

MEDIATION IN THE OFFENCES FROM THE SPECIAL LAWS

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Abstract

Changes in Romanian penal laws coming into force from 1st February 2014 brought an increasing number of offenses for which it is possible a penal mediation, including the offenses from the special laws (not included in the main Penal Code), for which the withdrawal of the advance complaint or the reconciliation of the parties removes the penal responsibility. These offenses from the special laws are reviewed and detailed by the author with the mark of the removal mode of the penal responsibility, achieving a practical table for practitioners. Mediation procedure in the special laws crimes is similar into the general criminal mediation, but the application of the most favourable in time law may require special attention.

Keywords: penal mediation, special laws offences, mediation agreement, penal mediation procedure

JEL Classification: J52, K14

1. Variety of criminal rules, challenge for jurists and mediators

Social and legislative dynamics determine an evolution of the criminal normative framework that cannot constantly produce Penal Code amendments. The Code structure is one devised integratively, globally, covering most crime incriminating acts. Particular cases, very domain-specific applicable, are, however, subject to separate laws. The legal literature records terms that vary in these broad norms' classification. Gh. Diaconescu uses the general term "crimes outside the Penal Code", attributing to the special laws the role of legislative intervention on the Penal Code and to the "extra-penal" laws the role of regulation of the norms linked to a particular field of activity, criminal laws intertwining harmoniously with the governed domains.² Another term is "special offences" sometimes used to refer offenses from laws outside the Penal Code. But the term most widely used is the "*offences from the special laws*" that we will use throughout this study, designating offenses described in laws specific to a particular field of activity, in which, for a maximum clarity, they also have associated penalty forms for appropriate sanction for the violation of the described norm.

The value of the penal norms from the special laws is demonstrated by the Code's amendments come into force recently, which have included in the main body of the Penal Code many offences previously described in special laws, under specific or generalized form. In the new version of the Penal Code appeared new offences concerning: trafficking, child protection, e-commerce, cybercrime, bailiffs, racketeering, witness protection, public roads, weapons and ammunition regime, health and safety in work, exercise of electoral rights.

The enactment dynamic creates advantages of a continuous updates of the legal framework, but sometimes, as noted the experts, can lead to conflicting situations.³ The last 10 years have also meant the gradual coverage of the void of structured information in this field by the appearance of several collections of laws, of certain critical papers on the texts of the special laws with provisions criminal, some continuously updated by including new legislation, but also through correlations with practice courts, Constitutional Court decisions, related laws etc., which formed a valuable tool for professionals.⁴

From the list of dozens of special laws containing criminal provisions, a small part include offenses for which mediation can be used in the removal of penal responsibility, some lesser known to the practitioners of justice or mediation.

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² Diaconescu, Gheorghe, *Infrațiunile în legi speciale și legi extrapenale*, Ed. All, Bucharest, 1996, pp. v-vii and next.

³ Vlăsceanu, Orlando; Vlăsceanu, Ioana, *Infrațiuni economice prevăzute în legile speciale*, Ed. Tribuna Economică, Bucharest, 2003, p.9.

⁴ Toader, Tudorel, *Infrațiunile prevăzute în legile speciale*, ed.6, Ed. Hamangiu, Bucharest, 2014.

2. The offences from the special laws in which the mediation can be used

The category of offenses for which the withdrawal of the advance complaint or the reconciliation of the parties removes the penal responsibility is the subject to mediation in criminal causes. The Law no 192/2006 on mediation and the mediator profession, subsequently amended and supplemented, establishes at the art. 67⁵:

"Art. 67. (1) The provisions of this Act are also applied in criminal causes, both in the criminal and the civil aspects, based on the distinctions shown in this section.

(2) In the criminal aspect of the trial, provisions on mediation applies only in causes of offenses for which, by law, the withdrawal of the advance complaint or the reconciliation of the parties removes the criminal liability.

(3) The parties and trial subjects can not be forced to accept the mediation procedure."

For the rest of offenses, the mediation is applicable to remove the penal responsibility.

Most offenses under these special laws involve criminal prosecution ex officio. A limited number of offenses require filing an advance complaint for the commencement of penal proceedings, and some offenses also provide the possibility of reconciliation of the parties, having as result the removal of the penal responsibility. These offenses also correspond to Art. 67, para. 2 of Law no 192/2006, which covers not only the offenses from the Penal Code, but also those of any other present or future normative act. Therefore, in their case it also can use the mediation.

2.1 The legislative framework before entry into force of the New Penal Code, concerning the offences from the special laws of which can mediate in the penal aspect

Before the entry into force of the new codes of penal matters, in February 2014, the special legislation included offences for which the advance complaint is required to be instituted the penal action in only 14 laws:

- Law no 11/1991 on unfair competition⁶, modified in 2013⁷- art. 8 reported to art.5;
- Law no 64/1991 on patents, modified, with provisions at art. 59 (the main form of the law⁸), respectively art. 58 (the modified form in 2002⁹);
- Law no 129/1992 on the protection of designs and models, with provisions at art. 42 (the main form of law¹⁰), respectively art. 51 (the modified form in 2003¹¹);
- Law no 16/1995 on topography of semiconductor products¹² - art. 40;
- Law no 51/1995 on organization and exercise of lawyer profession, with provisions at art. 33 (the main form of the law¹³), art. 37 (the modified form in 2001¹⁴), respectively art. 39, para 2,3,4 (the modified form in 2011¹⁵);
- Law no 8/1996 on copyrights and connected rights¹⁶ - art. 144 with connection to art. 140, 141, 142;
- Law no 84/1998 on trademarks and geographical indications¹⁷ – art. 83;

⁵ Law no. 192/2006 on mediation and the mediator profession, modified by the art. 84 para.6 from the Law 255/2013 for the implementation of the Law no 135/2010 on the Criminal Procedure Code and amending and supplementing certain acts which would be criminal procedure, published in Monitorul Oficial, no 515 from 14 August 2013.

⁶ Law no. 11/1991 regarding unfair competition, published in Monitorul Oficial no 24 from 30 Jan. 1991.

⁷ Modified by art. 27, pct. 2 from Law no. 255 / 2013.

⁸ Law no. 64/1991 on Patents for Invention, published in Monitorul Oficial no 212 from 21 Oct. 1991.

⁹ Law no. 64/1991 on Patents for Invention republished in Monitorul Oficial no 752 from 15 Oct. 2002.

¹⁰ Law 129/1992 on the protection of industrial designs, published in Monitorul Oficial no 1 from 8 Jan. 1993.

¹¹ Law 129/1992 on the protection of industrial designs republished in Monitorul Oficial no 193 from 26 Mar. 2003.

¹² Law 16/1995 on Protection of Integrated Circuits, published in Monitorul Oficial No 45 from 9 Mar. 1995.

¹³ Law 51/1995 on the organization and the legal profession, published in Monitorul Oficial no 116 from 9 Mar. 1995.

¹⁴ Law 51/1995 on the organization and the legal profession, republished in Monitorul Oficial no 113 from 6 Mar. 2001.

¹⁵ Law 51/1995 on the organization and the legal profession, republished in Monitorul Oficial no 98 from 7 Feb. 2011.

¹⁶ Law no. 8/1996 on copyright and related rights, published in Monitorul Oficial no 60 from 26 Mar. 1996.

¹⁷ Law 84 from April 15, 1998, on trademarks and geographical indications published in Monitorul Oficial no 161 from 23 Apr. 1998.

- Law no 160/1998 on organization and exercise of veterinarian profession, with provisions at art. 17¹ (the modified form in 2003¹⁸), art. 20, para. 2, 3, 4 (the modified form in 2005¹⁹);
- Law no 255/1998 on the protection of new varieties of plants, republished, modified and completed by Law no 119/2006, with provisions at art. 40 (the main form of law²⁰), art. 44 (the modified form republished in 2007²¹), respectively art. 43 (republished form in 2011²²);
- Emergency Ordinance no 55/2002 on the detention regime dangerous or aggressive dogs ²³ - art. 11;
- Law no 53/2003 – Labour Code, republished, with provisions at art. 279, reported to art. 277 and 278 (the main form of the law ²⁴), respectively art. 263 reported to art. 261-262 (the republished form in 2011²⁵);
- Law no 191/2003 on the offences on shipping regime²⁶ - art. 24 and art. 26, para 3;
- Law no 248/2005 on the free movement regime of Romanian citizens abroad ²⁷ - art. 50, para. 1 and 51, para. 1;
- Law no 62/2011 of Social dialogue, republished in 2012 ²⁸ - art. 218, para. 2 and 3.

Before February 1. 2014, a small number of special laws provide the reconciliation, with effect on removing penal responsibility, in some offenses for which the penal action initiated as a result of an advance complaint:

- Law no 51/1995 on organization and exercise of lawyer profession, with provisions at art. 33 (the main form of the law), art. 37 (the modified form in 2001), respectively art. 39, para 2,3,4 (the modified form in 2011);
- Law no 160/1998 on organization and exercise of veterinarian profession, with provisions at art. 17¹ (the modified form in 2003), art. 20, para. 2, 3, 4 (the modified form in 2005);
- Law no 53/2003 – Labour Code, republished, with provisions at art. 279, reported to art. 277 and 278 (the main form of the law), respectively art. 263 reported to art. 261-262 (the republished form in 2011);
- Emergency Ordinance no 55/2002 on the detention regime dangerous or aggressive dogs - art. 11.

Only for 2 cases the special laws allows a reconciliation, for offenses where penal action is initiated by default:

- Law no 217/2003 for preventing and combating domestic violence, modified by Law no 25/2012 and republished in 2012 ²⁹- art. 32, para 1;
- Law no 51/1995 on organization and exercise of lawyer profession, with provisions at art. 33 (the main form of the law), art. 37 (the modified form in 2001), respectively art. 39, para 2,3,4 (the modified form in 2011).

A significant moment in the development of legislation on intellectual property offenses was the adoption of the Emergency Ordinance no 190/2005, which abolished for a number of offenses from aforementioned laws the provision of initiation of penal action upon the filing an advance complaint of the injured party, replacing it with the ex officio initiation. The motivation of the

¹⁸ *Legea 592 / 2003 privind modificarea și completarea Legii no 160/1998 pentru organizarea și exercitarea profesiei de medic veterinar*, published in Monitorul Oficial no 8 from 7 Jan. 2004

¹⁹ *Legea 160 /1998 pentru organizarea și exercitarea profesiei de medic veterinar, republicată*, published in Monitorul Oficial no 433 from 23 May 2005

²⁰ *Legea 255 / 1998 privind protecția noilor soiuri de plante*, published in Monitorul Oficial no 525 from 31 Dec. 1998

²¹ *Legea 255 / 1998 privind protecția noilor soiuri de plante, republicată*, published in Monitorul Oficial no 65 from 26 Jan. 2007

²² *Legea 255 / 1998 privind protecția noilor soiuri de plante, republicată*, published in Monitorul Oficial no 926 from 28 Dec. 2011

²³ *Ordonanța de Urgență 55 /2002 privind regimul de deținere al câinilor periculoși sau agresivi*, published in Monitorul Oficial no 311 from 10 May 2002

²⁴ *Legea 53 / 2003 Codul muncii*, published in Monitorul Oficial no 72 from 5 Feb. 2003

²⁵ *Legea 53 / 2003 Codul muncii, republicată*, published in Monitorul Oficial no 345 from 18 May 2011

²⁶ *Legea 191 / 2003 privind infracțiunile la regimul transportului naval*, published in Monitorul Oficial no 332 from 16 May 2003

²⁷ *Legea 248 / 2005 privind regimul liberei circulații a cetățenilor români în străinătate*, published in Monitorul Oficial no 682 from 29 Jul.2005

²⁸ *Legea 62 / 2011 a dialogului social*, published in Monitorul Oficial no 322 from 10 May 2011

²⁹ *Legea 25 / 2012 privind modificarea și completarea Legii no 217/2003 pentru prevenirea și combaterea violenței în familie*, published in Monitorul Oficial no 165 from 13 Mar. 2012

legislator was based on the fact that "protection of intellectual property rights is an area where the European Commission has drawn particular attention in both the warning letter and the report to monitor Romania's accession to the European Union, published on 25 October 2005, one of the areas of grave concern identified by the Commission based on monitoring report and about to be achieved results with the utmost celerity."³⁰ Following this legislative change, the necessity of the advance complaint of the injured person was removed from 28 December. 2005 for the offences of 6 special laws, in just one case the legislator reintroducing this provision lately (see Table 1), thus limiting the possibility for mediation in the penal facts subsequent to that date provided in these laws.

2.2 The legislative framework subsequent the entry into force of the New Penal Code, concerning the offences from the special laws of which can mediate in the penal aspect

The new criminal legislation also influenced these regulations from the special laws. Law no 187/2012³¹, which introduced changes that came into force on February 1. 2014 has broadened the scope of offenses for which an advance complaint is necessary for the initiation of penal action, whether the reconciliation is possible to remove penal responsibility.³² Thus, several new offenses were classified as those for which the reconciliation can remove penal responsibility:

- Law no 64/1991 on patents, republished³³ - art. 55, 56 reported to art. 31;
- Law no 129/1992 on the protection of designs and models, republished³⁴ - art. 50, 52;
- Law no 16/1995 on topography of semiconductor products, republished³⁵ - art. 38;
- Law no 8/1996 on copyrights and connected rights, republished - art. 141;
- Law no 84/1998 on trademarks and geographical indications³⁶ - art. 90, para1, let. a;
- Law no 217/2003 for preventing and combating domestic violence - art. 32, para.1.

Also, the possibility of reconciliation of the parties to remove the penal responsibility, remaining valid only the necessity of advance complaint for initiating the penal action, was narrowed for the Emergency Ordinance no. 55/2002 on the regime of possession of dangerous or aggressive dogs, republished, at art. 12³⁷.

The content of the new Penal Code institution of reconciliation has been reconsidered to the Penal Code of 1969, art.132, by creating new conditions, but also by the reducing of the scope of offenses for which it is applicable. It appears that the new penal provisions of special laws, in line with developments in the Penal Code, changed the rule valid under the previous regulations, that the reconciliation can only intervene if the initiation of penal action was ex officio and only if it is expressly required by law. However, in the forms of laws brought into force after February 1st. 2014, the reconciliation of the parties as a way of removing the penal responsibility of the perpetrator is provided for offenses from 6 special laws, a growing number from the previous regulations of that date (see Table 1).

In addition, after February 1. 2014, it is added a new offence for which the advance complaint is required prior to the initiation of penal action, provided by art. 6¹ from Emergency Ordinance no. 31/2002 on prohibiting organizations and symbols of fascist, racist or xenophobic and promotion of

³⁰ *Ordonanța de Urgență 190 / 2005 pentru realizarea unor măsuri necesare în procesul de integrare europeană*, published in Monitorul Oficial no 1179 from 28 Dec. 2005.

³¹ *Legea 187/2012 pentru punerea în aplicare a Legii no 286/2009 privind Codul penal*, published in Monitorul Oficial no 757, from 12 Nov. 2012.

³² Dănilă, Cristi (coord.); Szabo, Anamaria; Dedu, Ion; Răduț, Andreea, *Ghid de mediere penală: conform noilor coduri*, Ed. C.H. Beck, Bucharest, 2014, pp. 152-159.

³³ *Legea 64 / 1991 privind brevetele de invenție, republicată*, published in Monitorul Oficial no 613 from 19 Aug. 2014.

³⁴ *Legea 129 / 1992 privind protecția desenelor și modelelor, republicată*, published in Monitorul Oficial no 242 from 4 Apr.2014.

³⁵ *Legea 16 / 1995 privind protecția topografiilor produselor semiconductoare, republicată*, published in Monitorul Oficial no 211 from 25 Mar. 2014.

³⁶ *Legea 84 / 1998 privind mărcile și indicațiile geografice, republicată*, published in Monitorul Oficial no 337 from 8 May 2014.

³⁷ *Ordonanța de Urgență 55 / 2002 privind regimul de deținere al câinilor periculoși sau agresivi, republicată*, published in Monitorul Oficial no 146 from 27 Feb. 2014.

the cult of persons guilty of crimes against peace and humanity³⁸, modified by the Law no 187/2013, art. 113.

The offenses set out prior in the Labour Code, concerning the failure of judicial decisions in labour disputes, were included in the new Penal Code, with similar provisions, but which removed the possibility of reconciliation of the parties to settle penal action. Other provisions concerning offenses from the previously provided special laws on the liberal professions (lawyers, veterinarians) were repealed and they were no longer applicable after February 1st. 2014.

In recent years it has not been regulated in special laws new offenses allowing the penal mediation, but appeared general regulations impacting the applicability of the mediation in penal matters.

The Table 1 achieved an overview of the provisions of the special normative acts for offences that can be mediated, specifying the changes that have occurred over time, especially when the penal law was changed, in February 2014.

2.3. Increasing the number of offences that can be mediated, after amending the legislative framework in 2014 - measure of supporting restorative justice

The new Penal Code and new Penal Procedure Code, which entered into force in February 2014, are the base of a modern vision on penal law. As appreciated C. Precup, the restorative justice presupposes a modern approach of the criminality that emphasizes offender accountability, and involvement of the community and victim in the justice act, comparing to the classic retributive justice, where the emphasis is on the offender's punishment. As per C. Danileț opinion, if the old Penal Code, in its shape based on the Penal Code in 1968, was centred on the punitive, retributive character of justice, where the "offender gets what he deserves", the new legislation implements the principles of restorative justice, as they are described in *Basic principles of the use of restorative justice programmes in criminal matters*, adopted by the United Nations Economic and Social Council resolution 12/2002³⁹. Restorative justice is considering repairing the harm of crime on the victim, on the community and even on the offender, they receiving "what it takes". Based on them, justice can be achieved through restorative practices such as victim-offender mediation, conciliation circle, damages, compensations, community councils, community service, etc.⁴⁰

We join the position formulated by the Government in a case at the Constitutional Court, which argues that: "*The possibility of reconciliation represents a concretization of the exercise of free access to justice, because it allows the injured person, in case of crimes against property, to dispose continuation or not of the penal action. The reason of the Penal Code is not to punish with any price and in any event, but to create a coherent and comprehensive legal framework to allow a fair and equitable application of criminal law. In this case, the injured party is entitled to assess whether it continues that the offender should be held criminally liable or that the fact that it was within the conditions prescribed by law to intervene the reconciliation is a sufficient argument in favour of social reintegration of the offender and cease of continuing penal action.*"⁴¹

³⁸ *Ordonanța de Urgență 31 / 2002 privind interzicerea organizațiilor și simbolurilor cu caracter fascist, rasist sau xenofob și a promovării cultului persoanelor vinovate de săvârșirea unor infracțiuni contra păcii și omenirii*, published in Monitorul Oficial no 214 from 28 Mar. 2002.

³⁹ ECOSOC. *Rezoluția 2002/2. Principiile de bază ale utilizării programului de justiție restaurativă în materie penală*. translation in Romanian by. C. Dăniuleț, în Dăniuleț, Cristi (coord.); Szabo, Anamaria; Dedu, Ion; Răduț, Andreea, *op. cit.*, pp. 107-113.

⁴⁰ Danileț, Cristi, *op.cit.*, pp.156-157.

⁴¹ *Decizia Curții Constituționale 445/2016 referitoare la excepția de neconstituționalitate a dispozițiilor art. 159 alin. (1), (2) și (3) teza a doua și ale art. 231 alin. (2) cu referire la art. 229 alin. (1) și alin. (2) lit. b) și c) din Codul penal*, published in Monitorul Oficial no 702 from 9 Sep. 2016.

Table 1. Offences from the special laws which can be mediated on the penal aspect

Legend: AC: the advanced complaint initiate the penal action
R: the reconciliation of parties remove the penal responsibility

Regulation	Articles	Type of offence	Time of act	
			before 1 Feb. 2014	after 1 Feb. 2014
Law no 11/1991 on unfair competition, modified by Law no 187/2012	art. 8 with reference to art. 5	Counterfeiting of goods; use and disclosure of trade secret; import, storage or marketing of products / services with false claims regarding intellectual property, origin and characteristics of goods	AC	AC
Law no 64/1991 on patents, modified by Law no 187/2012	art 59 from the main form of law, art. 58 from the republished law in 2002, respectively art. 55 and art. 56 with reference to art. 31 from the law republished in 2014	Acquiring the quality of inventor; counterfeiting of patented inventions	AC ⁴²	R
Law no 129/1992 on the protection of designs and models, republished in 2003, modified by Law no 187/2012	art. 42 from the main form of law, art. 51 from the republished law 2003, respectively art. 50, 52 from the law republished in 2014	Appropriation of authorship of industrial designs; counterfeiting of design and industrial models	AC ⁴³	R
Law no 16/1995 on topography of semiconductor products, modified by Law no 187/2012	art. 40 from the main form of law, respectively art. 38 from the law republished in 2014	Counterfeiting of protected topographies	AC ⁴⁴	R
Law no 51/1995 on organization and exercise of lawyer profession, republished in 2001 and 2011	art. 33 from the main form of law, art 37 from the law republished in 2001, art. 39, para. 2,3,4 from the law republished in 2011	Insult, slander or threat, striking or other violence committed against lawyer	AC, R	
Law no 8/1996 on copyrights and connected rights, modified by Law no 187/2012	art. 144 with reference to art. 140, 141, 142 from the main form of law, respectively art. 141 from the law republished in 2014	Various acts of non-respect of authorship of a work and use the works without the consent of the author	AC ⁴⁵	R
Law no 84/1998 on trademarks and geographical indications, modified by Law no 187/2012	art. 83 from the main form of law, respectively art. 90, from the law republished in 2014	Counterfeiting or unauthorized entry on the market of trademarks or registered geographical indications	AC ⁴⁶	R
Law no 160/1998 on organization and exercise of	art. 17 ¹ from the law modified by the Law no	Preventing the exercise of the veterinary profession,	AC, R	

⁴² Limited at the acts before 28 Dec. 2005, as a result of repaling of art. 58, alin. 2, by art. VIII from *Ordonanța de Urgență 190/2005, pentru realizarea unor măsuri necesare în procesul de integrare europeană*

⁴³ Limited at the acts before 28 Dec. 2005, as a result of repaling of art. 51, alin. 2, by art. IX from *Ordonanța de Urgență 190 /2005, pentru realizarea unor măsuri necesare în procesul de integrare europeană*

⁴⁴ Limited at the acts before 28 Dec. 2005, as a result of repaling of art. 40 alin. 3, by art. XI from *Ordonanța de Urgență 190 /2005, pentru realizarea unor măsuri necesare în procesul de integrare europeană*

⁴⁵ Limited at the acts before 28 Dec. 2005, as a result of repaling of art.144, by art. XII from *Ordonanța de Urgență 190 /2005, pentru realizarea unor măsuri necesare în procesul de integrare europeană*

⁴⁶ Limited at the acts before 28 Dec. 2005, as a result of repaling of art. 83, alin. 5, by art. XIII from *Ordonanța de Urgență 190 /2005, pentru realizarea unor măsuri necesare în procesul de integrare europeană*

veterinarian profession, modified by Law no 592/2003 and Law no 187/2012	592/2003, art. 20, para. 2, 3, 4 from the law republished in 2014	slander, insult, threat, striking or other violence against veterinarian		
Law no 255/1998 on the protection of new varieties of plants republished in 2007, modified by Law no 187/2012	art. 40, from the main form of law, art. 44, from the law republished in 2007, art. 43 from the law republished in 2014	Counterfeiting, distribution, false or disclosure of confidential information by an official, for plant varieties	AC ⁴⁷	
Emergency Ordinance no. 31/2002 on prohibiting organizations and symbols of fascist, racist or xenophobic and promotion of the cult of persons guilty of crimes against peace and humanity, modified by Law no 187/2012	art. 6 [^] 1, para 1	The threat through computer systems to offenses on the grounds of discrimination		AC
Emergency Ordinance no 55/2002 on the detention regime dangerous or aggressive dogs, modified by Law no 60/2003, modified by Law no 187/2012	art. 11 from the main form of law, respectively art. 12 from the law republished in 2014	Failure to take measures to prevent canine attacks, with or without injury	AC, R	AC
Law no 53/2003 – Labour Code, republished, modified by Law no 187/2012	art. 279 with reference to art.277, 278, from the main form of law, respectively art. 263, with reference to art.261, 262, from the law republished in 2014	Refuse on respecting of judgments on labour matter ⁴⁸	AC, R	
Law no 191/2003 on the offences on shipping regime, modified by Law no 187/2012	art. 24, art. 26, para.3	Hitting of a superior; hitting of an inferior on a ship	AC	AC
Law no 217/2003 for preventing and combating domestic violence, republished in 2012, modified by Law no 187/2012	art. 32, para.1 from the law republished in 2012, respectively art. 32 from the law republished in 2014	Violation of a protection order to a family member	R	R
Law no 248/2005 on the free movement regime of Romanian citizens abroad, modified by Law no 187/2012	art. 50 and art. 51	Hindering the right to travel abroad; letting the minor in another state without respecting the law	AC	
Law no 62/2011 of Social dialogue, republished in 2012, modified by Law no 187/2012	art. 218, para. 2.and 3	Conditioning, coercion, or limiting of activity of an elected members in trade unions	AC	AC

The progress in this regard is observed by comparing the number and nature of offenses in both Penal Code and special laws in which mediation is possible in order to remove the penal responsibility or termination of penal action, which increased after the entrance into force of the New

⁴⁷ Limited at the acts before 28 Dec. 2005, as a result of repaling of art. 40, alin. 5, by art. XIV from *Ordonanța de Urgență 190 /2005, pentru realizarea unor măsuri necesare în procesul de integrare europeană*, respectively at the acts after 26 Jan.2007, as a result of the modification of the law by *Legea 119/2006 pentru modificarea și completarea Legii no 255/1998 privind protecția noilor soiuri de plante*.

⁴⁸ The articles 261 si 262 from *Legea 53/2003 – Codul Muncii* was included in the new Penal Code, within art. 287, para.1, lit. d,e, remaining offences that can be mediated, penal action being initiated by advance complaint of the injured person.

Penal Code and special laws modifications. The analyse of trend reveals that there is an increase in the number of offenses for which the law provides that penal action are initiated by an advance complaint, but a significant decrease of the scope of offenses for which reconciliation removes the penal responsibility. This can be explained on the basis of preliminary thesis that led to the changes in the new Penal Code. One of them established since 2008, when began the work on the new text of criminal law: "*Regarding the causes removing penal responsibility is imposed waiving the parallel regulation of the lack and deprivation of the advance complaint or the reconciliation of the parties, being required to choose one of them. Best solution would be giving up the reconciliation and dedication on withdrawal of advance complaint with the effects in personam.*"⁴⁹

3. Mediation procedure in penal cases concerning offenses from the special laws

The mediation process in penal cases concerning offenses from the special laws is similar to other offenses under the Penal Code. The knowledge of these special laws that include offences that can be mediated is an advantage for mediators and justice practitioners, who can provide to individuals amicable solution to their disputes in penal cases, but also for persons involved in the facts or consequences of the facts in the commercial, intellectual property sphere, or from the sphere of individual rights.

The injured party and the offender can participate at the mediation procedure, which can take place with the two sides together or separately. Although provision exists for about a year in the Mediation Law, introduced in art. 60¹, para. 1 lit. g, by the Law no 115/2012⁵⁰, is no longer in force from 1 February 2014, we believe that the principle introduced by this provision as if the injured person refuses to participate at an information on mediation session with the perpetrator, the meeting can be also separately held, is perfectly applicable and still worth remembering by the mediation practitioners to conduct the mediation sessions in penal cases. It also may consider the possibility of the parties to be represented in the mediation by other persons entitled under the provisions of art. 52 of the Mediation Law.

The mediation, unlike the traditional process of justice, doesn't intend the final determination of guilt or innocence status of persons in conflict. The major procedural role of the mediator is to create conditions to guide the parties toward a solution to the problem.⁵¹ Mediation ends, as the case, through an arrangement between the parties as a result of conflict resolution, through finding by the mediator of the mediation failure or through submitting the mediation contract by either party.

Formalizing the successful outcome of mediation is drafting a *mediation agreement*. By text of the law, concluding a mediation agreement is governed separately from the withdrawal of advance complaint and reconciliation, being an alternative causes of removing penal responsibility. With this distinction made by the legislator, the mediation agreement, the withdrawal of the advance complaint and reconciliation are alternative ways to terminate the penal process and deter penal action initiation. All three have a double legal nature, both criminal law and criminal procedure, being a cause which removes the penal responsibility, but also a reason that prevents the initiation and pursuit of penal action. In addition, in order to provide a clear distinction between them, the legislator replaced at the art. 56, para. 1 lit. c) the term "reconciliation", from the main form of Mediation Law no 192/2006, with the term "agreement", thereby giving the mediation agreement a distinctive character, as a way of amicable settlement of a conflict under penal law. Moreover, the Decision no 9/2015 of the High Court of Cassation and Justice lays down in point 1 that "*in pursuance of Article 67 of the Law no.*

⁴⁹ Tesis V, part A, let. 1 from *Hotărârea de Guvern no 1183/2008 pentru aprobarea tezelor prelabile ale proiectului Codului penal*, published in Monitorul Oficial no 686 from 08.10.2008.

⁵⁰ *Legea 115/2012 pentru modificarea și completarea Legii no 192/2006 privind medierea și organizarea profesiei de mediator*, published in Monitorul Oficial no 462 from 9 Jul. 2012.

⁵¹ Buzatu, Nicoleta-Elena; Pipaș, Maria-Daniela – *Effective Communication – A Viable Solution to Mediation*, în "International Journal of Academic Research in Business and Social Sciences", Jan. 2014, Vol. 4, No. 1, p.684.

192/2006 on mediation and the mediator profession, the conclusion of a mediation agreement constitutes a *sui generis* cause which removes penal responsibility, distinct from the reconciliation.”⁵²

Unlike reconciliation - allowed only before reading the document instituting the court, according to art. 159, para. 3 of the NCPP, the mediation agreement may intervene “*whenever in a criminal trial, until the final penal decision*”, according point 2 of the Decision of the High Court of Cassation and Justice previously cited, being one of the conditions of withdrawal of an advance complaint. However, according to Constitutional Court Decision no 397/2016, entered into force of 15 July 2016, the conclusion of a mediation agreement regarding the offenses for which reconciliation can occur take effect only if there is before reading the document instituting the court, as otherwise prejudice the principle of oneness, equality and impartiality of the judiciary enshrined in art. 124 par. (2) of the Constitution.⁵³

It can distinguish two types of *mediation procedures*, depending on whether the mediation is made: extra-procedural (outside a penal action), regulated by art. 69 of mediation Law, or procedural (in a triggered penal action), regulated by art. 70 of the same law.⁵⁴ Mediation can be carried out only for the listed penal offenses, but for the civil aspect of the penal trial can be addressed as an alternative for the recovery of damages in any of the crimes. It is significant that mediation may take place both in cases where penal action were initiated, and in cases where advance complaint has not yet been effectively filed by the injured party.

A special attention should be paid to recent legislation changes, associated with the entry into force of the new penal codes. On this occasion, a number of new offenses have entered in the category of cases that can be mediated and for several other were set changes - generally passes in the category of offenses for which reconciliation removes penal responsibility in the category where the advance complaint is required prior to the initiation of penal action, as indicated in Table 1 of achieved systematization.

For these new regulations it rises the question of penal law enforcement in time, governed, on the one hand, by art. 3 of the new Penal Code, which states that “*criminal law applies to offenses committed during the time it was in force*”, and, on the other hand, by the art. 5 and 6 of the new Penal Code, regarding the application of more favourable criminal law. In these cases, we join the opinion that may be considered more favourable the law which links the prosecution of filing of an advance complaint or the law that provides the possibility of reconciliation of the parties, to remove penal responsibility.⁵⁵

4. The necessity of supporting the restorative justice consolidating demarche by supporting mediation

Increasing the number of offenses in the Penal Code and special laws for which mediation is possible, mostly consequence of the entry into force of amendments established by the Law no 187/2012, can be put in the context of progress towards a restorative justice. It can be appreciated that the new penal legislation give individuals a broader opportunity to appeal to mediation for prejudices from a crime both by recovering the loss suffered by the injured person and by the possibility to repair the damage created by the perpetrator, without as it continues to be penaly responsible for the acts corrected.

⁵² Decizia Înaltei Curți de Casație și Justiție 9 / 2015 privind pronunțarea unei hotărâri prealabile pentru dezlegarea în principiu a următoarelor probleme de drept: “1. dacă dispozițiile art. 67 from Legea no 192/2006 privind medierea și organizarea profesiei de mediator se interpretează în sensul că medierea este o cauză *sui-generis* de înlăturare a răspunderii penale sau este o modalitate a împăcării ca și cauză de înlăturare a răspunderii penale reglementată de dispozițiile art. 159 from Codul penal; 2. dacă medierea poate interveni numai până la citirea actului de sesizare potrivit dispozițiilor art. 159 alin. (3) from Codul penal sau poate interveni în tot cursul procesului penal.”, published in Monitorul Oficial no 406 from 9 Jun. 2015.

⁵³ Decizia Curții Constituționale no 397 / 2016 referitoare la excepția de neconstituționalitate a dispozițiilor art. 67 from Legea no 192/2006 privind medierea și organizarea profesiei de mediator, în interpretarea dată prin Decizia no 9 from 17 aprilie 2015 a Înaltei Curți de Casație și Justiție - Completul pentru dezlegarea unor chestiuni de drept în materie penală, și ale art. 16 alin. (1) lit. g) teza finală from Codul de procedură penală, published in Monitorul Oficial nr 532 from 15 Jul. 2016.

⁵⁴ These 2 articles was also modified starting from 1 Feb. 2014 by art. 84, para. 8, respectively 9 from Law no 255/2013.

⁵⁵ Dănilă, Cristi, *Considerații privind medierea penală*, in “Revista Dreptul”, no. 2/2014, pp.167-168.

However, there is a regression of the initial approach of promoting mediation as a simplified alternative or support to the classic justice, mediation losing rapidly after 2014 increasingly more of its institutional instruments and capacities to promote itself and provide clear solutions, especially in penal cases.

It is not too late for the legislator to resume the guidance on penal mediation made by the Committee of Ministers, urging since 1999 the EU member states that "*legislation must facilitate the penal mediation*" as well as "*mediation in penal causes must be possible in all stages of the procedure of criminal justice system*",⁵⁶ and to consider as a legislative priority to clarify the legislation on mediation and enhance the effectiveness of mediation as an simplified alternative to the penal process.

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⁵⁶ *Recomandarea no(99) 19 a Comitetului de Miniștri către Statele Membre privind mediere penală, adoptată la 15 sept. 1999*, translation in Romanian by C. Dănilă, în Dănilă, Cristi (coord.);Szabo, Anamaria; Dedu, Ion; Răduț, Andreea, *op. cit.*, pp. 107-113.