. (1), (2), (4) and (8) of the Criminal Procedure Code, which entails disregard of the right to a fair trial, in the context of the right of defense and equality of arms. The right to defense pursues the primary aim of a trial, namely to find out the truth, and to be able to defend oneself, the person must know the acts of which he/she is accused, as well as the evidence/data on which it is based, not knowing these elements affecting the exercise of the right to defense, and the status of the offender, is incompatible with the right to defense, lacking the specific remedy to participate in the trial. In this context, at the pre-trial chamber stage, what the judge is asked to **find** is **that the legal provisions have been diverted from their purpose**, in the sense that the public prosecutor did not start the *in personam* criminal prosecution

(although, according to the criminal investigation proceedings, he/she had all the necessary elements) precisely so that the defendant and possibly his/her lawyer would not have access to the file, could not participate in the criminal prosecution, the taking of evidence and in the early hearing procedure!

The participation of the suspect through his/her lawyer in criminal investigation proceedings (hearing of witnesses, aggrieved parties) **ensures that the right to a fair trial is respected** because only in this way can the interests of the defense be compared with those of the victims or witnesses called to testify. The need to protect victims and witnesses cannot prejudice the substance of the right of defense. To the extent that it would have been necessary, they could have requested protective measures. The accused must be given adequate and sufficient opportunity to challenge the testimony of witnesses and victims at the time it is given or later, including at the stage of the criminal prosecution when the prosecutor will ultimately consider whether the accused should be prosecuted.

Going further with the reasoning, we can also invoke **Art. 8 of the Criminal Procedure Code**, in conjunction with Art. 21 para. (3) of the Constitution, where the legislator expressly provides that the judicial bodies must conduct the criminal prosecution and trial in compliance with procedural guarantees and the rights of the parties and litigants to ensure the right to a fair trial. As such, there is this specific and continuous obligation and it is provided by the legislator for the prosecution body, which aims to carry out the criminal investigation proceedings in compliance with the law, and when there have been legislative violations, according to art. 282 para. 4 of the Criminal Procedure Code, relative nullity may be invoked during the pre-trial phase, and the prosecutor must redo the judicial orders/procedures. The applicable sanction is without doubt relative nullity, as the legal provisions laid down by the legislator have been violated in a prejudicial manner and the right to a fair trial has been irremediably infringed.

Thus, **the correct interpretation of the provisions of Art. 311 of the Criminal Procedure Code always obliges the criminal prosecution bodies, after the beginning of the criminal prosecution, in the situation in which they find new facts during the *in rem* criminal prosecution phase, to order the extension of the criminal prosecution concerning the new facts found. Also, if the evidence presented after the extension of the criminal prosecution results in a reasonable suspicion regarding the person who committed the offence, under Art. 305 para.(3) of the Criminal Procedure Code, the criminal prosecution bodies must provide the accused with the status of a suspect and all the rights, implicitly the obligations, deriving from this position.**

In a situation where both the provisions of Art. 311 and those of Art. 305 para.(3) of the Criminal Procedure Code are violated, the accused's right to defense is violated not only because he/she will not have the opportunity to defend himself/herself as a suspect, not being informed of his/her status, rights and obligations, but also because he/she will not be guaranteed the right to be given evidence concerning his/her person, which would neutralize the need to extend the criminal proceedings.

Violation of the positive procedural obligation provided for by Art. 311 and Art. 305 para. (3) of the Criminal Procedure Code, by carrying out criminal investigation proceedings without an *in rem* extension as well as the taking of evidence at this stage,

beyond the time when a criminal accusation could have been brought reasonably, leads to an infringement of the right to a fair trial of the accused, such as to entail the incidence of the **sanction of relative nullity** in the case, under the conditions of Art. 282 of the Criminal Procedure Code, concerning the judicial orders or evidence presented after that time.

Regarding the omission to extend the criminal prosecution, in recent practice, it is possible to identify practical cases in which the pre-trial chamber judge found and sanctioned the failure to extend the criminal prosecution, as follows:

The Carei District Court held that *"obviously, the lack of extension of the criminal prosecution for each of the above acts has direct consequences on the fairness of the procedure and on the possibility of the defendant to exercise his procedural rights. In addition, the court notes the evasive manner in which the criminal investigation body chose to inform the defendant, during his hearing as a suspect, that he is suspected of committing the offence of fraudulent bankruptcy, provided for and punishable by Art. 241, para.(1) let. a) and c) of the Criminal Code, consisting in the fact that, as special administrator of S.C. V&G S.R.L., a company in bankruptcy, he made payments and terminated lease contracts without the approval of the appointed judicial liquidator, lawyer (page 10, vol. I of the criminal prosecution file). Moreover, if one were to accept the hypothesis that any irregularity would be covered by the disclosure of the subject matter of the criminal accusation, this would imply that the order of judicial orders in criminal proceedings, as provided for by the provisions of the Criminal Procedure Code, would be unnecessary or, moreover, that there would no longer be a need to draw up essential and mandatory orders provided for by the procedural provisions (e.g., the initiation of the criminal prosecution, the extension of the criminal prosecution). Compliance with the provisions of Art. 311 of the Criminal Procedure Code is not a matter of expediency left to the discretion of the prosecutor, since, although relative nullities may indeed be covered, it is found that such an approach is not possible in the present case and would be likely to violate the principle of legality provided for by Art. 2 of the Criminal Procedure Code, especially since this situation has also spread to the notification of the case. Thus, it should be noted that the criminal proceedings are conducted under the principle of legality, which requires the fulfillment of all judicial orders provided for by the procedural law, without which it is inconceivable to resolve the conflict of criminal law, and there is no such judicial order in the present case, namely the extension of the criminal prosecution. However, by issuing judicial orders in other than legal conditions or even by omitting to perform them, the prerequisites for a fair resolution of the case are no longer ensured and criminal procedural sanctions intervene as measures to ensure compliance with the principle of legality in the criminal trial. In light of these considerations, the pre-trial chamber judge considers that the sanction of relative nullity of the order to continue the criminal prosecution no. ###/P/2021 of 15.09.2022 (pages 92-93, vol. I of the criminal prosecution file), the order to initiate criminal proceedings no. ###/P/2021 of 21.02.2023 (pages 158-160, vol. I of the criminal prosecution file) and the order to change the legal classification no. ###/P/2021 of 10.07.2023 (pages 140-143, vol. I of the criminal prosecution file) is applicable, given the provisions of Art. 280 para.(2) of the Criminal Procedure Code, as*

well as their subsequent orders. At the same time, taking into account the obvious inconsistencies between the acts for which the *in rem* criminal prosecution was initiated and those for which it was ordered to continue the criminal prosecution, the initiation of criminal proceedings, the change of legal classification and the indictment, the fact that the above-mentioned orders are subject to the sanction of relative nullity, as well as the provisions of Art. 328 para.(1), thesis I of the Criminal Procedure Code, according to which the indictment is limited to the act and the person for which the criminal prosecution was conducted, the irregularity of indictment no. #####/P/2021 dated 04.09.2023 of the Public Prosecutor's Office attached to the Carei District Court shall be found, which entails the impossibility to establish the subject matter and limits of the trial." (The pre-trial chamber judgement no.217/2024) The same conclusions were reached by the Ilfov Court (The pre-trial chamber judgement no.290/2021).

In the same way, the Dolj Court held that "regarding the irregularity of the referral to the court of indictment no. 136/D/P/2023 dated 22.11.2023 issued by the Public Prosecutor's Office attached to the High Court of Cassation and Justice - The Directorate for the Investigation of Organized Crime and Terrorism - ...Territorial Service concerning the indictment of the defendant X for the offence under Art. 335, para. 2 of the Criminal Code arising from the lack of extension of the *in rem* criminal prosecution for the offence under Art. 335, para. 2 of the Criminal Code, the Pre-Trial Chamber judge finds that the indictment is well-founded. Examination of the documents in the criminal case file shows that after the *ex officio* referral to the prosecutor on the suspicion of committing the offence provided for by Art. 335, para. 2 of the Criminal Code (minutes of 11.01.2023, page 29), order no. 113D/P/2022 of 16.01.2023 issued by the Public Prosecutor's Office attached to the High Court of Cassation and Justice - Directorate for the Investigation of Organized Crime and Terrorism - The Territorial Service decided to continue the criminal prosecution of suspect X for the offence under Art. 335, para. 2 of the Criminal Code, and on 11.10.2023, by order no. 113D/P/2022, he became a defendant. However, in the absence of the extension of the criminal prosecution for the offence for which the *ex officio* referral was ordered, the attribution of the status of the suspect, and then of the defendant, to the said X was made in violation of the principle of legality of the criminal proceedings, provided for by Art. 2 of the Criminal Procedure Code, but also in violation of Art. 311, para. 1 of the Criminal Procedure Code, according to which, if, after the start of the criminal prosecution, the criminal prosecution body finds new facts, it orders the extension of the criminal prosecution.#### In consideration of the above arguments, the pre-trial chamber judge shall admit in part the motions and exceptions invoked by the defendant based on Art. 345 para.1 and 3 of the Criminal Procedure Code" (The pre-trial chamber judgement dated 21.03.2024).

3. Conclusions

Given the above, we note that the lack of diligence of the criminal prosecution body concerning the failure to extend the criminal prosecution at the procedural stage of the *in rem* criminal prosecution and conducting investigations in these circumstances, concerning new facts that were not taken into account at the time of the referral,

produce a series of violations of the rights of the accused person and implicitly procedural harm that can only be remedied by applying the sanction of relative nullity.

Also, as the activity of the prosecution bodies progresses and the criminal prosecution is ordered to continue, then the criminal proceedings are initiated and finally the indictment is submitted to the court, we observe that the harm caused is amplified, the provisions of Art. 305 para. (3) of the Criminal Procedure Code regarding the moment at which a person must acquire the status of a suspect is violated, which entails disregard of the right to a fair trial, in this case also violating the right to defence and equality of arms, rights provided and guaranteed by the Romanian Constitution under Art. 21 para. (3), and the provisions of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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