SOME CONSIDERATION REGARDING THE SCOPE OF MEDICAL SAFETY MEASURES IN THE CASE OF NON-TRIAL ORDINANCES

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Abstract

The medical hospitalization and medical treatment are medical safety measures can be taken across the duration of criminal cases and aim to remove a state of danger and prevent the illicit acts provided by the criminal law. In accordance with GEO number 80/2016, the legislator introduced the possibility of taking these safety measures of a medical nature both in situations where a solution of non-prosecution, respectively filing or waiving the criminal investigation is ordered.

Thus, from the corroborated interpretation of the provisions of art. 315 para. 2 lit. a, of the C.p.p. and art. 318 para. 8 of the C.p.p., it appears that the ordinances by which the prosecutor orders a solution of non to send to court may include provisions regarding the notification of the judge of the preliminary chamber in order to take, confirm, replace or terminate said medical safety measures.

Regarding the prosecutor"s request through the order of dismissal or waiver of criminal prosecution of the judge of the preliminary chamber to decide on a medical safety measure, the specialized doctrine and the judicial practice have outlined two opinions.

In a first opinion, it is considered that the notification of the judge of the preliminary chamber in order to take a safety measure of a medical nature must be made only after the non-trial solution remains final.

According to the second opinion, the prosecutor is not obligated by any procedural condition to respect a specific term when he notifies the judge.

The present paper aims to analyze the arguments of the two opinions by means of analysing the legal doctrine, the relevant jurisprudence in the matter, but also to the standards imposed by the EDO Convention.

Keywords: *medical hospitalization, medical treatment, non-litigation solutions, prematurity, social danger.*

1. Introduction

The medical safety measures are ordered in a criminal trial against a person who has committed an unjustified act prohibited by the criminal law and who poses a danger to society.

In order to order a medical safety measure, it is not necessary for the perpetrator to have committed a crime, since it is sufficient for him to commit an unjustified act provided by the criminal law, and to present a danger to society due to a mental illness or infectious disease or as a result of the chronic consumption of alcohol or psychoactive substances.

Thus, beyond the situation of taking a medical safety measure by the decision to convict the person accused of committing the crime, in the judicial practice we encounter more and more cases in which the obligation to medical treatment or hospitalization are requested by the prosecutor and ordered by judge after non-court solutions.

This study aims to present the procedural steps to be followed in this procedure and to analyze the issues and difficulties involved.

We are going to analyze the two existing opinions in the judicial practice regarding the moment of notifying the judge of the preliminary chamber with the proposal to order a medical security measure, by reference to the purpose and meaning of the applicable criminal procedural norms.

2. Content

Medical safety measures have both an immediate purpose, that of removing a state of danger, and a mediated purpose[1], namely the prevention of illicit acts.

By their nature, medical safety measures presuppose the interference with the rights of individuals.

Medical hospitalization is a real deprivation of liberty, and the conditions of its disposal must be in accordance with the provisions of the E.C.H.R..

The nature of the institution of medical hospitalization - a safety measure of a medical, curative nature, implies a deprivation of liberty, as implied in the jurisprudence of the E.C.H.R. in the matter[2], notwithstanding the fact that such a measure can only be taken if at least three conditions are met.

Thus, the illness (alienation) must have been clearly established; second, the disorder must be of such magnitude as to justify hospitalization; third, hospitalization can be extended only if the persistence of this medical condition is proven.[3]

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[1] Mihail Udroiu, Drept penal. Partea generală, Ediția a 3-a, Editura C.H. Beck, București, 2016, p. 419.

[2] Case of Filip c. Romania, ECHR rulling 14.12.2006.

[3] Case of Johnson c. United Kingdom, ECHR rulling 24 octombrie 1997.

The jurisprudence of the E.C.H.R. has established that not only violent behavior poses a danger to society, but any action or inaction that infringes on the social values protected by the criminal law, namely any act infringing on its provisions.

The E.C.H.R. considers that no deprivation of liberty of an alienated person can be considered in accordance with Article 5 para. 1 e) if it was decided without taking into consideration the opinion of a medical specialist.

The deprivation of liberty, in the form of hospitalization, is such a serious measure that it is only justified if the less severe measures have been considered as insufficient to ensure the protection of both the personal or public interest.

It must therefore be held that the deprivation of liberty of the person concerned is indispensable on the basis of the particular circumstances of the case.[4]

Thus, from the perspective of the standards imposed by the E.C.H.R. and the consistent jurisprudence of the E.C.H.R. on the medical security measures (especially those of deprivation of liberty) it is essential that prior to ordering such a measure an expertise be performed to ascertain the health of the individual.

Regarding the procedural moment of taking said medical safety measures, it is found that they can be taken either provisionally, during a criminal trial, or definitively, at the end of the criminal trial, by the decision to convict, acquitt, terminate the criminal trial or by the order of waiver of the criminal investigation.

In essence, the medical safety measures, taken both during the criminal process and those ordered at the end of it, are temporary procedural measures, the duration of which is influenced by the evolution of the medical situation of the person.

The main difference is that the temporary medical safety measures produce are in effect only during the criminal trial, whereas those taken by means of the final decision in the case or after a solution of non-prosecution, remain in force until the perpetrator recovers, regardless of the evolution of the criminal process.

According to art. 245 para. 1 of the Criminal Procedural Code, the judge of rights and freedoms during the criminal investigation, the judge of the preliminary chamber, during the preliminary chamber procedure or the court, during the trial, may order the measure of obligation to medical treatment or medical hospitalization, according to art. 109 or art. 110 of the Penal Code.

The medical safety measure provided for in Article 109 of the Criminal Code consists in obliging the suspect or defendant to regularly follow the medical treatment prescribed by a specialist.

As to the measure mentioned in Article 110 of the Criminal Code, it consists in the involuntary admission of the suspect or defendant to a specialized medical care unit.

Both measures shall be in effect until the person recovers or until an improvement in his health occurs, sufficient to remove the state of danger.

If a medical safety measure has been taken provisionally, at the time of completion of the criminal proceedings it will again be subject to review by a judge.

In the situation of pronouncing a criminal decision, according to art. 404 para. 4 lett. d. of the Criminal Code, the court is obliged to rule on the needed security measures, including on a medical one.

In the phase of the criminal investigation, the provisions of art. 246 para. 13 in accordance with art. 248 para. 14 of the Criminal Procedural Code, which stipulates that in case of ordering a non-court solution, the prosecutor will notify the judge of the preliminary chamber for confirmation or, as the case may be, replacement or termination of the medical security measure.

In order to prevent situations in which, although it is necessary to undergo a medical safety measure, due to the intervention of a non-prosecutorial solution, it is no longer be possible to order the provisional application of such measures, the legislator allows a request to the judge of the preliminary chamber.

Thus, according to the provisions of art. 315 para. 2 letter e, of the Criminal Procedural Code, the non-prosecutorial ordinance should mention provisions expressed in art. 286 para. 2, as well as provisions regarding the notification of the judge of the preliminary chamber with the proposal of ending the security measures provided by art. 109 or 110 of the of the Penal Code, in full accordance with provisions of art. 246 para. 13.

Also, according to art. 318 para. 8 of the Criminal Procedural Code, the ordinance ordering the renunciation of the criminal investigation should include both the aspects provided by art. 286 para. 2 of the Criminal Procedural Code, as well as the provision provided by art. 315 para. 2 lett. E of the Code of Criminal Procedure regarding the notification of the judge of the preliminary chamber regarding the taking, confirmation, replacement or termination of medical safety measures.

According to art. 246 para. 13, in case of a solution of not to send to court, the prosecutor notifies the judge of the preliminary chamber for the confirmation or, as the case may be, the replacement or termination of the measure.

The latter, in the council chamber, with the participation of the prosecutor, listens, if possible, to the person subject to the provisional measure, in the presence of his lawyer, and, after performing a forensic examination, decides by means of a reasoned rulling. An appeal may be lodged against the decision, within 3 days of the ruling, which shall be resolved by the

[4] Case of Litwa c. Poland, no. 26629/95, § 78, ECHR 2000-III.

judge of the preliminary chamber of the hierarchically superior court to the notified one or, as the case may be, by the competent panel of the High Court of Cassation and Justice.

In the judicial practice and in the specialized literature, the issue of the moment when the notification of the judge of the preliminary chamber was made with the proposal to take a medical security measure, according to the provisions of art. 315 para. 2 lett. e of the Criminal Procedural Code and art. 318 para. 8 of the Criminal Procedural Code.

According to one opinion[5], the judge of the preliminary chamber invested with the proposal to take the measure of the medical hospitalization or the obligation to medical treatment must immediately rule on the request of the Public Ministry, even if the solution of non-prosecution is not yet final.

This hypothesis is encountered in situations where the request is made:

- by a classification ordinance against which a complaint was filed in the procedure provided by art. 340-341 of the Criminal Procedural Code;
- by a filing ordinance that can still be challenged within 20 days from the communication, according to art. 339 para. 4 of the Criminal Procedural Code;
- by an ordinance of renunciation of the criminal investigation which has not yet been confirmed by the judge of the preliminary chamber, according to art. 318 para. 15 of the Criminal Procedural Code

The supporters of this jurisprudential orientation appreciate the fact that since by modifying art. 315 para. 2 lett. R of the Code of Criminal Procedure, the legislator established the possibility for the prosecutor to notify the judge of the preliminary chamber to take the medical safety measure, provided by art. 109 and art. 110 of the Criminal Code, irrespective of the definitive or non-definitive character of the solutions for filing or waiving the criminal investigation.

In this opinion it is argued that the provisions of article 315 par. 2 lett. E of the Criminal Procedural Code allow a notification of the judge of the preliminary chamber, without conditioning the admissibility of the notification of any procedural conditions, the judge being allowed to analyze the substantive conditions for ordering such a measure.

It is noted that a contrary interpretation, in terms of waiting for the finalization of the solution of classification or waiver of criminal prosecution, would be excessive, unforeseen by law and sometimes likely to perpetuate a state of danger that must be removed immediately and not after finalizing the non-litigation solution[6].

The second opinion states that the judge of the preliminary chamber can rule on the request to take a medical security measure only after the solution mentioned earlier remains final, respectively after the 20 days term from the moment it reached the recepient; after the rejection of the complaint against it; after the admission of the complaint, but with the change of the classification ground; after the confirmation of the solution of the waiving of the criminal investigation by the judge.

It should be noted that in the case of admission of the complaint in the procedure mentioned in art. 341 para. 6 lett. c, para. 7 lett. d of the Criminal Procedural Code, it is mandatory that the new ground retained by the judge of the preliminary chamber should constitute an unjustified act incriminated by the criminal law, without it being absolutely necessary to constitute a crime.

If the prosecutor requests a medical safety measure after the closing a case, in, for example, one of the cases provided by art. 16 para. 1 of the Code of Criminal Procedure regarding the non-existence of the deed, the lack of evidence of the deed[7], the lack of incrimination of the deed in the criminal regulation or the existence of a justifying cause, the request should not be admitted.

Medical safety measures may be taken, in accordance with art. 107 para. 2 Code of Criminal Procedure only against that person who committed an unjustified act incriminated by the criminal law,.

Regarding the waiver of the criminal investigation, ordered by the prosecutor by ordinance or by the indictment act of other participants, the medical measure becomes final when the request for confirmation of the solution by the judge of the preliminary chamber is granted, in accordance with the procedure provided by art. 318 of the Criminal Procedural Code.

As far as we are concerned, we agree with the second opinion expressed in the legal doctrine and in the judicial practice regarding the moment of the possibility of analyzing the proposal to take a medical safety measure, namely after a final solution of classification or waiving of the criminal investigation.

Thus, the moment of formulating the request for notifying the judge regarding the taking of a medical safety measure must be only when the non-referral solution remains final.

A contrary interpretation, which would allow a definitive security measure to be taken before the final clarification of the fact that the criminal action has been extinguished, cannot be accepted.

It is particularly important to distinguish between the two categories of medical safety measures, namely provisional and definitive measures.

By reference to art. 245 para. 2 of the Criminal Procedural Code and art. 247 para. 2 of the Criminal Procedural Code, both types of medical safety measures have a limited duration in time, namely until the recovery of the individual, the improvement of his

[5] Penal Decision no. 8 of 07.01.2021, of the Prahova Tribunal, unpublished; Penal Decision no. 471 of 31.12.2021, of the Prahova Tribunal, unpublished.

[6] Penal Decision no. 471 of 31.12.2021, of the Prahova Tribunal, unpublished.

[7] Criminal sentence no. 17/22.02.2021, of Câmpina District Court, unpublished.

health or the when the state of danger that led to the measure has passed.

If in this respect the two types of medical safety measures are similar, the main difference between them should be noted.

Provisional security measures have their effects only within the limits of the criminal process and can be applied only while the person is a suspect or defendant in a criminal case.

The temporary medical hospitalization and temporary obligation to medical treatment join can be viewed as accessory measures to the criminal process, their existence being limited to its duration.

As soon as the criminal proceedings are completed, regardless of the procedural stage they have reached, these provisional measures shall be subject to a new judicial review.

From the interpretation of art. 246 para. 13 in accordance with art. 248 para. 14, after a decision not to prosecute, the prosecutor is obliged to refer the matter to the preliminary chamber judge in order to decide on the confirmation, replacement or termination of the measure.

After the judge is notified regarding the confirmation, replacement or termination of the security measure that was already provisionally ordered, the request is to be analyzed in accordance with the procedure provided by art. 246 para. 13.

The judge will hear, if possible, the person subject to the provisional measure, in the presence of his lawyer, and after performing a forensic examination, will rule by reasoned decision.

Corroborating this text with art. 246 para. 2 of the Criminal Procedural Code and art. 248 para. 2 of the Criminal Procedural Code we find that in most cases, an expertise has already been undertaken at the time of the provisionally security measure.

However, in order to have a more recent perspective on the evolution of the health of the subject to the medical safety measure, in practice a new forensic examination is often undertaken.

In order for the security measures to remain definitive, these steps shall be taken after the criminal process is completed with a solution of non-prosecution.

We recall that the reason why the temporary medical hospitalization and temporary obligation to medical treatment are not definitive (without including in this reasoning the time-limited nature of medical safety measures in general) is the very fact that they were ordered within the confines of the criminal process and their duration cannot exceed the moment the criminal process is finalized.

At that moment, if it is considered that the substantive conditions are met (the respondent commits an unjustified act incrimined by the criminal law, the existence of a state of danger that originates from an illness, etc.) the judge of the preliminary chamber will decide, this time definitively, on the confirmation, replacement or termination of the medical safety measure.

Under the same conditions, stemming from the interpretation of art. 315 para. 2 lett. e of the Criminal Procedural Code, the judge of the preliminary chamber will analyze and will also rule on a firstly requested proposal when the requested measures have not already been taken during the criminal investigation.

However, in these conditions, we consider that the notification of the preliminary chamber judge is a subsidiary provision to the solution of dismissal or waiver of criminal prosecution, its existence being totally dependant on the principal solution, which is necessary to become "*final*".

That is why, in general, prosecutor"s offices send files to the preliminary chamber judge for medical security measures (as well as for ordering the special confiscation or revocation of a certain document), after the solution of waiving the criminal investigation has been confirmed or the complaint against the filing solution was rejected, or no complaint was filed within the legal deadline.[8]

The medical safety measure depend symbiotically on the legality and validity of the solution of classification or waiver of criminal prosecution.

Otherwise, should the classification solution be annulled by the hierarchically superior prosecutor or by the judge of the preliminary chamber, and the criminal investigation continues its course, the provisions of art. 315 para. 2 lett. e, of the Criminal Procedural Code may be breached.

By analyzing the instances when the medical security measure is taken before the non-trial solution becomes final, we could encounter situations in which these are indefinite, irrespective of the completion of the criminal process.

We could also encounter the situation in which, according to art. 341 para. 7 lett. C of the Criminal Procedural Code, the judge would admit the complaint against the dismissal, would annul the solution and would order the beginning of the trial, while a final medical security measure is still ongoing.

The judge may consider that the reason that was the basis of art. 549 index 1 of the Criminal Procedural Code (procedure in which it is necessary to finalize the classification solution) must be transposed by analogy also in the case of a medical safety measure.

In support of this opinion we also mention the fact that unlike the confiscation procedure in case of classification, regarding the paradigm of the medical security measures which may last until the end of the criminal investigation, the prosecutor can use art. 245-248 of the Criminal Procedural Code which clearly underline the provisional character of the obligation to

[8] Minutes of the Meeting of the Presidents of the Criminal Sections of the High Court of Cassation and Justice and of the Courts of Appeal - 18.12.2020, p. 50, accessed at *http://inm-lex.ro/wp-content/uploads/2021/03/Minuta-intalnire-presedinti-sectii-penale-18-decembrie-2020.pdf.*

medical treatment or temporary medical hospitalization.

With regard to the argument put forward in support of the first case-law, namely the existence of a delay in taking a measure designed to remove a state of danger, we consider that this is precisely the role of the provisional safety measures, to remove the state of danger, provisionally, until the non-litigation solution is final.

Thus, we consider that it is imperative to finalize the classification solution, so that, at the time when the preliminary chamber judge is notified, the deadline for filing the complaint against the classification order has expired or the complaint has been rejected, or admitted, with the confirmation of the solution but with a different basis, since in the latter case the criminal investigation is definitively completed and the basis of the solution is foreseeable.

Given the deprivation of liberty involved in the measure of hospitalization, the judge would consider that the notification must be made as soon as possible after the finalization of the dismissal solution.

We consider that it is necessary for the dismissal order to remain final prior to the notification, because even if it remained final between the time of the notification and the time of the decision, the procedural rights of the suspect or defendant would be harmed, since he would no longer effectively benefit from the double degree of jurisdiction conferred by law.

3. Conclusions

In conclusion, in the judicial practice and in the doctrine there are different orientations regarding the moment when the judge of the preliminary chamber should be invested with the claim to take some medical safety measures.

Taking into the to the scope of establishing the right to notify the judge of the preliminary chamber according to art. 315 para. 2 lett. E of the Criminal Procedural Code, and the nature of the two types of medical safety measures, we consider that the judge of the preliminary chamber can rule on the request to order the taking of the measure of medical hospitalization or the obligation to medical treatment **only after the non-litigation solutions remain final**.

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