TERMINATION BY OPERATION OF LAW OF THE PRECAUTIONARY MEASURES

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Abstract

Precautionary measures fall within the category of procedural measures that have caused controversy in terms of doctrine and case-law. For the first time, the legislator considered it appropriate to establish a deadline by which it was established for the judicial authorities to verify the precautionary measures. The present study aimed to make an analysis of Law no. 6 of 18 February 2021, both from the perspective of the legislation, but also from the perspective of the interpretation and application, exclusively with regard to the sanction of non-compliance with the deadlines set by the legislator, but also with regard to the appeal procedure.

Keywords: *procedural measures, precautionary measures, Law no. 6 of 18 February 2021, seizure, realisation of seized assets, competent judicial authorities.*

1. Introduction

Precautionary measures are those procedural measures that are part of the range of instruments offered by the legislator in order to ensure a better conduct of procedural activities, consisting of certain constraints or means of depriving or limiting certain fundamental rights of citizens.

Precautionary measures are procedural measures which may be taken in the course of criminal trial by the public prosecutor, the preliminary chamber judge or the court and which consist of the seizure of movable or immovable property belonging to the suspect, the accused, the civilly liable party or other persons, as the case may be, with a view to special or extended confiscation, the reparation of the damage caused by the offence, as well as to guarantee the enforcement of the fine or legal costs.[1]

The present study does not aim to analyse the substance of each precautionary measure that may be ordered in criminal proceedings by the judicial authorities, but we will focus our attention on the obligation to verify them, from the point of view of the existence of the reasons for taking or maintaining the measures and the sanction that intervenes if this procedure has been disregarded. Thus, we want to analyze the reason of the legislator at the time of the regulation of art. 250^2 of the Criminal Procedure Code, as introduced by Law no. 6/2021, as well as the effects of this new institution in the practice of judicial authorities and the interpretation of specialized doctrine.

Given the fact that one year has passed since the entry into force of the above-mentioned rule, and that the practice of the judicial authorities has not crystallised from the perspective of the incidence of the sanction that intervenes if the judicial authorities do not verify the precautionary measures within the time limit set by the legislator, we consider that the present study is of particular importance for the unification of judicial practice and for guaranteeing the respect of the procedural rights of the participants whose assets are subject to these procedural measures.

2. Doctrinal and jurisprudential analysis of the verification of precautionary measures

Precautionary measures are regulated by the legislator in Title V of the Code of Criminal Procedure, entitled Preventive and other procedural measures, and are provided for in Chapter III, entitled Precautionary measures, restitution of property and restoration of the situation prior to the commission of the offence. Procedural measures are defined in the doctrine as coercive institutions that can be ordered by the criminal judiciary for the proper conduct of criminal proceedings and to ensure the achievement of the object of the actions exercised in criminal proceedings. The procedural measures are: preventive measures, medical safety measures, precautionary measures, restitution of goods and restoration of the situation prior to the offence.

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[1] Gh. Mateuț, *Procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2019, p. 898.

Provisions on the taking of precautionary measures have been the subject of many criticisms of unconstitutionality[2], in the period 2015-2020, 10 exceptions of unconstitutionality were invoked. Regarding art. 250 para. (1) of the Code of Criminal Procedure, the author has invoked the unconstitutionality exception, saying that the provisions of the law under criticism contravene the constitutional provisions contained in art. 21 on free access to justice and art. 44 on the right to private property, saying, in essence, that the protective measure is maintained until the final judgment in the criminal case has become final, since the duration of the proceedings may exceed a reasonable time and, at the same time, the taking of such a measure restricts the right to property for an unlimited period of time and without the possibility of reversal.

By CCR Decision no. 629/2015, it was fixed that the interference generated by the seizure of movable and immovable property of the suspect, defendant, civilly liable person or other persons in whose ownership or possession the property is located concerns fundamental rights, namely the right to property, is regulated by law, has as a legitimate purpose the conduct of the criminal investigation, is a judicial measure applicable in criminal proceedings, is imposed, is appropriate *in abstracto* to the legitimate aim pursued, is non-discriminatory and is necessary in a democratic society to protect the values of the rule of law. At the same time, the Court finds that the interference in question is proportionate to the cause which gave rise to it, since the protective measures are of a provisional nature, being ordered for the duration of the criminal proceedings, and the Court, having analysed the principle of proportionality in its settled case-law, has held that it presupposes the exceptional nature of restrictions on the exercise of fundamental rights or freedoms, which necessarily implies that they are also of a temporary nature.[3]

Decision 146 of 27 March 2018 considers the constitutionality of the provisions of art. 249 of the Code of Criminal Procedure in relation to the criticism that there is no time limit on the taking of precautionary measures, the author considering that a reasonable period must be provided for which precautionary measures may be imposed on a person's property, pointing out that, in the current legislation, the condition of proportionality of the restriction of the right to private property is not met.[4]

The Constitutional Court, referring to previous case law in which it has settled similar aspects[5], rejected, as unfounded, the objection of unconstitutionality, ruling, in essence, that the provisions of art. 249 of the Code of Criminal Procedure constitute a restriction of the right to private property, but that the restriction must be permissible, non-discriminatory, necessary for the proper conduct of the criminal proceedings, justified by the general interest and, lastly, proportionate to the aim pursued.

For the first time, the issue of the reasonable term of precautionary measures was raised by the Law for amending and supplementing Law no. 135/2010 on the Code of Criminal Procedure, as well as for amending and supplementing Law no. 304/2004 on judicial organization, adopted by the Romanian Parliament on 18 June 2018. Thus, by Decision no. 633 of 12 October 2018, delivered in *a priori* control, it was requested to examine the proposal to amend the provisions of art. 249 of the Code of Criminal Procedure.[6] Therefore, the Court found that the amending provision is unconstitutional, in contravention of the principle of legal certainty, in the component relating to the clarity and predictability of the law, as well as the provisions of art. 44 para. (9) of the Constitution, according to which goods intended for, used in or resulting from offences or contraventions may be confiscated only under the conditions laid down by law.[7]

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[2] See the following CCR Decisions:
- no. 894/17.12.2015, Official Gazette of Romania no. 168/04.03.2016;
- no. 20/19.01.2016, Official Gazette of Romania no. 269/08.04.2016;
- no. 216/12.04.2016, Official Gazette of Romania no. 419/03.06.2016;
- no. 463/27.06.2017, Official Gazette of Romania no. 764/26.09.2017;
- no. 146/27.03.2018, Official Gazette of Romania no. 455/31.03.2018;
- no. 181/29.03.2018, Official Gazette of Romania no. 537/28.06.2018;
- no. 548/26.09.2019, Official Gazette of Romania no. 62/29.01.2020;
- no. 654/17.10.2019, Official Gazette of Romania no. 42/21.01.2020;
- no. 192/28.05.2020, Official Gazette of Romania no. 674/29.07.2020;
- no. 633/12.10.2018, Official Gazette of Romania no. 1020/29.11.2018.

[3] *https://legislatie.just.ro/Public/DetaliiDocumentAfis/173188*.

[4] D.M. Morar (coord.), *Codul de procedură penală în jurisprudența Curții Constituționale,* Hamangiu Publishing House, Bucharest, 2021, p. 662.

[5] CCR Decision no. 186/06.03.2007 (Official Gazette of Romania, no. 275/25.04.2007), CCR Decision no. 230/14.03.2007 (Official Gazette of Romania no. 236/05.04.2007).

[6] Art. I point 154: in art. 249, para. (4) is amended to read as follows: precautionary measures for special confiscation or extended confiscation may be taken against the property of the suspect or accused or of other persons in whose property or possession the property to be confiscated is located if there is evidence or strong indications that the property in question has been obtained from criminal activities. Precautionary measures may not exceed a reasonable duration and shall be revoked if this duration is exceeded or if the grounds for taking the precautionary measures no longer exist.

[7] *https://legislatie.just.ro/Public/DetaliiDocumentAfis/208175*.

The doctrine[8], *de lege ferenda*, stated that "*the lifting of the protective measure should also be possible when its actual duration is unreasonably long in relation to the duration and progress of the proceedings and the consequences it produces go beyond the normal effects of such a measure (e.g. the activity of a company whose accounts are seized is seriously disrupted so that employees have not been paid their salaries for a very long time). In other words, as we have already pointed out, even in maintaining the protective measure, the proportionality test must be carried out. In this respect, the ECtHR has held, for example, that the suspension of a company's right to dispose of its shares for more than 11 years does not comply with the requirement of proportionality between the general interests of the company and the interests of the company, the burden being excessive.*[9] *However, a five-year duration of the protective measure was considered by the Court to be proportionate if, given the complexity of the case, the criminal authorities did not remain passive during this period, gathering evidence, hearing witnesses and making several requests for legal assistance.*[10]"

In the economy of the new criminal procedure legislation, the legislator has not regulated a maximum duration of the precautionary measures in terms of time, the doctrinal opinion being that they can be in place throughout the criminal proceedings.

However, by Law no. 6/2021 on the establishment of measures for the implementation of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing a form of enhanced cooperation in relation to the establishment of the European Public Prosecutor's Office (EPPO), art. 250^2 was introduced into the Code of Criminal Procedure, marginally referred to as the verification of precautionary measures, with the following content: "*throughout the criminal proceedings, the public prosecutor, the preliminary chamber judge or, as the case may be, the court shall periodically verify, but not later than six months during the criminal proceedings and not later than one year during the trial, whether the grounds for taking or maintaining the precautionary measure still exist and shall, where appropriate, order the maintenance, restriction or extension of the measure ordered or the lifting of the measure ordered, the provisions of art. 250 and 250[1] applying accordingly*."

After reading the explanatory memorandum of the law mentioned, we extract the reason why it was considered appropriate to introduce this article: *in practice, there have been cases where ANABI has been notified with requests for the recovery of assets that have been unavailable for more than 5 years, which were no longer of value, the assets becoming unsaleable over time and the costs of administration exceeding the value of the assets. In order to increase the effectiveness of the measures available to ANABI, it was necessary to regulate the ex officio verification of whether an attachment measure generates disproportionate damage or costs (...) In addition, the lack of an express legislative provision requiring the judicial authorities to verify the grounds on which the precautionary measure was taken or whether new grounds have arisen to justify maintaining the measure or lifting it was highlighted by prosecutors and judges during their consultation on strengthening and streamlining the national system for the recovery of criminal debts. Art. 18 para. 2 of this draft proposes the introduction of a new article in the Code of Criminal Procedure, which would constitute an express basis for the periodic review of the seizure measure.*

Law no. 6/2021 was published on 18 February 2021 in the Official Gazette of Romania, Part 1, and entered into force, according to art. 25 of the same law, 10 days after its publication, on 28 February 2022.

We consider that the legislator's reasoning in enacting the criminal procedure rule was, on the one hand, that the duration of the perpetuation of the precautionary measures must be reasonable in relation to the complexity of the case, its subject matter, and, on the other hand, the guarantee to the judicial authorities that the assets that have been subject to seizure, following recovery, can cover the recovery of damages, legal costs, payment of fines or confiscation.

The introduction of an obligation for judicial authorities to verify the subsistence of precautionary measures within a certain period of time was a good idea, but problems have already arisen in judicial practice in terms of interpretation of the text under consideration, as the legislative technique used is clearly incomplete.

The two elements we will consider concern the calculation of the 6-month or one-year time limit and the sanction that intervenes if it is disregarded. In a first view[11] it was considered that the rule is of immediate application and, once it enters into force, is applicable to all cases pending before the courts and public prosecutors' offices in which precautionary measures have been ordered. In a second interpretation, which is such as not to give rise to a very large number of

[8] See the following: A.R. Trandafir, în M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2020, p. 1546.

[9] See the following: *ECtHR, Forminster Entreprises Limited v. Czech Republic, judgement from 9 january 2009, para. 76-78, www.hudoc.echr.coe.int.*

[10] See the following: *ECtHR, Benet Praha SPOL S.R.O. v. Czech Republic, judgement from din 28 september 2010, para. 103 and following., www.hudoc.echr.coe.int.*

[11] See the following: *https://www.chirita-law.com/verificarea-masurilor-asiguratorii-in-cursul-procesului-penal/.*

documents issued in the same period, which would lead to unjustified overcrowding of judicial bodies, the time limit runs from the date of entry into force of the law. Finally, in a third, more nuanced interpretation, for the preliminary chamber procedure or for the trial phase, the verification should be made at the first deadline already set in the case. I think a combination of these interpretations would be advisable: in the course of the prosecution, if the 6-month time limit had already expired, the prosecutor should proceed with the verification of the measure as soon as possible given the complexity of the case and its load; the preliminary chamber judge or the court should proceed with this verification at the first deadline granted in the resolution of the case.[12]

And our opinion is in the sense of verifying, immediately, the precautionary measures established in pending cases, precisely, in relation to the legislator's reasoning who considered it appropriate to establish these deadlines incumbent on the judicial bodies. Given that we have exceeded the one-year time limit from the entry into force of the law under discussion, this interpretation takes second place and we focus our attention on the penalty that applies in the event of failure to comply with the six-month time limit, *i.e.* one year.

In an initial view expressed[13] following the model of the sanction for preventive measures, the sanction should be the automatic termination of the measure. On the other hand, in the absence of an express provision to this effect, it is difficult to speak of a termination as of law. Moreover, for some assets, a document stating the legal termination would be required anyway (*e.g.* in the case of immovable property, the removal of the attachment from the land register is based on the documents provided for in the Regulation-annex to ANCPI Order no. 700/2014; the bank attachment will not be lifted in the absence of a document from the judicial body etc.).

In another opinion[14], along the lines of art. 241 para. 1 letter a) of the Code of Criminal Procedure applicable to preventive measures, the (unverified) precautionary measure should be terminated by operation of law at the expiry of these legal deadlines, and the judicial body before which the criminal case is pending should declare the termination of the precautionary measure by operation of law, *ex officio*, or at the request of the person concerned, and communicate a copy of the order or decision to the person against whom the measure was ordered and to the institutions responsible for its implementation.

In our opinion, in the absence of an express ground, the judicial authorities have at their disposal the provisions of art. 268 para. (1) and (2) of the Code of Criminal Procedure[15] where the legislator enshrines the sanction of the termination of the right when a procedural measure can only be ordered for a period of time and this period has expired. This rule is of a general nature and may constitute a legal basis for declaring that precautionary measures are automatically terminated, in the absence of a special rule, as the legislature has provided in the case of preventive measures. At the same time, *de lege lata*, we consider it appropriate to expressly regulate this sanction but also a procedure for challenging the prosecutor's order, *i.e.* the decision of the preliminary chamber judge or the court by any person who justifies an interest.

Indeed, the legal deadlines in question directly regulate in time the obligation of the judicial authorities to verify the precautionary measures (which are not ordered for a specific period of time), which is why the automatic termination of these precautionary measures, on expiry of the period within which their legality and validity should have been verified, appears rather as a procedural sanction attracted by the passivity of the judicial body - thus triggering a presumption of illegality and unreasonableness of the precautionary measure not verified within the time limits laid down by law.[16]

From the point of view of the legal nature of the period of six months, *i.e.* one year, within which the competent judicial bodies are obliged to verify the precautionary measures, this is a legal, substantial, peremptory, maximum and sequential period.[17] We consider that this term is of a substantial nature, in relation to the fact that it protects extra-procedural rights and interests of the person, from the perspective of property rights, and the method of calculation is that provided by the legislator in art. 271 of the Code of Criminal Procedure, the day on which it begins and ends being included in its duration.

However, if the judicial authority takes a decision in the procedure for review of the protective measures after the expiry of the time-limits referred to, inferentially, by way of appeal, the judge of rights and freedoms, the preliminary chamber judge of the superior court or the superior court shall uphold the

[12] *https://www.juridice.ro/729837/verificarea-periodica-a-masurilor-asiguratorii-in-cursul-procesului-penal.html#_ftn3*.
[13] *https://www.juridice.ro/729837/verificarea-periodica-a-masurilor-asiguratorii-in-cursul-procesului-penal.html#_ftn3*.
[14] V.R. Gherghe, *Verificarea măsurilor asigurătorii pe parcursul procesului penal*, in Dreptul no. 1/2022, p. 120.
[15] "(1) Where the law lays down a time-limit for the exercise of a procedural right, failure to comply with that time-limit shall entail forfeiture of the right and nullity of the act performed after the time-limit, and paragraph (2) Where a procedural measure may be taken only within a specified period, the expiry of that period shall automatically entail the cessation of the effect of the measure."
[16] V.R. Gherghe, *Verificarea măsurilor asigurătorii pe parcursul procesului penal*, in Dreptul no. 1/2022, p. 128.
[17] N. Volonciu, A.S. Uzlău, *Noul Cod de procedură penală comentat*, Hamangiu Publishing House, Bucharest, 2014, p. 438.

appeal lodged and shall dismiss the order or the decision and declare that the protective measures are automatically terminated.[18]

Indeed, by finding that the peremptory time limits of six months and one year respectively have been exceeded, the judicial body competent to rule on the appeal will find, from a procedural point of view, that the judicial body has forfeited its procedural right to order that the precautionary measure be maintained, as well as the nullity of the late procedural act of disposal, and, from a substantive point of view, the legal termination (*ope legis*) of the acts of seizure generated by the precautionary measure, which was not maintained within the mandatory legal time limits.[19]

In judicial practice[20], regarding the late verification of the precautionary measure, the court rejected the exception of the late verification of this measure, considering that the time limits of 6 months, respectively one year, are not time limits of lapse but of recommendation and moreover it was considered that a legal analogy cannot be made in criminal procedure with the time limits concerning the verification by the court of preventive measures, because in the case of precautionary measures, the legislator has not expressly provided as a cause for the legal termination of security measures the non-verification within the time limit.

An appeal was lodged against this decision and on the basis of art. 475 in conjunction with art. 468 para. (1) of the Code of Criminal Procedure, the Court of Appeal of Alba Iulia, by judgment of 22 March 2022, referred the matter to the Court of First Instance for a preliminary ruling on a question of law relating to the interpretation of art. 250^2 of the Code of Criminal Procedure, namely, what is the legal nature of the period of six months during the criminal proceedings and one year during the trial, during which it is necessary to periodically verify the continued existence of the grounds for taking or maintaining the precautionary measure.[21]

In view of the fact that the practice of the judicial bodies is not uniform from the point of view of the interpretation of the legal nature of the time limit for the verification of the precautionary measures[22], we can only follow the preliminary ruling that will be ordered by the High Court of Cassation and Justice on the occasion of the referral to the Alba Iulia Court of Appeal, so that the application of the sanction in case of non-observance of it is homogeneous.

Analysing the recitals of the judgment, reference is made to another judgment, Decision of 23 April 2021 of one Court of Appeal, in which it was held, with regard to the legal nature of the time-limits referred to, that these are substantive time-limits and that these provisions impose an obligation, and not a recommendation, on the court to carry out a review of the measure, and that the natural consequence can only be that the court forfeits its right and that the measure taken after the time-limit is null and void. In the case of this institution, it can be said to be of a mixed nature, *i.e.* substantive law in terms of the material content of the institution (existence of the right) and procedural law in terms of the formality and method of exercising this right.

From the point of view of the practice of the Court of Cassation, following an analysis of the 24 judgments in the case, in only one case is reference made to the institution of termination of rights, namely:

- Decision no. 524/25 May 2021 the court of appeal has not exceeded the period of one year within which it is required to rule on the precautionary measure taken by the criminal judgment under appeal, which is calculated from the time of entry into force of Law no. 6/2021 and even if that period had been exceeded it is concluded that the criminal procedural law does not provide for a sanction similar to that regulated in the matter of the preventive measure provided for in art. 241 para. (1) letter a), that of the automatic termination of the measure in question;

Following consultation of open sources, it appears that an exception of unconstitutionality has been invoked with regard to art. 250^2 of the Code of Criminal Procedure[23], to which three cases have been joined, the procedure being currently at the report stage. We will also follow developments in terms of the regulation of criminal procedure in relation to the Romanian Constitution, as the issue under debate is far from settled.

3. Conclusions

If, at the beginning of the drafting of this study, we considered that there was no need for legislative

[18] See the conclusion of the judge of rights and freedoms of the Bucharest Court, ordered in case 2476/3/2022.

[19] V.R. Gherghe, *Verificarea măsurilor asigurătorii pe parcursul procesului penal,* in Dreptul no. 1/2022, p. 143.

[20] By the final decision on preventive measures no. 25/03.03.20200, pronounced by one Court in the criminal case no. X/107/2017/a.9.1. it was ordered under art. 250^2.of the Code of Criminal Procedure, to maintain the measure of seizure, established by the prosecutor's order of 07.12.2016 etc.

[21] At the time of writing, as the conclusion is dated 28.03.2022 and the application is not registered on the website of the High Court of Cassation and Justice.

[22] *Decision no. 39/23.04.2021,* Court of Appeal of Brasov, contesting the precautionary measure – legal termination.

[23] *https://www.juridice.ro/769318/o-noua-perspectiva-asupra-masurilor-asiguratorii-in-procesul-penal-consecintele-incalcarii-dispozitiilor-art-250-2-cod-procedura-penala.html*; in cases 262/D/2022 on 31.01.2022, file 3791D/2021 on 16.12.2021, file 3411 D/2021 on 10.11.2021, all at report stage.

intervention or the use of instruments to unify judicial practice, we now consider that the legislator will have to intervene again, quickly, in order to regulate both the penalty for non-compliance by the judicial authorities in verifying the precautionary measures within 6 months or 1 year, respectively, and the procedure for contesting the order or the decision ordering the termination of the order.

Given that we are one year and one month from the date of entry into force of Law no. 6/2021 introducing art. 250^2 in the Code of Criminal Procedure, that the High Court of Cassation and Justice has been seized for the resolution of some legal issues regarding the legal nature of the term of verification of precautionary measures, but also that the Constitutional Court is considering the exception of unconstitutionality of the text mentioned, it is clear that the institution is not crystallized and our scientific approach requires a continuation of this study after the two pillars of reference will be pronounced.

However, we maintain the view expressed in the study that, at present, the judicial authorities have at their disposal the provisions of art. 268 para. (1) and (2) of the Code of Criminal Procedure, where the legislator enshrines the sanction of termination of the right when a procedural measure can only be ordered for a period of time and it has expired. This rule is of a general nature and may constitute a legal basis for declaring that precautionary measures are automatically terminated, in the absence of a special rule, as the legislature has provided in the case of preventive measures. At the same time, *de lege lata*, we consider it appropriate to expressly regulate this sanction and to provide for a procedure for appealing against the prosecutor's order, *i.e.* the decision of the preliminary chamber judge or the court, by any person who justifies an interest.

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