THE TAKING OF EVIDENCE IN PRE-TRIAL CHAMBER PROCEEDINGS. BETWEEN LEGALITY REVIEW AND THE RISK OF PREJUDICING THE MERITS

Ștefan Alberto LUPU*

Abstract

This paper analyzes, from both a theoretical and practical perspective, the issue of taking of evidence during the preliminary chamber proceedings, as a mechanism for vetting the legality of criminal investigation acts and the evidentiary basis of the charges. The study aims to highlight the specificities of taking the evidence in this procedural stage, as well as to define the boundaries within which the preliminary chamber judge may exercise the review of legality without encroaching upon the assessment of the substantive merits of the charge.

The analysis focuses on the conditions of admissibility, relevance, and necessity of evidence in the preliminary chamber, as well as on its role in verifying the legality of how evidence was obtained and administered during the criminal investigation phase.

Furthermore, the paper examines the practical difficulties arising from the intersection of legality and the merits of the case, highlighting the risk that, in certain situations, review exercised by the judge may take on a substantial dimension. Based on an analysis of the regulatory framework, doctrinal trends, and judicial practice, the study identifies the main challenges encountered in applying the provisions regarding the taking of evidence in the preliminary chamber and the verification by the judge of preliminary chamber of evidence-gathering by criminal investigation bodies, with critical observations and points of reflection aimed at strengthening the role of this procedure in ensuring a fair criminal trial.

Keywords: *evidence, assessment, legality, verification, vetting.*

1. Introduction

The preliminary chamber proceedings are configured, within the architecture of the criminal trial, as a vetting mechanism between the investigation phase and the trial phase. Its role is to ensure a controlled transition between investigative activity and the actual jurisdictional stage, by subjecting the indictment and the evidentiary material to a rigorous legality review. Within these proceedings, any irregularities affecting the criminal investigation activity are subject to examination, debate, and, where applicable, sanctioning.

The purpose of the preliminary chamber is, on the one hand, to strengthen the legitimacy and credibility of the evidence to be used at trial, and, on the other, to ensure the effective and enhanced protection of the fundamental rights and freedoms of the parties involved in the criminal proceedings.

According to Article 342 of the Code of Criminal Procedure, the scope of the preliminary chamber consists of verifying, following the referral for trial, the jurisdiction and the legality of the court's referral, as well as verifying the lawfulness of the taking of evidence and the performance of procedural acts by the criminal investigation bodies. Consequently, the preliminary chamber judge is vested with strictly defined powers, exclusively limited to the judicial review of legality over the criminal investigation activity. By establishing this procedure, the legislature sought to create an autonomous judicial framework designed to ensure, with a high degree of rigor, the verification of the legality and correctness of procedural acts prior to the case being brought before the court.

This paper aims to analyze, in particular, the verification of the legality of the taking of evidence in preliminary chamber proceedings, with an emphasis on the specific manner in which this review is carried out in judicial practice. The aim is to highlight key aspects regarding how the preliminary chamber judge, although limited by the scope and jurisdiction established by law, actually proceeds with the review of the legality of the taking of evidence. From the perspective of judicial practice, the issue arises of the risk that, during this review, the judge may exceed—even unintentionally—the limits of the legality review, encroaching upon the sphere of assessing the merit of the evidentiary material.

* PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest, Lawyer in the Bucharest Bar (e-mail: stefan.lupu@rvsa.ro).

In this context, this paper will address the hypothesis of a possible "contamination" of the preliminary chamber judge, in the sense of forming a preliminary opinion regarding the veracity of the charges, as a result of direct contact with the evidentiary material. This raises the core question of the study: to what extent can the preliminary chamber judge go in analyzing the evidence without exceeding the bounds of legality and entering the realm of the substantive merits? The difficulty of this distinction is compounded by the fact that, in certain situations, verifying legality requires access to the content of the evidence, which may, in practice, compromise the neutrality of the analysis.

Another key aspect of the analysis is the admission of new evidence by the preliminary chamber judge in this procedure. In this regard, this paper will examine how the preliminary chamber judge admits and examines evidence in this procedure, as well as the criteria by which the judge assesses the necessity of such evidence for verifying the legality of the evidence gathered during the criminal investigation phase or the legality of the criminal investigation authorities' activities. The evidence adduced in the preliminary chamber is not intended to help establish the facts of the case or to support the charges, but serves exclusively to verify the legality of how the evidence was obtained and handled by the criminal investigation bodies.

The analysis of the legality of the taking of evidence represents, in this context, one of the central components of the preliminary chamber procedure, and the exercise of this power must be carried out according to the requirements established in the case law of the European Court of Human Rights, particularly with regard to respect for procedural safeguards and fundamental rights. Consequently, it is necessary to examine, from both a theoretical and practical perspective, the limits of the legality review exercised by the preliminary chamber judge, as well as the risk that this review may take on a substantial dimension, going beyond the scope of a strictly formal verification.

Closely linked to the subject matter of the preliminary chamber proceedings is the exclusion of evidence, acting as the primary consequence when the taking of evidence during the investigation phase is found to be unlawful. Thus, in the exercise of his or her duties, the preliminary chamber judge is not limited to an abstract verification of the compliance of procedural documents, but may order, according to the law, the exclusion of evidence obtained in violation of legal provisions or procedural safeguards. This prerogative gives the review of legality concrete effectiveness, transforming it into an effective mechanism for the protection of fundamental rights.

Furthermore, the exclusion of evidence gathered during the criminal investigation phase may be ordered not only as a result of the examination and assessment of the documents in the case file, but also following the submission of new evidence during the preliminary chamber proceedings. Such evidence, requested by the parties, may aim to highlight the unlawful nature of the evidence obtained by the criminal investigation bodies, including with regard to the specific methods and techniques used in the process of administering and obtaining it.

Consequently, the analysis also addresses the mechanisms through which the illegality of the taking of evidence can be demonstrated, as well as the legal effects of such a finding on the configuration of the evidence to be used during the trial phase.

2. Taking of evidence within the Preliminary Chamber. Legislative evolution and functional limits

Since the entry into force of the Code of Criminal Procedure, the preliminary chamber proceedings have undergone significant changes regarding the admissibility of evidence in this procedure, changes driven by both legislative amendments and the case law of the Constitutional Court.

In its original form, the preliminary chamber was conceived as a predominantly written procedure, in which the judge conducted a review of legality limited to examining the documents and evidence in the case file. The lack of oral proceedings and effective adversarial proceedings, as well as the restricted role of the parties, effectively precluded the possibility of presenting evidence at this stage of the proceedings, with the review being predominantly formal in nature.

This initial approach, however, was subject to substantial criticism in constitutional case law, which highlighted the need to ensure adversarial proceedings and the effective participation of the parties within this procedure.

Thus, in Decision No. 641 of November 11, 2014[1], the Court ruled that, under certain circumstances, the factual circumstances underlying the obtaining of certain evidence have direct and implicit relevance to the legality of the evidence. The inability of the preliminary chamber judge to admit new evidence or to request the submission of certain documents, as well as the absence of oral arguments regarding these issues, placed the judge in a position where he could not clarify the factual situation, a circumstance that may implicitly affect the legal analysis. From this perspective, the Court held that the outcome of the preliminary chamber proceedings regarding the lawfulness of the taking of evidence and the performance of procedural acts by the criminal investigation bodies has a direct influence on the trial on the merits, as it may prove decisive in determining the guilt or innocence of the defendant; furthermore, the Court found that the strict regulation of the preliminary chamber leads to a violation of the parties' right to a fair trial, specifically regarding its components of adversariality, orality, and equality of arms.

In light of this decision by the Constitutional Court, Law No. 75/2016[2] amended Article 345(1) (1) of the Code of Criminal Procedure, establishing that when ruling on motions and objections raised in the preliminary chamber, in addition to the material in the criminal investigation file, any new documents submitted may also be taken into account. In practice, the legislator has established through this amendment that only documentary evidence may be additionally admitted in the preliminary chamber.

This legislative solution was in turn criticized by the Constitutional Court, which, in Decision No. 802/2017[3], invoked the case law of the European Court of Human Rights to establish the need for the parties to have the opportunity to use all means provided by law to invoke facts or circumstances in their defense, including the presentation of any evidence that would demonstrate the illegality of the evidence produced by the criminal investigation bodies. Thus, the Court ruled that although the amendment introduced by Law No. 75/2016 regulates the possibility for the parties and the injured party to challenge the evidence admitted during the criminal investigation phase, it did not provide the procedural tools or means to demonstrate the illegality of the act, so that, in order not to undermine the right to defense and the principle of equality of arms, it is necessary that, in the preliminary chamber proceedings, the verification of the legality of the taking of evidence by the criminal investigation bodies be carried out directly, in the presence of the parties and the injured party, with the possibility of presenting any means of evidence.

Currently, Article 345(1) of the Code of Criminal Procedure provides that "At the hearing scheduled according to Article 344(4), the preliminary chamber judge shall rule on the motions and objections filed, as well as on objections raised ex officio, in chambers, based on the proceedings and materials in the criminal investigation file and any other evidence, hearing the arguments of the parties and the injured party, if present, as well as those of the prosecutor."

However, the taking of evidence in the preliminary chamber is specific and limited in nature. The evidence admitted in this proceeding is not intended to establish the facts or support the charges, but exclusively to verify the legality of the taking of evidence and the conduct of the criminal investigation. In this sense, it serves an instrumental function, being subordinate to the limited scope of the proceeding.

In the specialized literature[4], it has been noted that the preliminary chamber judge must make a clear distinction between a challenge to the legality of the evidence and a challenge to its credibility or reliability, so as not to extend the scope of the preliminary chamber to matters specific to the trial on the merits.

Therefore, the taking of evidence in this proceeding is admissible but must remain strictly limited to the purpose of the proceeding, in order to avoid transforming the preliminary chamber into a preliminary stage of the trial on the merits.

3. Verification of the legality of the taking of evidence and the admission of evidence in preliminary hearing proceedings

As we have shown, verifying the legality of the taking of evidence is one of the essential components of the preliminary chamber proceedings, as through this process the judge is called upon to determine whether the

[1] Published in the Off.Gazette no. 887 of 05.12.2014.

[2] Published in the Off.Gazette no. 334 of 29.04.2016.

[3] Published in the Off.Gazette no. 116 of 06.02.2018.

[4] See Kuglay in M. Udroiu (coord) *Codul de procedură penală. Comentariu pe articole, 4th ed., C.H.* Beck Publishing House, Bucharest, 2023, p. 2252.

evidence gathered during the criminal investigation phase was obtained and used in compliance with the provisions of criminal procedure, the right to defense, and the specific safeguards of a fair trial.

The review conducted by the preliminary chamber judge does not concern the probative value of the evidence or its ability to support a conviction, but exclusively the legality of how it was obtained and handled in the case.

The preliminary chamber judge, according to his strict powers, must distinguish between two aspects, which from a practical perspective may be confused: on the one hand, the legality of the evidence, which concerns compliance with the legal conditions for its collection and administration, and, on the other hand, the merit of the evidence, which concerns its persuasive force and its relevance in establishing the factual situation. The latter does not fall within the jurisdiction of the preliminary chamber judge; it belongs to the trial phase itself, where the evidence is subject to adversarial debate among the participants in the criminal proceedings and to the free and direct assessment of the trial court.

At this stage, it is not the responsibility of the preliminary chamber judge to assess the relevance, conclusiveness, or usefulness of the evidence already gathered by the criminal investigation bodies from the perspective of the merits of the case. Its analysis is limited to determining whether the evidence was obtained and produced in a lawful and fair manner.

When, during the preliminary hearing proceedings, the parties or the injured party submit a request for evidence, the judge must verify whether such evidence is admissible, useful, and necessary in light of the limited scope of the proceedings. At this stage, the proposed evidence is not admitted to prove the existence of the offense, the defendant's guilt, or the groundlessness of the charge, but rather to demonstrate or clarify an alleged illegality that occurred during the criminal investigation phase.

Consequently, the criterion of the evidence's utility in the preliminary chamber has a specific connotation. Evidence is useful not because it can contribute to ascertaining the truth in the sense of establishing the merits of the charge, but because it can clarify the circumstances relevant to verifying the legality of the criminal investigation or the challenged evidentiary procedure. Usefulness thus relates to the evidence's ability to demonstrate the existence of a procedural irregularity, a violation of the right to defense, an unjustified interference with fundamental rights, or the use of illegal techniques to obtain evidence.

The admissibility of the evidence proposed in the preliminary hearing must, in turn, be analyzed in relation to the purpose of the proceedings. Not every piece of evidence requested by the parties may be granted, but only that which is directly related to verifying the legality of the taking of evidence or the conduct of criminal investigation acts. A request for evidence that is, in reality, intended to challenge the merits of the accusation, re-evaluate the credibility of a witness, or demonstrate the insufficiency of the evidence must be rejected as exceeding the scope of the preliminary chamber.

The judge may not admit evidence of an exploratory nature, formulated in general terms, or lacking a minimum of justification. The party requesting the taking of evidence must indicate, at least in substance, which aspect of illegality it seeks to prove and how that evidence can help clarify that aspect. In other words, the evidence must be necessary for resolving a question of legality, not merely convenient for the party's procedural strategy.

The preliminary chamber procedure cannot be transformed into an early trial on the merits. The risk of such a transformation arises especially when, under the guise of invoking procedural irregularities, the parties actually seek to submit to the judge issues concerning the credibility of the evidence, its probative value, or the coherence of the charges. However, these issues may be examined in the preliminary chamber only if they are inextricably linked to the legality of how the evidence was obtained or produced.

The admission of evidence in the preliminary chamber may be justified when a party alleges the existence of unfair practices in the taking of evidence. This category may include, for example, entrapment to commit an offence, the use of manoeuvres likely to affect the free will of the person being questioned, the obtaining of statements through pressure, or the use of procedures that evade legal safeguards. In such situations, the evidence requested in the preliminary chamber is not intended to prove the non-existence of the act, but rather to demonstrate that the evidence was obtained through means incompatible with the legality and fairness of the criminal proceedings.

From a practical standpoint, in order to decide whether proposed evidence is useful and necessary for verifying legality, the preliminary chamber judge must understand the subject of the criticism and the connection between the requested evidence and the alleged irregularity. This operation inevitably involves some reference to the content of the documents and evidence in the case file.

However, the analysis must not turn into an assessment of the merits of the charge. The judge must not ask whether the evidence proposed in the preliminary chamber is capable of changing the decision on the merits, but whether it is capable of clarifying the legality of how the evidence was obtained.

The evidence taken in the preliminary chamber proceedings has an instrumental and limited function. It serves to verify the legality of the evidence gathered during the criminal investigation phase and may, if relevant violations are found, justify the exclusion of evidence obtained or taken unlawfully. This function explains why the standard of analysis is different from that applicable during the trial phase: the aim is not to ascertain the judicial truth in the sense of establishing guilt, but to protect the criminal proceedings against the use of evidence tainted by legal defects.

4. The scope of verification of the legality of evidence in the Preliminary Chamber

The scope of the preliminary chamber judge's review of the legality of the taking of evidence remains a significant practical and doctrinal controversy.

Over time, the role of the preliminary chamber judge has been debated, particularly in cases involving evidentiary procedures that interfere with fundamental rights (technical surveillance, home searches, etc.). Thus, the question has arisen as to whether this review must be limited to verifying the formal conditions for authorizing and taking evidence, or whether it may also include an examination of the substantive grounds that justified the use of such procedures.

Legal doctrine[5] has held that the prevailing trend in judicial practice is restrictive in nature, meaning that the preliminary chamber judge cannot go beyond a strictly procedural review, limited to the jurisdiction of the judicial body, the existence and validity of the authorization documents, as well as compliance with the legal requirements regarding form and duration. According to these courts, an analysis of substantive elements—such as the existence of reasonable suspicion, the necessity, or the proportionality of the measure—would amount to an assessment of the merits, which is inadmissible at this stage of the proceedings.

However, legal doctrine has also developed the view[6] that the preliminary chamber must verify both the "legality" and the "merits" of the authorization of evidentiary procedures. According to this approach, the preliminary chamber judge should verify not only the formal compliance of the authorization documents but also the existence of elements that effectively justify the use of those measures.

In this regard, a series of arguments have been presented. A first argument in support of this view is that the distinction between "legality" and "substantiation," established in case law, finds no explicit support in the regulation of evidentiary procedures. An analysis of the legal provisions shows that the authorization of measures such as technical surveillance, search, or other infringements of fundamental rights is conditioned not only on the fulfillment of procedural requirements but also on the existence of substantive elements, such as reasonable suspicion, necessity, and proportionality of the measure. However, these conditions cannot be excluded from the scope of legality, as they are an integral part of the requirements imposed by law for the validity of the evidentiary procedure.

It was then shown that limiting the review to purely formal aspects would lead to an incomplete and, in certain situations, ineffective verification. If the preliminary chamber judge were prevented from examining the existence of reasonable suspicion or the proportionality of the interference, the review of legality would become a mere formality, devoid of any real substance.

Thus, it would be possible for a highly intrusive measure to be retained in the evidence solely because it formally meets the authorization requirements, even if, in practice, it was not justified. Another important argument in support of this view stems from the need to ensure effective review of interferences with fundamental rights. In the area of technical surveillance measures, for example, it has been emphasized that the verification must be comprehensive, covering both formal and substantive requirements. In the absence of such a possibility, the defendant would be deprived of an effective remedy against unjustified interference, which would amount to an impermissible restriction of the right to a defense and the right to a fair trial. In other words, if the analysis of substantive conditions could not be carried out either during the criminal investigation phase,

[5] See B. Micu, *Camera preliminară*, Hamangiu Publishing House, Bucharest, 2022, p. 49.
[6] See R. Slăvoiu, *Verificarea legalității procedeelor probatorii în camera preliminară*, in Dreptul no. 1/2018, p. 147-155.

or in the preliminary hearing, or subsequently during the trial phase, this would lead to a situation where certain evidentiary procedures escape any real control.

From this perspective, the author has shown that the concept of legality must be understood in a broad sense, encompassing all the conditions imposed by law for the ordering and execution of an evidentiary procedure. Thus, the verification of legality cannot be limited to the existence of the authorization order or to formal compliance with it, but must also address the grounds that justified its issuance.

The proposal is not to transform the preliminary chamber into a full-fledged trial on the merits, but merely to recognize that certain elements traditionally considered to pertain to the merits are, in reality, components of legality when the law establishes them as conditions for ordering the measure. Therefore, the analysis of these elements would not constitute an exceeding of the jurisdiction of the preliminary chamber judge, but rather a correct application of the legal provisions.

I concur with this view, as the broad interpretation of the concept of legality in certain situations appears to be not only justified but necessary. A rigid demarcation between legality and merits, although established in theory, proves difficult to maintain in practice and, in certain situations, even artificial. Cases arising in judicial practice reveal that there are instances in which the legality of the taking of evidence cannot be meaningfully assessed without at least some reference to the substantive elements that justified the ordering of the evidentiary procedure. As correctly emphasized in the opinion cited above, regarding intrusive means of evidence, the conditions of legality inherently include elements such as the existence of reasonable suspicion, necessity, and proportionality of the measure. However, excluding these elements from the scope of review would reduce the verification of legality to a purely formal exercise, devoid of effectiveness. This controversy is not accidental but reflects a certain lack of coherence in criminal procedural law. The law does not provide a complete and clearly defined framework in all situations; there are areas of overlap between institutions and even genuine legislative gaps. Under these circumstances, the attempt to maintain an absolute separation between legality and merits risks ignoring the reality of how procedural mechanisms function and leading to formalistic solutions, to the detriment of the effective protection of fundamental rights.

The view expressed above, with which I concur, is also significantly supported by the reasoning of Constitutional Court Decision No. 244/ 2017[7] issued with reference to the provisions of Article 145 of the Code of Criminal Procedure, which did not allow the person subject to technical surveillance—who did not have the status of a defendant—to challenge the legality of the measure.

This Decision highlights the need for effective review of technical surveillance measures, as a form of interference in private life. In this regard, the Court held that there must be an a posteriori review of these measures, allowing the person concerned to verify not only the formal compliance with legal provisions but also the fulfillment of all conditions provided by law for their ordering and execution

However, since the Constitutional Court held that the provisions of Article 145 of the Criminal Procedure Code were unconstitutional precisely due to the lack of an effective mechanism for a posteriori review of technical surveillance measures in cases where the subject of the surveillance was not indicted — a review that must address not only formal aspects but also elements pertaining to their justification, such as necessity and proportionality — it is all the more imperative to recognize such a review in the case of a defendant subject to these measures who has been indicted. To accept the contrary would lead to an inconsistent outcome, in which the very person against whom the criminal proceedings have advanced to a later stage would enjoy a lower level of protection. Therefore, verifying compliance with legal conditions necessarily involves analyzing the elements justifying the interference, namely the necessity and proportionality of the measure in a democratic society. In the absence of this possibility, the review would become illusory, and the right of access to justice and the right to an effective remedy would be devoid of content.

Another distinct issue, particularly sensitive in the context of verifying the legality of the taking of evidence, is the scenario of entrapment.

According to Art. 101 of the Criminal Procedure Code "(1) The use of violence, threats, or other means of coercion, as well as promises or inducements for the purpose of obtaining evidence, is prohibited. (2) Interrogation methods or techniques that impair a person's ability to recall and recount, in a conscious and voluntary manner, the facts constituting the subject matter of the evidence may not be used. This prohibition applies even if the person being interrogated consents to the use of such interrogation methods or techniques.

[7] Published in the Off.Gazette no. 529 of 06.07.2017.

(3) Judicial authorities and any persons acting on their behalf are prohibited from inciting a person to commit or to continue committing a criminal offense for the purpose of obtaining evidence."

To the extent that a defendant brought to trial claims in the preliminary chamber proceedings that judicial bodies or persons acting under their coordination determined or decisively influenced the defendant's conduct, the question arises as to whether and under what conditions such a circumstance may be taken into account in the preliminary chamber proceedings.

Entrapment constitutes a serious violation of the principle of fairness in the taking of evidence, as the State cannot artificially create the criminal situation it subsequently seeks to punish. In this sense, a finding of entrapment does not merely concern the credibility of the evidence, but the very legality of the manner in which it was obtained Given this situation, the first issue that arises is how the defendant can prove, during the preliminary chamber proceedings, that entrapment occurred during the criminal investigation phase. In the absence of an express provision, such proof may be established by requesting the taking of evidence capable of demonstrating the active role of judicial authorities or their collaborators in inducing the criminal conduct.

The admissibility of such evidence must be analyzed in relation to the purpose of the preliminary chamber proceedings. Although, at first glance, invoking entrapment might be characterized as a defense on the merits, in reality it may have direct relevance regarding the legality of the taking of evidence. To the extent that it is demonstrated that the evidence was obtained through provocative behavior by the authorities, it becomes incompatible with the requirements of a fair trial and, consequently, subject to exclusion. The major difficulty, however, lies in the position of the preliminary chamber judge, who is called upon to analyze such a claim without exceeding the limits of his or her jurisdiction. Thus, the question arises as to whether assessing the existence of an entrapment requires an analysis of legality or one of merit.

Of course, proving this situation of illegality can be done by any means of evidence, and audio-video recordings, documents, witnesses, etc., may be requested.

In this regard, in judicial practice[8] during the preliminary chamber, entrapment was analyzed as a violation of the principle of legality and fairness in the taking of evidence in a case where the defendant was indicted for committing high-risk drug trafficking offenses, essentially holding that, following an investigative operation conducted by the criminal prosecution bodies, using an undercover investigator and an authorized collaborator, the defendant offered prohibited substances and was subsequently found in possession of a significant quantity of drugs intended for sale.

During the preliminary chamber proceedings, the defendant argued that the evidence had been obtained unlawfully, claiming that the entire criminal activity had been instigated by the judicial bodies, through the investigator and the authorized collaborator. In this regard, it was argued that there were no prior concrete indications of the defendant's involvement in drug trafficking, and that the initiative for the transaction did not originate with him, but was instigated by the collaborator. It was also argued that the entire investigation was the result of active participation by the judicial bodies in the commission of the offense, in violation of the provisions of Article 101(3) of the Code of Criminal Procedure, which prohibit inciting a person to commit an offense for the purpose of obtaining evidence.

To substantiate the alleged illegalities raised by the defendant, he requested that the preliminary chamber judge admit certain evidence, namely the hearing of the undercover investigator and the authorized collaborator, as well as the conduct of investigations regarding the status of the informant and any benefits from which the informant might have benefited. In this case, the preliminary chamber judge, in light of the purpose of the preliminary chamber proceedings as regulated by Article 342 of the Code of Criminal Procedure, rejected the requests to take evidence, finding that the motions and objections raised could be resolved based on the material in the criminal investigation file, without the need for additional evidence.

In analyzing the arguments raised by the defendant regarding provocation by the criminal investigation bodies, the preliminary chamber judge held that the defendant's allegation that he was provoked into committing the offense of which he is accused cannot be upheld. In the preliminary chamber judge's assessment, the actions of the criminal investigation bodies cannot be considered to have led to the initiation of the defendant's criminal activity, but rather conformed to it; the investigative activity remained, proportionally,

[8] Order of divestiture (of jurisdiction) no. 66 din 12.03.2026, Satu Mare Tribunal, available at https://rejust.ro/juris/3g9e649g8 last time consulted on 14.03.2026.

within the limits of undercover operations rather than falling within the scope of the activities of agents provocateurs.

The preliminary chamber judge held that certain cumulative conditions must be met for the undercover investigator's activities to be considered passive conduct that does not constitute entrapment, conditions which were cumulatively met in this case: a) There must be reasonable suspicion that a person is participating in an offence, this suspicion arising from the existing complaint documents in the case—regarding this condition, the preliminary chamber judge noted that at the time the criminal investigation began, the defendant's involvement in drug trafficking had come to the attention of the criminal prosecution bodies and was already under their scrutiny, and his conduct could justify a reasonable suspicion regarding the pre-existence of criminal activity. Furthermore, there was reasonable suspicion that the defendant had not become involved in such drug trafficking activities by accident; at the time of the ex officio referral, there was information that the defendant was part of a specialized criminal group, and he was using a Facebook account to sell high-risk drugs, namely crystal meth; b) the activity of the criminal investigation authorities was authorized according to the law – regarding this condition, the preliminary chamber judge held that the activity carried out by the undercover investigator and the collaborator took place under the conditions and within the limits authorized by the prosecutor's order dated June 3, 2025 as part of the evidentiary procedure involving authorized participation in operations concerning drugs and psychoactive substances, for the purpose of obtaining evidence; c) the undercover investigator did nothing other than offer the defendant an opportunity, a routine occasion—in this case, the preliminary chamber judge held that the undercover investigator-informant acted within the limits authorized by the prosecutor, the defendant being the one who offered the authorized informant the quantity of 2.19 g of 3-CMC, and he was the one who set the price.

At the same time, the preliminary chamber judge also noted that the defendant's criminal intent was not created by the actions of the judicial bodies, as they had well-founded reasons to suspect the defendant's illegal activities, so that the criminal investigation bodies acted within the scope of a bona fide investigation through which a "normal" opportunity was created for the defendant to commit an offence.

Consequently, the preliminary chamber judge found that the actions of the judicial bodies were carried out for the sole purpose of gathering evidence, and not with the intent of unfairly inciting the commission of a criminal act; thus, the defendant's allegations regarding the existence of entrapment are entirely implausible.

The preliminary chamber judge emphasized that the actions of state agents and their collaborators merely provided the defendant with an opportunity to commit a new criminal offense, and thus did not violate the principle of fair administration of evidence or the right to a fair trial; consequently, the judge held that, in this case, the orders to continue criminal investigation proceedings and to initiate criminal prosecution are not affected by any procedural defect and no grounds for illegality can be established in this regard.

Finally, the preliminary chamber judge noted that during the criminal investigation, procedural rules were not diverted from their purpose, having been used to substantiate the criminal charges rather than to incite the commission of offenses. The investigative methods and strategies employed by the investigation bodies were used within the scope of their legal authority to gather evidence regarding the facts under investigation, and not to provoke the defendant into committing offences. Thus, given the dates on which the criminal investigation bodies claim the acts were committed (June 3, 2025, November 9, 2025) of which the defendant is accused, it cannot be considered that the criminal investigation was conducted in violation of the principle of fairness of evidence or that the defendant was provoked to commit offences. Furthermore, the judge noted in his reasoning that the hearing of the undercover investigator and the collaborator, as well as the issuance of the letter to DIICOT regarding the outcome of the complaint filed by the defendant, are irrelevant in light of the evidence presented in the case (witnesses) during the criminal investigation. Thus, it was held that the evidence requested during the preliminary chamber proceedings is not useful for resolving the case, which is why it was also rejected at the court hearing.

In my opinion, the analyzed decision clearly highlights the practical difficulty in preliminary chamber proceedings of distinguishing between the exclusive review of legality and the assessment of the merits of the charge. Although the preliminary chamber judge starts from the correct premise that the scope of the proceedings is limited to verifying the legality of the taking of evidence and the conduct of criminal investigation acts, the actual analysis carried out regarding the entrapment appears to exceed, at least in part, this framework. Thus, in order to reject the defendant's argument regarding the existence of entrapment, the preliminary chamber judge did not limit himself to a formal verification of the authorization of the undercover investigator and the collaborator or to checking compliance with the limits of the authorization. On the contrary, it examined the existence of reasonable suspicion, the defendant's prior conduct, his alleged involvement in drug trafficking, the fact that he allegedly supplied the prohibited substances, and that he allegedly set the price of the transaction. However, such elements no longer concern exclusively the regularity of the evidentiary process, but inevitably touch upon the factual basis of the charge. In this context, it can be observed that the preliminary chamber judge ends up using, to exclude the hypothesis of entrapment, reasoning that presupposes a certain assessment of the defendant's conduct. Statements such as that the judicial authorities' activity "conformed" to an already existing criminal activity or that the defendant merely benefited from a "common opportunity" to commit the offence may be perceived as going beyond the analysis of legality and as approaching a preliminary assessment of the merits of the charge. In such a scenario, the risk is not merely that of an overly broad analysis, but of forming a preliminary judicial opinion regarding the existence of the act and the defendant's conduct.

The decision cited above confirms that entrapment represents one of the borderline situations in which legality and merit inevitably intersect. Although one might say that entrapment is a matter of legality, since it concerns the fairness of the taking of evidence and the express prohibition provided for in Art. 101(3) of the Code of Criminal Procedure, its analysis in the preliminary chamber proceedings is risky and difficult. The line between assessing legality and assessing merit is fine. In this context, the question legitimately arises as to whether it is appropriate for such an issue to be resolved in the preliminary chamber proceedings or whether, on the contrary, it should be reserved for the trial phase. On the one hand, examining the challenge at this stage serves the preliminary chamber's filtering function, allowing for the exclusion of evidence obtained unlawfully before it influences the decision on the merits. On the other hand, the deeply factual nature of this institution and the need for a detailed analysis of the specific circumstances of the case create the risk that the preliminary chamber judge may exceed the limits of its jurisdiction and carry out, even implicitly, an assessment of the merits of the charge.

Precisely for this reason, this matter confirms the idea that the distinction between legality and merit is not always rigid, and in certain situations, the review of legality inevitably takes on a substantive dimension. I believe that such an analysis should be conducted with great caution. The preliminary chamber judge may and must verify whether the evidence was obtained through entrapment, but the judge's reasoning must avoid wording that anticipates the defendant's guilt or that validates, prior to the trial on the merits, the existence of criminal conduct. Otherwise, the preliminary chamber proceedings risk becoming not only a filter for legality, but also a forum where the outcome of the case on the merits is foreshadowed, even if only indirectly.

In conclusion, entrapment confirms, perhaps more than any other legal institution, that the distinction between legality and the merits of the case, although necessary at a theoretical level, cannot be maintained in absolute terms in judicial practice, requiring a nuanced approach tailored to the specifics of each case

A key aspect regarding the exclusion of illegally obtained evidence is the current wording of the provisions of Article 102(2) and (3) of the Criminal Procedure Code, as amended by Law No. 201/2023. According to these provisions, evidence obtained unlawfully may not be used in criminal proceedings, and the nullity of the act ordering or authorizing the taking of evidence, or by which it was taken, results in the exclusion of the evidence and the removal from the case file of the evidence corresponding to the excluded evidence. This legislative solution has a dual significance. On the one hand, it penalizes violations of the rules governing the taking of evidence. On the other hand, it aims to prevent any subsequent contact by the judge with evidence affected by legal defects. In this way, exclusion is not merely a declaratory sanction but creates an appearance and an effective guarantee of impartiality, in the sense that the judge will not be influenced, even indirectly, by the content of illegally obtained evidence.

The effects of the exclusion of evidence are not limited to its mere removal from the case file, but may even influence the structure of the charge. In the event that, following a verification of legality, the preliminary chamber judge excludes one or more pieces of evidence, without this measure affecting the entire body of evidence, the judge orders, pursuant to Art. 345(3) (3) of the Criminal Procedure Code, that the case be returned to the prosecution so that the prosecutor may assess whether to maintain the indictment or request the return of the case.

Thus, the preliminary chamber judge is not in a position to assess whether the remaining evidence is sufficient to support the indictment and to refer the case to trial. Such an assessment would inevitably entail an analysis of the merits of the charge, which exceeds the limits of its jurisdiction. For this reason, the procedural mechanism established by law requires that, following the exclusion of evidence, the prosecutor—as the party bringing the criminal action—be the one to decide whether to maintain the order to refer the case to trial.

The preliminary chamber judge cannot order the commencement of the trial without the prosecutor expressing his position following the exclusion of evidence, as this would implicitly validate the sufficiency of the remaining evidence, thereby making an assessment regarding the merits of the charge. This is evident from Article 346(3)(c) of the Criminal Procedure Code, which provides that the preliminary chamber judge will return the case to the prosecution if the prosecutor requests its return, under the conditions set forth in Article 345(3), or fails to respond within the time limit specified in those provisions.

This mechanism confirms the functional distinction between the powers of the preliminary chamber judge and those of the prosecutor, as well as the legislator's concern to prevent the judge from ruling, even indirectly, on the sufficiency of the evidentiary material.

Regarding the issue under consideration, we emphasize that the taking of evidence in preliminary chamber proceedings—requested by the parties precisely to demonstrate the illegality of evidence obtained during the criminal investigation phase—helps to identify legal defects and, consequently, to exclude such evidence. The effect of such a solution is not merely formal, but may have a direct impact on the substance of the charge, either by weakening the evidentiary basis or by leading to the case being remanded to the prosecutor's office.

In this context, the manner in which motions to admit evidence in the preliminary chamber are worded takes on particular importance. The parties must precisely identify the alleged irregularity, the evidence by which it can be proven, and the connection between the requested evidence and the subject matter of the preliminary hearing. In such a situation, the preliminary chamber judge faces a difficult balancing act: they must remain within the bounds of legality review, but at the same time allow for the taking of evidence necessary for that review to be effective.

Therefore, even if the preliminary chamber judge does not assess the merits of the evidence, the effects of verifying the legality of its collection may indirectly influence the structure of the indictment and the subsequent course of the criminal trial. This reality confirms that, in practice, the distinction between legality and merit is not absolute, and the preliminary chamber remains a procedural space where this tension is constantly present.

5. Conclusions

The taking of evidence in preliminary chamber proceedings is an essential element in ensuring the effectiveness of the review of legality over criminal investigation activities.

The evidence admitted in the preliminary chamber is not intended to help establish the facts or support the prosecution's case, but rather serves an instrumental function, being intended solely to verify how the evidence was gathered during the criminal investigation phase. It is precisely this function that gives the preliminary chamber procedure the character of a genuine filtering mechanism, insofar as, through this evidence, the judge can identify and sanction violations of procedural rules or fundamental safeguards.

However, the analysis revealed that the preliminary chamber judge is in a difficult position, being called upon to strike a delicate balance between the need for effective review of legality and the obligation not to exceed the limits of its powers.

In many situations, verifying the legal violations alleged by the parties and the injured party involves a reference, even if indirect, to factual elements that approach the merits of the charge. This reality creates the risk that the legality review may take on a substantial dimension, and that the judge may be exposed to the danger of forming, even unintentionally, a preliminary opinion on the merits of the case.

The effectiveness of the legality review depends not only on the legal framework but also on the parties' ability to identify irregularities and propose relevant evidence to prove them, as well as on the judge's willingness to admit the evidence necessary to conduct a substantive—rather than merely formal—review.

The preliminary chamber procedure remains an essential institution in the architecture of criminal proceedings, but, at the same time, one marked by significant practical difficulties. The rigidity of certain legal provisions, the lack of clear guidelines in distinguishing between legality and soundness, and the complexity of specific situations can transform this stage, in certain cases, into a process that is more formal than effective.

Under these circumstances, the question legitimately arises as to whether the preliminary chamber procedure, in its current form, always succeeds in fulfilling its role as a genuine filter of legality or whether, on the contrary, it risks becoming, in certain situations, a formal stage, insufficiently adapted to the complexity of the issues it is called upon to solve.

References

- Andrei Viorel Iugan, Tratat privind probațiunea în procesul penal, C.H.Beck Publishing House, Bucharest, 2025;
- Micu Bogdan, Camera preliminară, Hamangiu Publishing House, Bucharest, 2022;
- Mihail Udroiu (Co-ordinator), Codul de procedură penală. Comentariu pe articole, 4th ed., Bucharest, 2023;
- Radu Slăvoiu, Verificarea legalității procedeelor probatorii în camera preliminară, in Dreptul no. 1/2018.
- Constitutional Court Decision No. 641/2014, published in the Official Gazette No. 887 of December 5, 2014;
- Constitutional Court Decision No. 802/2017, published in the Official Gazette No. 116 of February 6, 2018;
- Constitutional Court Decision No. 244/2017, published in the Official Gazette No. 529 of July 6, 2017
- Order of divestiture (of jurisdiction) no. 66 din 12.03.2026, Satu Mare Tribunal, available at https://rejust.ro/juris/3g9e649g8 last time consulted 14.03.2026
- The Code of Criminal Procedure, updated January 2026, Universul Juridic Publishing House;
- Law No. 75/2016, published in the Official Gazette No. 334 of April 29, 2016;