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Brief Analysis of the Fine Penalty Settlement in the New Romanian Penal Code

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Abstract:

In this study, the author briefly sets out the manner in which the new Romanian Penal Code, in force since 1 February 2014, regulates the institution of the principal penalty of fine.

In a constant comparison to the corresponding provisions of the previously Criminal Code it is shown the specific of the fine under the new legislation, which now consists of day-fine institution after the model of some evolved systems of comparative criminal law.

By analyzing how the fine will be determined, the author concludes that the new regulation allows a better proportionate sentencing, operating with two elements that individually are determined in concreto: the number of day-fines and, respectively, the amount of a day-fine.

Another new element of the Romanian penal law, also inspired from comparative law, consists of the fine penalty accompanying imprisonment, established subsequently the identification that the agent has acted to obtain a patrimony benefit. The study exposes the ratio that grounded the new settlement and checks how the sanction is established and executed when the initial penalty is imprisonment or a fine.

Further on, the analysis focuses on the hypothesis of replacing the fine with imprisonment as a result of bad faith of the sentenced person who does not pay for it, although he has available financial resources. Welcoming the newly introduced provisions in the Code, the author draws the attention of the reader on unresolved situations under the previous legislation, when the convicted person is not of bad faith, but does not pay the fine because it is not affordable. Currently, in such a case, the fine will be replaced by a number of days of community service work, subject to the convict's agreement in this respect. Otherwise, the fine will be replaced with imprisonment, just like in the case of bad faith.

Finally, one last section, tangent to the topic of the fine penalty, addresses the replacement of unpaid community service with imprisonment for committing a new crime or failure to perform work in conditions set by the court.

Keywords: *new Penal Code; the Penal Code in 1969; days-fine; fine that accompanies imprisonment; community service work; replacing fine with imprisonment; replacing fine penalty with unpaid community work.*

I. Definition and elements of novelty

1. In art. 61, the Penal Code starts by defining the fine penalty, showing that it consists in *the amount of money that the offender is required to pay to the State* and

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establishing its relatively fixed nature, in which now – even more that in the regulation of previously Code – the judge has the exclusive role, the most important one[1].

The way of actual payment of the fine is set in Law no. 253/2013 regarding the execution of penalties, educational measures and other non-custodial measures ordered by the court in criminal proceedings[2], to which we will refer briefly to the end of our study.

2. Moving to the definition of fine penalty, the novelty of utmost importance is the introduction of the days-fine system for calculating the fine to be paid[3].

The system governed by art. 61 Penal Code uses two essential elements for determining the fine, namely:

a) *number of days-fine*, expressing the gravity of the offense committed and the dangerousness of the offender, reason for which the number is determined by the general criteria of penalty individualization, respectively

b) *the value of a day-fine,* which is the amount of money corresponding to a day-fine to be determined, according to the amendments introduced by Law no. 187/2012 for the implementation of the Penal Code[4], taking into account the financial situation of the convict and his legal obligations towards his dependents.

Once established, the number of days is multiplied by the value of a day-fine, and the result is the amount that the convict is obliged to pay as a fine.

The proposed mechanism of determining the amount ensures better individualization of the sentence actually imposed both in terms of proportionality, expressed in number of days-fine and effectiveness by determining the value of a day-fine view of the financial situation of the convict.

II. Proportionate sentencing. Number of days-fine. General limits. Special limits. Establishment

3. According to art. 61 paragraph (2) final thesis Penal Code., the number of days-fine is between 10 days and 400 days.

These are *general limits* on the days-fine, important to be properly identified because - just like the prison sentence – they can never be overcome. Thus, regardless of the number of circumstances or causes of mitigation or aggravation it cannot be set a number of days-fine less than 10 days or greater than 400 days[5].

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[1] Regarding the relatively nature of the fine penalty, according to the previous regulation, see Șt. Daneș, V. Papadopol, *Individualizarea judiciară a pedepselor (Proportionate Sentencing)*, Ed. Juridică, Bucharest, 2004, p. 82.

[2] Published in the Official Gazette no. 513 August 14, 2013.

[3] As stated in the Explanatory Note, this fine penalty enforcement system is found in the criminal codes of Germany (§ 40), Spain (art. 50), France (art. 131-5), Portugal (art. 47) Switzerland (art. 34, in force since January 1st, 2007), Sweden (ch. 25, section 1), Finland (Chap. 2, Section 4) and was taken over by Law no. 301/2004 on the Criminal Code, published in the Official Gazette no. 575 of June 29, 2004 (repealed before the entry into force).

[4] Published in the Official Gazette no. 757 of November 12, 2012.

[5] On this aspect, in the doctrine has been shown that the causes system of deterioration of the Code allows, in the most severe cases, the reach of general maximum, without, however, exceeding it. However, it is believed that "it does not mean that by a special law might not provide a special maximum of days-fine exceeding the general maximum, although we appreciate that it is not advisable" - see, B.N. Bulai *Comentariu* (*Review*), in G. Antoniu (coord.), *Explicații preliminare ale*

4. Thus, regarding the number of days-fine, the *special limits* thereof are provided by art. 61 para. (4) Penal Code, as follows:

a) between 60 and 180 days-fine, when the law provides for the offense committed only a penalty fine;

b) between 120 and 240 days-fine, when the law provides penalty fine alternating with imprisonment of up to 2 years; respectively

c) between 180 and 300 days-fine, when the law provides penalty fine alternating with imprisonment of more than 2 years.

As noted, in the report of special limits regulation the number of days that can be established, the legislature kept broadly, the algorithm provided by art. 63 Penal Code 1969 with the sole difference that in cases where the fine is not unique penalty, the landmark element is not imprisonment for one year, but - now - imprisonment of up to 2 years. The change is not just a formality, but thus was tried the referencing to the special maximum of the prison sentence, as he was amended in the special part and specific criminal laws, in consequence „new logic of penalty"[6].

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noului Cod penal (*Preliminary Explanations of the new Criminal Code*), vol. II, Ed. Universul Juridic, Bucharest, 2011, p. 37.

In our opinion, a general maximum exceeding by a special law is not only advisable, but should not be allowed, contradicting the logic of the system proposed by the legislature. To the extent, however, such a special rule would take effect at some point in the future (probably in our system), we believe that, directly under the Criminal Code, the penalty should be limited to a maximum of 400 days, being unable to conceive - in the current legislation - a number of days-fine exceeding this "barrier".

Moreover, such a situation was met under the rule of the previous Criminal Code, but the Constitutional Court lost the opportunity to settle the matter in terms of the logic of penalty system as a whole, considering that are not violated constitutional rules. In this regard, we show that according to art. 276 letter c) of Law no. 573/2004 on the capital market (published in the Official Gazette no. 571 of June 29, 2004), the fine is established "between half and the full amount of the transaction made with the commission of the acts referred to in art. 245-248 (...)". The text was repealed by G.D. no. 32/2012 regarding undertakings for collective investment in transferable securities and investment management firms and amending and supplementing the Law no. 297/2005 on the capital market (published in the Official Gazette. No. 435 of June 20, 2012), but the Constitutional Court was apprised previously with exception of unconstitutionality of several provisions of the law, *inter alia*, and provisions of art. 276 paragraph letter c). By a vote of 6: 3, the Constitutional Court rejected the criticism concerning breach of legality and proportionality of the penalty (in the case before the exception was invoked, a defendant was liable to a fine of 806 times the maximum general of the Criminal Code in force at that time), considering that "the fact that by the method of determining the criminal fine, the limits established in the general rule of the Criminal Code are exceeded (...), is not likely to print criticized text of unconstitutional nature, since no constitutional provision does not forbid it" (C.Const., Decision no. 53/2012, published in the Official Gazette no. 234 of June 6, 2012). In a separate opinion, it is stated that "(...) the legislative solution in the law on capital market, on fine penalty, is unconstitutional because the fine is not determined and may exceed the general limits of the Criminal Code". In reasoning, the judges emphasizes, rightly, that "if specific limits may be exceeded in case of retaining the aggravating circumstances, *the general limits cannot be exceeded under any circumstances, thus ensuring unity of criminal law, the measures necessary for preventing and combating crime and citizens' equality before the law (sn)*. Contrary to these general limits, by criminalizing the law on capital market, the special limits of fines are indefinite because it can be applied between half and total transaction value achieved by committing all the facts. C:\Users\Bobo_B4D\My Documents\Documents and Settingsusersintact 3.0cacheLegislatietemp 198270" We believe that to ensure proportionality between the seriousness of the offense and the penalty imposed cannot be exceeded the limits of the main penalty (...)".

[6] For details, see, V. Cioclei, *Aspecte privind noua logică a pedepselor în noul Proiect de Cod penal (Aspects of the new logic of penalties in the new Penal Code Project)*, Criminal Law Notebooks,

Specifically, the number of days-fine will set between the limits so determined (if we are not in the presence of mitigating circumstances or causes, or aggravation of sentence), the court using in this respect the general criteria of proportionate sentencing laid down in art. 74 para. (1) Penal Code, namely: the circumstances and how the crime was committed and the means used; the hazard status created for protected value; the nature and severity of outcome or other consequences of the offense; offense reason and purpose; nature and frequency of offenses that constitute criminal history of the offender; conduct after committing the crime and during the criminal trial; level of education, age, state of health, family and social situation.

Individualization criteria which the legislator makes available to the court are more numerous and more diversified, so that in practice no difficulties should arise in relation to the establishment *in concreto* of the number of days-fine, this especially under the conditions and according to the Penal Code of 1969, when also the general criteria for proportionate sentencing were considered for setting the fine between special limits.[7]

III. The value of a day-fine

5. According to art. 61 paragraph (2) the appropriate amount of a day-fine is between 10 lei and 500 lei. For actually determining the amount of the day, the next paragraph states that the court will take into account the financial situation of the convict, and legal obligations of the convicted towards its dependents.

The criterion for the financial situation of the convict and its legal obligations was introduced by Law no. 187/2012, in an attempt to create a fairer system in fixing the amount, depending on income disparities of the person (active) and the expenses that it has and that can be easily identified (passive). The reference, however, to the notion of „convicted" is, however, unfortunate as it would suggest that only in a conviction these criteria will be important - is obviously wrong, because the court will individualize the penalty, including setting it in relation to introduced new criteria for a solution to postpone the penalty, in which case we cannot speak of a *convicted* person. We believe that the use of phrases like „guilty person" would be more accurate and will be considered, *de lege ferenda*, at the proximal changes to the criminal law that will have to take into account all the shortcomings and errors in the Code already identified in the literature and in legal practice.

If in the report setting the number of days-fine we were confident that there will be no difficulties in judicial practice, in the report setting the day-fine value, we are more skeptical. We believe that the legislator would have to develop either in the Code or in secondary legislation how the court will determine the exact financial situation of the person responsible, and how will identify its legal obligations. Furthermore, we believe it would have been more indicated to be detailed a number of additional criteria - besides financial situation and the legal obligations of the convicted – depending which the court individualizes the amount of a single-day fine. For example, § 40 of the German

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no. 3/2009, p. 59. The author shows that one of the main objectives of the Code was *"(...) the need for resettlement in normal limits the sanctioning treatment*, even if, from this point of view, there is a much different approach to the current (formerly, n.n.) regulation, approach that enables us to talk about *a new logic of penalties*".

[7] In this respect, see, D. Popescu, *Comentariu (Review)*, in T. Vasiliu (coord.), *Codul penal. Comentat și adnotat. Partea general (Criminal code, Reviewed and annotated, General part)*, Ed. Științifică, Bucharest, 1972, p. 409.

Penal Code which refers to the personal financial situation of the convict for determining the amount of a day-fine, add that the court will start from the net income of the convict or might normally have (calculated per day), there can be taken into account properties' value of the convict.

Finally, both in *demonstrating financial situation and legal obligations*, we believe that the defendant will submit, most often documents, that will be considered by the court. But if the defendant pleads not guilty, it is obvious that such an approach will lead to the undermining his defense strategy so that it is more than likely that it will not submit such documents. On the other hand, to the extent that the court of its own motion is seeking such documents or evidence may lead to an ante-pronouncement, leading to a slippery slope of a challenge.

The easiest solution would be - we believe - that the file contain this information from the prosecution stage (whether by indictment or the court is notified that there is a plea bargain agreement) and possibly the session prosecutor ask the court, in order to update, the issue of addresses thus obtaining this information again.

6. In the report of the actual method of obtaining information in relation to the financial situation, we believe that we can send to the provisions of art. 23 paragraph (4) of Law no. 253/2013, incidents in the non-execution procedure of fine. There is stated that for establishing grounds that led to the non-execution of the fine, the court will request data on the financial situation of the convict from local public administration authority from his residence and, if it deems necessary, from the employer or from the tax authorities of the National Agency for fiscal Administration, as well as from other public authorities or institutions that should have information on the person's financial situation.

The information obtained in this way, for example, from the employer could be corroborated also in relation to the criterion of dependents of the person - for example, it might be noted a garnishment on account to pay alimony for a child of a marriage dissolved and so on.

Finally, once determined the amount of a day-fine, it will invariably be the same for the whole number of days-fine previously established. Thus, the court is not allowed to establish different rates, the mechanism of proportionate sentencing being in fact a multiplication by two factors: a number of days (***A***) **x** an amount per day (***B***).

7. Summarizing the above and in the previous section, we imagine the following example: a person commits an offense of theft, punishable under art. 228 Penal Code with imprisonment from 6 months to 3 years or a fine, and the court is inclined towards the fine penalty.

In this case, the court will first determine the number of days-fine. Being a fine provided alternatively by imprisonment exceeding two years, the special limits for day-fine will be 180 or 300. Within these limits, based on general criteria of individuation, the court will determine the number of days-fine, for example 250.

Subsequently, the court determines the appropriate amount of a day-fine between 10 and 500 lei, given the financial situation of the convict and its obligations. Suppose that the court sets a rate of 50 lei for a day-fine.

Finally, to determine the amount that the convict will have to pay, the court multiplies the corresponding amount of a day-fine with the number of days-fine set. In our example, the amount will be 50 x 250 = 7,500 lei.

IV. The possibility of increasing special limits in order to obtain a patrimony benefit

8. According to art. 61 paragraph (5) Penal Code, if by the offense was intended to obtain a patrimony benefit, and the law provides for that offense only the fine penalty or if the court is actually inclined to fine penalty, then the special limits of the fine may be increased by one third.

Since the analysis, *in extenso*, of the hypothesis in which the offense is to achieve a patrimony benefit will follow in Section VI (fine accompanying imprisonment) at this time we will only make some remarks strictly on the operating mode in case of fine penalty.

We emphasize that the increase is always optional for the court and can operate only after grounded identification of the circumstance of the offense to pursue a patrimony benefit. We also believe that the court will choose to increase the limits only if it considers that the initial special limits are not sufficient to fair individualize of number of days-fine - in other words, the initial special maximum seems insufficient. The increase will apply only to the number of days-fine, and not to the limits of the amount of a day-fine that will remain the same as regulated by art. 61 paragraph (2) Penal Code, namely between 10 and 500 lei. Also, the increase is variable, the law did not requiring a specific number of days-fine as increase.

We anticipate that in our court practice, the number of days-fine will be determined in a single step without being broken down the number of days specified for the offense itself and the number of days set in consideration of patrimony pursued. Moreover, according to the previous Penal Code, such a practice was common in most cases of aggravation (aggravating circumstances, continued form, post-enforceable relapse), where the law or the enforcement system did not require the automatic highlighting of the increase.

From the perspective of a day-fine amount, it will be determined under common law, *i.e.,* according to art. 61 paragraph (2) Penal Code, taking into account the financial situation of the person and the legal obligations it have towards its dependents.

Finally, the fine thus established, including possible increase for pursuing patrimony benefit (which anyway will likely not be identified separately in the number of day-fines content), it has the character of a single sentence (in fact, we believe that no court will identify for itself how many days set for the offense itself and how many for pursuing patrimony benefit), which is why on the execution and any other consequences, there will be no difference of regime, being applicable the common law.

9. As example, let's resume the hypothesis of offense by theft provided by art. 228 Penal Code and punishable with imprisonment from 6 months to 3 years or with a fine. In this case, the court is inclined towards fine penalty, in which case the number of days-fine will be 180 or 300. Noting that the crime was clearly committed to obtaining a patrimony benefit, the court may increase the minimum and the maximum of the number of days-fine [determined in accordance with art. 61 paragraph (4) c) Penal Code] by a third. Thus, the days-fine number proportionate sentencing will finally take place not between 180 and 300 days-fine, but between 240 and 400 days-fine. It is noted that such maximum limit reached general do not exceeds the maximum of 400 days provided in art. 61 paragraph (2) final thesis Penal Code.

V. Penalty fine execution

10. According to art. 22 of Law no. 253/2013, the person sentenced to the fine is ordered to pay the fine in full within 3 months from a final conviction. If the convicted person is unable to pay the fine in full in due time under paragraph (1), the execution judge, upon request, will order rescheduling payment of the fine in monthly installments over a period not exceeding two years.

If he will order monthly installment, the completion will include: the fine, the number of monthly installments for amounts that are spread equally and payment deadline.

VI. Fine accompanying imprisonment

1. Preliminaries. History. Source of inspiration

11. Besides the main novelty in the field, consisting of day-fine system, another element of novelty lies in the so-called fine institution that accompanies imprisonment regulated in art. 62 Penal Code.

Please note that although the legal text refers only to the possibility of applying fine cumulative with imprisonment when by the offense was intended to obtain a patrimony benefit, in this review we will analyze, all together, also the possibility for the court to raise special limits of the fine penalty because of the same patrimony benefit pursue, regulated by the art. 61 paragraph (5) Penal Code. Furthermore, in the review from the section IV, we draw attention only on the way of determining the penalty, anticipating the presentation of other issues in this section.

12. Used to the provisions of the Penal Code of 1969, such a power conferred to the judge to apply cumulatively the two ways of punishment, in the case of the hypothesis corresponding to art. 62 Penal Code, it seems a premiere for the Romanian lawyer.

The reality, however, is another one: the Penal Code of 1969 removed the penalty fine system cumulative with imprisonment[8]. Thus, the Penal Code of 1936 provides additional penalty fine, which could be applied cumulatively in addition to the main penalty of imprisonment, according to art. 25 paragraph (1) pt. 5 of the Code[9]. In fact, the drafters of the new Code showed that "the possibility of being fined with the penalty of imprisonment for the same offense is not a first for our criminal law, being found in the Penal Code of 1936 [art. 25 point 5 and art. 52 paragraph (1)]"[10]. The inspiration for the current regulation is represented by the German Penal Code provisions (§ 41), the institution being also established under French law (art. 131-2, 131-5 Penal Code) Dutch [Art. 9 paragraph (3) Penal Code] Italian [art. 24 paragraph (2)] and Swiss (art. 50).

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[8] For details, D. Popescu, *op. cit.*, p. 409.

[9] For further information, see J. Grigoraș, *Individualizarea pedepsei (Proportionate Sentencing)*, Ed. Științifică, Bucharest, 1969, p. 71. Also, see I. Ionescu-Dolj, *Notă (Note)*, in C.G. Rătescu and others, *Codul penal „Regele Carol II" Adnotat*, vol. I, *Partea generală*, *(Penal Code „King Carol the II[nd], Annotated*, *General part*), Ed. Librăriei SOCEC & Co., SA Bucharest, 1937, p. 80; V. Dongoroz, *Drept penal (Criminal law)*, Asociația Română de Științe Penale (Romanian Association of Criminal Sciences), Bucharest, 2000, p. 500.

[10] Explanatory Note (*http://www.just.ro*).

2. The reason of said institution. The scope of offenses

13. In the explanatory note to the Code, it was shown that the reason behind the introduction of this regulation is explained by the need to establish effective criminal coercive measures that would not impose life imprisonment increase.

In this regard, we note that, in post-December of 1989, crime has grown as a result of the considerable increase in the number of crimes against property or those likely to bring patrimony benefits to offenders, and towards this reality so far, in the plan of penal policy, it was considered appropriate and sufficient the significant increase of imprisonment for these offenses. The effect was not as expected, as shown in the same explanatory note, even the contrary, we emphasize, for which we make reference to the National Administration of the Penitentiary reports available online[11].

Returning, once the conclusion reached, beyond any criticism and arguments in the press, that the obsolete method of the increase to absurd limit of penalties for offenses against property does not attain its purpose, it had to rethink the whole strategy. Thus, amid significant decrease of imprisonment limits for offenses against property, to ensure „necessary and effective legal means to prevent and sanction such crimes (...), it opted for the solution of introducing the possibility of applying and a coercive of patrimony nature, where the court considers that such a sanction is required and contribute to a better proportionate sentencing of punishment"[12].

14. Analyzing the scope of offenses for which it could have such a fine penalty, in literature has shown that „the law provides that the penalty of fine to be imposed in addition to imprisonment, not only for crimes which by their nature involve tracking a patrimony benefit, but also for other offenses (for example, extortion, deprivation of liberty, disclosure of professional secrecy)"[13].

The author quoted shows, however, further, that „this institution should be used mainly for offenses which by their nature do not involve producing a financial loss"[14].

We mention that we understand the logic of arguments, the author suggesting that the agent will practically be twice penalized, considering its purpose: so it should be capitalized as a component of the offense, but also it will give value to establish the new type of fine. However, after some reflection, we will not share our opinion. In this regard, we refer to the above provisions quoted from the explanatory note, where is clear shown the legislator purpose that this institution to be applied especially on crimes against property, passing through the fact that sometimes pursue to obtain a patrimony benefit is recovered as a constituent of such crimes - theft is the easiest example to visualize. With all the seemingly unfair nature of a double sanction, we believe that this was exactly the intention of the legislator, in an attempt to stem the tide of crime against

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[11] Without presenting statistics or figures, we emphasize that the overwhelming majority of offenders that are currently enforced in prisons in Romania are convicted for crimes against property, crime of theft (with its qualified forms including) standing out clearly.

[12] Explanatory Note (*http://www.just.ro*). See also V. Cioclei, *op. cit.*, p. 59 and next.

[13] M. Udroiu, *Drept penal. Partea generală. Noul Cod penal (Criminal Law. General Part. The New Penal Code)*, Ed. C.H. Beck, Bucharest, 2014, p. 186-187. Without expressly stating it, and another author - I. Chiş, *op. cit.*, p. 403 - exemplifies also with the assumptions that are committed offenses other than those against property - witness making a false statement to obtain a material benefit (in the context of the crime of perjury) or perpetrator using a forged document to obtain an inheritance (in respect of the offense of forgery).

[14] M. Udroiu, *op. cit.*, p. 187.

property: once the reality of the past 20 years (starting in 1992 and especially in 1996) demonstrated to us that increasing penalties indefinitely does not produce any deterrent effects, maybe the "patrimony" sanction, cumulative to the deprivation of liberty will have another effect. In fact, at the risk of being accused of cynicism, the offender „obsessed" of patrimony, his economic sanction will have a stronger effect than the risk of custodial sentences more consistent (which anyway under the previously Code were a mere illusion, the courts being more concerned with „inventing" mitigating circumstances to low judicial sentences under special minimum and not to apply penalties toward the maximum extremely generous[15]).

3. Setting out the fine

15. As shown, according to art. 61 paragraph (5) Penal Code, where for the offense, which aimed to obtain a patrimony benefit, the law provides only the fine penalty, or the fine penalty or is provided alternatively with imprisonment, but the court chooses the fine, and the special limits thereof may be increased by a third.

If, however, the law provides for crime committed only the imprisonment, or imprisonment alternatively with fine penalty, but the court chooses the prison sentence, the court could apply in addition to imprisonment, when deemed necessary, also fine penalty that will accompany thus the imprisonment. Again, it is noted that the increase is optional.

16. According to art. 62 paragraph (2) Penal Code, the special limits of the day-fine provided by the art. 61 paragraph (4) letters b) and c) of the Penal Code [reference is made only to cases of letters b) and c) because in these cases the special limits of the fine shall be determined according to the imprisonment] is determined according to the length of prison sentence set by the court, unable to be reduced or increased on account of apprehension of attenuation causes or worsening of sentence. In determining the appropriate amount of a day-fine, will be take into account the value of patrimony obtained or pursued.

As it can be seen, if the fine is accompanying imprisonment, the fine proportionate sentencing follows two steps: *first,* for the number of days-fine and *secondly* for a day-fine amount.

17. In terms of *number of days-fine*, the special limits will be determined by the duration of imprisonment already established and not by the special maximum provided by law for the crime committed, as is the case of common law criminal fine. Moreover, the special limits thus obtained cannot be reduced or increased as a result of circumstances or causes of mitigation or aggravation, as usually happens. The explanation is that special limits are determined by reference to imprisonment established, or any causes or circumstances of aggravation or mitigation were used

[15] As example, despite the impressed record of the defendant H.M., which demonstrate a specialization in committing crimes of theft in means of transport across Cluj-Napoca, the trial court imposed a sentence of only six months in prison, while the text of the law required a minimum of 3 years at the time [Cluj-Napoca Court, criminal Division, Sentence no. 999/2013 (unpublished). The sentence became final by rejecting as groundless the appeal promoted by the Couthouse - see, C.A. Cluj, criminal chamber and for cases involving minors and family, Decision no. 1562/2013 (unpublished)].

already in the process of proportionate sentencing (determination) of prison sentence, which was individualized between special limits reduced to 1/3.

For example, imagine that a robbery was committed according to art. 229 paragraph (1) Penal Code, for which the law provides imprisonment from one to 5 years, and the court imposed a prison sentence of one year and six months. In this case, special limits of the fine will be determined by reference to the actual punishment of one year and six months, according to art. 61 paragraph (4) letter b) Penal Code (referring to imprisonment not exceeding 2 years), thus being between 120 and 240 days-fine, not by reference to the special maximum of 5 years, which would lead to the establishment of day-fine special limits according to art. 61 paragraph (4) letter c) Penal Code (referring to prison penalty more than 2 years).

Suppose now that the penalty of 1 year and 6 months imprisonment was established by the court following the arrest of mitigating circumstances – thus, the imprisonment was not individualized between one and five years, but between 8 months and 3 years and 4 months. Therefore, has already been taken into account the mitigating effect when established the imprisonment, and by reference to the penalty (individualized between limits reduced as a result of mitigation), it is explained why the legislator has expressly stated that the number of day-fine thus obtained can still be reduced (in this case), because otherwise they would capitalize twice the mitigating effect.

18. From the perspective of a day-fine amount, it will not be determined by reference to the defendant's financial situation and legal obligations that he has, but by taking into account the value of obtained or pursued patrimony, considering the special case of setting the fine in whose presence we are[16]. The legislator is elliptical because it is not specified an algorithm for calculating the amount and are not indicated nor the additional criteria beyond reporting the value of patrimony obtained or pursued[17]. Or, patrimony benefit is not easy to quantify with any certainty, nor where there is a patrimony benefit actually obtained, much less if the only benefit was pursued without being obtained (the attempt, for example). It thus remains at the discretion of the court determining the precise amount that will have to take into account the reason of introducing the institution, this having the role to involve an economic constraint, as additional to the main penalty that continues to be the prison. We mention that in this context we use the term "main penalty" not in the sense naturalized in criminal law in relation to the classification of the sentence, but with meaning in everyday language. Thus, the court will have to remember that the real punishment is here, however, the prison and the fine set as extra only accompanies the imprisonment, contributing to good proportionate sentencing of punishment required.

4. Execution of penalty

19. We saw in the previous commentary that where an offense is committed which aimed to obtain a patrimony benefit, and the law provides fine penalty or penalty fine is provided only alternatively with imprisonment, but the court chooses the fine, the fine

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[16] In this regard, B.N. Bulai, *op. cit.*, p. 39.

[17] In the sense that the courts will refer most probably to all the general criteria laid down for determining the amount of a day-fine, namely, financial situation and legal obligations to dependents, see, S. Răduleţu, *Comentariu (Review)*, in T. Toader (coord.), *Noul Cod penal. Comentarii pe articole (The new Criminal Code. Comments on articles)*, Ed. Hamangiu, Bucharest, 2014, p. 142.

thus obtained follows the execution regime of common law. The solution is natural, because in this case we are in the presence of a fine that accompanies imprisonment, but only in the presence of increase limits of the number of days-fine taking into account its motive or distinct purpose.

In this case, when the fine appears distinct in addition to imprisonment, the solution is maintained partly because it is much easier to read the "increase" of penalty (fine) in addition to imprisonment, incident following the particular purpose pursued (patrimony benefit).

Thus, to the extent that is ordered the execution of prison sentence, the execution of fine in these conditions will follow the established common law of fine penalty. To the extent that conditional sentence is decided according Article 83 paragraph (3) Penal Code, the legislator chose to do a "common body" between the two sentences, stating that automatically will be delayed the enforcement and penalty fine. The solution is natural, because legally the court could not issue a decision for postponement and for the same offense to utter a sentence and to be able to execute the penalty of fine. However, in case of suspension of sentence under supervision, according to art. 91 paragraph (2) Penal Code, when imprisonment is accompanied by fine penalty (applied according to Art. 62), the fine is executed even if enforcement of prison sentence was suspended under supervision. In such circumstances, it is even more visible the reason institution of the fine that accompanies imprisonment penalty, which now exceeds judicial proportionate sentencing of the punishment, and already passes the stage of legal proportionate sentencing of its enforcement. Thus, even if the court finds that the defendant can redeem without effective enforcement of the sentence, the legislator imposes mandatory payment of the fine laid down under article 62 Penal Code, in order to "punish" economical the person who broke the crime field to obtain such benefits.

VII. Replacing the fine with imprisonment

1. Drawbacks of the regulation of the Penal Code of 1969

20. According to art. 63^1 Penal Code of 1969, in case of theft in bad faith by the convict to pay the fine, the fine was replaced by imprisonment. It was possible, however, only if the offense for which the conviction was ordered, provided the fine penalty alternating with imprisonment. Therefore, if the offense was punishable by law only by a fine or when penalty fine was reached, as an effect of mitigating circumstances, under art. 76 letter e) second thesis of Penal Code 1969, the replacement may not work.

In such a situation, it could possibly try the convict enforcement.

In the same context, were encountered situations where theft could not prove the bad faith to pay the fine, therefore again not being able to have a replacement. Moreover, in this case, also the enforcement was virtually doomed to failure, because failure to demonstrate bad faith arises also from the fact that the convicted person does not have income or assets to enable payment. Finally, there is the hypothesis that undoubtedly the convicted was really in good faith, but cannot execute the fine penalty, not having liquidities. In these last two cases presented, the person finally reached does not to bear any constraint as a result of the crime[18], solutions that departed from legislator will, reflected in art. 63^1 Penal Code[19] of 1969.

[18] See also the Explanatory Memorandum (*http://www.just.ro*).

[19] In fact, let's not forget that the provisions of the art. 63^1 were subsequently introduced in the Criminal Code in 1969. Thus, initially could not conceive that there is a person employed „in a

21. Under current rules, as we shall see, the drawbacks outlined above are avoided – in the case of the convicted of bad faith under the provisions of art. 63 Penal Code, and in the case of the convicted of good faith, according to art. 64 Penal Code.

2. The conditions to operate the replacement

22. According to art. 63 Penal Code, if the convicted person, in bad faith, is not paying the fine punishment, in whole or in part, the number of days-fine non-executed is replaced by a corresponding number of days of imprisonment.

The novelty elements consist, *first of all*, in the fact that replacing is operating now in mandatory way, once the conditions are accomplished. *Secondly*, considering how the penalty fine is individualized in relation to the set number of days-fine, they will be valued at replacement.

As shown in the literature on this last point, the new regulation preclude the possibility of the courthouse to individualize the imprisonment with which is replaced the fine[20], the text of the law requiring a clear algorithm of correlation between the number of days-fine and days of imprisonment.

The conditions to operate the replacement are, cumulatively, the followings:

a) the person has been sentenced to a fine penalty.

As noted in previous comments, it will be an amount in a certain quantum, which was determined by multiplying the number of days-fine with an amount determined per day.

b) the person to evade in bad faith from paying the fine.

The phrase „in bad faith" means a situation where the convicted person has the financial means to pay the fine imposed, but under attributable reasons he do not pay the amount due to the state budget. If the person has no means, it cannot be replaced the fine penalty with imprisonment. We will show in the next section possible solutions in this situation.

The legislator provided in art. 22-23 paragraph (4) of Law no. 253/2013, procedure to follow in establishing the reasons which have led to failure to pay the fine: thus, the judge entitled with enforcement, noting that the sentenced person has not paid the fine, in whole or in part, within the period prescribed by law, notifies the court. This is to establish the reasons that led to the non-performance of fine penalty, shall request data on the financial situation of the convict from local government from his residence and, if it deems necessary, the employer or fiscal bodies within the National Agency for Fiscal Administration, as well as other public authorities or institutions which hold information about financial situation of the convict.

23. If the court finds as bad faith the failure to pay the fine, it will proceed to replace the fine with imprisonment[21].

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socialist state" can achieve an income from which it can pay its fine, reason for which was not considered necessary such a provision [that is, furthermore, in the Criminal Code of 1936, in art. 54 paragraph (5)] – for details, see, D. Popescu, *op. cit.*, p. 409.

[20] M. Udroiu, *op. cit.*, p. 189.

[21] We mention that - in the version of project of adopted Code in the Commission - fine replacement became possible only if the convicted person cannot be enforced, the Helicon being similar legislation in art. 36 paragraph (1) Swiss Criminal Code (in force as of January 1, 2007) and art. 49 of the Portuguese Criminal Code - see art. 63 of the Preliminary, Criminal Law Notebooks, no. 2-3 / 2007, p. 269. In our opinion, the current version of the Code is more fortunately – the

The replacement will be made by a simple algorithm: thus, *if the fine was not paid at all*, the court will identify the number of days-fine established by the trial court, following that one day-fine to be replaced with one day in prison; *insofar as the fine was paid in part* (remember that it may be paid in the rates, by exception), we believe that the court will divide the unpaid amount to the quantum of a day-fine. The number obtained will be rounded to a whole number (calculating in favor of the convict), and this number of days-fine will be replaced with an equal number of days in prison.

24. The penalty thus obtained will be mandatory enforced in penitentiary under common law. In this regard, we note that the decision no. 50 of June 4, 2007 maintains its actuality in the interest of law sections of the High Court of Cassation and Justice [22]. Thus, based on the provisions of art. 63^1 of the Penal Code of 1969, the Supreme Court determined that the replacement of the fine with imprisonment, a penalty to be determined by the court, can only take place by effective enforcement. In other words, with mandatory power on the future, to put an end to an inconsistent practice of our courts, which, in some cases, after replacing fine with prison, they suspended the enforcement.

3. The case of fine that accompanies imprisonment. Case of fine imposed under a plurality of offenses

25. Finally, we mention that the replacement operates also for the unpaid fine that accompanied imprisonment, imposed under art. 62 Penal Code. In this case, imprisonment thus obtained (by the same "conversion algorithm") is added to the initial prison sentence, the final penalty resulted having penalties having the legal regime of a single penalty (set for one offense).

Although the legal text of the Penal Code expressly refers only to fine penalty which accompanied the imprisonment, we believe that this will be the same solution also if the resulting punishment applied, in the structure of which we have both imprisonment and fine (for example, a sentence obtained as a result of the application of the sanction system of the offenses, one of the penalties set for a concurrent offense being imprisonment, and one or more other being the fine). The solution will be similar for the same reason, even if a relapse post-condemnatory, in which the second term would consist of fine penalty, which is not paid in bad faith.

VIII. Execution of fine by doing work in community service

1. The reason for introducing the institution

26. As noted in the previous section, under the Penal Code of 1969, if the person was sentenced to fine of good faith - in other words, the person did not have the means

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criminal fine penalty is not aimed at increasing the state budget, but the financial penalty of the convict, applied as the main penalty the least serious. Or, once it is established that it is in bad faith (having financial liquidities) it means that the convicted person did not understand the consequences of a conviction handed down, so it is necessary to replace milder punishment initially applied.

[22] Published in the Official Gazette no. 775 of November 15, 2007. In the same regard, C. Voicu, A.S. Uzlău, R. Moroșanu, C. Ghigheci, *Noul Cod penal. Ghid de aplicare pentru practicieni (The New Penal Code. Application Guide for Practitioners)*, Ed. Hamangiu, Bucharest, 2014, p. 106; C. Mitrache, C. Mitrache, *Drept penal român. Partea general (Romanian Criminal Law. General Part)*, Ed. Universul Juridic, Bucharest, 2014, p. 237.

to pay the amount required - could not replace the fine penalty with imprisonment. Finally, it came to be no afflictive consequence for the convicted on account of an offense.

This is the main reason for entering text of the law that is the subject of our analysis: thus, in the assumption described above, the court - with the prior consent of the convict - will replace days-fine with a corresponding number of days of work in community service.

On the edge of this innovation to the Penal Code, in the explanatory note is indicated, "thus regulated, the community work appears, in terms of legal nature as a substitute for penalty as fine for people of insolvent good faith who agree fine execution of the sentence in this way"[23].

Until the full performance of community service obligation, it may cease when the convicted person pays the amount of money corresponding to the remaining days-fine served, or can be converted into imprisonment by replacing days-fine executed in days of imprisonment, if the person convicted or does not perform community service under the conditions set by the court or commits a new crime[24].

2. Conditions

27. The conditions required to be met cumulatively, result from reading art. 64 Penal Code. Thus, it is necessary:

a) to be a final conviction to the fine penalty.

The penalty fine will consist of an amount in a certain quantum, which was determined by multiplying the number of days-fine fixed by the court with an amount determined per day by the same court.

b) the fine penalty cannot be executed in whole or in part.

Non-payment in part is on the assumption that its execution was agreed in the rates, and one or some of these installments have been paid.

c) the reasons for failure not be non-attributable to the convicted person.

In other words, we are assuming good faith - a person wishes the execution of penalty but lacks the financial means to enable it to make payment – has no income or has no assets etc.

d) to exist the prior consent of the person convicted to perform community service work, except in cases where, due to health, the person cannot perform the work.

The replacement is only possible insofar as the convicted has given prior consent to perform unpaid community work to comply with the regulations on the prohibition of forced labor. If he does not consent, art. 64 paragraph (5) Penal Code provides that the fine be replaced with imprisonment, according to art. 63 Penal Code as described in the section above. In this case, the replacement with fine penalty operates atypically, not because the person is in bad faith, but in view of its refusal to provide unpaid work, which thus cannot be ordered. In the absence of this provision – really rough [25] –

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[23] Explanatory Note (*http://www.just.ro*).

[24] As noted in the explanatory note, the model of inspiration was taken from the comparative law - similar provisions contain art. 36 paragraph (3) letter c) Swiss Criminal Code, art. 53 Spanish Criminal Code, art. 48 Portuguese

Criminal Code.

[25] Considering the provision „questionable", see, B.N. Bulai, *op. cit.*, p. 42-43. The author shows that „the legislator assimilates the lack of consent of the convict to a fine penalty - that it could not executed for reasons beyond him - to provide, instead of paying the fine, an unpaid community service work, with bad faith failure to enforce a fine penalty".

no convict would agree with the provision of free labor, because anyway there could not be any negative consequences, even if there is the sentence. Or, let's not forget that it was precisely the reason of art. 64 Penal Code, namely, to correct the existing legal vacuum in this area, under the Penal Code of 1969.

28. Returning to the assumption of consent, we draw attention to the hypothesis that the health of the convict cannot allow such an activity. In this case, we believe that we must make a distinction depending on the specific situation: to the extent that it is a temporary impediment, the court shall order the replacement, following that the work be done effectively after recovery. Insofar as it is a permanent disability, the court shall order the replacement, because it makes no sense, it is obvious that the work cannot be done. The court cannot replace the fine with prison, because they are not met any conditions set by art. 63 Penal Code, regarding the existence of bad faith. Apparently, it seems that may arise a situation where criticism to former art. 63^1 Penal Code 1969 to maintain also on the new regulation. We express, however, confidence that unpaid work will be extremely varied, the range of institutions and companies that will be involved allowing virtually that even severely physically disabled person to carry out some type of activity.

29. Finally, once cumulatively met all these conditions, the court shall replace the fine penalty with provision of a community service work. The algorithm will be identical to that shown for the replacement of the fine with imprisonment (in case of failure both total and partial), to a day-fine corresponding a day of community service.

3. The case of fine that accompanied the imprisonment

30. According to art. 64 paragraph (2) Penal Code, if the fine replaced in accordance with paragraph (1) accompanied the imprisonment (according to Art. 62), the requirement of community service is executed after imprisonment.

Again, for the same reasons, we believe that the solution is applicable if the fine imposed is considering the sanctioning system from contest or post-condemnatory relapse.

4. Termination of obligation to provide unpaid community service work

31. Execution of community service stops naturally at the end of the set. Also, according to art. 64 paragraph (3) Penal Code, it can stop faster in terms of time, to the extent that it is paid the appropriate days-fine remaining unexecuted. For example: a person has committed a crime of threat, provided by art. 206 Penal Code, punishable by imprisonment between three months and one year, alternating with a fine. The court - according to art. 61 paragraph (4) b) Penal Code - set a number of 150 day-fine, with a rate of 20 lei per day, resulting in an amount of 3,000 lei. Noting the factual impossibility of settlement, the court ordered under art. 63 Penal Code, the replacement of the fine with a total of 150 days of community service work. After the execution of such 40 days, the convict receives, following an inheritance, a sum of money allowing it to pay the fine. In this situation, the unexecuted remaining days are 110, and the final amount will be 2,200 lei. Once submitted the receipt for payment, combined with evidence of working days actually provided, shall cease enforcement of community service work.

Finally, we believe that enforcement of labor supply will stop sooner also in the imagined above hypothesis on the occurrence of reasons not attributable to individuals convicted of permanent physic incapacity (or even psychiatric disorders) which can no longer allow the exercise of any activity.

5. Replacing with prison the community service work

32. The execution through community service work is replaced with the prison in the following cases:

a) when the person does not perform unpaid work requirement under the conditions set by the court.

In this case, according to art. 106 paragraph (2) of Law no. 252/2013, probation officer, ex officio or upon notification received from the institution determined as a place of execution, stating that the person does not perform the obligation of unpaid community service work under the conditions set by the court, will go to court for enforcement.

According to art. 561 paragraph (1) Code of Criminal Procedure, the competent court (court of enforcement, in this case) will replace the number of days-fine executed through community service work with an equal number of days in prison.

b) when a person commits a new crime discovered before the full performance of community service obligation.

In such a situation, the competent court shall be the court in the first instance judging the offense committed before the full performance of community service, according to art. 561 paragraph (1) Code of Criminal Procedure.

We note that to operate replacement are required to be cumulatively met several conditions:

b_1) committing a new crime.

It is unclear from the wording of the law when it has to be committed the new offense - after final conviction to fine penalty or after final decision of replacement. In these circumstances, we believe that we will have to refer to the time the sentence becomes final.

We also note that the legislator always requires the replacement, no matter how serious is the offense, the form of guilt with which has been committed or punishment set for it. Surely, the solution required by law is more easily applied in judicial practice, because otherwise we do not see how it would be possible to establish punishment for offenses plurality (e.g., how is determined the punishment - without replacement - between a number of days-fine executed through community service work - which is not a punishment! - and imprisonment or fine?) or the way of proportionate sentencing of execution (e.g. whether it was conditional upon prison sentence, what would has happened with the new fine, which however could not be executed because the convict was not affordable? Also, if it were subject to the form of guilt for crimes, being optional for crimes of negligence, what would have happened if the court had ordered a custodial sentence for the new crime with enforcement?)

b_2) discovering new crime before serving his full obligation of work.

To operate replacement, it is necessary that the offense is discovered before serving his full obligation of work, by discovery meaning simple information (*in rem*) about

committing an offense under criminal law (e.g. in case of an offense of murder, it will be considered discovered if the victim's body is found, even if there is no clue about the identity of the perpetrator). No matter when it will be pronounced a final judgment in relation to this new crime element - the landmark being its moment of detection.

If the offense is not discovered before serving his full unpaid work, it will not be able to operate replacement of work already performed. In this case, we believe that the new offense discovered will be in the state of multiple intermediate (remember that the first term was a fine penalty sentence, and the second offense was committed previous the sentence execution) with the original offense, following that the treatment be legally applied [to the extent that for the new offense will be determined the imprisonment, the full performance of the work will not produce any effect, because under common law system of penalties, the fine would be added entirely to prison - see art. 39 paragraph (1) letter d) Penal Code - or, in this case the fine would have been executed, so that we no longer have additions; instead, to the extent that for the new offense is established also the fine penalty, we believe that subsequently application of the system provided by art. 39 paragraph (1) letter c) will be deducted the fine actually executed through the provision of unpaid work, whether it is the heaviest punishment, or part of the increase of 1/3, according to art. 40 paragraph (3)].

33. Once cumulatively met the conditions, the court will replace the number of days-fine unexecuted by community service work at the date of the final judgment of conviction for a new offense with corresponding number of days of imprisonment. They will be added to the penalty for the new offense.

The way of replacement makes us to have some observations.

First of all, as expected, we see that the replacement of a corresponding number of days of imprisonment occurs regardless of type of punishment established for the new offense (even if for this it is determined the imprisonment).

Secondly, we notice that the sanctioning system applicable will always be the arithmetic aggregation, regardless of the form of multiple offenses.

However, from legal scrupulously, we wonder which could be the form of the plurality of crimes in this case? Certainly, the first response should be intermediate plurality, because the term consisted of a penalty fine, replaced by a number of day-fines unexecuted through community service work as a result of inability to enforce. However, we believe that the answer is not so easy.

Thus, let's imagine the following example: the offense committed is a beat or other violence aggravated - art. 193 paragraph (2) Penal Code, committed against a family member. By conjugate applying of art. 193 paragraph (1) and (2) of the Penal Code, based on art. 199 Penal Code, the Court - which turned to fine penalty – applies the fine penalty, individualizing a fine of 400 days-fine. Once noting that the convicted person cannot pay the fine, for reasons beyond him, the court orders its replacement by a corresponding number of days of community service work. After performing the work equivalent of 10 days, the convict commits an offense of murder. The court, applying the provisions of art. 64 paragraph (5) b) Penal Code, obtains for the first offense a penalty of 390 days, therefore more than a year, needed to give birth to the first term of post-condemnatory relapse.

Are we, in such a case, in the presence of post-condemnatory relapse and not intermediate plurality, as we were initially tempted to answer?

In our opinion, the answer is no. Plurality of offenses arises with the commission of the second offense, or at this moment there is no imprisonment penalty (which appears

only consecutively to replacement, an operation that takes place most probably by the same judgment by which the courthouse for second offense also pronounce conviction for the the latter offense). At the time of committing the second term of the plurality of crimes, there is only a sentencing judgment to fine penalty and a judgment replacing it with a corresponding number of days of community service work. The fine was not yet executed, being still the penalty to be executed, the unpaid work being in this situation, as it showed in the Explanatory Note, "a substitute form for penalty fine". Likewise are the provisions of art. 64 paragraph (4) Penal Code, which stipulates that the execution of community service ordered under paragraph (1) ceases by paying the corresponding fine for days-fine remaining unexecuted.

For all these reasons, we believe that in such circumstances we will always be (regardless of the number of days-prison that could be set for the term I) in the presence of the plurality of intermediate form.