

THE LEGAL TERMINATION OF THE UNVERIFIED PRECAUTIONARY MEASURES WITHIN THE 6-MONTH PERIOD, DURING THE PRELIMINARY CHAMBER PROCEDURE

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Abstract

During the Preliminary Chamber procedure, the precautionary measures ordered must be checked by the Preliminary Chamber Judge or the Preliminary Chamber panel, as the case may be, within the 6-month legal term.

In judicial practice, there have been situations where this deadline has not been met in terms of verifying the legality of these measures, meaning in which it is necessary to clarify some aspects at the level of understanding and applying some normative texts.

Thus, from the interpretation of the provisions of art. 250² CPP, reported to the provisions of art. 268, para. (1) and (2) CPP, failure to comply with the legal term of 6 months results in the decline from the exercise of the right to continue to verify the subsistence of the grounds that led to the taking and maintenance of the precautionary measures and the legal termination of the measures ordered, with the consequence of their lifting.

Given that the institution of the Preliminary Chamber (found in the Special Part, Title II CPP) is not part of the institution of judgment on the merits (found in the Special Part, Title III CPP), the term to which we have to refer is 6 months, not 1 year, this procedure is not „in the course of the judgment” (the phrase inserted by the legislator in the norm contained in art. 250² CPP).

The purpose of this paper is to explain and detail the above-mentioned aspects by the co-authors in order to provide a set of arguments that can be used by practitioners, if they are faced with the non-verification of the precautionary measures within the legal term, during the Preliminary Chamber procedure.

Keywords: *Preliminary Chamber, legal term, precautionary measures, decline from the exercise of the right, non-verification.*

1. Introduction

This paper addresses a common theme in judicial practice, namely the particularities of the Preliminary Chamber Procedure regarding a specific problem encountered by defendants during a criminal trial, in respect of the issue of the maximum period within which the precautionary measures must be verified during the Preliminary Chamber Procedure.

In this respect, one must take into consideration that the maximum legal term available for the verification of the necessity to maintain the precautionary measures in accordance with the CPP is no more than 6 months or else the legal termination of the measures ordered occurs.

However, despite the clarity of the above mentioned criminal legal norm, the National courts had a non-unitary practice from this point of view, an aspect which led to the non-compliance with the procedural rights of the persons concerned by the precautionary measures in question.

The chosen topic is important from the perspective of the consequences of non-compliance with this term by the Judge of the Preliminary Chamber by reference to the precautionary measures subject to verification, given the general obligation to ensure that the right to a fair trial and the right to defense are also respected from this point of view.

The co-authors intend to answer the matter under consideration in respect of the final minutes of the proceedings, rendered by the CA Bucharest, on 6 February of the current year in a particular case file, *i.e.*, case no. 21959/3/2021/a1.1, whereby this issue is motivated in detail and unequivocally.

Furthermore, the paper addresses the relevant judicial practice by presenting opinions expressed in recent HCCJ case-law on the subject of this study.

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2. The legal termination of the unverified precautionary measures within the 6-month period

2.1. Brief considerations on the factual situation deduced to judgment

For a preliminary purpose, a series of clarifications on the factual situation deduced to the judgment of the Preliminary Chamber Panel of the CA Bucharest in Case file no. 21959/3/2021/a1.1, are necessary for a full understanding of the findings of the final minutes of the proceedings on 06.02.2024.

Thus, in the foregoing case it was ordered the establishment of the precautionary seizure of all immovable movable property (*i.e.*, constructions, land, cars, valuables, amounts in bank accounts, etc.), belonging to a defendant natural person and a defendant legal person. These measures were ordered to repair an alleged damage caused to the state budget by committing the tax evasion offense, which was the object of the money laundering process, for special confiscation, according to the indictment.

Against the ordinance dated 03.06.2020 the two defendants have filed appeals, pursuant to art. 250 CPP, both of which were rejected as unfounded by the Bucharest Tribunal.

Subsequently, analysing the legality of the legal certainty of the precautionary seizure, the Preliminary Chamber Judge held, according to art. 250² CPP, that the precautionary measure set forth by the Ordinance of 03.06.2020, of the Prosecutor of the Prosecutor's Office attached to the Bucharest Tribunal, is legal and thorough and it is necessary to maintain the seizure instituted.

It was also held that, according to art. 250² CPP ¹ „*in the entire course of the criminal trial, the prosecutor, the Judge of The Preliminary Chamber or, as the case may be, the Court periodically checks, but no later than 6 months during the criminal investigation, respectively, one year during the trial, if the grounds that determined the taking or memorising of the precautionary measure subsist, ordering, as the case may be, maintaining, restricting or extending the ordered measure, respectively raising the ordered measure, the provisions of art. 250 and 250¹, applying accordingly.*”

Last but not least, as regards the allegations of the defendants from which it follows that the insurance measure has ceased by right as a result of non-compliance with the 6-month period provided by the provisions of art. 250² CPP in which the precautionary measures should have been verified, the Preliminary Chamber Judge assessed that they were unfounded.

2.2. Recitals of the CA Bucharest from the final minutes of the proceedings no. 70/CP/06.02.2024

Analysing the documents and papers of the file, in relation to the formulated requests and arguments invoked in their support, CA Bucharest's Preliminary Chamber Panel found that the appeals are well founded.

Thus, it was assessed that, according to the provisions of art. 250² CPP, throughout the Criminal trial, the prosecutor, the preliminary chamber judge or, as the case may be, the, the Court of law periodically checks, but no later than 6 months during the criminal investigation, respectively one year during the trial, if it subsists the grounds that determined the taking or maintaining the precautionary measures, as the case may be, maintaining, restricting or extending the ordered measure, respectively raising the ordered measure, the provisions of art 250-250¹ being applied accordingly.

Preliminarily, CA Bucharest considered that it was necessary to analyse the nature of the terms provided by art. 250² CPP, in relation to the reasons invoked in support of the appeals.

According to the Decision of the Court, precautionary measures consist in the freezing of the envisaged goods, by instituting a seizure on them. As a result of the establishment of seizure, the owner of these assets loses the right to introduce them or strike tasks, the measure affecting the attribute of the material legal provision, throughout the criminal process, until the final settlement of the case².

Also, by dec. no. 894/17.12.2015³ regarding the exception of unconstitutionality of provisions art. 249 para. (1) CPP, the first sentence, CCR held that the interference generated by ordering the seizure on the movable immovable property of the suspect, defendant, defendant, the civilly responsible person or other persons in the property or possession of which are located the goods are related to fundamental rights, namely the right of ownership, it is regulated by law, respectively art. 249 *et seq.* CPP, has as legitimate purpose the conduct of the

¹ As introduced by Law no. 6/2021, published in the Official Gazette of Romania no. 167/18.02.2021.

² See HCCJ dec. no. 2/2018, the Panel for the settlement of some legal issues determines that addresses the notion of „freezing” to which are referred to the provisions of art. 249 para. (2) CPP.

³ Published in the Official Gazette of Romania, Part I, no. 168/04.03.2016.

criminal investigation, being a judicial measure applicable during the criminal trial, is imposed, being appropriate *in abstracto* to the legitimate purpose pursued, the following, it is necessary in a democratic society to protect the values of the rule of law.

At the same time, the interference analysed is proportional to the case that determined it, since the insurers are provisional, as they are disposed during the Criminal trial, and the Court, analysing the principle of proportionality, the, in its constant jurisprudence, it held that it presupposes the exceptional character of restrictions on the exercise of rights or freedoms.

Likewise, by dec. no. 24/20.01.2016⁴, CCR held that in the absence of ensuring an effective judicial control over the freezing of assets during a criminal trial, the State does not fulfil its constitutional obligation to guarantee private property to the natural/legal person.

According to the CA Bucharest, precautionary measures are thus real, temporary interim procedural measures, which aim to guarantee the reparation of the damage caused by the crime, the execution of the fine penalty, the enforcement of the special confiscation measure or of the extended confiscation, as well as the guarantee of the payment of the judicial expenses generated by the conduct of a Criminal judicial procedure. Moreover, substantial terms are those that protect rights, prerogative extra-judicial interests, preexisting criminal proceedings independent of it, limiting the duration of measures, or making the performance of acts conditional or promoting actions that would annihilate an extra-judicial right or interest.

Unlike substantial deadlines, procedural time limits are the terms that protect the rights of the procedural interests of the participants in the Criminal proceedings contribute to disciplining the systematisation of the procedural activity in order to ensure the timely achievement of the purpose of the Criminal trial. The establishment of substantial time limits is likely to ensure the certainty of the extent of Criminal liability, of sanctions or other measures that restrict the extra-judicial freedoms of the injured person.

Thus, in the matter of the precautionary measures, it is about the protection of extra-judicial pre-existing rights, CA Bucharest has assessed that the maximum terms of 6 months and 1 year in which the insurance measure must be verified are substantial deadlines. The classification of time limits as substantial or procedural considers the nature of the rights and interests they protect and not the sanction that occurs in case of non-compliance (whether expressly provided for in particular, whether it is regulated in a general way).

The reason for the existence of a certain differentiation, from the essence of the classified object precisely determines the division into categories, and the effect occurs to this classification and does not precede it. The fact that the legislator did not provide in the newly introduced text a sanction for non-compliance with these deadlines does not give them the nature of procedural deadlines, as long as the nature of the term of verification of the insurance measure does not depend on the express regulation of a sanction but, as has been shown, on the nature of the protected interests.

From the analysis of the law text, it follows that the legislator has sought to impose an obligation on the judicial bodies, that of carrying out the verification of the subsistence of the grounds which determined the taking or maintenance of the insurance measure „no later than” the term of 6 months, respectively 1 year.

Such an obligation imposed on judicial bodies cannot be appreciated at the same time as a recommendation, only because it was not expressly provided for one of the sanctions that are imposed by necessity as a result of the finding of non-compliance with an imperative deadline, namely, the decline of the criminal judicial body from the exercise of the procedural right, such as the nullity of the procedural act made over time or, from a substantial point of view, from a substantial point of view, legal termination (*ope legis*) of unverified measures within the imperative term imposed by law.

Also, as was noted in the doctrine on the classification of terms⁵, for example in the field of preventive measures, the circumstance that a judgment after the expiry of the duration of the previously ordered preventive measure leads to the finding of legal cessation of this preventive measure, does not mean that it is the effect of the nullity of that judgment on the grounds that the court was revoked from the „right” to rule it again after the expiry of the time limit, but it is the effect of reaching the deadline of a procedural measure in the conditions in which there is no other valid decision to prolong it.

As such, CA Bucharest noted that the term in question is a peremptory (imperative) term since a procedural activity must be carried out within it (verifying the legality of the precautionary measures). The reason for the

⁴ Published in the Official Gazette of Romania, Part I, no. 276/12.04.2016.

⁵ See N. Volonciu, A.S. Uzlău, *The New Criminal Procedure Code, commented*, Hamangiu Publishing House, 2014.

term of six months/one year established to verify the legality and reliability of the insurers is to ensure compliance with the proportionality of the measure in relation to the duration and the evolution of the procedure, namely, to remove the arbitrariness that deprives maintenance on an indeterminate duration of a restrictive measure of rights.

Moreover, the maintenance of the precautionary measures in the Criminal process must comply with the proportionality requirements imposed by the ECtHR, The Court of Strasbourg pointing out that „lifting of the precautionary measures should be possible when their effective duration is excessively high in relation to the duration and the course of the procedure and the consequences that it has produces exceed the normal effects of such a measure”⁶.

Under these conditions, CA Bucharest has assessed that the sanction that intervenes in case of non-compliance with the maximum terms of 6 months 1 year in which the insurance measure must be verified is to be regarded from the point of view substantial is the legal termination (*ope legis*) of unverified measures within the imperative term imposed by law.

By applying these principles to the case, the Court observed that the last verification of the precautionary measures took place on 21.01.2021, thus, at the time of the analysis carried out by the Preliminary Chamber Judge of the First Court, by the conclusion challenged (16.01.2023), the substantial, imperative deadline imposed by art. 250² CPP was exceeded.

As such, the Court noted that the term in question is a peremptory (imperative) term since a procedural activity must be carried out inside it (verifying the legality of the precautionary measures). The reason for the term of six months/one year set forth to verify the legality and reliability of the insurers is to ensure compliance with the proportionality of the measure in relation to the duration and the evolution of the procedure, namely, to remove the arbitrariness that deprives maintenance on an indeterminate duration of a restrictive measure of rights.

Additionally, the maintenance of the precautionary measure in the criminal proceedings must respect the proportionality requirements imposed by the ECtHR, the Court of Strasbourg said that „*the lifting of the insurance undertaking should be possible when its effective duration is excessively high in relation to the duration and course of the procedure and the consequences it produces outweigh the normal effects of such a measure*”⁷.

Thus, CA Bucharest stated that under these conditions, the sanction that occurs in case of non-compliance with the maximum time limits of 6 months 1 year in which the precautionary measure must be verified is the termination of right (*ope legis*) of unverified measures within the mandatory time limit imposed by law.

Finally, applying these principles to the particular case subject to judgement, the Bucharest Court of Appeals noted that the last verification of the precautionary measures took place on 21.01.2021, thus, at the time of the analysis carried out by the Preliminary Chamber Judge of the First Court of 16.01.2023, the substantial, imperative term imposed by art. 250² CPP was exceeded. Consequently, the Court considered that the sanction of non-compliance with this term is the legal termination of the insurance measures, which is pursuant to art. 425¹ para. (7) point 2 letter a) CPP. As a result, the Court admitted the appeal declared by the defendants against the merits of 16.01.2023 issued by the Trib. Bucharest in case no. 21959/3/2021/al.1.

3. Conclusions

This paper emphasises the importance of observing the deadlines provided by law for the verification of the precautionary measures during the Preliminary Chamber procedure, by analysing the considerations pronounced by the CA Bucharest in a given case.

It is also notable that the nature of the deadlines for verifying the legality and thoroughness of these interim measures of a patrimonial nature in the criminal proceedings, which presented difficulties in practice, is clarified, because of non-unitary judicial practice at the level of national courts.

Last but not least, the paper may be of interest to legal practitioners, given that the recitals of the CA Bucharest judgment under review can serve as a model both for possible defenses formulated by lawyers, as well as for prosecutors or judges in Criminal matters.

⁶ See Case *Forminster Enterprises Limited v. Czech Republic*, judgment from 09.01.2009, para. 76-78.

⁷ *Ibidem*.

References

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- ECtHR, Case *Forminster Enterprises Limited v. Czech Republic*, judgment from 09.01.2009, para. 76-78.
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