

## SHORT CONSIDERATIONS ON THE SCOPE OF THE RIGHT TO A FAIR TRIAL PROVIDED BY ART. 6 OF THE ECHR – THE CONCEPT OF "CRIMINAL CHARGE"\*

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**Abstract:** *The concept of "criminal charge" referred to in the text of article 6 of the European Convention on Human Rights has an autonomous meaning in the conventional protection system, which must be analysed in the light of the principles developed in this matter in the case law of the Strasbourg Court. The purpose of this article, after examining the relevant case law and doctrine, is to highlight the criteria that have been considered by the European court in order to determine whether a certain judicial procedure can be classified as belonging to the sphere of criminal law. At the same time, the article aims to analyze the practical relevance of this delimitation, especially in the matter of the right to a fair trial, to what extent certain stages of the criminal trial or special "criminal" procedures fall under the scope of the provisions of art. 6 of the European Convention on Human Rights, and must observe the fairness requirements of the procedure.*

**Key words:** *Public Law, Criminal Law, European Convention on Human Rights, criminal charge, right to a fair trial, criminal procedure, procedural guarantees.*

### Introduction

The meaning and scope of the concept of *prosecution in criminal matters*, as set-out in the case law of the European Court of Human Rights, is of particular practical importance, both nationally and internationally, in the context in which it is relevant both in terms of establishing the scope of the guarantees offered to the persons charged with the provisions of art. 6 of the Convention<sup>1</sup>, and for the proper application of the non bis in idem principle and of the right of the defendant to benefit from a double degree of jurisdiction in criminal matters.

Thus, in the event that it will be established that in a certain procedure, the court is going to rule on a *charge in criminal matters*, within the meaning given to this concept in the conventional system, the defendant must enjoy all the

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<sup>1</sup> *The European Convention on Human Rights*, as amended by Protocols no. 11 and 14.

guarantees offered by art. 6 of the Convention on Criminal Matters, as developed in the case law of the Strasbourg Court. In this respect, we recall that the case law of the European court is directly applicable nationally, in the light of the provisions of art. 20 of the Constitution of Romania.

Equally, the right of the defendant to benefit from a double degree of jurisdiction in criminal matters, provided by art. 2 paragraph 2 of the Protocol no. 7 to the European Convention on Human Rights, is applicable only in respect of proceedings concerning a criminal prosecution.

Last but not least, this concept is also relevant in terms of the right not to be judged or punished twice, as provided by art. 4 of the Protocol no. 7 to the European Convention on Human Rights, as it becomes applicable only insofar as the two judicial proceedings against the same person, for the same deeds, are criminal in the conventional meaning of this notion.

This article aims to present the criteria considered in the case law of the European court for defining the concept of *criminal prosecution*, and for delimiting its scope, compared to other judicial procedures regulated in the national legislation.

At the same time, it presents the criteria that must be met for a certain judicial procedure to be included in the criminal area, criteria that have been developed in particular in the case of *Engel and others v. The Netherlands*.<sup>2</sup>

### **The concept of "criminal prosecution"**

The European Convention on Human Rights, and in particular art. 6, does not define "criminal prosecution", which represents an autonomous notion developed in the case-law of the Strasbourg court.

In the Court's opinion, the charge in criminal matters represents *an official notification, emanating from a competent authority, of the fact that a person is charged with committing a crime*<sup>3</sup>.

This concept is mainly related to the right to a fair trial (provided for in Article 6 ECHR), to the right not to be judged or punished twice, materialized in the principle of non bis in idem (art.4 paragraph 1). of Protocol no.7 ECHR) and guaranteeing the right to two degrees of jurisdiction in criminal matters (art.2 of Protocol no.7 ECHR).

Thus, the procedural guarantees in criminal matters offered by art.6 par.1, par.2 and par.3 of the Convention, apply to persons against whom a "criminal prosecution" has been formulated, as defined by this concept in the conventional

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<sup>2</sup> Judgment on the merits delivered by the Court (Plenary), *Engel and Others v. the Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, ECHR 1972;

<sup>3</sup> Judgment on the merits delivered by a Chamber, *Eckle v. Germany*, no. 8130/78, Series A no. 51;

system. The prominent place that the right to a fair trial occupies in democratic societies has determined the Court to prefer a "substantive" approach, rather than a "form" one, in terms of the concept analyzed in the present study and which is provided by art. 6 par.1 of the Convention <sup>4</sup>.

A *criminal prosecution* come into existence either when a person is officially notified by the competent authority that he or she is suspected of having committed a crime, or from the moment his / her situation is substantially affected by the actions taken by the competent authorities, due to the existence, as far as it is concerned, of a suspicion in this regard. <sup>5</sup>

Thus, for example, a person arrested on the suspicion of having committed a criminal offense <sup>6</sup>, a person heard on his /her involvement in committing acts that constitute crimes <sup>7</sup> or a person who has been formally charged, in accordance with the procedure provided by national law <sup>8</sup>, can be considered persons against whom an accusation has been made in criminal matters and thus enjoy the protection offered by article 6 of the Convention. By way of example, occurrence of any of the aforementioned events, irrespective of their chronological order, is the one that determines the application of Article 6 in its criminal side.<sup>9</sup>

### **The scope of the guarantees offered by art. 6 of the European Convention of Human Rights.**

In its case-law, the European human rights litigation court has ruled that not every proceeding of a criminal nature benefits from the guarantees provided by Article 6 ECHR, but only the proceedings that concern a decision on the merits of any criminal prosecution, excluding thus the adjacent aspects of criminal proceedings.

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<sup>4</sup> Judgment on the merits delivered by a Chamber, Šubinski v. Slovenia, no. 19611/04, §62, ECHR 2007;

<sup>5</sup> Judgment on the merits delivered by a Chamber, Deweer v. Belgium, no. 6903/75, §42-46, Series A no. 35; Eckle, op.cit., §73; Judgment on the merits delivered by a Chamber, McFarlane v. Ireland, no. 31333/06, §143, ECHR 2010;

<sup>6</sup> See, among others: Judgment on the merits delivered by a Chamber, Heaney and McGuinness v. Ireland, no. 34720/97, §42, Reports of Judgments and Decisions 2000-XII; Judgment on the merits delivered by a Chamber, Brusco v. France, no. 1466/07, §47-50, ECHR 2007;

<sup>7</sup> See, among others: Judgment on the merits delivered by a Chamber, Aleksandr Zaichenko v. Russia, no. 39660/02, §41-43, ECHR 2010; Judgment on the merits delivered by a Chamber, Yankov and Others v. Bulgaria, no. 4570/05, §23, ECHR 2010;

<sup>8</sup> See, among others: Judgment on the merits delivered by the Grand Chamber, Pélissier and Sassi v. France, no. 25444/94, §46, Reports of Judgments and Decisions 1999-II; Judgment on the merits delivered by the Grand Chamber, Pedersen and Baadsgaard v. Denmark, no.49017/99, §44, Reports of Judgments and Decisions 2004-XI;

<sup>9</sup> Judgment on the merits delivered by the Grand Chamber, Simeonovi v. Bulgaria, no. 21980/04, §111, Reports of Judgments and Decisions 2017 (extracts)

Thus, it does not fall under the protection of Article 6 ECHR:

- procedure regarding the recusal of a magistrate <sup>10</sup> ;
- Review procedure, because it concerns a final court decision, so that the person requesting it is not a "defendant" <sup>11</sup> ;
- procedures subsequent to a final conviction, which require enforcement of the more favourable criminal provisions introduced by a new law <sup>12</sup> ;
- the procedures regarding preventive detention <sup>13</sup> ;
- the procedure regarding the admissibility of a trial against the defendant, which was considered as a prejudicial question <sup>14</sup> ;
- the extradition procedure <sup>15</sup> ;
- the procedure for expelling a foreigner<sup>16</sup>;
- the procedure of the European arrest warrant <sup>17</sup> ;
- the procedure regarding the conditions of application of an amnesty law regarding a final conviction <sup>18</sup> ;
- the procedures for transferring convicted persons <sup>19</sup> .

Instead, it was appreciated that it falls within the scope of protection of Article 6:

- the procedure of re-trial of a person permanently convicted in absentia <sup>20</sup> ;
- the procedure of conducting a search <sup>21</sup> ;
- legal remedies <sup>22</sup> ;

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<sup>10</sup> Judgment on the merits delivered by a Chamber, *Mickovski v. Former Yugoslav Republic of Macedonia*, no. 68329/01;

<sup>11</sup> Judgment on the merits delivered by the Court (Plenary), *Oberschlick c. Austria*, no. 11662/85, Series A no. 204;

<sup>12</sup> Judgment on the merits delivered by a Chamber, *Nurmagomedov c. Russia*, no.30138/02, ECHR 2007;

<sup>13</sup> Judgment on the merits delivered by a Chamber, *Neumeister c. Austria*, no.1936/63, Series A no.8;

<sup>14</sup> Judgment on the merits delivered by a Chamber, *Korellis c. Cyprus*, no.54528/00, ECHR 2003;

<sup>15</sup> See, among others: Decision of the Commission (Plenary), *Kirkwood v. United Kingdom*, no. 10479/83, D.R. 37, p.158; Judgment striking the case out delivered by a Chamber, *Farmakopoulos v. Belgium*, no. 11683/85; Series A no.235-A; Decision of the Commission (Plenary), *Raidl v. Austria*, no.25342/94; Decision of a Chamber, *Raf v. Spain*, no 53652/00, Reports of Judgments and Decisions 2000-XI; Decision of a Chamber, *Penafiel Saldago v. Spain*, no.65964/01

<sup>16</sup> Decision of the Commission (Plenary), *Agee v. United Kingdom*, no.7729/76, D.R. 7, p. 164

<sup>17</sup> Decision of a Chamber, *Monedero Angora v. Spain*, no.41138/05, Reports of Judgments and Decisions 2008;

<sup>18</sup> Decision of a Chamber, *Montcornet de Caumont v. France*, no.59290/00, Reports of Judgments and Decisions 2003-VII;

<sup>19</sup> Decision of a Chamber, *Szabo v. Sweden*, no.28578/03, Reports of Judgments and Decisions 2006-VIII;

<sup>20</sup> Judgment on the merits delivered by the Grand Chamber, *Sejdovic v. Italy*, no. 56581/00, Reports of Judgments and Decisions 2006-II;

<sup>21</sup> *Eckle v. Germany*, op.cit.; Judgment on the merits delivered by a Chamber, *Barry v. Ireland*, no.18273/04, ECHR 2005;

- procedures before the constitutional jurisdictions <sup>23</sup> , in the event that their result is likely to influence the solution of ordinary jurisdictions;
- the flagrant procedure <sup>24</sup> ;
- enforcement proceedings aimed at the seizure of goods which are suspected of infringement <sup>25</sup> .

Equally, the Court considered that the provisions of art.6 also apply in the case of the criminal procedures following which the defendant is applied an administrative sanction, due to the low degree of social danger of the deed.

Thus, the guarantees provided by article 6 of the Convention are applicable if a court decided to close the procedure, after conducting an expert's examination and hearing several witnesses, because the deed was insignificant <sup>26</sup> or when, after the closure of the premises of a trader, as a result of a crime of selling prices, the criminal action was quashed by an amicable agreement between the prosecutor's office and the trader, who was obliged to pay a fine <sup>27</sup> .

*The procedural time from which we can speak about a criminal prosecution within the meaning of the Convention is extremely important, since from this time only all the procedural guarantees provided by Article 6 ECHR are guaranteed.*

In its case-law, the European Court of Human Rights has ruled that a person becomes defendant, which entails the application of the guarantees provided by Article 6 of the Convention, since the national authorities had reasonable grounds to suspect him/her of committing a crime and not from the moment when this quality is formally brought to his notice. <sup>28</sup>

The time when a *criminal prosecution* is formally *brought* against a person may coincide with the date of the arrest, the date on which the defendant is notified that the criminal prosecution was initiated against him/her, the date of the criminal proceedings being initiated or the date at which some preliminary investigations were initiated, the date on which the first hearing took place at the police headquarters or a house search was carried out, or with the date of communication of the indictment. <sup>29</sup>

<sup>22</sup> Judgment on the merits delivered by the Grand Chamber, Meftah and others c. France, no.32911/96, 35237/97, 34595/97, Reports of Judgments and Decisions 2002-VII;

<sup>23</sup> Judgment on the merits delivered by a Chamber, Gast and Pop v. Germany, no.29357/95, Reports of Judgments and Decisions 2000-II; Decision of a chamber, Caldas Ramírez de Arrellano v. Spain, no. 68874/01, Reports of Judgments and Decisions 2003-I (extracts)

<sup>24</sup> Judgment on the merits delivered by a Chamber, Blaj c. Romania, no.36259/04, ECHR 2014;

<sup>25</sup> Judgment on the merits delivered by a Chamber, Phillips c. United Kingdom, no. 41087/98, Reports of Judgments and Decisions 2001-VII;

<sup>26</sup> Judgment on the merits delivered by a Chamber, Adolf c. Austria, no.8269/78, Series A no.49;

<sup>27</sup> Deweer v. Belgium, op.cit. apud. M. Vasiescu, Dictionary of Human Rights, Bucharest: Publishing House C.H.Beck., 2013, p.23

<sup>28</sup> Brusco c. France, op.cit;

<sup>29</sup> See in this regard: Eckle v. Germany, op.cit; Judgment on the merits delivered by a Chamber, Pantea v. Romania, no.33343/96, Reports of Judgments and Decisions 2003-VI; Judgment on the merits delivered by a Chamber, Coeme and Others v. Belgium, no. 32492/96,32547/96,32548/

*Article 6 The ECHR is applicable in all the procedural stages with relevance on the court ruling a decision concerning the merits of the case, starting from the initial stages of the investigation carried out by the criminal investigation bodies and until the exhaustion of all the ordinary remedies, considering that the fairness the procedure is analyzed as a whole.* <sup>30</sup>

The procedural safeguards provided for in Article 6 do not, in principle, apply to preliminary measures that can be taken in a criminal trial before an indictment is formally formulated, but such measures may nevertheless fall within the scope of other conventional provisions, in especially those of art.3 and art.5 ECHR. <sup>31</sup>

Thus, although the main purpose of Article 6, in criminal matters, is to ensure a fair trial before a competent "court" to rule on the merits of the charges <sup>32</sup>, the guarantees offered by art.6 become applicable as soon as there is a criminal prosecution, within the meaning given to this concept in the European Court of Human Rights case-law. Therefore, the guarantees offered by art. 6 of the Convention are also relevant to the proceedings before the trial, if and to the extent that the fairness of the proceedings is seriously prejudiced by an initial breach of these guarantees, which took place in the early stages of the investigation. <sup>33</sup> .

The stage of criminal prosecution may be of particular importance in relation to the subsequent proceedings: the evidence taken at this stage often determines the framework in which the charges are to be examined during the trial, and the domestic law may institute certain consequences arising from the attitude of the accused at his hearing. initials, which can be decisive for the prospects of defense in subsequent proceedings. The way in which the provisions of Article 6 para. 1 and par. 3 of the Convention are to be applied prior to the prosecution of the

96,33209/96,33210/96, Reports of Judgments and Decisions 2000-VII; Judgment on the merits delivered by a Chamber, *Diamantides v. Greece*, October 23, 2003, no.60821/00, ECHR 2003; Judgment on the merits delivered by a Chamber, *Loffler v. Austria*, no.30546/96; *Barry v. Ireland*, op. cit.; Judgment on the merits delivered by a Chamber, *Bertin-Mourov v. France*, no. 36343/97; apud. M. Udriou, O. Predescu, *European protection of human rights and the Romanian criminal trial*, Bucharest: Publishing House C.H. Beck, , 2008, p.639

<sup>30</sup> Judgment on the merits delivered by a Chamber, *Allenet de Ribemont v. France*, no.15175/89, Series A no.308; Judgment on the merits delivered by a Chamber, *Samoilă and Cionca v. Romania*, no.33065/03, §91 - §101, apud. M. Udriou, O.Predescu, op.cit., p.540

<sup>31</sup> Judgment on the merits delivered by the Grand Chamber, *Saunders v. United Kingdom*, no.19187/91, §67, Reports 1996-VI; Judgment on the merits delivered by a Chamber, *Fayed v. United Kingdom*, no. 17101/90, §61, Series A no.294-B ; apud. M. Udriou, O. Predescu, op.cit., P.539

<sup>32</sup> Judgment on the merits delivered by a Chamber, *Imbrioscia v. Switzerland*, no. 13972/88, §36, Series A no.275; Judgment on the merits delivered by a Chamber, *Brennan v. United Kingdom*, no.39846/98, §45, Reports of Judgments and Decisions 2001-X; Judgment on the merits delivered by a Chamber, *Shabelnik v. Ukraine*, no. 16404/03, §52, ECHR 2009; Judgment on the merits delivered by the Grand Chamber, *Dvorski v. Croatia*, no.25703/11, §76, Reports of Judgments and Decisions 2015;

<sup>33</sup> *Imbrioscia v. Switzerland*, op.cit., §36; *Dvorski v. Croatia*, op.cit., §76;

defendant depends on the characteristics of the procedure and the specific circumstances of each case.<sup>34</sup>

### **Delimitation of criminal proceedings from other judicial procedures. The Engel criteria**

In his case-law<sup>35</sup>, the Strasbourg Court has ruled that, in order to determine whether a particular fact imputed to a person represents a *criminal prosecution*, the following three criteria must be considered:

- a) Qualification of the deed as a crime under the national law;
- b) Nature of the offense;
- c) The nature and gravity of the sanction that a subject risks;

However, the European court has established that these criteria are alternative, so that they do not need to be cumulatively met to be in the presence of a "*criminal prosecution*".

However, a cumulative approach is allowed, assuming that the separate analysis of the three criteria mentioned above did not lead to a conclusion regarding the existence or absence of an *accusation*.<sup>36</sup>

#### ***a) Qualification of the deed as a crime under the national law;***

According to this criterion, the European court first checks whether the act attributed to the person is incriminated as a crime in the national law of the state concerned.

If so, the European Court of Human Rights will consider this internal qualification of the deed, following which, in case of a negative answer in this first test, it will proceed to analyze the other two criteria.

Thus, this criterion is applied with priority, the other two having a subsidiary nature, implementing it only in the assumption that the national law of the state does not qualify the litigation as a criminal one.

Therefore, the concept of *criminal prosecution*, in the interpretation given by the European court, allows the inclusion in the scope of article 6 of the Convention of a crime that is not qualified as criminal in the domestic law, but prohibits the reverse operation, for the purpose of excluding from the scope of protection of the conventional provisions of a procedure which according to the national law, is of criminal nature.

In the Strasbourg Court's view, the internal qualification of the deed is therefore a simple starting point for its own analysis, which will lead to its own

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<sup>34</sup> Imbrioscia v. Switzerland, op.cit., §38;

<sup>35</sup> Engel and Others v. the Netherlands, op.cit;

<sup>36</sup> See Judgment on the merits delivered by a Chamber, Garyfallou AEBE v. Greece, no.18996/91, Reports 1997-V;

qualification. The indication given by the national law has only "*a formal and relative value*", which is to be examined in the light of a "*common denominator*" of the laws in the matter of other contracting states.<sup>37</sup>

**b) Nature of the offense;**

The criterion of the nature of the criminal offense was analyzed, in the jurisprudence of the European court, in the light of the following aspects:

*Applicability of the violated rule*

First of all, shall be examined whether the norm in question is addressed to the whole population or only to a certain category - lawyers, military, doctors, etc.<sup>38</sup> Thus, in the event that the legal norm in question applies to a limited number of people (for example, the members of a profession); this is rather related to the disciplinary law than the criminal law.

If the rule addresses to all legal subjects, having a general effect, the Court considers that, most likely, we are in the presence of a criminal litigation within the meaning of Article 6 of the Convention.

*Purpose of the penalty*

The purpose of this criterion is to distinguish criminal penalties from those of a purely administrative nature. Thus, from this perspective, the European court will analyze whether the rule in question contains a *punitive and dissuasive sanction*<sup>39</sup>.

In this respect, an important aspect to be considered is the circumstance if the *application of a sanction represents the consequence of finding the guilt of the defendant*<sup>40</sup>.

**c) The nature and gravity of the sanction that a subject risks;**

In its case-law, the European court has established that in the event that the purpose of the sanction applied is rather a reparative one, the cause is outside the scope of criminal law, but if the purpose of the sanction is rather punitive or preventive, then there are indications that there is a dispute criminal<sup>41</sup>.

Thus, it has been considered that, as a rule, they belong to the criminal law, the facts of which the perpetrators are exposed to measures deprived of liberty or fines, "*except those which, by their nature, duration and ways of enforcement, do not cause significant harm*"<sup>42</sup>.

<sup>37</sup> C. Bârsan, European Convention on Human Rights. Comments on articles, 2nd edition, Bucharest: Publishing House C.H. Beck, 2010, p.413

<sup>38</sup> Judgment on the merits delivered by a Chamber, Bendenoun c. France, no.12547/86, Series A no.284;

<sup>39</sup> Judgment on the merits delivered by the Court (Plenary), Öztürk c. Germany, no.8544/79, Series A no.73;

<sup>40</sup> Judgment on the merits delivered by the Grand Chamber, Benham v. United Kingdom, no. 19380/92, Reports 1996-III;

<sup>41</sup> R. Chiriță, The right to a fair trial, Bucharest: Publishing House Universul Juridic, 2008. p.242

<sup>42</sup> Judgment on the merits delivered by the Grand Chamber, Escoubet c. Belgium, no.26780/95, Reports of Judgments and Decisions 1999-VII, apud. C. Bârsan, op.cit., P.414



Equally, the Court considered that we are facing a "*criminal prosecution*" and, assuming that the sanction is of a pecuniary nature, if this has an exorbitant value or if, in the case of non-payment, the fine can become a measure depriving of liberty, regardless of whether or not this substitution was made or not in the case<sup>43</sup>.

Nevertheless, the Court considered that if the sanction applied to the person concerned is the prohibition to hold a public office for a period of 10 years, we are in the presence of a criminal litigation. The severity of this sanction was examined in the light of the fact that this prohibition has significant effects on the defendant's personal situation, who is unable to continue his professional life. At the same time, the Court also considered the nature of the sanction, which is obviously punitive and preventive.<sup>44</sup>

### Conclusions

The inclusion of a certain judicial procedure in the criminal scope, according to the criteria developed in the case-law of the Strasbourg Court, set out above, has particular importance for the practical work, given that this delimitation determines the scope of the guarantees of a fair trial governed by art. 6 of the Convention.

In the same respect, the identification of the criminal trial stages, i.e. the special judicial criminal proceedings, covering an accusation in criminal matters, has a practical relevance, because only within them the defendant enjoys the full range of rights offered by art. 6 of the Convention.

In view of these aspects, we consider the knowledge of the European Court of Human Rights case-law presented above to be essential, so that it can be properly applied in criminal cases pending with the Romanian judicial bodies.

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<sup>43</sup> Öztürk v. Germany, op.cit. ;

<sup>44</sup> Judgment on the merits delivered by a Chamber, Matyjek c. Poland, no.38184/03, ECHR 2007, apud. R. Chiriță, op.cit., P.243