

# CAUSES OF UNPUNISHING THE ATTEMPT

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## **Abstract**

*The object of this study is to analyse the aspects regarding the causes for not punishment of the tentative in Romanian Criminal Law, in other words, analysing the situation when the author himself, voluntarily, ended the ongoing execution, or through its active behaviour, the result did not occur. It is necessarily to mention that in this case also, there is tentative, but, according to Art. 34, para. 1 from the Romanian Criminal Law, the author shall not be sanctioned if, before the discover of the crime it was divested or the authorities were notified about it, thus the consumption can be prevented, or he himself prevented the consumption of the crime.*

**Keywords:** *crime, tentative, offender, causes for not punishment, discontinuance, prevention of the result.*

## **Introduction**

According to the Romanian Criminal Code, the tentative consist in the enforcement of the intention to commit the offense, but the enforcement has been stopped or has not produced the effect. Noted that there is no tentative when the impossibility of the offense' consumption is the consequence of the way the its execution was conceived.

The tentative if punished only when the law expressly provides that and it is punishable by between half minimum and half maximum provided by the law for the consumed offence, without the minimum being smaller than the general minimum of the punishment.

The tentative if the form of offence that is situated in the phase of crime execution, between the beginning of the execution of the action that constitutes the material element of the objective side, and the production of the result socially dangerous.

The tentative represents an imperfect form of an offence that the offender decided to make, characterized by a disparity between the subjective and objective element.

From the objective point of view, the tentative appears as a deed of execution followed by an immediate consequence in the objective reality, and from the subjective point of view, the tentative presumes the same psychological elements as the consumed offence, but the difference to this (offence type) consists in the apparition of certain causes (circumstances) that does not lead to the result desired by the offender.

By comparison with the consumed offence, the tentative represents an imperfect form, because the criminal outcome is not fulfilled due to the failure of the time of consumption<sup>1</sup>.

Characterized by an unfinished execution or by the absence of the result, so by an incomplete objective side, the tentative is an atypical form of crime that the subject propose to commit. On the other hand, it is an offence because, even if it wasn't committed from the objective point of view, it is an act criminalized and punished by the Romanian criminal law.

In other words, the tentative is defined in the doctrine as an atypical form of the offence through which the deeds committed in the phase of execution were interrupted or, even that they were executed integrally, they did not yield the result of the incriminated crime.<sup>2</sup>

From the definition given by Art. 32 of Criminal Code to tentative, it emerges that the existence of these conditions must meet the following general conditions:

- The existence of the offender' intention to commit a specific offence;
- Enforcement of the criminal decision;
- The criminal deed must be interrupted or without effect.

Staying of the offence in the imperfect form of tentative may be due either to independent causes, either causes beyond the control of the author, or to causes directly related to his will.

The Romanian Criminal Code refers to the causes of not punishment of the tentative in Art. 34: "Divestment and the prevention of the result' production" and states that is not to be punished the author that, before the discovery of the crime was divested or he notified the authorities concerning the commitment, thus its consumption cannot be prevented, or he himself prevented the crime commitment.

In the development of the criminal activity can intervene the willingly renunciation of the offender by interrupting or ceasing from his own will to commit the crime (divestment), because the author, willingly, interrupted the crime even he could continue it, or he prevented the consumption of the crime (result' production).

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<sup>1</sup> Tănăsescu, I., Tănăsescu, C., Tănăsescu, G. (2002), *Drept penal general*, Bucharest, All Beck Publishing House, p. 284

<sup>2</sup> Popoviciu, L. R. (2011), *Drept penal: partea generală, Curs universitar*, Bucharest, Pro Universitaria Publishing House, p. 136

In order for divestment of prevention of the result' production to constitute causes of unpunishment of the tentative, it is necessary that these must intervene before the consumption of the crime.

### **1. Divestment**

The divestment is met at the imperfect tentative (unfinished, interrupted) and represents the willingly renunciation from the offender to consume the execution of the crime that constitute the material element of the objective side of the crime<sup>3</sup>.

It is in this kind of situation the person that enter in a room with the purpose of stealing goods but, before embracing any good, from different reasons, he rectifies its initial decision and abandon the started execution.<sup>4</sup>

Although it is customary to define the divestment as a voluntary abandonment of the execution of the interrupted tentative as an involuntary abandonment of the execution, in reality in all of these cases, usually, there is an act of will of the author, but in case of the interrupted tentative the author will be a constrained will and, whereas in case of divestment, it's the case of a free will of the author.

In other words, by divestment it is understand the renunciation by free will to take the decision to commit the offense and to cease the action that constitutes the material element of the crime<sup>5</sup>.

Divestment, implying, by concept, an interruption through author's will of the crime execution, means that there it cannot take place only before the execution facts have been moved to the end.

In order to divestment to constitute a cause of unpunishment of the tentative, it must be met, cumulatively, the following conditions:

- Act of execution of the offense to be started;
- The renunciation to continue the execution of the criminal activity must be based on the free will of the offender;
- The renunciation must take place before the end of the execution or, in other words, the renunciation must take place in useful time;
- The renunciation must take place before the discovery of the offense;
- The renunciation must be permanent<sup>6</sup>.

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<sup>3</sup> Mitrache, C-tin., (2000), *Drept Penal Român-partea generală*, Bucharest, ȘANSA S.R.L Publishing House, p. 193

<sup>4</sup> Popoviciu, L. R. (2011), *Drept penal: partea generală, Curs universitar*, Bucharest, Pro Universitaria Publishing House, p. 156

<sup>5</sup> Antoniu, G., Bulai, C., (2011), *Dicționar de drept penal și procedură penală*, Bucharest, Ed. Hamangiu, p. 259

<sup>6</sup> Boroi, A., (2006), *Drept penal. Partea generală*, Bucharest, C.H. Beck Publishing House, p. 145

In an opinion divestment is not conditioned on its definitive character, arguing that it is not necessary that the author abandoned the plan the crime, the idea to commit the offense, divestment may be granted where he renounces the act of execution began, aiming the act of execution to resume at a later time, when conditions are more favourable<sup>7</sup>.

The majority opinion in the Romanian criminal doctrine claims that divestment should be definitive because it is difficult to admit that the author interrupts execution only because circumstances have become unfavourable, are not dangerous and shows signs of improvement, for which should benefit from impunity resulting from divestment<sup>8</sup>.

## **2. Prevention of the result production**

Prevention of the result meets the attempted perfect (complete) and lies in the attitude of the offender which removes producing dangerous outcome, although the criminal activity is carried out to the end.

It is in such a situation a person who, having administered a poisonous substance to the victim with intent to kill, rectify the decision taken and submit an activity of preventing the occurrence of death by administering an antidote or by confinement in a unit health to give it the necessary medical assistance<sup>9</sup>.

This question of punishment can intervene only if the so-called offenses materials, characterized by the production of a particular outcome, not actual formal offenses that consumed entirely by simply committing to action that constitutes their element material.<sup>10</sup>

Prevention of the result thus means an intervention in the production of the result after execution documents were completed to do everything possible so that the result does not occur. This implies that, objectively, be possible for such intervention, i.e. to have an execution time between completion and production results. For example, the offender shot a person who cannot swim in water with an intention to kill and salt immediately after her and saves her.

Prevention of the result is placed between the moment of completion of the execution of the crime (the material element of the crime was done entirely, without the intervention of any cause to interrupt the operation) and when its consumption.

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<sup>7</sup> Stretianu, F., Nițu, D., (2014), *Drept penal. Curs universitar*, Bucharest, Universul Juridic Publishing House, p. 499

<sup>8</sup> Pascu, I., Dobrinioiu, V., Dima, T., Hotca, M.A., Păun, C., Chiș, I., Gorunescu, M., Dobrinioiu, M., (2014), *Noul Cod penal comentat. Partea generală*, Bucharest, Universul Juridic Publishing House, p. 251

<sup>9</sup> Popoviciu, L. R. (2011), *Drept penal: partea generală, Curs universitar*, Bucharest, Pro Universitaria Publishing House, p. 157

<sup>10</sup> Bulai, C., Bulai, B., (2007), *Manual de drept penal. Partea generală*, Bucharest, Universul Juridic Publishing House, p. 446

Prevention of the result resembles divestment in terms of psychological position of the perpetrator, in that both represent a return on its own initiative the perpetrator to what was done in the criminal judgment. They differ, however, in terms of objective, by the time differently involved in the accomplishment of the material element of the crime and by that if discontinuance is sufficient, usually passive, while impediments of the result is not only take a positive attitude (share).

Prevent the possibility of the result arises materially object of the offense, with the end of execution and ends with a moment before the occurrence of the result, i.e. the crime.

Prevention of the result production involves the following conditions to be met:

- execution act has been concluded but did not produced the result;
- prevention of the result to be achieved voluntarily;
- during the criminal activity carried out by the perpetrator result does not occur, and it actually hinder his production;<sup>11</sup>
- prevention of the result to occur before the discovery of the crime.

### **The legal effects of assisting and preventing the occurrence of the result**

Divestment and prevention of the result are the causes of punishment, with impunity, but there are causes eliminating the criminal nature of the act. The perpetrator is found in one of these cases will not be punished for the attempted crime to which they withdrew or had prevented the outcome.

According to the Romanian criminal law in terms of legal effects of unpunished cases of attempt, we mention that the attempt is not removed, it continues to exist, only that the author will not be penalized for it.

This effect is expressly enshrined in the Romanian Criminal Code Art. 34 paragraph 1 according to which the author is not punished, before the discovery of the offense, was divested or the authorities of committing notified of it, so that consumption can be prevented or hindered the crime itself.

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<sup>11</sup> Popoviciu, L. R. (2011), *Drept penal: partea generală, Curs universitar*, Bucharest, Pro Universitaria Publishing House, p. 157

In the system of the provisions included in art. 34 of the Criminal Code, divestment or prevention of the result becomes effective legal cause for punishment only on the author, because of having personal punishment.

In case of the facts committed in ventures, the provision is stated in art. 51 of the Romanian Criminal Code provides that the participant is not punished if he denounces timely the offense, so consuming it can be prevented, or if it impedes the crime itself.

The provisions of art. 34 para. 2 of the Romanian Criminal Code provisions governing enforcement situation qualified, i.e. acts which, in the event of discontinuance or prevention of the result, themselves constitute another crime. These provisions are a complement to Art. 34 para. 1 of the Romanian Criminal Code and relates to acts of enforcement carried out before the author have renounced the crime.

Impunity arising from divestment or prevention of the result has, however, absolute, it does not preclude accountability for everything that has been committed previously the case of punishment, so if acts performed until discontinuance or prevent the occurrence of the result is another offense, shall be punished for that offense.

Therefore, the application rule contained in art. 34 para. 2 of the Romanian Criminal Code acts committed until discontinuance no longer fall under criminal law as acts of execution of the crime of committing that was divested author, but as an alternative to their deeds, by themselves, constitute a crime and thus apply the penalty for that offense.

## **Conclusions**

*We consider particularly important this subject because the reason the impunity of the perpetrator in case of divestment or obstruction of the result is the legislator wanted to encourage, stimulate the perpetrators to renounce the continued execution of the offense or if the execution documents were taken up at the end, to prevent the production of socially dangerous result and consequence of social value protected not be injured.*

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