THEORETICAL AND PRACTICAL CONSIDERATIONS REGARDING THE PROCEDURE OF PRELIMINARY CHAMBER

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Abstract

The paper addresses from the theoretical point of view, but also taking into consideration some practical references, one of the most controversial procedures covered by the Code of Criminal Procedure in force - namely the procedure of preliminary chamber. The study notes that since the entry into force of new criminal legislation and until its writing, this procedural stage has undergone many modifications and adjustments, in particular through the unconstitutionality decisions it invokes and analyses briefly. At the same time, issues of judicial practice resulting from the recent jurisprudence of the national courts facing different problems caused by the causes brought to their attention are also discussed.

Keywords: *criminal trial; Preliminary Chamber; the lawfulness of the conduct of criminal prosecution acts; the object of the preliminary chamber.*

1. Introduction

Animated by the desire to have more celerity in the progress of the Romanian criminal trial, the legislator wanted to speed up its various procedural stages or phases through some of the new institutions included in the Code of Criminal Procedure that came into force on February 1st, 2014. Among the institutions through which this objective would have been achieved is also the procedure of preliminary chamber. In the very explanatory statement accompanying the draft of the new Code of Criminal Procedure, it is stated that "through the institution of the preliminary chamber, the project aims to meet the requirements of legality, celerity and fairness of the criminal process"[1]. The same document presents the preliminary chamber as a "new, innovative institution, which aims at creating a modern legislative framework that would remove the excessive length of proceedings in the trial phase."

At the same time, the stated purpose of regulating this procedure is to "resolve the issues of the lawfulness of the referral and of the lawfulness of the administration of the evidence, ensuring the premises for the speedy resolution of the case". The authors of the explanatory memorandum are even convinced that by regulating the procedure of preliminary chamber: "some of the deficiencies that led to the conviction of Romania by the European Court of Human Rights for violating the excessive length of the criminal trial are eliminated."

The Explanatory Memorandum foresees that it will: "have a direct, positive effect on the speedy resolution of a criminal case" ... by the fact that "the project aims to meet the objective of improving the quality of the act of justice, through punctual regulation, both in terms of the term (maximum 30 days from the registration of the case and not less than 10 days from the same date) in which the preliminary judge of the case is ruling, as well as under the conditions in which he orders the commencement of the judicial inquiry".

As presented, the institution of the Preliminary Chamber offered special positive perspectives on the effects it would have on the pace of the criminal proceedings, implicitly on the duration the criminal trial was going to have under the new Code for Criminal Procedure. However, animated by the desire to have more celerity in the progress of the criminal trial (at any cost we might say), the authors of the new Code for Criminal Procedure have failed to create safeguards to preserve some categories of human rights consecrated at the international level.

As it stands, the doctrine noted that, in order to ensure the celerity expected in the field of the preliminary chamber, the legislator provided a maximum period for the implementation of this stage, it determined that its specific aspects are solved in the council chamber (meaning in the non-public sittings) without the participation of the prosecutor and the parties, the conduct of the procedure taking a predominantly written form[2]. In the same way, we even showed immediately after the entry into force of the new Code for Criminal Procedure that there are some problems regarding how the procedure for preliminary chamber was regulated in this new Code. In particular, we have shown that precisely one of the features characterizing it - the preponderantly written character - casts doubt on the real and effective contradictory (controversial) feature, since neither the

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[1] https://www.senat.ro/legis/PDF/2013/13L010EM.pdf.

[2] B. Micu, AG Paun, R. Slăvoiu, Criminal Procedure, Hamangiu Publishing House, Bucharest, 2014, page 224.

defendant nor the prosecutor have the opportunity to express their views directly before the judge[3].

Given this backdrop of criticisms brought by doctrine and by the judicial practice as well, it came to the situation where the texts governing the procedure for preliminary chamber were subject to constitutional control, and many of them were identified as being in contradiction with the principles enshrined in the Constitution or with internationally accepted standards in the field of human rights protection[4].

Synthetically, the Constitutional Court noted that the rule governing the procedure for the preliminary chamber procedure: a violation of the principle of equality of arms[5] - by that that it provided the prosecutor's exclusive access to the claims and exceptions made by the defendant; by not communicating to the other parties the claims and the exceptions made and by excluding from the course of the procedure for the preliminary chamber the civilly responsible party, the injured party and the civil party. In the same way, the Constitutional Court found a violation of the contradictory (controversial) and oral principles, the proceedings being conducted exclusively based on the documents filed by the parties without summoning them, as well as an obvious breach of the rights of defence by not allowing to administrate other evidence beside the documentary evidence. Equally, the restriction of the prosecutor's participation in the proceedings of the preliminary chamber was deemed to be in breach of the provisions of article 131 of the Romanian Constitution.

In this way, the whole philosophy of the organization and functioning of the preliminary chamber procedure was forced to be rethought and put on the benchmarks that the Constitutional Court set out. This approach was made by the legislator, through the Government Emergency Ordinance no. 82/2014 for the amendment and the completion of the Law no. 135/2010 on the Code of Criminal Procedure[6], respectively, of the Law no. 75/2016 for the approval of the above-mentioned Emergency Ordinance[7]. Therefore, comparing to the initial characteristics, the preliminary chamber appears as radically modified.

The doctrine noted that through the Decision no. 641/2014 of the Constitutional Court the preliminary chamber procedure has radically changed, being much closer to the ECHR's view of a criminal proceedings before a judge, even if it does not end with a ruling on the substance of the criminal charge. In this context, the quoted author characterizes the modification operated by the Law no. 75/2016 on the preliminary chamber procedure as a step forward in the attempt to transform it into a fair procedure[8].

2. About the current regulation of the preliminary procedure for the chamber

Regarding the preliminary chamber procedure, it is appreciated, in some opinions, that it does not have the nature of a distinct procedural phase for the following arguments: the judicial function it involves does not refer to the merits of the case, it does not have the capacity to stop by itself the criminal trial, it only has an intermediate character, it does not have the nature and the size of a procedural phase[9] .

Differently, in other opinions, it is considered that the preliminary chamber procedure is a "new phase of the criminal trial (and not a procedural phase of the trial phase) in which the judge sitting in the preliminary chamber achieves a precisely determined objective, namely, he analyses the lawfulness of the administration of the rules of evidence, of the court's referral through the indictment and of the acts performed by the criminal prosecution bodies, thus preparing the next stage of the criminal trial, that of the trial in order to achieve the purpose of the criminal trial"[10].

We agree with the first of the two opinions expressed, the fundamental argument that makes us accept this solution lies in the fact that, in such a procedure, one cannot reach a solution that will lead to the conclusion of that case. Evidence in this respect is that even if the death of the defendant occurs between the time of the indictment and the completion of the procedure of the preliminary chamber, the judge sitting in the preliminary chamber cannot rule on the merits of the case but he would be bound to order that the deceased is to be arraigned.

Following the changes made to the preliminary chamber procedure by the two above-mentioned normative acts, the doctrine notes that others are currently the characteristics of the preliminary chamber stage. It is appreciated that the decision of the Constitutional Court overturned the characters initially imagined by the legislator for the preliminary

[3] B. Micu, AG Paun, R. Slăvoiu, op. cit. 2014, pages 224-225.

[4] See the decisions of the Constitutional Court on the texts governing the institution of the preliminary chamber: e.g. Decision no. 461/2014 (published in the Official Gazette of Romania, Part I , No. 887 of December 5th, 2014), Decision no. 663 of November 11th, 2014, published in the Official Gazette of Romania, Part I, no. 52 of January 22nd , 2015; Decision no. 552 of July 16th, 2015 , published in the Official Gazette of Romania, Part I, no. 707 of September 21st, 2015; Decision no. 631 of October 8th, 2015 , published in the Official Gazette of Romania, Part I, no. 831 of November 6th, 2015;

[5] To this end, see I. Neagu, M. Damaschin, Treaty of Criminal Procedure, Special Part, Universul Juridic Publishing House, Bucharest, 2015, pages 209-210.

[6] Published in the Official Gazette of Romania, Part I, no. 911 of December 15th, 2015.

[7] Published in the Official Gazette of Romania, Part I, no. 334 of 29 April 2016.

[8] A.D. Băncilă, The Preliminary Chamber after the Decision no. 641/2014 of the Constitutional Court and the Law no.75/2016. New features of the procedure and practical consequences, in Dreptul Magazine no. 9/2016, page 27-28.

[9] A. Zarafiu, Criminal Procedure. General Part and Special Part, CH Beck Publishing House, Bucharest, 2014, page 341.

[10] M. Udroiu, Criminal Procedure, Special Part, CH Beck Publishing House, Bucharest, 2014, page 110-111.

chamber procedure, which made it transformed from a procedure carried out without the participation of the prosecutor, parties and the injured person, with a limited controversial feature between the prosecutor and the defendant and preponderantly written into a procedure conducted with the participation of the procedural actors, completely contradictory and oral in which becomes possible to administer evidence[11].

In another opinion, criticism is made regarding the legislative changes introduced by the Law no. 75/2016, considering that although this normative act should have come under the Constitutional Court's Decisions, the especially Decision no. 641/2014, "quite surprisingly, the legislator did not understand the essence of the Court's reasoning and was not receptive to the judicial practice and to the opinions of the experts drafted after the Decision no.641". Thus, "by misinterpreting the principles of contradiction and the right to an oral hearing before the court, the Law no. 75/2016 returns practically in time, where we were before the Court's decision from November 11th, 2014, on the realm of the non-controversial procedure and of the decisions taken without summoning"[12].

It is particularly criticized that the Law no. 75/2016 amended article 346 paragraph (1) from the Code for Criminal Procedure, which regulates the situation of the passivity of the parties in submitting requests or *exceptions, stipulating that:* "If no requests and exceptions have been formulated within the terms provided for in article 344 paragraphs (2) and (3), nor any objections were raised *ex officio*, upon the expiry of these time-limits, the judge sitting in the preliminary chamber shall declare the lawfulness of the court referral, of the administration of the evidences and of the execution of the criminal prosecution and ***orders the commencement of the trial***. The judge sitting in the Preliminary Chamber shall pronounce his findings in the council chamber, ***without summoning the parties and the injured person and without the participation of the prosecutor, by resolution***, which shall be immediately communicated to them." It is considered that this new regulation is practically a regrettable return to the non-controversial character of the preliminary chamber, as it was before the constitutional court remedied it[13]. The arguments invoked for the support of that assertion are in the sense that the presumption that a party to the criminal proceedings which has not complied with the time-limit granted by the court does not wish to invoke personal procedural nullity before it is lacking legal support. However, we believe that legal support is given by the criticized provision itself, which clarifies a doctrinal dispute generated by the regulatory framework governing the preliminary chamber procedure.

The controversy concerns the legal nature of the term of at least 20 days provided by article 344 paragraph (2) Code for Criminal Procedure, in which requests and exceptions may be formulated on matters which may form the subject-matter of the preliminary chamber. In the doctrine, it was appreciated, first, that this term is a forfeiture term, which makes the requests and the exceptions filed after its passing to be ignored by the judge, being a legal term[14]. Differently, it is considered that the term is not a forfeiture term, but a recommendation, being a judicial one[15].

We believe, however, that given the manner in which the Preliminary Chamber procedure is currently governed, the term of at least 20 days (which may be increased by reference to the complexity of the case) has acquired a clear forfeiture character. In the same sense, in the judicial practice[16] it was appreciated that from the systematic interpretation of the provisions forming the legal framework relating to the procedure of preliminary chamber it results that the legislator has established in this field two types of procedural deadlines with distinct effects:

- An imperative procedural term, absolutely and indissolubly linked to the exercise of the procedural right of the parties or the injured person to formulate requests and exceptions regarding the lawfulness of the complaint, the lawfulness of the administration of evidence or the execution of criminal prosecution acts (this category is considered to circumscribe as well the term provided for in article 345 paragraph (3) from the Code for Criminal Procedure, whose non-compliance by the prosecutor has the binding effect of restitution of the case, according to article 346 paragraph 3 letter c) from the Code for Criminal Procedure)
- A procedural term of recommendation, relative, fixed by the judge sitting in the preliminary chamber for the handling of applications and exceptions, the non-observance of which does not affect the legality of the act performed.

The terms provided by article 342 paragraphs (2) and (3) have the role of disciplining the activities in the preliminary chamber and giving this procedure the speed needed to achieve its purpose. In that context, in the case-law, it is justly appreciated, in our opinion, by reference to how the procedure for preliminary

[11] A.D. Băncilă, op. cit., page 28.

[12] A. Stan, The Preliminary Chamber and the new legislative amendments - short critical observations. How we return from where we left, available at: https://www.juridice.ro/444627/camera-preliminara-si-noile-modificari-legislative-scurte-observatii-critice-cum-ne-intoarcem-de-unde-am-plecat.html.

[13] Idem.

[14] Corina Voicu, Daniel Atasiei, in the *New Code of Criminal Procedure,* coordinated by Nicolae Volonciu, Andreea Simona Uzlau, Hamangiu Publishing House, Bucharest, 2014, page 890.

[15] Mihail Udroiu, *Criminal Procedure, Special Part,* CH Beck Publishing House, 2015, pages 129-130 and Irina Kuglay, in *The Code for Criminal Procedure – Comments on articles,* coordinator Mihail Udroiu, CH Beck Publishing House, 2015, page 912.

[16] ICCJ, Criminal Section, Resolution no.922 / 05.10.2016, unpublished.

chamber is currently regulated, that the term regulated by article 342 paragraph (2) Code for Criminal Procedure has a forfeiture character, which means that the failure to formulate requests and exceptions within this term generates the sanction of forfeiture of the right to formulate them after its expiration. Even in the event of formulating them after that time, the judge sitting in the Preliminary Chamber judge should ascertain the delay in invoking the claims or the exceptions.

While we accept that this is the possible legal solution by reference to the current regulatory framework, we believe that it is susceptible to unconstitutionality itself. Any provision that would have the role of disciplining the conduct of the preliminary chamber procedure cannot lead to solutions that would violate a person's right of access to justice (governed by article 21 of the Romanian Constitution), and which would not allow the establishment with clarity of the object and boundaries of the judgment by reference to the case with which the court is vested. The way in which the procedure for preliminary chamber is currently governed can lead to this negative solution, especially by referring to the fact that the possibility for the court to invoke ex officio requests and exceptions is limited to absolute nullity. In the same sense, it is clear from the case-law that: "... in relation to the content of the provisions of article 282 paragraph 2 Code for Criminal Procedure, the judge sitting in the preliminary chamber cannot, of its own motion, invoke violations of the law which are punishable by relative nullity … As a rule, the judge sitting in the preliminary chamber may censor ... the legality of the evidence and the acts of the criminal prosecution only to the extent that they have been challenged by the parties and, by way of exception, ex officio, under the limitative and restrictive conditions foreseen in article 281 paragraph 1-4 Code for Criminal procedure, regarding the absolute nullities"[17].

A further negative aspect of the way the preliminary chamber procedure is regulated is the limitation of the type of evidence that can be administrated in the preliminary chamber procedure - an aspect that violates the principle of finding out the truth. We take into consideration the provisions of article 345 paragraph (1) Code for Criminal procedure, in accordance with which "... the judge sitting in the preliminary chamber shall settle the requests and the exceptions formulated or the exceptions raised ex officio, in the council chamber, on the basis of the works and the material in the criminal investigation file and any other new documentary evidence being presented, listening to the conclusions of the parties and of the injured party, if present, as well as of the prosecutor." It is noted that the only new evidence that can be administrated in the preliminary chamber is the documentary evidence, although such a limitation does not result from the findings of the Constitutional Court. By the way the text is formulated in the new regulation, situations can may appear where this limitation may lead to the fact where the judge sitting in the preliminary chamber cannot administer evidence (for example, he cannot hear witnesses), issue that leads to the impossibility to determine whether an evidence has been unlawfully or unfairly administrated during the prosecution. Such an impossibility to establish the illegality of the evidence makes it impossible to exclude it from the evidence at the end of the procedure for the preliminary chamber, and after that moment the sanction of exclusion is no longer accepted by the legislator. Thus, determined by the impossibility of finding out the truth about the illegitimate or unfair character of an evidence administered during the criminal prosecution, renders the evidence impossible to be removed from the evidentiary material. We believe that the regulatory solution needs to be reconsidered as it is not in line with the constitutional principles.

3. About the subject-matter of the preliminary camera

Under the article 342 Code for Criminal Procedure, "the subject-matter of the preliminary chamber procedure is the examination, after the indictment, of the jurisdiction and the lawfulness of the court's referral, as well as the verification of the lawfulness of the administration of evidence and the execution of the acts by the criminal prosecution bodies". The doctrine states that the subject-matter of the preliminary chamber procedure is to verify certain aspects: the jurisdiction of the court, the lawfulness (not the merits) of the court's referral, the lawfulness of the administration of evidence by the criminal investigation body, the lawfulness of the criminal prosecution[18].

Similarly, it is considered as purpose of the preliminary chamber procedure to check: the jurisdiction of the court, the competence of the criminal investigation bodies, the lawfulness of the court's referral and the lawfulness of the deed of intimation, the legality and the loyalty of the administration of evidence and the lawfulness of the procedural or procedural acts[19] .

It has been shown in the case-law that the examination of the judge sitting in the preliminary chamber is limited, by the legislator's will, to issues of law which are circumscribed to the requirements related to the form and content of the procedural documents, their concordance with the procedural acts which they incorporate or the legal pertinent provisions in the criminal prosecution phase,

[17] ICCJ, Criminal Section, Resolution no.922 / 05.10.2016, unpublished.
[18] A. Zarafiu, op. cit., page 341.
[19] M. Udroiu, op. cit., page 115.

characteristics that inevitably imply a formal character of this examination[20]. This examination is one that involves assessing the evidence from the sole perspective of legality or, as the case may be, of the loyalty of the administration of evidence, and does not aim at analysing the appropriateness of their administration.

4. Some aspects of judicial practice regarding the subject of the preliminary camera procedure

Given the fact that it is a new institution, the procedure for the preliminary chamber has recorded sufficient issues on which the case-law registers different findings or from which it results that the subject-matter of the preliminary chamber was not correctly understood.

Thus, it has been shown in the case-law that the following are criticisms of the merits of the case and cannot be assessed in the Preliminary Chamber: the requests and the exceptions concerning the incidence of a case preventing the initiation of the criminal proceedings, the lack of foreseeability of the legal, incrimination norm, the succession in time of the legal provisions in the field, the failure to assemble the constitutive elements of the offense or the wrong qualification of the active subject of the offense[21].

Regarding also the issues that cannot constitute the subject of the procedure of the preliminary chamber, it is stated in a decision of a case that "unfortunately, in our opinion, in the current regulation, the judge sitting in a preliminary chamber is not allowed to administer evidence to prove the disloyalty of the administration of some evidence in the criminal prosecution phase and, as such, the issues raised by chosen lawyer of the defendant BE cannot be verified by the judge sitting in the preliminary chamber"[22].

Similarly, it has been shown that "to statue, even only tangentially, over the *convincing* character of the description of the subjective aspect of the offense or over its ability to subsume the constitutive element of the offense ... is equivalent to dealing with issues that are essentially about the merits of the case, whose analysis clearly outweighs the subject and limits of the pending procedure"[23] (namely of the procedure for the preliminary chamber – author's note B.M.).

In a concrete situation, the judge sitting in the preliminary chamber excluded from the evidentiary material administered during the criminal investigation phase the witness statement given by the defendant's lawyer. In order to do so, from the documents and papers existing in the criminal investigation file, the judge found that Mrs. Ş.D. had no prior express and written permission from the defendant S.G., which is why the criminal investigation bodies could not hear her as a witness, being thus violated the provisions of article 116 paragraphs 3 and 4 from the Code of Criminal Procedure[24] .

Similarly, the judge sitting in the preliminary chamber observed that the criminal investigating authorities had heard the persons suspected of committing offenses under the criminal law, before ordering the continuation of their prosecution, as foreseen by the provisions of article 305 paragraph (3) of the Code of Criminal Procedure, before informing the persons concerned persons that they have acquired the status of suspect, before informing them of the facts for which they are investigated, their legal qualification as well as their rights provided for by article 83 of the Code of Criminal Procedure. For this reason, it was appreciated that the criminal investigation bodies disregarded the legal provisions meant to ensure the observance of the right to defence and to a fair trial, and, justly, the first instance found to be incident the case of the relative nullity provided by article 282 paragraph 1 of the Code of Criminal Procedure, which leads to the cancellation of the minutes, since the harm to the defendants cannot be eliminated otherwise, being thus excluded from the evidentiary material of the case[25].

5. Conclusion

The procedure for the preliminary chamber is, in the Romanian legislation, still in search of the place it has, but also of the balance that it must ensure between the need to speed up its course and to reduce the costs of justice on the one hand and the necessity to ensure the respect of the right to a fair trial for all those who have an interest in the criminal proceedings. Marked by findings of unconstitutionality and legislative adjustments, the procedure of the preliminary chamber is still susceptible to findings of new contradictions between the principles of the Constitution and the way it guarantees the fairness of the procedure.

[20] ICCJ, Criminal Section, Resolution no.922 / 05.10.2016, unpublished.

[21] ICCJ, Criminal Section, Resolution 20/2014, quoted in M. Udroiu, op. cit., pages 116-117.

[22] Court of Appeal Cluj, Resolution from February 26th, 2015, analysed extensively at: https://www.juridice.ro/380093/curtea-de-apel-cluj-camera-preliminara-elemente-de-nulitate-a-urmaririi-penale-si-inlaturarea-constatarii-tehnico-stiintifice.html.

[23] ICCJ, Criminal Section, Resolution no.922 / 05.10.2016, unpublished.

[24] Liesti Court of First Instance, Resolution of 05.05.2015, available at http://legeaz.net/spete-penal/verificarea-legalitatii-sesizarii-instantei-a-2015legalitatii-sesizarii-instantei-a-2015.

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