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Controversial Issues on the Requests and the Exceptions Invoked in the Preliminary Chamber Procedure - Jurisprudential Issues

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Abstract: The present paper aims to analyze the stage of the preliminary chamber, phase of the criminal trial introduced by the Romanian legislator with the adoption of the New Criminal Procedure Code. Preliminary chamber procedure is an element of novelty in the criminal process so law practitioners have encountered numerous difficulties in applying the new provisions. If some of these difficulties were remedied either by the Constitutional Court or by the High Court of Cassation and Justice through the procedure for resolving issues of law, a large part of the difficulty in interpreting the provisions governing the preliminary-ruling procedure was left to the national jurisprudence. Present study aims at revealing the most frequent controversial issues encountered in the practice of the courts, but especially in highlighting the non-unitary interpretation generated by their jurisprudence. The academic and practical interest lies in the fact that the present work can be a useful legal instrument in unifying the non-unitary practice, all the more so as it analyzes the solutions ordered by courts of any degree and on the whole territory of the country.

Keywords: preliminary chamber; exclusion of evidence; nullity; requests and exceptions

Introduction

The institution of the preliminary chamber procedure was introduced into the Romanian criminal procedural system with the entry into force of the New Criminal Procedure Code.²

The explanatory memorandum to the draft of the new Criminal Procedure Code³ reveals that the Romanian legislator, through the preliminary chamber phase in the criminal trial, aimed to meet the requirements of legality, celerity and fairness of the criminal trial.

Therefore, the preliminary chamber is a new, innovative institution that aims to create a modern legislative framework that removes the excessive length of proceedings in the trial phase. By regulating the procedure of the preliminary chamber, it is intended to resolve the issues of the lawfulness of the indictment and of the lawfulness of the administration of evidence, ensuring the premises for the prompt resolution of the cases. In this way, some of the deficiencies that led to the conviction of Romania by the European Court of Human Rights for the violation of the excessive duration of the criminal trial are eliminated.

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² Criminal Procedure Code adopted by Law no. 135 from 01.07.2010, published in the Official Monitor, Part I no. 486 of 15.07.2010, entered into force on 01.02.2014.

³ The explanatory memorandum to the draft of the new Criminal Procedure Code available online at: <http://www.cdep.ro/proiecte/2009/400/10/2/em412.pdf>.

We note that the object of this new procedure was established by the initiator¹ of this legislative proposal and consists in the verification of the legality and lafulness of the indictment. This institution is known in many European systems (Italy, Serbia, Kosovo, France) and is also regulated in the Statute of the International Criminal Court and aims to verify the existence of sufficient evidence of the criminal charge justifying the conduct of the trial phase.

Thus, by the content of the provisions governing the preliminary chamber, by the solutions which may be ordered, are set out the criteria by which it is determined whether the procedure in the course of criminal proceedings was fair in order to justify the criminal trial.

1. Jurisprudential Issues Regarding the Unlawfulness of the Indictment Invoked in the Preliminary Proceedings

According to art. 342 of the Criminal Procedure Code, the subject-matter of the proceedings of the preliminary chamber is the verification, after the indictment, of the lawfulness of the court's referral.

The indictment must detail and accurately describe the allegations made against the defendant, including:

1. presenting the factual situation with which the court will be heard. Thus, the prosecutor must analyze in detail the means of evidence administered to retain the factual situation on which the charge is based, to state the reasons for which some evidence is retained or for which others are removed, as well as to highlight the defendants' defense, or withholding its defense. (Udroiu, 2016)
2. full legal classification; The "legal" section of the indictment presupposes: the analysis of the constitutive elements of the offenses for which the prosecution has been carried out: the objective side, the subjective side (including where they are not met); analysis of worsening states (relapse, continued form, intermediate plurality) or attenuation (tentative) of punishment.
3. the civil aspects;
4. the means of evidence administered during the criminal prosecution;
5. data on the defendant;
6. data on the respective criminal prosecution: means of filing (complaint/denunciation/office); the order by which the prosecution was initiated; the order that further prosecution of the suspect was ordered; the ordinance by which the criminal action was initiated; the ordinance extending the criminal prosecution/criminal action or the change of legal classification was ordered; the preventive measures, mentioning the date on which the last extension of the preventive arrest/home arrest measure expires, namely judicial control; precautionary measures ordered. (Udroiu, 2016)
7. the enacting terms which will include: the injunction; the defendant sent to trial in a state of liberty or preventive arrest/home arrest; offense and full legal classification; other solutions provided by art. 327 letter b), art. 328 para. 3 of the Criminal procedure code; severance; legal costs; the names and forenames of the persons to be cited in court, indicating their quality in the proceedings, and the place where they are to be cited; the referral order of the competent court;

¹ Government Decision no. 829/2007 for the approval of the preliminary theses of the draft for a new Criminal Procedure code, published in the Official Monitor, Part I no. 556 of 14.08.2007.

By the indictment, the prosecutor may order adjudication and prosecution of criminal offenses for some of the facts for which the prosecution was carried out.

The indictment is subject to verification as to the legality and lauffullness of the hierarchically superior prosecutor, namely the chief prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

As regards the unlawfulness of the act of referring the court, the judicial practice revealed the requirements the indictment must meet in terms of legality in relation to the criticisms made by the defense in the sense of the prosecutor's omission to analyze the constituent elements of the offense which is the object of the judgment, such an analysis is not mandatory in the circumstances in which the prosecutor describes the factual situation and makes the necessary reference to the legal classification. (Iordache, 2014)

On the other hand, Oradea Court of Appeal (Decision no. 135, 2015) considered these exigencies not enough and ordered: *"to remedy the irregularities contained in the indictment no. 47/D/P/2014 dated 26 June 2015 of the DIICOT - Oradea Territorial Service for the clear exposure of the constituent elements of the offense both in the exhibition part and in the "legal" section namely the money laundering provided by art. 29 paragraph 1 letter a) of the Law no. 656/2002 held against RAZ and T. R.M., expressly mentioning the sums of money in respect of which activities were carried out that are circumscribed to the material element of the said offense, as well as in what they concretely consisted of these activities. Pursuant to Article 347 paragraph 3 of the Code of Criminal Procedure referred to in Article 345 (2) and (3) of the Code of Criminal Procedure, the notification of the decision to the DIICOT - Oradea Territorial Service in order to remedy the irregularity of the notice of act"*.

Also, the preliminary chamber judge at Suceava Court of Appeal (Decision no. 17, 2015) has analyzed all the elements which led to the conclusion of the lawfulness of the indictment:

"The analysis of the content of the indictment leads to the conclusion that the court document satisfies the fairness requirements of the proceedings and ensures a correct and complete information to the defendants of the accusations made against them and that the description of the facts is in accordance with the procedural acts relating to the conduct of the criminal proceedings (initiation of prosecution, extension of the prosecution and prosecution of the criminal action against the defendant).

The actions that have led to the criminal prosecution of the defendants are determined by a concrete way of committing offenses and a fixation of the spatio-temporal coordinates, which also result from the systematic examination of the mentions of the notification act by fitting them into the context factually or by reporting to the economy of related facts.

Regarding the legal classification of the facts, the preliminary chamber judge finds that in the act of referring the court both in the exposition and in the section "The legal framing of the facts" there are legal qualification operations of all the deeds retained by the defendants.

The indictment must also indicate the name and quality of the persons to be cited in the court, as well as the place where they are to be cited, as well as the precautionary measures, and this document includes all these elements.

In exercising the function of supporting the criminal action, the act of referring the court must contain a clear and complete description of the facts and circumstances extracted on the basis of the evidence in the criminal investigation phase, the analysis of the evidence, the lawfulness of the deeds and the other aspects that contribute to the good conduct of the criminal process".

In judicial practice (Decision no. 20, 2014), it was also shown that *“The defendant’s requests regarding the incidence of a case that prevents the criminal action from being initiated, by expressly referring to the provisions of art. 16 par. 1 lit. b) Criminal Procedure Code, the lack of predictability of the incriminating legal norm, the succession in time of the legal provisions in the matter, the failure to meet the constitutive elements of the offense of conflict of interest from the point of view of the objective and subjective aspect of the offense, the wrong qualification of the active subject of the offense, are in fact critics regarding the substance of the case, and not of the lawfulness of the court’s referral. As regards the assessment of the way the criminal investigation body interprets the evidence, this can not lead to the unlawfulness of the evidence gathered during the criminal prosecution”*.

In this respect, it is worth noting that the indictment is a procedural act of a form and content that presents a specific legal technique. (Iordache, 2014)

2. Possibility to File Requests in the Preliminary Chamber

Where the case file contains interceptions from another case, performed under a technical surveillance warrant issued under the national security law, the parties may request the judge of the preliminary chamber to declassify:

- the request of the Prosecutor’s Office for authorization of the national security warrant;
- the rulling by which the High Court of Cassation and Justice (hereinafter HCCJ) had authorized the technical surveillance measure.

If the records were not obtained in a criminal case, the documents drawn up by the Romanian Intelligence Service (hereinafter RIS) on their basis are only acts of discovery, according to art. 61 of the Criminal Code, acts that could be the basis of the notification of the criminal prosecution bodies, but can not have probative value in the criminal trial.

It is necessary for the prosecutor and thereafter the judge of the preliminary chamber to analyze the lawfulness of obtaining these records.

2.1. Legal Basis

Article 345 para. 1 in conjunction with art. 352 par. 11 of the Criminal Procedure Code: *“Where classified information is essential to resolving the case, the court shall, as a matter of urgency, request, where appropriate, total declassification, partial declassification or change to another classification or access to those classified by the lawyer of the defendant”*.

Article 93, paragraph 12 of the Internal Rules of Courts: *“In cases concerning proposals and notifications regarding the approval of searches and the use of special surveillance and research methods and techniques, as well as the issuance of a referral order, the consultation and the issuance of copies of the acts and rulings thereof are allowed only to the persons at par. 3 (the lawyers, parties or representatives of the parties, the appointed experts and interpreters concerned) only after the authorized activities have been completed and the period for which the measures have been approved expired and only if they do not affect the proper conduct of the criminal proceedings. In the same way, the court’s special documents and records relating to these files can be consulted”*.

Even if all the conditions necessary for the issuing of the warrant on which the recordings were made are fulfilled, the prosecutor and the preliminary chamber judge must also consider the condition of a criminal case having as object the crimes stipulated by art. 3 of Law 51/1991.

Without the preliminary chamber judge examining the legality of obtaining these records and without considering whether they were obtained as evidence in a criminal proceeding, they can not be used in the criminal trial.

2.2. Non-unitary Jurisprudence

“Given that the file is missing from the request of the Prosecutor’s Office for the interception and recording of telephone conversations, as well as the decision by which the HCCJ admitted it, nor is the court number indicated by the Decision from 21 June 2012, has accepted the request made by the defendant BD through his lawyer, and asked the HCCJ to submit the relevant documents.

By address no. (...), the HCCJ informed the court that these documents were classified as State Secret Class, the Strict Secret level and for this reason were not submitted.

In such a situation, the court was unable to assess the lawfulness of obtaining the authorization to intercept and record telephone conversations”. (Criminal sentence no. 973, 2012)

In another case, the preliminary judge of the Iași Court of Appeal *“qualified the defendant's requests as requests for the taking of evidence and ordered their rejection by reference to the subject matter of the preliminary chamber as regulated by the provisions of art. 342-346 Criminal Procedure Code”. (Decision no. 2016, 2016)*

On the other hand, ICCJ, in case file no. 1380/1/2016, by the Decision of 25.05.2016 admitted the request for declassification and ordered the return *“with address to the Classified Documents Compartment of the High Court of Cassation and Justice and calls for steps to be taken to declassify the national safety warrant. .. in the case of the said PA and of the conclusion which gave rise to the issuance of this mandate, as well as the declassification of the decision on the basis of which the warrant no... was issued, stating that the evidence in the case file was obtained on the basis of the mandate”.*

2.3. Non-unitary Jurisprudence within the HCCJ

“Admitted in part the requests and exceptions made by the defendants DMG, OOC regarding the interception of telephone conversations, used as evidence in the file no. 95/P/2011, handled by the Prosecutor’s Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate - The Pitesti Territorial Service in which the indictment was issued on November 18, 2015. Asks the prosecutor to request the partial declassification and subsequently submit to the file the authorization to intercept and record the communication of the conversations in case of authorization 003068/15 08 2007 and of the report requesting the measure. According to art. 345 paragraph 3 of the Criminal Procedure Code, the prosecutor will remedy the irregularities found and will file the documents requested under item I”. (Decision of 19.02.2016, 2016)

Given that the prosecutor did not comply with the demands of the judge, in the same case file, the court stated: *“admits, in part, the exceptions formulated by the defendants. Excludes from the evidentiary material the interceptions and recordings of communications performed under mandate no. 003068 of 15.08.2007 issued by the High Court of Cassation and Justice”. (Decision no. 287, 2016)*

Furthermore, in appeal procedure, another judge from HCCJ ruled: *“Admits the appeal filed by the Prosecutor’s Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate against the order no. 287 of April 6, 2016, pronounced by the Preliminary Chamber judge*

in file no. 4215/1/2015. It partially cancels the disputed decision. Dismisses as unfounded the requests and exceptions made by the defendants D. M. G., O. O. C., regarding the interceptions and recordings of communications performed under mandate no. 003068 of 15 August 2007”. (Decision no. 143, 2016)

Thus, we observe that, even within the High Court of Cassation and Justice, in the same case, but in different procedural stages, the optics of the courts are not unitary.

3. Defense Access to Data from Technical Surveillance

To the extent that among the evidence submitted by the prosecutor there are also evidence obtained through technical surveillance, the lawyer of the defendant, for the observance of the right to a fair trial and the principle of equality of arms, may file before the judge of the preliminary chamber various requests regarding the optical devices and playback reports:

- The request to make available to the defendant copies of the optical media containing the records;
- Application for the release of photocopies according to the criminal prosecution volumes containing the minutes;
- Request to issue an address for forwarding to the case file original files containing records to compare with those in the case file.

3.1. The Request to make Available to the Defendant Copies of the Optical Media Containing the Records

Legal Basis

Article 97 par 2 lett. f) corroborated with art. 143 par. 2 of the Criminal procedure code in relation to the principle of equality of arms (Article 6 (1) and Article 6 (3) (d) of the ECHR).

Article 162, paragraph (1) of the Rules of Internal Order of the Courts stipulating that: “*Copies on the hard copy or on certified copies thereof in criminal cases shall be released only to the parties or their representatives, with the approval of the preliminary chamber judge ...*”

The usefulness and relevance of this request lies in the possibility of analyzing the legality of the transcripts in relation to the data inserted in their content, by comparison with the optical supports, their files and constructive series.

3.2. Application for the Release of Photocopies According to the Criminal Prosecution Volumes Containing the Minutes

Judicial practice has demonstrated that such an application has been formulated by defense to carry out verifications.

Thus, a first aspect that needs to be verified is the correspondence between the constructive series of optical supports mentioned in the minutes and the constructive series of the optical supports in the case file.

Also, in order to avoid the suspicion of falsifying the content of the conversation either by deleting elements or by adding phrases from other conversations carried in another context, defense can analyze the content of the conversation played in the verbal record of the case by comparison with the file containing the record.

Legal Basis

Article 94, paragraph 2 of the Criminal Procedure Code concerning the right of the lawyer to study the documents of the case, the right to record data or information in the file, and to obtain photocopies at the expense of the client.

Article 93, paragraph 10 of the Internal Rules of the Courts: „*In cases where (...) the use of special methods and techniques of surveillance or research, (...) the consultation and the issuance of copies of the acts and rulings thereof are permissible only for the persons referred to in paragraph (3) only after completion of the authorized activities and the expiry of the period for which the measures were granted and only if they do not affect the proper conduct of the criminal proceedings*”.

4. Administration of new Documents in the Preliminary Chamber

Administration of the evidence with new documents, which are not in the possession of the parties, but to other judicial bodies. Obligation of the court to issue an address at the request of the parties

Article 345 para. 1 Criminal Procedure Code: „*at the deadline set in accordance with art. 344 par. (4) the Preliminary Chamber judge shall settle the requests and exceptions invoked or the exceptions raised ex officio in the council chamber on the basis of the works and material in the criminal investigation file and any new documents submitted to the parties and the victim, if present, as well as the prosecutor*”.

The legislator limited the domain of the evidence that can be administered in the preliminary chamber procedure to the lawfulness of the court's referral, as well as to the verification of the lawfulness of the administration of evidence and the execution of the acts by the criminal prosecution bodies.

In the preliminary chamber procedure, only new documents may be administered in accordance with the law. The novelty of the documents has a much wider sphere, by “new documents”, we understand both the documents that date after the indictment and the documents that have been given before, but which have not been administered in the criminal investigation phase.

We consider that the meaning of new documents is not limited to the documents actually in the possession of the parties but they can be:

- documents that are in the possession of other persons, natural or legal, evidence that can be requested according to art. 170 par. 1 second sentence of the Criminal Procedure Code;
- information held by natural and legal persons or judicial bodies that can be filed in the form of addresses addressed to the court;
- computer data that is stored in a computer system or on a data storage medium that is susceptible to being printed on paper (e-mail, SMS);

Also, new documents that can be administered in the preliminary chamber procedure may also include: subscriber, user and service data held, owned or controlled by providers of public electronic communications networks or electronic communications service provider intended for the public, other than the content of the communications and than those provided in art. 138 par. (1) lit. j) of the Criminal Procedure Code.

For example, by requesting the submission of data from the electronic communications provider or the telephone converser to the case file, it can be proven that a particular telephone number belongs to another person or as a particular conversation (referred to in the indictment) has not occurred at a certain date or has never occurred.

There are numerous cases in which the defendant can not bring evidence of the illegality of the administration of evidence during the prosecution because they are either in another court or in the prosecutor's office or other specialized bodies of the state.

The only way in which the defendant can prove the unlawful administration of the evidence is by means of requests to the court to ask for relations or information from institutions that have said documents or information.

We consider that those requests are admissible only in the preliminary proceedings procedure since only at this stage of the trial the judge can fully analyze the lawfulness of the evidence administration and may sanction the illegality of the evidence.

Rejection of these requests not only lacks the defendant's effective defense in the preliminary chamber procedure but is likely to infringe the right to a fair trial.

5. Analysis of the Limits of Competence of the Judge of Rights and Freedoms in the Preliminary Chamber Procedure

5.1. The Possibility of the Preliminary Chamber Judge to Analyze the Limits of the Competence of the Judge for Rights and Freedoms and to Order the Annulment of the Acts Performed by Him in Breach of His/Her Competence

According to art. 53 of the Code of Criminal Procedure, *“the judge of rights and freedoms is the judge who, within the court, according to its competence, solves in the course of the criminal prosecution the applications, proposals, complaints or any other notifications regarding the approval of the use of special methods and techniques of surveillance or research or other probative procedures under the law”*.

The appointment of a special magistrate - the judge of rights and freedoms and the judge of the preliminary chamber, together with the other two already existing, the prosecution function and the judiciary - is in the nature of fitting the legislation accordingly to establish a balance between the requirements for an effective criminal procedure in order to protect the basic procedural rights as well as the fundamental human rights for the participants in the criminal trial and the unitary observance of the principles defining the equitable procedure.

The principle of loyalty has an explicit consecration in the Code of Criminal Procedure, but also in the judicial practice of the last 50 years. Its origin lies in the principle of legality, which is also demonstrated by the etymology of the word “loyalty”, which derives from the Latin law (legality). Therefore, loyalty is a component of legality viewed in a broad sense.

The principle of loyalty is a component of the right to a fair trial, benefiting from a legal commitment at the jurisprudential level. ECHR jurisprudence developed on this principle does not restrict its components to the three modes mentioned in paragraph (1) - (3) of art. 101 of the Criminal procedure code, but includes the loyalty aspects within a generic analysis (of the implicit guarantees) that it carries on the realm of art. 6 parag. 1, in terms of fairness of procedures as a whole.

Therefore, even if it is not expressly mentioned in the art. 102, given the relationship between legality and loyalty, the legality is related to injury, and the unlawful and unfair administration of evidence can cause such harm, it can be argued that the sanction of nullity for violation of the loyalty principle of administration of evidence obviously transpires.

5.2. Non-unitary Jurisprudence

“Admite excepția nulității absolute invocată din oficiu cu privire la autorizarea perchezițiilor domiciliare și a supravegherii tehnice. În baza art. 281 alin. 1 lit. b Codul de procedura penală rap. la art. 102 alin. 3 și 4 Codul de procedura penală constată nule absolut probele obținute prin procedeele probatorii ale percheziției domiciliare și supravegherii tehnice, ori pe baza probelor obținute prin aceste procedee probatorii și în consecință exclude din materialul probator următoarele: - înscrisurile ridicate cu ocazia perchezițiilor din 26.11.2016, așa cum sunt enumerate în procesele verbale aflate la filele 13-20, 67-69 și 81-84 din vol. III, dos. u.p.; - procesul-verbal de percheziție domiciliară din 26.11.2015 privind aspecte de la percheziția efectuată la aceeași dată la imobilul ... și planșa fotografică aflate la filele 13-20 și respectiv 22-32 din vol. III, dos. u.p.; - procesul verbal de percheziție domiciliară din 26.11.2016 privind aspecte de la percheziția efectuată la aceeași dată la imobilul din com. S, sat S, jud. V, aflat la filele 67-69 din vol. III, dos. u.p. - procesul verbal de percheziție domiciliară din 26.11.2016 privind aspecte de la percheziția efectuată la imobilul din mun. F, jud. V, aflat la filele 78-79 din vol. III, dos. u.p. - raportul de constatare nr. 638663/14.01.2016, aflat la filele 1-58 din vol. II, dos. u.p./Admits the exception to the absolute nullity invoked ex officio concerning the authorization of home searches and technical surveillance. Based on art. 281 par. 1 lett. b) of the Criminal procedure code reff. to art. 102 par. 3 and 4 of the Criminal Procedure code, establishes absolutely void the evidences obtained through the evidential procedures of the home search and technical surveillance, or on the basis of the evidence obtained through these evidentiary procedures, and consequently excludes from the evidentiary material the following: - the documents filed in the searches of 26.11.2016, as listed in the forms at pages 13-20, 67-69 and 81-84 of volume III of the prosecution file; - the home search report of 26.11.2015 on aspects of the search made on the same date on the property ... and the photographic sheet at the 13-20 and 22-32 tabs of volume III of the prosecution file; - the home search report of 26.11.2016 regarding the searches made at the same date on the building in S, village S, district V, located at the tabs 67-69 of volume III of the prosecution file, - the home search report of 26.11.2016 on aspects of the search made at the building in F, V county, at sheets 78-79 of volume III of the prosecution file, - Report of Finding no. 638663/14.01.2016, found at sheets 1-58 of volume II of the prosecution file” (Decision of 25.05.2016, 2016).

As the representatives of the Prosecutor's Office explained, the exception relates to the fact that the evidence, the search and the technical surveillance in this case were authorized by the Focșani Court, given that, in the opinion of the Preliminary Chamber Judge, they should have been authorized by Vrancea Court. The difference done in this respect, precisely the aggravating form of the unlawful participation in the offense of abuse of office, which raises the jurisdiction of the Tribunal as a superior court. Prosecutors have stated that at the time when those evidence was obtained, the criminal prosecution was initiated „in rem” regarding the crime and not the person, and the qualification of the legal framing was made later.

“In order to rule in this manner, the preliminary chamber judge to examine the request for the absolute nullity of the criminal conviction no. 29 / I / 22.09.2014 of the judge of rights and freedoms within the Court of Law (file no.) And exclusion of some evidence, formulated in the light of the

provisions of art. 345 par. (1) and art. C.proc. pen, found that they are not founded, according to the provisions of art. 141 C.p.p.

Therefore, ascertaining the legality and the lafulness of the criminal conviction no. 29/I/22.09.2014 of the judge of rights and freedoms within the Z. Court, the application for finding the absolute nullity of this criminal conviction and excluding all the evidence obtained as a result of the provisional authorization of the use of the technical surveillance measures was rejected, respectively of the interception and recording of telephone calls made from the telephone number no., belonging to the defendant AF M". (Decision no. 86, 2015)

In another point of view, a preliminary chamber judge stated that *"on these matters, the requests made were the in fact means of appeal against the final judgments of the judges of rights and freedoms, which authorized part of the interceptions in the case. A first aspect concerns the fact that, from a procedural point of view, those judgments can not be discussed as to their lawfulness in the preliminary procedure, and the Preliminary Chamber judge cannot rule on their legality, not exercising the role of a judicial review body, filtering on matters exclusively related to the legality of acts of the prosecutor. The purpose of the preliminary proceedings is to verify the lawfulness of the acts of the prosecutor and not to discuss the legality of certain final judgments of the rights and freedoms. If the legislature considered it necessary, it would have included an appeal against this type of conclusion, but according to the criminal procedure these are final". (Decision no. 39, 2016)*

The Preliminary Chamber judge at the Court of Appeal, contrary to the assessment of the Preliminary Chamber judge from the first court, points out that in the preliminary procedure, will be analyzed both the legality of the administration of evidence by the criminal prosecution bodies (by reference to the act by which the evidence or the evidence-based procedure, and/or by reference to the act by which the evidence was administered) and the lawfulness of the decisions by which the judge of rights and freedoms has given, authorized or confirmed different probative procedures, respectively the means of evidence obtained by the approved probative procedure.

"A preliminary chamber judge has no jurisdiction to verify the merits of the judge of the rights and freedoms judgments as regards the fulfillment of the substantive conditions necessary for the assent, confirmation or authorization of the probationary procedure (for example, it cannot be ascertained whether at the time of the probationary procedure, resulting in reasonable suspicion of the commission of a crime or the fulfillment of the conditions of proportionality and subsidiarity).

The issues raised by the defendant-contestant NG, through his lawyers, concern issues regarding the merits of the judgments of the judges of rights and freedoms of Bucharest Tribunal dated 11.02.2015, 13.02.2015, 27.02.2015, 27.03.2015 and 28.04.2015, respectively their lack of reasoning in relation to the lack of analysis of the conditions of necessity, proportionality and subsidiarity of the supervision measures, and thus exceeds the competence of checking the preliminary chamber judge, the reasoning being the same with regard to the correction of the material errors". (Decision no. 39, 2016)

5.3. Material Competence of the Judge of Rights and Freedoms

Prerequisite situation:

The judge of rights and freedoms, during the prosecution, following the request of the prosecutor, ordered the approval of the technical surveillance measures.

The Judge's decision is motivated by reference to facts and legal framing other than those indicated by the prosecutor in the request and most important the necessity, proportionality and subsidiarity of the measures have not been analyzed.

Subsequently, the technical surveillance measures are carried out on the basis of these warrants until the expiry of the authorized period.

After the criminal prosecution is completed, the indictment is drawn up, the case reaching the preliminary chamber.

The defense invokes before the judge of the preliminary chamber the nullity of the rulings of the judge of rights and freedoms given that they were issued with reference to offenses other than those for which the defendant was prosecuted.

During the preliminary camera procedure, the judge of rights and freedoms issues a material error correction, replacing the reasoning in the disputed conclusion.

5.4. Critical Incident

Motivating a decision with reference to other facts and analyzing proportionality, subsidiarity and the need to authorize technical surveillance measures for offenses other than those described in the indictment cannot constitute material error.

Decision of material error is the result of a new deliberation and reassessment of the factual situation initially analyzed by the judge of rights and freedoms at the moment of the approval of the technical surveillance.

The maximum deadline until which a correction of the “material error” could be issued is given as of the court referral date, which is the date from which the prosecution is deemed to be completed and the date when the material competence of the any judge of rights and freedoms in relation to the cause of the judgment ends.

Any decision issued by a judge of rights and freedoms after the court has been notified cannot have legal effects, being issued in violation of the jurisdictional competence in relation to the procedural stage and in flagrant contradiction with the principle of separation of judicial functions.

To consider that after the court's referral, in the preliminary chamber procedure, when the preliminary chamber judge checks the lawfulness of the administration of the evidence, a judge, namely the judge of rights and freedoms, may cover the nullity of the act by which the administration of the evidence was granted, the issuance of a material error correction sentence means a lack of object of the preliminary chamber procedure and an unlawful interference in the jurisdiction of the preliminary chamber judge.

“Covering the absolute nullity” of a judge of rights and freedoms decision is a flagrant violation of the right to a fair trial of the defendant who is in a situation where, although evidence against him has been unlawfully granted, although he has challenged them the preliminary chamber judge, those evidence will remain in the case.

The doctrine (Mateuț, 2012) shows that: *“if a piece of evidence has been submitted to the judge in breach of the procedural provisions or if an admissible evidence in principle before him has been subject to irregular administration, sanctions must be imposed”*.

5.5. Non-unitary Jurisprudence

“Indeed, even if one could discuss this legality, with the answer to the exceptions, the NAD representatives filed five sentences of the same judges of rights and freedoms, correcting the obvious

material error, stating that the judgments should be considered as a whole and not separately as it did.

It should also be underlined that Art. 278 of the Criminal Procedure code does not provide for a time limit until the material error can be corrected by the criminal investigating body, the judge of rights and freedoms, the preliminary judge of the court or the court that drafted the act". (Decision no. 39, 2016)

While the legislator did not provide for a deadline for the material error correction procedure, technical surveillance measures can no longer be amended to make material misstatements after all technical surveillance has been completed and after the null decision has entered the legal circuit and has produced effects.

In other words, the "error" already committed in the procedure for the administration of evidence cannot be "repaired" after the finalization of the criminal prosecution but only sanctioned by the preliminary chamber judge with the exclusion of the evidence thus obtained.

6. Exclusion of Recordings

Exclusion of interceptions made by RIS under a national security warrant and used in other cases under Art. 142 para. 5 of the Criminal Procedure Code

Legal basis:

Article 140 par. 1 of the Criminal Procedure Code: *"technical surveillance measures may be ordered during criminal prosecution, for a maximum of 30 days at the request of the prosecutor, by the judge of rights and freedoms".*

Article 142 par. 5 of the Criminal Procedure Code: *"the data resulting from the technical surveillance measures may also be used in another criminal case if they contain conclusive and useful data or information regarding the preparation or perpetration of another offense mentioned in art. 139 par. (2)".*

The legislator imposed the condition that the technical surveillance should be available only in a criminal case, namely a case in which the prosecution was initiated.

It is obvious that in order for the data to be „used in another criminal case" it is necessary that they were legally obtained in a first criminal case, namely a criminal case in which the prosecution was started.

Only in the preliminary chamber procedure the judge of the preliminary chamber can analyze the legality of the evidence obtained during the criminal investigation phase.

If the RIS performs interceptions, information obtained under national security warrants cannot be used in other criminal cases because they have not been obtained in criminal cases.

The absence of a criminal case implies that no criminal investigation can be carried out, so the information thus obtained can only be the basis of the initiation of a criminal prosecution.

The prosecutor to whom this information is presented may use them to justify the provisional authorization on the basis of which the interception and the application requesting the judge's authorization of the interceptions.

Even assuming that are met all the conditions necessary for issuing the warrants on which the records were made, the preliminary chamber judge is obliged to analyze also the condition of a criminal case having as object the offenses provided by art. 3 of Law 51/1991.

If the records were not obtained in a criminal case, the acts drawn up by the RIS on their basis are only acts of discovery, according to art. 61 Criminal Procedure Code, acts that could be the basis of the notification of the criminal investigation bodies, but cannot have probative value in the criminal trial.

"The basis of the use in file no. 57/P/2015 of the National Anticorruption Directorate - Central Structure of the evidence obtained through the implementation of warrant no. ... of 24.12.2013 issued by the competent judge of the High Court of Cassation and Justice is the provisions of art. 139 par. 3 Code of criminal procedure, not the provisions of art. 142 para. 5 Criminal Procedure Code, as a consequence, is not necessary, as a consequence, an ongoing criminal trial, within which the request for issuance of the national security mandate is made.

Thus, the only condition to be considered from the point of view of admissibility as evidence of registered conversations/registrations made on the basis of a national security warrant is the existence of the mandate issued by the judge of the High Court of Cassation and Justice, a condition in the present case - Volume IX of the criminal investigation file was deposited the mandate no. .../ 24.12.2013, declassified, issued by the competent judge of the High Court of Cassation and Justice, the contents of which include the basis of the issue, respectively the provisions of art. 3 lit. f) and i) of the Law no. 51/1991 on the national safety of Romania.

The law allows the use of any legally registered record, regardless of the context in which it was obtained or the data subject". (Decision no. 39, 2016)

We consider that unless the preliminary chamber judge examines the legality of obtaining these records and without considering whether they have been obtained as evidence in a criminal proceeding, they can not be used in the case.

National case law (Decision no. 575, 2016) shows that: *„admits, in part, the claims and the exceptions invoked by the defendants S.C.M., M.M.F. and B.L. The inadmissibility of the indictment no. 81/P/2011 of 16 December 2015 of the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate - the Timisoara Territorial Service, regarding the description of the facts for which the three defendants were prosecuted. Excludes from the evidentiary material interceptions and recordings of communications under mandates no. ..., no. and no. ... issued by the High Court of Cassation and Justice. Returns the case on defendants S.C.M., M. M. F. and B.L. at the Prosecutor's Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate - Timisoara Territorial Service in order to restore criminal prosecution in file no. 81/P/ 2011 of the same Prosecutor's Office observing the procedural rights of the parties".*

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