# FEW PRACTICAL ASPECTS AND PROBLEMS REGARDING LAW NR. 202/2010

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**Abstract**
*We have analyzed the impact the introduction of art. 74¹ penal C. over a certain category of infractions, respectively over the economical nature infractions. Harmonization of such recent norms with the already existent legislative framework rises a series of questions and possible practical problems. Also, we have considered interesting to appreciate if such changes are sufficient or there is not a conflict between the punishments set forth by regulators for each of such infractions. Should the answer be yes, there should be considered the possible conciliation methods.*

***Keywords:*** *sanction, replacement, individualization, penal liability, prejudice.*

## Introduction

Occurrence of law 202 gave rise to a series of legislative changes; from my point of view, the provisions keeping the attention and regarding an institution of great interest, are those provided in art. 74¹ penal C., as well as those in art. 320¹ penal. proc. C.

They both concern new methods for individualization of punishments, cases of punishment reduction or of replacement of the penal sanction with an administrative one. The first article (74¹ Penal Code[1]) does not benefit from a marginal denomination, yet it might be „cases of imprisonment punishment reduction or of application of another sanction".

A first element worth being analyzed is the legal nature of these two new institutions introduced by the regulator by Law 202/2010. We may not remember that art. 74¹ in Penal Code would have introduced a new attenuated circumstance, as they "define circumstances, qualities, states or situations accompanying the fact, contributing to the determination of the associated danger level, of the gravity and its qualification, or which relate to the personal situation of the doer, determining this one's associated danger, the kind of his fault and the incidence of the penal liability"[2].

To which extent could we talk about a replacement method for penal liability in case of art. 74¹ Penal Code? We know that the replacement of the penal liability may be unconditional when an

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[1]Article 74¹ Penal Code:

Paragraph 1- In case of committing fraudulent management infractions, scam, dilapidation, abuse in service for personal interests, abuse in service against public interests, abuse in service as also qualified as negligence in service, provided in the present code, or of economic infractions provided by special laws, by which a loss was generated, if during the penal pursuit or during trial, until settlement of the case in first instance, the defendant or faulty part integrally covers the caused prejudice, limits of the punishment provided by law for the committed crime being reduced to half.

Paragraph 2- In case the prejudice caused and recovered under the same conditions is up to euro 100,000, in the national currency equivalent, the fine punishment may be applied. If the prejudice caused and recovered under the same conditions is up to euro 50,000, in the national currency equivalent, an administrative sanction applies, which is recorded in the criminal record.

Paragraph 3- Provisions of paragraphs 1 and 2 do not apply if the doer had committed another similar crime, provided in the present code, within a 5 years interval from crime committing, for which it benefited from the provisions of paragraphs 1 and 2.

[2] Vintilă Dongoroz and colab., Theoretical explanations of the Romanian penal code, vol. II, p. 129, Editura Academiei Române, Bucharest, 2003.

infraction is non-incriminated and the nature of liability changes se or may be conditioned, in which case the replacement only operates if certain conditions are met; such form of conditioned replacement may compulsory operate by simply meeting the conditions required by law, or may be at the free choice of the court instance[3].

In the present case, I think we may say that paragraph 1 in art. 74¹ Penal Code represents a cause for punishment reduction, paragraph 2 thesis I constitutes a form of conditioned liability replacement and which only operates if the court considers so (it may not be replaced by a non-penal liability, yet the court may choose a fine in case of prejudice recovery), and regarding paragraph 2 thesis II, I believe it is possible to retain a non-equivoque for of penal liability replacement with an administrative liability form, replacement only operating as the intervention of the court being no longer necessary for the observation of such situation.

By the content of art. 74¹ Penal Code a series of infractions are set forth to which the present provisions are applicable, the doer's criterion being economic: to be more exact, it refers to those result infractions, provided in the penal code within title III (against the patrimony) and title V (against the authority) and which have caused a prejudice, a loss, on one hand, as well as to economic infractions provided in economic laws and which also caused a loss.

The cause for the reduction of the punishment limits to half, becomes functional for the above mentioned infractions only in case before the end of the trial stage in instance, the defendant or plaintiff covers the entire prejudice produced. On this case I believe that including the defendant in such provisions is excessive and that the regulator should have exclusively refer to the defendant, as it does not provide for the possibility of a solution at the end of the penal pursuit to consider art. 74¹ penal C.. I say this as art. 74¹ is part of Section II – Attenuating and aggravating circumstances and from the content of **art. 80 penal C.** it results that they may only be held by the court: „any circumstance kept as attenuating circumstance or as aggravating circumstance should be shown in the **decision**." The things are just the way they are as the <u>legal</u> individualization work is exclusively attributed to the court instance, and positioning such article recently introduced in <u>Chapter V. Individualization of punishments</u> from general side of the Penal code confirms such thing.

Paragraph 2 in art. 74¹ in penal C., comes with additional specifications setting forth the quantum of the produced prejudice, what punishment and sanction may be applied. Therefore, of the prejudice was up to Euro 100,000 in national currency equivalent, than in case the fine punishment **may apply**. Two observations should be made here: first of all the possibility and not the obligation of setting forth the fine punishment, as well as the fact that it is for the first time when the regulator sets forth a quantum into another currency than the national one in the content of the Penal Code. Practically, a recommendation for clemency is made in case of economic infractions that produced a prejudice covered by the end of the trial (reduction by ½ of the punishment limits) and which does not exceed the amount of euro 100,000. Case in which minimum one paradox is obvious: if the punishment limits are reduced by half, this refers to imprisonment punishments, as for this type of infractions there is not yet provided the fine punishment as alternative. But the regulator sets forth by the present article the possibility of applying the fine sanction, which alters from the legal point of view the provisions on the sanctions from each of the articles incriminating din such infractions, either from the Penal Code special part or from special laws. Practically, a change of the sanctions occurs, which is not provided in the legal content of the mentioned infractions. Nevertheless, mentions of the regulator are not exclusive, but exemplificative – „ (...) for some economic infractions as provided in the special laws".

The second thesis of paragraph 2 regards the situation when the caused prejudice does not exceed the amount of Euro 50,000 in the national currency equivalent, in which case an administrative sanction **applies**, <u>recorded into the criminal record.</u> This time not like in the previous thesis that „may apply".

[3] V. Dongoroz-op. cit., p. 192.

Moreover, in paragraph 3 a negative condition is provided, more exact the provision of art. 74¹ paragraphs 1 and 2 Penal Code do not apply if the doer benefited from these provisions within a prior five years interval before committing the present penal action. We have as elements: **a negative condition** circumscribed by **previously committing a similar infraction** within a **given term** and **for which the doer benefited from such institution.** In other words, art. 74¹ penal Code may apply in case it had not been applied for the same personal action for the same person for a similar act in the past 5 years.

The thing that remains unclear in this case is the interaction between this institution and other substantial penal law institutions, like the general individualization criteria: punishment limits from the special side, the social hazard of the action performed, the doer person and the circumstances attenuating or aggravating the penal liability (the situations of infractions, recidivism, aggravating circumstances and attenuating circumstances).

If in case of paragraph 1 it seem to yet retain from the court notifying with the case instance, with the same regime as a cause for punishment reduction by half, in case of paragraph 2 thesis II the other institutions that might be present in the case are automatically eliminated.

In situation of paragraph 1 it is clear that there will be started from such reduced limits of the punishment and the incidence of other norms of punishment individualization will be normally analyzed.

Regarding paragraph 2 thesis II, the faculty of applying a fine punishment is left for the court's choice which and in this case shall be able to make an analysis of all cases that might concur to the establishment of the punishment, such as to correctly individualize the punishment. For example, if there is observed that the defendant has penal antecedents (even if not for the same type of action) and/or in case there are aggravating incidents and circumstances from the general part, the court may pronounce an imprisonment punishment, which, should the defendant is also retained the attenuating circumstances and had covered a prejudice of up to Euro 100,000, may be subject to supervision.

Problems yet occur from the analysis of thesis II of art. 74¹, paragraph 2 penal Code: the regulator pronounces in the meaning that if the prejudice is less than Euro 50,000 and covered/recovered under conditions in the previous paragraph, then the court shall apply an administrative sanction. Practically, the court may no longer analyze any other incidental institution , is not interested if we have also aggravating circumstances retained and if, let's say, the defendant is recidivist. Regardless the situation, such a sanction to be further recorded in the criminal record will apply. It is clearly an arbitrary norm attacking the legality of the penal suit by cancellation of the legal individualization in such a case. If we also consider the fact that probably most of the economic infractions frame into this thesis, we will observe that therefore the regulator found it necessary to solve the problem of the celerity of the penal trial, impairing on the other hand its legality.

O also observe the fact that an obvious pecuniary discrimination produces: defendants affording to pay the prejudice shall benefit from this institution that becomes a real shield for a potential imprisonment punishment, and those not affording it, who could not find a job after the beginning of the penal pursuit or who had no possibility of obtaining a credit for covering the prejudice or who have no assets to sell in this regard, shall receive a liberty privation punishment as such infractions are not provided with the alternative fine punishment.

By the same law 202/2010 art. 320¹ in penal proc. Code was also introduced, called „Trial in case of guilt recognition"[4]. By the present article a distinctive procedure is regulated, applicable in

[4] Article 320¹ penal proc. Code.

Paragraph 1- Until beginning of judgment investigation, the defendant may personally state or by authentic writ that it recognizes the acts retained on the court notification deed and that it requests the judgment to take place based on the evidences administered during the penal pursuit stage.

case the defendant recognizes committing the acts recorded on the prosecution deed and requires for the judgment to be made based on the probation in the penal pursuit. This thing presumes the exclusivity of the already administered probation in the previous, the new evidences only possibly consisting in deeds of circumstantiation. In this case, the trial shall be solved with celerity – practical, upon the first judgment term, if there are no reasons to postpone - , and in case the settlement of the civil side involves administration of evidences, the case will be disjoint on this side. As effects, the court is held that under such conditions to pronounce the conviction of the defendant to a punishment of which limits will be reduced by 1/3 in case of imprisonment punishment and by ¼ in case of fine punishment.

There is spoken of a single type of court notification, namely by indictment, but I assume that such provision also apply in case the court kept the case for judgment in case of admitting a claim based on art. 278[1] penal proc. Code, giving another consideration to the probation in the penal pursuit stage, for example.

We have several conditions circumscribing this institution:

First of all, the moment until it might become applicable is clearly set forth by the regulator - „until the beginning of the judgment investigation". Any further moment brings the impossibility of invoking the incidence of art. 320[1] penal proc. Code in question.

Second of all, recognition should be complete, without reservation, aiming exactly the facts retained in the defendant's task and exactly as they were retained by indictment. Also, the defendant states that it does not intend to administrate other, from such rule exception being made for deeds in circumstantiation; yet the later ones may not be submitted unless upon the same moment, the postponement excluded for their submission, therefore as it results from the law's text.

Based on paragraph 3 of this article there is practically coming back to the rules for judgment investigation carrying on, the defendant is interrogated, after which the floor is given to the prosecutor and to the other parties on the case. A lack from the regulator is that it doesn't provide the institution available for the court in case the probation is considered as insufficient? There is a suggestion in paragraph 4 where it is said that „the court settles the penal side when, from the administered evidences results that the actions of the defendant are established and there are enough information regarding its person to allow the establishment of a punishment". Otherwise, I consider that the court may dispose, according to art. 332 penal proc. Code, the return of the case for remaking the penal pursuit.

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Paragraph 2 – Judgment may only take place based on the evidences administered during the penal pursuit stage, only when the defendant states that it totally recognizes the acts retained on the court notification deed and that it does not request administration of evidences, except for the writs in circumstantiation it is able to administer upon this judgment term.

Paragraph 3- Upon judgment term, the court asks the defendant if it requests the judgment to take place based on the evidences administered during the penal pursuit stage, which it knows and acknowledges, proceeds to its hearing and then it gives the floor to the other parties.

Paragraph 4- The court instance settles the penal side when, from the evidences administered, it results that the actions of the defendant are established and there are sufficient information regarding its person to allow the establishment of a punishment.

Paragraph 5 – Should for settlement of the civil action administration of evidences be necessary before the court, its disjoint will be ordered.

Paragraph 6 - In of case settlement by application of paragraph 1, the provisions of art. 334 and 340—344 correspondingly apply.

Paragraph 7 - The court instance shall pronounce the defendant's conviction, who benefits from a reduction by 1/3 of the limits of punishment provided by law, in case of imprisonment punishment, and from a reduction by ¼ of the limits of punishment provided by law, in case of fine punishment. Provisions of paragraphs 1—6 do not apply in case the penal action aims an infraction punished by life detention.

Paragraph 8 - In case of petition rejection, the court instance continues to judge the cause according to the common law procedure.

In case there is necessary to administrate evidences regarding the civil side of the case, disjoint shall be disposed, such as the settlement of the penal trial to be not delayed by the settlement of the civil action.

In the paragraph before the last one the limits of reduction for punishments is mentioned in case of guilt recognition; what amazes is that the regulator uses a strict tone for the possibilities: to be more exact, it only refers to the possibility of conviction, not considering the situation of replacement of the penal liability or defendant's acquittal based on art. 11, point 2 compared to art. 10 letter b[1] penal proc. code, for example. In any case, it is established that the imprisonment punishment will be reduced by 1/3, and the fine by ¼.

These provisions are not applicable when for the infraction the court had been notified with the life detention is provided. What is not very clearly said is if this thing is also valid in case of infractions with life detention alternative punishment provided and that of imprisonment, bur from a first interpretation it would result that including in such situations, the provisions of art. 320[1] penal proc. Code may not apply.

When such a request belongs to the defendant and it is rejected by the court, judgment shall be carried out according to common law procedure, as mentioned within paragraph 8. Practically, only this way the restitution of the case to the prosecutor would be possible for remaking the penal pursuit, as the special procedure regulated by this article does not provide for such possibility.

## Conclusions

There are several observations possibly brought to this new institution, but we shall concentrate, first of all, on the issues generated by its „crossing" with the penal law institution substantially presented in the first part of the study, respectively the one in art. 74[1] in Penal Code.

Practically, two different cases of reduction are established: one in the general part of the Penal Code by which the limits of the punishment are reduced by half, respectively a fine or an administrative sanction applies, and the one in the penal proc. Code by which the limits of the punishment are reduced by 1/3 in case of imprisonment, respectively by ¼ in case of fine.

There is no reason such cases wouldn't be cumulative; therefore there will be reached a series of situations when such reductions will cumulate in the same case, but what happens if they disappear from the penal Code. They shall be bringing the application of a fine instead of imprisonment punishment, the ones in the penal procedure code are decreasing such fine by ¼, but the infraction in question is only provided with imprisonment punishment, as in case of fraudulent management, for example?

The legal nature of the case provided in art. 74[1] penal Code is bivalent: on one hand it works as a special case of punishment reduction, and on the other hand it has a nature of penal sanction replacement with another, obviously more favorable (imprisonment is transformed in fine or an administrative sanction).

Starting from those above analyzed there can be said that such new institutions introduced by the regulator by Law 202/2010, activates on several ways:

On one hand, it favors the recovery of the prejudice in case of economic nature infractions, the same time acting in favor of the penal trial celerity; it reduces the punishment limits or even another punishment is chosen, like the fine or an administrative sanction applies.

No the other hand, a positive discrimination is made concerning the defendants; those who committed economic infractions, with prejudice recovered until the end of judgment, benefit from such institutions, unlike the other defendants regarding another type of infractions who may only benefit from the provisions of art. 320[1] penal proc. Code.

In conclusion, there may be said that such institutions seem to follow a penal vanguard's policy and tend to apply less severe sanctions for certain categories of defendants. There is an evident distinction made between this type of economic infractions and, practically, an evident attenuation of

the social abstract danger in such cases is intended. It is true that the provisions of art. 320[1] may apply regardless the nature of infraction (therefore not only to economic infractions), but also its effects are more reduced that in cases retained in art. 74[1] Penal Code.

Yet there cannot be denied that such provisions positively contribute to the celerity of the penal suit settlement and helps to achieve a lower volume of files recorded on the case of one instance.

## References

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