PRELIMINARY CHAMBER, A NEW INSTITUTION IN THE ROMANIAN PROCEDURE LAW

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Abstract

The Prosecutor, in charge with the criminal prosecution, informs the Court through the indictment drawn up by him. Given its importance, as Court informing document, the law provides special treatment for its content and form. Both the end of the criminal prosecution and the arraignment, as distinct moments of the procedure, are parts of the criminal prosecution, considered criminal trial phase. The New Criminal Procedure Code introduced this new phase, the preliminary chamber, with the purpose to verify the lawfulness of arraignment. Thus, incorrectly drawn up files are stopped from being presented before the Court.

Keywords: *criminal trial, preliminary chamber, judge, prosecutor, judge, defendant.*

1. Introduction

An important new entry in the New Criminal Procedure Code is the preliminary chamber, an institution which leads to the new judicial position provided by art 3 paragraph 1 of this Code, specialized in examining the lawfulness of lawsuits.

The Romanian lawmaker thought that it was necessary to introduce it, given the judicial environment, in general, and, in particular, the lack of celerity in the criminal trials, especially, the lack of trust of the justice seekers in the justice action, together with the social and human costs resulted by the criminal trial, by a high consumption of the time and financial resources.

The lawmaker based the introduction of the preliminary chamber on the desire to observe to the requirements of lawfulness, celerity and equity of the criminal trial.

The preliminary chamber is a new concept aiming at creating a legal frame, able to eliminate the excessive length of the criminal procedure during the trial phase and assuring, at the same time, the lawfulness of the lawsuit and the evidence.

Also, another aim was to eliminate the deficiencies that had led to decisions of the European Court of Human Rights against Romania for exceeding length of the criminal trial.

2. Preliminary Chamber

The procedure of the preliminary chamber encompasses rules that eliminate the possibility to further return of the case to the prosecutor, during the trial phase, as the lawfulness of the evidence and the lawsuit had already been decided upon by this preliminary chamber.

The Judge of the preliminary chamber is bound to verify the conformity of the evidence produced during the criminal investigation, together with the guarantees related to the procedure lawfulness.

Thus, the lawfulness of the evidence production has been closely related to the assurance of the equity character of the criminal trial.

If the preliminary chamber judge finds necessary to invalidate the evidence proof, due to an essential violation of the procedure rights of one party, he will eliminate it as proof of evidence. The lawmaker focused on improving the justice action and the circumstances that determine the beginning of the justice administration.

The content of the provisions regulating the institution of the preliminary chamber and the solutions adopted represent the guarantee for the conditions so as the procedure during the criminal investigation have a fair character for a judgment on merits.

The presentation of the motives of the law project on Criminal Code, which became Law no 135/2010, said that: „when analyzing the deficiencies of the procedure system, appeared the need for a modern system concept, able to answer the necessity to create a justice adopted to the social expectations, and also the necessity to improve the quality of this public service”[1].

The new Procedure Code stipulates that this preliminary chamber is a new institution, whose purpose is to create a modern legal frame.

At the beginning, the initial thesis on creating the new Procedure Code, approved by the Romanian Government Decision no 829/2007, this trial phase is called preliminary step. For unknown reasons, the lawmaker gave up to this expression.

The preliminary chamber procedure is not completely new for us; such phase existed in the

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[1] See Part 2 called – *Reason for Making the Law* no 1 – *Description of the current situation,* of NCPP Project, p. 1.

Romanian legal system known as preliminary meeting.

This preliminary meeting was introduced b the Decree no 506/1953, abrogated afterwards by the Decree no 473/1957.

Article 269 of the first legal act provided the following: "the files received from the prosecutor are to be examined in a preliminary meeting so that the court, judging the merits, receives only the cases where the evidence is necessary, sufficient and legally administrated, and thus, the court, judging the merits, could decide whether the facts are supported by evidence or not and whether the defendant committed them or not and therefore, found guilty for this".

We can easily notice that the institution of the preliminary meeting was a procedure step similar to the preliminary chamber, easily described by the definition of the late, "a procedure step, preamble to the judging step, when the judge, especially assigned for this, according to the competence of the court, verifies the lawfulness of the court, of the evidence or of the procedure actions carried out by the criminal investigating bodies"[2].

We can see that both procedures represent preliminary steps of the trial, with the purpose to analyze the act of notification of the Court in order to find the observance of the law requirements. The aim of these procedures is to stop files that have been incorrectly drawn up, before being presented before the judging Court.

The institution of the preliminary meeting led to many judicial debates and controversies[3] on intricacy resulted from the content of the regulation on aspects on which the Court could rule decisions, such as guilt of the author or on which the Court could issue appreciations on the probative character and the truthfulness of the pieces of evidence.

Law no 3/1956 brought amendments on the institution of preliminary meeting in order to reach an agreement with other institutions of this law.

For instance "the writ of summons" became „accusation conclusions".

The same law set that the Court President and the prosecutor shall draw up a report instead of a "President's presentation" and "Prosecutor's report".

During the preliminary meeting they used to acknowledge the classification and the cease of the criminal case, and according to the same law, the Curt could re-open a criminal case after it had been ceased by the effect of classifying it in the preliminary meeting. This re-open was made only at the express demand of the prosecutor and only pursuant to the reasons proposed to be reviewed, with precise application. For this reason, the prosecutor had to attach to his request, the papers with the new circumstances to be analyzed, as base for his action. Therefore, the Prosecutor would draw up new accusations, brought before the Court, and the trial was re-begun with the arraigning phase, followed by a new preliminary meeting, carried out in the known circumstances.

In practice, new debatable aspects appeared concerning, for instance, the fact that during the preliminary meeting the Court had to decide or not, on the guilt of the defendant, and then decide on the arraignment, being sure about the guilt of the accused person. Also, another controversy was related to the circumstance where the Court decided on the probative character of the evidence, on their truthfulness, whether the case was classifiable or not if there were illegal or doubtful pieces of evidence, or pieces of evidence fought against with others proving the lack of guilt[4].

It was thought that the main characteristic of the preliminary meeting was to assure the best conditions for the judgment on merits, not being able to anticipate the solution ruled by the Court of First Instance.

The preliminary meeting decided whether the pieces of evidence were legally administrated and sufficient, leading to the preparation for the trial and helping the Court to decide if the facts were supported by evidence and the if accused found guilty for having committed them.

Proof analysis consisted in verifying whether they were legal and also whether they had been legally administrated, according to the Criminal Procedure Law. Thus, any possibility to verify the guilt of the author was eliminated.

At that time, there was an opinion about the judges of the preliminary meeting who shall not adopt "a preconceived opinion about the guilt of the accused"; that would take place during the oral contradictory and free debates in the judging session.[5]

Another issue raised by the legal text, at that time, was about the incompatibility of the presence of judges, who had taken part to the preliminary meeting, at judgment on merits. The former Supreme Court decided that judges' participation to the preliminary meeting is not incompatible with their presence in the trial court, as the preliminary meeting doesn't rule on the merits and the arraignment is not a "ruling on the merits"[6].

This, in our opinion, is debatable, because the judge, no matter how impartially he would judge, he couldn't "forget" his opinion on the accused, made during the preliminary meeting; that is why we think

[2] Antoniu G. and Bulai C, *Dictionary of criminal law and procedure*, Hamangiu Publishing House, Bucharest, 2011, p. 110.

[3] Volonciu N., *Amendments of Criminal Procedure Code of R.P.R*, archives of the University of Bucharest "C. I. Parhon" and *Magazine of Social Sciences – Judicial Sciences* 6(1956) , p.161 and follow.; Brutaru V., *Preliminary Chamber, a new institution of the criminal procedure law*, Law 2 (2010), p.2007-2015.

[4] Roman. D at the *Scientific Session* of University *Babeş Bolyai*, Cluj, New Justice 2 (1956), p.262.

[5] Kahane S. , *Course of Criminal Procedure*, Lithography of Education Bucharest, p. 227.

[6] Supreme Court, *Criminal Decision no 324/30 March 1954.*

the decision is not right and it affects the principle of presumption of innocence of the defendant and his right to a fair trial.

The preliminary meeting was justified by the Supreme Court practice[7] because they thought it has the possibility to correct the legal qualification of the facts presented by the Prosecutor; by changing the legal framing of the fact in the preliminary meeting, we can have a classification, due to the amnesty, or due to the lack of the preliminary plea or to the presence of another reason that makes impossible the beginning of the criminal trial. Finding that the alleged fact of the accused, complies with all the features of a more severe crime, the Court, during the preliminary meeting, can change the classification, without sending back the papers to the criminal investigating authorities. The case can be sent back when the evidence are not sufficient for a right qualification. The competence of the preliminary meeting, during the previous legal system, was quite generous. It had the power to rule on all law matters, both the material and the criminal procedure, provided it was not on merits, it didn't anticipate on the trial session, it didn't pronounce on the guilt or absence of guilt of the author.

About the facts, during the preliminary meeting, the Court could decide whether the facts had been or not supported by an intention, and thus, decide on bringing more pieces of evidence or classify the case.

A decision on a classification during the preliminary meeting, due to the presence of a cause which makes impossible the beginning of the criminal trial, or due to the insufficient lawfulness of the actions or data (evidence), the preliminary meeting is not replacing the Prosecutor but verifies whether there are conditions for a judgment on merits, the prosecutor still being the accusing part; the preliminary meeting becomes a preparatory step for the judgment, like an instrument for establishing the truth; the trial session has the exclusive right on stating the truth and the guilt of the author.

Another author[8,9] thinks that: during the preliminary meeting, the evidence cannot be taken into consideration in order to establish the truth as, not being definite, they cannot be considered as object of analysis; the analysis criterion is the evidence value and this value is clear only when the evidence is definitive and considered as a total. Another author thinks it is hard to believe that a judge, who, during the preliminary meeting, has studied the circumstances for arraignment, doesn't have an opinion about the guilt of the defendant. Thus, he could be contested for pre-judgment. We think that judges who presided the preliminary meeting, are no longer compatible with judgment on merits, contrary to the opinion of the Supreme Court. Many authors believe that it is impossible to decide that a charge is well grounded and not to have an opinion about the guilt of the defendant.

During the preliminary meeting, the judge has to reach a decision: whether the defendant shall be found guilty, given the evidence produced during the criminal prosecution and confirmed during the preliminary meeting, and thus the file shall be transferred to be trialed; if the evidence lead to the opposite opinion, the judging panel shall classify the case; and in case the panel cannot reach a verdict, they shall send back the case for a complete criminal prosecution, and if this cannot happen, they will classify the case (in dubio pro reo). Finding out the truth, including the guilt, is an objective both for the preliminary meeting and for the trial phase and eliminates the risk to have the judges, influenced by the actions of the preliminary phase while judging on merits in court room.

Thus we can see that preliminary chamber is not completely new to our legal system and it has predecessors in other similar institutions in compared law.

The New Criminal Procedure Code adopted a new fundamental principle – separation of judicial functions. According to art 3 paragraph 1, the criminal trial is divided into 4 judicial functions: criminal prosecution, provision of fundamental rights and freedoms during the trial, verification of the lawfulness of the arraignment and judgment. The function of verifying the lawfulness of the arraignment, carried out by the judge of the preliminary chamber, doesn't belong to the criminal prosecution phase or to the judgment. Therefore, the judge of the preliminary chamber doesn't participate to criminal prosecution action or to judgment.

The preliminary chamber institution of the New Criminal Procedure Code is very similar to other institutions in the compared law.

In the American procedure system, the preliminary hearing represents an important trial step. Its purpose is to establish whether the evidence procured by the prosecutor is sufficient to justify the accusation brought against the defendant. This preliminary hearing takes place before a judge who, after the prosecutor's speech, gives the defendant the opportunity, through his lawyer, to defend himself, deciding whether there are enough and grounded reasons to bring the case in front of a jury. The jury has the right to reject the evidence if it is not well grounded or to send it forward to the Chamber of the Grand Jury.

If the file is rejected for lacking evidence, the arrested defendant is freed at once. If he is free and the file has been rejected, the defendant is not bound anymore to observe the conditions set by the

[7] Roman D at the *Scientific Session* of University *Babeş Bolyai*, Cluj, New Justice 2 (1956), p.262.
[8] Perju N at the *Scientific Session* of University *Babeş Bolyai*, Cluj, New Justice 2 (1956), p.273.
[9] Kahane S., *Course of Criminal Procedure*, Lithography of Education, Bucharest, p. 227.

prosecution (for instance, not to leave town). Anyway, a file rejection during the preliminary hearing doesn't mean that the Grand Jury cannot lodge another accusation against the defendant, sometimes, afterwards. Thus, an accused can be prosecuted and arrested again, for the same deed, even though his file was rejected during the preliminary. Although the defendant has the right to a preliminary hearing, he can lose this right if the State gets an accusation from the Grand Jury before the preliminary hearing. It is a tactical move of the Prosecutor to avoid the "probable cause hearing".

There are cases when the defendant doesn't have the right to the preliminary hearing, such as the situation when the file is brought before the Grand Jury before the defendant being arrested or an offence, and the defendant finds out about it after the Grand Jury issued a sentence decree.

If the Judge preliminarily heard a file and this has been sent to the Grand Jury for trial, with enough evidence, the Grand Jury is not influenced by the decision of the Judge who sent the file. The Grand Jury can either acquit the defendant either reject the file for lack of evidence. The preliminary hearing shall last for a reasonable time period, meaning "no more than 10 days since the beginning of the hearing, when the defendant is arrested, and no later than 20 days, when the defendant is free".

The justice in the United Kingdom uses the preliminary hearing in order to establish whether there is evidence to justify the arraignment. The accused party has the opportunity to acknowledge the accusation brought against him/her. If there is enough evidence, the judge sends the case for trial and if he thinks there isn't, the case is rejected. The victim of the offence and other witnesses are, usually, compelled, to testify during the preliminary hearing.

In France, the judge of the first instance can use several procedure instruments, such as: issuance of searching warrants, request of producing certain evidence and annulment of others, issuance of warrants for witnesses or demands for experts opinions and testifies. The instruction judge issues and order if there is not a file; or he can decide there is sufficient evidence for a trial and can make a recommendation for the Court of Appeal for a preliminary hearing.

If the Court of Appeal supports the recommendations of the Judge of instruction, they will send the case to the Cour d'Assise, the only Court in France with jury (Court of Appeal and Cour d'Assise are part of the same instance as the Judge of Instruction). The Judge of Instruction is notified through the initial indictment issued by the Public Ministry.

3. Conclusions

The Preliminary Chamber seeks to solve matters on lawfulness of the arraignment and of the evidence.

According to art 54 of The New Criminal Procedure Cod, the judge of the preliminary chamber has competence in: verifying the lawfulness of the arraignment decided by the Prosecutor, verifying the lawfulness of the evidence and of the procedure papers drawn up by criminal prosecution authorities, solving complaints brought against resolutions for no criminal prosecution or arraignment, and also other situations, expressly provided by law.

At the same time the judge of preliminary chamber can judge certain ways of appeal against resolutions for no criminal prosecution or arraignment, but also legal disputes against resolutions on preventive measures in preliminary chamber on conclusions about the solutions of the demands and exceptions of this preliminary procedure.

The preliminary chamber procedure is a written one, of no more than 60 days since the registration of the file. This period includes also the term for solution of possible disputes drawn up, according to art 347 paragraph 1 of the New Criminal Procedure Code, by the defendant and by the Prosecutor against the solution ruled in Conclusions, by the Judge of Preliminary Chamber.

Recent jurisprudence has registered many debates on the sanction for non observance of this term, legally provided. It is considered as a procedural term and by its violation shall not affect the validity of the procedure and of the conclusions of the judge of preliminary chamber, maybe only disciplinary sanctions for him.

Another debate appeared in the jurisprudence is the one concerning the 5 day term given to the Prosecutor by the Judge of Preliminary Chamber in order to remedy possible errors. According to art 346 paragraph 3, letter a of the Criminal Procedure Code, this judge shall rule his decision about sending the case to the Prosecutor's Office if the Prosecutor hasn't remedied the deficiencies within 5 day time.

In absence of deficiencies and if the criminal prosecution was legal and well grounded, the judge of preliminary chamber decides on sending the case to the next phase, judgment on merits, complying with lawfulness, celerity and equity.

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