

## ISSUES REGARDING THE JURISDICTION IN CASE OF JOINING THE CRIMINAL CASES

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### Abstract

*The joinder of criminal cases determines a prorogation of material or territorial jurisdiction of the court or, as the case may be, of the prosecuting authority ensuring a proper performance of the legal activities.*

*The current Code of Criminal Procedure regulates both the compulsory joinder and the optional joinder of the criminal cases, according to a summary proceedings, stipulated in article 45 (during the trial), and, respectively, article 63 paragraph (1) related to article 45 (during the criminal investigation).*

*The concurrence between the civil and military nature of the judicial body is settled in favour of the civil nature of the judicial body, observing the equivalence of its degree. After joining the cases, the enactment of certain decisions by the judicial body determines either maintaining the legal empowerment (in case of the court) or, as the case may be, declining the jurisdiction (in case of the prosecuting authority).*

**Keywords:** *jurisdiction; joinder of cases; court; prosecution body; joinder procedure.*

### 1. Introduction

**The joinder of criminal cases is an institution of major importance in the criminal procedural law with direct repercussions on the procedural trajectory of a criminal case. Although the joining of the cases is of such major importance, it does not benefit from a thorough and exhaustive analysis in the specialized legal doctrine.**

Also, the judicial bodies in their practice do not approach this institution with much interest, in general the prosecutors and the courts of law deal with it in an expeditious way, by a simple order of joinder and with no further argumentation as to why the joinder is applicable, nor why the legal conditions of joining the cases are actually met in the respective cases.

This paper deals with a full theoretical, but still pragmatic, analysis of both the old and the new procedural regulations in the matter of joinder of the cases in criminal matters. By examining current legislation as compared to the old regulation, some principles can be drawn up to provide answers to several aspects signaled in the practice of prosecutor's offices or courts of law. The analysis of each case of bringing together criminal cases has an important role for the clarification of the problems caused by what we contend to be a limited regulation of this procedural institution.

It shall be noted from our analysis that the regulation on the joinder of cases in criminal matters is

not very vast and it does not address all the issues that may appear in the judicial practice.

This paper therefore aims to bring to light some controversy over the current regulations in the matters related to the joinder of the cases in criminal matters, problems that give rise to a proper doctrinal analysis in order to provide the necessary answers. It is our contention that this paper will definitely serve as guideline for the legal authors and for the legal professionals as well.

### 2. General issues. Institution of joining the cases in criminal matters

#### Regulatory act in the current Code of Criminal Procedure

The current Code of Criminal Procedure<sup>1</sup> (hereinafter referred to as the Code of Criminal Procedure) regulates the joinder of the criminal cases as independent and special procedural institution, specific to courts, in **articles 43-45**, within Title III (*Participants in criminal proceedings*), Chapter II (*Jurisdiction of judicial bodies*), Section 3, a section marginally and suggestively called "*Special stipulations regarding the jurisdiction of courts*".

The simple positioning of the institution for joining the cases within this section determines ab initio its qualification as an **institution waiving** the common rules on the jurisdiction of the courts.

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<sup>1</sup> Effective from 1 February 2014.

The joinder of cases by the prosecution bodies<sup>2</sup> does not benefit from a freestanding regulation in the Code of Criminal Procedure, different from the one related to the jurisdiction of courts. Under the provisions of article 63 paragraphs (1) and (2) of the Code of Criminal Procedure, contained in Section 5 (*Prosecuting authorities and their jurisdiction*) of the same Title and the same Chapter of the Code of Criminal Procedure, the provisions of article 43-45 also properly apply during the criminal investigation, with one exception, but to which we shall refer below.

As we shall mention, the current regulation is not much different from previous regulation in the Previous Code of Criminal Procedure (hereafter referred to as the Code of Criminal Procedure 1968), the regulatory differences being rather formal than related to content.

#### **Notion. Rationale for regulating the joinder of cases in criminal matters**

As it results from the very topography of the initial criminal procedural provisions, the joinder of cases is a **special procedural incident** with implications on the **jurisdiction** in criminal matters - both of the courts and of the prosecuting authorities. The joinder of cases is, in a more plastic but eloquent expression, "gathering together" several criminal cases - among which there are certain links - either during the criminal investigation or during the trial, even if the judicial body (the court or prosecuting authority) would not normally be competent to settle all these cases.

From a technical and legal point of view, the specialized doctrine has correctly acknowledged that the joinder is the **operation** in which two or more causes are brought together in one file to be solved by one court order<sup>3</sup>. The joinder or criminal procedural junction occurs when substantive links exist between criminal cases, so that finding the truth can only be achieved by examining these cases within the same proceedings<sup>4</sup>.

As a matter of course, the Code of Criminal Procedure does not define as such the notion of joinder of criminal cases or their effects on judicial proceedings, but its meaning and implications are easily deduced from all the provisions governing it.

The legislator has thus provided the institution for joining the cases **for the good administration of justice** and for avoiding a separate trial by the same court and passing a contradictory court order in cases between which there are substantial connections necessary to find the truth in the same criminal proceedings<sup>5</sup>. The same purpose of a good administration of justice is also pursued by the

legislator in case of joinder of cases during the criminal investigation, since, in addition to the advantages of time and resources of the prosecution carried out in one case and concurrently regarding the same offences and persons, the eventual prosecution of all these offences and persons subsequently ensures a unitary and consistent trial by a single court.

As a matter of fact, one of the objectives pursued by the Code of Criminal Procedure by regulating the jurisdiction of the judicial bodies and all other issues related to the participants in the criminal proceedings has been to create a legislative framework "*in which the criminal proceedings become faster and more efficient, and significantly less expensive*"<sup>6</sup>. The reason for joining the cases is undoubtedly limited to the aim pursued by the legislator in the current criminal procedural regulation. The simultaneous investigation and trial of the cases between which there are certain connections as a result of the implementation of the joining mechanism, guarantee a good performance of the criminal proceedings, since, in this way, the **efficiency** of the judicial activities is ensured, avoiding possible contradictory or unfounded decisions in the respective cases.

The mechanism for joinder of criminal cases therefore tends to ensure a **unitary justice** and, in the broad sense, it is a benefit to the good course of justice. The joinder of criminal cases leads to a better settlement thereof, since it gives the judicial bodies the opportunity to have an overview of all the circumstances in which the offences have been committed<sup>7</sup>. The aim of joinder of cases is to ensure that the truth is attained by conducting all investigations by the same investigation bodies at the same time for a fair and consistent production of evidence, thereby clarifying the contradictions between the statements of the heard witnesses, through confrontations and the production of other necessary evidence<sup>8</sup>.

#### **Effects of joinder of cases from the jurisdiction perspective. Prorogation of jurisdiction**

The joinder of cases in criminal matters may have the effect, as legal doctrine and practice call, of **legal prorogation of jurisdiction**. This prorogation of jurisdiction functions both with regard to the prosecuting authorities and the courts.

The **jurisdiction** of judicial bodies, courts or prosecuting authorities is the scope of the duties that each category of judicial bodies has to fulfil, according

<sup>2</sup> Mentioning that the only prosecuting authority competent to order the joinder of criminal cases during the criminal investigation, is the prosecutor.

<sup>3</sup> A. Zărafiu, *Procedură penală. Partea generală. Partea specială. Conform Noului Cod de procedură penală*, Editura C.H. Beck, 2015 – p. 130.

<sup>4</sup> C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.

<sup>5</sup> High Court of Cassation and Justice, Criminal Division, decision no. 2379 of 14 June 2011, available on www.scj.ro

<sup>6</sup> Explanatory statement of the Code of Criminal Procedure, effective from 1 February 2014, p. 4.

<sup>7</sup> I. Neagu, M. Damaschin, *Tratat de procedură penală, Partea generală*, Editura Universul Juridic, București, 2014, p. 365.

<sup>8</sup> Constitutional Court of Romania, Decision no. 719/2016 - the exception of the unconstitutionality of the provisions of article 43 paragraph (1) of the Code of Criminal Procedure, published in the Official Gazette no. 125 of 15 February 2017, paragraph 16.

to the law, in the criminal proceedings<sup>9</sup>. In principle, this jurisdiction can be determined by an offence (material jurisdiction - *ratione materiae*) or, exceptionally, by the quality of the perpetrator of an offence (personal jurisdiction). Also, without going into details that go beyond the scope of this paper, we recall that another form of jurisdiction of the judicial bodies is also the territorial form (*ratione loci*), established in accordance with the dispositions of article 41 of the Code of Criminal Procedure, according to certain criteria expressly provided by the legislator.

Thus, the joinder of criminal cases would, at first glance, be a prolongation or extension of the limits of jurisdiction of a judicial body and of offences or persons not assigned to it according to the customary rules<sup>10</sup>. The prorogation of jurisdiction is essentially an **exception** to the ordinary rules of jurisdiction which allows the judicial body to carry out judicial activities in respect of certain offences or persons in respect of whom it has not been initially competent without the acts performed under those conditions to become null and void<sup>11</sup>.

The joinder of cases is governed by special provisions on jurisdiction, which derogate from the ordinary rules of jurisdiction, so that all joinder cases listed in article 43 of the Code of Criminal Procedure will be restrictively interpreted and cannot be extended by analogy to other situations not provided by law.

As we shall see below, **not all cases of joinder of cases cause a genuine prorogation of jurisdiction**, some of which do not attract a genuine effect of extending the jurisdiction of the judicial body to these causes, but rather a formal one.

The old doctrine defines the prorogation of jurisdiction as “*the prolongation or extension of jurisdiction, regarding the offence, to another offence or another offender of different jurisdiction*”<sup>12</sup>. Other perpetrators, examining the prorogation of jurisdiction under the Code of Procedure 1968, have argued that there is a prorogation of jurisdiction due to some errors in the classification of the offence or the failure to recognise circumstances leading to a change of classification<sup>13</sup>.

Also, under the aegis of the former regulation, the Supreme Court has ruled in a decision similar to this case that “*the prorogation of jurisdiction means the extension of the normal jurisdiction of the judicial bodies to cases which, naturally, belong to other judicial bodies, according to the law “ratione materiae” or “ratione loci”*”<sup>14</sup>. At the same time, the specialized doctrine has rightly considered in that the

prorogation of jurisdiction is always legal in criminal matters and can only take place in favour of a judicial body of the same rank or of a higher rank, never in favour of a lower judicial body<sup>15</sup>.

### 3. Regulation of the institution for joining the cases in the current Code of Criminal Procedure and in the Code of Criminal Procedure 1968

As can be seen from the simple comparison of the two criminal procedural regulations, the changes in the joinder of cases *during the trial* have occurred more formally, in principle the cases of joining the cases being renamed and restructured by the current Code of Criminal Procedure (A). Regarding the regulation of the joinder of cases *during the criminal investigation*, no changes in the content have been made either in the current Code of Criminal Procedure, as stated below (B).

(A) Regarding the joinder of cases during the trial, the criminal procedural provisions of the two codes may technically be presented as follows:

#### Current Code of Criminal Procedure

*TITLE III: Participants in criminal proceedings*

*CHAPTER II: Jurisdiction of judicial bodies*

*SECTION 3: Special stipulations regarding the jurisdiction of courts*

*Article 43:*

*Joinder of cases*

(1) *The court shall order the joinder of cases in case of continued offences, of formal multiple offences, or in any other cases when two or more material acts compose a single offence.*

(2) *The court may order the joinder of cases, provided that this does not delay the trial, in the following situations:*

*a) when two or more offences were committed by the same person;*

*b) when two or more persons participated in the commission of an offence;*

*c) when there is a connection between two or more offences and joinder of cases is required for a proper administration of justice.*

(3) *The provisions of paragraphs (1) and (2) are also applicable when several cases, having the same subject matter, are pending with the same court.*

*Article 44:*

*Jurisdiction in case of joinder of cases*

<sup>9</sup> Quoted in C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 116.

<sup>10</sup> A. Zărafiu, *Procedură penală. Partea generală. Partea specială. Conform Noului Cod de procedură penală*, Editura C.H. Beck, 2015 – p. 130.

<sup>11</sup> *Idem*.

<sup>12</sup> Tr. Pop, *Drept Procesual Penal, vol. II, Partea Generală*, Tipografia Națională S.A. Cluj, 1946, p. 189.

<sup>13</sup> V. Dongoroz (coord.) *Explicații teoretice ale Codului de procedură penală roman, Partea generală, vol. I*, Editura Academiei Republicii Socialiste România, București, 1975, p. 102.

<sup>14</sup> High Court of Cassation and Justice, Criminal Division, decision no. 1495 of 10 May 2012, available on [www.scj.ro](http://www.scj.ro).

<sup>15</sup> C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.

(1) In case of joinder of cases, if in relation to various perpetrators or various acts, the jurisdiction belongs, under the law, to several courts of an equal level, the jurisdiction to rule on all facts and on all perpetrators shall rest upon the court which has been firstly notified, and if, depending on the nature of facts or on the capacity of persons, the jurisdiction belongs to courts of different levels, the jurisdiction to rule on all joined cases rests with the court of the higher level.

(2) The jurisdiction to rule on joined cases remains adjudicated even if for the act of the perpetrator who determined the jurisdiction of a specific court, splitting or termination of criminal proceedings was ordered or an acquittal was ordered.

(3) Concealing and favouring the offender and failure to report any offences fall under the jurisdiction of the court deciding upon the offence to which these are related, and if the jurisdiction based on the capacity of persons belongs to courts of different level, the jurisdiction to rule on all joined cases rests with the court of the higher level.

(4) If one of the courts is a civil court and the other is a military court, the jurisdiction rests with the civil court.

(5) If the military court is of a higher level, the jurisdiction rests with the civil court having an equivalent level and has jurisdiction under articles 41 and 42.

Article 45:

Case joinder procedure

(1) The joinder of cases may be ordered at the request of the prosecutor, the parties, the victim and ex officio by the competent court.

(2) The cases may be joined if they are judged by a first instance court, even after the cancellation or annulment of the court order, or by the Court of Appeal.

(3) The court shall decide through a court session report, which may be appealed only together with the merits of the case.

#### **Code of Criminal Procedure 1968**

TITLE II: Jurisdiction

CHAPTER I: Types of jurisdiction

SECTION III: Jurisdiction in case of indivisibility and connection

Article 32:

Joinder of cases

(1) In case of indivisibility or connection, the trial at first instance is judged by the same court if it takes place at the same time for all offences and all perpetrators.

Article 33:

Cases of indivisibility

(1) The following cases are considered indivisibility:

a) when more persons were involved in the commission of an offence;

b) when two or more offences were committed through the same act;

c) in case of continued offence or in any other cases in which two or more material acts make up one offence.

Article 34:

Cases of connection

The following cases are considered connection:

a) when two or more offences are committed through different acts, by one or more persons together, at the same time and in the same place;

b) when two or more offences are committed at different times and in different places, as a result of a prior understanding between the perpetrators;

c) when an offence is committed in order to prepare, facilitate or hide the perpetration of another offence, or in order to facilitate or ensure avoidance of criminal responsibility by the perpetrator of another offence;

d) when there is a connection between two or more offences and the cases must be joined for a better administration of justice.

Article 35:

Jurisdiction in case of indivisibility and connection

(1) In case of indivisibility or connection, if the jurisdiction regarding the different perpetrators or the different deeds rests, under the law, with various courts of an equal level, the jurisdiction to judge all the deeds and all the perpetrators rests with the court which has been firstly notified, and if the jurisdiction according to the nature of the deeds or to the quality of the persons rests with the courts of different level, the jurisdiction to judge all the joined cases rests with the court of the higher level.

(2) If one of the courts is a civil court and the other is a military court, the jurisdiction rests with the civil court.

(3) If the military court is of a higher level, the jurisdiction rests with the civil court having an equivalent level as the military court.

(4) The jurisdiction to judge the joined cases is kept by the court it was granted to, even if the splitting or termination of the criminal proceedings or the acquittal were ordered for the offence or the perpetrator who determined the jurisdiction of this court.

(5) Concealing and favouring the offender and failure to report any offences fall under the jurisdiction of the court deciding upon the offence to which these are related, and if the jurisdiction based on the capacity of persons belongs to courts of different level, the jurisdiction to rule on all joined cases rests with the court of the higher level.

Article 36:

Court competent to decide upon the joinder of cases

(1) Whether the cases are joined or not is decided by the court which is competent to judge, according to the provisions of article 35.

(2) *In the case stipulated in article 35 paragraph 3, the joinder of cases is decided by the military court which forwards the file to the competent civil court.*

Article 37:

*Special cases*

(1) *In the indivisibility cases stipulated in article 33 letters a) and b), as well as in the connection cases, the cases are joined even if they are judged by the first instance court, even after the cancellation of the decision forwarded by the court of appeal or after the annulment forwarded by the court of last appeal.*

(2) *The cases are also joined by the courts of appeal, as well as by the courts of last appeal of the same level, if they are at the same stage of the trial.*

(3) *In the indivisibility case stipulated in article 33 letter c), the cases must always be joined.*

Starting from the reference provisions of the two normative acts mentioned above, some clarifications are required:

### 3.1. Joinder cases

Reading the provisions on joinder of criminal cases according to the Previous Code of Criminal Procedure and comparing them with those of the current regulation, the institution for joining the criminal cases seems to be fully reformed. In fact, the legislator has made a reform only in terms of the configuration of the institution in the structure of the Code of Criminal Procedure.

The doctrine has argued that in the previous regulation the joinder of cases has been a “*procedure deriving from the express and distinct provision of certain cases of connection or indivisibility*”<sup>16</sup>. The previous criminal procedural law has expressly provided the indivisibility and connection as causes for joinder of cases. It has been argued that they are the most common cases of prorogation of jurisdiction<sup>17</sup>. The specialized doctrine has defined the indivisibility as the legal situation of a criminal case, which, comprising multiple offences or persons, forms a unity that requires the judgment of the “*complex assembly*” of offences and persons by the same court<sup>18</sup>. The notion of *connection* has also been defined as the legal situation of a criminal case in respect of two or more offences which, because of the link between them, require them to be judged jointly by the same court<sup>19</sup>.

As a first remark, it is noted that the current Code of Criminal Procedure has not taken over the express provision in article 32 of the Code of Criminal Procedure 1968, which has tried to define the conditions of joinder of cases, namely the “*first instance*” trial by the “*same court*” if this trial “*takes place at the same time for all the offences and for all the perpetrators*”. Practically, article 32 of the Code of Criminal Procedure 1968 has explicitly referred to the procedural context in which the cases could be joined,

in which case the joinder could only take place when the cases have been at the same procedural stage and phase.

Having regard to the purpose of the institution, the joinder cases and the case joinder procedure regulated almost identically in the Code of Criminal Procedure 1968, such a reference was superfluous, since it was entirely understandable that the joinder could only be ordered if those cases were *pending* and aimed at the same procedural stage and phase, in the sense that none was definitively settled at the time of the joinder. Moreover, the rationale for joinder of cases and the good administration of justice could only concern the pending cases which were not finally settled at the time of the joinder.

Regarding the actual cases (grounds) of the joinder of criminal cases, the configuration of the current Code of Criminal Procedure places these cases in one article (article 43), unlike the Code of Criminal Procedure 1968, which lists joinder cases in two distinct articles (article 33 and article 34). Also, the earlier names of the joinder cases, namely “*cases of indivisibility*” and “*cases of connection*”, were no longer kept as terminology by the current Code of Criminal Procedure, trying to approach more pragmatically the institution for joining the criminal cases.

However, it is easy to see that the current article 43 of the Code of Criminal Procedure includes in its contents the cases of indivisibility and connectivity stipulated in the Code of Criminal Procedure 1968. Article 43 of the Code of Criminal Procedure shows that the joinder of cases can occur in two hypotheses: *compulsory joinder* (in the cases stipulated in paragraph 1 of article 43) and *optional joinder* (in the cases stipulated in paragraph 2 of article 43).

In essence, the cases of **compulsory joinder** in the current Code are the indivisibility cases stipulated in **article 33 letter b)** (*when two or more offences were committed through the same act*) and **article 33 letter c)** (*in case of the continued offence or in any other cases in which two or more material acts make up one offence*) of the Code of Criminal Procedure 1968.

Accordingly, the cases of **optional joinder** in the current Code include both the indivisibility case stipulated in article 33 letter a) (*when two or more persons participated in the commission of an offence*), and all cases of connection stipulated in article 34 of the Code of Criminal Procedure 1968 (*where two or more offences are committed by different acts by one or more persons together, at the same time and in the same place; where two or more offences are committed in time or in a different place, after a prior agreement between the offenders or when an offence is committed to prepare, facilitate or hide the commission of another offence, or is committed to facilitate or ensure the*

<sup>16</sup> I. Neagu, M. Damaschin, *Tratat de procedură penală, Partea generală*, Editura Universul Juridic, București, 2014, p. 365.

<sup>17</sup> G. Theodoru, *Tratat de Drept procesual penal*, Ed. Hamangiu, 2007, p. 311.

<sup>18</sup> *Idem*.

<sup>19</sup> *Ibidem*.

*avoidance of the criminal liability of the perpetrator of another offence).*

The delineation of compulsory joinder cases and optional joinder cases also results from the provisions of the Code of Criminal Procedure 1968, although they were slightly inconsistent, and this distinction in its provisions was not very clearly outlined. Thus, the circumstance that certain cases attracted the compulsory joinder and others did not result from the provisions of article 37 paragraph (3), according to which the indivisibility cases stipulated in article 33 letter c) *had to be always joined. Per a contrario*, the other cases of connection and indivisibility were deemed as cases of optional joinder which were thus left to the discretion of the competent court.

However, regarding the regulation of the Code of Criminal Procedure 1968, an element of novelty is the provisions of article 43 paragraph (3) of the Code of Criminal Procedure, which expressly regulates the situation in which the cases, which are capable of compulsory or optional joinder, are, as the case may be, judged by *the same court*, and therefore not different courts, of equal or different level.

### 3.2. Jurisdiction of the joined cases

In point of the court competent to judge all joined cases, it can be found that there has been no change in the rules for determining that jurisdiction, both Codes of Procedure containing the same provisions in that regard.

Thus, according to both regulations, if, in relation to the different perpetrators or different offences, the jurisdiction belongs, according to the law, to several equal level courts, the jurisdiction to judge all the offences and all the perpetrators rests with **the court which was firstly notified** (*chronological priority*) and if, according to the nature of the offences or the quality of the persons, the jurisdiction belongs to different level courts, the jurisdiction to judge all the joined cases rests with the court of a higher level (*hierarchical priority*). Similarly, when there is also a military judicial body between the competent bodies, the jurisdiction rests with the civil judicial body (*functional priority*). If the military judicial body is of a higher level, the jurisdiction belongs to the civil judicial body of an equal level (*hierarchical and functional jurisdiction*)<sup>20</sup>.

On another occasion<sup>21</sup>, we have showed that the normative solution of judging the joined cases by the civil court instead of the military court has not been embraced by the Romanian legislator from the beginning. We emphasize that it was different from the normative solution contained in article 35 paragraphs (2) and (3) of the Code of Criminal Procedure 1968, prior to the amendment introduced by Law no. 356/2006, which provided for the jurisdiction of the military court in the joinder of cases pending in the civil and military courts, respectively. Subsequently, article

I, paragraph 17 of Law no. 356/2006 amended the above mentioned provisions, reaching the normative solution preserved by the *de lege lata*, which means that the civil court is competent to judge the joined cases, not the military court.

Also, the provision that **the concealment, the favoring of the offender and the failure to report any offences** lie within the jurisdiction of the court that judges the offence to which they refer, and the provision that, if the jurisdiction by the quality of the persons belongs to different level courts, the jurisdiction to judge all the joined cases rests with the higher court, are also identical in the current regulation.

At the same time, both codes of procedure provide that, if the offence or the perpetrator that determined the jurisdiction of a certain court were ordered to split, terminate the criminal proceedings or acquittal, the jurisdiction of the joined cases **is still acquired**.

### 3.3. Case joinder procedure

In that regard, it is also noted that the two regulations contain **similar provisions** as to the court having jurisdiction to order the joinder, as well as the procedural stage and phase in which it may be ordered.

It is necessary, however, to emphasize, with particular reference to **the concurrence between a civil and a military court**, that, although the trial of the joined cases rested with the civil court, after the above-mentioned distinctions, however, if we are in the presence of a higher level military court, according to the former provisions of article 35 paragraph (3) of the Code of Criminal Procedure 1968, the joinder of cases was decided by the military court, which then sent the file to the civil court competent to judge the joined cases. *De lege lata*, this provision no longer exists, as the jurisdiction to decide the joinder, as naturally, rests with the same court having jurisdiction to judge the joined cases, according to article 45, paragraph (1) of the Code of Criminal Procedure the final sentence, respectively the civil court of an equal level as the military court or the civil court of an equivalent level as the military court of a higher level.

We consider that the new legislator's option to renounce the provision that, in the above-mentioned situation, the joinder of cases is decided by the military court, is normal and corresponds to the recognized principle of *legal symmetry*. Given that the civil court is the one which, in fact, has the legal jurisdiction to judge the joined cases, it is the only one which can decide on the procedural incident of the joinder of cases, whether we are talking about a compulsory or optional joinder. At the same time, we believe that the provision on joinder of cases issued by a court other than the court with jurisdiction to resolve the joined cases would constitute an unlawful interference with the judicial activity of the latter court.

<sup>20</sup> Note in N. Volonciu, *Comentariu la articolul 44 din Noul Cod de Procedura Penală*, 2014, [www.sintact.ro](http://www.sintact.ro).

<sup>21</sup> See in this respect, Dan Lupascu, Mihai Mareș, *Considerații privind competența organelor judiciare civile și a celor militare*, published on 5 June 2017 on [www.juridice.ro](http://www.juridice.ro) and in "Revista Pandectele Române" number 3 of 30 June 2017.

Regarding **the procedural stage and phase** in which the joinder can be ordered, given the procedural reconfiguration of the appeal, namely the fact that the appeal has become *de lege lata* an extraordinary appeal (review), it is no longer possible to join the cases in the appeal according to the current Code of Criminal Procedure, the cases being already settled by final judgments<sup>22</sup>. Therefore, the current Code of Criminal Procedure has kept from the previous regulation only the possibility to join the cases (i) **in the first instance court**, even after the judgment was cancelled or annulled in the appeals and (ii) **in the court of appeal** respectively.

(B) Regarding the joinder of cases *during the criminal prosecution*, the criminal procedural provisions of the two codes may technically be presented as follows:

#### **Current Code of Criminal Procedure**

*TITLE III: Participants in criminal proceedings*

*CHAPTER II: Jurisdiction of judicial bodies*

*SECTION 5: Prosecuting authorities and their jurisdiction*

*Article 63:*

*Common provisions*

*(1) The provisions stipulated in articles 41-46 and 48 shall also apply accordingly during the criminal investigation.*

*(2) The provisions of article 44 paragraph (2) shall not apply during the criminal investigation.*

*[...]*

#### **Code of Criminal Procedure 1968**

*TITLE II: Jurisdiction*

*CHAPTER I: Types of jurisdiction*

*SECTION IV: Common provisions*

*Article 45:*

*Provisions applicable to criminal investigation*

*(1) The provisions of articles 30-36, 38, 40, 42 and 44 shall also apply during the criminal investigation accordingly.*

*(1<sup>1</sup>) The provisions of article 35 paragraph 4 shall not apply during the criminal investigation.*

*[...]*

*(4<sup>1</sup>) In the case of indivisibility or connection between offences for which the jurisdiction rests with the National Anticorruption Directorate and the Directorate for Investigating Organized Crime and Terrorism, the jurisdiction to carry out the criminal investigation in the joined case belongs to the specialized prosecuting authority which has been firstly notified. The provision is not applicable if the splitting has been ordered regarding the offence leading to the jurisdiction of the other structure.*

The comparison of the two regulations shows that the Romanian legislator's view has remained the same in the current Code of Criminal Procedure. The

provisions on the joinder of cases during the trial are also applicable during the criminal investigation, except for the normative situation regarding the keeping of jurisdiction by the criminal court when the splitting, termination of the criminal proceedings or acquittal are ordered for the offence or the perpetrator who has determined its jurisdiction according to the rules in the joinder.

Thus, the closing of the case or splitting regarding the offence or the perpetrator, which has generated the jurisdiction to conduct the criminal investigation of the judicial body is ordered during the criminal investigation or upon the termination thereof, the jurisdiction to conduct the criminal investigations for the remaining offences or the perpetrators or the offence or the perpetrator about whom the splitting was ordered, **is not won by the prosecuting authority**. In this case, the case shall be referred to the competent body, a reference which, in our opinion, is achieved through the **declination of jurisdiction**.

As a differentiation element, the Code of Criminal Procedure has not preserved the previous provision on establishing the jurisdiction in cases where the cases of indivisibility or connection simultaneously led to the jurisdiction of both specialized structures within the Prosecutor's Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate and the Directorate for Investigating Organized Crime and Terrorism. This provision was, however, superfluous, since the jurisdiction to conduct the criminal investigations could be established by properly applying the same criteria laid down for the trial.

It is noticed that the prorogation of jurisdiction during the criminal investigation, generated by the case joinder mechanism, does not have a final effect in this case.

#### **4. Cases of joinder of cases in criminal matters**

As mentioned above, the joinder of criminal cases is **mandatory** in case of the application of one of the cases stipulated in article 43 paragraph (1) of the Code of Criminal Procedure, but it represents a **faculty** of the body in the judiciary in the case of the application of any case stipulated in article 43 paragraph (2) of the same code. The cases of compulsory and optional joinder are generally applicable both during the judgement and the criminal investigation.

a) Compulsory joinder of cases

The compulsory joinder, as it results from the content of article 43 paragraph (1) of the Code of Criminal Procedure, occurs in the case of **the continued offence, the combination of offences**<sup>23</sup>, as

<sup>22</sup> C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 137.

<sup>23</sup> Pursuant to article 38 paragraph (2) of the Criminal Code, there is a *combination of offences* when an action or inaction committed by a person, due to the circumstances in which it has occurred or the consequences which it has incurred, accomplishes the content of several

well as **in any other cases where two or more material acts constitute a single offence** - it is about other forms of the offence stipulated in the substantial criminal law, respectively **the successive continuous offence**<sup>24</sup> or the **complex offence**<sup>25</sup>.

It is noted that the regulation of mandatory joinder of criminal cases has a purely objective basis, namely the existence of a single offence in its materiality, which may include one or more material acts. In essence, however, because the **same offence** has been committed by a person, it is necessary both to investigate it and to judge it, once, by the same judicial bodies.

There has been criticism about the constitutionality of article 43 paragraph (1) of the Code of Criminal Procedure, in terms of clarity, precision and predictability of the rule, due to the use of a allegedly ambiguous terminology on cases in which, in the practice of the judicial bodies, it could be the basis for compulsory joinder. On this occasion, the Constitutional Court has analyzed the cases stipulated in article 43 paragraph (1) of compulsory joinder of cases and has found fairly that the first two cases are expressly defined in the Criminal Code, and the third legal hypothesis mentioned in the criticized text implies that the court, following the analysis, classifies the material acts which are committed by the defendant and which are not a continued offence or a combination of offences, in the constituent content of the same offence.

The Court has stated in this respect that *“this activity of the judicial bodies of establishing the legal classification of the investigated offences is not, however, lacking of clarity, precision and predictability the criminal and criminal procedural norms, being the direct consequence of the duty of the law enforcement judicial bodies, duty which is a direct application in the criminal procedural laws of the constitutional provisions of article 124 on the administration of justice”*<sup>26</sup>. The Court has rejected the exception of unconstitutionality, arguing *“that, by the criticized text, the violation of the constitutional provisions of article 1 paragraph (5) regarding the quality of the law or the*

*provisions of article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which regulates the principle of legality of incrimination, cannot be supported since the necessity for the legal classification of the committed offences by the courts in order to establish the existence of one of the legal assumptions stipulated in article 43 paragraph (1) of the Criminal Code, does not deprive the addressees of the criticized text of the possibility to adapt their conduct according to its requirements”*<sup>27</sup>.

With particular regard to the **continued offence**, according to article 35 paragraph (1) of the Criminal Code, an offence is continued when a person commits, at different time spans, but for the same purpose and against the same victim, actions or inactions that each have the content of the same offence.

As it has been pointed out in the doctrine, the conditions for the continued offence to exist, according to the new criminal procedural regulation are: the unit of perpetrator, the plurality of actions or inactions committed at different time spans, the unit of criminal intent, the legal homogeneity of the acts of execution to which the unit of victim was added, a condition that does not exist under the previous regulation<sup>28</sup>.

Regarding the condition of the unit of victim is, however, relevant the Decision of the Constitutional Court of Romania no. 368/2017 on the exception of unconstitutionality of the provisions of article 35 paragraph (1) and article 39 paragraph (1) letter b) of the Criminal Code, which stated that the phrase *“and against the same victim”* in the provisions of article 35 paragraph (1) of the Criminal Code is unconstitutional because it creates discrimination within the same category of persons who commit at different time spans, but for the same purpose, actions or inactions that each have the content of the same offence, leading to the violation of the provisions of article 16 paragraph (1) of the Constitution regarding the equality of citizens before the law<sup>29</sup>.

We consider that this reconfiguration of the conditions for the continued offence to exist, as a result of Decision of the Constitutional Court of Romania no.

offences. In this situation, the perpetrator undertakes a single action, which, by its pursuit, affects at least two social values protected by different offences by the legislator.

<sup>24</sup> The offence is *continuous* when its material element (action or inaction incriminated by the criminal law) is naturally extended. In fact, we are talking about a single material act extended over time, therefore, of one offence in its materiality. For this analysis, we consider that only the *successive continuous offence* is likely to be the subject of a compulsory joinder of cases, because, by itself, it assumes the natural interruption and the resumption of the material act, without generating multiple offences - as is the case, for example, of the offence of driving a vehicle without having a driving license.

For a similar definition of the successive continuous offence, see C. Mitrache, C. Mitrache, *Drept penal român, Partea generală*, Universul Juridic, București, 2014, p. 301.

<sup>25</sup> The *complex offence* is expressly regulated by article 35 paragraph (2) of the Criminal Code providing that the offence is complex when its content includes an action or an inaction which constitutes an offence stipulated in the criminal law, as a constituent element or aggravating circumstance element. *The compulsory joinder of cases seems natural if the committed offence is a complex one, i.e. it includes at least two actions or inactions which are incriminated as freestanding offences under the law.*

<sup>26</sup> Constitutional Court of Romania, Decision no. 719/2016 - the exception of unconstitutionality of the provisions of article 43 paragraph (1) of the Code of Criminal Procedure, published in the Official Gazette no. 125 of 15 February 2017, paragraph 21.

<sup>27</sup> *Idem*, paragraph 22.

<sup>28</sup> Tr. Dima în I. Pascu, V. Dobrinou (coord.), *Noul Cod penal comentat, Partea generală*, ed. a II-a, Editura Universul Juridic, București, 2014, p. 262.

<sup>29</sup> Constitutional Court of Romania, Decision no. 368 of 30 May 2017 on the exception of unconstitutionality of the provisions of article 35 paragraph (1) and article 39 paragraph (1) letter b) of the Criminal Code, published in the Official Gazette of Romania, part I, no. 566 of 17 July 2017.

368/2017, also has consequences on the criminal procedural realm, including from the perspective of joinder of criminal cases. Although article 35 paragraph (1) of the Criminal Code has not yet been in line with the Court's decision, its effects are in the order of the substantive criminal law, so that, *de lege lata*, the recurrent offence shall also be considered when the material acts are committed against different victims - individuals or legal entities.

In particular, where, for various reasons, until the entry into force of the said Decision of the Constitutional Court of Romania, two or more cases having as their object legally homogeneous offences committed by the same perpetrator on the basis of the same criminal intent, but against different victims, have been prosecuted or judged separately, **it shall be necessary to join** these cases complying with the rules on the jurisdiction to judge the joined cases.

Regarding **the effect of the prorogation of jurisdiction of compulsory joinder**, the doctrine has rightly considered that it could in most cases generate only a prorogation of territorial jurisdiction, but it could theoretically be accepted as the hypothesis of the prorogation of material jurisdiction in the case of combination of offences<sup>30</sup>. In this regard, an example is when the perpetrator shoots a gun at a person holding a publicly appointed office, thereby endangering the national security, but, by the same action, he/she also hurts a civilian, he/she commits both the attempt under article 401 of the Criminal Code, as well as an attempted murder, the prorogation of jurisdiction determining the trial of the case by the court of appeal according to article 38 paragraph (1) letter (a) of the Code of Criminal Procedure, although the murder is judged in the first instance by the district court.

Of course, there cannot always be a prorogation of jurisdiction as a result of joinder of cases under article 43 paragraph (1) of the Code of Criminal Procedure. For example, there shall not be a genuine prorogation of jurisdiction if the same prosecuting unit has been notified and opened separate criminal files dealing with different material acts of one continued offence committed within the same territorial jurisdiction. In this case, the joinder of criminal files does not give rise to any prorogation of jurisdiction, not even territorial, the prosecuting unit being also territorially competent to carry out investigations regarding those material acts.

#### b) Optional joinder of cases

The optional joinder of cases is regulated by article 43 paragraph (2) of the Code of Criminal Procedure and is, in essence, an incorporation, in a

slightly different form, of the case of indivisibility stipulated in the Code of Criminal Procedure 1968 in article 33 letter a) and the cases of connectivity stipulated in the same code in article 34.

In the **optional joinder** of cases, the court having jurisdiction over the joinder of cases **shall appraise** whether there is **a connection** between those cases, on the one hand, and, on the other hand, whether the trial **is not delayed** by the joint trial of cases, respectively whether the joint trial of the cases would not affect the speed of the criminal trial and its resolution within a reasonable time. Of course, the same principles apply accordingly when the prosecutor appraises the joinder of cases during the criminal investigation.

In particular, the joinder of cases is optional in case of **the multiple offences**<sup>31</sup>, of **the participation in the offence**<sup>32</sup>, and in any other cases **where there is a connection between two or more offences and the joinder of cases is necessary for the proper administration of justice**.

In the latter case, for example, even the situation expressly indicated by the legislator in article 44 paragraph (3) of the Code of Criminal Procedure with respect to the jurisdiction to judge the offences of concealment, favouring the offender or failure to report offences together with the offence/offences to which they refer. A similar legal solution should also be recognized, for example, with regard to *the offence of perjury* committed during the criminal investigation, which, insofar as it would not lead to an unjustified delay in the settlement of the criminal case concerning offences related to false testimony, should be investigated within the same file.

The connection, a concept used in the previous Code of Criminal Procedure, but which is relinquished *de lege lata*, is a term specific to the civil procedural law, which was also dealt with in the interwar criminal procedural doctrine. It was then argued that *"two or more offences are connected when there is an objective extrinsic connection between them, that is, there is no subjective approximation between the perpetrators of these offences as in the participation and by their material nature, the offences did not engage in a common purpose as with the correlative offences, but owing to extrinsic circumstances, e.g. place, time, persons, object, etc., a connection was established between the offences, a connection that makes them connected"*<sup>33</sup>. Concerning the notion of connection, it was rightly stated in the legal literature that it is based on a criterion of *procedural opportunity* for the good administration of justice<sup>34</sup>.

<sup>30</sup> C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 134.

<sup>31</sup> According to article 38 paragraph (1) of the Criminal Code, there are multiple offences when two or more offences were committed by the same person through separate actions or inactions, before being finally convicted for any of them. Also, there are multiple offences when one of the offences has been committed for the commission or concealment of another offence.

<sup>32</sup> *The participation in the offence* refers to the legal situation in which several persons participate as co-perpetrators, instigators or accomplices in the commission of an offence under the criminal law act.

<sup>33</sup> I. Tanoviceanu, *Tratat de drept și procedură penală, vol.II*, Tip. „Curierul Judiciar”, București, 1925, p.439.

<sup>34</sup> Tr. Pop, *op. cit.*, p. 190.

Obviously, in the cases of optional joinder, there shall be no prorogation of jurisdiction where the court or, as the case may be, the prosecuting authority is competent materially or by the quality of the person and territorially in relation to all the cases involved in the joinder. However, since the optional joinder cases refer to offences and/or different persons, the likelihood of joinder producing an effect of prorogation of jurisdiction is much higher than in the case of compulsory joinder of cases.

c) Joinder of cases with the same object before the same court

In line with the above, the current Code of Criminal Procedure has also regulated as a matter of novelty the situation of compulsory or optional joinder of cases where **there are several cases judged by the same court having the same object** - article 43 paragraph 3 of the Code of Criminal Procedure).

We consider that, although from the wording of article 43 paragraph (3) of the Code of Criminal Procedure would appear to be in the presence of a special case, distinct from joinder, in fact the above mentioned provisions do not regulate a real case of joinder of cases, but rather **an apparent case or, at the most, a case assimilated by the legislator in the actual cases of joinder**. Since the text of law refers to the phrase “*the same object*” of the cases judged “*by the same court*”, we consider that these causes are characterized by *identity of person and offence*<sup>35</sup>. Under these circumstances, the reason for joinder referred to in article 43 paragraph (3) is different from the reasoning of the institution for joining the cases, that is to bring together, in the same file, cases relating to distinct factual aspects.

Therefore, under article 43 paragraph (3), the joinder of cases, being about the same object of the cases, **cannot lead to a prorogation of jurisdiction**. However, the only procedural remedy to avoid cases in which the cases with the same subject are settled by the same judicial body at the same time, can only be that of joinder of cases.

The text provides that both the provisions of paragraph (1), which regulates the compulsory joinder, as well as those in paragraph (2) of article 43, which regulates optional joinder are applicable. In this respect, the text is deficient, and it is not clear whether, if there are two cases with an identical object, their joinder would be compulsory or optional. On this point, we consider that, when identifying an identical object in relation to two or more criminal cases judged by the same court, **their joinder must be mandatory** and cannot be left to the appreciation of the panel which has been firstly vested. Otherwise, there is a risk of

contradictory decisions in the same criminal case on the same matter of fact or law.

## 5. Jurisdiction in case of joinder of criminal cases. Sanctions

As we have stated in Section II dedicated to analyzing the regulation of the institution for joining the cases in the current Code of Criminal Procedure and in the previous Code of Criminal Procedure, jurisdiction in joinder of cases in criminal matters essentially involves **two elements**: the judicial body competent to issue the *procedural act of the joinder*, therefore, to decide whether or not the cases are joined, but also the judicial body competent to *subsequently judge the joined cases* (the *unique* case resulting from the joinder).

Both during the trial and the criminal investigation, the judicial body competent to order the joinder is the same body that subsequently judges or investigates the joined cases. This jurisdiction to resolve the joined cases becomes, through extension (prorogation), a material or personal jurisdiction or, as the case may be, territorial jurisdiction.

Synthetically, the **jurisdiction** to judge/prosecute all the offences and all the perpetrators belongs to the court which was firstly notified/prosecutor's office which was firstly notified in the case of judicial bodies of an equal level, or, as the case may be, the court of a higher level/the Prosecutor's Office of a higher level in the case of judicial bodies of different levels. Also, as we have stated, the concurrence between the civil and military nature of the judicial body is in favour of the civil nature of the judicial body, complying with its level equivalence.

At the same time, unlike the rules applicable during the trial, if following the joinder of cases, the prosecuting authority orders the closing or splitting as regards the offence or the perpetrators, who determined the jurisdiction of a certain body, the jurisdiction to carry out the prosecution is lost as regards the other offences.

According to the provisions of article 281 paragraph (1) letter b) of the Code of Criminal Procedure, in the configuration given by the Decision of the Constitutional Court of Romania no. 302/2017<sup>36</sup>, disregarding the rules on the material and personal jurisdiction of the courts and the prosecuting authorities, when the trial or the prosecution has been conducted by a judicial body of a lower level than the competent judicial body, shall be sanctioned with **absolute nullity**. On the other hand, the rules on territorial jurisdiction are provided under the sanction

<sup>35</sup> Strictly related to the trial by the first instance court, both article 317 of the Code of Criminal Procedure 1968, and article 371 of the Code of Criminal Procedure stipulate that the trial is limited to the *offences and persons* indicated in the document instituting the proceedings.

<sup>36</sup> The Decision of the Constitutional Court of Romania no. 302/2017 passed on 4 May 2017, found that the legislative solution, included in the provisions of article 281 paragraph (1) letter b) of the Code of Criminal Procedure, which does not regulate in the category of absolute nullity the violation of the provisions on the material jurisdiction and by the quality of the person of the prosecuting authority, is unconstitutional.

of **relative nullity**, being necessary to prove the injury inflicted by the person invoking it, according to the provisions of article 282 paragraph (1) of the Code of Criminal Procedure.

It has been pointed out in the specialized doctrine that, when the prorogation is determined by the application of different rules of material jurisdiction or by the quality of the person for some defendants in those cases, *the effect of the prorogation of jurisdiction is mandatory under the sanction of absolute nullity*, since the prorogation of jurisdiction is always in favour of the higher court<sup>37</sup>. For the identity of reason, in view of the Decision of the Constitutional Court of Romania no. 302/2017, we consider that such a sanction also intervenes if the prorogation of jurisdiction is done in favour of the higher level prosecutor's office.

Analyzing the rules for determining the jurisdiction in case of compulsory or optional joinder of cases during the trial stipulated in article 44 of the Code of Criminal Procedure, we consider that **the sanction of absolute nullity** may be applied in the following **hypotheses**:

**A first hypothesis** could be that in which the trial of the joined cases is carried out in violation of the rules of jurisdiction in article 44 paragraph (1) of the Code of Criminal Procedure, more precisely in the case where the trial of the joined cases is not made by the higher court in relation to the nature of the offences or the quality of the perpetrators, but by a lower court.

**A second hypothesis** might be that in which the trial of the joined cases is carried out in violation of the jurisdiction rules in article 44 paragraphs (1) and (2) of the Code of Criminal Procedure, respectively by the military court instead of the civil court.

**A third hypothesis** could equally be the one in which the offences expressly stipulated in article 44 paragraph (3), namely the concealment, the favouring of the offender and the failure to report certain offences, are joined in the offence to which they refer and are judged by a lower level court, although they would have been in the jurisdiction of a higher level court in relation to the quality of the person what he has committed them.

Lastly, **another hypothesis** in which we consider that the absolute nullity sanction could also be imposed is that in which the court rejects the request for joinder, although, a compulsory joinder is applicable in this case and the jurisdiction to judge the joined cases would have rested with a court of higher level. We consider, however, that such a hypothesis would be more difficult to find in the judicial practice, since the compulsory joinder of cases is rather capable of a prorogation effect in the area of territorial jurisdiction, than an effect in terms of material jurisdiction.

From the perspective of the effects that a possible rejection of the joinder of cases in a compulsory case of joinder may have in the field of jurisdiction, the

provisions of the supreme court stipulated in a decision passed in the appeal are relevant, considering that **the disregard of the obligation to join the cases** is sanctioned with absolute nullity when the prorogation refers to the material and personal jurisdiction and relative nullity when the prorogation relates to the territorial jurisdiction<sup>38</sup>. In that case, the legal situation was represented by the existence of two case files judged by the same court (Cluj Court) concerning material acts that were included in the content of a single continued offence of influence peddling for two defendants. Although there were no requests for joinder in the case, the failure to join the cases being criticized in the appeals, the Supreme Court considered, however, that in this case, it was not even a matter of prorogation of jurisdiction, since jurisdiction over the perpetrators and their offences rested with one and the same court - Cluj Court, and not to more courts of an equal level or different levels. As such, it was found that *the failure to join the cases did not in any way affect the material, personal and/or territorial jurisdiction* of the court that is legally gained by the same unique court, which was vested from the beginning to settle the two cases.

As regards the violation of the jurisdiction rules in case of optional joinder of cases, we consider that the analysis of a possible nullity can only be made if the request for joinder has been admitted (because only in this case an effect of prorogation of jurisdiction becomes possible), and the hearing of the cases by a non-competent court according to the distinctions contained in article 44 of the Code of Criminal Procedure.

**Finally**, all these distinctions regarding the sanction of nullity in the event of non-compliance with the rules of jurisdiction in the area of joinder of criminal cases are also properly applied *during the criminal investigation*.

## 6. Case joinder procedure

*During the trial*, according to the rules stated in article 45 of the Code of Criminal Procedure, the joinder shall be ordered **at the request** of the prosecutor, the parties, the injured party and, **ex officio, of the competent court** which has jurisdiction to judge by prorogation (the court which joins the cases). We consider that, although the law does not make a distinction, the holders of the request for joinder can be both those who determine the jurisdiction of the court judging the joined cases, as well as the ones in the court, judging the case to be joined.

As regards the procedural phase and the procedural stage of the cases, it is necessary for these cases to be in the **same procedural phase and stage** and the cases under the criminal investigation with those that are pending trial, the cases in progress with

<sup>37</sup> C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.

<sup>38</sup> High Court of Cassation and Justice, Criminal Division, decision no. 2379 of 14 June 2011, available on [www.scj.ro](http://www.scj.ro).

those in the preliminary chamber procedure or the cases under appeal with those judged by the first instance court cannot be joined<sup>39</sup>. In this respect, article 45 paragraph (2) explicitly states that the joinder may take place if the cases are judged **by the first instance court**, even after the decision has been cancelled or annulled, or **by the court of appeal**. The joinder is essential for the cases to be judged at the same time, so that, to the extent that one of the cases has been finally judged, there can be no question of joining them<sup>40</sup>.

Given that a new trial by the first instance court as a result of the cancellation/annulment of the decision in the appeals is a new trial on the merits of the case, we consider that two cases judged by the first instance court can be joined, one of which is in a first procedural cycle and the other in a second procedural cycle, determined by the cancellation/annulment with referral for a new trial.

In the doctrine, there was discussion about the possibility to join the cases in the preliminary chamber stage, the parties expressing their points of view. In this respect, the supreme court's view seems to be the one according to which **the joinder of cases cannot occur in the preliminary chamber**. Thus, the High Court of Cassation and Justice, in order to settle a challenge against the preliminary chamber resolution<sup>41</sup>, considered that the joinder of cases could only be carried out *after the preliminary chamber procedure*. Consequently, the judge conducting the preliminary chamber may refer a case to a court to value the joinder with another case which is judged by it, only after the preliminary chamber procedure and the start of trial.

According to the judge conducting the preliminary chamber within the Supreme Court, the provision for referral of the case in order to value the joinder may be included in the report ordering the start of trial.

In order to state the above, the judge conducting the preliminary chamber within the Supreme Court considered that, in relation to the provisions of both article 43 but also of article 45, paragraph (2) of the Code of Criminal Procedure, the joinder of cases may be made if **they are judged by the first instance court**. According to the same judge, by using the phrase "*by the first instance court*", in relation to the provisions of article 3 paragraph (1) letter d) and paragraph (7) of the Code of Criminal Procedure and the name of Chapter II - "Hearing by the first instance court" in Title III - "Trial" of the special part of the Code of Criminal Procedure, **the legislator wanted the cases to be joined only after the preliminary chamber procedure**. In fact, according to the judge, another argument to support this theory is the fact that, in the preliminary chamber, the filter procedure is carried out

by the judge conducting the preliminary chamber and not by *the court*.

Consequently, in relation to the foregoing, the judge conducting the preliminary chamber considered that the joinder of cases in criminal matters is made before the first instance court and not in the preliminary chamber procedure.

We also embrace the arguments put forward by the judge conducting the preliminary chamber of the High Court on the subject matter and we consider that the joinder of criminal cases cannot take place in the preliminary chamber procedure. In addition to the textual arguments put forward in this case, the possibility to join the cases in such a procedure should also be examined in the light of the solutions or measures that may be taken in the this procedure.

For example, if the cases are joined in the preliminary chamber, and the judge conducting the preliminary chamber would order, in the first instance, to remedy the irregularities of both documents instituting the proceedings which are the subject of the verifications conducted in the preliminary chamber. Given that we are talking about two distinct indictments, so two procedural documents belonging to different prosecutors, we would practically have situations in which the filter procedure would be unduly delayed, with each prosecutor being liable for his/her own indictment and his/her own file. At the same time, a possible joinder in the preliminary chamber can never lead to a joinder of the prosecution files pending before the court, especially as we are in the presence of prosecutions which are, basically, finalized.

Finally, the court competent to judge the joined cases shall decide on the request for joinder or, on its own initiative, by a **court session report** which can be appealed only with the merits of the case.

*During the criminal investigation*, the case joinder procedure is different in view of the nature and specificity of this procedural stage, although, in principle, the rules applicable in the field of joinder during the trial apply accordingly. In particular, the joinder during the criminal investigation may be ordered at the request of the parties but also of the main subjects, namely the suspect and the victim, as well as ex officio by the prosecutor's office competent to carry out the criminal investigation for all the joined cases. The joinder, as a procedural act, is ordered by the prosecutor by means of an ordinance.

## 7. Conclusions

Considering all the above matters, it can be concluded that the joinder of the criminal cases in the Romanian procedural law is a complex institution with

<sup>39</sup> C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.

<sup>40</sup> In the same sense, see also Timișoara Court of Appeal, by the criminal court sentence no. 153/PI of 27 February 2018, available at [www.jurisprudenta.com](http://www.jurisprudenta.com).

<sup>41</sup> High Court of Cassation and Justice, Criminal Division, judge conducting the preliminary chamber, court session report no. 827 of 14 September 2017, available at [www.scj.ro](http://www.scj.ro).

many practical implications and even difficulties of interpretation and application.

Any controversial issue of the application of the joinder of criminal cases should be solved, by starting with the analysis of the regulation of this criminal procedural law institution. It is necessary to firstly observe the main purpose of regulating this procedural measure, namely, which is the good administration of justice, without neglecting the fundamental human rights of the parties in a criminal case.

Although it may seem that the joinder of cases in criminal matters is a simple institution, it may give rise to different interpretations, especially with regard to the sanctions that may apply for breaching the provisions

regulating this institution. As usual, the most important aspects to be dealt with on this matter remains the sanction of procedural nullity.

A further legislative approach on the matter should focus maybe on providing clearer regulations with regard to the procedural phases and stages of the criminal proceedings in which the joinder may be ordered, especially in respect to those special procedures that may not fall directly under the cases of joinder provided by art. 43 of the Criminal Procedure Code in force (e.g.: complaints against the acts of the case prosecutors of non-referral to the court, challenges to the enforcement of the court decisions, etc.).

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- V. Dongoroz (coord.) *Explicații teoretice ale Codului de procedură penală roman, Partea general, vol. I*, Editura Academiei Republicii Socialiste România, București, 1975, p. 102.
- High Court of Cassation and Justice, Criminal Division, decision no. 1495 of 10 May 2012, available on [www.scj.ro](http://www.scj.ro).
- C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.
- I. Neagu, M. Damaschin, *Tratat de procedură penală, Partea generală*, Editura Universul Juridic, București, 2014, p. 365.
- G. Theodoru, *Tratat de Drept procesual penal*, Ed. Hamangiu, 2007, p. 311.
- *Idem*.
- *Ibidem*.
- Note in N. Volonciu, *Comentariu la articolul 44 din Noul Cod de Procedura Penală*, 2014, [www.sintact.ro](http://www.sintact.ro).
- See in this respect, Dan Lupascu. Mihai Mareș. *Considerații privind competența organelor judiciare civile și a celor militare*, published on 5 June 2017 on [www.juridice.ro](http://www.juridice.ro) and in "Revista Pandectele Române" number 3 of 30 June 2017.
- C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 137.
- Pursuant to article 38 paragraph (2) of the Criminal Code, there is a *combination of offences* when an action or inaction committed by a person, due to the circumstances in which it has occurred or the consequences which it has incurred, accomplishes the content of several offences. In this situation, the perpetrator undertakes a single action, which, by its pursuit, affects at least two social values protected by different offences by the legislator.
- The offence is *continuous* when its material element (action or inaction incriminated by the criminal law) is naturally extended. In fact, we are talking about a single material act extended over time, therefore, of one offence in its materiality. For this analysis, we consider that only the *successive continuous offence* is likely to be the subject of a compulsory joinder of cases, because, by itself, it assumes the natural interruption and the resumption of the material act, without generating multiple offences - as is the case, for example, of the offence of driving a vehicle without having a driving license.

- For a similar definition of the successive continuous offence, see C. Mitrache, C. Mitrache, *Drept penal român, Partea generală*, Universul Juridic, București, 2014, p. 301.
- The *complex offence* is expressly regulated by article 35 paragraph (2) of the Criminal Code providing that the offence is complex when its content includes an action or an inaction which constitutes an offence stipulated in the criminal law, as a constituent element or aggravating circumstance element. *The compulsory joinder of cases seems natural if the committed offence is a complex one, i.e. it includes at least two actions or inactions which are incriminated as freestanding offences under the law.*
- Constitutional Court of Romania, Decision no. 719/2016 - the exception of unconstitutionality of the provisions of article 43 paragraph (1) of the Code of Criminal Procedure, published in the Official Gazette no. 125 of 15 February 2017, paragraph 21.
- *Idem*, paragraph 22.
- Tr. Dima în I. Pascu, V. Dobrinouiu (coord.), *Noul Cod penal comentat*, Partea generală, ed. a II-a, Editura Universul Juridic, București, 2014, p. 262.
- Constitutional Court of Romania, Decision no. 368 of 30 May 2017 on the exception of unconstitutionality of the provisions of article 35 paragraph (1) and article 39 paragraph (1) letter b) of the Criminal Code, published in the Official Gazette of Romania, part I, no. 566 of 17 July 2017.
- C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 134.
- According to article 38 paragraph (1) of the Criminal Code, there are multiple offences when two or more offences were committed by the same person through separate actions or inactions, before being finally convicted for any of them. Also, there are multiple offences when one of the offences has been committed for the commission or concealment of another offence.
- *The participation in the offence* refers to the legal situation in which several persons participate as co-perpetrators, instigators or accomplices in the commission of an offence under the criminal law act.
- I. Tanoviceanu, *Tratat de drept și procedură penală, vol.II*, Tip. „Curierul Judiciar”, București, 1925, p.439.
- Tr. Pop, *op. cit.*, p. 190.
- Strictly related to the trial by the first instance court, both article 317 of the Code of Criminal Procedure 1968, and article 371 of the Code of Criminal Procedure stipulate that the trial is limited to the *offences and persons* indicated in the document instituting the proceedings.
- The Decision of the Constitutional Court of Romania no. 302/2017 passed on 4 May 2017, found that the legislative solution, included in the provisions of article 281 paragraph (1) letter b) of the Code of Criminal Procedure, which does not regulate in the category of absolute nullity the violation of the provisions on the material jurisdiction and by the quality of the person of the prosecuting authority, is unconstitutional.
- C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.
- High Court of Cassation and Justice, Criminal Division, decision no. 2379 of 14 June 2011, available on [www.scj.ro](http://www.scj.ro).
- C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.
- In the same sense, see also Timișoara Court of Appeal, by the criminal court sentence no. 153/PI of 27 February 2018, available at [www.jurisprudenta.com](http://www.jurisprudenta.com).
- High Court of Cassation and Justice, Criminal Division, judge conducting the preliminary chamber, court session report no. 827 of 14 September 2017, available at [www.scj.ro](http://www.scj.ro).