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Preliminary Chamber According to the Latest Amendments to the Criminal Procedure Code[1]

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Abstract. The author examines the Romanian procedure before the preliminary chamber during the penal (criminal) procedure as regulated by current legal norms. The basis of the examination is formed by the requirements for a fair trial in the course of penal justice, especially from the perspective of the specific objections which may only be raised in the preliminary phase of the procedure. The author concludes that the preliminary chamber procedure may be optimized under several aspects in order to ensure a better, more efficient approach to the criminal trial.

Keywords: penal code, criminal trial, preliminary chamber, procedural objections, fair trial

Given that the intention of the legislator[2] was that through the institution of the preliminary chamber the Criminal Procedure Code[3] should meet the requirements of legality, celerity, and fairness of the criminal process, we legitimately wonder whether today, after several decisions of the Constitutional Court[4] that found some legal provisions governing the institution under discussion unconstitutional, as

1 This article takes into account the Government Emergency Ordinance (GEO) no. 18/2016 published in the Official Gazette of Romania, Part I, no. 389 of 23 May 2016, by which the legislator did not make any other changes to the regulations on the preliminary chamber.

2 *Proiectul Legii privind Codul de Procedură Penală. Expunere de motive* [Bill on the New Penal Code. Statement of Reasons] https://www.juridice.ro/wp-content/uploads/2015/07/Expunere-de-motive-Proiectul-Legii-privindCodul-de-procedura-penala-forma-transmisaParlamentului.doc (last accessed on: 10 May 2023).

3 Law no. 135 of 1 July 2010 on the Criminal Procedure Code, published in the Official Gazette no. 486 of 15 July 2010.

4 See, in particular, Decision no. 631 of 8 October 2015, published in the Official Gazette no. 831 of 6 November 2015; Decision no. 641 of 11 November 2014, published in the Official Gazette no. 887 of 5 December 2014.

well as after a decision rendered following an appeal in the interest of the law by the High Court of Cassation and Justice,[5] and several amendments made by Law no. 75/2016,[6] the institution of the preliminary chamber is able to achieve its purpose.

According to Art. 342 of the Criminal Procedure Code: 'The object of the preliminary chamber procedure is to verify, after the committal for trial, the jurisdiction and the legality of the referral to the court as well as the legality of the administration of evidence and the performance of acts by the prosecution bodies'.[7] This means that first the preliminary chamber judge verifies the jurisdiction of the court to which he belongs and implicitly his own, according to Art. 54 of the Criminal Procedure Code,[8] an activity that materializes in the study of the subject matter of the case file, which was randomly assigned to him, and its compliance with the provisions of Arts. 35–42 of the Criminal Procedure Code regarding the jurisdiction of the courts. If the preliminary chamber judge finds that he or she has jurisdiction, this fact does not materialize in any criminal procedural act, in the sense that the judge is not called upon to draw up a writ attesting it. This positive aspect will be indirectly known by the parties in that once the judge has established jurisdiction, he or she will order by a resolution that the provisions of Art. 344 paras (2) and (3) of the Criminal Procedure Code be complied with. The question that arises is if the preliminary chamber judge finds that the court does not have jurisdiction, then what is the procedural framework in which this will take place since there are no direct, express provisions in the current rules on this matter.

In Art. 344 para. (4) of the Criminal Procedure Code, the legislator has established that: 'Upon expiry of the time limits provided for in paras (2) and (3), if requests or objections have been formulated or if he has raised objections ex officio, the preliminary chamber judge shall set the deadline for their resolution, with the summoning of the parties and the injured person and with the participation of the prosecutor.' Since Art. 47 of the Criminal Procedure Code[9] provides that

5 Decision no. 5 of 26 May 2014, published in the Official Gazette no. 80 of 30 January 2015.

6 Law no. 75/2016, published in the Official Gazette no. 334 of 29 April 2016.

7 Translation by the author. Unless otherwise specified in the footnotes, all translations of Romanian texts are by the author.

8 Criminal Procedure Code: 'Art. 54 – Jurisdiction of the preliminary chamber judge
The preliminary chamber judge is the one who, within the court, according to its competence:
a) verifies the legality of the committal ordered by the prosecutor;
b) verifies the legality of the taking of evidence and the performance of procedural acts by the prosecution;
c) decides on complaints against decisions not to prosecute or not to refer cases for trial;
d) resolves other situations expressly provided for by law.'

9 Criminal Procedure Code: 'Art. 47 – Objections of lack of jurisdiction
(1) The objection of lack of jurisdiction in the matter or according to the quality of the person of the court inferior to the court having jurisdiction according to the law may be invoked during the whole trial, until the final judgment is rendered.
(2) The objection of lack of jurisdiction in the matter or as to the capacity of the person of the

the question of lack of jurisdiction is to be dealt with by way of a plea of lack of jurisdiction, which may be raised first of all *ex officio*, by reference also to the provisions of Art. 344 para. (4) of the Criminal Procedure Code, being in the presence of a plea raised in the preliminary chamber, I consider that it can be resolved in the council chamber only with the parties and the injured party summoned and with the participation of the prosecutor. As regards the way in which this plea of lack of jurisdiction is raised, in relation to the tense of the verb that the legislator uses in the above article 'if he has raised objections of his own motion […]', but also by logical reference to the fact that the parties and the injured party may raise such an objection by means of a document to be submitted to the case file, I consider that the judge may raise this objection by a decision rendered in the council chamber without summoning the parties and the injured party and without the participation of the public prosecutor, after which, by resolution, he or she sets a deadline for its settlement, which will take place with the summoning of the parties and the injured party and with the participation of the public prosecutor. Another, simpler, option would be to set a time limit in the council chamber to discuss jurisdiction, summoning the parties and the injured party and with the participation of the public prosecutor, where the objection of lack of jurisdiction would be raised *ex officio*, which would be recorded in the decision, after which it would be discussed and then ruled on. Considering that the objection of lack of jurisdiction does not require an elaborate preparation of defences by the parties, the injured party and the prosecutor, and that this procedure has been legislated to facilitate speedy criminal proceedings, the second option would probably be the most efficient one.[10]

Remaining on the subject of jurisdiction, it should not be ignored that, in accordance with the provisions of Art. 47 of the Criminal Procedure Code, jurisdiction may also be subsequently called into question, after the writ in the preliminary chamber procedure, during the trial, following the procedural time limits depending on the type of jurisdiction and the provisions relating to this procedural stage.[11]

Following CCR Decision no. 641 of 11 November 2014 of the Constitutional Court, the legislator wished to harmonize the rules of the preliminary chamber with the fundamental law, respecting the Court's criticism based on the right of

court superior to the court having jurisdiction by law may be raised until the commencement of the inquiry.

(3) The objection of lack of territorial jurisdiction may be raised under the conditions laid down in paragraph (2).

(4) The objection of lack of jurisdiction may be raised ex officio by the prosecutor, the injured party, or the parties.'

10 See Judgment no. 147/2016, file no. 2862/211/2016/a1 of the Cluj-Napoca [Local] Court, unpublished.

11 See Judgment no. 1332/2015, file no. 13752/211/2015 of the Cluj-Napoca [Local] Court, unpublished.

the parties to a fair trial with its three components of adversarial proceedings, oral proceedings, and equality of arms. Thus, Art. 344 para. (2) of the Criminal Procedure Code has been amended in the sense that, whereas previously the communication of the indictment, the notification of the indictment, the proceedings in the preliminary chamber, the right to hire a lawyer, and the possibility of formulating requests and objections only concerned the accused, now, with the exception of the communication of the indictment, this takes place in relation to all parties and injured parties. With regard to the failure to communicate the indictment to the civil party, the civilly liable party, and the injured person, it should be considered whether the new regulation is fully in line with the Court's decision, which in para. 49 of the grounds for its ruling stated that: 'in view of the adversarial principle, both the civil party and the civilly liable party must be offered the same rights as the accused'. However, they are in a position of apparent inferiority in that they are not notified of the indictment, which may contain many aspects that disadvantage them, such as reference to evidence that was unlawfully taken, references to the non-constitution or constitution as a civil party, the amount of the civil claims, etc., in which these parties are interested and which may affect their procedural rights.

Considering that the parties and the injured party are not identical in the sense that the procedural position of the defendant, the civil party, the civilly liable party, and the injured party differ from each other by the very different status of each of them in the criminal case, which is why the procedural rights conferred by Arts. 78, 81, 83, 85, and 87 of the Criminal Procedure Code are not identical, only similar and specific to each of their capacities, and that the Court itself states that they must be granted the same rights, and not identical, to those of the accused, I am entitled to consider that, in the given circumstances, the Court's decision is respected. Moreover, in para. 43 of the grounds of the decision, the Court states that: 'from the perspective of adversarial proceedings [...] the legal rule must allow all parties to the criminal proceedings – defendant, civil party, civilly liable party – to be provided with documents that are likely to influence the judge's decision and provide for the possibility for all these parties to effectively discuss the observations submitted to the court'. The indictment is not a document likely to influence the judge's decision, but as the Court pointed out in para. 31 of the reasoning of the decision, 'the elaboration of the indictment and the referral of the defendant for trial, [...] represents "official notification, by the competent authority, of the suspicion that a criminal offence has been committed" and, implicitly, a criminal charge'. which overwhelmingly concerns the defendant; as such, it is natural that the indictment is communicated only to him, an aspect which in no way violates the principle of equality of arms nor the decision of the Court. Moreover, according to Art. 344 para. (2) of the Criminal Procedure Code, concomitantly with the communication of the indictment, the

accused, the other parties, and the injured person are informed of the object of the procedure in the preliminary chamber, of the right to hire a lawyer, and of the possibility of formulating requests and objections so that it is in agreement with what the Court stated in para. 36 of the grounds of the decision, where, referring to the practice of the European Court of Human Rights (ECtHR), it stated that: 'according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[12]

However, the mere communication of the indictment is not intended to create such a disadvantageous situation, as long as all the parties and the injured party are informed of the stage of the proceedings the criminal case has reached, of their rights and the possibilities within that stage. The reasoning of this argument is supplemented by the fact that, according to Art. 344 para. (4) of the Criminal Procedure Code, the legislator has established that: '(4) Upon expiry of the time limits provided for in paras. (2) and (3), if requests or objections have been formulated or if he has raised objections ex officio, the preliminary chamber judge shall set the deadline for their resolution, with the summons of the parties and the injured party and with the participation of the prosecutor.' – i.e. after the parties and the injured party have been given the opportunity to make submissions and raise objections, a framework is also created in which they will be able to debate them and present their own defences, thus also respecting the Court's reasoning in para. 35 of the grounds of the decision, ensuring 'the right of each party to participate in the presentation, argument, and proof of its claims or defences and the right to discuss and contest the submissions and evidence of the other party' followed by 'the disclosure to the other party of arguments of fact and law on the one hand and the opportunity for the other party to respond to them on the other' and 'a real opportunity to debate before the judge all that is put forward in law or in fact by the opponent and all that is presented by him, evidence or other documents'.

Based on all of the above, the procedure in the preliminary chamber appears to take two forms. The first, in which no requests have been made and no objections have been raised, takes place in the council chamber, without the parties and the injured party being summoned and without the participation of the prosecutor, and ends with the adoption of a writ, simple in structure and content, whereby, according to Art. 346 paras. (1) and (2) of the Criminal Procedure Code, the preliminary chamber judge finds the legality of the referral to the court, the taking of evidence, and the carrying out of criminal proceedings and orders the trial to begin; the writ is then immediately communicated to the parties and the injured

12 European Court of Human Rights, Fifth Section, *Klimentyev v. Russia*, Application no. 46503/99, Judgment of 16 November 2006, https://hudoc.echr.coe.int/eng?i=001-78031 (accessed: 5 May 2023), para. 95.

party, it being subject to appeal within 3 days of communication, thus ensuring compliance of these provisions with both the Decision of the Constitutional Court no. 641/2014 and no. 631/2015 in that, unlike the previous legislation, all decisions adopting the preliminary chamber decision are subject to appeal,[13] and therefore also this one (even if no requests have been previously made and no objections have been raised on which the judge must rule).

The second form, in which requests have been made and objections raised, is more complex and requires a more detailed approach. Thus, it starts with the formulation of requests and raising of objections by the parties and the injured party or by the court's own motion, because until that point the path is the same as the one in the first form. According to Art. 344 para. (4) of the Criminal Procedure Code, upon the expiry of the time limits set by the preliminary chamber judge for the formulation of requests or objections, the judge sets the time limit for their resolution, with the summoning of the parties and the injured party and with the participation of the prosecutor. It should be noted that the legislator does not mention any other obligation on the part of the judge in terms of communicating the applications and objections to the prosecutor, the other parties, and the injured party, which means that all these participants in the criminal case will become aware of their content by studying the file. The legislator has not laid down any procedural norms to be followed or time limits to be observed in the case of any defences, but it goes without saying that they must be lodged by the deadline set for their resolution. Art. 345 of the Criminal Procedure Code regulates the procedure in the preliminary chamber, but, unfortunately, it does not have a strictly defined structure. From its content, it is clear that the judge decides on the requests and objections submitted or objections raised *ex officio*, in the council chamber, on the basis of the works and the evidence in the criminal case file, the subsequent administration of any evidence[14] that the preliminary chamber judge deems necessary in order to form a view as to their merits, and not in order to resolve the merits of the case, hearing the submissions of the parties and the injured party, if they are present, and of the prosecutor, and then ruling on them in the council chamber in a decision (writ), which has a broad, complex content, in which the judge addresses all the requests and objections, the defences put forward, in order to decide on their merits. The way in which he or she decides on the claims and defences determines the decision he or she will render in the preliminary chamber. According to Art. 346 para. (2) of the Criminal Procedure Code, when rejecting the requests and objections presented or raised *ex officio*, the preliminary chamber judge will issue a single decision, which will contain both the decision on them and the decision of the preliminary chamber, which can only be the finding of the legality of the referral to the court,

13 See in this regard also art. 425[1] of the Criminal Procedure Code.

14 See Decision of the Constitutional Court no. 802 of 5 December 2017, published in the Official Gazette no. 116 of 6 February 2018.

the administration of evidence, and the carrying out of criminal proceedings and the order to start the trial. On the other hand, when he or she admits requests and objections presented or raised *ex officio*, according to Art. 345 para. (3) of the Criminal Procedure Code, the judge will find either irregularities in the act of referral or the nullity[15] of acts of criminal prosecution carried out in violation of the law or will exclude one or more items of evidence taken. This decision shall be notified immediately, pursuant to Art. 345 para. (2) of the Criminal Procedure Code to the prosecutor, the parties, and the injured party. The procedure then concerns the prosecutor, as the representative of the accusation during the criminal trial, in the sense that if the judge has found irregularities in the referral, after communicating it to the prosecutor, according to Art. 345 para. (3) of the Criminal Procedure Code, the prosecutor has the obligation to remedy[16] them and to inform the judge whether he or she maintains the committal order or whether he requests that the case be returned, within 5 days of the communication. Although this text of the law is not sufficiently clear, I consider that even when the judge finds that certain acts of criminal proceedings are invalid or excludes one or more items of evidence, the prosecutor is obliged to inform the judge within five days whether he maintains the committal order or requests that the case be returned. The fulfilment of these obligations is important because how the judge will rule on the preliminary ruling, as we will see below, partly depends upon them.

Given the provisions of Art. 346 para. (4) of the Criminal Procedure Code, as a general rule, the judge will not grant the preliminary ruling by the same decision admitting one or more of the requests and objections presented or raised *ex officio* and will find either irregularities in the preliminary ruling or the nullity of acts of criminal prosecution carried out in breach of the law or exclude one or more of the items of evidence taken, but s/he will have to set a new deadline in the council chamber, with the parties and the injured party being summoned and the participation of the prosecutor, on which occasion it will issue a new decision containing one of the following solutions, in accordance with Art. 346 para. (3) letters a) and c), as well as para. (4) of the Criminal Procedure Code:

1. return the case to the Public Prosecutor's Office if:

a) the indictment is irregularly drawn up, and the irregularity has not been remedied by the prosecutor within 5 days, or if the irregularity entails the impossibility of determining the object or limits of the trial;

b) the prosecutor requests that the case be returned or fails to reply within the time limit laid down in the same provisions;

2. order the trial to commence if it has found irregularities in the act of referral, has excluded one or more of the items of evidence taken, or has found that criminal prosecution acts carried out in violation of the law are null.

15 See Arts. 280–282 of the Criminal Procedure Code.

16 See Decision no. 23 of 4 May 2022, published in the Official Gazette No. 665 of 04 July 2022.

In connection with the above and referring to the solutions established by the legislator, we note that the mere fact that the prosecutor does not respond within 5 days entails the return of the case to the prosecution regardless of the irregularities of the act of referral or the nullity of some acts of criminal prosecution or the evidence excluded.

From these legal provisions, also an apparently unnatural situation may arise, given that the legislator has established that this writ, which resolves the procedure in the preliminary chamber, will be given in the council chamber 'with the summons of the parties and the injured person' even if previously the judge had also set a deadline in the preliminary chamber at which he summoned the parties and the injured party, on which occasion he or she decided by admitting one or more of the requests and objections raised, a court date at which they could be present and be given a period of time for their information, set at that time by the judge, which as a duration included the period of 5 days from the communication set by the prosecutor. I consider that these regulations were introduced in the form mentioned because the legislator had in mind the possibility that the judge may adopt a decision to start the trial, postpone the judgment according to Art. 391 of the Criminal Procedure Code or the deadline for drafting the judgment according to Art. 406 of the Criminal Procedure Code, which is the rule in the matter, so that the anticipated setting of a future deadline would not be based on precise data that would give certainty that at that deadline the judge has decided on the solution or that all these activities will have been undertaken.

In the light of the provisions of Art. 346 para. (4^2) of the Criminal Procedure Code, the judge will give the preliminary chamber decision by the same writ by which he will admit one or more of the requests and objections invoked or raised *ex officio* and will find either irregularities in the act of referral or the nullity of acts of criminal prosecution carried out in violation of the law, when the preliminary chamber judge will return the case to the Public Prosecutor's Office due to the fact that he has excluded all the evidence taken during the criminal prosecution.

Regarding the appeal, the legislator has introduced two new elements in Art. 347 of the Criminal Procedure Code, namely that all the decisions of the preliminary chamber may be appealed against within 3 days of their communication and that the holders of the appeal are now the prosecutor, the parties, and the injured party. Although the decisions by which the requests and objections invoked or raised *ex officio* are resolved cannot be directly challenged, the legislator has established that the appeal may also concern the manner in which the requests and objections are resolved, thus representing an indirect means of appeal in relation to them. Regarding the procedure for deciding on the appeal, in the same article, the legislator has stated that the appeal is to be decided in the council chamber, with the parties and the injured party being summoned and the

prosecutor taking part, where no other requests or objections may be invoked or raised *ex officio* than those presented before to the preliminary chamber judge, except in cases of absolute nullity.

The legislator has also provided for novel elements regarding the transitional situation of preventive measures in that it has clarified who is competent to verify the legality and merits of the preventive measure, when a preventive measure has been ordered against the accused and an appeal has been lodged, by providing in Art. 348 para. (2) of the Criminal Procedure Code that it belongs to the preliminary chamber judge of the court seized with the indictment, if the preliminary chamber judge of the superior court or the competent panel of the High Court of Cassation and Justice has not yet been assigned to resolve the appeal, and it has been assigned to resolve the appeal, the competence belongs to it.

Considering all of the above, it can be concluded that the preliminary chamber procedure as it is now regulated, by the amendments made through Law no. 75/2016, comes closer to the requirements of legality, promptness, and fairness of the criminal trial originally envisaged by the legislator only in the version in which there are no requests or objections, but even in this situation the procedure could have been made more urgent if the judge had been given the opportunity to shorten its duration by reducing the 20-day period provided for in Art. 344 para. (2) of the Criminal Procedure Code depending on the subject matter of the case, or simply to end the procedure when, one of the cases preventing the initiation and exercise of criminal proceedings under Art. 16 of the Criminal Procedure Code arises during its course such as the death[17] of the accused, reconciliation of the parties,[18] etc. If there are requests or objections, the entire preliminary chamber procedure takes a long time, exceeding by far the 60-day time limit envisaged by the legislator in Art. 343 of the Criminal Procedure Code, despite all the efforts of the preliminary chamber judge. In this case too, if one takes into account that in the previous legislation, after the trial on the merits of the case, which lasted for a certain period of time, the appeal was to quash the judgment and order the case to be referred for retrial, it could be that the preliminary chamber procedure is a solution to avoid such situations, but only regarding relative nullities since absolute ones can be invoked at any stage of the criminal case.

17 See Decision no. 223/2016, file no. 1957/211/2016/a1 of the Cluj-Napoca [Local] Court, unpublished.

18 See Decision no. 59/2016, file no. 23754/211/2015/a2 of the Cluj-Napoca [Local] Court, unpublished.