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The Preliminary Chamber Competence in the Light of Articles 342-347 of the C.C.P. Provisions

Denisa BARBU¹

Abstract

The current Code of Criminal Procedure brings important changes to some of the institutions of the old Code of Criminal Procedure, but it also establishes a number of new institutions that did not exist in our criminal law. Based on these considerations, we have appreciated that at this time, in view of the consolidation of the legislation in the field, it is useful to design a work that examines the competence of the preliminary chamber judge. Therefore, the ways in which the claims and exceptions relating to the legality and loyalty of the prosecution are evaluated in this stage of the trial to know who the right holders are entitled to formulate / invoke claims and exceptions will be analysed; the date until which they can be formulated; the subject of criticisms that may be brought to prosecution; the cases in which the case is returned to the prosecutor's office or the cases in which the opening of the court is ordered. Even if the Preliminary Chamber judge does not verify the merits of the evidence or the trial, its role is as important as the role of the court, since its rulings on the lawfulness of the prosecution can have a significant reflex on the settlement of the criminal proceedings, given that the basis of any criminal proceedings is the probation. It should be noted that, in addition to proceedings in the preliminary camera stage, the Criminal Procedure Code confers on the judge of preliminary proceedings and derived competences in the matter of disposal of special confiscation, the total or partial dissolution of a document after the prosecutor has ordered a non-adjudication confirmation / refusal to reopen the criminal prosecution or to settle the complaint against the classification solutions, respectively the verification of the lawfulness and the soundness of the decision to renounce the criminal prosecution, but the legislator established its own procedural rules, the provisions of art. 342-347 C.C.P. not establishing the common law on them.

Keywords: *Preliminary Chamber; the return of the case; the commencement of the trial; the irregularity of the notice; the lawfulness of the administration of the evidence.*

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We shall analyse the ways in which the claims and exceptions relating to the legality and loyalty of the prosecution are assessed in this process to be considered:

- a) who are the holders of the right to formulate / invoke claims and exceptions;
- b) the date by which they can be formulated;
- c) the subject of criticisms that can be brought to prosecution;
- d) the situations in which the case is returned to the prosecutor's office or the cases in which the opening of the court is ordered.

The purpose of the preliminary-ruling procedure [1] is to verify, after the defendant has been sued by the prosecutor's indictment, of the following:

a) jurisdiction of the court;

It will be verified that the court has been seized with an act that attracts the jurisdiction of that court, and not the merits of the allegation;

b) competence of the prosecution bodies (cause of relative nullity to the prosecution if the conditions stipulated in the Ordinance 282 of the NCPP are fulfilled);

The material, personal and functional competence of the criminal investigation bodies will be verified.

If the jurisdiction is determined by the quality of the person, it is not necessary for all defendants to have the quality provided by the law, it being sufficient that one of them has had the quality of the derogation from the rules of material competence.

c) the regularity of the notification document;

Verifying the regularity of the indictment is a distinct element in verifying the legality of criminal prosecution acts, the indictment not being a criminal prosecution act, but the act of referring the court that is issued by the prosecutor after the completion of the procedural stage of the prosecution.

It is well established in the doctrine [2] that the validity of the indictment is independent of the lawfulness or sanctions applied to the criminal prosecution and that *the unlawfulness of the acts of criminal prosecution is not such as to attract, by itself, the unlawfulness of the referral to the court.*

If both indictment and non-adjudication (filing or waiving of criminal prosecution) were ordered by indictment, verifying the legality of the court referral will only refer to the remedies available to the court. The classification solution can be checked as to the legality and soundness of the preliminary chamber judge in the context of the *derived competences* only if a complaint is made, according to the procedure provided by art. 340 and 341 of the NCCP, while the decision to renounce the prosecution will be subject

to the internal and judicial procedure for verifying the legality and solidity under the conditions of art. 31S paragraph (10) - (16) NCCP. Therefore, through the requests and exceptions formulated in the preliminary chamber the participants can not submit to the judge's analysis the aspects of illegality or non-motivation of the non-adjudication / non-adjudication solution, at this stage of the criminal trial, the judge having the functional competence to proceed and the analysis of these solutions, by the provisions of art. 342 NCCPs;

The illegality of criminal prosecution does not always lead to the finding and illegality of the court's referral; in this regard, it has been stated in the case-law that "the regularity of the referral concerns only the intrinsic formal and basic aspects of the act of vesting (...) any other legality of the conduct of the prosecution does not concern the regularity of the investment (...)" [3] However, it will be found that the court has been unlawfully notified and if the defendant has been sued for the sake of having committed an act for which the prosecution has not been initiated or extended, or in the case where one or more deeds the criminal action was not initiated or it was illegally moved by indictment, and these irregularities cannot be remedied by the prosecutor at the stage of the preliminary hearing, their finding attracting the decision to return the case to the Prosecutor's Office.

d) The lawfulness and loyalty of the evidence taking during the criminal prosecution in order to verify the incidence of the derived sanction of *exclusion* [the sanction of exclusion is derived from the sanction of nullity as it results from the provisions of art. 102 par. (3) NCPP];

It will be verified whether the defendant's rights of defence have been respected in the course of criminal prosecution in the process of administering the evidence, or whether any of the cases of absolute nullity referred to in Art. 281 par. (1) e) and f) NCCP or another violation of the law in the process of sampling that attracts the incidence of relative nullity under the conditions of art. 282 NCCP.

We shall analyse both the lawfulness of the administration of evidence by the criminal prosecution bodies (by reference to the act whereby the evidence, the means of proof or the probationary procedure was approved, approved, approved, and / or by reference to the act by which the evidence was and the lawfulness of the sentences by which the judge of rights and freedoms has approved, authorized or confirmed various probative procedures, respectively the means of proof obtained by the approved slaughter process (for example, the admission of a home search may be considered as unlawful by a judge of rights and freedoms from a lower court in the capacity of the competent person or person to judge the

case in substance or the authorization of a technical supervision without the participation of the prosecutor in the council chamber proceedings etc.). [4]

Likewise, it will not be necessary to verify the relevance, the validity or the utility of the evidence administered during the criminal investigation, the analysis being cantonal only in the area of legality.

e) **the lawfulness of the processing / procedural acts** by the criminal investigation bodies to check the incidence of the nullity for the penalty (absolute or relative).

It will be checked whether the processing or procedural acts have been performed in compliance with the legal provisions in the order of the NCCP, if the mandatory stages of the prosecution provided by the NCCP have been completed or if any of the cases of absolute nullity provided by Art. 281 par. (1) lit. e) and f) of the NCCP or other violation of the law in connection with the procedural or procedural acts in the course of the criminal prosecution that attract the incidence of the relative nullity under the conditions of art. 282 of the NCCP.

It will not be possible for the preliminary judge to verify the orders for the establishment of the precautionary measures which have previously been subject to a review of legality and merit before the judge of rights and freedoms which has resolved the complaint brought by the defendant.

The contradictory nature of the preliminary-stage phase is not an origin, but a consequence of declaring unconstitutional procedural provisions governing the written and non-contradictory nature of the preliminary proceedings.

Determining the time-limit is mandatory whenever the Preliminary Chamber judge considers that it is imperative to invoke, of its own motion, exceptions concerning cases of absolute nullity or inaccuracy of the notice of appeal, since it has no procedural capacity to invoke otherwise these exceptions in a contradictory procedure, within the time limit set in the council chamber, in which the prosecution and defence know about them and may debate them in a contradictory manner [4].

By the deadline set in *the council chamber*, the judge hearing a preliminary hearing must debate the applications and exceptions submitted in writing or raised by the parties or the injured party, as well as those raised ex officio, and to hear the prosecutor's conclusions (whose participation is mandatory if sanction of absolute nullity) of the injured parties and person (if present), respectively of the defendant's lawyer. Thus, both the contradictory and the oral procedure and the equality of the weapons between the prosecution and the defence are ensured. The parties and the injured party take note of the position of the Prosecutor's Office regarding

the applications and exceptions invoked in the case, and may counter the statements of the representative of the Public Ministry [4].

Considering that according to the provisions of art. 282 par. (3) and (4) a) NCCP nullities can be **invoked until the end of the procedure in the preliminary chamber**, we consider that some authors also need to understand by this autonomous notion the moment of finalizing the debates and solving the requests and exceptions in the procedure stipulated by art. 345 NCCP. [5] Therefore, in the procedure provided by art. 346 NCCP (carried out after the expiry of the time limit set for the remedy procedure and which has as its sole purpose the determination of the solution to be given: the return of the case to the Prosecutor's Office or the commencement of the trial) no further claims and exceptions regarding the legality and loyalty of the prosecution may be invoked; as an exception, art. 347 par. (4) of the NCCP has stipulated the possibility of invoking the appeal of the absolute nullity only.

After the closure of the debates, the preliminary chamber judge assesses the applications and the exceptions formulated in relation to the whole of the criminal investigation material and, **as the case may be, the evidence with new documents** administered during the preliminary chamber procedure (according to art. 345 par. (1) of the NCCP) and may order, by **a reasoned decision pronounced in the council chamber**, one of the following **solutions**:

a) **to establish the lawfulness of the court's referral, the taking of evidence and the performance of criminal prosecution** (if all claims and exceptions made by the parties or the injured party or ex officio are dismissed) **and order the commencement of the trial**;

b) **notes the fact that the act of referral is irregular** (for example, it is found that the act of filing is not suitable to validly testify to the court, not describing the act of accusation of the defendant, or it is not possible to establish the interval of time when the act was committed, or the indictment has not been drawn up by the prosecutor in the competent prosecutor's office or has not been verified by the hierarchically superior prosecutor in terms of legality and merit;

c) **to exclude all the samples administered by the court**, finding the nullity of the documents by ordering or authorizing taking of the evidence or by which the evidence was administered and ordering the return of the case to the prosecutor's office;

d) **excludes a sample or a part of the samples taken as a result** of the nullity of only one or several acts whereby the taking of samples or the taking of evidence was ordered or was authorized;

e) finds the incidence of the sanction of absolute nullity or relative nullity [if it has been invoked by the person concerned within the time limit provided by art. 282 par. (4) a) NCCP, and there is an important harm to the procedural rights of the person who cannot be removed other than by the annulment of the act] **regarding all processing / procedural acts during the criminal prosecution and order the restitution of the case to the prosecutor's office;**

In this case, all the criminal prosecution is found to be null and void. As a consequence, it will also be ordered to exclude all evidence administered during a single follow-up strike as a total of nullity. Therefore, with respect to the provisions of art. 346 par. (42) NCCP, the restitution will even be ordered by the conclusion that the entire prosecution is null and void [6].

f) finds the incidence of the sanction of absolute nullity or relative nullity [if it has been invoked by the person concerned within the time limit provided by art. 282 par. (4) lit. a) NCCP, and there is an important harm to the procedural rights of the person who cannot be removed other than by the annulment of the act] **regarding one / some of the processing / procedural acts during the criminal prosecution;**

g) declines the competence to conduct the preliminary chamber procedure of the preliminary chamber judge in the competent court (territorial, material or personal).

It is obligatory to draw up the minute in which the pronounced solution is recorded.

The conclusion shall be communicated to the prosecutor, the parties or the injured party who may file **an appeal within 3 days from the commencement of the minute of the conclusion.** [7]

The conclusion by which the Preliminary Chamber Judge decides to decline the competence (g) above **is final.**

Conclusion

Even if the Preliminary Chamber judge does not verify the merits of the evidence or the trial, its role is as important as the role of the court, since its rulings on the lawfulness of the prosecution can have a significant reflex on the settlement of the criminal proceedings, given that the basis of any criminal proceedings is the probation.

It should be noted that, in addition to proceedings in the preliminary chamber stage, the Criminal Procedure Code confers on the judge of preliminary proceedings and derived competences in the matter of disposal of special confiscation, the total or partial dissolution of a document after

the prosecutor has ordered a non-adjudication confirmation / refusal to reopen the criminal prosecution or to settle the complaint against the classification solutions, respectively to verify the legality and the validity of the decision to renounce the prosecution. For these derived competences, the legislator established its own procedural rules, the provisions of art. 342-347 of C.C.P. not establishing the common law on them.

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