

RELEASE OF SEIZURE ORDERED IN THE CRIMINAL INVESTIGATION STAGE, IN THE CASE OF ROMANIAN CRIMINAL PROCEEDINGS PEREMPTORY SETTLED

Ximena MOLDOVAN*

ABSTRACT: *In spite of the fact that the Romanian Criminal Procedure Code was intended to be a legal progress, it appears to carry many gaps, one of which concerns the circumstance that it does not expressly regulate the material competent body to order the release of the seizure ordered at the criminal investigation stage in the criminal proceedings peremptory settled. This circumstance forces us to make use of the provisions of the New Civil Procedure Code.*

KEYWORDS: seizure, administrative action, challenge on enforcement.

JEL CODE: K14

One of the many aspects insufficiently covered by the provisions of the New Romanian Criminal Procedure Code is related to the identification of the entity competent to order the release from seizure ordered during the criminal investigation phase in the Romanian criminal proceedings which are peremptory settled.

In the context of the regulations contained in the New Romanian Criminal Procedure Code¹, the precautionary measures “consist in the preservation of movable or immovable assets by establishing a levy on them”².

Although the Romanian legislator expressly refers in the content of Article 249 para. 2 of the Romanian Criminal Procedure Code, strictly to a single precautionary measure commonly referred to as *seizure*, the specialty works in the field (Udroiu, 2016) (N. Volonciu coordinator, 2014), mentions the circumstance that from the corroboration of the legal provisions found in Chapter I “The Preventive Measures” of Title V on “The Precautionary Measures and Other Procedural Measures” are in fact available to the competent judicial bodies several actual legal instruments in the form of “seizure”.

Thus, following the corroboration of the provisions of Article 249 para. 2 of the Romanian Criminal Procedure Code with the provisions of Article 252 of the Romanian Criminal Procedure Code, it results that the seizure is applicable either *to movable*

* Lawyer PhD, Faculty of Economics, Law and Administrative Sciences, Petru Maior University of Tg. Mures, ROMANIA.

¹ Law no. 135/2010, published in the Official Gazette no. 486 of 15 July 2010, in force since 1 February 2014.

² Article no. 249 of the new Criminal Procedure Code.

tangible assets or to movable intangible assets or to immovable assets under the form of the mortgage regulated by the provisions of Article 253, para. 4 of the Romanian Criminal Procedure Code, concurrently its provisions identifying the precautionary measure of *seizure*, as regulated by the provisions of Article 254 of the new Romanian Criminal Procedure Code.

Thus, the seizure as a precautionary measure allows for any amount of money owed by any title, to the suspect or defendant or to the civilly liable party by a third party, or even the injured party, to be preserved, within the limits and under the conditions provided by law.

Regarding the capacity to take precautionary measures during the criminal investigation phase, the new Romanian Criminal Procedure Code does not present inconsistencies, maintaining as in the previous regulation, the exclusive competence of the prosecutor to order the establishment of the precautionary measures in the criminal prosecution phase of the criminal trial³.

Moreover, regarding the material competence to take precautionary measures during the criminal proceedings, the legislature maintains essentially the same provisions as those contained in the old regulation of Article 163 of the Old Romanian Criminal Procedure Code, however introducing new elements.

Thus, if according to the regulation of the old Romanian Criminal Procedure Code the precautionary measures were taken “*in the course of the criminal prosecution by the prosecutor or by the court*”⁴, the provisions of the new criminal procedural regulation, more explicit, and at the same time correlated with the new reviewing procedure of the lawfulness of the act of apprising the criminal court, offers this competence “to the prosecutor during the criminal prosecution, to the judge of the preliminary chamber or the court, *ex officio* or at the request of the prosecutor, in the preliminary chamber procedure or in the course of the trial ... by ordinance or, where appropriate, by reasoned conclusion”⁵.

Per se, the purpose of taking precautionary measures subsists in both normative acts in question, namely that of preserving the movable or immovable asset, stating that in the new Romanian Criminal Procedure Code it was extended, motivating that such a measure is taken “in order to avoid the concealment, destruction, alienation or evasion control of the goods which may be the subject of special seizure or extensive confiscation or which may serve to ensure the execution of the punishment or legal costs or the repair of the damage caused by the offense”.

“*Preservation*”, as defined by the Explanatory Dictionary of the Romanian Language, refers to the action of making something unavailable, respectively which can not be used at one’s will, which is not free, in the legal sense, meaning that the good can not be disposed of.

Considering such a purpose of *unavailability*, the Romanian legislator created, both in the old criminal procedural regulation and in the current one, the necessary legal levers for the effects of such an action to become opposed *erga omnes*.

³ Article 163 of the old Criminal Procedure Code ruled: “*the precautionary measures are established during the criminal proceedings by the prosecutor or by the judgment court...*”.

⁴ Article 163 para. 1 of the old Criminal Procedure Code.

⁵ Article 249 para. 1 of the new Criminal Procedure Code.

Thus, for the immovable property seized, the prosecutor, the preliminary chamber judge or the court who ordered the seizure, shall ask the competent body for the mortgage registration on the seized property, enclosing a copy of the ordinance or conclusion on the establishment of the seizure and a copy of the Minutes of the seizure, the same procedure being applicable when ordering the mortgage registration on movable assets⁶.

The provisions of the old Criminal Procedure Code contained in Article 166 provided for the advertising of the preservation measures only the possibility of taking the mortgage inscription, given the fact that the new Criminal Procedure Code also provides for the possibility of mortgage registration.

Given that the precautionary measures ordered as seizure in the criminal investigation phase are not challenged under the conditions of Article 250 of the new Criminal Procedure Code (Article 168 the old Code of Criminal Procedure), they will produce effects throughout the settlement of the case, until the case is peremptory settled.

The problem arises when the criminal proceeding is peremptory settled, the value of the charges imposed by the final court decision has been paid, and there is the desire for the precautionary measures that have become obsolete to be removed. Moreover, the aspect of the material capacity of the legal bodies to order the removal of the seizure is equally stated in the contraventional matters.

In such a case, the courts considered that none of the provisions of the Criminal Procedure Code, nor the provisions of Article 163 of the Old Romanian Criminal Procedure Code, nor the provisions of Article 249 and the following of the New Romanian Criminal Procedure Code, do not expressly regulate the competence to remove the precautionary measures ordered during the criminal investigation phase, in the case of the criminal proceedings which are peremptory settled⁷.

Fairly and legally it would be that through the final settlement of the criminal case, the court that had the capacity to settle the case, to clarify also what would happen with the precautionary measures, respectively to mention whether they would be maintained or not, and to what extent.

But what happens when such a statement is not comprised in the operative part of the final judgment, and at the same time the institution that has the material competence to remove it can not be identified? To whom will the owner of the property with the precautionary measure established address and which will be the legal basis invoked?

In such a case, based on *Article 163 of the old Romanian Criminal Procedure Code*, the measure of seizure was established by the Ordinance of the National Anti Corruption Prosecutors' Office (NAPO), and at the same time the property of the defendant was registered in the specifications of the immovable property.

The precautionary measure of the seizure imposed on the real estate was maintained throughout the criminal case even after its final settlement.

Neither the first instance court which settled the criminal case nor the reviewing courts referred to the duration of the maintenance of the seizure, limiting itself in stating that it would be maintained, although it would have been natural to specify that it would preserve in time *until the full payment of the obligations for which it was established was*

⁶ Article 253 para. 4 and 5 of the new Criminal Procedure Code.

⁷ See in this respect Decision no. 563/A, ruled by the Court of Appeal Apel Târgu-Mureş on 7 July 2015.

made, a statement which, as a rule, inserted in the operative part of the final judgment would have allowed the removal of the precautionary measure.

In the absence of such entries from the operative part of the final criminal judgment, in conjunction with the lack of legal basis indicating the competent entity to remove the seizure, according to Article 2, para. 2 of the New Romanian Civil Procedure Code⁸, the procedural provisions constitute a source of Criminal proceedings law, insofar as the new Romanian Criminal Procedure Code does not contain any contrary provisions.

It is true that implicitly there is the possibility to request the Romanian criminal court which gave the final judgment to repair the deficiency of the operative part of criminal judgment regarding the maintenance duration of the seizure based on Article 279 of the Romanian Criminal Procedure Code that allows the *Clearance of obvious omissions* (Article 196 the Criminal Procedure of 1968), but such a request must be corroborated with the provisions of the Romanian Civil Procedure Code in relation to the term within which the operative part of the court order may be requested. It should be noted that the passage of a long period from the final ruling of the criminal judgment brings in the risk of rejecting the request for omission removal, implicitly the risk of its rejection by invoking the argument of disinvestment by the criminal court.

Therefore it is the responsibility of the civil law to resolve such situations.

In such a case, the court, following a petition for legal action filed in administrative litigation, as opposed to the Ministry of Public Finance acting as representative of the Romanian State, the creditor of the seized amounts, with a generic request for legal action and without a legal basis indicated, the Romanian civil court, on the basis of the principle of fairness, ordered the removal of the seizure, labeling the applicant's claim as a declaratory action⁹.

However, the administrative court will not be able to order by President's ordinance the restitution of the property seized for the purpose of confiscation on the basis of an offense in the case the offense report was challenged, precisely because this measure is not a peremptory one. (Iovănaș, 2017)

There is, however, a legal basis indicated in the new Romanian Criminal Procedure Code which refers to the enforcement of the precautionary measures ordered in the peremptory cases, but which does not specify the way of removing the precautionary measures, and makes references to the Romanian Civil Procedure Code.

According to Article 250, paragraph 8, of the new Romanian Criminal Procedure Code: "*After the peremptory judgment is ruled, a civil appeal may be lodged only in respect of the manner in which the precautionary measure is carried out*".

Such a provision is however questionable from the point of view of an appeal in the meaning that by such a procedural approach it could be taken into account strictly the manner in which the precautionary measure was carried out, for example the sale of the good at a public auction in order to obtain sums of money subject to confiscation.

We opine to the fact that, by this expression, the legislator did not have in view strictly the forced execution itself, but in the broad sense the rights and obligations of both parties

⁸ According to Article 2 para. 2 of the New Civil Procedure Code: "... the provisions of this Code shall apply to other matters insofar as the laws governing them do not contain any contrary provisions."

⁹ See in this respect the Decision no. 563/A, ruled by the Court of Appeal Târgu-Mureș on 7 June 2015.

involved in the forced execution procedure, as it happens also in the civil forced execution.

More specifically, the forced execution involves implicitly the fact that once the debt has been paid, the creditor has the right to have his seizure measure removed and to fully enjoy the property right of the asset upon which the seizure was established.

In this respect, the Romanian courts upheld the requests for removing the seizure ordered in the criminal investigation phase in the peremptory criminal cases, drafted on the basis of Article 250, para. 8, of the New Romanian Criminal Procedure Code corroborated with Article 701 and the following Romanian Civil Procedure Code by way of appeal against enforcement, if proof of the payment of the amounts in respect of which the measure was established has been made, at the same time noting the caducity of these measures¹⁰.

REFERENCES

- C. Mocanu, A. V. S. a. p. – i. l. i. o. d. c. l. c. e. s. a. u. b. a. c. a. f. c. g. r., 2015. *www.juridice.ro.* [Interactive] [Accessed on 20 June 2017].
- Iovănaș, E., 2017. *Jurisprudență relevantă în materie contravențională, para.54, p.307.*, Cluj-Napoca: Limes Publishing House.
- Iovănaș, E., 2017. *Jurisprudență relevantă în materie contravențională, para.54, p.307.*, Cluj-Napoca: Limes Publishing House.
- N. Volonciu coordinator, A. R., 2014. *Noul Cod de procedură penală adnotat; Partea Generală – Analiză comparativă, Noutăți, Explicații, Comentarii p. 45.* Bucharest: Universul Juridic Publishing House.
- N.Volonciu coordinator, A. R., 2014. *Noul Cod de procedură penală adnotat; Partea Generală – Analiză comparativă, Noutăți, Explicații, Comentarii, p. 453.* Bucharest: Universul Juridic Publishing House.
- Udroiu, M., 2016. *Procedură penală. Partea Generală – Sinteze și Grile, p.753.* 3rd Edition Bucharest: C.H. Beck Publishing House.

¹⁰ In this respect, see the Civil Judgment no. 2437 ruled by the District Court of Târgu-Mureș on 15 May 2017.