

RECIDIVISM – A FORM OF MULTIPLE OFFENSES

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Abstract: *The notion of multiple offenses is regulated by the current Criminal Code in Title II concerning the offense, Articles 38-45, and encompasses three forms: the concurrence of offenses, recidivism, and intermediary plurality. Among these forms, recidivism is regulated by Article 41 of the Criminal Code. According to this article, "recidivism occurs when, after a final conviction to a prison sentence of more than one year and until rehabilitation or the expiration of the rehabilitation term, the convict commits a new offense with intent or aggravated intent, for which the law prescribes a prison sentence of one year or more. Additionally, recidivism also occurs when one of the penalties is life imprisonment." (Florin Streteanu, 2010). The issue of recidivism generates interest in the current landscape due to the enormous expenses incurred by the justice system in this regard and the consequences this phenomenon has on society. The public perception of recurring criminal behaviors and prolonged sentences is associated with a reduction in the chances of social reintegration for inmates.*

Keywords: *Criminal Code, offense, recidivism, post-conviction recidivism, post-execution recidivism, recidivist, recidivism, penalty*

I. Introduction. Concept. Legal Basis

From an etymological perspective, the notion of "recidivism" comes from the Latin term "recidivus," meaning "relapse," and in a broad sense, "recidivism" means "the repetition of a phenomenon after its apparent disappearance," (Mateut, 1997) i.e., "the reiteration of offenses." (Mateut, "Recidiva în cazul persoanei fizice", 2007)

Regarding recidivism, the New Criminal Code has introduced new elements both in terms of the definition and terms of recidivism, as well as the penalty, compared to the regulations in the 1969 Criminal Code. Thus, the principle of relative recidivism has been retained, but the terms of recidivism have been modified to increase their limits, and minor recidivism has not been regulated, as it no longer justifies itself due to not revealing the same danger as major recidivism.

In doctrine, recidivism is considered a mandatory aggravating cause of the penalty, and for this reason, it does not constitute an aggravating circumstance, does not enter into the abstract or concrete content of the offense, and does not serve for the legal classification of the act (V. Pașca).

Regarding the sanctioning treatment of recidivism, it differs from that in the old Criminal Code, being regulated by arithmetic accumulation in the case of post-conviction recidivism and by increasing the special limits of the penalty by half in the case of post-execution recidivism.

Recidivism is an institution of criminal law that is regulated by the provisions of Article 41 of the Criminal Code. The New Criminal Code regulates the existence of the state of recidivism differently, depending on whether the active subject of the offense is a natural or legal person.

Recidivism is "a basic form of multiple offenses, consisting of the commission of a new offense by a person who has been definitively convicted for another offense." (Bulai, 1997) Recidivism exists when, after a final conviction to a prison sentence of more than one year and until rehabilitation or the expiration of the rehabilitation term, the convict commits a new offense with intent or aggravated intent, for which the law prescribes a prison sentence of one year or more. Additionally, recidivism also occurs when one of the aforementioned penalties is life imprisonment.

To establish the state of recidivism, consideration is also given to the conviction pronounced abroad if the act is also provided for by Romanian criminal law and if the conviction has been recognized according to the provisions of Article 41, paragraph 3 of the Criminal Code.

Recidivism is conditioned by both the existence of a prior definitive conviction of the offender and the commission of a new offense with intent by the offender. The prior definitive conviction and the new offense committed represent the constitutive elements of the state of recidivism, called "terms of recidivism," and determine its modalities.

Recidivism is a socio-criminological phenomenon with a relatively widespread, stable, historical-evolutionary, and juridical-criminal character, expressed through the totality of offenses committed in a certain territory, within a determined period, by persons with criminal records (Simionescu, 2011).

The resumption of criminal activity after a definitive conviction for a previously committed offense leads to a more energetic repressive reaction and the exclusion of recidivism from the benefit of certain acts of clemency. (Poenaru, 1982)

II. Forms of recidivism

A final conviction for an offense and the commission of a new offense represent the elements of recidivism, which is a form of multiple offenses. These elements are known in specialized literature as "the two terms of recidivism." (Basarab, 1997). Thus, the first term of recidivism consists of a final conviction to a custodial sentence, and the second term consists of committing a new offense.

The forms of recidivism represent the manner in which recidivism concretely manifests itself, in relation to the variations to which the two terms of recidivism are subject. These differ from each other by their concrete content, which influences the assessment of the social danger posed by recidivists.

Recidivism can take various forms and modalities, depending on the relationships between the two terms. The new Criminal Code has adopted the systems of general recidivism, temporal recidivism, relative recidivism, and international recidivism.

The new Criminal Code does not explicitly regulate post-conviction and post-execution recidivism but still stipulates the legal conditions for recidivism after conviction and those for recidivism after execution, as well as their penal regime.

The current Criminal Code regulates the existence of recidivism differently, depending on whether the active subject of the offense is a natural person or a legal entity.

Based on the timing of the new offense after the prior conviction, specifically before or after the execution of the sentence, recidivism has two forms: post-conviction recidivism and post-execution recidivism.

Post-conviction recidivism is also known in criminal doctrine as "fictitious recidivism" or "formal recidivism," whereas post-execution recidivism is known as "real recidivism."

Depending on the nature of the offenses constituting recidivism, two categories are distinguished: general recidivism and special recidivism.

Recidivism is general when its existence is not conditioned by the nature of the committed offenses, and it is special when its existence is conditioned by the commission of offenses of the same kind or nature.

Depending on the gravity of the first conviction, recidivism can be absolute or relative.

Recidivism is absolute when its existence is not conditioned by the gravity of the first conviction or by the severity of the penalty prescribed by law for the newly committed offense or by the form of guilt with which the offenses are committed.

Recidivism is relative when its existence is conditioned by a certain gravity of the penalty pronounced for the first offense, or by the severity of the penalty prescribed by law for the newly committed offense, or by the form of guilt with which the offenses are committed.

Depending on the time elapsed between the execution of the penalty for the previous offense and the commission of a new offense, recidivism can be permanent or temporary.

Recidivism is permanent or perpetual when its existence is not conditioned by the time elapsed since the commission of the new offense within a certain period, (Dongoroz, 1939) and it is temporary when its existence is conditioned by the commission of the new offense only within a certain interval from the conviction or from the execution of the penalty pronounced for the previous offense.

Based on the location where the final penalty for the offense constituting the first term of recidivism was pronounced, there are territorial and international recidivism.

Recidivism is territorial or national when the first term consists of a final conviction to a prison sentence pronounced by a Romanian court, and it is international when the final conviction constituting the first term of recidivism is pronounced by a foreign court.

Depending on the sanctioning treatment of recidivism, it can have a single effect, progressive effect, uniform sanctioning regime, or differentiated sanctioning regime.

Single-effect recidivism consists of applying the same penal treatment to both first-time recidivists and multiple recidivists. Progressive-effect recidivism involves aggravating the recidivist's penalty with each new recidivism. Uniform sanctioning regime recidivism involves applying the same sanctioning regime to all forms of recidivism. Differentiated sanctioning regime recidivism involves applying different sanctioning regimes to different forms of recidivism.

In the current Criminal Code, the forms of recidivism are as follows:

- For natural persons: post-conviction recidivism, post-execution recidivism, national recidivism, international recidivism, temporary recidivism, general recidivism, single-effect recidivism, differentiated sanctioning effect recidivism.

- For legal entities: post-conviction recidivism and post-execution recidivism (Constantin Mitrache, "Drept penal român. Partea generală", 2019)

Post-conviction recidivism for natural persons exists when, after a final conviction to life imprisonment or a prison sentence of more than one year for an intentional offense, the convicted person commits a new intentional offense or an offense with aggravated intent before the start of the sentence execution, during its execution, or while in a state of escape, and the penalty prescribed by law for the second offense is life imprisonment or a prison sentence of one year or more (Article 41, Criminal Code).

III. Recidivism in the case of natural persons

III.1. Post-conviction recidivism of a natural person

Conditions regarding the First Term of post-conviction recidivism for a natural person:

a) The first term of post-conviction recidivism is the final conviction to imprisonment or life detention.

b) The final conviction must involve imprisonment for more than one year or life detention. This condition is met when the sentence is pronounced for a single offense or as a resulting sentence for a combination of offenses. It is also satisfied when, in addition to imprisonment for more than one year, a penal fine is imposed under the conditions of Article 62 of the Penal Code. For recidivism to exist, if the first term consists of a combination of offenses, one opinion holds that the sentence for at least one intentional offense must exceed one year (G. Antoniu, M. Basarab, M. Udriou), while another opinion asserts that the resulting sentence should be considered and not the sentence for the negligent offense, even if it is greater (G. Ivan).

Additionally, the condition is met when the sentence is pronounced by a foreign court, provided this judicial decision has been recognized in Romania according to the law.

To fulfill the severity condition of the conviction for the first term of recidivism, it is required that at the time of committing a new offense, the previous sentence must be more than one year. c) The final conviction must be for an intentional offense or one committed with intent.

Convictions for offenses committed out of negligence are not considered when establishing recidivism.

Negative conditions regarding the first term of recidivism - the following aspects are not considered when establishing recidivism:

- a) Convictions for acts that are no longer defined as offenses (Art. 42(a) Penal Code)
- b) Convictions for amnestied offenses (Art. 42(b) Penal Code)
- c) Convictions for offenses committed out of negligence (Art. 42(c) Penal Code).

A final judicial decision where the court ordered the renunciation of penalty application or postponement of penalty application cannot constitute the first term of recidivism because in these two situations, the court does not pronounce a conviction, and it does not result in any disqualification, interdiction, or incapacity for the individual and would not constitute a precedent that could give rise to recidivism (Constantin Mitrache, "Drept penal român. Partea generală", 2019)

Other convictions that cannot constitute the first term of recidivism:

- Final convictions to a fine penalty.

- Convictions for offenses committed during minority.

Conditions regarding the second term of post-conviction recidivism:

- a) The commission of a new offense as defined by Art. 174 Penal Code, which includes any act punishable by law as a completed offense, an attempt, or participation as a co-author, instigator, or accomplice.
- b) The new offense must be committed with intent or overextended intent.
- c) The legal penalty for the new offense must be one year or more.
- d) The new offense must be committed after the final conviction for the previous offense and before the execution or deemed execution of the penalty provided in the conviction.

The moments when the new offense can be committed to give rise to post-conviction recidivism are:

- Before the start of penalty execution.
- During penalty execution, which includes: during detention, during the interruption of imprisonment or life detention, during the conditional release supervision period, or in a state of escape.
- If the offense constituting the second term of recidivism is continuous, continued, or habitual, it must be completed before the execution or deemed execution of the previous conviction.

III.2. Post-execution recidivism in the case of a natural person

Post-execution recidivism exists when, after serving a sentence of more than one year, total or partial pardon, or after the completion of the prescription term for executing such a sentence for an intentional offense, the convicted person commits another offense with intent or overextended intent for which the law prescribes a penalty of life detention or imprisonment of one year or more (Art. 41 Penal Code) (Drimer).

Conditions regarding the first term of post-execution recidivism:

The first term of post-execution recidivism is a sentence of more than one year of imprisonment, which has been executed or considered executed by total or partial pardon or for which the execution term has been completed, or it may consist of a life detention sentence from which the convict has been conditionally released, and the penalty is considered executed or has been extinguished by prescription.

The more than one year imprisonment, executed or considered executed, must have been pronounced for an intentional offense, directly or indirectly, or with intent.

The mode of execution of the penalty is irrelevant: actual execution in a place of detention, partial execution with the rest pardoned, partial execution with conditional release, or whether the sentence was pronounced by a Romanian or foreign court.

Negative conditions regarding the first term of post-execution recidivism:

The conviction must not be among those not considered in establishing recidivism (Art. 42 Penal Code).

Convictions for which rehabilitation has occurred or for which the rehabilitation term has been completed will not be considered when establishing recidivism.

Conditions regarding the second term of post-execution recidivism:

The second term of post-execution recidivism consists of committing a new intentional offense, directly or indirectly, or with intent, for which the law prescribes a penalty of more

than one year of imprisonment. The severity condition of the newly committed offense is met when the penalty prescribed by law is life detention. The new offense must be committed after serving the penalty, total or partial pardon, or prescription of the penalty execution that constituted the first term of major post-execution recidivism, and it must be committed before rehabilitation or the completion of the rehabilitation term, either automatically or judicially.

III.3. Penal treatment of recidivism for natural persons:

Recidivism constitutes a mandatory aggravating factor for penalties, as reflected in the penal sanctioning system. It demonstrates the offender's increased danger, necessitating a more vigorous repressive response.

The application of the main penalty in the case of post-conviction recidivism follows the arithmetic accumulation system, according to Art. 43(1) Penal Code.

When the convicted person commits a new offense before starting the execution of the penalty forming the first term, a penalty is set for the newly committed offense, which is added to the previous unexecuted penalty. Whenever, in the merging of penalties for multiple offenses in the form of recidivism, life detention was applied for the first term or for the newly committed offense, this penalty will be applied as the legislator deemed it sufficiently severe.

When the new offense is committed during the execution of the imprisonment forming the first term, after the convict has already served part of the penalty pronounced for the previous offense, the penalty set for the new offense is added to the remaining unexecuted part of the previous penalty.

The calculation of the remaining unexecuted penalty is done from the date of committing the new offense when the state of post-conviction recidivism arose, not from the date of the conviction decision for this offense.

If the newly committed offense is escape, the penalty for escape will be added to the remaining unexecuted part of the previous penalty at the date of escape. Committing the offense of escape can give rise to a state of post-conviction recidivism if the other conditions are also met.

If after a final conviction and before the previous penalty is executed or considered executed, the convict commits several concurrent offenses, of which at least one is in a state of recidivism, the rules for multiple offenses apply first, followed by recidivism rules. The penalties set for the newly committed offenses will be merged according to the provisions for multiple offenses, and the resulting penalty will be added to the previous unexecuted penalty or the remaining unexecuted part of it, according to Art. 43(2) Penal Code.

If the convict escapes and then commits an offense while in a state of escape, the two offenses are concurrent, but the penalty set for escape is added to the remaining unexecuted part of the previous penalty, and then this penalty is added to the penalty set for the offense committed while in a state of escape (Art. 285(4) Penal Code).

The application of the main penalty in the case of post-execution recidivism is done by applying a penalty within the limits prescribed by law, increased by half, according to Art. 43(5) Penal Code.

When the penalty prescribed by law is life detention alternatively with imprisonment, and the court chooses life detention, this penalty will be applied and cannot be aggravated further.

In cases where, after the previous penalty has been executed or considered executed, multiple concurrent offenses are committed, of which at least one is in a state of recidivism, the rules for post-execution recidivism take precedence over those for multiple offenses.

In cases of repeated offenses both in a state of post-conviction recidivism and in a state of post-execution recidivism, the rules for post-execution recidivism apply first, meaning the penalty is set within the special limits increased by half, and then the rules for post-conviction recidivism apply by adding the aggravated penalty to the previous penalty or its remaining unexecuted part.

If, by applying the provisions regarding recidivism, the general maximum prison sentence of 30 years is exceeded, the prison sentence imposed for execution cannot exceed 30 years.

According to the provisions of Article 43, paragraph 3 of the Penal Code, if multiple prison sentences are established and their sum, under the conditions of Article 43, paragraphs 1 and 2 of the Penal Code, exceeds the general maximum of the prison sentence by more than 10 years, and for at least one of the concurrent offenses the penalty provided by criminal law is 20 years or more, life imprisonment may be applied instead of a prison sentence.

According to the provisions of Article 45, paragraph 3, letter b of the Penal Code, if, in addition to the previously applied principal penalty, a complementary penalty of the same nature and content was also applied in the case of the new offense, the unexecuted part of the complementary penalty will be added to the penalty established for the new offense.

Safety measures in the case of recidivism are merged according to Article 45, paragraphs 6 and 7 of the Penal Code, as with all forms of plurality of offenses.

After the final conviction decision, it is possible to discover that the offender, at the time of committing the new offense which led to the conviction, was in a state of recidivism. This situation, if not known at that time, did not lead to the application of legal provisions regarding recidivism, or the state of recidivism was known, but its effects were not taken into account because life imprisonment was applied.

In such a situation, the recalculation of the penalty for the state of recidivism is required, considering two scenarios:

- The subsequent discovery of the state of recidivism implies the finding, acknowledgment of the state of recidivism for which there was no evidence in the file at the time the conviction decision became final.
- The recalculation of the penalty due to the discovery of the state of recidivism also applies in the case of commutation of life imprisonment to a prison sentence. The recognition of the state of recidivism of the convicted person whose life imprisonment has been commuted or replaced is important for the application of other institutions of executive criminal law or acts of clemency.

IV. RECIDIVISM IN THE CASE OF LEGAL ENTITIES

According to the provisions of Article 146 of the Penal Code, there is recidivism for legal entities when, after the finality of a conviction and until rehabilitation, the legal entity commits another offense, with intent or with exceeded intent.

The recidivism of a legal entity has two modalities: post-conviction recidivism and post-execution recidivism.

IV.1. Post-conviction recidivism in the case of legal entities

Post-conviction recidivism in the case of legal entities occurs when, after the finality of a conviction, the legal entity commits another offense with intent or with exceeded intent, and the fine for the previous offense has not been executed.

Conditions regarding the first term of post-conviction recidivism in the case of legal entities:

- A definitive conviction for a fine
- The offense that led to the definitive conviction can be committed with intent or with exceeded intent
- The definitive penalty applied should not have been executed or should not have been fully executed until the commission of the new offense
- The conviction for the fine should not be among those disregarded when determining the recidivism status, according to Article 146 paragraph 4 of the Penal Code in conjunction with Article 42 of the Penal Code. (Constantin Mitrache, "Drept penal român. Partea generală", 2019)

Conditions regarding the second term of post-conviction recidivism in the case of legal entities:

- Committing another offense by the legal entity
- The new offense must be committed with intent or with exceeded intent (praeterintention)
- The new offense must be committed before the fine for the previous offense has been executed.

IV.2. Post-execution recidivism in the case of legal entities

Post-execution recidivism in the case of legal entities is the form of recidivism that occurs when, after paying the fine or considering it executed, the legal entity commits a new offense with intent or with praeterintention.

Conditions for the first term of post-execution recidivism in the case of legal entities

The first term of post-execution recidivism in the case of legal entities consists of:

- The existence of a prior definitive conviction for committing an offense.
- The offense that led to the definitive conviction must have been committed with intent or with exceeded intent.
- The conviction for which the fine was executed should not be among those disregarded when determining the recidivism status, according to Article 146 paragraph 4 of the Penal Code in conjunction with Article 42 of the Penal Code.
- The definitive conviction for the fine must be executed or considered as executed before the commission of the new offense. The fine is considered executed when its enforcement has expired through any of the legal means (prescription, pardon).

Conditions regarding the second term of post-execution recidivism in the case of legal entities

The second term of post-execution recidivism in the case of legal entities consists of:

- Committing another offense after the fine for the previous offense has been executed or considered as executed.

- The new offense must be committed with direct or indirect intent or with praeterintention.
- The new offense must be committed before rehabilitation. In the case of legal entities, rehabilitation is solely by law.

IV.3. Penal treatment of recidivism in the case of legal entities

In the case of legal entities, the primary punishment is a fine based on the day-fine system, according to Article 137 of the Penal Code, with special punishment limits expressed in day-fines.

According to the provisions of Article 146 paragraphs 2 and 3, a unified sanctioning system for recidivism in the case of legal entities has been established, regardless of its form (post-conviction or post-execution).

The court will establish a fine for the new offense within the limits provided by law, increased by half. The special limits that are increased by half are the number of day-fines, which are set between 100 and 5000 lei based on the turnover criterion for legal entities with a profit-making purpose or based on the value of the asset for other legal entities, as well as other obligations of the legal entity. The punishment established under the above conditions will be added to the previous punishment or to the remainder to be executed from it.

The legislator has not regulated the application of punishment in case of committing multiple offenses again after a definitive conviction by the legal entity, and at least one is in a state of post-conviction recidivism, which is why several opinions have been issued in legal literature on this aspect.

In one opinion (Constantin Mitrache, "Drept penal român. Partea generală", 2019), which is closer to the spirit of the regulation in this matter, it is appreciated that the court will proceed as follows:

1. Firstly, a punishment will be established for each new offense, and for those committed in a state of post-conviction recidivism, the punishment will be set within the limits provided by law, increased by half.
2. Then, the punishments established in point 1 will be merged according to the provisions of the competition of offenses.
3. Finally, the resulting punishment from point 2 will be added to the unexecuted previous punishment or to the remaining unexecuted punishment.

By successively applying the legal provisions on recidivism and the competition of offenses, the general maximum of the fine punishment cannot be exceeded under the conditions of Article 137 paragraph 2 of the Penal Code. The general maximum of the punishment is obtained by multiplying the maximum number of day-fines (600) by the maximum amount corresponding to one day-fine (5,000 lei), which is 3,000,000 lei.

In the case of post-execution recidivism in the case of legal entities, the punishment for the new offense will be established within the special limits provided by law, increased by half.

If after the execution of the fine punishment or the extinction of its execution through pardon or prescription, the legal entity commits multiple offenses again in a state of post-execution recidivism, firstly, a punishment will be established for each within the special limits provided by law, increased by half, then all these punishments will be merged according to the rules regarding the competition of offenses.

Punishments of different nature complementary to each other, except for dissolution, or those of the same nature but with different content, are cumulated, and in the case of complementary punishments of the same nature and with the same content, the most severe one is applied.

Safety measures taken in the case of special confiscation are cumulated, according to Article 147 paragraph 3 of the Penal Code.

If after the finality of the conviction decision of the legal entity for the new offense, and before the fine is executed or considered as executed, it is discovered that the convicted legal entity was in a state of post-conviction or post-execution recidivism, the court will apply the rules for sanctioning the respective recidivism form.

The recalculation of the punishment in case of subsequent discovery of the recidivism state is possible only if the discovery of the recidivism state occurred before the fine punishment for the new offense was executed or considered as executed.

Conclusions

Understanding the forms of recidivism is important for a better understanding of the legal regulations concerning recidivism and presents a particular practical interest because recidivism always appears in one of these forms, depending on which the degree of persistence on the path of criminality of the perpetrator can be assessed, as well as the mode of sanctioning recidivism, and the legislator's conception regarding the structure and conditions of existence of recidivism.

Considering that the criminal legislator has separately regulated the criminal liability of legal entities, in Title VI, Articles 135 - 151 of the Penal Code, it should have expressly provided legal solutions for different situations, either through distinct regulations or through references to regulations concerning natural persons, because in these hypotheses, in the silence of the law, any answers may give rise to objections since there is no explicit reference by the legislator.

Therefore, as a recommendation for future legislation, the legislator should expressly establish the method of applying punishment in the case of a legal entity committing multiple offenses again after a definitive conviction, with at least one being in a state of post-conviction recidivism, just as in the case of natural persons, through the provisions of Article 43 paragraph 2 of the Penal Code.

Furthermore, as a recommendation for future legislation, the legislator should expressly regulate the provisions regarding the subsequent discovery of the state of recidivism in the case of legal entities, with some authors currently believing that in such situations, the provisions applicable to natural persons under Article 43 paragraph 6 of the Penal Code should be applicable.

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