Exemption from criminal liability of minors according to article 61 and article 78a of the penal code (PC) – competition and peculiarities in the application field

Summary
In the paper, the question is discussed of the application field and peculiarities of the exemption from criminal liability of minors, together with applying instructive measures under article 61 of the PC and with the imposition of administrative penalties under article 78a of the PC. The question is raised of the choice of the more favourable regime by the judicial bodies in the event of competition among norms, with a view to the peculiarities of the deed and the perpetrator in each specific case. The conclusion imposes itself that the coincidence in the application field of the two institutes for specific hypotheses does not guarantee to a sufficient extent the judicial security and the uniform application of the law. Suggestions are made for a change of the institute under article 78a of the PC with a view to its application solely with respect to minors that turned 16.

Keywords: exemption, minors, penalty, instructive measures, administrative penalty
The exemption from criminal liability of minor perpetrators is related to the fulfillment of the criminal law policy of depenalization, based on the principles of giving up penal repression and humanization of criminal proceedings with respect to young law offenders. An alternative system of administrative law penalties and/or instructive measures was created; the legislator uses these measures with respect to the perpetrator of a crime, instead of implementing penal responsibility [1]. The goal that the legislator has posed is the correction and instruction of minors by means of preserving the criminal nature of the deed, but the penalties envisaged in the PC are replaced by instructive measures or administrative penalties. The modern approach in contemporary penal policy necessitates that it should be part of the European penal policy, observing the main principles of “sparing” justice, proportionality and justice, subjected to the understanding of using minimum penal repression in the counteraction to crime [2]

The expression of the higher differentiation of measures for state and social influence by means of limiting the imposition of penalties led to the inclusion of minors in the circle of persons that are within the application field of exemption from criminal liability, and imposing administrative penalty under article 78а of the PC. The high crime rate and the problems related to jurisdiction pose the problem of the general effectiveness of the exemption from criminal liability under article 78а of the PC with respect to minors, as a specific means for obtaining the goals of the criminal law.

It must be noted that the active editing of article 78а of the PC [3] has an imperative nature and concerns material prerequisites, in the cumulative availability of which courts of law are unconditionally obligated to exempt the perpetrator of criminal liability. The court follows their availability officially – without a possibility for assessment of the individual peculiarities of the specific crime and the social danger of the perpetrator or the attitude of the parties. The expansion of the application field of the institute under discussion simultaneously deprived the court of its discretionary rights with respect to the assessment of whether the doer has to be exempted from criminal liability in the event of availability of the envisaged prerequisites. In that manner the legislator deems that the irrefutable presumption is present of reaching the desired general instructive and warning effect of the penal law, with present required prerequisites, without complying with the specific facts on the case, the personality of the perpetrator or other circumstances influencing the social danger of the deed and the perpetrator. The conclusion imposes itself that the advisability of the exemption from penal responsibility under article 78а of the PC is not based on circumstances related to the crime perpetrated and the personality of the perpetrator; it is mechanically connected with the presence of specific prerequisites. That is particularly unacceptable, when there is a question of minor perpetrators whose personality’s peculiarities, indi-
individual development and emotional peculiarities impose the need for discretionary power of the court for the assessment of the method of influence.

The existence of two independent regimes of exemption from criminal responsibility of minor offenders imposes the comparison of the advantages and disadvantages of each of them. It is necessary that the law enforcing body should estimate both the type of norm and its application scope and in each specific case select the regime of exemption from criminal responsibility that will in the highest extent correspond to the interests of the perpetrator and the attainment of the correction and instruction goals of the penalty, without using penal repression.

1. Advantages of article 61 of the PC:

1.1. In the application of article 61 of the PC, when the prosecutor refuses to initiate legal proceedings, the interaction of the minor and the legislation system will be completely avoided, and there will be no unnecessary stigmatization of the perpetrator. With the option of “suspension of pre-trial proceedings by the prosecuting attorney”, and also with the third hypothesis – “refusal to submit the minor to court”, that interaction will be minimal. Solely, when the court deems that the minor must not be tried; in a procedural respect we will have a situation similar to the situation of exemption under article 78а, para. 6 of the PC.

1.2. The exemption under article 61 of the PC can also be applied in the event of perpetration of a serious crime. Theory and court practice have never contradicted each other on that matter, and the fact is not accidental that the initial text of article 29 of The Law for Tackling Antisocial Offences of Minors (LTAOM), where that exemption was arranged – the crime was not deemed a serious one, was edited to its present form following the legal definition of “serious crime” in article 93, item 7 of the PC. Moreover, there is no legal impediment for the application of article 61 of the PC, even when the negative prerequisites of article 78а, para 7 of the PC are present – the harm caused is serious body injury or death, or the perpetrator was drunken, or in a multitude of crimes, as well as the crime was perpetrated against an authority body or in connection with the implementation of his work duties.

1.3. Under article 61 of the PC, it is mandatory to take into consideration the peculiarities of the minor’s psychology in the perpetration of offences – penchant and thoughtlessness. These specifics of the subjective side of the deed are not taken into consideration under article 78а of the PC which application is related solely to specific objective prerequisites and excludes the individualized approach.

1.4. The possibility for multiple exemptions under article 61 of the PC, as well as the lack of prohibition for a person that has already been tried to be released and to undergo instructive measures, is the next advantage for minors when article 61 of the PC is applied. The law poses no restriction like the one envisaged in article
78a, para. 1, “b“ - the perpetrator should not have been tried for a crime of general nature, and should not have been exempted from criminal liability under the order of that section.

1.5. When exempting under article 61 of the PC, there is no requirement for the restoring of property damages involved, which is definitely more favourable for the minor.

1.6. The norm is dispositive, and its application is placed under dependence on the subjective assessment of the management and decision taking body – whether in a specific case there can be successful application of instructive measures under LTAOM.

1.7. The exemption from criminal responsibility under article 61 of the PC ensures prompt, real and timely corrective interference, and in that way it is possible to avoid the institutional state interference being characteristic of the penal process passing through all phases which could have a negative effect on the future development of the minor and lead to his or her stigmatization [6].

1.8. The last advantage of the exemption under article 61 of the PC is its proven application for many years, the established and non contradictory legal practice in that application.

2. Shortcomings of article 61 of the PC:

2.1. The application of article 61 of the PC is excluded after the person that has perpetrated the crime as a minor comes of age, because no instructive measures can be imposed on adults instead of punishment, whereas – under the same circumstances – according to article 78a of the PC the person that has already come of age by the moment of imposing of the legal act will be exempted from criminal punitive responsibility, but will be imposed the administrative punishment – public reprimand, possibly an administrative punishment – depriving of the right to practise a specific profession or activity, because that person was under age by the moment of the deed.

2.2. The prosecutor’s order of refusal to initiate or of suspension of the criminal proceedings can be attacked only in front of the higher-ranking prosecutor. In that manner there are no procedural guarantees that the perpetrator will contradict his or her participation in the incriminated deed or his or her guilt with the admissible proof and evidence, or will appeal the legal act with which he or she was found guilty of the crime perpetrated. In that connection, the problem is raised of the legal nature of the prosecutor’s actions when he or she refuses to initiate or to suspend the pre-trial proceedings already initiated, when there is no evidence collected of the deed and the guilt. In theory, the thesis is formed that in that manner the minor’s rights are restricted, in the event that he or she does not
acknowledge his or her guilt and is of the opinion that the discussion of the case in court will give him or her possibility to prove his or her innocence [7].

2.3. If the exemption is not applied by the prosecutor but by the court, the minor will have passed through the entire punitive process – with its two phases. Thus the minor will not to any extent be spared the stigmatization, it is just the opposite. Moreover, if the court does not itself impose an instructive measure and exercises its other opportunity – to refer the case to the Local Commission for Tackling Offences of Minors (LCTOM), there an instructive case will also be initiated and discussed on the case, which means that the minor will have to pass through two procedures – under the Penal Procedure Code and under LTAOM.

2.4. The other downside of article 61 of the PC is that some of the instructive measures under LTAOM, which are the solely applicable ones for that exemption from criminal responsibility, are much harsher than the administrative punishments envisaged in article 78a, para. 6 – public reprimand and deprivation of the right to exercise a specific profession or activity. Placement in specialized boarding schools /instructive boarding schools (IBS) and social pedagogical schools (SPS)/ is of repressive nature, and doubtless has harsher legal consequences than both administrative punishments indicated.

3. Advantages of article 78a of the PC

3.1. The principles of humanism, procedural speed and economy of punitive repression included in the institute of article 78a of the PC, meet the new paradigm in the punitive policy for decriminalization and depenalization.

3.2. By applying article 78a of the PC, the stage of consecutive passing of the minor through two different procedures – a punitive and an instructive case – will never be achieved, because article 78a of the PC does not envisage a variant of transferring the case to LCTOM.

3.2. For minors who turned 16 the proceedings of exemption under article 78a of the PC can conclude solely with the imposition of an administrative punishment – public reprimand, likely an administrative punishment – deprivation of the right to practise a specific profession or activity, if the deprivation of such a right is envisaged for the respective crime.

3.3. The refusal of the court to apply this type of exemption is subjected to appeal due to the violation of the property law because the norm is imperative. It is within the powers of the appellate and cassation instances to change the sentence, respectively the decision, and to exempt the perpetrator from criminal responsibility under article 78a, when the legal prerequisites are available. That is an additional guarantee that the minor’s rights will not be violated when there is a presence of the material and legal prerequisites for application of article 78a of the PC, if the first instance court has ordered a vicious legal act.
3.4. If the deed has not been perpetrated by the minor owing to penchant or thoughtlessness, there is no obstacle for the application of article 78a, para. 6 of the PC.

3.5. The norm is applicable for continued crime under article 26 of the PC, regardless of the number of deeds.

3.6. Although the practice is contradictory, a lot of crimes fall under the hypothesis of article 78a of the PC, after the reduction under article 63 of the PC, which is obligatorily applied for minors, a lot of these crimes can be of high social risk [8]. That makes the application field of article 78a exceptionally vast.

3.7. The imperative nature of the norm excludes the subjective approach of the law enforcement body and is a condition for non contradictory legal practice.

3.8. In proceedings under chapter 28 of the Penal Procedure Code, the civil claim is inadmissible, and the victim cannot exercise his or her rights of a civil plaintiff and private accuser, furthermore, the victim cannot appeal court acts [9].

4. **Downside of article 78a of the PC**

4.1. The application of article 78a of the PC does not envisage the use of the individualized approach by the court, like in the exemption from criminal responsibility with imposition of instructive measures under article 61 of the PC. That is to a great extent an unacceptable decision as far as it is a matter of minors, because it is namely for minors that the court needs to have broad capabilities at its disposal for taking into consideration the specificity of each individual perpetrator and his or her specific deed.

4.2. An absolutely necessary prerequisite for the application of article 78a is that the perpetrator should not have been convicted of a crime of general nature, or exempted from criminal responsibility under that order.

4.3. The drunken state of the perpetrator [10] does not permit the application of article 78a, although the use of alcohol is vastly common among minors [11].

4.4. To be exempted under that order, the minor must obligatorily have restored the constituent property damages.

4.5. The norm of article 78a of the PC is inapplicable, when the deed has caused death or serious body injury, irrespective of the form of the guilt for the occurrence of the result – with malice or unintentionally.

4.6. An obstacle to the application of the discussed institute is when the crime was perpetrated against an authority body during or in connection with carrying out his duties. As such a direction is frequently characteristic of hooligan deeds, also typical of minors, this restriction narrows down the possibilities for application of article 78a of the PC with respect to them.

4.7. As the administrative and punitive responsibility arises when a minor turns 16, for persons who are under 16 the consequences of the exemption under article
78a of the PC can be much more serious than for those minors that have become 16 years old; for whom, for the same or a more seriously punishable crime, again under article 78a of the PC, the court has imposed an administrative punishment – public reprimand.

The discussed advantages and disadvantages of the two institutes of exemption of criminal responsibility of minors do not impose a categorical conclusion about which of the two regimes would be more favourable for the perpetrator. Regardless of the fact that the norm of article 78a of the PC is imperative and the application of article 61 of the PC depends on the discretionary powers of the prosecutor or the court, in each specific case it must be taken into consideration the circumstances that have importance for the choice of the type of exemption from criminal responsibility. In the event of competition between the two regimes, it is necessary to observe in all cases both the minor’s rights and the goals that the legislator poses for correction and instruction of the perpetrator without using punitive repression.

On the basis of the advantages and disadvantages of both institutes, the conclusion can be drawn that article 61 of the PC, with respect to minors who are under 16 years old, when the prosecutor refuses to initiate or to suspend the pre-trial proceedings already initiated, is a more favourable legal norm, because the contact with the judicial system is avoided to a higher extent, as there is no discussion of the case in a jury session. In that sense, the imperative application of article 78a of the PC, when there are simultaneous prerequisites for application of both types of exemption – both under article 61 and under article 78a of the PC, will put the minor who is still under 16 years old in a more unfavourable legal situation compared to a minor that turned 16; the latter can only be exempted under article 78a by the court. That is why the legislator should restrict the application field of article 78a of the PC only to minors turned 16 on whom solely an administrative punishment can be imposed. In that manner, the content of the norm will correspond to its systematic place in the PC. Taking into consideration the analysis carried out and the arguments outlined, we would like to offer de lege ferenda the following revision of the text of article 78a, para. 6 of the PC which will correspond to the thesis outlined above:

“When the grounds are available under para. 1 and the deed has been perpetrated by a minor turned 16, the court will exempt the minor from criminal responsibility, by imposing an administrative punishment – public reprimand. The court can also impose an administrative punishment – deprivation of the right to practise a specific profession or activity within a term of up to three years, if a deprivation of that right is envisaged for the respective crime“.

Thus, for minors that are under 16 years old, solely the exemption under article 61 of the PC will remain, whereas for those turned 16, the court will be able to
apply article 61 solely in the event that the prerequisites under article 78a of the PC are not available.

References:
See Decision No. 482 of 05.11.2010 on pun.case No. 478/2010 of the Supreme Cassation Court
Stankov B. ibidem, p. 16.
Dimitrova Iv. “Some considerations with respect to the application of the institute of exemption from criminal responsibility with imposition of an administrative punishment against minors“//University of National and World Economy, Sofia, publ. in collection of papers, volume 2, UNWE Publ., Sofia, 2015, pp. 265–270.
Decision No.758/2005 on pun. case No. 437/2004 of the Supreme Cassation Court.
See Order No. 1 of 17.01.1983 of the Plenum of the Supreme Court. With the indicated interpreting act it is accepted that the driver of the vehicle is always in a drunken state, when the alcohol content in the blood is not less than 0.5 promille.
Before the changes in the PC reflected in State Gazette, issue 95 of 2016, the text of article 78a, para 7 of the PC did not imply a simple reply to the question of whether these negative prerequisites refer also to the deeds perpetrated by minors, although practice was not contradictory, and in fact it was a matter of non coordination of the individual editings of article 78a of the PC, but the legislator eliminated that error, and currently there is no doubt that negative prerequisites are applied for minors as well.