

# (IM)POSSIBILITY TO RECOVER THE DAMAGE CAUSED BY EMBEZZLEMENT AFTER THE CONVICTION TO A SUPERVISED SUSPENDED SENTENCE

Associate professor **Sandra GRĂDINARU**<sup>1</sup>

## **Abstract**

*The present paper intends to analyze the real and effective possibility of a civil party in a criminal trial to recover the damage created by the convicted person, under the conditions in which the criminal court orders the sentence to imprisonment but chooses as the option of executing the sentence, a supervised suspension. The basic idea of the present study starts from the possibility of the civil party to request the revocation of the suspension under supervision of the sentence applied to the convicted person, given that it has no other methods to recover his damage by other means of coercion. Present study aims to analyze the jurisprudential optics of the Romanian courts, notified with the solution of such a request, the argumentation being concentrated around the criteria in relation to which the conduct of the convicted person is analyzed during the probation period. The institution of the revocation of the suspended sentence under supervision established by the Romanian legislator is not adapted to the socio-economic conditions in Romania, in the sense that the provisions of the positive law do not establish the criteria in relation to which the criminal court can settle such a request. The academic and practical interest of the present approach is mainly given by the comparative presentation of the solutions pronounced in this field, starting from a specific case analyzed critically. The scope of addressability of the work is relatively extended, being useful not only to the legal practitioners: lawyers, executors, probation counselors, prosecutors, judges, etc., but also to the civil parties - natural or legal persons (public institutions or commercial companies), being in the impossibility of recovering the damage definitively found by a criminal decision convicting the defendant who committed mainly an economic offense, or subsidiary any offense against the patrimony.*

**Keywords:** economic crimes, embezzlement, damage, suspended sentence.

**JEL Classification:** K14, K22, K40

## **1. Analysis of jurisprudence and doctrine on the request for revocation of suspended sentence for failing to pay the damages**

Romanian courts have been notified repeatedly in order to revoke the suspension under supervision for non-fulfillment of the civil obligations stipulated by a criminal court.

The majority of the jurisprudence revealed that national courts<sup>2</sup> order the revocation of the suspension under supervision with the following motivation: The bad faith is presumed by law, so the court has no obligation to establish it, giving the burden of proving that he has not been able to fulfill his obligations to the convicted person, and the court, judging the merits of the evidence from the file, will decide on the existence or non-existence of the bad faith.

Specialized literature<sup>3</sup> emphasized that the convict has the obligation that until the expiration of the term of trial to pay the civil obligations established by the sentence of conviction. Failure to fulfill this obligation in bad faith leads to the compulsory revocation of the conditional suspension. The burden of proof rests with the convicted person who claims such an impossibility. After having benefited from the legal provisions that allow a convict to be free treatment and also benefited from the court's forgiveness, considering that the purpose of the punishment can be achieved without its execution, the convicted person must confirm that this purpose can be achieved, and one of the confirmation modalities is also the fulfillment of the civil obligations established by the sentence of conviction.

Regarding the capacity of the convicted person to work, the Romanian courts<sup>4</sup> held that:

The court thus holds that the convicted respondent is a young person, capable of work, but

---

<sup>1</sup> Sandra Grădinaru – „Alexandru Ioan Cuza” University of Iași, Romania, sandra.gradinaru@yahoo.com

<sup>2</sup> Decision no. 642 of 10.09.2015 pronounced by the Botosani Tribunal.

<sup>3</sup> Matei Basarab, Viorel Pasca, Gheorghita Mateut, Constantin Butiuc, *The Criminal code - commented. The general part*, Hamangiu Publishing House, Bucharest, 2007, pp. 458-459.

<sup>4</sup> Focsani Court, Criminal Sentence no. 382/28.03.2018.

who showed no interest in the victim of the crime, throughout the term of supervision, but only after notifying the court and only with the payment of a small part of the debt that the creditor has against him. The impossibility of payment is not proven in relation to the fact that the debtor did not prove that he participated in schooling courses, vocational training, enrollment in a stable job and neither the proof of the income realized in a working month, even as a day laborer.

At the same time, in the case of economic offenses whose damage was not recovered during the criminal trial, the High Court of Cassation and Justice, in a similar case<sup>5</sup> held that:

Moreover, the court finds the defendant's bad faith also from the defendant's own activity, being convicted because he seized the amount of money and did not return it, in this sense, pointing to the defenses filed before the court of appeal, where he mentioned that he did not use this amount in any way. However, in this context in which the defendant claims that he had at his disposal the amount of money he wrongly acquired, the passage of a very long period of time since the acquisition of the amount (August 6, 2013) and for 2 years, from the date of the definitive sentence of conviction (February 11, 2016), period in which he did not show any disposition to execute its obligations, it leads the court to the conclusion that the revocation of the conditional suspension is necessary and it is not necessary to wait for the probation period to be terminated to dispose in this regard .

## 2. Procedural aspects - the deadline for formulating the request for revocation

Regarding the deadline for formulating the request to revoke the suspension under supervision, there were jurisprudential discussions, based on the interpretation of the incidental normative texts.

According to art. 583 para. 2 of the Criminal procedure code If, until the expiry of the term provided in art. 93 paragraph (5) of the Criminal Code, the convicted person did not comply with the civil obligations established by the sentencing decision, the competent probation service notifies the court that pronounced the suspension in the first instance, in order to revoke it. The notification can also be made by the prosecutor, the probation counselor or the interested party, until the expiration of the probation period.

Thus, according to the normative text, only the notification made by the probation service is subject to the term provided by art. 93 paragraph 5 of the Criminal code. In the case of the notification made by the person concerned (the civil party), it is no longer conditioned by the expiry of a certain term.

Regarding the moment of the notification of the court with the request for revocation, we highlight the practice of the supreme court<sup>6</sup>, according to which The notification of the court in order to revoke the conditional suspension of the execution of the sentence or the suspension under supervision of the execution of the sentence, in the event of the non-fulfillment by the convicted of the civil obligations established by the sentencing decision, must be made before the expiry of the probation period, regardless if the case is judged before or after the expiration of this term.

In this regard, we also exemplify the jurisprudential position of national courts<sup>7</sup> who hold that: This possibility granted to the court, to revoke the suspension of execution, for the sole reason that the convicted person did not repair the damages caused by the crime committed, is based on the idea that the failure of the convicted person, during the probation period, to pay the civil obligations established by the sentence of conviction, comes from bad faith.

The bad faith is presumed by law, so the court has no obligation to establish it, giving the the burden of proving that he has not been able to fulfill his obligations to the convicted person, and the court, judging the merits of the evidence from the file, will decide on the existence or non-existence of the bad faith

It is thus held that the request for revocation must be submitted at a time that can highlight

<sup>5</sup> High Court of Cassation and Justice, Criminal Section, Decision no. 142 of February 16, 2018.

<sup>6</sup> Decision 14/17.10.2011 of the High Court of Cassation and Justice.

<sup>7</sup> Decision no. 642 of 10.09.2015 pronounced by the Botosani Tribunal.

the convicted person's intention to evade from the execution of civil obligations, respectively to demonstrate his bad faith, because, from the contrary interpretation of art. 84 the final thesis of the Criminal Code we note that the revocation of the suspension of the execution of the sentence cannot be ordered if the convicted person proves that the non-fulfillment of the civil obligations established by the sentencing decision was not due to his bad faith .

In conclusion, the request for revocation must be filled until the probation period is exhausted, and the trial of the case can take place both before and after the fulfillment of this term, provided the application is submitted before the expiry of the term.

This is also the opinion of the High Court of Cassation and Justice, expressed on the occasion of the ruling on the appeal in the interest of the law<sup>8</sup> on this aspect. The High Court held that, the opinion that the request for revocation of the suspension made during the probation period would be premature, because up to this moment the convicted person can perform his obligations, cannot be received because it would mean that the convicted person would benefit from a grace period for their execution equal to the probation term. This would be equivalent to the recognition of an unforeseen law and would render ineffective the provisions contained in art. 81 paragraph 5 and art. 86<sup>1</sup> para. 4 of the Criminal Code, according to which the suspension of the execution of the sentence does not entail the suspension of the security measures and of the civil obligations provided in the sentence of conviction. Regarding the moment when the court, notified with the solution of the request for revocation before the expiration of the probation period, can order the revocation of the suspension of the execution of the sentence, it can be placed either before the completion of the probation or after, as long as the legislator does not provide that the revocation must be pronounced within this term.

### **3. Impossibility to recover the damage**

By the Criminal Decision no. 1147/30.10.2012 of the Iasi Court of Appeal was admitted the appeal made by the civil party SC Y SRL against the criminal sentence given by the Iasi County Court, which was partially canceled, on the criminal side, in the sense of increasing the amount of the sentence applied to defendant X from 3 years and 6 months' imprisonment to 4 years' imprisonment and a probationary term of 6 years, while the other provisions of the criminal sentence appealed are maintained.

The convicted person, with bad faith throughout the probation, did not comply with the civil obligations imposed by the court, which attracts the revocation of the suspension under supervision, at the request of the civil party.

The civil party of the criminal case is an interested party in a request to revoke the suspension under supervision of the convicted person, given that the convict has not fulfilled his civil obligations.

We consider that failing to pay the damage caused to the civil party, although the probation period is about to expire or even has expired, is due in most cases to the fact that the convicted person was not forced to execute the sentence in the penitentiary but benefited from the suspension under supervision of the sentence.

Basically, the convicted person, although he/she has benefited from the court's clemency, defies the effects of the definitive criminal decision and with bad faith refuses to pay the damage created to the civil party, especially since there is no effective way of restraint.

Particularly relevant in this context is that not even the forced execution of the final criminal decision is likely to lead to the recovery of the damage created by the convicted person because he/she has the possibility to evade the payment of the entire amount.

Revoking the suspension under supervision appears to be the only way of restraint by which the convicted person can be motivated to repair the damage created to the civil party, but

---

<sup>8</sup> Decision no. 14/2011 of 17/10/2011 of the High Court of Cassation and Justice, published in the Official Gazette, Part I no. 821 of 21/11/2011 regarding the appeal in the interest of the law.

especially only by this method the punitive and preventive purpose of the punishment applied can be achieved.

In this case, for 6 years, the convicted person managed to evade the civil effects of a definitive criminal decision by making modest payments.

The rare and minor payments made by the convicted person were not payments made in order to cover the damage created, but to mislead the judicial bodies and the civil party.

By this attitude, the convicted person most often seeks the expiration of the probation period and the rehabilitation, because subsequently, since there is no concrete way of restraint, to stop the payments and to keep a considerable amount of money, acquired in an illicit manner, by committing crimes.

Committing economic crimes becomes a source of income for the convicted person, given that he/she has misappropriated a considerable amount of money, amount that would not have been able to accumulate through legal lucrative activities and which is not generating interest and is not updated with inflation index.

Another method by which the convicted person has the possibility to circumvent the forced execution of the damage created by committing the crime of embezzlement is to sign a payment commitment with the judicial executor for a derisory amount against the total amount owed, a commitment that however he has the possibility not to respect.

Another argument in support of a request to revoke the suspension under supervision is the situation of the work places of the convicted person during the probation period.

An analysis of the records held by the Territorial Labor Inspectorate revealed that the convicted persons, during the trial period, frequently changes their jobs precisely to circumvent the forced execution started by the civil party against them.

An indication in support of this conclusion is that the change of the work place occurred after the moment when the judicial executor identifies the new place of work of the convicted person and ordered the imposition of a seizure on monthly income.

The main way to circumvent the forced execution of the salary income is to falsely sign a contract for a part-time job or for a lower salary than the real one, a situation that benefits only the convicted person.

However, considering all these methods already identified for avoiding the payment of the damage created by committing the economic crimes, we consider that the re-education of the convicted person cannot take place, imposing the revocation of the suspension of the execution under supervision of the punishment applied.

The rejection of a request to revoke the suspension under supervision filled by the civil party is another factor that creates the convicted person the belief that he/she will remain unsanctioned for the crime committed. Basically, it can be stated that, although the crime committed was discovered in time and a criminal conviction decision was pronounced, in fact the convicted person does not suffer any consequence of the conviction.

#### **4. Decision of the court to reject the request for revocation - critics**

The court in the present case, however, ordered the rejection of the revocation request made by SC Y SRL against the convicted person.

In the following, we will briefly present the reasons for the contestation formulated by the civil party.

The court held that the bad faith of the convicted person was not proven, non-payment of civil damages being due to the restrictive material situation.

The court's argument ignores the fact that the bad faith of the convicted person is presumed by the mere fact of non-performance of the civil obligations within the probation period.

Thus, in an unlawful manner, the court reversed the burden of proof and forced the civil party to prove the bad faith of the convict, context in which the convicted person was allowed to remain passive in this procedure and not to administer any tangible evidence which can prove that

he did not have the real and effective possibility to pay the civil damages.

The rejection of the request for revocation appears as a violation of the *nemo propriam turpitudine alegans* principle, according to which no one can invoke his own fault. The alleged restrictive material situation of the convict, retained by the court, insofar as it is real, is due exclusively to the passivity of the convict, who has not taken effective steps in identifying a stable job and generating monthly income.

In fact, the convicted person, by the methods described above, with bad faith avoided paying the damage created by committing the crime of embezzlement for the entire duration of the probation period established by the criminal court, without proving remorse at any time and without proving the fact that he has taken effective steps to employ.

According to the court decision: the current patrimonial situation of the convicted person does not give any indications in the sense of retaining a bad faith in the non-payment of civil obligations.

The court held in the reasoning that: in order to retain the bad faith in non-payment of civil obligations it is necessary to find that the person in question had an intentional attitude against the legal provisions, expressing, implicitly or explicitly, a refusal to proceed in the sense ordered by the court, being fully aware of the consequences of its conduct.

In this regard, the court ignored the fact that the convicted person did not prove that she registered with the County Agency for Employment as a person in search of a job and did not participate in the numerous reconversion and/or professionally retraining courses, organized by this institution.

Given the fact that the convicted person is a person capable of work and that she should be aware of the effects of revoking the suspension under supervision of the execution of the sentence, it is obvious that she did not take any minimum diligence to repair civil damages.

This attitude is incompatible with the very essence of the probation period during which any convicted person must prove his straightening and regret regarding the criminal acts committed.

## 5. Contrary jurisprudence

Even in the situation where the convicted person obtained modest incomes during the trial term, in the national case law<sup>9</sup> it was considered that:

The convicted person had the real possibility to pay to the civil party at least a third of the damage, considering the amount of the income made monthly by him, which is located between 600-900 lei/month, after the deduction of taxes.

The fact that the convicted person tried to make a payment is not proof of good faith, because his intervention took place after one year and a half from the final conviction, the amount he wanted to pay is derisory compared to the value to which the civil party is entitled, and the convicted person gave no explanation why he did not make any payment from 04.05.2016 and until January 2018. The court finds that the named C. C has shown bad faith, did not make any real effort to pay the civil obligations, although he had been warned about the consequences of his passivity.

Some courts<sup>10</sup> considered that, if the convicted person does not have his own financial resources, but benefits from material support from third parties, the bad faith is proved by the simple fact of not executing the civil obligations ordered by the sentencing court.

The report shows that during the probation period, as long as he remained in the country, the convict did not have personal income, being supported by his parents. (...)

From the analysis of the documents attached to the case file, the court found that the convict was aware of his obligations, including the obligation to pay the damage caused to the civil party. Even though he did not have a stable job, it is found that he was not totally without income.

The court appreciated that the convict had shown bad faith in fulfilling the civil

<sup>9</sup> Constanta Court, Criminal decision no. 776 / 15.06.2018.

<sup>10</sup> Buhusi Court, Criminal Sentence No. 53/2018, Public hearing of March 14, 2018 case file no. 2080/199/2017.

obligations, even though he did not have constant incomes, yet he made some incomes. From the income realized the convict did not express his intention to cover the damage created and he did not prove before the court that he had no possibility to fulfill his civil obligations.

## 6. Conclusions

In the procedure aimed at revoking the suspension of the execution of the sentence under supervision, the court is asked to analyze the entire period elapsed from the moment of the final conviction and until the date of the request for revocation and not just the situation from the moment of the request for revocation.

The attitude of the convicted person from the time of the criminal prosecution and until the moment of the request for revocation, in the situation of non-payment of the damage, does not denote correction and awareness of the gravity of the committed crime. Given that he/she has committed an offense with patrimonial effects, the purpose of the probation period is precisely to repair the damage caused by embezzlement.

Otherwise, the purpose of the punishment, to remedy the negative consequences produced and to re-educate, is not achieved, which lacks the fairness and equality of treatment of the convicted person against the civil party.

By rejecting the request to revoke the suspension under supervision, a significant imbalance is created between the clemency offered by the courts and the bad faith manifested through non-payment of civil obligations. However, this fact comes to encourage the committing of patrimonial crimes, there being the belief of a circumvention of the judicial provisions without a proportionate and equitable liability.

The rejection of the request for revocation is likely to lead to the creation of a high social impact and the diminution of the confidence in the justice on the one hand, as well as to encourage other people in committing criminal offenses, on the other.

An analysis of the difference between the damages found by criminal conviction decisions and the damages actually recovered from the convicted persons reveals that very often, the civil party does not have effective legislative means for the recovery of the damage.

A legislative impediment is given even by the possibility of the criminal court to order the release of the convicted person, by suspending the execution of the sentence under supervision applied to the convict, before repairing the damage created by economic offenses or offenses against the patrimony.

Often, the convicted person still has the financial resources illegally acquired or manages to disguise how he used them, so that the judicial bodies will be almost impossible to recover the damage.

In these conditions, the convicted person assumes any criminal consequence can have the sentence of conviction, being convinced that, after the rehabilitation, he will have the possibility to keep the illicit funds.

Another legislative impediment from the perspective of the civil party is given by the means available to him against the convicted person in the post-conviction period.

Civil procedural law allows the civil party to request the forced execution of the convicted person, but most of the time, this method is not efficient. The criminal law and criminal procedure law intervenes as the last resort by granting the possibility of the civil party to request the revocation of the suspension under supervision of the sentence applied by the criminal court.

But this last method of coercion instituted by the Romanian legislator is not adapted to the socio-economic conditions in Romania, in the sense that the provisions of the positive law do not establish the criteria in relation to which the criminal court will be requested to order the revocation of the suspension under supervision.

In this way, the criteria for assessing the conduct of the convicted person during the probation period are left to each individual court, which may appear as an additional guarantee of respecting the rights of the convicted person, but puts the civil party in an inferior procedural

position.

We consider that, although it is required that the convicted persons benefit from the procedural guarantees provided by national and international law, this fact should not be of such a nature as to disadvantage the victim of the economic crimes, a civil party in the criminal trial that is forced to request a second intervention of the criminal court to recover his damage.

### **Bibliography**

1. Matei Basarab, Viorel Pasca, Gheorghita Mateut, Constantin Butiuc, *Criminal Code -commented. The general part*, Hamangiu Publishing House, Bucharest, 2007.
2. Decision 642 of 10.09.2015 pronounced by the Botosani Tribunal.
3. Decision no. 14/2011 of 17/10/2011 of the High Court of Cassation and Justice, published in the Official Gazette, Part I no. 821 of 21/11/2011 regarding the appeal in the interest of the law.
4. High Court of Cassation and Justice, Criminal Section, Decision no. 142 of February 16, 2018.
5. Buhusi Court, Criminal Sentence no. 53/2018 from March 14, 2018, pronounced in the file no. 2080/199/2017.
6. Constanta Court, Criminal Decision no. 776/15.06.2018.
7. Focsani Court, Criminal Sentence no. 382/28.03.2018.