WAIVER TO THE APPLICATION OF PENALTY IN THE NEW CRIMINAL CODE

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ABSTRACT: *WAIVER TO THE APPLICATION OF PENALTY, LEGAL INSTITUTION NEWLY ESTABLISHED IN THE CRIMINAL LEGISLATION OF ROMANIA, ALLOWS THE JUDGE, IN SOME CIRCUMSTANCES, WHEN HE IS CONVINCED THAT THE OFFENDER CAN BE CORRECTED BY APPLYING A WARNING, TO NOT APPLY A PENALTY FOR THE CRIME SUBJECT TO THE TRIAL. EVEN IF ALL THE CONDITIONS REQUESTED BY THE LAW ARE MET, USING THIS INSTITUTION IS NOT MANDATORY, BUT OPTIONAL, THE COURT BEING THE ONE THAT DETERMINES IF IT IS OR NOT OPPORTUNE* [1].

KEY WORDS: *WAIVER TO THE APPLICATION OF PENALTY, NEW CRIMINAL CODE, WARNING, CRIME*

1. INTRODUCTION

Waiver to the application of penalty, legal institution newly entered in the criminal legislation of Romania, allows the judge, under certain conditions, when he is convinced that the offender – adult physical person can be corrected by applying a warning, to not apply a penalty for the crime subject to the trial. Even if all the conditions applied by the law are met, using this institution is not mandatory, but optional, the court being the one that appreciates if it is or not opportune [2].

Waiver to the application of penalty is regulated in Title III "Penalties", Chapter V "Individualization of penalties", Section 3 "Waiver to the application of penalty", art. 80-82 of the General Part of the New Criminal Code [3].

The institution of the waiver to the application of penalty is based on the trust – firstly of the legislator establishing it and then of the judges applying it to the concrete cases – in the possibilities for correcting the person who committed a crime, without applying a penalty to this person [4].

With respect to the legal nature of the institution of the waiver to the application of penalty, in the doctrine more opinions were expressed. Thus, one opinion considered that the waiver to the application of penalty represents a cause eliminating the criminal character of the act [5]. Another opinion shows that, although regulated in Chapter V "Individualization of penalties", within Title III (Penalties) of the New Criminal Code, the waiver to the application of penalty is not a way of individualizing the penalty, but a way

of replacing the criminal liability with an administrative liability [6]. Finally, according to another opinion, we agree with, the waiver to the application of penalty is a new institution, an alternative measure for determining a penalty, having no veritable correspondent within the Criminal code of 1968 and representing an extension in the trial stage of the principle of prosecution opportunity, thereby providing the judge with the possibility of not sanctioning some crimes of reduced severity [7].

Therefore, as long as, from the procedural point of view, the waiver to the application of penalty represents one of the procedural solutions (different from the conviction) providing the possibility of solving the criminal legal relationship occurred as a result of a crime, in terms of the substantive law, the institution represents the only measure of legal individualization which may be valorized before the stage of determining a penalty [8].

2. CONDITIONS FOR THE WAIVER TO THE APPLICATION OF PENALTY

Waiver to the application of penalty may be decided by the court if the conditions provided by the law (art. 80 of the New Criminal Code), on the crime committed by the offender are met [9].

2.1. Conditions on the committed crime (objective conditions) [10]:

a) Penalty provided by the law for the committed crime shall be a fine or imprisonment for 5 years or less;

The fine may be provided by the law as sole penalty or alternatively with the imprisonment for maximum 5 years (for example, the crime of battery and other acts of violence, provided by the art. 193 paragraph 1 of the New Criminal Code; the fight, provided by the art. 198 paragraph 1 of the New Criminal Code; the termination of pregnancy, provided by art. 201, paragraph 1 of the New Criminal Code; the threat; the harassment; the exploitation of begging, provided by art. 214 paragraph 1 of the New Criminal Code; using a child for begging; the home invasion; the violation of the headquarter; the theft etc.)

If the act remained under the form of attempt, it is the penalty provided by the law for the consumed crime which is important.

b)The committed crime should have a reduced severity.

The form of guilt with which the crime is committed (intention, by fault, oblique intent) is not important.

The reduced social danger of the crime does not result *eo ipso* from the limits of the penalty provided by the law, being necessary the court to find it *in concreto* depending on the following criteria: nature and extension of the caused consequences, used means, way and circumstances in which the crime was committed, reason and intended purpose.

2.2. Conditions on the offender (subjective conditions):

a) The offender must not have been previously convicted, excepting the cases provided by the art. 42 letter a) and letter b) of the New Criminal Code, namely the acts which are not any more provided by the criminal law and the amnestied crimes, or for which the rehabilitation intervened or the rehabilitation period was completed (art. 80 paragraph 2 letter a of the New Criminal Code).

Obviously, the text refers to a definitive conviction decision, thus excluding the solution of delay or waiver from which the offender benefited, if they remained definitive more than 2 years before the date of committing the crime for which he/she is on trial [11].

It is not important the form of guilt the crime is committed with (intention, by fault, oblique intent) for which the definitive conviction was decided, nor the penalty provided by the law for this crime or the penalty which was previously determined for the offender (for example, the existence of a definitive conviction to the penalty of fine determined for a crime by fault may be an impediment on deciding the waiver to the application of penalty) [12].

Law no. 187/2012 for applying the Law no. 286/2009 on the Criminal Code [13], in art. 239, provides that the term *conviction* used in art. 80 paragraph 2 letter a) of the New Criminal Code also refers to the decisions by which, against the offender, there was taken, during the age of minority, an educative measure, excepting the case when there are at least 2 years after the execution date or after this measure was considered as executed.

Art. 9 paragraph 2 of the Law no. 187/2012 provides that the crimes committed during the age of minority, for which there were applied penalty based on the provisions of the previous Criminal Code, do not constitute impediments for deciding the waiver to the application of penalty for a crime committed after the definitive conviction.

b) Against the same offender the waiver to the application of penalty must have not been decided the last 2 years before committing the crime for which he/she is on trial;

The Law no. 290/2004 on the criminal record, republished, with the subsequent amendments and completions [14], in art. 6 paragraph 1, provides that within the General Inspectorate of Romanian Police the central criminal record shall be organized and operated registering the physical persons born outside Romania and the foreign legal persons subject to the criminal record, operative records and special records of the police, which committed crimes on the Romanian territory and which were convicted or against which the waiver or delay of penalty was decided or against which preventive measures were decided, as well as the persons found in the situations provided by the art. 14 paragraph 2 of the law.

In art. 9 letter b) the same law provides that, in terms of physical persons, the criminal record shall also include data on waiver or delay of penalty, commencement, interruption and termination of execution of penalties and educational measures, supervised suspension of the penalty execution, replacement, timing and payment of criminal fines.

Waiver to the application of penalty may not be decided for the crime newly committed if against the same offender the penalty was decided by a definitive decision the last 2 years before committing the crime for which he/she is on the trial; in this situation it may decide either the mandatory or optional revocation of the penalty delay, or the maintenance of the previous measure and delaying the penalty for the crime newly committed by fault [15].

c) The offender must not have absconded from the prosecution or trial or must not have tried to baffle finding the truth or identifying and holding liable the authors or the participants in the crime;

For benefiting from the measure of the waiver to the application of penalty, it is necessary that the offender not have made difficult or not have tried to baffle the dispensation of justice, namely he/she should have a loyal procedural attitude [16].

d) In relation to the person of the offender, to his/her behavior before committing the crime, to his/her efforts for eliminating or reducing the consequences of the crime, as well as to his/her possibilities of correction, the court appreciates that applying a penalty might be inopportune due to the consequences it should have on the offender.

In order to appreciate that applying a penalty should be inopportune due to the consequences it might have on the offender, the court shall take into account the following criteria: the person of the offender, the behavior he/she had before committing the crime, his/her efforts to eliminate or reduce the consequences of the crime, as well as his/her possibilities of correction. For appreciating these criteria, the court may decide preparing an assessment report by the probation service [17].

The fulfillment of the above mentioned conditions does not create a right for the offender to obtain a solution of waiver to the application of penalty, but only an option, the court having the possibility to decide the delay of penalty or even a conviction solution [18].

Waiver to the application of penalty may be also decided in case of multiple crimes if for each concurrent crime the above mentioned conditions are met.

3. WARNING

When deciding the waiver to the application of penalty, the court applies a warning against the offender, according to art. 81 paragraph 1 of the New Criminal Code.

Thus, applying the warning is not an optional operation of the court, but it is mandatorily decided, whenever it waived to the application of the penalty [19].

According to art. 81 paragraph 2 of the New Criminal Code, the warning consists of presenting the reasons determining the waiver to the application of penalty and warning the offender about his/her further behavior and the consequences to which he/she exposes if committing crimes again.

In case of the concurrence of several crimes, the court applies against the offender, according to the art. 81 paragraph 3 of the New Criminal Code, a single warning.

In the New Criminal Code the warning is not provided among the penalties of criminal law and it is not considered as penalty with administrative character. Unlike the New Criminal Code, which does not define the warning from the legal point of view, the previous Criminal Code provided that the warning [more precisely "reprimand with warning" – art. 91 letter b)] had an administrative character and was applied in case of the institution called "replacement of criminal liability", respectively for the acts which did not represent a social danger needed for a crime (art. 18^1). From the interpretation of the provisions of art. 81 of the New Criminal Code it results that the warning is absolutely dependent on the measure of waiver to the application of penalty [20].

According to art. 404 paragraph 3 of the New Criminal Procedure Code [21], when the court decides the waiver to the application of penalty, in the preliminary part it shall mention the application of the warning.

According to art. 575 of the New Criminal Procedure Code, the execution of the warning is immediately carried out, during the meeting where the decision was pronounced. If the warning may not be carried out immediately after being pronounced, its execution may be carried out when the decision shall be declared definitive, by communicating a copy to the person against which it shall be applied.

4. EFFECTS

When the court decides the waiver to the application of penalty, it does not pronounce the offender's conviction, but it applies against him/her, as above mentioned, a warning [22].

Once the warning was applied, it is able to warn him/her on the further activity, but it does not establish an additional liability or a consequence related to the "waiver to the application of penalty", if the offender should commit a new crime [23].

The provisions of art. 82 paragraph 1 of the New Criminal Code provide that the person against which it decided the waiver to the application of penalty is not subject to any forfeiting, interdiction or incapacity which could arise from the committed crime.

This means, for example, that regardless the committed crime, the offender may not be forfeited from the right to be custodian or trustee or forbidden to occupy a certain public position or to be forfeited from the right to exercise a certain profession, for the reason that he/she committed a crime [24].

According to art. 82 paragraph 2 of the New Criminal Code, the waiver to the application of penalty does not produce effects on the execution of safety measures and on the civil obligations provided by the decision.

Thus, even if the waiver to the application of penalty is decided, the court may apply in the case safety measures [25] (for example, confiscation of the goods used for committing the crime) or to oblige the offender to totally or partially repair the prejudice caused by the crime, approving the civil action of the civil party [26].

Not being a conviction solution, the waiver to the application of penalty may not be the first term of the relapse or of the intermediary plurality [27].

5. CANCELATION OF THE WAIVER TO THE APPLICATION OF PENALTY

In the provisions of art. 82 paragraph 3 of the New Criminal Code is regulated the cancelation of the waiver to the application of penalty. Thus, if during 2 years after the decision on waiver to the application of penalty was declared definitive, it discovers that the person against which this measure was taken committed another crime before the decision remained definitive, for which a penalty was established even after the expiration of this period, the waiver to the application of penalty shall be canceled and it shall establish the penalty for the crime which initially leaded to the waiver to the application of penalty, then applying, as appropriate, the provisions on multiple crimes, relapse or intermediary plurality.

The procedural provisions on the cancelation of the waiver to the application of penalty are found in art. 581^1 of the New Criminal Procedure Code.

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[15]. Mihail Udroiu, *op. cit*., p. 248.

[16]. *Idem*, p. 249.

[17]. *Ibidem*.

[18]. *Ibidem*.

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Meaning that the warning represents a penalty with administrative character, see Vicenţiu-Răzvan Gherghe, *Instituţia renunţării la aplicarea pedepsei în noul Cod penal român*, in *Dreptul* no.

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[26]. Mihail Udroiu, *op. cit*., p. 250.

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