PRELIMINARY CHAMBER - A SOLUTION FOR THE CELERITY OF CRIMINAL TRIALS?

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ABSTRACT: *This paper deals with the problem of the celerity of the criminal trial, from the perspective of the institution of preliminary chamber, seen by the legislator as a solution for delaying the resolution of cases. Although this was the initial purpose for introducing this filter-stage, the judicial practice shows that, for the most part, the preliminary chamber does not solve, and even hinders, this problem of celerity. The paper deals with the problem of the impossibility of eliminating this stage, of the deadline in which the case is resolved in the preliminary chamber, as well as the possibility of sending the case back to the prosecutor's office even after the trial begins.*

KEYWORDS: *preliminary chamber, fair trial, celerity of trial, sending back the case.*
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One of the important principles of the criminal process is the principle of operability, also known as speed or celerity. Although it is not expressly provided for by the law, it responds to the purpose of the criminal trial, which consists in finding out in time the facts that constitute offences. (Mateut, 2007) Although it has been recognized as an unwritten principle of the criminal trial in Romania, however, one of the most numerous convictions of our state at the Strasbourg Court are those for the long duration of trials.

Since the date of its first judgment, which ruled on the violation of the right to a fair trial in the light of the unreasonable duration of the decision in the case *Pantea against Romania*[1], the Court has issued more than 200 similar decisions. The period 2005-2014 was the most significant for Romania in the field of convictions for excessive length of trials, as the number of convictions increased excessively. Currently, approximately 500 pending applications concern violations of Article 6 in this respect. The Court held that all national legislative changes make only an assertion of the reasonable length of the proceedings without the existence of a national legislative measure that would effectively enforce this principle (DragosCalin, 2014).

The new Criminal Procedure Code was seen as a response to the deficiencies of the Romanian criminal procedural system, which led on the one hand to numerous convictions of our state at the European Court of Human Rights, and, on the other hand,

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[1]ECHR, Application no. 33343/96, Decision of 3 June, 2003

to the creation of a climate of distrust in the judicial system[2]. According to the Ministry of Justice and Citizens' Freedoms, as it results from the explanatory memorandum of the draft law on the Code of Criminal Procedure, it is justified the need to introduce new institutions and procedural stages, precisely to reduce the duration in solving criminal cases (Valea, 2015).

The appeal regarding the duration of the criminal trial, the regulation of two degrees of jurisdiction, the elimination of stages such as the presentation of the criminal investigation material, the introduction of the possibility of concluding with the prosecutor a guilty plea agreement, the simplified procedure for admittance of guilt before the judge - all these were seen as methods of accelerating the resolution of cases. But the longest trials were due to those situations in which the sending back of the case to the prosecutor's office was ordered after years of trial, in trial court or even in appeals. For this reason, the legislator has taken from the laws of other states (France, Italy, Germany) a filter procedure that eliminates the deficiencies involved in the phase of criminal investigation and allows in the phase of the trial only those files that are legally drawn up, avoiding further returns of the case.

At the level of the Romanian criminal procedural law, the preliminary chamber procedure is not entirely new and innovative, with a post-war regulation referring to the "preliminary hearing", introduced by Decree 506 of 1953 (Iordache, 2014) which in Article 269 provided for a filter procedure similar to the stage of the present preliminary chamber. Art. 269 of the original text introduced by Decree 506 provided the following: "The cases received from the prosecutor are submitted for examination in a preparatory hearing, in order to reach the trial court only those cases in which there is the necessary evidence, sufficient and legally administered, so that the court, judging the merits of the case, can decide whether the facts are proven and if the accused has committed them and is guilty of committing them."(Brutaru, 2010). However, this did not last a longer period in the area of criminal procedural law, being subsequently repealed by Decree no. 473/1957.

After more than half a century, the Romanian legislator saw again the need to introduce a filter phase between the criminal prosecution and the judgment, considering that a stage in which the verification of the acts performed in the criminal prosecution phase would be created, this would lead to the impossibility of subsequent returns of the case to the prosecutor, in the trial phase, thus accelerating the criminal proceedings.

The way the institution of the preliminary chamber in the New Criminal Procedure Code was designed, with short deadlines for communicating the indictment, formulating exceptions and resolving them in the council chamber, without summoning the parties, this would theoretically lead to a faster solution of cases. But in its initial form, the preliminary chamber did not respect even the most elementary aspects of guaranteeing a fair trial - the right to defense and the adversarial principle. For this reason, the institution of the Preliminary Chamber has become one of the most controversial and modified institutions of the Romanian Criminal Procedure Code, which entered into force in 2014.

[2] Although the doctrine has debated on a possible speeding up of lawsuits by means of alternative dispute resolution methods, the Romanian legislation has not regulated them in the criminal trials until present. For more details on these methods in the civil lawsuits, see (ROBA , 2010).

The changes occurred both through the decisions of the Constitutional Court and the will of the legislator (or the Government, through the NGO), however, have not succeeded so far to cover all the problems that subsequently arose in its practical application.

The stage of checking the jurisdiction of the court, the legality of the criminal investigation, the legality of the evidence, carried out on the basis of article 301 of the old Code of Criminal Procedure, at the first trial term, most of the time (especially in the simplest cases) did not lead to delaying the process. Indeed, in some more complex cases more court time-limits were needed to pass this stage, but this was an exceptional situation.

In contrast, the preliminary chamber procedure intervenes in all cases, whether they are simple or complex, and the minimum period of 20 days that the preliminary chamber judge must grant to the parties for filing requests and exceptions cannot be reduced even in the situation where the defendant states that he does not intend to file applications in the preliminary chamber.

In the Italian law system, the preliminary chamber procedure, called *udienzapreliminare*, has undergone numerous changes compared to the original text, since 1988. At present, after more than three decades in which both the Italian legislator and the judges of the Constitutional Court intervened, we consider that it reached a "maturity" capable of largely guaranteeing respect for the right to a fair trial. Even if it is not a perfect regulation, it is certainly one that can be taken as a model for the laws in which the institution of the preliminary chamber is still new, as is the case in Romania. In Italian law, the preliminary chamber procedure intervenes only in the case of more serious offenses, with the punishment provided by the law for more than 4 years, but also in these situations the defendant can request the withdrawal and the summoning directly to the court, by written request, filed with at least three days before the deadline set for the preliminary chamber trial. Thus, in the event that an accused person does not challenge the legality of the criminal investigation or evidence, he may request the celerity of trial, the preliminary chamber procedure being practically a right he is entitled to, not an obligation.

Another aspect to observe as regards Romanian legislation is the fact that the Criminal Procedure Code also provides for a term within which the preliminary chamber procedure is conducted - 60 days. However, this time limit for resolving exceptions is a term of recommendation, and there is no penalty for exceeding this deadline. However, after the changes regarding the summoning of the parties, the communication of the right to invoke exceptions also by the other parties, as well as by the injured person, the guarantee of the adversarial character, the submission of evidence, it would actually not be possible to comply with the term of 60 days.

This leads to the situation where, even in less complex cases, it takes at least 3 months to communicate the indictment, to grant 20 days for the filing of exceptions, to set the time limit in the preliminary chamber, and eventually to resolve the appeal. In complex cases, the preliminary chamber procedure may take up to one or two years.

After declassifying the Collaboration Protocols between the Prosecutor's Office and the Romanian Intelligence Service, as well as the Constitutional Court Decision no. 51/2016[3] by which the Court found that the phrase "or other specialized bodies of the

[3] Published in the Official Gazette no. 190 of 14 March, 2016;

state" contained in the provisions of art. 142 para. (1) of the Code of Criminal Procedure is unconstitutional,[4] a problem that was frequently invoked in many pending cases was that of the legality of the interceptions made in the phase of criminal investigation. Verifying this aspect requires obtaining information from the Prosecutor's Office, as well as from the Romanian Intelligence Service, information that is often sent classified (service secret, state secret). The issuing of applications, obtaining the answers and possibly declassifying them make this stage now even longer.

At the same time, the extension of this phase is sometimes due to the legislator's failure to impose on the preliminary chamber judge, first of all, to check his competence. According to art. 342 of Criminal procedure code, the object of the preliminary chamber procedure is the verification of the legality of the notification of the court, as well as the verification of the legality of the submission of the evidence or of the acts performed by the criminal investigation bodies. The competence of the notified judge is an aspect of legality of the referral of the court, but it is analyzed by some judges together with the analysis of the other applications and exceptions invoked. Thus, it is possible to reach the situation where a preliminary chamber judge, after completing the whole stage-summoning, notification of indictment, setting the term, assuring the defense, submitting evidence regarding the legality of certain documents, etc. - will find out by the decision given in the settlement of applications and exceptions that is not materially or territorially competent to adjudicate the case in the preliminary chamber. The question thus arises, to what extent those ordered by this judge (for example, the admission or repeal of the request for referral of the Constitutional Court, the admission or rejection of evidence to prove the illegality of some documents, the correction of the indictment by the prosecutor) could be maintained by the judge of competent preliminary chamber.

To the extent the lawmaker would require that, in the situation in which the parties invoke the exception of lack of competence, this should be considered before all other requests, only this would cause the file not to remain for a long time in work with an incompetent judge.

Last but not least, although the Preliminary Chamber was intended to be a step that eliminates any possibility of sending a case back to the prosecutor's office, after the beginning of the trial, the practice shows that it has not fulfilled this purpose, either.

Thus, even if theoretically, in the preliminary chamber procedure, all the aspects that could lead to a return of the case in the phase of criminal investigation - the nullity of some criminal proceedings, the invalidity of the indictment, the nullity of the evidence - in practice, certain violations of the law lead to the absolute nullity of the documents, which can be found also in the appeal procedure.

Several national courts have considered that it is necessary to suspend the procedure of Preliminary Chamber on appeal, including when it is found the incidence of one of the

[4]The court holds that the legislator's option for the technical supervision mandate to be executed by the prosecutor and the criminal investigation bodies, which are judicial bodies, is justified, according to art. 30 of the Code of Criminal Procedure, as well as by the specialized police officers, provided they can hold the certification as judicial police officers, under the conditions of art. 55 paragraph (5) of the Code of Criminal Procedure. This option is not justified, however, regarding the inclusion, in the content of art. 142 para. (1) of the Code of criminal procedure, of the phrase "other specialized bodies of the state", not specified in the Code of Criminal Procedure or in other special laws.

cases of absolute nullity provided by art. 281 of the Code of Criminal Procedure[5], for example the assistance of the lawyer of the suspect or the defendant, as well as of the other parties, when the assistance is obligatory.

With regard to the resolution of the Appeal in the interest of the law submitted by the Governing Board of the Bucharest Court of Appeal on "the possibility of censoring the preliminary chamber procedure in appeal and the limits of censorship", the High Court of Cassation and Justice rejected the referral as inadmissible, stating that there are not sufficient opposing case law solutions[6], referring to decisions whereby the national courts found, in the appeal procedure, defects of the preliminary chamber procedure based on different aspects. Thus, it implicitly found the possibility of returning to the preliminary chamber from the appeal procedure.

However, returning to the preliminary chamber for re-examination clearly attracts the possibility of rendering any solution provided by law at this stage. Thus, for example, in a case,[7] the Bucharest Court of Appeal, considering that there is no legislative impediment limiting the possibility of the court of appeal to sanction the absolute nullities intervened in the preliminary chamber, has "remedied" the defects occurring even from the stage of the preliminary chamber procedure, regarding the non-assistance by the lawyer of a party when the legal assistance is compulsory, ordering the complete squashing of the sentence appealed and its referral for retrial to the first trial court, specifying that "the trial will resume its course starting with the preliminary chamber procedure , according to art. 342 and following. "

What is noteworthy about this solution, however, is the fact that the court also required the preliminary chamber judge, when conducting this procedure, to examine, with reference to tax evasion offenses and, respectively, misuse of company's goods or credit, the need "*to establish or indicate in the indictment the amount of the damage caused by committing these offenses, but also the need to indicate in the document of notification of the injured person in relation to the offense provided by the law of commercial companies*".

Indicating to the preliminary chamber judge the limits of retrial, the Court of Appeal has actually indicated to him that, according to the provisions of art. 345 para. 3, he should order the Prosecutor's Office to remedy the irregularities of the referral document within 5 days. But, in the situation where, in the retrial stage, ordering the correction of the irregularities, the preliminary chamber judge subsequently finds that the irregularity was not remedied by the prosecutor within the term provided in art. 345 paragraph (3), if the irregularity entails the impossibility of establishing the object or the limits of the trial, or if it finds the prosecutor does not respond within the stipulated term, according to art. 346 a. 3 Code of Criminal Procedure, this will have to order the case be sent back to the prosecutor's office.

Thus, although the trial followed its course until the appeal was resolved, we got to the case of sending the case back to the Prosecutor's Office, the preliminary chamber practically not fulfilling its role of *accelerating the trial of the case.*

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[5]Criminal decision no. 675 / P of June 10, 2016 of the Constanta Court of Appeal - the criminal section, the criminal decision no. 1159 / P of June 14, 2016 of the Constanta Court of Appeal - the criminal section, the decisions no. 70 of December 18, 2014 and 66 of December 11, 2014 of the Military Court of Appeal

[6]High Court of Cassation and JusticeRIL no. 9 of 19 March 2018

[7]Court of Appeal Bucharest, Criminal Division II, Criminal decision no. 130/A of 1 February, 2019

What's the solution? Obviously, we cannot go beyond the absolute nullities, the legislator will not be able to introduce any provision that prohibits their finding if the preliminary chamber stage has been passed. The solution, therefore, to avoid these situations that lead to the delay in resolving the cases, is not in perfecting the legislation, but perfecting its application. The increased attention of the judicial bodies in view of the early detection of irregularities, the proper defense of the parties, the conscientiousness of the criminal prosecution body in order to perform acts strictly following the law, increasing the number of magistrates to reduce the workload, could lead to the celerity in solving causes.

Without completely disregarding the advantages that the preliminary chamber procedure can offer, we note that the preliminary chamber procedure, introduced for the celerity in solving cases, has not achieved this goal, on the contrary, has led in many cases to much more delayed solutions.

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