

A SHORT PRESENTATION OF THE PRELIMINARY CHAMBER AS THE PHASE IN THE CRIMINAL PROCEEDINGS

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Abstract

The current Code of Criminal Procedure brings important changes to some of the institutions of the old code of criminal procedure, but it also establishes a number of new institutions that did not exist in our criminal law. Based on these considerations, we have appreciated that at this time, in view of the consolidation of the legislation in the field, it is useful to design a work that examines the competence of the preliminary chamber judge. The paper follows the new configuration of the institutions, especially the one concerning the preliminary chamber judge. The criminal trial knows the preliminary chamber phase, usually, located after the criminal investigation phase and before the trial phase.

The Preliminary Chamber judge is not a training judge as provided for in the Romanian inter-war criminal law or in the French criminal proceedings, and has no competence in collecting evidence, discovering the offender or its participants, or analysing the merits of the accusation or in bringing the defendants to justice. Even if the Preliminary Chamber judge does not verify the merits of the evidence or the trial, its role is as important as the role of the court, since its rulings on the lawfulness of the prosecution can have a significant reflex on the settlement criminal proceedings, given that the basis of any criminal proceedings is the probation.

Keywords: jurisdiction, Preliminary chamber, Criminal investigation, competence, comparative analysis.

1. Introduction

The criminal proceedings are not confused with the judicial activity in criminal matters, as the parties, the lawyer, the trial subjects (the suspect and the injured person), as well as other procedural subjects (finding bodies, witnesses, experts, etc.)¹ participate with the criminal justice bodies. The Preliminary Chamber seeks to resolve issues relating to the jurisdiction and lawfulness of the court's referral, as well as the lawfulness of taking the evidence and the execution of acts by the criminal investigation bodies, ensuring that the case is resolved in a speedy manner².

2. Content

From this definition it follows that the Preliminary Chamber judge has the following powers: it checks the lawfulness of the referral ordered by the prosecutor, verifies the lawfulness of the administration of the evidence and the execution of the procedural acts by the criminal prosecution bodies, solves the complaints against the non-court solutions

(classification)³ or non-pursuing⁴; resolves other express requests provided by law⁵.

The Preliminary Chamber judge may also order the measure of provisional prescription for medical treatment⁶, precautionary measures⁷, and other intrinsic attributions to the conduct of criminal proceedings⁸.

The analysis of the lawfulness of the concluding sentences of the computer search, we consider that it falls within the competence of the preliminary chamber judge⁹.

Beyond the substantive changes, the preliminary camera procedure is placed historically in the succession of the institution of the indictment chamber provided by art. 279 C.C.P. 1936, which had the power to order the referral of the defendant to the Court of Jurists, when there is evidence and solid evidence against the defendant¹⁰.

At the moment, the Preliminary Chamber procedure has a different philosophy than the institution of the preparatory meeting provided in Art. 269-279 C.C.P. which was in force between 1953-1957 and abrogated by the Decree no. 473 of 20th September 1957, in which an analysis was made of both the merits of the referral and of the lawfulness of the criminal investigation or its completeness. This procedure was non-public, but the prosecutor and, exceptionally, the

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¹ Denisa Barbu, *Drept procesual penal. Partea generală*, Ed. Lumen, Iași, 2016, p.13.

² M. Udroui, s.a., *Codul de procedură penală. Comentariu pe articole*, Ed. C.H.Beck, București, 2015, p.196.

³ Art. 318 C.C.P. was declared non-constitutional by Decision CCR no.23 din 20.01.2016 (O.M. No. 240 of 31 .01.2016).

⁴ See art. 340-341 C.C.P.

⁵ Maintaining the preventive measures, M. Udroui, s.a., *op. cit.*, p.197.

⁶ Art. 245 para 1 C.C.P.

⁷ Art. 249 C.C.P.

⁸ See the attribution of the judge of rights and freedoms, N. Volonciu, s.a., *Noul Cod de procedura penala comentat*, Hamangiu, Bucuresti, 2014, p. 131.

⁹ M. Udroui ș.a., *op. cit.*, p. 490.

¹⁰ M. Udroui, *Sinteze și grile, Procedura penală. Partea specială*, C.H.Beck, București, 2016, p.147.

accused could participate if the court deems it necessary. As a result, the prosecution of the accused falls within the jurisdiction of the judge who participates in the proceedings of the preparatory hearing and, at the preparatory hearing, the court could order the return of the case for completion or restoration of the criminal prosecution, if the provisions of procedural steps were not complete which guarantee the establishment of the truth or the classification of the case and the termination of the criminal proceedings, if it was aware of the existence of one of the reasons for preventing the commencement or prosecution of the case.¹¹

The comparative law analysis reveals that although the source of inspiration for the Chamber of the Preliminary Chamber is found in the German¹² and Italian Penal Procedure Code, the national procedure of the preliminary chamber resulting from the modification of the NCPP through LPANCPP shows little similarities with the institution of the Preliminary Chamber provided by art. 199-204 of the Code of German Penal Procedure, respectively with the institution of the preliminary hearing (*udienza preliminare*) provided by art. 418-425 of the Italian Code of Criminal Procedure.

In the German criminal proceedings, the proceedings before the judge, after the indictment is made and before the commencement of the trial is non-public but contradictory with the prosecutor's participation and the defendant's summoning; this preliminary procedure leads either to a solution to commence a trial or a solution to close the case; (if there are sufficient grounds to believe that the person who has been convicted has committed an offense of which he is accused) has no right to verify the lawfulness of the criminal proceedings or evidence administered during the criminal prosecution, may administer evidence, can hear the defendant.

In the Italian criminal procedural law the preliminary hearing procedure before the judge is non-public, but contradictory with the prosecutor's participation and the summoning of the defendant and injured person; the preliminary hearing shall not be limited to verifying the legality of criminal acts or evidence administered during the criminal prosecution, the judge may also check whether the accusation is well

founded, administer evidence, hear the defendant or analyse the complete character of the prosecution and order completion of the criminal prosecution.

The procedure of the preliminary chamber is a new phase of the criminal trial¹³ (and not a stage of the trial phase) in which the preliminary chamber judge carries out a precisely determined objective, namely analyses the lawfulness of the administration of evidence, the referral of the court by indictment and the acts performed by to the criminal prosecution bodies, thus *preparing the next stage of the criminal trial for the purpose of achieving the purpose of the criminal trial*; the beginning of the judgment phase is the consequence of the judge's preliminary ruling; in the same regard, the Constitutional Court stated in Decision no. 641/2014 the following: "Thus, in the light of the procedural attributions entrusted to the Preliminary Chamber Judge, in the context of the separation of judicial functions according to the abovementioned Law, the Court concludes that it has the function of verifying the legality of the referral or non-adjudication, **and in the legislator's view, this new procedural institution does not belong to either criminal prosecution or judgment, being equivalent to a new phase of the criminal process.**

The procedure of the preliminary chamber was entrusted, according to art. 54 NCCP, to a judge - the preliminary chamber judge - which activity is circumscribed to the same material, personal and territorial jurisdiction of the court of which he is a party, conferring on this *new procedural procedure* a jurisdictional character. However, according to the jurisprudence of the Court of Justice, the Court notes that „*this action does not concern the merits of the case, and the procedural act exercised by him not quoting or postponing, in a positive or negative sense, the essential elements of the conflict report: deed, person and guilt.*”

Within the time limit set by the Preliminary Chamber Judge, the defendant / injured party / civil party / civil responsible party can file requests and exceptions to invoke *the lack of competence of the prosecution bodies, the unlawfulness of the referral / notice* (for example, the failure to state the deed in the indictment), *the unlawful administration of the evidence of the evidence* (the unlawful conduct and

¹¹ M. Udrouiu, *op. cit.*, p.147.

¹² The Commission for the elaboration of the new code set up within the Ministry of Justice has been advised by German experts and professors within IRZ (The German Foundation for International Legal Cooperation).

¹³ It is well established in the doctrine that *the procedural stage* comprises a set of processing and procedural acts and measures, carried out in the order and in the forms prescribed by law, by the judicial authorities and the parties to the trial, fulfilling a limited objective in achieving the purpose of the criminal proceeding. The objective of a procedural phase is the preparation of the next procedural phase, until the final phase of the criminal process is reached". (Gr. Theodoru, *Tratat de procedură penală*, ed. 2, Hamangiu, București, 2012, p.544). For the purposes of the procedural stage of the preliminary chamber procedure is also the Decision no. 18/2014 of the Board of the High Court of Cassation and Justice, whereby the Supreme Court of Appeals was notified in the interest of the law (file no. 6/2014), stating the following: „In such a procedural circumstance, the suspension of the commencement of the trial, the appeal of the contestation results in the prolongation of the procedural stage of the preliminary chamber until the time of the settlement of the contestation stipulated in art. 347 of the NCCP and of the final remaining of the conviction on the appeal. Given that the case is in *the preliminary stage of the preliminary hearing* until the appeal is settled, the procedural provisions applicable in the matter of preventive measures up to the moment of resolving this appeal are the provisions of art. 348 of the same Code on Preventive Measures in the Preliminary Chamber Procedure, the provisions of Art. 207 on the verification of preventive measures in the preliminary procedure and the provisions of Art. 205 concerning the appeal against the decision ordering preventive measures in the preliminary-chamber procedure”.

computer search in the absence of the defendant, with witnesses without the defendant's acknowledgment of the date of the hearing, etc.), *the illegality of the investigation, the making of procedural / procedural acts by criminal prosecution bodies* (for example, the unlawful prosecution of a criminal offense for an act for which criminal prosecution has not been initiated or extended); thus, the incidence of absolute or relative nullity, ie the exclusion of unlawfully or unfairly administered evidence, can be invoked¹⁴.

In the motivation of the Constitutional Court Decision no. 641/2014 resulted that **the defendant or his lawyer may request the preliminary chamber judge to administer evidence**¹⁵ in order to prove the unlawfulness of the criminal prosecution or the evidence administered; by amending the provisions of art. 345 par. (1) NCCP by Law no. 75/2016 stated that within the set timeframe the preliminary chamber judge shall settle the applications and exceptions made or the exceptions raised ex officio on the basis of the works and the material in the criminal investigation file **and any new documents submitted**. Taking into account the considerations of the **Constitutional Court Decision no. 641/2014, that limitation on the principle of the freedom of evidence in relation to the subject-matter of the preliminary-ruling chamber appears to be unconstitutional**; thus, by Law no. 75/2016 is attested, in other words, that the evidence of the provocation or pressure of the prosecuting authorities on witnesses / suspects or indicters to obtain statements in the desired sense of the accuser can be proved only by new documents¹⁶.

Mainly, the Preliminary Chamber Judge can invoke ex officio the absolute nullity cases provided by art. 281 par. (1), e) and f) NCCP; there may be situations in which the Preliminary Chamber judge also invokes the absolute nullity provided in Art. 281 par. (1), a), b) or d) of the NCCP [for example, when the absolute nullity of the conclusion of the judge of rights and freedoms, whereby the issuance of the technical supervision mandate was ordered when the conclusion was issued by an incompatible judge, from a material or personal incompetent court (inferior to the appropriate one) in a procedure conducted without the prosecutor's participation].

The Preliminary Chamber judge cannot invoke ex officio the cases of relative nullity, which, according to Art. 282 para. (2) NCCPs may be invoked only in the course of criminal proceedings by the suspect, defendant, prosecutor, other parties or injured party.

The provisions of art. 344 para. (4) NCCP as amended by Law no. 75/2016 no longer refer to the need to communicate to the prosecutor the applications and exceptions made by the parties or the injured

person or the communication between those participants of the requests and exceptions made; in the case of complex cases in which requests or exceptions are filed even at the time set for the controversial debate, the prosecutor, parties or procedural subjects may, however, request a time limit to specify their procedural position in relation to the claims and exceptions invoked¹⁷.

The contradictory nature of the preliminary-stage phase is not primary, but a consequence of declaring unconstitutional procedural provisions governing the written and non-contradictory nature of the preliminary proceedings chamber.

The phase of the criminal proceedings in the preliminary-ruling procedure results, first, from the explicit regulation of this phase in a distinct title from that of the decision in the special part of the Code of Criminal Procedure.

Even if the Preliminary Chamber judge does not verify the merits of the evidence or the trial, its role is as important as the role of the court, since its rulings on the lawfulness of the prosecution can have a significant reflex on the settlement of the criminal proceedings, given that the basis of any criminal proceedings is the probation.

It should be noted that, in addition to proceedings in the preliminary chamber stage, the Criminal Procedure Code confers on the judge of preliminary chamber proceedings and derived competences¹⁸ in the matter of special confiscation, total or partial dissolution of a document after the prosecutor has ordered a non-adjudication confirmation / refusal to reopen the criminal prosecution or to settle the complaint against the classification solutions, respectively to verify the legality and the validity of the decision to renounce the prosecution. For these derived competences, the legislator established its own procedural rules, the provisions of art. 342-347 C.C.P. not establishing the common law on them.

It must be pointed out that the Preliminary Chamber Judge has the same material, personal and territorial jurisdiction as that of the court of which it is a member, its functional competence being different.

The analysis carried out by the preliminary chamber judge has the effect, either of returning the case to the criminal prosecution phase by ordering the return of the case to the prosecutor's office with or without the resumption of the criminal prosecution or the passage of the case into the trial stage by the order of commencement of the trial.

It should be noted that the criminal proceedings do not go through the preliminary chamber phase if the court's request was made with an agreement on the recognition of guilt or if the judge of the preliminary

¹⁴ Conform art. 342 C.C.P. and the following.

¹⁵ Regarding the Constitutional Court Decision no. 641/2014 states that „the impossibility of a preliminary chamber judge *to administer new evidence or to request the filing of certain documents* (...) puts him in a position not to be able to clarify the factual situation, a matter which can be implicitly affected on the legal analysis” (s.n., M.U.).

¹⁶ M. Udrouiu, *op. cit.* p.165.

¹⁷ Ibidem.

¹⁸ M. Udrouiu, *op. cit.*, *Sinteze...*, p.149.

chamber ordered the commencement of the trial following the admission of the complaint against the order by which the prosecutor ordered the closing towards the defendant.

3. Conclusions

The provisions of art. 425 paragraph 7 point 2, b of C.C.P. are criticized in the formulation, as it limits the hypothesis of the abrogation of the judgment and the referral back only if it is found that there is a breach of the preliminary ruling procedure. We consider that the preliminary chamber judge invested with the trial of the contestation will not be able to overcome and will not be able to ignore other cases of illegality invoked and found, having the obligation to declare the nullity of the contested conviction in the cases provided by art.

281 C.C.P. and, as a consequence, to declare the admission of the appeal, the annulment of the contested judgment and the referral of the case to the Preliminary Chamber Judge, for the retrial.

We appreciate that by regulating the double degree of jurisdiction in this matter, the Romanian legislature provided a superior standard to that stipulated by art. 2 of the Additional Protocol no. 7 to the European Convention and, therefore, the procedural parties and subjects must be effectively granted the right to two degrees of jurisdiction. However, the above-mentioned deficiencies lead, in the absence of a referral case, to resolving requests and exceptions regarding the legality and loyalty of the first and last criminal investigation by the judicial control court, whose hierarchical control function is devoid of substance in the absence of an effective judgment at first instance.

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