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FORENSIC AND LEGAL REFLECTIONS ON NON-POSTPONED PROSECUTION ACTIONS

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Summary

The article refers to the forensic and procedural importance of carrying out criminal prosecution actions that cannot be postponed by the prosecuting officer or prosecutor. An analysis is made regarding the concordance between the urgency of the criminal prosecution actions, the observance of the rights and procedural guarantees of the participants in the process and the compliance of the criminal procedural regulations with the technical recommendations and forensic tactics, regarding the rapid discovery of the crime and providing evidence to prove the person's guilt innocence. It proposes a notion of "criminal prosecution actions that do not suffer postponement" and there is controversy over some procedural issues contrary to the principles of forensics.

Introduction. According to p. 6 art. 6 of the Code of Criminal Procedure of the Republic of Moldova (further CCP), through case of non-postponement actions is understood the real danger that the evidence will be lost or destroyed, that the suspect or accused person can hide in the suspected room or that other crimes will be committed . In art. 272 C.C.P., which is entitled "Urgent cases", the legislator mentions that if the criminal investigation body finds that the criminal investigation is not within its competence, it is obliged to carry out the criminal investigation actions that do not suffer postponement, and in art. 273 C.C.P. is regulated the situation when the finding bodies have the right, under the conditions of the C.C.P., to detain the perpetrator, to pick up the crime objects, to request the information and documents necessary for the finding of the crime, to summon persons and to obtain statements from them, to order the technical-scientific and medico-legal findings to be made, to proceed with the damage assessment and to carry out any other actions that cannot be postponed, with the elaboration of all the legal acts, under the conditions provided by art. 260–261 C.C.P., in which the actions performed and the ascertained circumstances will be recorded.

According to art. 279 C.C.P., in the case of flagrant offenses, as well as in cases that do not suffer postponement, the consent of the owner (head of the unit) or the authorization of the instruction judge are not required, but, about the respective actions that has been taken is informed immediately, but not later than 24 hours, the prosecutor or, as the case may be, the instruction judge who was to issue the respective authorization. We notice that in some situations the legislator uses the expressions cases and actions that do not suffer postponement and in art. 6 C.C.P. it refers only to cases, but not to actions that do not suffer postponement. These aspects are of profound importance both in the forensic sense for the discovery and investigation of the crime, and for ensuring the legality of all these procedural actions and guaranteeing the fundamental and procedural rights of the participants in the trial.

Methodology. In the process of elaborating the article, the historical, logical (deduction, induction, demonstration), comparative, dialectical methods connected to the aspects of the procedural legislation and to the dialectical principles of forensics, were applied. The historical method is applied in order to elucidate the evolution in time of some institutions of criminal procedural law, which were previously principles of forensic tactics. The comparative method is applied in order to highlight the divergences of application of the procedural legal norms on the subjects in certain objective and subjective conditions. The dialectical method was applied in order to know the objective situation in the judicial practice of applying the procedural norms and the forensic tactical recommendations.

Results and discussions. Controversies over prosecution actions that are initial and subsequent, that are postponed and that are not postponed, have often aroused the interest of practitioners and doctrinaires. The success of criminal investigation (discovery and investigation) is essentially determined by the effectiveness of the use, application by ascertaining and criminal investigation bodies of all probative instruments (including prosecution actions) which are part of the arsenal of evidence, made available by the legislator. And it is not only a question of whether these actions have been carried out, but, in particular, the consistency and timeliness of carrying them out, because only in such a way can information (evidence) be obtained which allows correct and efficient procedural decisions to be taken[5].

Recommendations regarding the consistency of the performance of acts of ascertainment and prosecution actions in the case of the investigation of a certain type of crime are indicated by the science of forensic methodology. Thus, the forensic methodology recommends which procedural actions (prosecution actions) are to be carried out initially after receiving

information about the commission of a crime or about the preparation of an illegal act.

Likewise, the procedural actions that do not suffer postponement are indicated, as a rule, the on-site investigation, the hearing of the victim, the hearing of witnesses, the making of technical-scientific or medico-legal findings, the detention of the suspect, etc.

We note that the C.C.P., as we mentioned, in art. 6, defined the notion of "case that does not suffer postponement". Hence, by the method of deduction, we conclude that once there are cases that do not suffer postponement in the investigation of a crime, then the procedural tools that are to be applied to the case that do not suffer postponement, also become prosecution actions (ascertaining documents) that do not suffer postponement. The legislator did not define the notion of "procedural actions that do not suffer postponement", but this expression is known and recognized by practitioners who apply procedural rules and by doctrinaires in the fields of criminal procedural law and forensics.

This institution of "procedural actions that do not suffer postponement" has had a number of changes and improvements in the current regulation of the C.C.P. compared to the 1961 procedural law.

The current law on criminal procedure has embodied many advanced ideas to improve the criminal investigation phase in the investigation of crimes. However, the legislator, paying particular attention to the rights of the participants in the process, to the algorithm of advancing the process to the trial phase of the case, to the grounds and the procedure for carrying out certain prosecution actions, did not build the institution of procedural actions quite logically and consistently which does not suffer from postponement. Sometimes, the imperfection of procedural law allows for an ambiguous interpretation of the relevant legal rules on the establishment of procedural actions that do not suffer postponement. This process is becoming more complicated due to the lack of scientific research in this field. And for these reasons, the Constitutional Court often intervenes to interpret or to abolish some regulations.

Until the present, the procedural status and content of the institution of non-postponed procedural actions have not been properly established and their urgency criteria have not been identified.

According to art. 1 paragraph (1) C.C.P., the criminal process is considered to have started from the moment of notification or self-notification to the competent body regarding the preparation or commission of a crime. Thus, for the initiation of the criminal process and, consequently, for the beginning of the activity of the criminal investigation bodies or of the prosecutor, in all cases, this activity is determined by the notification of the

competent bodies from the sources provided by art. 262 and 273 C.C.P about the commission or preparation for the commission of an act provided by the Criminal Code. That act is also the starting point of the criminal process without which it cannot begin.

In art.274 paragraph (1) C.C.P. it is established that the criminal investigation body or the prosecutor, notified in the manner provided in art. 262 and 273, shall order within 30 days, by ordinance, the beginning of the criminal investigation if, from the content of the act of notification or of the acts of ascertainment there is a reasonable suspicion that an offense has been committed and there are no circumstances that preclude criminal prosecution, informing the person who submitted the notification or the respective body about this[4].

About the 30-day deadline, the question arises regarding the procedural actions that can be carried out and, implicitly, the guarantees of the rights of the persons involved in the criminal process until the initiation of the criminal investigation.

The procedural actions carried out before the initiation of the criminal investigation provide the criminal investigation body with that information about the crime, based on which the grounds for initiating the criminal investigation or refusing to initiate the criminal investigation are expected to arise. The legislator in art. 279 paragraph (1) C.C.P. allows the performance of procedural actions only in strict accordance with the stipulations of the criminal procedural law and only after the registration of the notification regarding the crime. The procedural actions for the performance of which the authorization of the instruction judge is necessary, as well as the procedural coercive measures can be carried out only after the initiation of the criminal investigation, unless the law provides otherwise.

From the point of view of forensics, such prosecution actions are urgent (not postponed), whose delay in their production may lead to the loss, deterioration of the traces of the crime, or significantly complicate their detection and consolidation, or allow the person suspected of committing the crime to escape the process. Consequently, procedural actions that do not suffer postponement are those actions that take place immediately, as a postponement in their execution can lead to irrecoverable negative consequences, and sometimes excludes the possibility of detecting a crime and identifying the offender.

The place and the legal significance of the procedural actions that do not suffer postponement, at the stage of starting the criminal process and initiating the criminal investigation can be understood from the analysis of their tasks: identification of offenders, prevention and repression of crime; checking whether there are grounds for initiating criminal proceedings; de-

tecting and collecting the material traces of a crime; establishing the competence to investigate the crime; sample collection; establishing the material damages caused, identifying the reasons and conditions (circumstances) that contribute to the perpetration and concealment of the respective type of crimes.

It is considered that the performance of procedural actions which cannot be postponed is considered to be the initial stage of the investigation, at which the prosecution body, which is in an emergency, initiates criminal proceedings and promptly conducts criminal proceedings to establish the evidence and identify the persons who committed the criminal act.

We are of the opinion that the concept of "criminal prosecution actions that do not suffer postponement" is one of a predominantly forensic nature rather than a criminal procedure. The urgency of criminal proceedings does not depend on who carries them out, on the criminal investigation body or on the ascertainment bodies. Their urgency depends on the presence of the danger of loss of evidence and the occurrence of other negative consequences in the event of a postponement in the investigation of the crime, that is the urgency of the situation, which must be understood as the sudden occurrence of such circumstances which clearly indicate signs of an offense and give reason to believe that the postponement in carrying out compulsory proceedings, it can in fact lead to the loss of traces of the crime, the concealment of the perpetrators, the loss of the possibility of recovering the damage caused by the crime, the threat or persistence of danger to the life, health and property of persons, etc.

It is important to distinguish the actions taken urgently by the ascertainment bodies and the criminal investigation bodies. The ascertainment body shall carry out the actions prior to the criminal investigation in order to establish and confirm reasonable suspicions that an offense has been committed. In this sense, the ascertaining bodies draw up ascertaining documents. They have the right, in accordance with the law, to detain the perpetrator, to pick up the crime objects, to request the information and documents necessary for the finding of the crime, to summon persons and to obtain statements from them, to order the technical-scientific and medico-legal findings, to carry out the assessment of the damage and to carry out any other actions that do not suffer postponement, with the elaboration of all the legal acts, under the conditions provided by art. 260 – 261 C.C.P., in which the actions performed and the ascertained circumstances will be recorded. The acts of ascertainment prepared by these bodies are means of proof.

At the same time, the legislator provided that the ascertainment bodies will send the ascertainments documents to the criminal investigation body within 24 hours, and in the cases that the suspected person was detained -

within three hours. From here the question of what procedural actions the ascertaining body would be able to carry out within 24 hours, what is the usefulness of these actions?

The legislator mentions that the ascertainment bodies can carry out the following procedural actions until the criminal investigation is started: to detain the perpetrator, to pick up the crime objects, to request the information and documents necessary for the finding of the crime, to summon persons and to obtain statements from them, to order the technical-scientific and medico-legal ascertainments, to carry out the assessment of the damage and to carry out any other actions that do not suffer postponement.

These procedural actions, assigned in the competence of the ascertainment bodies, obviously cannot be framed within 24 hours. In order to obtain the statements, people must be summoned (post quotation will take several days), 24 hours are not enough to make a technical-scientific or medico-legal expertise, to receive documents or information from other institutions and organizations, 24 hours is not enough (the law gives them time to respond to these institutions and organizations which is greater than 24 hours). At the same time, it will be taken into account that the ascertainment bodies are more diverse compared to the criminal investigation bodies, and the ascertainment procedures are also specific and determined by the object of the crime.

In this regard, the Constitutional Court stated that the 24-hour period within which the ascertainment body must send the documents prepared to initiate criminal proceedings to the competent bodies does not raise an issue from the perspective of the Constitution. This time limit is likely to ensure that the contested action is effectively exercised.[1]

The regulation, however, from the C.C.P., which is not fully clear, leaves room for interpretation by law enforcement. According to some authors[2], the term of 24 hours, within which the ascertainment bodies must transmit the ascertaining documents and the attached evidence to the criminal investigation body or, as the case may be, to the prosecutor, it must be calculated from the moment the reasonable suspicion of the offense is established and, in no way, from the moment of recording the information and carrying out the first procedural action of ascertainment. We agree with this view and believe that the legislator needs to amend the law to bring clarity to this chapter and to avoid situations of ambiguity.

The legislator has established a series of procedural actions that are attributed to the ascertainment bodies (to detain the perpetrator, to pick up the crime objects, to request the information and documents necessary for the finding of the crime, to summon persons and to obtain statements from them(except for the suspect), to order the technical-scientific and med-

ico-legal ascertainments, to carry out the assessment of the damage and to carry out any other actions that do not suffer postponement).

What concrete measures can be taken to consolidate, to keep traces of a crime, the legislator has not established, and the most unclear is the expression "any other actions that do not suffer postponement". Respectively, from a forensic point of view, we ask ourselves a series of questions: the investigating body may carry out on-site search, body examination, body search, search of documents and objects, collection of objects and documents. A series of procedural actions, which require authorization from the instruction judge, or the owner's permission for the on-site research will be carried out exclusively by the criminal investigation body. In this situation there is a risk of delayed on-site searching, there is a risk of loss of evidence due to the inability of the ascertaining body to conduct searches, etc., actions that are strictly regulated by the C.C.P. and from the perspective of the persons participating in the process in whose competence procedural actions are assigned. Therefore, the expression "any other actions that do not suffer postponement" attributed in the competence of the ascertaining body does not refer to the actions that require authorization, it does not refer to the procedural actions in which the suspected person participates. This procedure was chosen and regulated by the legislator to the detriment of the principle of forensics - the time after the commission of the crime is in favor of the offender. However, another procedure has been established, that from the moment the criminal is detained, within three hours, the ascertaining documents and the suspected person will be sent to the criminal investigation body which can carry out, after starting the criminal investigation process, any criminal investigation action that does not suffer postponement.

However, in forensic science, in addition to obtaining comparison models, ordering and conducting judicial expertise, on-site researching, examination of documents, objects, corpses, it is considered that it is not traditionally postponed in the search and seizure of criminal assets. , detention and hearing of the suspect, hearing of victims and witnesses and other actions, the promptness of which is dictated by the circumstances of the crime committed.

Thus, in the forensic aspect, depending on the tactical situation and the consequences that may occur, the procedural actions that do not suffer postponement must be considered as procedural actions carried out immediately, before and after the beginning of the criminal investigation.

The order in which certain procedural actions are taken depends on the characteristics and nature of the offense and is determined by the person who is currently conducting the criminal investigation or ascertainments. Depending on the situation: in one case, for example, it is necessary to ini-

tially detain the suspect (after detention, the ascertainment bodies lose their competences, but they will assist and help the criminal investigation body). In other cases, the on-site researching, the hearing of victims, witnesses, the ordering and making of ascertainments will be carried out, and only after reasonable suspicion has been established that a crime has been committed the ascertainments will be forwarded to the prosecuting authority or , the prosecutor.

We would like to mention that the participation of the ascertaining body in the performance of the procedural actions is not always mandatory, because the criminal investigation is started immediately after the notification of the criminal investigation body about the committed crime. If we perform an analysis of the C.C.P., from the moment of registration of the notification regarding the crime and until the adoption of the ordinance to start (or not to start) the criminal investigation, the following can be performed:

a) hearing witnesses;
b) on-site research (if there is the consent of the owner);
c) presentation for recognition;
d) the experiment;
e) body examination;
f) examination of the corpse;
g) technical-scientific and medico-legal ascertainment.

These procedural actions are carried out without the participation of the suspect. The performance of other procedural actions until the beginning of the criminal investigation is not allowed, under the risk of the invalidating of the evidence.

In many cases it is necessary, home searching, body examination of the person, on-site research in case the owner does not allow access, exhumation for researching the corpse, picking up objects or documents containing state or trade secrets, examining correspondence, intercepting telephone conversations, etc., there will be a need for authorization from the instruction judge, and the conduct of procedural actions is accompanied by the application of coercive measures related to the observance of the personal and property rights of citizens, protected by law. Even if in a forensic sense, most of these actions would be postponed, the legislator allowed their "postponement" until a series of procedural "formalities" were completed, aimed at ensuring respect for the personal and property rights of individuals. In such a situation, we consider that these can no longer be called procedural actions that do not suffer postponement, because the emphasis was placed on the procedural aspect to be performed and not on the forensic recommendation regarding the danger and possibility of disappearance, alteration or intentional destruction of evidence.

In the specialized literature it arouses discussions and the action related to the detention of the offender, if it is one that does not suffer postponement or can be postponed.

Detaining an offender at the place of the crime or immediately after committing it, allows obtaining, in most cases, undoubtable data in the form of traces on his clothes and body, which demonstrates the commission of the crime even by this person. Such data may be used by the prosecuting authority or the prosecutor when hearing the suspect, who, under the pressure of available evidence, may make truthful statements and subsequently plead guilty.

The detention of the suspect has specific purposes – suppressing criminal activity, preventing escape, establishing identity, ensuring his participation in criminal proceedings, preventing and exerting pressure on witnesses and victims, preventing the suspect from falsifying evidence and suppressing any other attempts to thwart the establishment of the truth in the case… At the same time, detention is a procedural coercive measure.[2] Detention, in forensic sense, is an urgent procedural action, consisting in the direct physical arrest of a person involved in the commission of a crime, suppression of his possible resistance, fixing the traces of the crime from his body, searching the body and picking up the objects that accuse him. In the forensic aspect, it is an action that does not suffer postponement.

The non-postponement of the detention is dictated by the possibility of evading the suspect from criminal prosecution and trial and is meant to ensure the timely identification and fixing of the traces of the crime on his body and clothing. These traces can usually be found if the suspect is physically examined and searched immediately.

Thus, we conclude:

- the legislator does not make a distinction between prosecution actions that are postponed and not postponed;
- in order to ensure the prompt response of the state to any violations of the law, which could also be crimes, a number of competences have been conferred by law on the ascertaining bodies;
- the ascertaining bodies draw up procedural documents aimed at establishing the existence of reasonable suspicion and if they detain the offender, they transmit the documents and the detained person to the criminal investigation body;
- some interpretations in the text of the law regarding the deadlines given to the ascertaining bodies is not clear and arouses misinterpretations and wrong actions by law enforcement;
- it is not clear the expression “perform other actions that do not suffer postponement” attributed to the competence of the ascertaining body, if

from the analysis of the content of the law, the circle of procedural actions that fall within the competence of the ascertaining bodies is easily defined.

We consider that it is necessary to review the competences of the ascertaining bodies in order to also assign competencies to perform procedural acts with the participation of the perpetrator (body examination, body search), since the legislator allowed the detention of the offender and its transmission, within 3 hours, to competent criminal investigation authority.

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