

# Waiving the Application of Punishment

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**ABSTRACT:** Waiving the application of punishment is a modern legal institution regulated in the Romanian Criminal Code that allows the court to exclude the application of punishment under specific conditions. This article analyzes the legal foundations, conditions of application, effects and implications of this measure. Waiver of punishment represents a form of judicial individualization of criminal liability that allows the court to decide that, in certain cases, the application of punishment is unnecessary to achieve the preventive and educational purpose of the criminal sanction. This measure is regulated in Article 80 of the Criminal Code, while Article 74, paragraph (1), establishes the general criteria for individualization that the court must take into account.

**KEYWORDS:** punishment, application, waiver, conditions, effects

## Introduction

The judicial individualization of the establishment, application and execution of sanctions is one of the institutions fundamentally revised by the provisions of the new Romanian Criminal Code. This form of individualization has as its main concern the establishment of the way in which the offender will bear the coercion applied as a result of the crime committed, an operation also sensitive because it has the ability to directly and to a significant extent influence the process of his social recovery. The proportionality of the punishment in relation to the gravity of the crime and the dangerousness of the offender must not be reflected only in its nature, duration, or amount, but also in the manner of execution, because otherwise, there is a risk that the effort made for the reintegration of the offender will produce effects contrary to the intended purpose (Ministry of Justice of Romania 2024).

In the doctrine (Paşca 2014, 478), the opinion was expressed that waiving the application of the punishment is not a way of individualizing the punishment, but a way of replacing criminal liability with administrative liability, being analyzed within the institution of criminal liability. It was also shown that “the individualization of the punishment has as its purpose the establishment of a punishment, or, in this case, its application is waived.” This opinion is also reinforced by the fact that following the waiving of the application of the punishment, the court applies a warning to the offender, which is an administrative sanction. At the same time, from a criminal procedural aspect, waiving the application of the punishment represents one of the solutions that the court can reach in resolving the criminal action and is ordered by a court decision to waive the application of the punishment.

Waiving the application of punishment is a measure that the court can use, under the conditions established by law, to resolve those criminal cases in which the crime is of low gravity, and the offender, by the conduct before and after the commission of the act, does not require the application of any punishment. By ordering the waiver of the application of punishment, the court considers that the re-education of the offender can take place without having to reach the point of establishing a punishment that would prove inappropriate due to the consequences it would have on the person. At the same time, the shortcomings that deprivation of liberty entails by isolating the convict from his family are avoided and the criminal contagion that exists in places of detention is also avoided. It is also worth mentioning the avoidance of the expenses that the execution of the punishment in a penitentiary entail (Mitrache and Mitrache 2017, 478).

Regarding the legal nature of the waiver of the application of the penalty, it can be determined according to the stages of judicial individualization, which materialize in a series of successive operations. The penalty is established, applied, and on the occasion of its application, the method of individualizing the execution of the penalty is determined (suspension of the execution of the penalty under supervision or effective execution). The process of judicial individualization of the establishment, application, or execution of the penalty distinctly outlined in the new regulation, providing judges with several procedural solutions arranged in a progressive succession (Rîșniță and Curt 2014, 16).

### **Conditions for waiving the application of punishment**

The court may order the waiving of the application of punishment if several conditions regarding the crime and the offender are met. Even if all the conditions required by law are met, the use of this institution is not mandatory, but optional, the court being the one that assesses whether or not it is appropriate (Rădulețu S. in Toader et al. 2014, 168).

The waiving of the application of punishment may be ordered by the court if the conditions provided by law are met, namely Article 80 of the Romanian Criminal Code regarding:

- The crime committed;
- The person of the offender;
- The court's assessment that the application of a punishment would be inappropriate.

### ***Conditions regarding the crime committed***

a) The act exists, constitutes a crime and was committed by the defendant. This condition establishes that the court must be convinced that the act exists, is not an imaginary or groundless act. The act must be legally classified as a crime, respecting its constitutive. The condition also implies the clear identification of the perpetrator of the act – the defendant, who must be directly responsible. This condition excludes the possibility of waiving the application of punishment for acts that have not been proven or that are not crimes according to the law.

b) The punishment provided by law for the crime committed is a fine or imprisonment of up to 5 years. It refers to the reduced gravity of the crime. More serious crimes, with higher penalties, are excluded. The exclusion of serious crimes ensures that the institution of waiving the application of punishment is not abused. This condition provides a clear delimitation for the court, reducing subjectivity.

c) The crime committed is of low gravity, taking into account the nature and extent of the consequences produced, the means used, the manner and circumstances in which it was committed, the motive and the purpose pursued. Low gravity is determined by a holistic assessment of the circumstances of the act. Minor material damage or lack of serious consequences for the victims. If the crime was committed without violence or dangerous means. The intention of the offender can influence the perceived gravity (e.g. a crime committed out of necessity vs. one committed out of revenge). This condition can generate difficulties, because low gravity is interpretable.

d) In the case of multiple offenses, the waiver of the application of the penalty may be ordered if the conditions relating to the act are met for each concurrent offense. It applies when the defendant commits several distinct offenses. The court must analyze each offense separately, and the conditions must be met for all of them. If one of the offenses does not meet the conditions (e.g. reduced gravity or applicable penalty), the waiver cannot be ordered.

Each condition is designed to ensure the fair and equitable application of the waiver of the penalty, but the interpretation of some (such as reduced gravity) may be subjective. Clarification and exemplification of the criteria may improve their applicability in practice.

### ***Conditions regarding the offender***

a) Not having had a previous conviction. This condition is aimed at people who are in their first contact with the criminal justice system, emphasizing the idea of rehabilitation. The lack of previous convictions suggests that the offender is not a repeat offender, which supports the idea that the act committed is an isolated incident.

b) The offender must not have benefited from a waiver of the application of the sentence or a postponement of the application of the sentence in the last 2 years prior to the date of the commission of the crime for which he is being tried. This condition prevents the abuse of leniency measures, forcing the offender to correct his behavior in the long term. A period of two years is specified, providing a clear time frame for assessing eligibility. Circumstances that could justify a new waiver in the case of minor crimes or exceptional situations are not taken into account.

c) The offender must not have evaded criminal prosecution or trial or attempted to thwart the discovery of the truth or the identification and criminal prosecution of the perpetrator or participants. This condition protects the criminal process by requiring the offender to cooperate with the authorities. The fact that the defendant did not obstruct justice is a sign of respect for the law. It is possible that some behaviors may be considered attempts to thwart, even if they were not intentional.

d) In relation to the person of the offender, the conduct prior to the commission of the offense, the efforts made by him to eliminate or mitigate the consequences of the offense, as well as his possibilities for correction, the court considers that the application of a penalty would be inappropriate due to the consequences it would have on his person. This condition allows the court to analyze cases according to the personal circumstances and the previous behavior of the defendant. If the defendant has made efforts to repair the damage, this demonstrates responsibility.

e) The offender must be an adult natural person. It excludes minors from the scope of the waiver of punishment, as they benefit from other special regulations. There is no clear justification for excluding legal persons, although they may have an active role in the commission of some crimes.

The conditions relating to the offender are designed to ensure that this measure of leniency is applied only in cases that merit a more lenient approach. However, some provisions may give rise to difficulties of interpretation or uniform application.

The court's conviction that the application of a punishment would be inappropriate due to the consequences it would have on the offender's person is made in relation to his person, the conduct prior to the commission of the crime, the efforts made by him to eliminate or diminish the consequences of the crime, as well as his possibilities for correction – Article 80 para. 1 let. b of the Romanian Criminal Code.

### **Effects of waiving the application of punishment**

The person against whom the waiver of punishment has been ordered is not subject to any forfeiture, prohibition or incapacity that could arise from the crime committed – Article 82 para. 1 of the Romanian Criminal Code. The waiving the application of punishment does not produce effects on the execution of the security measures and civil obligations provided for in the decision. The waiver of punishment entails the application of a single warning to the offender.

According to Article 82 para. 3 of the Romanian Criminal Code, if within two years from the finality of the decision ordering the waiver of the application of the penalty, it is discovered that the person against whom this measure was taken had committed another crime prior to the finality of the decision, for which a penalty was established even after the expiry of this term, the waiver of the application of the penalty is annulled and the penalty is established for the crime that initially led to the waiver of the application of the penalty, then applying, as the case may be, the provisions regarding the concurrence of crimes, recidivism or intermediate plurality.

As an exception, the measure of waiving the application of the penalty may also be ordered in the event that all the conditions listed above are not met. According to Article 20 of Law no. 143

of July 26, 2000, on the prevention and combating of illicit drug trafficking and consumption, the defendant accused of committing the act provided for in Article 4 of the aforementioned law complies with the protocol of the integrated assistance program for drug users, the court may order the waiving of the application of the penalty even if the conditions provided for in Article 80 of the Romanian Criminal Code are not met (Buzatu 2012).

## Conclusion

The waiver of punishment is a legal institution that reflects a modern approach to criminal law, focused on the individualization of criminal responsibility and the prevention of recidivism. The successful implementation of this measure depends on the ability of the courts to carefully assess all relevant circumstances, ensuring a balance between firmness and leniency. This approach not only makes the criminal justice system more effective but also promotes a more considerate and understanding perspective on crime and punishment.

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