THE PROCEDURE OF VERIFYING PRECAUTIONARY MEASURES IN CRIMINAL PROCEEDINGS

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Abstract

This paper aims at providing an overview of the institution of precautionary measures also called preliminary injunction measures in the criminal trial, namely of the procedure instituted by the legislator in art. 250[2] CPP and on the terms in which the judicial bodies are obliged to verify whether or not the grounds for maintaining precautionary measures still exist. It is a matter of principle that protective measures, like precautionary measures, are measures that have the effect of limiting the fundamental rights of the person against whom they are ordered, and the manner in which they are ordered and maintained must observe the limits and guarantees of the right to a fair trial. The present study will mainly focus on the aspects related to the way in which this procedure is carried out by the judicial bodies, as well as the contradictions encountered in the legal practice on the legal termination of protective measures, on the nature of the terms regulated by art. 250[2] CPP and on the conditions that must be analysed in this verification procedure.

Keywords: *verification, termination of right, terms, obligation, equitable, measure.*

1. Introduction

The precautionary or injunction measures have generated many a debate over time, both at the doctrinal and jurisprudential level, discussions that looked at both the way of regulating these procedural measures in the Criminal Procedure Code and their practical applicability. These procedural measures are of particular importance in the conduct of the criminal proceedings and they can give rise to various particular situations with relevance for criminal practitioners. Precautionary measures are provisional procedural measures, with a right-restricting real nature, which aim at guaranteeing the repair of the damage caused by the crime, the execution of the fine, the injunction of the special seizure or the extended confiscation, as well as the guarantee of the payment of legal expenses generated by the conduct of a criminal judicial proceedings.

The need to analyse the institution of precautionary measures verification, as regulated in art. 250[2] CPP, comes on the one hand from the laconic way of drafting the text which creates application difficulties for the judicial bodies and on the other hand from the non-unitary present jurisprudence on this institution.

This paper will mainly address certain general issues about precautionary measures in the criminal trial, namely the conditions under which these preventive measures can be taken and the procedure provided by law, and then the current opinion of the courts on the nature of the terms in which they should carry out the procedure for verifying the precautionary measures by the judicial bodies, and whether or not a sanction is required in case of non-compliance with these terms as well as criticisms related to the practical way in which the juridical bodies understand the existence of the grounds requiring the maintenance of these measures during the course of the criminal trial.

Also, through this paper, we set out to highlight the ambiguities in the drafting of art. 250[2] CPP, which in its current form, creates practical problems, questioning the legislator's omission regarding certain important procedural aspects. Among these aspects, we are going to review the omission of the legislator to establish the maximum term until which the insurance measure must be verified in the preliminary chamber procedure and to propose by *de lege ferenda* the necessity of the legislator's intervention on the text provided by art. 250[2] CPP in the sense of establishing the term in which the verification of precautionary measures must be carried out during the preliminary chamber procedure, it being well known that there are cases in which the preliminary chamber proceedings extend over a longer period of time.

Also, after analysing the verification procedure as it is regulated by the provisions of art. 250[2] CPP case, we are going to discuss the need for the intervention of the legislator to clarify the norm in terms of establishing the consequences that may occur in the event of non-compliance with the deadline for the verification of

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precautionary measures. Although we are of the opinion that at this moment, there is a regulation in the Criminal Procedure Code of the consequence in case of non-compliance with the verification deadlines, it being expressly regulated by the provisions of art. 268 para. (2) CPP, nevertheless, considering the non-unitary practice in the matter, it is necessary that the legislator intervene in order to correct the provisions of art. 250^2 CPP, *i.e.,* by the express addition of the legal termination solution of the injunction measures.

The issue of the terms established by the legislator in the provisions of art. 250^2 CPP, for verifying the precautionary measures, is important from the viewpoint of art. 6 ECHR on the observance of the right to a fair trial and questions the existence of a legislative vacuum consisting in the absence of a rule expressly regulating the consequences that may arise if the precautionary measure established on a person's assets is not subject to verification by to the judicial bodies within the term established by the legislator, depending on the procedural phase of the case. Therefore, the simple regulation of a rule that only establishes the conduct of the judicial bodies to verify the precautionary measures within certain terms without expressly indicating what sanctions are ordered in case of non-compliance with the terms of 6 months or one year provided by the law, renders incomplete the rule set by art. 250^2 CPP and give rise to the legislator's obligation to intervene and complete this norm.

We appreciate that in the matter of precautionary measures, a review of the legal provisions is necessary, especially with regard to art. 250^2 CPP, so that this institution is adapted to the new aspects of judicial practice. The revision of the procedure for verifying the precautionary measures is necessary, given that they are measures triggering the restriction of certain fundamental rights, and thus, in order to guarantee compliance with all procedural guarantees, the law must be clear, predictable and provide the necessary levers so that the limitation brought by these measures does not become excessive, abusive and disproportionate.

The introduction of the provisions of art. 250^2 in the Criminal Procedure Code and the establishment of the mechanism for verifying precautionary measures was necessary. However, it seems that the application of these provisions in the criminal trial is more of a formality. This emerges from the current judicial practice. The mere fact of forwarding for debate of the parties the „maintenance" of the injunction measures without an effective analysis on the existence of the need to maintain them, makes this procedure ineffective for the purpose for which it was enacted. The verification involves a concrete, thorough and mandatory analysis for the judicial bodies. Any deviation from the legal method of carrying out this procedure results in violating certain rights of the persons against whom these measures were instituted, or this is not the purpose of the verification procedure introduced by the legislator.

2. Precautionary measures: conditions and procedure

Precautionary measures are regulated in the provisions of art. 249 *et seq.* CPP and represents the mechanism by which the prosecutor, the preliminary chamber judge or the court, ex officio or upon request, may order the non-disposal of the assets of the suspect, the defendant or the civilly responsible party in order to avoid concealment, destruction, alienation or evasion from prosecution of goods that may be subject to special seizure or extended confiscation or that may serve to guarantee the execution of the fine or legal expenses or the repair of the damage caused by the crime.

By their effect, the precautionary measures guarantee the execution of the patrimonial obligations arising from the resolution of the criminal action and the civil action within the criminal trial.[1] They do not imply the loss by the owner of the asset's property, but of the right of material and legal disposal over it.

CPP regulates three distinct categories of precautionary measures: the sequestration itself, the mortgage notation and the seizure measure. The last two are considered special forms of seizure. The purpose of the precautionary measures is the unavailability of both movable assets and of immovable assets.

The functionality of these measures is only precautionary and not reparative. The application of the measure does not automatically represent the coverage of the damage, the court must oblige by its order the coverage of the damage caused by the crime. For instance, the seizure report may not constitute a title by which the defendant could be prosecuted for the payment of civil damages [2].

[1] I. Neagu, M. Damaschin, *Treatise on criminal procedure. General part*, 3rd ed., revised and completed, Universul Juridic Publishing House, Bucharest, 2020, p. 721.

[2] *Idem*, p. 722.

From the analysis of the provisions of art. 249 CPP, a series of conditions regarding the taking of injunctive measures emerge: precautionary measures to guarantee the execution of the fine may only be taken on the assets of the suspect or the defendant, and in this case applies the principle according to which criminal liability is personal, or, in order to ensure the execution punishment, only the property of the person to be held criminally liable may be confiscated; the injunction measures ordered for special seizure or extended confiscation may be taken on the assets of the suspect, the defendant or the persons in whose ownership or possession the assets to be confiscated are located and the insurance measures instituted in order to guarantee the repair of the damage caused by the commission of the crime or to guarantee execution of judicial expenses may be ordered on the assets of the suspect, the defendant or the civilly responsible party only up to the concurrence of the probable value of the damage incurred and the expenses caused by the criminal trial.

As a rule, the precautionary measures are optional, the legislator establishing, in art. 249 para. (1) CPP, the possibility for the courts to assess in relation to all the data of the case if the establishment of these precautionary measures is justified and necessary. However, the provisions of art. 249 para. (7) CPP provide that the precautionary measures are mandatory if the injured party is a person without exercise capacity or with restricted exercise capacity. Also, certain normative acts regulate the obligation to take these precautionary measures. See in this regard Law no. 241/2005 on preventing and combating tax dodging[3] or Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption[4] which provide for the mandatory establishment of precautionary measures in the event of the commission of one of the deeds criminalised by these laws.

Taking precautionary measures is ordered during the criminal investigation, by the prosecutor, by justified ordinance, at the request or ex officio, in the preliminary chamber procedure by the preliminary chamber judge by conclusion and may be ordered ex officio, at the request of the prosecutor or the civil party cases as well as in the trial phase, by the court by conclusion, judgement or decision, ex officio, at the request of the prosecutor or the civil party.

The suspect, the defendant, the civilly responsible party and any other interested person may file an appeal against the decision to institute precautionary measures as well as against the way of carrying out these measures. The appeal against the prosecutor's ordinance may be introduced within 3 days from the date of notifying the order to take the measure or from the date of its implementation, to the judge of rights and freedoms from the court that would have the competence to judge the case for merits. The appeal is not suspensive of execution. The resolution of the appeal is done in the council chamber, with the summons of the person who formulated the appeal and the interested persons and with the mandatory participation of the prosecutor.

As for the conclusion by which a precautionary measure was ordered by the preliminary chamber judge, the trial court or the appellate court, the defendant, the prosecutor or any other interested person can file an appeal within 48 hours of the ruling or, as the case may be, from communication. The appeal is suspensive of execution, it is submitted to the first court or appellate court that issued the contested decision and is forwarded, together with the case file to the hierarchically superior court. The appeal is settled in a public hearing, with the participation of the prosecutor and with the summons of the defendant and the interested party who formulated it.

3. The procedure for verifying the precautionary measures

According to art. 250^2 CPP, „throughout the criminal trial, the prosecutor, the preliminary chamber judge or, as the case may be, the first court periodically checks, but no later than 6 months during the criminal investigation, or one year during the trial, if the grounds that determined taking or maintaining the precautionary measures, ordering, as the case may be, the maintenance, restriction or extension of the ordered measure, or the lifting of the ordered measures, the provisions of art. 250 and 250^1 applying accordingly."

This legal text was introduced into the Criminal Procedure Code by Law no. 6/2021 on the establishment of measures for the implementation of Council Regulation (EU) 2017/1.939 of 12 October 2017 implementing a form of consolidated cooperation regarding the establishment of the European Public Prosecutor's Office

[3] Published in Official Gazette of Romania no. 672/27.07.2005.
[4] Published in Official Gazette of Romania no. 219/18.05.2000.

(EPPO)[5]. Considering that the precautionary measures are not available for a certain period of time, as is the case with the precautionary measures, the legislator understood to establish also at the level of the precautionary measures the obligation of their periodic verification, in order to analyse by the judicial bodies whether the precautionary measures continue to be proportionate and they are still justified to be maintained as interferences in the fundamental rights of the person against whom they were instituted.

Therefore, from the provisions of art. 250^2 CPP, it appears that the prosecutor, the preliminary chamber judge as well as the court must carry out a check on the injunctive measures instituted on the assets of the suspect or the defendant, no later than 6 months during the criminal investigation, or one year during the trial in the sense of to analyse whether the reasons that determined the taking or maintaining of the precautionary measures still exist.

In this procedure, the existence of the grounds that led to the taking of these measures will be analysed by referring to new elements involved in the case and the proportionality of the measure will be examined considering the speed of the procedure, the length of time during which the goods were unavailable, maintaining the proportional nature of the interference in the exercise of the right of ownership.[6]

In this procedure, it is not possible to verify, in principle, whether the conditions stipulated by the law were met at the time of taking the protective measures, the judicial bodies will not analyse whether there were grounds that led to the taking of the precautionary measures, but only if they exist. This verification procedure cannot be interpreted as an appeal against the act by which these precautionary measures were established. By way of exception, certain illegalities existing at the time of the measures taking may be analysed, but only in the context where they have a flagrant character [7], for example the nature of the goods subject to precautionary measures can be questioned, *i.e.*, if an asset that cannot be the object of the precautionary measures or the quality of the person with respect to whom these measures were taken, for example, a injunctive measure may not be ordered to guarantee the punishment of the fine on the assets of persons who are not related to the criminal case, since the imposition of these measures has consideration of the principle of the personality of criminal liability, thus only the assets of persons likely to be criminally sanctioned with a criminal fine may be made unavailable.[8]

During the criminal investigation, the procedure for verifying the protective measures is non-contradictory, the prosecutor not having the obligation to summon the defendants or to hear them An appeal against the prosecutor's order can be made by the defendant or by any interested party, within 3 days from the date of communication of the order maintaining the measure. The appeal is settled by the judge of rights and liberties from the court that would have jurisdiction to judge the case on merits. The appeal will be resolved according to the provisions of art. 250 CPP. In the event that the prosecutor ordered the prosecution of the defendant before the resolution of the appeal against the order to maintain the protective measures, the provisions of art. 250 para. (5^1) CPP, otherwise the appeal will be resolved by the preliminary chamber judge.[9]

During the preliminary chamber procedure and in the trial phase, however, the procedure is adversarial, so the verification of precautionary measures will be discussed with the prosecutor, the civil party, other interested persons and the defendant. The court session will be held in the council chamber, if the case is in the preliminary chamber procedure, or in public session if the case is in the trial phase. On the verification of the precautionary measures, the court will issue a decision that may be challenged within 48 hours from the decision or, as the case may be, from communication. The appeal will be resolved within 5 days of registration.

As regards the procedure for verifying the precautionary measures and the competent body to carry it out in the hypothesis that the case is the appeal of the contestation against the conclusion of the preliminary chamber judge ordering the start of the trial or the return of the case to the prosecutor's office, there is no express regulation. However, in the literature[10] it has been appreciated that even in this situation incidents *mutatis mutandis* become considerations of dec. no. 5/2014, ruled by HCCJ in the resolution of an appeal in the interest of the law by which it was established that the preliminary chamber judge from the court seised by indictment, whose conclusion ordering the start of the trial was appealed, has the competence to rule on

[5] Published in Official Gazette of Romania no. 167/18.02.2021.
[6] A.V. Iugan , *Procedural measures* , C.H. Beck Publishing House, Bucharest, 2023, p. 322.
[7] *Ibidem.*
[8] M. Udroiu, *Synthesis of Criminal Procedure. General part*, C.H. Beck Publishing House, Bucharest, 2020, p. 1046-1047.
[9] A.V. Iugan, *op. cit.*, p. 318.
[10] *Ibidem*.

precautionary measures, according to the legal provisions that regulate precautionary measures in the preliminary chamber procedure, until the resolution of the appeal provided for by art. 347 CPP. Practically, applying *mutatis mutandis* this decision also in the matter of precautionary measures means that if the case is in the phase of appeal against the conclusion of the preliminary chamber judge and the verification of the precautionary measures is required, the verification procedure will have to be done by the judge from the Court notified with the indictment, namely from the Court on merits.

4. The deadlines for carrying out the procedure for verifying the precautionary measures

An important practical problem is the analysis of the nature of the terms provided by the provisions of art. 250^2 CPP, namely the terms of 6 months and one year in which the judicial bodies must order the verification of the precautionary measures and the sanction that is applied in case of exceeding these terms. As shown in the previous sections, when it comes to the deadlines for verifying the precautionary measures and the sanction that occurs if these deadlines are exceeded, the judicial practice is non-uniform, the Courts` ruling on this aspect in different ways.

According to art. 250^2 CPP case, the verification of precautionary measures is done periodically, but no later than in 6 months in the criminal investigation, and one year during the trial. From the analysis and interpretation of this legal text, it follows that the prosecutor is obliged to carry out the procedure for verifying the precautionary measures no later than 6 months from the date on which they were instituted and the court will set a deadline for verifying the precautionary measures not later than a year. As for the preliminary chamber, the provisions of art. 250^2 CPP does not regulate what the verification term would be. We appreciate that in this procedure as well a deadline for verifying the precautionary measures should be established, especially given that the preliminary chamber procedure extends over a long period of time and in the context in which there are doctrinal opinions that qualify the preliminary chamber as a phase distinct part of the criminal trial and not a stage specific to the trial phase, to which the same verification period, *i.e.*, one year, should be applied.

But what happens when the precautionary measures are not verified by the judicial bodies within these terms? The provisions of art. 250^2 CPP does not regulate either the sanction that would occur in case of exceeding the deadlines in which the verification of the security measures must be carried out.

In the absence of an express regulation in the matter of precautionary measures regarding the incidental sanction in case of non-compliance with the verification deadlines, we appreciate that the provisions in this matter must be compulsorily corroborated with the provisions of art. 268 CPP and if the judicial bodies would exceed the deadlines provided by the legislator for the verification of precautionary measures, their omission would have the effect of the direct application of the provisions of art. 268 para. (2) CPP, namely to state that the precautionary measure has ceased by law.

The direct application of the provisions of art. 268 para. (2) CPP was also the solution ruled by certain courts. Thus, in judicial practice[11] it was noted: *«The provisions of art. 268 para. (2) CPP shows that when a procedural measure may only be taken for a certain period of time, the expiration of this term automatically causes the measure to cease to be effective. Even if in the regulation art. 249 et seq. CPP there is no explicit mention of the type „the precautionary measure is taken for a duration of", from the very obligation of its verification "no later than" the clear intention of the legislator that the preventive measure is taken or maintained only for a certain limited period emerges.»*

Also in judicial practice, one raised the issue of the need to qualify the nature of the terms provided for by art. 250^2 CPP, namely if they are substantive terms or procedural terms. In this sense, it was appreciated that the substantive terms are those that protect rights, prerogatives and extra-procedural interests, pre-existing to the criminal trial and independent of it, limiting the duration of certain measures or conditioning the performance of acts or the promotion of actions that would annihilate a right or an extra-procedural interest . Unlike the substantive deadlines, procedural deadlines are the deadlines that protect the procedural rights and interests of the participants in the criminal trial and contribute to the discipline and systematisation of the procedural activity in order to ensure the timely and just achievement of the purpose of the criminal trial. Or, considering that in the matter of precautionary measures, it is about the protection of pre-existing extra-procedural rights, it was assessed that the maximum terms of 6 months and 1 year, within which the precautionary measure must be

[11] HCCJ, crim. s., crim. dec. no. 547/20.09.2022, *www.scj.ro*, last time consulted on 16.03.2024.

checked, are substantial terms, and the expiry of the substantial terms attracts a specific sanction, *i.e.,* legal termination [12].

In judicial practice as well, there were also courts which appreciated that the terms provided by the provisions of art. 250^2 CPP are recommendation terms and would not attract the sanction of legal termination of injunction measures.

In support of this opinion, one started from the fact that the legislator did not foresee a procedural sanction in the case of the judicial body remaining inactive or exceeding the deadline. The explanation lies in the fact that it is a term of procedure, of recommendation, which may be used by procedural subjects and judicial bodies according to the legitimate individual or general interest or of the criminal trial, but the possible sanctions are extra-procedural . At the same time, it was also appreciated that, unlike the regulation in the matter of preventive measures, evoked in support of the legal termination solution, in the case of which art. 241 CPP expressly establishes the situations of termination by law, such a regulation is not found regarding precautionary measures. In the court's opinion, the legal solution of applying this text by analogy in the case of precautionary measures cannot be accepted, since the legal terms have distinct legal natures (procedural terms in the case of precautionary measures and substantive terms in the case of preventive measures).[13]

Furthermore, in the opinion of those who qualify the terms provided by art. 250^2 CPP as recommendation terms, it is also taken into account the fact that art. 241 CPP does not contain a rule of principle, a norm of a general nature that could become applicable to the analysed hypothesis, but represents a special norm, whose sphere of incidence is clearly defined in its very content, being thus of strict interpretation and application - *specialia generalibus derogant*. An interpretation by analogy implies the extension of the solution in similar matters that do not benefit from express regulation, where the law is silent, and not in hypotheses for which the legislators themselves evaluated the solutions, within distinct regulations. In the case of precautionary measures, the law wording expressly provides the solutions, art. 250^2 CPP listing only the maintenance, restriction, extension or lifting of the preventive measure, not the legal termination.

As regards the nature of the terms established by the provisions of art. 250^2 CPP, important are also the issues discussed during the meeting of the chief prosecutors of the criminal and judicial investigation section of the PICCJ - DNA, DIICOT and the prosecutor's offices within to the appellate courts [14] where it was concluded that *„it is difficult to accepted that, by legally establishing this maximum term, the legislator would have aimed for it to be only a recommendation and that exceeding it would remain without any consequences regarding the precautionary measure; it is not a simple term to speed up the procedures, but one that protects substantive rights among the fundamental ones, so that the protection must be concretized by considering that upon the expiration of this maximum legal duration, in the absence of a provision to maintain the measure, it ceases by law. However, the legal text is obviously unconstitutional due to the lack of any provision regarding the consequence of exceeding the maximum duration. Therefore, the appropriateness of raising an exception of unconstitutionality must be analysed."*

As far as we are concerned, we appreciate that the terms provided by art. 250^2 CPP are not recommended terms, they are substantive terms and exceeding these terms cannot be without sanction. The fact that the legislator did not provide in the newly introduced legal text a sanction for non-compliance with these deadlines does not grant them the nature of recommendation deadlines. The fact that they cannot be qualified as recommendation deadlines results from the wording of the text, from which it follows that *„one **checks** periodically **but no later** than 6 months during the criminal investigation, and one year during the trial".* So the terms used „checks" and „no later than" establish an obligation and not a possibility/ a faculty /a recommendation. The legislator established an imperative deadline, the non-verification of precautionary measures within this deadline having as *ope legis* effect the termination of these measures.

Moreover, we appreciate that in the matter of precautionary measures also we should take into account the considerations of the HCCJ RIL dec. no. 7/2006, pronounced in the matter of preventive measures[15] according to which *„In the light of the constitutional provisions and the international regulations to which reference was made, these mandatory provisions of the Criminal Procedure Code require strict compliance with the deadlines*

[12] CA Bucharest, dec. no. 440/19.09.2023 and Conclusion no. 271 of 16.05.2023, *www.rejust.ro*, last time consulted on 16.03.2024.

[13] HCCJ, dec. no. 209/30.03.2022, *www.scj.ro*, last time consulted on 16.03.2024.

[14] Minutes of the non-unitary practice meeting at the national level - prosecutors, Bucharest, May 27-28, 2021, p. 61-62, *www.inm-lex.ro*, last time consulted on 16.03.2024.

[15] Published in the Official Gazette of Romania, Part I, no. 475/01.06.2006.

for verifying the legality and validity of the preventive incarceration measures during the trial, because otherwise there would be no guarantee that deprivation of liberty may only take place under the conditions determined by law". Or, on the same reasoning as that considered by the supreme court in the matter of preventive measures, we appreciate that the norm established by the provisions of art. 250^2 CPP is an imperative norm, as it results from its wording and from the terms used by the legislator, and the non-verification within the established terms of the precautionary measures would disregard man's fundamental guarantees, such as the observance of the right to property which may be limited only in the conditions determined by law.

The legal nature of these terms is given by the purpose of the regulation, art. 250^2 CPP being introduced for disciplining and systematising the procedural activity regarding precautionary measures. The legislator reflected on these terms considering the need to respect the proportional character of the measure in relation to the duration and evolution of the procedure. The rationale for establishing the obligation through the phrase „no later than" was precisely that of eliminating arbitrariness as regards the indefinite maintenance of a right-restricting measure. Therefore, these terms cannot be qualified as mere recommendations and cannot go beyond the purpose intended by the legislator, namely preventing the accused from using their assets, in order to avoid the imposition of an excessive individual burden.

We agree that the current regulation of art. 250^2 CPP is unclear and one should intervene precisely because there is a non-uniform practice in terms of how this text is applied by the judicial bodies; however, we appreciate that the legislator has directly outlined certain aspects that, when combined, can give a solution to this non-unitary practice, as follows:

First of all, from the text of art. 250^2 CPP law the obligation results to verify the precautionary measures within the terms established by the legislator, this obligation being highlighted by the phrase „no later than".

Secondly, given the obligation established by the legislator and the nature of the precautionary measures as measures restricting rights, we believe that the mere corroboration of the provisions of art. 250^2 CPP with the provisions of art. 268 para. (2) CPP, provisions regarding deadlines, can clarify the situation of the sanction and the solution that would be imposed in the event that the injunction measures were not verified within the deadlines provided by the legislator.

Last but not lease, we consider that the very fact that the legislator wanted to regulate at the level of precautionary measures also, similar to the matter of preventive measures, the institution of verification, proves the fact that the legislator was primarily concerned with respecting the proportionality of the duration of the precautionary measure with the restriction of the right to property and put at the disposal of the persons against whom these measures were instituted the necessary levers for the defence of their property right, so that one can discuss, within the established terms, whether or not such interference with these rights is still justified. Therefore, the assessment that the verification terms would be mere recommendation terms only would disregard the legislator's intention.

On the same note, by dec. no. 24/26.01.2016[16], CCR retained that, in the absence of ensuring effective judicial control over the measure of making assets unavailable during a criminal trial, the state does not fulfil its constitutional obligation to guarantee the private property of the natural/legal person.

5. The condition of proportionality of precautionary measures

According to the provisions of art. 250^2 CPP, the Court charged with verifying the precautionary measures will check whether the reasons that determined the taking or maintaining of the precautionary measures still exist and will examine the proportional character of the interference in the exercise of the right to property.

By dec. no. 19/2017[17], pronounced by HCCJ in an appeal in the interest of the law, the Supreme Court showed that *„the institution of a precautionary measure obliges the judicial body to establish a reasonable ratio of proportionality between the purpose for which the measure was ordered (for example, in order to seize assets), as a way of ensuring the general interest, and the protection of the accused persons' right to use their assets, in order to avoid imposing an excessive individual burden"*. With regard to the proportionality between the purpose pursued when establishing the measure and the restriction of the accused person's rights, it was assessed that this *„must be ensured regardless of how the legislator assessed the necessity of ordering the seizure, as arising from the law or as being left to the discretion of the judge. The condition follows both from art. 1 of the*

[16] Published in Official Gazette of Romania no. 276/12.04.2016.
[17] *www.scj.ro*, last time consulted on 11.03.2024.

First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms, as well as from art. 53 para. (2) of the Constitution of Romania, republished (the measure must be proportional to the situation that determined it, to be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom)".

Therefore, one of the important aspects that must be taken into account by the Court in the procedure in which the precautionary measures are verified is to analyse whether the maintenance of the precautionary measures still meets the proportionality conditions at the time when the judicial body performs the verification. The judicial bodies must take into account and respect the proportionality test so that the measure, by its duration and purpose, does not turn with the passage of time into an excessive burden for the person whose assets were made unavailable [18].

In the procedure of precautionary measures verification, the solution of lifting precautionary measures must be possible and considered by the court when **the effective duration of this measure is excessively long, in relation to the duration and evolution of the procedure and the consequences it triggers exceed the normal effects of such a measure** .

In judicial practice, the analysis of the existence of the measure proportionality and the existence of the grounds that lay at the basis at the establishment of these measures has become more of a formality, especially in cases where deeds provided for in special laws that require the mandatory taking of precautionary measures are investigated.

In a case pending before the CA Bucharest[19], the Court admitted the appeal filed by the defendants against the conclusion by which the precautionary measure was maintained in the procedure provided by art. 250^2 CPP, annulled the contested conclusion and ordered the case to be re-tried because the court on merits did not proceed with an effective verification of the precautionary measures instituted on the defendants' assets, it did not effectively analyse whether the grounds that determined the adoption or maintenance of the precautionary measure still exist. In this regard, the judicial review court held that *„the assertion of the trial court regarding the proportionality of the measure with respect to the intended purpose (...) presents a degree of generality that does not allow the judicial review court to discern what the actual arguments were in relation to which the court made this statement*" and that *„the examination of proportionality presupposes, first of all, that the court must make sure that the value of the seized goods does not significantly exceed the value of the damage attributed to the person concerned"*.

Analysing the manner in which the first court on merits applied the provisions of art. 250^2 CPP, the Court found that *„the first court on merits did not carry out any concrete analysis on the approximate value of the assets subject to the precautionary measure in order to assess whether the restriction of the value up to the level for which the precautionary measure was taken on all the assets initially subject to the sequestration, especially in the circumstances in which the goods are immovable located in the Municipality of Bucharest and in the Ilfov County, and may have significant values that, added up, substantially exceed the alleged damage in the case",* and continued *„the same assets were subject to precautionary measures both for a prejudice of 3,895,590 lei and for a prejudice of 2,324,377 lei"*.

In the same case, in a second procedural cycle, in the retrial of the case after the annulment, the Court [20], analysing the appeal against the conclusion by which the precautionary measures were maintained by the Bucharest Trib. in the retrial, found again that the court checked only formally whether the grounds still exist that led to the taking of precautionary measures, considering that *„although in the disputed conclusion the Tribunal analysed aspects regarding the fulfilment of the legal conditions to order the maintenance of precautionary measures, it analysed only formally the proportionality of the measure with respect to the intended purpose"* and that *"the valuation of the assets imposes with regard to the proportionality of the measure, since in the case, given the fact that at the time of taking the injunction measure the damage was estimated at the amount of 3,895,590 lei, later being reduced to the amount of 2,324,377 lei, it could be an excessive discrepancy between the value of the presumptive damage and the value of the assets made unavailable"*.

Concluding on the aspects identified in the judicial practice, we find that at the level of the courts, the procedure for verifying the precautionary measures does not achieve the purpose for which it was introduced in

[18] ECtHR, Case *Forminster Entreprises Limited v. the Czech Republic*, judgment from 09.01.2008, *www.hudoc.echr.coe.int.ro*, last time consulted on 16.03.2024.

[19] CA Bucharest, crim. s., crim. dec. no. 26/CO/18.01.2023, unpublished.

[20] CA Bucharest, crim. s., crim. dec. no. 492/CO/17.10.2023, unpublished.

the provisions of the Criminal Procedure Code. In the exposed case, there was no effective verification of the precautionary measures imposed on the defendants, the solution to maintain the injunction measures being ordered based on a general conclusion such as *„the court considers that the precautionary measures ordered in the case would be proportionate to the purpose pursued by their establishment"* without mentioning the criteria and the reasons on the basis of which this reasoning was built, should also be pointed out in the content of the decision. The need to understand the purpose for which this verification procedure was introduced is important and must be kept in mind by judicial bodies. The legislator sought to regulate a procedure intended to reanalyse aspects that have the effect of restricting/limiting certain fundamental rights, as through the establishment of precautionary measures the right to property is restricted.

Or, in the *supra* case, it was proven that this purpose was not taken into account by the court, given that: a) the precautionary measures were instituted on the defendants as early as 2017, an aspect that required the analysis of proportionality in relation to the period in which the assets were unavailable; b) the assets that are subject to the precautionary measures are immovable property, which at the time of the verification exceeded by far the value of the estimated damage in question, which required at least a solution to restrict the protective measures, and c) the value of the imputed prejudice gave rise to real debates, since one started from the premise that the damage would be 3,895,590 lei, but after returning the case to the prosecutor's office motivated by the lack of clarity of the accusations in terms of the damage, it was valued at 2,324,377 lei.

Another important aspect encountered in the judicial practice is constituted by the solutions ruled by the courts in the procedure of verifying the precautionary measures in the cases in which the deeds provided for in the special laws that impose the obligation to take the precautionary measures, for example Law no. 241/2005 on preventing and combating tax dodging[21] or Law no. 78/2000 for the prevention, detection and sanctioning of corruption deeds [22].

In these cases, often the solutions provided are to maintain the precautionary measures, the motivation being given by the fact that they are mandatory according to the law. We consider that such a motivation disregards the rationale of the legislator considered at the time of the introduction of art. 250^2 in the Criminal Procedure Code. In this case, if we had as premise exclusively the fact that the precautionary measures are mandatory because they are provided by law, we would leave without effect a legal provision, namely art. 250^2 CPP and we would create a difference of treatment among those who have instituted precautionary measures, which contravenes the right to a fair trial. In addition, it should be borne in mind that the provisions of art. 250^2 CPP were introduced in the said Code l by Law no. 6/2021, so after Law no. 78/2000 or Law no. 241/2005, the latter were not adapted to the changes brought to the Criminal Procedure Code, as the provisions of these laws have not been reanalysed also through the prism of introducing a procedure for their verification in the matter of precautionary measures.

In this situation, we reckon that the proportionality of the measure must be analysed regardless of whether the measure is mandatory or not. Any other interpretation would invalidate a legal norm, and this may only be done under the conditions expressly provided by law. This being the case, we appreciate that it is necessary for the legislator to intervene in order to clarify the rules in the matter of precautionary measures.

6. Conclusions

The procedure of verifying precautionary measures raises extensive and important debates. The manner in which this procedure is regulated triggers discussions in judicial practice, the non-unitary jurisprudence being obvious on certain issues with an essential aspect in carrying out the verification procedure by the judicial bodies. As we have shown, the provisions of art. 250^2 CPP lack accessibility and predictability. Although the purpose of establishing this procedure for verifying precautionary measures, similar to preventive measures, is clear, the legislator's intention to protect fundamental human rights being obvious, the nevertheless the frame drawn by the legislator, the conditions for effective verification and the method of applying this procedure are not clear, such a lack of clarity having the effect of diametrically opposed solutions or procedures.

We consider that the intervention of the legislator is necessary to clarify the way of applying this procedure, and the important aspects that should be addressed have been pointed out in this article. The importance of establishing certain essential conditions in this procedure would clarify the contradictory aspects faced by the

[21] Published in the Official Gazette of Romania no. 672/27.07.2005.
[22] Published in the Official Gazette of Romania no. 219/18.05.2000.

practitioners in the field of criminal law but also the persons directly involved, namely those against whom these right-restrictive measures are instituted.

We still maintain the importance of this procedure's existence in the current regulation. But a simple regulation in the Criminal Procedure Code is not enough, it is necessary for this regulation to be clear, to establish a complete procedure, with all the conditions that should be taken into account by the judicial bodies. A norm that establishes a certain conduct/rule, especially in the matter of measures restricting rights, must not have gaps, any gap in the application of a legal provision affects the rights of the person against whom it should be applied.

At this moment, the provisions of art. 250^2 CPP do not have the capacity to confer security to the legal relationship they regulate. The reality of this fact is proved by the judicial practice, which is non-unitary, contradictory and creates an imbalance in the matter of the solutions that may be ordered in the procedure of verifying the precautionary measures.

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