

THE INADMISSIBILITY OF THE COMPLAINT AGAINST THE ORDER ISSUED BY THE SUPERIOR PROSECUTOR IN THE PROCEDURE ESTABLISHED BY ART. 340 OF THE CRIMINAL PROCEDURE CODE

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Abstract

The national legislation gives the right to the litigant to appeal in case of dissatisfaction with the classification solution that the case prosecutor can issue in the first cycle of the criminal trial.

Thus, the classification of the prosecutor can be assessed at first instance by his superior prosecutor and, in case of maintaining the solution of not referring to the case, the interested party may appeal to the judge of the preliminary chamber of the competent court to rule on the legality and regularity of the grading order.

This procedure for checking the correctness of the classification solution is laid down in the texts of art. 339 and 340 of the Criminal Procedure Code before the superior prosecutor, according to the provisions of art. 339 of the Criminal Procedure Code.

And, in the light of the provisions of art. 340 para. (1) of the Criminal Procedure Code, by the marginal name "the complaint against remedies for non-prosecution or non-referral", it appears that the person whose complaint against the solution to the prosecution or the waiver of prosecution, issued by the order or the bill of indictment, has been rejected in accordance with art. 339, can make a complaint within 20 days after the notification, to the judge of the preliminary chamber of the court to which the court would be empowered under the law to judge the case in the first court.

It follows from the interpretation of the abovementioned legal text that the procedure laid down in art. 340 of the Criminal Procedure Code provides that solely the solution to the classification ordered by the case prosecutor's order may be subject to the submission of the court control and not the verdict of the superior prosecutor in the stage of the preliminary procedure within the prosecutor's office.

However, in the practice of courts, petitioners often criticize the solution given by the superior prosecutor through his order, by which the complaint against the case prosecutor's classification solution is rejected.

In such cases, although the practice is not uniform, I believe that the complaint made before the court by which criticism is made of the order issued by the superior prosecutor in the procedure established by the provisions of art. 339 of the Criminal Procedure Code is to be rejected as inadmissible.

Keywords: dismissal solution, complaint, superior prosecutor, bill of indictment, inadmissibility.

1. Introduction

1.1. What matter does the paper cover?

This paper addresses a common theme in judicial practice, namely the particularities of a remedy at law during the criminal investigation, namely the complaint against the order by which the case prosecutor dismisses the case, which is often wrongly formulated by the petitioners, in the sense that the complaint is filed against the order of the hierarchically superior prosecutor verifying the case prosecutor's order and confirming the dismissal solution.

1.2. Why is the studied matter important?

The subject chosen by the authors is of particular importance, as the national legislation offers the possibility, in an investigation in the first cycle of the criminal process (respectively in the criminal investigation phase) that, in the event that a dismissal

solution is ordered by the case prosecutor, the party dissatisfied with this decision should contest.

The Criminal Procedure Code imposes a strict procedure that the party that wishes to contest the case prosecutor's filing solution must follow, in this case there are two stages regulated by the provisions of art. 339-340.

Thus, pursuant to the provisions of art. 339 of the Criminal Procedure Code, against the dismissal solution ordered by the case prosecutor, the interested party may file a complaint, within 20 days from the communication of the ordinance to the hierarchically superior prosecutor who is, as the case may be, the chief prosecutor of the prosecutor's office when the case is investigated. to the prosecutor's offices attached to the judges and to the prosecutor's offices attached to the courts, the prosecutor general of the prosecutor's office attached to the court of appeal, when the case is investigated by the prosecutor's offices attached to the courts of appeal or by the chief prosecutor near the High Court of Cassation and Justice, when the criminal

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case was investigated by a section of the General Prosecutor's Office (*e.g.* pardon, criminal prosecution and forensics section, military prosecutor's office section) or when it is investigated by a specialized structure such as the National Anticorruption Directorate and the Directorate for Investigating Organized Crime and Terrorism.

Thus, in a first stage, the dismissal solution is verified by the hierarchical prosecutor of the one who ordered such solution, this being able to ascertain the validity of the reasons underlying the complaint, with the consequence of the reversal of the ordinance by which the dismissal was ordered, or it can be assessed that the dismissal solution is legal and thorough, thus rejecting the complaint as unfounded. Also, if the complaint is not filed within the procedural term of 20 days imposed by the provisions of art. 339 para. (4) of the Criminal Procedure Code then the complaint shall be rejected as late.

It should be mentioned that the same procedure must be followed by the interested person also in the hypothesis in which the dismissal solution is ordered by the indictment, the Criminal Procedure Code allowing the prosecutor, as provided for in art. 314, art. 328 referred to in art. 340 para. (1) to order the dismissal solutions also by the act by which the case is forwarded to court for other facts or for other defendants.

If the complaint is rejected by the hierarchically superior prosecutor, the person who challenged the dismissal solution still has the possibility to submit this decision of the case prosecutor to the legality control of a court.

The solution is natural since the legislator wanted to give the litigants all the guarantees of impartiality regarding the verification of a solution by which the criminal investigation against certain facts and persons complained to the criminal investigation bodies is concluded. Thus, it is appreciated that all the procedural rights of the petitioner are respected by verifying the filing solution by an institution independent of the one that issued the ordinance or indictment.

As in the case of the complaint filed before the hierarchically superior prosecutor, and in the case of the complaint addressed to the court, this must be done within the mandatory term of 20 days from the communication of the ordinance rejecting the complaint against the dismissal solution, otherwise the person being deprived of the right to submit for analysis the dismissal solution before the courts, the action having to be rejected as late.

Also, art. 340 para. (3) of the Criminal Procedure Code provides the obligatory mentions that must contain the complaint addressed to the courts, the petitioner, in case we are in the presence of an interested natural person, must mention his name, surname, personal numerical code as well as his

domicile, or in case petitioner is a legal person, the name, headquarters and indication of the legal representative or the conventional representative, the date of the ordinance or indictment ordering the filing solution, the number of the criminal investigation file, the name of the issuing prosecutor's office and the factual and legal reasons which substantiates the complaint.

2. Procedural issues and the resolution of the complaint by the competent court

The jurisdiction of the Preliminary Chamber within the court which would have the competence to judge the case in the first instance belongs to the Judge of the Preliminary Chamber if it were invested with the indictment, as an act of notification of the court. The Judge of the Preliminary Chamber may order, in cases where, during the criminal investigation, it was not ordered to initiate the criminal action either to admit the complaint in order to initiate or complete the criminal investigation, as the case may be, or to initiate the criminal action and complete the criminal investigation, admits the complaint and changes the basis of the classification if it is not more valid for the person who made the complaint, or rejects the complaint as unfounded, late or inadmissible.

If the criminal action was initiated during the criminal investigation, the Preliminary Chamber Judge may reject the complaint as late or inadmissible or may admit the complaint in case he may send a motivated case to the prosecutor to complete the criminal investigation. The Judge may also repeal the contested solution and order the trial of the facts and persons who are subject of the case and for whom the criminal action was initiated, verifying the legality and sufficiency of the evidentiary material and sending the case for random distribution, or may change the basis of the classification, if this change does not create a more unfavorable situation for the person who filed the complaint.

However, even in this situation, what is subject to analysis by the Preliminary Chamber Judge within the competent court is also the ordinance disposing the solution of not prosecuting the case prosecutor, and not the solution of the hierarchically superior prosecutor rejecting the dismissal solution.

In practice, confusion is often created regarding the act to be challenged in the procedure established by the provisions of art. 340 of the Criminal Procedure Code, which is probably due to the wording of para. (1) of this legal text in which the legislator states as follows: "*The person whose complaint against the classification solution, disposed by ordinance or indictment, was rejected according to art. 339 may file*

a complaint, within 20 days of communication, to the Judge of the Preliminary Chamber of the court which would have, according to the law, the competence to judge the case in the first court”.

Thus, persons whose complaint is rejected by the prosecutor who has ruled on the legality and validity of the non-prosecution solution tend to criticize the latter ordinance and not the dismissal solution ordered by the case prosecutor's ordinance.

In these conditions, in practice different solutions were offered, there are courts that have overlooked this lack of compliance, appreciating that, in essence, it criticizes the dismissal solution and other courts that, analysing the formal conditions found that the complaint is directed against the solution of the hierarchically superior prosecutor and not of the one who ordered the dismissal solution, even if the criticisms are fundamentally aimed at the dismissal solution.

We are of the opinion that, in the event that the ordinance of the case prosecutor by which he rendered the solution of non-trial is not exclusively challenged, the solution imposed in the case would be that of rejection as inadmissible of the complaint by the Preliminary Chamber Judge within the competent court.

This solution is justified because, from the interpretation of the text of art. 340 of the Criminal Procedure Code it results that the object of this procedure is exclusively the submission of the control of the courts to the dismissal solution ordered by the ordinance of the case prosecutor, and not to the release made by the hierarchically superior prosecutor during the preliminary procedure within the prosecutor's office.

In this sense, there is also the doctrine in criminal matters which stated as follows:

“[...] in the procedure regulated within art. 340 of the New Criminal Procedure Code verifies solely the legality and validity of the solution of dismissal or waiver of the criminal investigation given by the case prosecutor, in this procedure the judge cannot examine the ordinance of the prosecutor or the superior admits the complaint, disproves the solution from the prosecutor's ordinance or the disposition from the dismissal indictment and gives the same or another dismissal solution, for other reasons or for some of the reasons invoked by the petitioner, the above rule is applicable).

Thus, the Judge of the Preliminary Chamber cannot examine the legality and validity of the ordinance of the prosecutor who solves and rejects the

complaint under art. 339 of the New Criminal Procedure Code or the criticism regarding the non-observance by the prosecutor of the term for solving the complaint provided by art. 338 because, from the perspective of the technique of regulating the norm, the legislator has concretely ruled that the solution of the complaint based on art. 339 by the chief prosecutor of the prosecutor's office, the general prosecutor of the prosecutor's office attached to the court of appeal or the chief prosecutor of the section or, as the case may be, by the hierarchically superior prosecutor constitutes only a mandatory prior procedure, provided by law for the exercise of the complaint under the conditions provided for by art. 340 para. (1) of the New Criminal Procedure Code.

In case of rejecting the complaint formulated against the case prosecutor's solution, the Judge of the Preliminary Chamber cannot rule on the act by which the head of the prosecutor's office or the hierarchically superior prosecutor solved the complaint formulated according to art. 339 of the New Criminal Procedure Code, even if the complaint made by the petitioner were made within these limits.”¹

Also, in the specialized literature in criminal matters it has been shown that:

„only the solutions on the criminal trial, of non-prosecution ordered by the prosecutor who solved the case, and not other dispositions or procedural acts, are subject to judicial control. [...]”²

In accordance with the doctrine the practice in criminal matters, by way of example, by Decision no. 406 of January 19, 2005, the HCCJ (crim. s.) ruled that the limits of the procedures for solving complaints before the courts are clear and concern exclusively the dismissal solution provided by the case prosecutor's act, and not the hierarchically superior prosecutor's act.

It is important to mention that, considering the provisions of art. 340 of the Criminal Procedure Code and taking into account the content of the complaint in which the solution of the hierarchically superior prosecutor is attacked, the dismissal solution submitted by the order of dismissal remains final, not being attacked within 20 days as required by the mandatory provisions of the Criminal Procedure Code.

As an example, it is worth mentioning the recent solution rendered by the Pitești County Court in case no. 10588/280/2021 which, by the FN Minutes of the proceedings pronounced on February 9, 2022, admitted, based on the provisions of art. 341 para. (6) letter a) of the Criminal Procedure Code except for the inadmissibility of the complaint filed against the order of the hierarchically superior prosecutor.

¹ In this respect, please see N. Volonciu, *The New Criminal Procedure Code commented*, Hamangiu Publishing House, Bucharest, 2014, p. 847.

² In this respect, please see I. Kuglay, comment in M. Udriou (coord.), *The Criminal Procedure Code. Comment on Articles*, C.H. Beck Publishing House, Bucharest, 2015, p. 889.

Specifically, in the case mentioned above, the Judge of the Preliminary Chamber within the Pitesti County Court was invested by petitioning companies with a complaint formulated against the solution ordered by the hierarchically superior prosecutor within the procedure established by the provisions of art. 339 of the Criminal Procedure Code, respectively against Ordinance no. 136/II/2/2021 issued on May 14, 2021 by the Chief Prosecutor of the Prosecutor's Office attached to the Pitesti County Court.

Thus, by Ordinance no. 136/II/2/2021 issued within the file no. 9411 /P/2015, the Chief Prosecutor of the Prosecutor's Office attached to the Pitesti County Court rejected, as unfounded, the complaint formulated by the petitioning companies against the dismissal solution ordered against the respondent company, under the aspect of committing the alleged act of culpable destruction, the text of art. 255 para. (1) of the Criminal Code.

And, on July 6, 2021, the petitioners, through a conventional representative, sent to the court, by means of electronic ways of communication (e-mail), the complaint formulated against Ordinance no. 136/II/2/2021 issued by the hierarchically superior prosecutor by which the solution of classifying the case prosecutor was maintained as legal and thorough.

Thus, it results that the two companies understood to attack this procedural act, and not the dismissal solution ordered by the case prosecutor by Ordinance no. 9411/P/2015 issued on February 18, 2021, the respondent company invoked, *prima facie*, the exception of the inadmissibility of the action brought before the Pitesti County Court.

This aspect outcomes, unequivocally, from the content of the e-mail through which the action was sent to the court by which the conventional representative of the petitioning companies submitted the complaint to the Pitesti County Court, with the following description:

“Attached, please find the complaint formulated by SC RS SRL and SC MRI SRL against the classification ordinance no. 136/II/2/2021 by which the complaint against Ordinance no. 9411/P/2015 was rejected. with the specification that the original of the complaint will also be sent by post.”

Also, in the motivation of the exception, a systematic and literal interpretation of the complaint of the petitioning companies was made, from the very content and title of the complaint introduced before the Pitesti Court, resulting in expressly criticizing the Ordinance no. 136/II/2/2021 issued on May 14, 2021 by the Prosecutor's Office attached to the Pitesti County Court, being excluded the possibility of the existence of a material error, even if the reasons concerned the dismissal solution.

Thus, even in the expository part of the document submitted to the court, it is clearly specified by the petitioning companies which is the object of the complaint formulated in the procedure established by the provisions of art. 340 of the Criminal Procedure Code, namely:

“Complaint against Ordinance no. 136/II/2/2021 of May 14, 2021, of the Prosecutor's Office attached to the Pitesti County Court, by which it was ordered the rejection as unfounded of the complaint formulated by the undersigned against the Ordinance of classification no. 9411/P/2015 dated February 18, 2021.”

In addition, even within the content of the complaint it is unequivocally shown that its object is Ordinance no. 136/II/2/2021 issued by the Chief Prosecutor of the Prosecutor's Office attached to the Pitesti County Court, at tab no. 2, the petitioning companies stating that:

“As a matter of priority, we invoke the fact that the Ordinance of 14 May 2021 no. 136/II/2/2021 is not motivated and will not include even a sum analysis of the criticisms and aspects of illegality that were invoked by us within the complaint, repeating a single sentence of the Classification Ordinance no. 9411/P/2015, namely that a causal link could not be established between the occurrence of the accident and the inaction or action of a legal person determined so as not to meet the elements of objective typicality of the crime provided by art. 255 para. (1) letter b) of the Criminal Code.

In the situation of not motivating under any aspect of the Ordinance, we are forced to resume all the aspects invoked in the initial complaint, and the court will analyse them as follows.”

Thus, it is important to mention that the Judge of the Preliminary Chamber of the Pitesti County Court admitted the exception even if the petitioning companies resumed the criticism against the dismissal solution ordered by the case prosecutor.

Or, as we correctly consider that the Preliminary Chamber Judge also deemed, within the procedural framework established by the text of art. 340 of the Criminal Procedure Code, the petitioning companies had to formulate criticisms by complaint exclusively against the Ordinance of dismissal of the case prosecutor issued on February 18, 2021 within the file no. 9411/P/2015, and not against Ordinance no. 136/II/2/2021 dated May 14, 2021 of the hierarchically superior prosecutor.

Moreover, it should be noted that, in the event that such an exception is arose, the existence of a material error cannot be invoked as an argument, in other words that the dismissal solution is in fact criticized and not the ordinance by which the complaint is examined within the procedure established by the provisions of art. 339 of the Criminal Procedure Code.

In support of this argument, it is worth mentioning that both regarding the prosecutor's order or even in the case of the indictment, the party is informed of his/her entitlement, in case of disagreement, to contest the dismissal solution, indicating the established legal basis set forth in the Criminal Procedure Code as well as of the term of 20 days in which the complaint can be filed.

Recently, a practice has been crystallized among the criminal investigation bodies in the sense of sending to interested persons also an address which expressly specifies the ordinance against which a complaint may be filed in the procedures established by the provisions of art. 339 and art. 340 of the Criminal Procedure Code, precisely in order to prevent the cases of invoking some material errors evoked by the litigants.

In the present case, the circumstance that the petitioning companies had to criticize the dismissal solution and not to criticize the ordinance by which their complaint was rejected by the hierarchically superior prosecutor also results from the content of Address no. 136/II/2/2021 issued by the Prosecutor's Office attached to the Pitesti County Court, mentioning that:

"Please find attached Ordinance no. 136/II/2/2021 of May 14, 2021 of this prosecutor's office unit, by which it was ordered the rejection as unfounded of the complaint filed by you against ordinance no. 9411/P/2015 of the Prosecutor's Office at the Pitesti Court.

According to the Ordinance, you were obliged to pay the legal expenses in the amount of 50.00 lei.

All legal expenses must be paid to the Public Finance Administration to which you belong in account no. [...].

You can file a complaint against the non-submission solution under the conditions of Article 340 of the Criminal Procedure Code at the Pitesti County Court within 20 days from the date of receipt of the communication."

Therefore, it is clear that in the proceedings before the court where the legality and validity of the dismissal solution is verified, the procedural act that

must be subject to the control of the Preliminary Chamber Judge is the one ordering the non-prosecution by the case prosecutor, regardless of whether we are in the presence of an ordinance or of the indictment.

3. Conclusions

Given the aforementioned, the procedural act that must be subject to the control of the Preliminary Chamber Judge is the one ordering the non-prosecution by the case prosecutor.

From another perspective, the same solution of inadmissibility is imposed in the hypothesis in which the report of the criminal investigation bodies is criticized, which proposes the dismissal of the case, a dismissal which is also ordered by the act of the prosecutor.

Then again, in this situation, the provisions of art. 315 para. (5) of the Criminal Procedure Code state that the mention of all factual and legal grounds will be mandatory within the ordinance only in the event that the case prosecutor does not assimilate the arguments contained in the report with proposed dismissal drafted by judicial police investigation bodies or if there was another suspect concerned in the case.

The risk that the party criticizes the report of the criminal investigation bodies by which only the dismissal solution is proposed is present because the ordinance of the case prosecutor could be considered unmotivated by the interested person.

We are in the presence of a false failure to state reasons because in the situation where the case prosecutor appropriates the argument of the criminal investigation bodies that have been delegated to carry out criminal activities, the prosecutor is no longer obliged to repeat the same arguments in the text of his ordinance.

However, also in this hypothesis the ordinance that will be subject to the procedures established by the provisions of art. 339-340 of the Criminal Procedure Code is the ordinance of the case prosecutor by which the case was dismissed.

References

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