



Research Article

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Legal changes of the decision not to initiate a proceeding in the Albanian criminal procedure code, their implementation in practice

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Abstract

The Prosecutor's Office is the only constitutional body that carries out criminal prosecution, when it becomes aware of a criminal offense.¹ Within the framework of the exercise of this constitutional right, when it becomes aware of a criminal offense, it must not necessarily pursue criminal prosecution. In all cases where it verifies that at first sight, or prima facie, there are legal reasons that prevent it from pursuing criminal prosecution, such as the cases: when the fact does not constitute a criminal offense, the criminal fact does not exist, the suspect dies, there are reasons for impunity related to the offense and the author, or in all other cases provided for in the law, the prosecution takes the decision not to initiate criminal proceedings.² The prosecution takes the decision not to initiate criminal proceedings, when prima facie, it is clear that there is no criminal offense, or there are circumstances that do not allow the criminal proceedings to continue and investigative actions to be carried out. Given the nature of this decision, in which the prosecutor's office only verifies and does not carry out investigative actions, the prosecutor's decision must be quick. With the changes made to Article 291 of the Code of Criminal Procedure, the decision not to initiate criminal proceedings must be taken within 15 days from the moment of registration of the criminal report and not within 30 days as it was before the changes in 2017.

This time change seems to be in accordance with the nature of this decision, since its taking has only verification and not investigative reasons. But how has this deadline been implemented in practice? What are the consequences of not respecting this deadline, in relation to the decision made? All of these will be part of the analysis of this manuscript.

Keywords: exercise of criminal prosecution, non-initiation of criminal proceedings, 15-day deadline, verification, investigation.

1. Introduction

The Prosecutor's Office is the only constitutional body that carries out criminal

prosecution. In this perspective, the prosecutor's office is the entity that learns about the criminal offense in several ways, such as the report made by citizens, medical personnel, public servants, the person injured by the criminal offense, as well as mainly through judicial police agents, but also through the written media and not only, who in one way or another inform the prosecutor that a criminal offense has occurred. After learning about the criminal offense, the prosecutor decides through an intellectual verification process whether or not to prosecute and this is its exclusive right.

The prosecutor does not prosecute in all those legal cases which prohibit him from doing so. Cases should be mentioned, when: the fact does not constitute a criminal offense; the criminal fact does not exist; the suspect dies; there are reasons for impunity related to the offense of the author; as well as in all other cases provided by law.³

This legal regulation, i.e. the non-prosecution, aims to protect the freedoms and constitutional rights of persons, as well as the procedural economy, since obviously in this case the prosecutor does not have to prosecute, when it is known that at the end of the investigation, he will again dismiss it, as we are faced with prohibitive circumstances to pursue criminal prosecution.

2. Legal reasons for the decision not to initiate criminal proceedings

The decision not to initiate criminal proceedings is a way of not exercising criminal prosecution, that is, the prosecutor stops carrying out investigative actions, after the incriminating material, is submitted. In an overview of the legal reasons for which non-start is decided, it results that the decision not to proceed, is taken when:

- the person is dead;
- the person is irresponsible or has not reached the age of criminal responsibility;
- the injured party's complaint is missing or he withdraws the complaint;
- when the fact is not prescribed by law as a criminal offense or when it is clear that the fact does not exist;
- the criminal offense has been extinguished;
- amnesty was granted;
- in all other cases provided by law.

If one of the above legal causes is analyzed, they are verifiable causes, for which there is no need for investigations, but only to verify the existence of one of the above-mentioned facts.

More specifically, regarding the case "*...a. when the suspect is dead;*", we say that this legal cause does not need to be investigated, but verified, and for this a death certificate is sufficient.

Further, regarding the case when: "*...b. the person is irresponsible or has not reached the age of criminal responsibility;*" we bring to attention that these are causes of impunity, which need verification and not investigation. For this, medical records and a birth certificate are needed.

Meanwhile, regarding the legal cause when: "*...c) the complaint of the injured party is*

³ Article 290 of the Code of Criminal Procedure of the Republic of Albania.

missing or he withdraws the complaint;”, it can be analyzed that this is the case where without the will of the victim of the criminal offense who files a complaint, there is no criminal proceeding. In this case, the initiation of criminal prosecution is not the exclusive competence of the prosecution, but of the injured person.⁴

Another legal reason for not initiating criminal proceedings is the case “... ç) *when the fact is not prescribed by law as a criminal offense or when it is clear that the fact does not exist;*” In relation to this legal cause in practice, there may be discussions, whether it is a verifiable legal cause, or whether the existence of this cause should be investigated, since to conclude that the fact does not exist or is not even envisaged as a criminal offense, this may be a situation not very simple or clear, so it can be complex and needs investigations and not verifications. However, from practice we have seen that there are a lot of filed reports, in which it is about civil, administrative legal relations or where there is clearly no criminal offense. In these cases, the prosecution should not initiate a criminal proceeding. So, in these cases, it is left up to the prosecutor who, through an intellectual process, decides whether or not to initiate criminal proceedings.

Regarding the case when “...d) *the criminal offense has been extinguished;*” we say that these are the causes of the statute of limitations for criminal prosecution and this is undoubtedly a valid reason.

Regarding the case when “...dh) *amnesty was granted;*” we bring to your attention that this legal cause is also verifiable and for this it is enough to verify the approval and scope of application of the respective law that provides amnesty.

Finally, the decision not to initiate criminal proceedings can also be taken “...e) *in all other cases provided by law.*” This last legal provision has been left in view of the evolution that the law undergoes and legal cases that may not always be predictable. These cases can be cases where we are faced with criminal offenses or violations of Article 59 of the Code of Criminal Procedure, for which the person injured by the criminal offense goes directly to the court, thus not having the exercise of criminal prosecution by the prosecutor.

3. The nature of the decision not to initiate criminal proceedings

The above legal causes also determine the nature of the decision not to initiate a criminal proceeding. This decision is taken when the prosecutor verifies the existence of the above legal causes in the incriminating materials deposited in the prosecutor's office and that these causes by nature do not need to be investigated.

In its consolidated practice, the Supreme Court, either in criminal panels or in joint panels, has determined the nature of this decision. In one of its unifying decisions,⁵

⁴ Article 284 of the Code of Criminal Procedure. Complaint - “1. *For the criminal offenses provided by articles 84, 89, 102 first paragraph, 105, 106, 130, 148, 149, 243, 254, 264, 275, 290 first paragraph and 318 of the Criminal Code, criminal prosecution can only be initiated with the appeal of the victim, who can attract him at any stage of the proceedings. 2. The complaint is made by the victim to the prosecutor or to the judicial police by means of a statement, in which, personally or through a special representative, the will to proceed with regard to a fact provided by law as a criminal offense is shown.*”

⁵ See the Unifying Decision no. 2/2013 of the Albanian Supreme Court.

the United Colleges of the Supreme Court have determined that:

“Criminal proceedings are triggered by the notification received by the prosecutor mainly or by the judicial police, but also by the report of citizens or legal entities about the occurrence of a criminal offense. The prosecutor registers the criminal proceedings first for the offense that he has received notification that it has been committed and, as the case may be, also the name of the person to whom the criminal offense is attributed. It is precisely this moment that the prosecutor has the opportunity to verify if we are in front of the cases provided for in Article 290 of the Code of Criminal Procedure, that is, if we are in front of the circumstances that do not allow the initiation of criminal proceedings and that legitimize the decision to not initiate criminal proceedings.

Cases of non-initiation of the criminal case do not require any deep investigation. Establishing the circumstances is easy and is generally done before the start of the criminal proceedings, therefore, only a few quick checks are enough to conclude whether to start or not a proceeding. These circumstances, in fact, do not require a complicated and long process for collecting data or performing important investigative actions in the direction of discovering the facts related to the basis of guilt or innocence.”

So, considering the nature of this decision, which has only verification and non-investigative reasons, this decision must be taken within a short period of time, so that the prosecutor can decide whether to prosecute or not, and to end this the criminal investigation within a reasonable time.

But what were the problems in practice and what was improved with the legal changes?

4. Practice problems regarding the decision not to initiate criminal proceedings before the amendments of the Code of Criminal Procedure with Law 35/2017

In the unifying decision of the Supreme Court on 2013, the nature of the decision not to initiate criminal proceedings was determined, guiding the prosecutor to take the decision not to initiate criminal proceedings within a reasonable time. However, in the Code of Criminal Procedure before the amendments, there was no specific deadline within which the decision not to initiate a criminal proceeding had to be taken.

This legal gap was fixed by the order of the General Prosecutor, which forced the prosecutors to decide within 30 days whether or not to initiate criminal proceedings. However, despite this regulation of an administrative nature, in practice it was noticed that in a large part of the cases, the prosecutor's decisions were outside the 30-day deadline from the moment the incriminating material was registered. The actions that were carried out were not verifications, but investigations which took time and caused delays in the preliminary investigation as a whole. After performing these actions, which were mostly investigative, and after taking some evidence, the prosecutor could decide not to start criminal proceedings even though the 30-day period had passed, or order the initiation of criminal proceedings. Therefore, it was considered appropriate that, in accordance with the nature of this decision,

some changes should be made in the Code of Criminal Procedure, with the aim of regulating this legal practice.

5. Amendments to the Criminal Code with Law No. 35 of 2017

In order to improve and adapt the Albanian Code of Civil procedure with the legislation of the EU, several legal adjustments were needed. Changes and improvements were also made to the articles that regulate the decision not to initiate criminal proceedings. One of the changes brought about by this reform is the removal of a sentence in Article 290 of the Code of Criminal Procedure, which more specifically changes from *“criminal proceedings cannot start and, if they have started, they must stop in any state of the proceedings”*, in *“criminal proceedings cannot be started”*.

This change was in accordance with the nature of the decision not to initiate and also in accordance with the unifying practice of the Supreme Court, which determined that the decision not to initiate criminal proceedings is a way of not exercising criminal prosecution. In the case that if it is exercised, the prosecutor continuously has the obligation to register the criminal proceedings and depending on the results obtained from the investigation, has the right to make a request for trial, dismissal of charge case or suspend the criminal proceedings.

The decision not to start cannot be made when the preliminary investigation phase has started, as it is a decision that is made before the preliminary investigation has started at all and is a way of ending the exercise of criminal prosecution. If the criminal proceedings have started and there are legal reasons that do not allow you to continue investigating, the decision to dismiss the case and the accusation is made. This clear definition is in accordance with the purpose of the decision not to initiate criminal proceedings, where criminal proceedings cannot be initiated when the legal causes defined in the law are proven.

Another change that is in accordance with the nature of this decision is Article 291 of Code of Criminal Procedure, the decision not to start the proceedings. This amended article states that: *“When there are circumstances that do not allow the initiation of the proceedings, the prosecutor gives a reasoned decision not to initiate the proceedings, within 15 days from the registration of the report”*. So, this legal change has reduced the phase of verifications from 30 to 15 days, considering that in this case there is a need for verifications and not for investigations.

6. Implementation of changes to the Criminal Procedure Code in practice

The changes to the Criminal Procedure Code came into force in August 2017 and it took a reasonable time to get the expected results. One of the results, the changes that were expected to be implemented, was the decision not to start within the period of 15 days from the moment of registration of the criminal report in the prosecutor's office. During the implementation in practice, the prosecutors found it impossible to take a decision within this deadline, due to the administrative procedures circulating

within the institution of the prosecution. After the reports are registered in the register, they must go through the administrative procedure for registration and for the drawing before the head of the prosecution, as well as with the heads of the section, the relevant entries will be made in the register regarding the drawing of the reports and after that, they are distributed to the prosecutor. After the prosecutor receives the incriminating material, he needs to perform some verification actions, such as obtaining documents, verifying statements, the fact of death, the causes of impunity. Therefore, taking the decision not to initiate the proceeding within the 15-day deadline was impossible.

We have noticed from practice, that these decisions are taken outside this deadline. The Code of Criminal Procedure has not provided for the consequences of not respecting this deadline, whether this decision is valid or not? But has this deadline influenced the decisions not to initiate criminal proceedings? Do we have an increase or decrease in no-initiated decisions?

According to the data received from the Prosecutor's Office of the Judicial District of Tirana, the General Jurisdiction concluded that:

- For the year 2017, there are 17,321 reports, 6,215 non-starting decisions, thus 35% of the reports;
- For the year 2018, there are 17,024 reports, 6,604 non-starting decisions, thus 35% of the reports;
- For the year 2019, there are 18,399 reports, 8,060 non-starting decisions, thus 43% of reports;
- For the year 2020, there are 16,879 reports, 7,168 non-starting decisions, thus 42% of the reports;
- For the year 2021, there are 17,137 reports, 6,773 non-starting decisions, thus 39% of the reports;
- For the year 2022, we have 17,475 reports, 7,135 non-starting decisions, pra 40% of the reports.

From the data of the largest prosecutor's office in the country, the Prosecutor's Office of the Judicial District of Tirana, we find that after the 2017 reform, the number of decisions not to initiate criminal proceedings in percentage has remained unchanged, while in 2019 and 2020 there is an increase and furthermore, there is an increasing consistency in decisions not to initiate criminal proceedings. The prosecution did not have data on how many of these decisions were made within the time limit of 15 days or not.

What we have noticed in practice is that even though the decision is taken outside the 15-day period, it is recorded in the registers within the 15-day procedural period, but there are also decisions that are taken outside the 15-day period. This happens because of the very large workload that the prosecution has due to the emptying of the vetting process, as well as the arrival of verifying information outside the 15-day deadline.

During the check of the legality of this decision, one of the legal reasons for which the annulment is requested is taking the decision outside the 15-day deadline.

7. The position of the Supreme Court on the validity of the decision not to initiate criminal proceedings

With the Constitutional⁶ and legal⁷ reform, the Supreme Court assumed its constitutional and procedural role, interpreting the law definitively. In this perspective, the decisions of the Supreme Court are binding on the courts of lower levels, since they interpret the law definitively.

The Albanian Supreme Court with its decision no. 104 dated 30.03.2023 states that the appellant's appeal is based on Article 291 of the Code of Criminal Procedure, which provides: "1. When there are circumstances that do not allow the initiation of the proceedings, the prosecutor gives a reasoned decision not to initiate the proceedings within 15 days from the registration of the report. 2. The decision is immediately notified to those who filed a report or complaint, the victim or her heirs, who have the right to appeal to the court within 10 days from the announcement of the decision".

"The College points out that this particular case is different from other cases, where the decision of the prosecutor for not starting the proceedings was dealt with. Concretely, the College finds that the decision of the prosecutor should be annulled, because it is a decision taken outside the provisions of the 15-day deadline, defined by article 290 of the CCP, and as such should be considered an abnormal decision. The College reiterates that, with the reform of the criminal procedural law, changes have also been made to articles 290 and 291 of the CCP, where in the latter provision, explicitly foresees the deadline for taking the decision not to start the proceedings. This procedural provision in a taxing manner provides that the disposition of the prosecutor for not starting the criminal proceedings must be received within 15 days from the verification of the essence of the notification of the criminal offense by the to the prosecutor and only in the absence of tax-related circumstances defined in Article 290 of the CCP.

In advance, it is to clarify that, in reaching each of the conclusions provided for in article 290 of the CCP, some research or verification actions are required in order to verify the existence of the cases provided for in this article. Each of the cases defined in Article 290 of the CCP are such that they do not require the performance of procedural actions or any in-depth verification of them, so the legislator has provided a maximum period of 15 days in this case. Each of the cases of this provision is such that immediately, after the entry in the registry of the notification of the criminal offense (by initiative or report), the prosecutor can decide whether it is necessary or not to carry out investigative actions. It follows from this conclusion that it cannot be claimed that the proceedings have not started when the prosecutor needs more verifications or when time has passed and various investigative actions have been carried out.

⁶ Article 141 of the Constitution of the Republic of Albania provides that: "1. The Supreme Court examines issues related to the meaning and application of the law to ensure the unity or development of judicial practice, according to the law."

⁷ Article 432 of the Code of Criminal Procedure provides that: "1. Recourse to the Supreme Court against the decisions of the court of appeal can be made for the following reasons: a) for the non-compliance or wrong application of the material or procedural law, especially the unification or development of judicial practice; b) for non-compliance or incorrect implementation of the procedural law, resulting in the invalidity of the decision, the absolute invalidity of acts or the unusability of evidence; c) when the appealed decision contradicts the practice of the Criminal College or the United Colleges of the Supreme Court."

On the contrary, for example, if the knowledge of the criminal offense has come, for which a series of actions have been fulfilled and the 15-day deadline has passed from the moment of the registration of the report, the prosecutor must decide to “dismiss the case” for a misdemeanor (Article 328 CCP) and the request for dismissal of the charge (Article 329/a CCP) for crimes, because we are not in the situation where the proceedings have just started, as required by Article 290 CCP, but in that provided by Article 328 CCP.

The Board assesses that, from a substantial point of view, the passing of the 15-day deadline means that the case is not completely clear and that one of the cases provided for by Article 290 of the Criminal Code can be identified without difficulty, as there is a need to perform various actions investigation. While, from a formal point of view, the passing of this term has as a consequence (if at least one of the cases provided for by Article 328 of the CCP, which in fact appear to be the same as those of Article 290 of the CCP), the obligation of to the prosecutor to submit a request for dismissal of the charge or case (Article 329/a), when it is a case of a crime or his obligation to dispose of a decision to dismiss the case (Article 328 of the Criminal Code), when it is a case of a criminal misdemeanor. From the above, the College assesses that the prosecutor’s decision to “not start the proceedings” is unusual or abnormal, as a decision that is not foreseen by the criminal procedural legislation, if it was taken after the 15-day deadline. The law has left the prosecutor a time span of 15 days to evaluate the cases provided for in Article 290 of the Criminal Procedure Code, which means that the decision of the prosecutor not to proceed beyond the 15-day deadline, defined in the law, constitutes a deviation in exercising the prosecutor’s function, and therefore such a decision marks the abnormality of his decision-making.

The correct application of procedural principles⁸, between the court-prosecutor relations, imposes to limit the cases of structural abnormality in the exercise by the prosecutor of a power that is not attributed to him by the criminal procedural law. After the 15-day deadline has passed, the legislator has foreseen the intervention of the judge of the preliminary session, who must control the exercise of the criminal prosecution and the decision-making of the prosecutor, as is the concrete case, where it turns out that the decision-making of the prosecutor is beyond the reasonable limit determined by tax in law (beyond the 15-day deadline). After the 15-day deadline has passed, and when one of the conditions provided by Article 328 of the Criminal Code exists, as argued by the appeals court in the present case, the law provides that it is the court that has the power to decide on the request of the prosecution, if the case should to be fired or not”⁹.

Therefore, the Supreme Court has stated that decisions taken outside the 15-day period makes them invalid and should be abolished. This interpretation seems to us a bit extended and goes beyond the purpose of making this decision.

⁸ Article 2 of the Code of Criminal Procedure entitled “Respect for procedural norms”, in its point 1 provides that: “1. Procedural provisions determine the rules for the way of exercising criminal prosecution, investigation and trial of criminal offenses, as well as the execution of court decisions. These rules are mandatory for subjects of criminal proceedings, for state bodies, legal entities and citizens.”

⁹ For more, see decision no. 104 dated 30.03.2023 of the Albanian Supreme Court, paragraph no. 15.

8. Conclusions and recommendations

The prosecution, as a constitutional body for the exercise of criminal prosecution, has the exclusive right to exercise it or not. One of the ways of not pursuing criminal prosecution is the decision not to initiate criminal proceedings according to Article 290 of the Code of Criminal Procedure. This decision is taken when at first sight it clearly appears that the criminal fact does not exist, or the fact does not constitute a criminal offense, when we have the termination of the criminal prosecution, when the person dies, when there is amnesty, the person is irresponsible due to age or mind. So, the decision not to initiate criminal proceedings is taken for legal reasons which by nature do not need to carry out investigative actions, but only for verifications. This was determined by the Supreme Court in the Unifying Decision of the United Colleges with decision no. 2/2013, considering that this decision is taken when *prima facie*, it seems clear that there is no criminal offense.

The legal changes made to this decision also determined the 15-day deadline, within which the decision not to initiate criminal proceedings must be taken. This deadline starts and is calculated from the day the incriminating material was registered in the criminal offense report registers. This deadline is impossible to be respected by the prosecutors, due to the administrative route of drawing the incriminating material and the verification actions that must be carried out. The Code of Criminal Procedure has not provided for the consequence that comes in case of taking the decision outside the 15-day deadline.

The Supreme Court in its jurisprudence has determined that taking the decision outside the 15-day deadline makes this decision abnormal and constitutes a reason to annul it.

Our opinion is different from the position of the Supreme Court, as we do not think that the lack of respect for the 15-day deadline is a reason for the invalidity of the decision. We think that it is the legal reasons, whether they are respected or not, that make the decision invalid and not exceeding the legal deadlines. The important thing is that the decision not to start was taken for verification reasons and that it is clear that at first sight there is no criminal offense and that there are reasons for impunity related to the offense and the author.

The deadline set in the code is disciplinary and orienting for the prosecution, but it cannot invalidate the decision made. This interpretation by the Supreme Court goes beyond the scope of this decision.

If the prosecutor will not be able to receive the documents, he has requested for the purpose of verification within the 15-day deadline, it is up to the prosecutor to register the criminal proceedings and continue with the investigative actions. While on the 17th the verification information arrives, for example the report of the mental state-irresponsibility examination, the amnesty is issued, the death certificate arrives, etc. even though these are reasons that do not allow you to continue the criminal proceedings, the prosecutor must continue with the proceedings and with the investigation phase and even carry out all investigative actions even though they are

not necessary. However, this is not economical for the proceedings as a whole, as this takes physical time from the prosecutors who, instead of dealing with investigations for criminal offences, should also deal with investigations when there is no criminal fact or when there are reasons for impunity.

Practice has shown that decisions are made outside the 15-day deadline. This is a short deadline which is not respected by the prosecution objectively. Therefore, it is necessary to change this deadline by extending it.

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