

CONSTITUTIONAL AND CRIMINAL PROCEDURAL ASPECTS OF THE PRELIMINARY CHAMBER

S.-G. BARBU¹ A.-P. CONSTANTIN²

Abstract: *This paper aims to analyze a series of implications arising from the preliminary chamber judge's failure to comply with procedural criminal law provisions regarding the legal or reasonable timeframe for resolving exceptions concerning the legality and fairness of evidence administration in the Romanian criminal process, as well as the return of cases to prosecutors for the resumption of criminal investigations, based on an unjustified interference of the preliminary chamber judges in the constitutional duties of the prosecutors.*

Key words: *preliminary chamber, reasonable time, constitutional competence, fundamental rights.*

1. Introductory remarks

A preliminary analysis reveals that the institution of the preliminary chamber (we primarily refer to the institution of the preliminary chamber regulated by Articles 342-348 of the Code of Criminal Procedure; provisions concerning the trial in the preliminary chamber can also be found in isolated instances in other parts of the Code of Criminal Procedure or special legislation, but these are not the subject of the present study) was innovatively introduced by the legislator in the 2014 Code of Criminal Procedure with the purpose of providing a judicial filter to verify the legality and fairness of evidence administration and the procedural acts carried out during the criminal investigation, a phase distinct from the trial on the merits of the case.

The general objective of the preliminary chamber procedure, as initially envisioned by the legislator, was to ensure a procedural framework where the right to a fair trial is strictly observed, to enhance the efficiency of the subsequent trial stage, and to prevent the circumvention of the trial on the merits of criminal cases. Thus, by separating the matters regarding the "legality of the criminal investigation" from those concerning the soundness of the indictment, the legislator intended to allow the judge a structured approach to each category of requests and exceptions raised by the prosecutor, the parties, or ex officio. Following the final ruling by the preliminary chamber judge on the legality and fairness of evidence administration and the formulation of the criminal

¹ Transilvania University of Braşov, sg.barbu@unitbv.ro, corresponding author.

² University of Bucharest, alexandru.constantin05@gmail.com.

accusation, the trial judge may no longer revisit these matters, thereby establishing a rigorous order for the trial process.

Additionally, the preliminary chamber procedure seeks to prevent the excessive duration of criminal proceedings, in accordance with the requirements imposed by the case law of the European Court of Human Rights—a standard Romania continues to strive to meet in the most appropriate manner (in connection with this matter, see for example the European Court of Human Rights, 3rd Section, Judgment of 16 September 2008 in the case of *Beraru v. Romania* or the European Court of Human Rights, 3rd Section, Judgment of 30 September 2008 in the case of *Drăgănescu v. Romania*, available at: <https://jurisprudencedo.com>, accessed on 10.10.2024). Thus, in theory, the duration of the preliminary chamber procedure and the adjudication of requests regarding the legality and fairness of evidence administration during the criminal investigation, an essential prerequisite for assessing the soundness of the accusation at trial, should not exceed 60 days from the moment the court is seized.

While we fully agree with these objectives, this study does not aim to critique the institution of the preliminary chamber itself but rather to open a discussion about the potential constitutional damages caused by instances where the purpose of this procedure has been distorted, either by the gross failure of preliminary chamber judges to comply with the legal or reasonable time limits or by a potential alteration of the balance between the competencies of preliminary chamber judges and prosecutors in cases where files are returned to the prosecution within this procedure. In other words, this study aims to analyze the constitutional implications of the failure to comply with the legal deadlines for resolving requests and exceptions in the preliminary chamber procedure and the possible unjustified interference of preliminary chamber judges in the competencies of prosecutors.

Before proceeding further, it is necessary to make a few theoretical clarifications regarding the institution of the preliminary chamber, whose primary regulations are found in Articles 342-348 of the Code of Criminal Procedure.

The formal role of the preliminary chamber in criminal proceedings is summarized in Article 342 of the Code of Criminal Procedure, which defines the object of the preliminary chamber procedure as follows: the verification, after the indictment, of the competence and legality of the court's referral, as well as the legality of the evidence administration and the acts carried out by the criminal investigation bodies. As mentioned above, the preliminary chamber procedure does not involve assessing the soundness of the accusation but strictly verifying compliance with criminal procedure norms—in other words, verifying the legality of the file prepared by the prosecutor and its suitability to initiate the trial on the merits.

The duration of the preliminary chamber procedure is no more than 60 days from the date the case is registered with the court, as stipulated in Article 343 of the Code of Criminal Procedure. Evidently, given the particularities of the cases brought before the courts, this term is sometimes exceeded. Nonetheless, even in such cases, the procedure must be conducted within a reasonable time, in accordance with the standards established by national and European legislation and case law on the protection of human rights. The constant failure to comply with an express procedural deadline can seriously

affect the procedural rights of both the victim and the defendant, including the right to have the case resolved within a reasonable time, as expressly provided by Article 21(3) of the Romanian Constitution (according to Article 21(3) of the Romanian Constitution, “*the parties have the right to a fair trial and to the resolution of cases within a reasonable time*”) and Article 6 of the European Convention on Human Rights.

Article 344 of the Code of Criminal Procedure describes the preliminary measures of the preliminary chamber, in which the preliminary chamber judge must establish the deadlines within which the parties may submit requests and exceptions concerning the legality of the criminal investigation acts, as well as ensure the provision of defense counsel in cases where it is mandated by law.

The resolution of the requests and exceptions raised by the parties, the prosecutor, or ex officio by the preliminary chamber judge is conducted according to the procedure provided in Articles 345-346 of the Code of Criminal Procedure. Thus, the preliminary chamber judge verifies the legality of the administration of evidence and procedural acts and either: (i) finds the legality of the referral to the court, the administration of evidence, and the performance of the criminal investigation acts and orders the commencement of the trial; or (ii) orders the return of the case to the prosecution when: (i) the indictment is issued by a prosecutor without jurisdiction either based on the subject matter or the status of the person, or is improperly drawn, and the irregularity has not been remedied by the prosecutor within the term provided in Article 345(3) (5 days), if the irregularity makes it impossible to determine the object or limits of the trial; (ii) all the evidence administered during the criminal investigation has been excluded; (iii) the prosecutor requests the return of the case under the conditions of Article 345(3) or fails to respond within the prescribed time limit. It is important to note that the excluded evidence cannot be considered during the trial on the merits of the case.

According to Article 347 of the Code of Criminal Procedure, the decision of the preliminary chamber judge may be challenged within three days by the parties, the prosecutor, or the injured party, with the law providing an additional standard of protection against potential abuses or misinterpretations of legal norms, by establishing two levels of jurisdiction in the preliminary chamber procedure.

2. Violation of the provisions regarding the preliminary chamber procedure and potential constitutional damages

In attempting to combine the two concepts—violations of the preliminary chamber procedure provisions and constitutional damages—we aim to highlight two decisions from the judicial practice of preliminary chamber judges where the failure to respect deadlines for resolving requests and exceptions raised during the preliminary chamber procedure, as well as the return of cases to the prosecution due to unjustified interference by preliminary chamber judges in the competencies of prosecutors, led to the excessive extension of criminal trials or even the impossibility of effectively adjudicating them.

2.1. The decision of 15.02.2024 in case no. 7700/105/2016 (available at: <https://www.scj.ro/736/Cautare-jurisprudenta>, accessed on 10.10.2024)

The preliminary chamber judge from the Ploieşti Court of Appeal ordered the commencement of the trial in a case involving four defendants, who had been indicted on 16.12.2016 in case no. 150/P/2014 by the National Anticorruption Directorate (DNA), Ploieşti Territorial Service, for offenses of influence peddling, bribery, abusive investigation, disclosure of classified information, removal or destruction of documents, blackmail, abusive investigation, and complicity in bribery.

Previously, on 31.08.2023, the preliminary chamber judge from Prahova Tribunal had partially admitted the defendants' requests and exceptions, finding the indictment of 16.12.2016 irregular. The final decision by the preliminary chamber judge from the competent court to try the offenses for which the defendants were indicted was delivered approximately seven years after the indictment was filed with the court.

Both the defendants and the National Anticorruption Directorate contested this decision, and the Ploieşti Court of Appeal's preliminary chamber judge ruled on 15.02.2024, admitting in part the appeal filed by the DNA against decision no. 423/31.08.2023 and rejecting the other appeals as unfounded.

In this specific case, the preliminary chamber procedure lasted about seven years and two months. Ignoring the particularities of the case and regardless of how quickly the trial on the merits or appeal may be, this extremely lengthy procedure inevitably raises concerns about flagrant violations of the right to a fair trial and the resolution of cases within a reasonable time, as guaranteed by Article 21(3) of the Romanian Constitution and Article 6 of the European Convention on Human Rights. These constitutional and conventional standards protect not only the rights of the accused but also those of the victim, whose rights are equally defended by constitutional and infra-legal frameworks. Furthermore, a differential treatment between the defendant (in the latter's favor) and the victim (to their detriment) clearly violates the principle of equality before the law (Article 16(1) and (2) of the Romanian Constitution) through the disproportionate practices of preliminary chamber judges, as explained in this paper. These practices generate unacceptable discrimination, placing the victims of criminal offenses prosecuted by the indictment in a profoundly inequitable situation, as will be further elaborated below.

2.2. The decision of 03.04.2024 in case no. 6913/2/2023 (available at: <https://www.scj.ro/736/Cautare-jurisprudenta>, accessed on 10.10.2024)

The High Court of Cassation and Justice's preliminary chamber judges resolved an appeal against decision no. F/CP/07.12.2023, rendered by the preliminary chamber judge of the Bucharest Court of Appeal – First Criminal Division, in case no. 6913/2/2023.

In this case, the defendant was indicted on 16.10.2023 by the Bucharest Court of Appeal's Prosecutor's Office in case no. 414/P/2023 for the crime of removal or destruction of documents, as provided by Article 275 of the Criminal Code.

The preliminary chamber judge of the Bucharest Court of Appeal, First Criminal Division, held that the indictment clearly described the offense constituting the subject of the accusation (the nature of the offense, the manner, means, time, and place of its alleged commission, and the factual circumstances in which it was committed), as well as the

constituent elements of the offense. The judge also found that the defendant's criticisms exceeded the preliminary chamber procedure's scope, referring instead to the merits of the evidence or the criminal accusation, which were not within the purview of Article 342 of the Code of Criminal Procedure. Furthermore, the defendant's claims regarding the alleged failure to meet the offense's constitutive elements or the supposed misinterpretation of the legal provisions or the evidence by the prosecutor pertained to the merits of the case and went beyond the scope of the preliminary chamber procedure.

The defendant contested this decision within the legal term.

In reviewing the appeal, the High Court of Cassation and Justice's preliminary chamber judges adopted an unprecedented approach in this procedural stage concerning the concept of legality of the prosecutor's acts. They argued that the indictment did not meet the legal requirements, as it failed to present sufficient evidence to justify the prosecution. They considered that the absence of detailed explanations in the indictment gravely affected the defendant's right to a defense.

The judges concluded that the accusation was not sufficiently supported by evidence, leading to the relative nullity of the indictment, as it failed to convince "any objective and impartial observer evaluating the evidence that there is a reasonable (substantiated) presumption that the defendant committed an offense." In other words, the initiation of the criminal prosecution was not supported by a "beyond a reasonable doubt" evidentiary standard based on clear evidence, thus affecting the legality of the prosecutor's act of indictment.

In our opinion, the decision of the preliminary chamber judges is problematic because it clearly exceeds the limits of the preliminary chamber's specific attributions, as expressly defined by the Code of Criminal Procedure. As previously mentioned, the preliminary chamber procedure does not focus on the merits of the accusations (which involve evaluating the quality, truthfulness, or sufficiency of the evidence supporting the accusation) but solely on the legality of the evidence administration (i.e., the means of proof). The analysis of "legality" aims to determine whether the criminal investigation acts were performed in accordance with the law, whether the evidence was obtained legally, and whether the proceedings were conducted fairly.

By annulling the indictment for insufficient evidentiary grounds, the two preliminary chamber judges interfered with the prosecutor's duties, as only the prosecutor can determine, based on the evidence, whether there are sufficient grounds to initiate criminal prosecution and subsequently indict the defendant.

As mentioned above, the distinction between legality and merits is crucial for the balance of criminal justice.

The decision of the preliminary chamber judges to annul the indictment based on an examination of the "sufficiency of the evidence" amounts to an unjustified interference, assigning the preliminary chamber a role it does not possess. According to Article 346 of the Code of Criminal Procedure, if the criminal investigation acts are legally and fairly conducted, the court must order the commencement of the trial, and the assessment of the evidence should be left to the trial and the discussions on the merits.

Thus, we believe that the decision of the preliminary chamber judges of the High Court of Cassation and Justice may have unconstitutional implications, as it creates a precedent

where preliminary chamber judges could interfere in the prosecutor's duties as a state agent responsible for the prosecution and could annul investigative acts based on an evaluation of the evidence, which is not within their competence at this procedural stage. This could seriously affect the promptness of criminal proceedings, causing the evaluation of the merits of the accusations to occur before the trial stage, thus excessively prolonging the duration of proceedings and diluting the trial court's role in assessing guilt.

In a clear misinterpretation and misapplication of both procedural criminal law and the aforementioned constitutional and conventional provisions, the preliminary chamber judges excessively evaluated the existence of a supposed legal authorization to assess the indictment's merits as if they were conducting a trial on the merits. Moreover, they made strategic judicial assessments about the content of the indictment, claiming that it inadequately described the factual situation and, therefore, should be returned to the prosecutor for completion. Such analysis can only be conducted by the trial judge, and it must be done with full procedural guarantees for all parties involved in the criminal process.

Lastly, there is a noticeable tendency for the preliminary chamber judge to arrogate powers that neither the law nor the Constitution grants them at this procedural stage. In this regard, it can be asserted that the broad and excessive interpretation of the procedural norms governing the preliminary chamber leads to the conclusion that the provisions of the Code of Criminal Procedure regulating the preliminary chamber, due to their lack of precision, are contrary to the Constitution and should either be removed from the Code of Criminal Procedure or rephrased more rigorously and precisely.

3. Conclusions

The preliminary chamber procedure in the Romanian criminal justice system, while initially designed to enhance the efficiency of trials and ensure compliance with legal standards, has faced significant challenges. The deviations from the intended purpose, such as the failure to adhere to procedural deadlines and the overreach of preliminary chamber judges into prosecutorial duties, raise profound constitutional concerns.

Firstly, one of the most critical issues is the violation of the legal timeframe for resolving requests and exceptions during the preliminary chamber phase. The 60-day deadline, as stipulated in Article 343 of the Code of Criminal Procedure, was introduced to prevent undue delays in criminal proceedings. However, as seen in certain cases, this deadline is frequently exceeded, leading to lengthy procedures that contradict the principle of resolving cases within a reasonable time, as enshrined in both the Romanian Constitution (Article 21(3)) and the European Convention on Human Rights (Article 6). These excessive delays not only infringe on the rights of the accused to a fair trial but also undermine the rights of victims, creating an imbalance that compromises the overall fairness of the judicial process.

Moreover, the unjustified interference of preliminary chamber judges in the responsibilities of prosecutors has emerged as another problematic aspect. The role of the preliminary chamber is limited to verifying the legality of evidence and procedural acts, without delving into the merits of the case or evaluating the sufficiency of evidence.

However, in several instances, judges have annulled indictments or sent cases back to the prosecution based on their assessment of evidentiary sufficiency, a role that properly belongs to the trial phase. This encroachment not only prolongs the criminal proceedings but also risks undermining the prosecutor's constitutional mandate as a state agent responsible for the prosecution.

The constitutional implications of these practices are significant. The failure to comply with procedural norms can result in violations of the rights guaranteed by the Romanian Constitution and international human rights conventions. Additionally, the blurring of lines between the roles of judges and prosecutors threatens the balance of powers within the judicial system. The clear separation between legality and merits in criminal proceedings is fundamental to ensuring that justice is administered fairly and efficiently.

Moving forward, legislative clarification is essential to address these issues. The provisions governing the preliminary chamber procedure in the Code of Criminal Procedure must be reviewed and potentially revised to ensure they are applied uniformly and precisely. The scope of the preliminary chamber judge's role needs to be clearly defined to prevent overreach and safeguard the distinct responsibilities of judges and prosecutors.

Furthermore, it may be necessary to revisit the constitutionality of these provisions, starting from criticisms and observations similar to those presented in this paper, through the path of a constitutional exception provided by Article 146(d) of the Romanian Constitution. The Romanian Constitutional Court could play a pivotal role in reassessing the preliminary chamber institution, particularly in light of the concerns raised about its current application. Through a constitutional review, these provisions can be scrutinized for their alignment with fundamental rights and principles, ensuring that the judicial process remains fair, transparent, and efficient.

In conclusion, while the preliminary chamber procedure serves a vital function in the Romanian criminal justice system, its misapplication can lead to significant constitutional violations. To prevent further damages, legislative amendments, judicial restraint, and a potential constitutional review are necessary steps to uphold the integrity of the criminal justice process and protect the rights of all parties involved.

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