ABOUT THE PUNISHMENT ESTABLISHED FOR THE CRIME COMMITTED DURING PROBATION

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Abstract

Probation represents a measure of trust as far as the convict is concerned and it is ruled by the court for the continuation of the execution of the rest of the punishment without being detained. Exactly for this reason it is considered that when a person on probation has committed a crime while on probation, the applied punishment should be oriented according to the manner of calculation of the punishment in the case of the post-release recidivism.In this article, certain aspects of the probation institution have been analyzed, the opportunity of revocation or the maintaining of probation in case a new crime is committed between the period of probation and that of the punishment's fulfillment, and also the manner the punishment is established for this case being further examined.

Keywords*: probation, subsequent crime, merging, rest of the punishment*

1.*The notion of probation.* Probation is a measure of criminal policy of great importance for the fulfillment of the imprisonment punishment's purpose. It is considered as a stimulus for the convicts who show signs of amendment and it consists in the reduction of the time of imprisonment, being meant to accelerate the process of re-education and social reinsertion of the convict[1].

In the judicial doctrine, probation has been defined as a complementary institution of the regime of the execution of the imprisonment punishment, a mean of administrative individualization of the punishment, which consists in freeing the convict from the place of detention before the entire execution of the punishment, on condition that until the fulfillment of this period the convict should not commit any other crimes[2].

According to art. 59 of the Penal Code, art. 59^1 of the Penal Code and art. 60 of the Penal Code, the convict can be put on probation before the entire execution of the imprisonment punishment if a series of conditions, which concern the form of guilt under which the crime has been committed, are fulfilled, conditions such as: the age, the punishment's span, the work done by the convict, etc.

Therefore, the convict who needs to execute a punishment that does not exceed 10 years for a crime committed wittingly can be put on probation after one has executed at least two thirds of the punishment's span, if one is constantly working, disciplined and shows clear signs of amendment. If the punishment exceeds 10 years, the convict can be put on probation after one has executed at least three fourths of the punishment's span.

At the same time, for the negligence crimes, the convict can be put on probation before the entire execution of the punishment, after one has executed at least one half of the punishment's span for the imprisonment that does not exceed 10 years or at least two thirds for the imprisonment exceeding 10 years.

As far as the calculation means for the fractions of punishment is concerned the part of the punishment which can be considered, according to the law, as executed on the basis of the work

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[1] See C. Bulai, *Penal Law Workbook. General Part*, the Judicial Universe publishing house, Bucharest 2007, p. 586.

[2] See V. Dongoroz and collaboratores*, Theorethical explanations of the Romanian Penal Code, vol. II*, the Academic publishing house, Bucharest 1970, p. 42.

performed[3] is also taken into account. In this case, however, the fractions of punishment which the convict should execute before being put on probation are more reduced, as art. 59 line (2) of the Penal Code and art. 59[1] line (2) of the Penal Code stipulate.

Similar examples of the aforementioned can be diversified in multiple ways, however, mandatorily taking into consideration the conditions described in art. 59 of the Penal Code, art. 59[1] of the Penal Code and art. 60 of the Penal Code.

As far as the procedure that should be performed before the court of law can rule a probation request, one also encounters a series of provisions in Law no. 275/2006 concerning the execution of punishments and of the measures ruled by the judicial bodies during the penal trial. Therefore, according to art. 77 of the law aforementioned, probation is granted by the court of law according to the procedure stipulated in the Code of Criminal Procedure[4], as a result of a request made by the convict or at the proposal of the committee for the individualization of the regime of execution of the detention punishments. In case the committee is the one that requests probation, it should enclose its proposal in a motivated summons, together with the documents which certify the issues mentioned in the summons, and it should forward it to the court of law in whose circumscription the detention place is located. In case the committee observes that the convict does not fulfill the conditions to be put on probation, in the summons it prepares it should establish a term for the re-examination of the convict's situation, a term that cannot exceed one year. At the same time, the committee should inform the convict about the summons and it should bring to the convict's knowledge, by signature, that the convict can directly address a probation request to the court of law. When the convict chooses to directly address the court of law, requesting probation, together with the request the convict should also send the summons compiled by the committee for the individualization of the regime of execution of the detention punishments, together with the documents which certify the mentions enclosed within.

In order to solve the probation request of the convict or the request made by the committee, the court of law can examine the personal file of the convict. In case the convict's request or the request of the committee for the individualization of the regime of execution of the detention punishments is considered well-founded, the court of law shall grant probation, the convict being immediately set free.

2.*Setting the punishment for the crime committed during the probation period.* As it has been aforementioned, after granting the request of temporary freedom, the convict is set free from the penitentiary, this being the immediate effect of this penal measure. However, the convict is being set free from the penitentiary conditionally. According to the provisions of art. 61 line (1) of the Penal Code, "the punishment is considered executed if during the time span since being set free until the fulfillment of the punishment's duration, the convict has not committed any other crime". From this statement it is understood that the person convicted is still executing the punishment, even though the convict has been set free.[5]

The same law also stipulates that if during the time span since being set free until the fulfillment of the punishment's duration, "the person put on probation has committed a new crime, the court of law, taking into consideration its severity, *can* rule for *maintaining* probation, or for its *revocation*. For the latter, the punishment established for the crime committed subsequently and the

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[3] See art. 76 of Law no. 275/2006 concerning the execution of the punishments and of the measures ruled by the judicial bodies during the penal trial (published in the Official Gazette of Romania no. 627 of July 20, 2006)

[4] See art. 450 of Romania's Code of Criminal Procedure (republished in the Official Gazette of Romania no. 78 of April 30, 1997).

[5] Also see the provisions of art. 190 line (1) of the Implementing regulation of Law no. 275/2006 „Probation (...) is ruled for the continuation of the execution of the remaining punishment freely". (The Government's Decision no. 1897 of September 21, 2006 for the approval of the Implementing regulation of Law no. 275/2006 concerning the execution of punishments and of the measures ruled by the judicial organs during the penal trial, published in the Official Gazette of Romania no. 24 of January 16, 2007).

rest of the punishment that remained to be executed from the previous punishment is to be *merged*, *an augmentation of up to 5 years being applicable*." (author's note).

One cannot help observe the similarity between this situation and one of the hypotheses described in the provisions of art. 37 line (1) letter a) of the Penal Code: "There is recidivism for an individual in the following cases: a) when after the definitive conviction to imprisonment greater than 6 months, the convict wittingly commits a new crime, before beginning to execute the punishment, *during the punishment's execution* (author's note) or in escape state, and the punishment stipulated by law for the second crime is imprisonment for more than one year." Therefore, from the facts point of view and judicially speaking, it can be considered that committing a crime while on probation could constitute a case of recidivism after conviction.

However, the punishment that can be granted to a convict on probation for a crime committed between the period of probation and that of the punishment's fulfillment is similar to the punishment stipulated by the Penal Code[6] for *multiple crimes* committed by the individual, when there had been ruled only imprisonment punishments. There have been considered the provisions of art. 34 line (1) letter b) of the Penal Code according to which, in the case of multiple crimes, the court of law shall apply the hardest punishment which can be augmented up to its special maximum level, and when this maxim level proves to be insufficient, another augmentation of up to 5 years can be added.

Hence, in case more crimes have been committed *before* a definitive conviction has been ruled for the perpetrator, the hardest punishment shall be ruled, punishment *that can be augmented up to its maximum level* (author's note), and when this maximum level proves to be insufficient, another augmentation of up to 5 years can be added.

At the same time, there is the case when a convict put on probation commits a crime during the time span between the period of probation and that of the punishment's fulfillment, time span obviously chronologically situated after the definitive conviction decision, and also after the execution of a significant fraction of the punishment. In this case as well, according to art. 61 line (1) last thesis of the Penal Code, the court of law shall *merge* the rest of the punishment that has been left to be executed from the previous punishment with the punishment established for the crime committed subsequently, an augmentation of up to 5 years being applicable. (author's note)

In reality, "the mergence" consists in choosing which of the two punishments is harder: the rest of the punishment that has been left to be executed or the punishment for the new crime. Then, unlike the case of rival punishments, the hardest punishment chosen by the court of law shall not be augmented up to its maximum level, due to the fact that this procedure is not *expressis verbis* mentioned in the present Penal Code, and a clear definition of the "merger" is offered only in the judicial specialty literature. For this reason, the courts of law have the freedom to understand the verb "to merge" as an absorption procedure or as a judicial cumulative procedure.

According to the issues aforementioned, it can be observed that the Penal Code norms define "the mergence" by means of a systematic interpretation of the provisions of art. 36 of the Penal Code[7] in relation to art. 34 of the Penal Code and art. 35 of the Penal Code. Moreover, art. 39 line (1) contains the following provisions: "(1) In the case of recidivism stipulated in art. 37 line (1) letter a), the punishment established for the crime subsequently committed and the punishment applied for the previous crime are merged according to the provisions of art. 34 and 35." Nonetheless, at a closer examination of the legal texts mentioned hereinbefore, as far as art. 34 of the Penal Code is concerned there is a judicial cumulative system for the punishments of the same kind, while art. 35 of the Penal Code describes the absorption system for the punishments of the same kind and with the same content. It is true that art. 34 of the Penal Code concerns the main punishments that can be

[6] Romania's Penal Code, enacted by means of Law no. 15/1968, republished in the Official Gazette of Romania no. 65 of April 16, 1997.

[7] Art. 36 of the Penal Code is entitled "The merging of the punishments for rival crimes committed by the individual."

applied to an individual[8], and art. 35 of the Penal Code refers to the complementary punishments[9] and the safety measures[10], however, the fact there is room for interpretation cannot be denied. For this reason, we consider that for the issues aforementioned an exact definition for the "merging" procedure of the punishments is not offered by the legislator, as a result of an authentic interpretation, being possible for the court of law to use whichever system of punishment establishing and application for the plurality of crimes.

Moreover, the exact definition of the law for the procedure that should be followed has a greater impact on the effective way the punishment is established and applied by the court of law, this judicial body knowing exactly what steps it should follow. Much more intuitive and in the same time much more imperative is the text of art. 34 line (1) letter b) of the Penal Code[11] that that of art. 61 line (1) last thesis of the Penal Code [12]. As a result, it can be said that in the norms of art. 61 line (1) of the Penal Code, the existing statement of art. 34 line (1) letter b) of the Penal Code should be used, in such a way that not only the court of law but also the penal law's addressee to explicitly know the manner in which the punishment is established and applied.

For the interpretation of the provisions of art. 61 line (1) of the Penal Code it can be observed that the legislator's statement concerning the "rest of the punishment that remained to be executed from the previous punishment" is also scarce. To which remaining part does the legal norm refer to?! On one hand, one thinks about the rest of the punishment that has been left to be executed at the date of probation. However, the legislator also states, at the beginning of the same line, that the person put on probation is – legally- executing the punishment (even though the convict is not imprisoned any more), the punishment being considered executed only at the punishment's span fulfillment. Therefore, since the convict who is put on probation is still executing the punishment, it is possible for some courts of law to consider that "the rest of the punishment that remained to be executed from the previous punishment" to be calculated since the moment the subsequent crime is committed and not since the time the convict has been put on probation. Therefore, it is considered absolutely necessary for the legislator to specify exactly the moment that the court of law should consider when establishing the rest of the punishment that remained unexecuted.

The fact that the punishments' "merging" procedure and the augmentation of 5 years at most is just as important and it shall be applied only if the court of law *considers* that probation shall be revoked (author's note). Therefore, one can easily draw the conclusion that it is possible for probation not to be revoked, and for the second crime not to be considered even a rival crime. Since the legislator does not specify which is the regime of the subsequent crime, in case probation is not revoked, the principle of the indictment legality stipulated in art. 2 of the Penal Code does not offer the possibility to consider the subsequent crime as being neither rival crime nor the second term of a post – sentencing recidivism.

The possibility to revoke or maintain probation, left by the legislator to be interpreted by the court of law, also derives from the provisions of line (2) of art. 61 of the Penal Code, according to

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[8] According to art. 53 point 1 of the Penal Code the main punishments are life imprisonment, imprisonment from 15 days to 30 years and a fine from 100 lei to 50.000 lei.

[9] According to art. 53 point 2 of the Penal Code, the complementary punishments are: the interdiction of some rights from one to 10 years and military degradation. Also see art. 64-67 of the Penal Code.

[10] According to art. 112 of the Penal Code, the safety measure are: compulsory medical treatment, hospital admition, interdiction to occupy a position or to exercise a profession, a job or another occupation, interdiction to be in certain locations, expatriation of the foreigners, special seizure and interdiction to return to the family's home for a determined time.

[11] "b) when there have been ruled only imprisonment punishments, the hardest punishment is to be applied, which can be augmented up to its special maximum level, and when this maxim level proves to be insufficient, another augmentation of up to 5 years can be added."

[12] "(…) in this last case, the punishment established for the crime committed subsequently and the remaining punishment that remained to be executed from the previous punishment are to be merged, an augmentation up to 5 years being applicable."

which "revocation is *mandatory* (author's note) when the act committed represents a crime against the state's safety, a crime against peace and human kind, a manslaughter criminal crime, a crime committed with intent which resulted in a person's death or a crime by means of which extremely serious consequences have been produced."

Therefore, in case the court of law reaches the conclusion that it is not necessary for probation to be revoked, the previous punishment, for which the convict is put on probation therefore virtually executing it, and the punishment applied for the crime committed once again should be considered distinct and are to be autonomously executed.[13]

One can presume that the legislator has taken into account the situation when the subsequent crime has been committed out of guilt, and for this reason it does not agist the revocation of probation. This theory can also be found at the level of recidivism, when in art. 37 of the Penal Code it is stipulated that the second period of the recidivism should consist of a crime wittingly committed.

At the same time, one should also observe that, as far as the situation of multiple crimes is concerned, the form of guilt under which the respective crimes are committed it is not considered to be relevant; therefore some of them may be wittingly committed and others with intent. Hence, even though under the aspect of the *punishment's establishing* for the crimes committed during probation there may appear to exist a similarity with the situation of the multiple crimes, it should be observed that the sentencing regime is visibly easier than in the case of the plurality of crimes committed *before* the perpetrator has been definitively convicted for one of these.

Furthermore, in the judicial specialty literature there have been expressed opinions according to which "probation can be maintained even if the punishment ruled for the new crime is imprisonment which is to be executed in a place of detention, if the ruling of the new crime has occurred after the fulfillment of the punishment's execution, or if the conviction decision has remained definitive with a few days before the fulfillment of the punishment's span."[14]

One cannot agree with this thesis because, even though the new crime's rulling has occurred after the fulfillment of the punishment's span or the conviction decision has remained definitive with a few days before the fulfillment of the previuos punishment's span, it is almost ceratin that the subsequent crime has been committed between the time span since being put on probation and the moment of the punishmnett's fulfillment. The syncronization mentioned is owed to the fact that until the subsequent crime's ruling or until the ruling as being definitive of the conviction decision, there has been a phase of the penal prosecution, as well as a phase of ruling, which can also unfold at least in first court ruling and in appeal.

Furthermore, according to art. 450 line (3) last thesis of the Code of Criminal Procedure, the court of law judging the defendant for the subsequent crime is obliged to also rule upon the revocation of probation, and this court of law will surely consider the penal antecents of the defendant since these are known from within the act of aprehenssion. According to art. 263 of the Code of Criminal Procedure, it should be mentioned that the indictment should contain the data concerning the defendant[15].

Taking into consideration the fact that is clear that the punishment's establishment procedure for the crimes committed during probation, described in art. 61 line (1) last thesis of the Code of

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[13] See C. Bulai, *Penal Law Workbook. General Part*, the Judicial Universe publishing house, Bucharest 2007, p. 595; T. Dima, *Penal Law. General Part*, Hamangiu publishing house, Bucharest 2007, p. 630.

[14] C. Mitrache, *Romanian Penal Law. General Part*, the Judicial Universe publishing house, Bucharest 2010, p.428.

[15] It is considered that the legislator has considered the provisions of art. 70 line (1) of the Code of Criminal procedure, which of course should be verified by the prosecutor:"(1) The defendant, before being heard, is asked questioned about the first and last name, nickname, date and place pf birth, the parents' first and last name, citizenship, studies, military situation, place of work, job, address where one lives, *penal antecedents* and other information for establishing the defendant's personal situation."

Criminal Procedure, is faulty one can wonder if the legislator has not referred to the provisions of art. 40 line (1) of the Code of Criminal Procedure, concerning the intermediary plurality. Thus, it has been established that there is an intermediary plurality of crimes when after the defendant's definitive conviction for a crime previously committed, the convict committs a new crime before starting to execute the punishment, *during its execution* (author's note) or in state of escape and the conditions required by the law are not fulfilled for the existence of the recidivism state. Just as it has been previously mentioned, until the fulfillment of the punishment's span the convict put on probation is virtually executing it, albeit being released from the penitentiary[16]. Thus, the commitment of a new crime during probation can be considered similar to the intermediary plurality of crimes from all points of view.

Likewise, according to art. 40 line (1) of the Penal Code, the legislator has stipulated that for the intermediary plurality of crimes the punishment is to be applied according to the regulations for the *crime contest*. However, for the situation in which a crime is committed between the moment the convict has been put on probation and the fulfillment of the punishment's span, the provisions of art. 61 line (1) of the Penal Code allow the court of law judging the subsequent crime to maintain probation. The two texts of law contain obvious inconsistences, being discriminatory and in the same time biased in relation to the convicts who have benefited from the trust of the judicial system, being set free after the execution of a fraction of the punishment.

Moreover, if one also takes into account the moment when the convict has been put on probation being therefore released from the penitentiary, moment chronologically situated towards *the end* of the punishment established by the court of law, one can also observe the similarity between this situation and the post-release recidivism. The fact that the probation has been granted by a court of law as a sign of trust for the convict is not be neglected[17]. In such conditions, it can be said that the respective convict who has committed a crime during probation, due to the fact that one has betrayed the trust that has been granted not only by the court of law but also by the commission for the individualization of the regime of execution of the imprisonment punishments (in the case when this entity was the one that has proposed the probation), should serve a punishment at least just as severe as the one resulted from the application of the provisions of art. 39 line (1) of the Penal Code, concerning the post-release recidivism, can be easily oriented towards the punishment stipulated for the post-release recidivism. Consequently, it would be right for the augmentation indicated by the provisions of art. 61 line (1) last thesis of the Penal Code to be situated between the augmentation established for the post-sentencing recidivism (7 years)[18] and the one stipulated for the post-release recidivism (10 years)[19].

Besides, one should also take into consideration the trust granted to the convict by the court of law, in the sense that the convict can socially reintegrate and reform without actually executing the entire punishment for which the convict has been imprisoned. Accordingly, one can make a slight comparison with the provisions that regulate the conditional suspension of the punishment's execution, respectively art. 81 and following of the Penal Code. More precisely, one should refer to the legal norms which concern the revocation of probation in the case a new crime is committed during the probation period. Hence, it can be observed that in case the subsequent crime has been wittlingly committed, in art. 83 line (1) of the Penal Code the following solution is described: "If during the probation period the convict has committed a new crime, for which a new definitive

[16] Art. 61 line (1) of the Code of Criminal procedure: "The punishment is considered to be executed if in the time span since being put on probation until the fulfillment of the punishment's span, the convict has not committed another crime. (...)"

[17] See art. 190 line (1) of the Implementing regulation of Law no. 275/2006, approved by means of the Government's Decision no. 1897 of December 21, 2006, published in the Official Gazette of Romania no. 24 of January 16, 2007.

[18] See art. 39 line (1) of the Penal Code.

[19] See art. 39line (4) of the Penal Code.

conviction has been ruled even after the expiry of this term, the court of law revokes the probation, ruling for the *entire* execution, punishment which is ***not*** to be merged with the punishment applied for the new crime". (author's note)

3.*The revocation of the probation in relation to the provisions of the new Penal Code.* According to art. 246 of Law no. 187/2012[20], the new Penal Code[21] is to come into effect on Feburary 1, 2014. Subsequently, at least at a theoretical level, the analysis of the revocation of probation in case a new crime is committed is imposed by the future norms of penal law. Unlike the actual Penal Code, which regulates the revocation of probation in art. 61 (marginal name "The effects of probation"), the new Penal Code stipulates the provisions concerning the revocation of probation in a distinct article. Within art. 104 of the new Penal Code (entitled "The revocation of probation"), line no. (2) contains the following provisions: "If after being put on probation the convict has committed a new crime, which has been discovered during the probation period and for which a new conviction with the imprisonment punishment has been ruled, even after the expiry of this term, the court of law revokes probation and rules for the execution of the rest of the punishment. The punishment for the *new crime* is to be established and executed, as the case may be, according to the provisions of *recidivism* or *intermediary plurality*". (author's note)

Concerning the conditions required by the the new Penal Code for granting probation, one can esily observe that there are not stipulated other derogatory provisions for the reduction of the fractions of punishment which the convict should execute, on the consideration that the crime for which the convict has been convicted has been committed out of guilt or while being a minor. Thus, according to art. 100 line (1) of the new Penal Code, the only conditions that should be fulfilled for the court of law to grant probation for the imprisonment punishments are the following:

a) the convict has executed at least two thirds of the punishment's span, for imprisonment not exceeding 10 years, or at least three fourths of the punishment's span, but no more than 20 years, for imprisonment exceeding 10 years;

b) the convict is executing the punishment in open regime or semi-open regime;

c) the convict has fully fulfilled the civil obligations established by the imprisonment decision, except for the case when it is proved that it has not been possible in any way for the convict to fulfill them;

d) the court of law is certain that the convict is reformed and can be socially reintegrated.

Moreover, according to line (6) of the article aforementioned, "the time span between the date of being put on probation and the date of the punishmnet's fulfillment represents a *surveillance term* for the convict." (author's note)

Returning to the analysis of art. 104 line (2) of the new Penal Code, one can easily observe that the revocation of probation is mandatory, if a new crime has been committed, crime that has been discovered until the fulfillment of the surveillance period. In regard to these provisions, the new Penal Code does not make any distinction between the crimes for which the revocation of probation is up to the court of law [art. 61 line (1) of the actual Penal Code] and the crimes which mandatorily imply the revocation of probation [art. 61 line (2) of the actual Penal Code].

The mandatory revocation regulated by means of art. 104 the new Penal Code has been imposed as a result of the establishment of the new system of probation for which there exists a period of surveillance, measures and obligations, surveillance by the probation service and the possibility to modify or even cease the obligations, all these for the convict'social reintegration. In case the convict, regardless of all the support, control and institutional help granted, has a mala fide

[20] Law no.187 of October 24, 2012 for the implementation of Law no. 286/2009 concerning the new Penal Code, published in the Official Gazette no. 757/12.11.2012.

[21] Law no.286/2009 concerning the new Penal Code, published in the Official Gazette no. 510/24.07.2009.

behaviour or even commits a new crime, the law does not give the court of law the possibility to grant trust anymore, but is actually obliged to revoke probation.[22]

Concerning the nature and gravity of the crime, the form of guilt or participation with which it has been committed, one can notice that the new Penal Code does not contain any specification. Thus, in principle, the court of law is obliged to revoke probation regardless of the characteristics of the subsequent crime. In today's Penal Code, the court of law can rule for maintaining probation or for its revocation, "considering the gravity"of the subsequent crime. It can be observed that the version chosen by the future Penal Code is in full concordance with the requirements that the society should have in relation to a convict who has benefitted from probation. Nevertheless, there should be made a clear distinction between the punishment established for the wittingly committed crimes and that for the crimes committed unwittingly.

Then, in order for the revocation of probation to be ruled, the new law rules imply the fact that the discovery of the subsequent crime to be made during the surveillance term. One can notice that this condition was not stipulated by art. 61 of the actual Penal Code, being taken over by the legislator from the norms concerning the revocation of the conditional suspension of the punishment's execution in case a new crime is committed [art. 83 line (2) of the actual Penal Code[23]].

Unlike the actual reglementation, it is considered that the furture norms of penal law represent a step forward for the penal sciences' endeavors to prevent and combat the commitment of new crimes by the people who have already been definitively convicted and who have benefited the institution of probation. It is obvous that the future norms of penal law are much more severe than those in effect at the present time, mandatorily tightening the applied punishment, situation which is considered necessary as it results from the first part of the present article.

According to the future Penal Code, the first effect of the commitment of a crime during the surveillance term consists in the revocation of probation and in the coercion of the convict put on probation to execute the rest of the punishment. Therefore, in the future regulation, the legislator has adopted a different treatment: the punishment established for the crime subsequently committed and the rest of the punishment which remained to be executed from the previous punishment **shall not** merge anymore (author's note), yet the arithmetic cumulation procedure shall be applied.

This procedure is sustained by the provisions regulated by the future Penal Code concerning the punishment's establishing in the case of recidivism. Just as it is stipulated in art. 104 line (2) of the new Penal Code, the punishment for the new crime is established and executed, as the case may be, according to the provisions of *recidivism* or *intermediary plurality*. (author's note)

Art. 41 line (1) of the new Penal Code contains the following provisions: "(1) There is recidivism when, after an imprisonment punishment decision greater than one year has remained definitive and until the rehabilitation or the fulfillment of the rehabilitation term, the convict commits a new crime having intent or oblique intent, crime for which the law stipulates imprisonment punishment of one year or more."

Then, one should consider only the provisions that regulate the punishment which a court of law should apply in case of post-conviction recidivism, provisions described in art. 43 line (1) of the new Penal Code: "If before the previous punishment *has been executed* or *considered as being executed* a new crime is committed in recidivism state, the punishment established for this crime *is*

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[22] I. Pascu, V. Dobrinoiu, T. Dima et alli, *The Commented New Penal Code, vol I, General part*, the Judicial Universe publishing house, Bucharest 2012, p. 601.

[23] Art. 83 of the actual Penal Code **Revocation in case a new crime has been committed**. (1) If during the probation period the convict has committed a new crime, for which a definitive conviction has been ruled even after the expiry of this term, the court of law revokes the conditional suspension, ruling for the execution of the entire punishment, which does not merge with the punishment applied for the new crime. (2) However, the revocation of the punishment's suspension doesn't take place if the crime subsequently committed has been discovered after the expiry of this probation period. (...)

added at the previous unexecuted punishment or at the rest of the punishment remained unexecuted". (author's note)

Just as it is shown above, according to line (6) of art. 100 of the new Penal Code, "the time span between the date of being put on probation and the date of the fulfillment of the punishment's span constitutes surveillance term for the convict". Moreover, according to art. 106 of the new Penal Code, "if until the expiry of the surveillance term the convict has not committed a new crime, the revocation of probation has not been ruled and the annulment cause has not been discovered, *the punishment is considered executed*". Thus, the commitment of a crime during the surveillance period of probation is included in the conditions of post-convicition recidivism due to the fact that the post-release recidivism interferes when a new crime has been committed *after* the previous punishment has been *executed* or *considered as being executed*[24]. (author's note)

However, the new Penal Code also stipulates that the punishment for the new crime is established and executed, in certain cases, according to the provisions of intermediary plurality. According to art. 44 line (1) of the new Penal Code, "there is an intermediary plurality of crimes when, after a conviction decision has remained definitive and until the date when the punishment has been executed or considered as being executed, the convict commits a new crime and the conditions stipulated by the law in case of recidivism are not fulfilled. (2) In the case of intermediary plurality, the punishment for the new crime and the previous punishment are merged according to the provisions of the institution of multiple crimes." (author's note)

Thus, when the recidivism conditions, established by art. 41 line (1) of the new Penal Code, are not fulfilled, the punishment for the subsequent crime committed during the surveillance term of probation is established according to the provisions of the institution of multiple crimes.

According to art. 39 of the new Penal Code, "(1) In the case of multiple crimes, the punishment for each crime is to be established and the punishment is to be applied, as follows:

a)when there has been established a life imprisonment punishment and one or more punishments of imprisonment or by penal fine, the life imprisonemt punishment is to be applied;

b) when there have been established only imprisonment punishments, the hardest punishment is to be applied, to which an augmentation of a third of the total of the other punishments is to be added;

c)when there have been established only punishments by fine, the hardest punishment is to be applied, to which an augmentation of a third of the total of the other punishments is to be added;

d) when there has been established an imprisonment punishment and one by fine, the imprisonment punishment is to be applied, to which the enitre punishment by fine is to be applied;

e)when there have been established more imprisonment punishments and more punishments by fine, the imprisonment punishment is to be applied according to letter b), to which the enitre punishment by fine is to be applied according to letter c)."

Taking into account all the provisions aforementioned, one must admit that the manner in which the punishment for the subsequent crime committed during the surveillance term, but which **does not** fulfill the recidivism conditions, is to be established, is very confusing. Firstly, the institution of multiple crimes, by definition, implies the commitment of two or more crimes by the same person, by means of distict actions or lack of actions. Moreover, according to art. 44 line (2) of the new Penal Code, "in case of intermediary plurality, the punishment for the new crime and the *previous punishment* are merged according to the provisions of multiple crimes" (author's note). However, in the present situation – the revocation in case a crime is committed – only a single subsequent crime, committed during the surveillance term, is encoutered. Which should be the "previous punishment"?

[24] Art. 43 line (5) of the new Penal Code: "If after the previous punishment has been executed or considered to be executed a new crime has been committed in state of recidivism, the special limits of the punishment stipulated by the law for the new crime is to be augmented with a half."

It is absurd to consider that the legislator has taken into account the rest of the punishment that has remained unexecuted, on one hand, and the crime subsequently committed, on the other hand, which will be merged according to the applicable rules of the multiple crimes. In art. 104 line (2) of the new Penal Code it is established that in case a misdeameanor is committed during the surveillance term and an imprisonment punishment conviction is ruled (even after the expiry of this term), the court of law should act in two very precisely delimited stages:

- in the first stage, the court of law – manadatorily - revokes probation and *rules the execution of the rest of the punishment* (author's note);

- in the second stage, the court of law establishes the punishment for the new crime, which has absolutely no connection with the rest of the punishment.

In the text of art. 104 line (2) of the new Penal Code the following disposition can be found: "The punishment for the *new crime* is established and executed, as the case may be, according to the provisions of recidivism and intermediary plurality" (author's note). There exists no formulation which should lead to the idea that the punishment for the subsequent crime is to be merged with the rest of the punishment that has remained unexecuted. Furthermore, in the phrase previous to the one stated above, the legislator very clearly stipulates that the court of law revokes probation and *rules the execution* of the rest of the punishment[25] (author's note). The court of law, as far as the revocation of probation and the execution of the rest of the punishment are concerned, mandatorily takes a decision, in all the cases, prior establishing the punishment for the new crime.

Probably, the legislator has taken into account the situation in which the convict put on probation has committed a new crime during the surveillance term, and this crime is not situated in the conditions of the second term of recidivism, precisely: "an intent or oblique intent crime, for which the law stipulates the imprisonment punishment of one year or more"[26]. Hence, the only crimes which cannot constitute the second term of the recidivism are those committed out of guilt and those for which the law stipulates the imprisonment punishment of less than one year. The punishment of fine cannot be discussed because the conditions stipulated in art. 104 line (2) of the new Penal Code, ("for which an imprisonment punishment has been ruled") would not be fulfilled.

Then, one should ask oneself: which was the legislator's intention in the case of the wittingly crimes and of those for which the law stipulates the imprisonment punishment of less than one year? It is possibile that, in the case of these crimes, the legislator could have thought at the following solution: the court of law revokes probation and rules for the merging of the rest of the punishment that has remained unexecuted with the punishment established for the crime subsequently committed, according to the provisions of the institution of multiple crimes.

The legislator's intention is considered to have been good and, in all the cases, the revocation of probation must be ruled. One makes this statement due to the fact that the person put on probation should give special attention to his/her actions, in such a way as it would be impossible to commit any crime out of negligence[27].

If this has been the legislator's intention and the legislator wished to make a distinction between the situation of committing an intentionate crime and the one of committing a wittingly crime, the transposition in judicial norm is inaccurate and extremely confusing. The formulation of the text of art. 104 line (2) of the new Penal Code does not allow such an interpretation, because, just as it has been proved before, in the same line, but in the previous phrase, it was exactly the legislator

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[25] Art. 104 line (2) of the new Penal Code "If after being put on probation the convict has committed a new crime, which has been discovered during the surveillance term and for which there has been ruled a conviction of imprisonment, even after the expiry of this term, the court of law revokes probation and rules the execution of the rest of the punishment. The punishment for the new crime is extablished and executed, as the case may be, according to the provisions of *recidivism* or *intermediary plurality.*"

[26] See art. 41 line (1) of the new Penal Code.

[27] According to art. 16 line (4) letter b) of the new Penal Code, "the deed is wittingly committed when the perpetrator does not foresee the result of one's action, even though one should and could have anticipated it."

the one who unconditionally coerces the court of law to rule the revocation of probation and the execution of the rest of the punishment.

Consequently, in relation to the actual regulation, it can be said that the application of the norms concerning the punishment's establishing for the institution of multiple crimes to the situation of the punishment's establishing for the new crime committed during probation is impossible, due to the troublesome formulation of the text of art. 104 line (2) of the new Penal Code. It is true that if more crimes shall exist, then the provisions of the institution of multiple crimes can be applied, however, only concerning the new crimes committed[28]. The rest of the punishment remaining unexecuted **shall never** be merged with the subsequent crimes, due to the fact that the legislator actually coerces the court of law "to revoke probation and to dispose the execution of the rest of the punishment". As a result, concerning the rest of the punishment that has remained unexecuted and the punishment established for the subsequent crime the artihmentic cumulative process shall always apply, and not the one of the judicial cumulation, which implies a mergence.

Besides, in relation to the provisions of art. 100 of the new Penal Code, it can also be observd that, in order for the conditions of probation to be fulfilled, the convict must have executed *at least* two thirds of the punishment's span, in the case of imprisonment not exceeding 10 years, or *at least* three fourths of the punishment's span, in the case of imprisonment exceeding 10 years (author's note). Consequently, the situation of a crime's commitment during the surveillance term is very similar – at a temporal level – to the post-release recidivism. One should also take into consideration the trust that the court of law gives to the convict when ruling probation, trust that the convict put on probation defies when committing a new crime. According to art. 100 line (1) letter d) of the new Penal Code, probation can be ruled if "the court of law is certain that the convict has made amendments and can reintegrate in society".

In regard to the issues aforementioned stipulated, the following formulation is considered to be better suited for the situation created by the commitment of a new crime during the surveillance term:

"(2) If, after being put on probation, the convict has committed a new crime, which has been discovered during the surveillance term and for which an imprisonment conviction has been ruled, even after the expiry of this term, the court of law revokes probation and rules the execution of the rest of the punishment together with the punishment established for the new crime, according to the provisions of recidivism [author's note, art. 43 line (1) of the new Penal Code]. In case the subsequent crime is wittingly committed or if the law stipulates for this crime the imprisonment punishment of one year at most, the rest of the punishment remained unexecuted together with the punishment established for the new crime are to be merged according to the provisions of the institution of multiple crimes. (author's note, art. 39 of the new Penal Code)."

4.*In conclusion*, it can be observed that the provisions of art. 61 line (1) of the actual Penal Code must be reconsiderd in such a way as not to contradict the norms that regulate the plurality of crimes. Moreover, taking into consideration the severity of the punishment established for the crime committed between being put on probation and the fulfillment of the punishment's span, it is believed that this should be equivalent with the one existing at the level of the crimes committed after execution, thus consisting in an express warning of the convict put on probation in order to refrain from committing a new crime, during probation.

To the same effect, even the simple fact that the convict benefits from the clemency and evident trust of the court of law which decides the free him/her, in certain cases even after the

[28] See art. 43 line (2) of the new penal Code: "When before the previous punishment has been executed or considered executed more rival crimes have been committed, out of wich at least one is in state of recidivism, the established punishments are merged according to the provisions of the institution of multiple crimes, and the punishment resulted is added to previous punishment or to the rest of the punishment which has remained unexecuted."

execution of just half of the time for which the convict has been definitively convicted[29], should identify an correspondent in the severity of the punishment which the convict put on probation should receive, in case the convict has wittingly committed a new crime during probation. Therefore, it is believed that for the subsequent crime, the court of law can establish a punishment to which an augmentation between the augmentation established for the case of post-sentencing recidivism (7 years) and and the one stipulated for the case of post-release recidivism (10 years) can be added, and the rest of the punishment that has remained unexecuted to be arithmentically added to the respective punishment.

In what concerns the future regulations of the Penal Code which regulate the revocation of probation in case a new crime is committed during the surveillance term, it can be noticed that these – in the existent formulation- cannot be applied because they do not make a clear distinction between the wittingly committed crimes and those committed out of guilt. Furthermore, the text of art. 104 line (2) of the new Penal Code is incoherent, situation which will lead to severe problems as far as its application is concerned. For this reason, the reformulation aforementioned proposed should constitute at least a starting point as far as the advisably solving of this issue is concerned.

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[29] See art. 59[1] line (1) of the Penal Code: „The person convicted for committing one or more wittingly crimes can be released on probation before the entire execution of the punishment, after one has executed at least half of the punishment's duration for the jail time that does not exceed 10 years (…)".