

SECOND OFFENCE OF THE NATURAL PERSON

University Assistant **Jurj Liliana Mariana** PhD candidate
“1 Decembrie 1918” University, Alba Iulia
Law and Social Sciences Faculty
Specialization: Law

As a form of plurality of offences, the second offence consists in committing, once again, an offence, by a person that had been previously definitively convicted for another offence¹.

According to article 37 Penal Code, the second offence exists when, after the conviction or the execution of a punishment longer than 6 months or of at least three punishments inferior to 6 months, the defendant commits a new offence punished with life imprisonment or prison for more than one year. It is necessary that all offences be intended acts or at least praeter intentionem acts. The new offence is committed either before the beginning of the punishment execution or during the punishment execution, or during the state of escaped prisoner².

Key words: plurality of offences, second offence, previously definitively convicted, defendant.

Second Offence Classification:

1) According to the nature of the offences:

a) *General second offence* exists no matter whether the first offence and the second offence are or are not of the same type. Therefore, its existence is not conditioned by the nature of the offences committed, as it may have the same nature or a different nature.

b) *Special second offence* exists only if the two offences are directed towards the same juridical object.

2) According to the time passed between the execution of the punishment for the previous offence and the commission of a new offence:

a) *Perpetual or permanent second offence* involves the existence of the second offence situation irrespectively of the time span between the two convictions.

b) *Temporary second offence* when the second offence situation exists only if the crime is committed within a certain time span calculated from the conviction for the first offence (in case of murder, the second offence is always perpetual).

3) According to the seriousness of the punishment for the first offence:

a) *Absolute second offence* appears when its existence is not conditioned by the seriousness of the first conviction.

b) *Relative second offence* appears when its existence is conditioned by a certain seriousness of the conviction pronounced for the previous crime.

4) According to the place where the final punishment forming the first term

¹ Mateut Gheorghe, *Second Offence in the Theory and Practice of the Penal Law*, Lumina Lex Publishing House, Bucharest, 1997

² Penal Code and Penal Procedure Code, Hamangiu Publishing House, Bucharest, 2009

of the second offence was enforced:

a) *National or territorial second offence* appears when the first conviction was pronounced by a Romanian Law Court.

b) *International second offence* appears when the first conviction was pronounced by a foreign Law Court.

5) *According to the punishing treatment:*

a) *Second offence with a unique effect* supposes the application of the same penal treatment for the offender facing the first second offence as well as for the one who perseverated in the second offence (multi-recidivist).

b) *Second offence with progressive effects* supposes the aggravation of the recidivist's punishment at every new second offence.

c) *Second offence with an even punishing regime* supposes the same punishing regime for all the types of second offence.

d) *Second offence with a differentiated punishing regime* supposes a different punishing regime for the types of second offence.

6) *According to the moment of committing the second offence:*

a) *Post-conviction second offence*

b) *Post-release second offence*

7) *According to the convictions forming the first term of the second offence:*

a) *Big second offence*

b) *Small second offence*

8) *Types of Second Offence in the Romanian Penal Code in force*³:

- *big post-conviction second offence, in article 37, letter a*

- *big post-release second offence, in article 37, letter b*

- *small post-conviction second offence, in article 37, letter c*

- *small post-release second offence, in article 37, letter c*

- *international second offence as resulting from the provisions of article 37, last line*

- *temporary second offence as resulting from the provisions of article 38, last line*

- *general second offence as resulting from the entire regulation*

- *second offence with a unique effect as resulting from the punishing regime*

- *second offence with a differentiated punishing regime as resulting from the different punishing regime of the post-conviction second offence as compared to that of the post-release second offence*

- *post-conviction second offence of the legal person (article 40, index 2, line 1, letter a)*

- *post-release second offence of the legal person (article 40, index 2, line 1, letter b)*

BIG POST-CONVICTION SECOND OFFENCE

According to the provisions of article 37, letter a of the Penal Code, the big post-conviction second offence exists when after a final decision convicting the offender to the punishment of prison for more than 6 months, the offender commits a new offence, with intention, before starting to execute the punishment, during the execution of the punishment or while he is escaped, and the punishment provided by the law for the second offence is greater than one year.

Conditions for the Existence of the Big Post-Conviction Second Offence

³ Penal Code and Penal Procedure Code, Hamangiu Publishing House, Bucharest, 2009

1) **Conditions referring to the first term of the second offence⁴**

a) **It must be an intentioned offence.** The question is whether the praeter intentionem offences attract the status of second offence, as article 37 of the Penal Code allusively reminds the intentioned acts and at the same time, article 38 Penal Code provides that the offences committed by negligence do not attract the second offence state.

Considering that the provisions of article 38 Penal Code represent an exception, one may deduct that the praeter intentionem offences attract the status of second offence.

b) **The punishment applied for this first term must be imprisonment for more than 6 months.**

This punishment may be applied for only one offence or for several offences taken together. In practice, the question of the existence of the second offence status when the punishment from the first term was applied for several offences, both intentioned and by negligence arose.

In this case, if one of the offences composing the sum of offences is intentioned and the punishment established for it is superior to 6 months, second offence exists. If all the offences were punished with less than 6 months of prison but they are all intentioned and their total punishment is superior to six months, second offence exists. But if all offences composing the sum of offences were punished with less than 6 months in prison and if some of the offences were committed by fault, then second offence does not exist, even if the total punishment exceeds the 6 month limit.

c) **The punishment applied at the first term must be final.**

d) **The conviction applied for this first term of the second offence must not be mentioned in the article 38 of the Penal Code (the convictions provided by this article do not involve the status of second offence).**

- offences committed by an underage offender
- offences committed by negligence
- pardoned offences
- acts that are no longer considered offences by the penal law

2) **Conditions referring to the second term of the second offence⁵**

a) **The offences composing this term must be intentioned or at least praeter intentionem acts.**

b) **The punishment provided for this term must be life imprisonment or prison for more than one year.** In case of the first term, one considers the punishment actually established by the Law Court, and in case of the second term, one considers the punishment provided by the law. If it is a punishment of prison from 3 months to 2 years the second offence exists, as the special maximum is superior to one year. The actual punishment established by the Law Court is of no interest in this case. Even if the Law Court only enacts the 3 month punishment, the second offence still exists.

c) **The offence must be committed after the conviction established at the first term and before the execution of the punishment or before the moment when the punishment is considered as executed for this conviction.** Therefore, the offence may be committed in the time between the final decision of conviction and the actual execution of the conviction, during the execution or while the offender is escaped.

d) **The conviction must not be comprised in the ones provided by article 38**

⁴ Mitrache Constantin, Mitrache Cristian, *Romanian Penal Law. General Part*, Universul Juridic Publishing House, Bucharest, 2007

⁵ Bulai C., *Romanian Penal Law*, General Part, volume 1, "Sansa" SRL Publishing House, Bucharest, 1992

of the Penal Code.

In case of a sum of offences, if the offences are intended or by negligence, the question of the existence of the second offence state arises. In this case there are two hypotheses:

1) A situation where for at least one of the intentioned offences of the sum of offences a punishment superior to 6 months was established. Thus, if there are four offences, two by negligence and two intentioned, for which punishments of 5, 4, 7 and 3 months respectively were established, and the resulting punishment is of 9 months, the second offence exists as there is a punishment superior to 6 months.

2) A situation where for none of the intentioned acts a punishment superior to 6 months was established. Thus, if there are 4 offences, two by negligence and two intentioned, the Court established punishments of 5, 4, 4 and 5 months respectively, and the resulting punishment was of 8 months. The question is whether this situation fulfills the conditions of a second offence. One of the doctrine's opinions expressed the idea that second offence might be present if the punishment for an intentioned act plus the supplementary part corresponding to the other intentioned act exceeded 6 months.

Actually, we cannot divide the supplementary punishment added to the basic punishment in order to calculate the proportion corresponding to the punishment that interests us. In such a case, one cannot speak about second offence.

SMALL POST-CONVICTION SECOND OFFENCE

It appears when, after the conviction to at least three punishments inferior to 6 months for intentioned offences, the offender commits a new intentioned offence, punished by the law with life imprisonment or with prison for more than one year.

Conditions for the existence of the small second offence after conviction: the conditions are the same as in the case of the big post-conviction second offence, only that, in case of the first term, instead of a conviction superior to 6 months we deal with three convictions inferior or equal to 6 months. It is necessary that the last punishment of the series of three should not have been executed or considered as executed.

The punishing rules are identical with those that apply in case of the big post-conviction second offence. The part of the last punishment that was not executed shall be united, according to the above mentioned rules applying for the big post-conviction second offence, to the punishment applied for the offence causing the state of second offence.

BIG POST-RELEASE SECOND OFFENCE

It exists when after the execution of a punishment consisting of prison for more than 6 months, after the total reprieve or the reprieve of the punishment left unexecuted, or after the moment when the execution of such a punishment was prescribed by the law, the convicted person commits a new intentioned offence for which the law provides the punishment of prison for more than one year, either alone or alternatively with the fine.

Conditions for the existence of the big post-release second offence

1) *Conditions referring to the first term of the second offence:*

a) *The committed offence should be punished by the law with more than 6 months in prison.*

b) *The committed offence should be intended or a praeter intentionem offence.*

c) *The punishment for the first offence should have been executed.* The punishment is considered to be executed when its deadline expired, the punishment was reprieved or the execution of the punishment was prescribed.

d) *The conviction should not be one of those not taken into account when establishing the state of second offence, according to article 38, Penal Code.*

2) **Conditions referring to the second term of the second offence:**

- a) *It should be an intentioned or praeter intentionem offence.*
- b) *The punishment provided by the law for the second offence should be superior to one year, alone or together with the fine.*
- c) *The second offence should be committed after the execution of the punishment of the first term.*
- d) *The conviction should not be one of those not taken into account when establishing the state of second offence, according to article 38, Penal Code.*

The moment when the offence was committed represents a particularity as compared to the execution duration offences, in which case, in order to establish the type of second offence, one shall take into account the moment of their ending. Therefore, if such a crime is begun during the execution and ends after the execution, we are dealing with post-release second offence and not with post-conviction second offence⁶.

SMALL POST-RELEASE SECOND OFFENCE

It exists when after the execution of the three punishments inferior to 6 months, or after the moment when these punishments are considered to be executed, the offender commits a new intentioned offence punished with prison for more than one year. The three punishments must have been enforced for successive convictions, so that these punishments are concurrent.

Punishing the second offence (article 39, Penal Code)

In case of the second offence provided by article 37, letter a, the punishment established for the offence subsequently committed and the punishment applied for the previous offence shall be united and the supplementary punishment may be increased with up to 7 years. If the previous punishment was partially executed, the punishment left to be executed and the punishment applied for the subsequently committed offence shall be united.

In case of committing an offence after escaping, the previous punishment is the punishment that is being executed, cumulated with the punishment applied for escaping⁷.

In case of the second offence provided by article 37, line 1, letter b, a punishment up to the special maximum may be applied. However, if the special maximum is not enough in terms of imprisonment, a supplementary punishment of up to 10 years may be added, and in the case of the fine a supplement of no more than two thirds of the special maximum may be applied.

In case of the second offence provided by article 37, letter c, the above mentioned rules apply correspondingly.

If after the moment when the conviction decision remained final and before the moment when the punishment was executed or considered to be executed, one discovers that the convicted person is in the state of second offence, the Court applies the above mentioned provisions accordingly, and we are dealing with big or small post-release or post-conviction second offence. These provisions also apply if the punishment of life imprisonment was turned into imprisonment.

By the penal sentence no. 2193 from the 13th of November 2000, Târgu Mureş Law Court convicted, among others, the defender L.I. to 3 years of imprisonment for committing the crime of outrage and disturbance of the public order provided by article

⁶ Tulbure Adrian Stefan, Tatu Maria Angela, Boureanu Laurentiu, *Penal Law. Selective Bachelor Degree Course*, Risoprint Publishing House, Cluj-Napoca, 2005

⁷ Penal Code and Penal Procedure Code, Hamangiu Publishing House, Bucharest, 2009

321 line 1, and applying the provisions of article 37 letter b of the Penal Code⁸.

Mureş Tribunal, by the penal decision no. 45 from the 31st of January 2002, and Târgu Mureş Court of Appeals, by the penal decision no. 638/A from the 18th of December 2002, denied the appeal and the second appeal submitted by the defender.

The appeal for annulment is well-founded.

According to article 37 letter b of the Penal Code, the second offence exists when, among others, after the execution of a punishment to prison for more than 6 months the convicted person commits a new intended offence for which the law provides the punishment of imprisonment for more than one year, and according to article 38 line 2 of the Penal Code, when establishing the state of second offence one shall not take into account the convictions for which rehabilitation occurred.

At the same time, according to article 62 line 1 and article 5 of the Penal Code, the execution of the imprisonment punishment inferior to two years by the conscripted soldiers is made in a military prison in the cases provided by the law, as well as in the cases where the Law Court, taking into account the circumstances of the case and the convicted as an individual enacts it, and after the execution of the punishment the convicted person is rightfully rehabilitated.

By the sentence from the 14th of September 1995 pronounced by Timișoara Military Tribunal, which became final by the lack of appeal, the defender was convicted to one year and 10 months of imprisonment for committing the offence of deserting, provided by article 332, line 1 of the Penal Code.

According to article 62 Penal Code, the Court enacted that the punishment be executed in the military prison; the defender started to execute the punishment on the 18th of July 1995 and he remained in prison until the 13th of March 1997, when he was released under supervision and he was rightfully rehabilitated on the 17th of March 1997, when the punishment ended.

Therefore, for the act submitted to be judged, committed on the 17th of February 1999, the conditions of the second offence are not fulfilled. Consequently, the appeal for annulment was accepted, the decisions enacted in this case were annulled and the application of article 37, letter b of the Penal Code was removed, noticing, at the same time, that the 3 month imprisonment punishment was relieved according to article 1 and article 7 of the Law no. 543 / 2002.

In the penal law, the expression plurality of offences designates the situation where a person commits two or more offences before being finally convicted for one of them, as well as the situation where a person commits a new offence after being finally convicted for another offence. Therefore, there is only one offender and several offences committed by this one.

For the plurality of offences to exist, it does not matter if the offences were definitively trialed, if they are intentioned acts or if they were committed by negligence, and the moment of committing these offences is of no interest either. All these elements are important in order to delimitate the types of plurality of offences.

According to article 32 Penal Code, the plurality of offences represents, as applicable, a sum of offences or second offence. This statement can be criticized, as the types of plurality of offences are not actually limited to the sum of offences and second offence.

Thus, even the Penal Code regulates, in its article 40, another form of plurality, which does not refer to the sum of offences or to the second offence, and which was

⁸ www.euroavocatura.ro

called by the doctrine intermediary plurality.

There are also other types of plurality that are not expressly regulated by the Penal Code, and that are not a sum of offences, a second offence or an intermediary plurality. For instance, the case where an offender who had already executed the punishment for an offence committed by negligence, commits another offence, also by negligence. In this case, none of the three pluralities mentioned above is present.

Bibliography

1) Penal Code and Penal Procedure Code, Hamangiu Publishing House, Bucharest, 2009.

2) Bulai C., *Romanian Penal Law*, General Part, volume 1, “Sansa” SRL Publishing House, Bucharest, 1992.

3) Mateut Gheorghe, *Second Offence in the Theory and Practice of the Penal Law*, Lumina Lex Publishing House, Bucharest, 1997.

4) Mitrache Constantin, Mitrache Cristian, *Romanian Penal Law. General Part*, Universul Juridic Publishing House, Bucharest, 2007.

5) Tatu Maria Angela, *Penal Law Course. General Part*, Burg Publishing House, Sibiu, 2003.

6) Tulbure Adrian Stefan, Tatu Maria Angela, Boureanu Laurentiu, *Penal Law. Selective Bachelor Degree Course*, Risoprint Publishing House, Cluj-Napoca, 2005.

7) www.euroavocatura.ro