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**Considerations Regarding the Motion to Notify the High Court of Cassation and Justice in order to Issue a Prior Decision for Solving certain Law Issues in Preliminary Chamber Procedure**

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**Abstract:** The present paper aims at sustaining the concept regarding the possibility of examining the lawfulness, in the preliminary chamber, of court orders issued by a judge for rights and freedoms through which technical surveillance measures were authorized. This work is of great interest given the obvious discrepancy between the object of preliminary chamber procedure, in the light of the legality and validity of evidence acquired during prosecution and the non-challengeable nature of the warrant as provided by the Romanian Criminal Procedure Code. The jurisprudence of national court decisions reveals that the rulings issued by a judge for rights and freedoms through which a measure of technical surveillance is authorized are subject to judicial control in the preliminary chamber, but there also are several courts in Romania that states on the contrary.

**Keywords:** Preliminary chamber; technical surveillance measures; ruling; judicial control

## **1. The Factual Situation**

In fact, the defendant X brought in the preliminary chamber procedure, under article 344 par. 2 of the Criminal Procedure Code, requests and exceptions concerning the lawfulness of evidence and of the acts conducted by criminal investigation authorities in case no. .../P/2015, requesting the exclusion of data derived from conducting technical surveillance measures due to the fact that the decisions by which these measures were authorized are void.

In front of the Preliminary Chamber judge it was revealed that the means of evidence consisting of recordings of telephone conversations, rendered in the reports of the case file are obtained in flagrant violation of criminal procedural law, based on rulings and warrants given in flagrant violation of the law and therefore it is necessary to exclude them from the evidentiary material.

The rulings of judges for rights and freedoms, based on which were issued and extended over several months the warrants for technical surveillance that led to administration of evidences intrusive into the private life of the defendant were motivated considering different facts than those prosecuted in the present case, ignoring the very motivation of the prosecutor`s requests.

Meeting all essential conditions stipulated by articles 139-140 of the Criminal Procedure Code, for a lawful technical supervision, namely proportionality, necessity and subsidiarity, conditions designed to ensure compliance with fundamental rights and freedoms were not reviewed by judges of rights and freedoms based on present facts. They were based on a completely different subject than those of the case file. Therefore, the “considerations shown” by the judges refers to different crimes than those who were prosecuted in file no. ... /P/2015.

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The preliminary chamber judge rejected defenses arguments arguing that the rulings of judges for rights and freedoms are not subject of the preliminary chamber procedure. It shows that the lawfulness and validity of the rulings by which were approved the technical surveillance measures during a criminal investigation cannot be analyzed in this procedure.

Given these considerations, in statutory term, according to article 425<sup>1</sup>, the defense filed an opposition against the ruling dated 15.02.2016 passed by the preliminary chamber judge in case no./99/2015/a2 of Iasi County Court. The opposition was sent to the Court of Appeal Iasi.

From the exposed factual situation is shaping as an issue of law, the matter of the possibility of analyzing in the preliminary chamber procedure the lawfulness and validity of the rulings given by a judge for rights and freedoms, by which technical surveillance measures were authorized. In this context, we believe that the conditions provided by article 475 of the Criminal Procedure Code regarding the motion before the High Court of Cassation and Justice.

## **2. Admissibility Conditions**

Regulating the conditions of admissibility of the motion before the High Court of Cassation and Justice in order to give a ruling for unraveling an issue of law, the legislator has established in article 475 of the Criminal Procedure Code the possibility of certain courts, including the Court of Appeal, entrusted with solving a case as a last resort, if during the trial is ascertained the existence of an issue of law of whose settlement depends the ruling of the case and upon which the Supreme Court has not ruled yet by a prior decision or an appeal on points of law nor is subject to any such appeal, to refer the matter to the High Court of Cassation and Justice in order to give a ruling by which to settle as a matter of law principle the given legal issue.

The legislator has conditioned the admissibility of such motion by cumulative fulfillment of three conditions, namely: a) the existence of a case that is pending judgment as last resort on the role of one of the courts expressly provided in the previously mentioned article, b) settlement of that case depends upon unraveling of the issue of law subject of motion, and c) the legal issue has not been yet unraveled by the High Court of Cassation and Justice through legal mechanisms that ensures consistent interpretation and application of the law by the courts or are not subject of an appeal on points of law.

a) In the present case, the condition of the existence of a case pending judgment as a last resort is fulfilled given that the Court of Appeal Iasi is vested in file no. ... /99/2015/a2 with the appeal filed by the defendant X against the ruling of the Preliminary Chamber judge dated 15.02.2016 whereby the County Court Iasi rejected the motions and exceptions raised by the defense.

b) Also, the solution of the case depends on the legal issue that the defense intends to bring before the Supreme Court. By Decision no. 11 of June 2, 2014, pronounced by the panel of judges for unraveling certain issues of law in criminal matters, the High Court of Justice held that the admissibility of the motion for a preliminary ruling is conditioned, both if the case targets a rule of substantive law, or when is concerning a provision of procedural law, given that the fact that the interpretation given by the supreme court have legal consequences on how to resolve the case.

Between the legal issue whose enlighten is required and the resolution on the criminal prosecution and/or civil action by the court of last instance must be a relationship of dependency, meaning that the High Court decision rendered in proceedings according to articles 476 and 477 of the Criminal Procedure Code to be likely to have an actual impact on the judgment of the principal case. This requirement is the expression of the utility that the required unravel of the issue of law has on the settlement of the substantive criminal dispute.

*Moreover, both in Supreme Court's jurisprudence and in the doctrine, the majority outlined opinion is in terms of a broad interpretation of the term "substance of the case". "The use by legislator of the phrase "solving the case as a last resort", in conjunction with the provision that this work can be carried by the county court, it allows us to see that the unraveling of an issue of law may start not only*

*after judging the substance of the case, meaning settling criminal proceeding and possibly civil action. Thus, due to the rules of functional competence, the county court does not have the functional ability to judge the substance of a criminal case as a last resort, this competence thereof being offered, exclusively, to the Court of Appeal and High Court of Cassation and Justice, as courts of appeal. However, the county court can ultimately resolve a case. We consider, for example, the hypothesis given by article 341 par. 9 of the Criminal Procedure Code” (Neagu & Damaschin, 2015, p. 455)*

In terms of the meaning of "solving the substance of the case," High Court of Cassation and Justice held: "the phrase "solving the substance of the case" should not be understood, necessarily, as just solving criminal action and civil action. Thus, in the example mentioned above, the county court can judge as a last resort the complaint against the ruling by which it was ordered the commencement of a trial, without thereby being judged the criminal case or the criminal procedure"<sup>1</sup>.

The subject of this release is the ability of examining in the preliminary chamber procedure of the lawfulness and validity of the rulings by which were approved the technical surveillance measures during a criminal investigation. On that clarification depends the solving of the preliminary chamber phase and at the same time, the settlement of the civil and criminal action.

Thus, whether the rulings of judges for rights and freedoms can be subject of the preliminary chamber judge analysis, then they may be canceled as illegal during the procedure provided by article 346 of the Criminal Procedure Code, and the evidence thereof administrated may be excluded as unlawful.

Given that the records for playback carried out under warrants for technical surveillance issued by the judges for rights and freedoms, whose ruling were challenged in the preliminary chamber phase, are the main means of evidence underlying the prosecution, it follows that their exclusion could influence in a substantial manner the ruling on the prosecuted crime and therefore the very substance of the case.

In the previous criminal procedures code, what according to the new Criminal Procedure Code constitutes as subject of the preliminary chamber, thus checking the competence and lawfulness of the indictment and the verification of the legality of evidence and carrying out the criminal investigation, was conducted in a single phase of the trial which it began with the defendant sent before a court by drafting the act of indictment.

Since 01 February 2014, checking the legality of the indictment, the administration of evidence and the criminal investigation as well as the judgment of the case by administering and evaluating the evidence, was divided by the legislator in two distinct phases, but their subjects were left interdependent. A proof of this consists precisely in the fact that the solution given in the preliminary stage can prevent the transition to the phase of the judgment by returning the case to the prosecution and leaving the criminal action unresolved by the court.

c) In terms of the subject of the proposal for the Supreme Court, the issue of law in this matter is genuine, materializing in different ways of interpreting and correlating legal texts among them, these ambiguities preventing the coherent and correct application of the law. Thus, in practice, conflicting opinions were expressed upon which the Supreme Court has not ruled by a prior decision or by an appeal on points of law, opinions affecting the predictability of the justice act.

Regarding the nature of the issue of law subject of the motion, we believe that from both the preliminary rulings given by the Supreme Court and the opinions expressed in the doctrine, results that the legislator intended to regulate through the procedure prescribed by the provisions of article 475 of the Criminal procedure code a remedy for unraveling any issues, either from material or procedural law. *"It is difficult to accept that the legislator`s intention had been to limit the law issues that can be unraveled by this procedure only to the material law because there would be no reasonable justification for such a solution."* (Neagu & Damaschin, 2015, p. 455)

In fact, the provision of article 475 of the Criminal Procedure Code does not define the term "issue of law". In the doctrine it was revealed, however, that in order to be an real issue of law, when it targets a

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<sup>1</sup> High Court of Cassation and Justice, the Panel for a dispensation of law issues, decision no. 24/2014.

legal rule, it requires that the legal text to be doubtful, imperfect (incomplete) or unclear. The debated issue of law must be linked to the ability to interpret a law differently, either because this text is incomplete either because it is correlated with other statutory provisions.

As withheld by the Supreme Court *"on this issue, the doctrine also revealed that, within the meaning of the law, the issue of law, whose unravel is required, must be specific, following the punctual interpretation of a legal text, without exhausting the meanings or the applications; the question for the court must be one qualified and not purely hypothetical and generic. At the same time, the issue of law must be real and not apparent to regard different interpretation or antagonistic uses of the text of the law, of a rule of customary law that is unclear, incomplete or, as appropriate, uncertain or the incidence of broad principles of law, whose content or whose sphere of action are controversial."*<sup>1</sup>

In the present case, the question addressed to the High Court of Cassation and Justice targets precisely such a question of law punctual and tangible, as we highlight hereinafter.

### **3. The Issue of Law**

On 12/11/2015 was held at the headquarters of the Court of Appeal Iasi, the quarterly meeting of non-unitary practice in criminal matters, completed by "The record of quarterly meeting of non-unitary practice in criminal matters which took place at the Court of Appeal Iasi at the date of December 11, 2015 - the third and fourth quarters - No. 5202 / A / 2015."

During the meeting, the first item on the agenda was solving the following aspect:

*"The possibility to review in the preliminary chamber procedure the merits of court orders issued by the judge for rights and freedoms by which were authorized technical surveillance measures, given that, according to article 342 of the Criminal Procedure Code, the very subject of the procedure is to check after indictment, the competence and legality of the court as well as the verification of the lawfulness of the evidence and of acts of the prosecution."*

On this occasion they were expressed several opinions

In the first opinion, it was claimed that during this procedure, the judge can only check the lawfulness of evidence and of acts of the prosecution, but not the merits of court orders issued by the judge of rights and freedoms by which were authorized technical surveillance measures, given that the subject of the chamber preliminary provided in Article 342 of the Criminal Procedure Code (limited to verify after indictment, the competence and legality of the court as well as the verification of the lawfulness of evidence and of acts of prosecution) and cannot be extended to other issues that have not been contemplated by the legislator in the regulation of this procedure.

A second opinion showed that one of the conditions of lawfulness provided by article 139 of the Criminal Procedure Code is related to rationality, which requires its verification during this procedure, especially when it is invoked by the defendant's lawyer that there were no evidence to support a reasonable suspicion of his involvement in a crime and thus not justifies the approval of technical surveillance; in this context, the preliminary chamber judge examines aspects of rationality of the court orders by which were authorized technical surveillance measures by considering the evidence provided to the judge for rights and freedoms at the date of the prosecution's motion; therefore, a minimum reference to evidence is required in the contents of the judge's confidential ruling, being helpful to take into consideration the arguments of the prosecutor's motion.

The solution was adopted unanimously meaning that: *"In the preliminary chamber, the judge can only check the lawfulness of evidence and of the acts of prosecution, but not the merits of court orders issued by the judge for rights and freedoms by which were authorized technical surveillance measures, given the subject of the preliminary chamber, provided in art. 342 Criminal Procedure Code (unanimous opinion)"*

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<sup>1</sup> High Court of Cassation and Justice, Decision no. 1/2016.

*On the other hand, in the experience of other courts of law, the solutions were antinomian: “in applications submitted by defendants they invoke unlawfulness of evidence obtained through interception warrant dated 03.06.2014 ordered by the Prosecutor of the Attorney's Office of Olt County court and confirmed by the judge for rights and freedoms by ruling no. 7 of 03/11/2014.*

*To these considerations, under article 345 par. (1) of Criminal procedure code were partially admitted the requests submitted by the defendants. It excluded interceptions and recording on magnetic tape of telephone conversations and the audio-video recordings of conversations held in the environment resulting from the warrant of 06/03/2014 issued by the prosecutor, confirmed by ruling no. 11/03/2014 given by the judge for rights and freedoms in case no. .../104/2014 wiretaps and records pursued up to 10.04.2014”<sup>1</sup>*

*“In order to rule so, the preliminary chamber judge, examining the motion for nullity of criminal ruling no. 29/I/22.09.2014 given by the judge for rights and freedoms of the District Court Z. (case no.\_) and for the exclusion of evidence, formulated in terms of article 345 par. 1 of Criminal procedure code, found that it is not substantiated, according to article 141 of the Criminal procedure code.*

*Therefore, arguing on the lawfulness and the merits of the criminal ruling no. 29/I/09.22.2014 issued by the judge for rights and freedoms of the District Court Z., has rejected the motion for nullity of this decision and for the exclusion of any evidence obtained as a result of a temporary authorization for the use of technical surveillance measures, namely the interception and recording of calls made from phone no. station belonging to the defendant”<sup>2</sup>*

In the doctrine there were sought different opinions which indicates that: “The ruling of the judge for rights and freedoms to authorize technical surveillance measures is not challengeable; However, we appreciate that within the competence of the preliminary chamber judge lies the analysis of the lawfulness of the ruling by which technical surveillance measures are authorized, namely the means of evidence obtained in the process” (Udroiu, 2015, p. 356).

So, given the evident aspects highlighted for the panel of judges from the High Court of Cassation and Justice, pursuant to articles 475-477 of the Criminal Procedure Code, in order to issue a prior ruling to unravel an issue of law regarding the possibility to review in preliminary chamber proceedings, the rulings given by judges for rights and freedoms by which were authorized technical surveillance measures, given that, according to article 342 of the Criminal Procedure Code, the subject of preliminary procedure consists in the verification of the indictment, of the competence and legality of the motion, as well as verification of the lawfulness of evidence and of the acts of prosecution.

#### **4. Adjournment of the Proceedings**

At the same time, given the factual and legal situation exposed above, we believe that is incident the case ruled by the legislator in article 476 par. 2, second sentence, of the Criminal Procedure Code that states the compulsory suspending of proceedings: “*If the adjournment is not ordered at the same time with the motion filling and the judicial investigation is completed, prior to the High Court of Cassation and Justice’s ruling on the motion, the court has to suspend the debate until a ruling as specified in article 477 par. 1 of the Criminal procedure code is issued.*”

We appreciate as obvious that the legislator intended by the legal text mentioned above, to prevent the court of last instance to enter into the debate phase “on the substance of the case” within the general meaning typical for the procedure provided by article 475 of the Criminal Procedure Code, precisely so they don’t issue an unlawful ruling that does not take into consideration the law as unraveled within the prior decision of the Supreme Court.

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<sup>1</sup> Decision 51 of 02.09.2015 delivered by the Court of Appeal Craiova.

<sup>2</sup> Conclusion no. 86/2015 Cluj Court of Appeal pronounced on 02.12.2015 in case no. 2758/84/2014 / a4.

Given that the High Court of Justice has not yet ruled on the issue of law in question, if the court empowered to solve the case as a last resort would give the floor to the parties to plead “on the substance of the case” they would be unable to relate to the unraveling given by the supreme court.

As we mentioned above, the solving of the case depends on the issue of law raised. If the court which filed the motion for the High Court of Cassation and Justice would deliberate and would decide on the “merits”, the motion procedure before the High Court of Cassation and Justice would remain with no purpose.

## **5. Conclusions**

Considering that the preliminary chamber procedure as part of the criminal trial, that aims to verify the entire prosecution phase, we highlight the fact that the ruling by which technical surveillance measures were authorized, as part of the evidentiary ensemble, falls within the functional competence of the preliminary chamber judge, allowing him to verify these ruling, issued by the judge for rights and freedoms, as for their lawfulness and merits.

To consider at this moment that through the preliminary chamber is possible to evade the warrants from the examination conducted by the judge of preliminary chamber leads to deprivation of content of the object of preliminary chamber itself.

Thereby, considering that the exclusion of evidence is a sanction that might be applied by the judge of the preliminary chamber, according to the above reasoning, can be ascertained inclusively the nullity of the ruling by which has been duly authorized the evidentiary method. In other words, preliminary chamber judge can ascertain the nullity of the ruling given by a judge of rights and freedoms by which it authorized conducting technical supervision measures.

Given all these considerations it has been requested that the proposal formulated should be admitted and the motion to be filed at the High Court of Cassation and Justice in order to give a prior ruling for unraveling the indicated issue of law.

## **6. References**

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