

# Appeal on the Duration of the Criminal Proceedings

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**ABSTRACT:** The special procedure of the appeal concerning the duration of the criminal trial does not concern the resolution of a criminal case, it does not offer absolution on matters of fact or law that anticipate the way of solving the criminal trial, it does not dispose on the guilt of the defendant or on the punishment imposed on him. Instead, its primary focus is on addressing the excessive or unreasonable character of the duration of the criminal trial in a procedure characterized by contradictory and orality. In this context, the defendant, the injured persons, the civil parties, the parties with civil liability or the prosecutor, in the exercise of their rights, may use this special procedure necessary to respect the right to a fair trial.

**KEYWORDS:** appeal; reasonable duration; fair trial, effective investigation; ECHR case-law

## 1. Legal provisions regulating the appeal regarding the duration of the criminal trial

The special procedure of the appeal regarding the duration of the criminal trial was regulated by the legislator by Law no. 255/2013 for the implementation of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I no. 515 of August 14, 2013, in fulfilling the obligations arising under the state from the provisions of Articles 6 and 13 of the Convention for the protection of human rights and fundamental freedoms, that is to create an effective judicial system capable of resolving criminal cases within a reasonable time and ensuring, at the level of national law, that, an effective remedy to allow the exploitation of the rights and freedoms enshrined in the Constitution.

From this point of view, the European Court of Human Rights has established by its case-law that the remedies offered for the purpose of ensuring the right to a fair trial, which presupposes the resolution of cases within a reasonable time, they may be accelerator or compensatory remedies [see judgments of March 29, 2006 in cases *Scordio (no.1) against Italy*, *Riccardi Pizzati against Italy and Musci against Italy*]. Accelerator remedies consist of the regulation of internal legal mechanisms that have the effect of solving processes within reasonable time limits. Compensatory remedies are the express and quantified reduction of penalties imposed as a result of the excessive duration of the case-solving procedure.

From the point of view of the criminal procedural provisions, the appeal regarding the duration of the criminal trial was introduced by the provisions of art. 488<sup>1</sup> - 488<sup>6</sup> Criminal procedure code, in the sense that if the criminal investigation or trial activity is not carried out within a reasonable period, an appeal may be made, requesting the acceleration of the procedure. Thus, this procedure is an *accelerator remedy*. As regards the regulation of this institution in the internal criminal procedural law, **the right holders to appeal regarding the duration of the criminal trial** are, according to Article 488<sup>1</sup> para. (2) of the Criminal Procedure Code, the following, the defendant, the victim, the civil party and the party with civil liability. During the trial, the appeal may also be filed by the prosecutor.

The procedure regulated under Article 488<sup>4</sup> - 488<sup>6</sup> of the Criminal Procedure Code **does not concern the merits of the criminal case, through the analyzed procedure not being tried an accusation in criminal matters, within the meaning of the provisions of Article 6 of the**

**Convention**, nor the fact that, by the pronounced conclusion of the judge of rights and freedoms or the court does not order on the guilt of the defendant or on the punishment imposed on him, or, c assess the reasonable duration of the criminal investigation or trial activity, according to the provisions of Article 488<sup>1</sup> para. (1) of the Criminal Procedure Code. However, having regard to the issues to be considered by the court in order to resolve the complaint, in the context of this procedure, the participants in the criminal proceedings have the right to attend the hearing in order to support, before the court, their arguments regarding the excessive or reasonable character of the duration of the criminal proceedings, and, in a procedure characterized by contradictory and orality (Decision no. 423 of June 9, 2015, of the Constitutional Court of Romania, published in the Official Gazette of Romania, Part I, no. 538 of July 20, 2015).

Moreover, Decision no. 599 of October 21, 2014, of the Constitutional Court of Romania, published in the Official Gazette of Romania, Part I, no. 886 of December 5, 2014, revealed that through the procedure established by the provisions of Article 341 (5) of the Criminal Procedure Code, regarding the resolution of the complaint in the council chamber, the legislator, in addition to the obligation to provide any person with an effective opportunity to address justice in order to defend his rights, freedoms and legitimate interests, **must impart to this possibility a fair character which confers fullness of exercise by achieving the aim pursued.**

**The competence to solve the challenge regarding the duration of the criminal trial** is vested, according to Article 488<sup>2</sup> par. (1) of the Criminal Procedure Code:

- the judge of rights and freedoms from the court to which it would be competent to hear the case at first instance in criminal cases in the course of the criminal investigation;
- in criminal cases, during the ordinary or extraordinary trial or appeal, the court is hierarchically superior to the one in whose role the case is.

According to paragraph (2) of Article 488<sup>2</sup> of the Criminal Procedure Code, when the judicial procedure on which the appeal is filed is pending before the High Court of Cassation and Justice, the power to settle the appeal belongs to another panel within the same section.

The appeal shall always be made in writing and shall include the essential elements provided in the provisions of art. 488<sup>3</sup> Criminal procedure code, namely:

- the name, surname, domicile or residence of the natural person, namely the name and registered office of the legal person, as well as the quality in question of the natural or legal person making up the application;
- the name and quality of the person representing the party in the process, and in case of representation by lawyer, his name and professional office;
- correspondence address;
- the name of the prosecutor's office or court and the file number;
- the factual and legal grounds on which the appeal is based;
- date and signature.

## **2. Procedure for solving the appeal regarding the duration of the criminal trial**

### ***a) Procedure in cases which are at the stage of criminal prosecution***

The scope of the criminal investigation is regulated by the provisions of Articles 5 and 285 (1) of the Criminal Procedure Code, according to which the criminal investigation, as a phase of the criminal trial, is regulated, the purpose is to gather the necessary evidence on the existence of crimes, to identify the persons who committed crimes and to establish their criminal liability. After the beginning of the criminal investigation *in rem* (on the act), the criminal investigation body, in the achievement of the object of the criminal investigation, proceeds to administer the

evidence specific to the investigation stage of the act in order to identify the perpetrators and to formulate the accusations.

The High Court of Cassation and Justice – the competent panel to hear the appeal in the interest of the law by Decision no. 7/2022, published in the Official Gazette of Romania, Part I no. 484 of May 16, 2022 – showed that the appeal regarding the duration of the criminal trial, in the event of remaining in the criminal investigation phase, brings into question two interdependent notions: the actual investigation and the reasonable duration. In this respect, the effectiveness of the investigation presupposes an effective investigation, which would reveal the perpetrator and the elements useful to the accusation; thorough, based on evidence; conducted with celerity, so within a reasonable period excluding the intervention of the prescription of criminal liability. The effective investigation is an obligation of diligence for the judicial body, assessed in the appeal regarding the duration of the criminal trial. The duty of diligence is incompatible with leaving the file in non-working by introducing it into the passive evidence of unknown authors, after a one-year investigative effort. This conclusion is more evident in the hypothesis that the file remains thus archived during the limitation period of criminal liability.

In the case of criminal prosecution *in rem*, the immediate purpose is to identify the perpetrator and issue the charges, to ensure the final desideratum, and to hold criminal liability. Regarding the ***procedure for solving the appeal***, according to the provisions of art.488<sup>4</sup> par.(1) of the Criminal Procedure Code, the judge of rights and freedoms, and, in order to solve the appeal for a case in the stage of criminal investigation, it has *the obligation to inform the prosecutor about the appeal filed, which, with reference to the possibility to formulate a point of view on it, to order transmission, within 5 days at most, a file or a certified copy of the case file by the prosecutor, and to inform the other parties in the trial and, where appropriate, the other persons referred to in Article 488<sup>1</sup> para. (2) Of the Code of Criminal Procedure on the appeal filed and on the right to express his point of view within the time limit granted for this purpose by the judge of rights and freedoms.*

The non-transmission of views within the time limit set by the court does not prevent the resolution of the appeal, which will be made within 20 days of its registration.

### ***b) Procedure in cases which are in the trial phase***

In judicial practice, there have been few cases challenged during the criminal trial when the file is in the course of the trial or ordinary appeals (appeal, contestation) or extraordinary (appeal for annulment, appeal in cassation, review, reopening of criminal proceedings in case of missing trial of the convicted person).

The procedure is similar to the one that is done in the cases that are in the course of the criminal investigation, where the court hierarchically superior to the one on whose side the case is pending informs the court on whose side the case is pending of the appeal filed, with reference to the possibility of formulating a point of view on it, the submission of the file or a certified copy by the court in which the case is pending in no more than 5 days and the information of the other parties in the trial about the appeal and the right to express ones point of view.

Whether we are in a proceeding where the case is in the stage of criminal prosecution or is in the trial phase, the criminal procedural provisions laid down in the provisions in Article 488<sup>4</sup> para. (5) of the Criminal Procedure Code shows that the resolution of the appeal regarding the duration of the criminal trial is made by concluding, in *the council chamber, with the summoning of the parties* (defendant, civil party, party with civil liability), of the main procedural subjects (suspect and the injured person) and with the participation of the prosecutor.

The provision on summons to appeal on the length of the criminal proceedings must comply with the principle of contradictory which allows the parties to participate equally in the

presentation, argumentation, argumentation, discuss and combat the claims made by each and express their opinion on the initiatives of the court for the purpose of establishing the truth. The principle is expressed by the adage *audiatur et altera pars*. In criminal matters, the principle of contradictory also expresses the requirement that the function of accusation be separated from the judicial function, being on a procedural position equal to the function of defense, and the accusation and defense are challenged in front of the court from contradictory positions, so that the authority that judges to reach a correct assessment of the evidence. Thus, the establishment of judgment on the principle of contradictory implies equality of arms both in terms of the criminal side and in terms of the civil side.

Guarantees of a fair trial also imply the right of the participants in the trial to take cognizance of any document or observation presented/submitted to the court and to debate/debate it. This is essential for the trust of the judiciary in the functioning of the judiciary and is based on the safety of the parties, whose ability to express themselves on any document in the file. (See the Decision of the Constitutional Court of Romania no. 599 of October 21, 2014). In case of non-appearance of the legally summoned persons, the resolution of the appeal is not prevented.

### **3. Solving the appeal regarding the duration of the criminal trial**

On the occasion of the settlement of the appeal, according to art. 488<sup>5</sup> par. (1) of the Criminal Procedure Code, the judge of rights and freedoms or the court checks the length of the proceedings on the basis of the proceedings and the material in the case file and the points of view presented, taking into account the nature and subject matter of the case, the complexity of the case, and, including by taking into account the number of participants and the difficulties in taking the evidence, the extraneity elements of the case, the procedural phase of the case and the duration of the previous procedural phases, the behavior of the appellant in the judicial proceedings under review, including in the light of the exercise of his procedural and procedural rights and in the light of the fulfilment of his obligations in the proceedings, the conduct of the other participants concerned, including the authorities involved, the intervention of legislative changes applicable to the case and other elements likely to influence the duration of the procedure.

The judge of rights and freedoms or the court, for the purpose of solving the appeal, shall rule according to the provisions of Article 488<sup>6</sup> para. (1) Criminal procedure code, when it considers the appeal as well-founded, admits the appeal and sets the time limit within which the prosecutor can solve the case, respectively the court can settle the case, as well as the time limit within which a new appeal cannot be filed.

In cases with unknown authors, the setting of the time limit for the completion of the criminal investigation and the date from which a new appeal can be filed is an effective mechanism within the institution, which, with effects on ensuring the effectiveness of the investigation. The solution of classification will not be appropriate, however, until the identification of the incidence of one of the cases listed by Article 16 of the Criminal Procedure Code (cases that prevent the initiation and exercise of criminal action).

For the purpose of setting a time limit for the completion of the criminal investigation in cases with unknown authors, the High Court of Cassation and Justice, the Panel competent to judge the appeal in the interest of the law, by Decision no. 7/2022, in the unitary interpretation and application of the provisions of Article 488<sup>6</sup> (1) of the Criminal Procedure Code, reported in Article 285 of the same code and Article 154 of the Criminal Code, established that in the cases having as object complaints regarding the duration of the trial in the case of facts whose authors have not been identified (or identifiable), although the criminal investigation bodies have done

their due diligence for this purpose, deadlines are set for the completion of the criminal investigation (which also involves the identification of the perpetrators) and, respectively, in which a new appeal cannot be filed.

According to paragraph (2) of the same article, in all cases, the judge of rights and freedoms or the court that adjudicates the appeal *will not be able to give guidance nor will he be able to offer absolution on matters of fact or law that anticipate the manner of resolution of the trial or which would prejudice the freedom of the judge of the case to decide, according to the law, on the solution to be given to the trial, or, where appropriate, the freedom of the prosecutor to pronounce the solution he considers legal and thorough.*

Also, according to Article 488<sup>5</sup> (3) of the Criminal Procedure Code, if it is found to exceed the reasonable duration, a new appeal in the same case will be settled with *the sole* consideration of the reasons arising after the previous appeal. The decision shall be communicated to the appellant and shall be forwarded for information to all parties or persons listed in Article 488<sup>4</sup> (1) letter c), from the case file, which are bound by the time limits contained therein. The conclusion by which the judge of rights and freedoms or the court resolves the appeal is not subject to any appeal.

#### 4. Conclusions

The appeal regarding the duration of the criminal trial is a special procedure that constitutes an accelerator remedy in order to solve a criminal case, without, however, representing an accusation in criminal matters and does not order the guilt of the defendant or the punishment imposed on him, it can only be assessed as to the reasonable duration of the criminal investigation or trial activity.

The reasonableness of the duration of a procedure is assessed according to the circumstances of the case, which require an overall assessment (European Court of Human Rights, Boddaert case against Belgium, p. 36). In order to examine whether the duration of a criminal proceeding was reasonable, the European Court of Human Rights in its case-law considered, in particular, the complexity of the case, the conduct of the applicant, the competent administrative and judicial authorities. In its case-law, The European Court of Human Rights for Romania has delivered judgments explaining the content of the notion of effective investigation and its rigors and has clarified the concept of a reasonable duration of the criminal procedure, in application of Article 6 of the Convention for the protection of human rights and fundamental freedoms.

Thus:

- in Case Mocanu and others against Romania, the European Court of Human Rights held that the authorities did not conduct an effective investigation and found the violation of Article 2 and 3 of the Convention under procedural aspect (Decision of 17.09.2014 - applications no. 10.865/09, 45.886/07 and 32.431/08, paragraphs 319-323, 325-326);

- in Case Veres against Romania, the Court held that the authorities did not conduct an in-depth and effective investigation and found the violation of art. 3 of the Convention under procedural aspect (Decision of 24.06.2015 - Application no. 47.615/11, paragraphs 58-60 and 64);

- in the Archip case against Romania, the European Court of Human Rights found that the investigation was not thorough, appropriate or effective (Ruling of September 27, 2011 - Application no. 49608/08, paragraphs 61-62, 65);

- in the Anamaria-Loredana Orasanu case and others against Romania, the Court established that there is a violation of Article 2 of the Convention against the lack of an effective

investigation (Decision of November 7, 2017 - Application no. 43.629/13 and 74 other requests, paragraph 48);

We consider that the special procedure of the appeal regarding the duration of the criminal trial is an institution that must comply with the provisions of Articles 6 and 13 of the Convention for the protection of human rights and fundamental freedoms, and, that is to create an effective judicial system capable of resolving criminal cases within a reasonable time. Although the solutions that the judge of rights and freedoms takes or the court in the case of admission of the appeal, *setting a time limit* where either the prosecutor within the criminal investigation phase, either the court at the trial stage should settle the case within the time limit set by the court, failure to resolve the case does not result in any sanctions. In judicial practice, failure to comply with these deadlines did not lead to any sanctions because the legislator did not concern himself with establishing sanctions, especially in cases where the authors were identified, and the judicial bodies did not carry out the investigation procedure in those cases sometimes even until the limitation period was fulfilled.

The deadline set by the court is actually a *time limit of recommendation* that does not attract any sanctions if not respected, so that they may attract disciplinary sanctions or a judicial fine for persons who were obliged to comply with them.

## References

- Code of Criminal Procedure of Romania, published in the *Official Gazette of Romania*, Part I no. 486 of July 15, 2010.
- Law no. 255/2013 for the implementation of the Criminal Procedure Code, published in the *Official Gazette of Romania*, Part I no. 515 of August 14, 2013.
- Constitutional Court of Romania, Decision no. 599 of October 21, 2014, published in the *Official Gazette of Romania*, Part I, no.886 of December 5, 2014.
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