THE NATURE OF TERMS SET FORTH IN THE PROVISIONS UNDER ART. 250^2 CPP AND THE SANCTION TO BE APPLIED AS A CONSEQUENCE OF THEIR VIOLATION

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Abstract

This article focuses on reviewing the aspects regarding the nature of terms of 6 months, respectively, of 1 year, which were established for checking the legality and judiciousness of the precautionary measure in the criminal trial, by introduction of art. 250^2 CPP.

Thus, starting from the review of the nature of such terms, in corroboration with reviewing the purpose itself of this new regulation, one may also conclude what was the legislator's intention with regard to the sanction to be applied when such are violated, a sanction that was not, however, mentioned expressly.

Starting also from the judicial practice which is not constant, namely from the non-uniform mode of construction and application of legal provisions, this article intends to clarify, from a theoretical perspective, the nature of terms referred to in art. 250^2 CPP, and also the sanction to be applied as a consequence of violating such terms. We will conclude further with the practice of courts of law, in support of our opinion.

Keywords: *precautionary measures, nature of terms, procedural terms, sanction for violating the terms, lawful termination of precautionary measures.*

1. Introduction

Through the Law no. 6/2021 laying down some measures for the application of Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), was inserted in the Criminal Procedure Code, art. 250^2, pursuant to which „*throughout the criminal trial, the prosecutor, Pre-Trial Chamber judge or, as the case may be, the court of law should check periodically, but not later than 6 months in course of the criminal prosecution, respectively, one year in course of adjudication, whether the grounds determining taking or maintaining the precautionary measure still subsist, ordering, as the case may be, maintaining, restricting or extending the measure ordered, respectively, elimination of the measure ordered, the provisions under art. 250 and 250^1 being applicable accordingly*."

In spite of the fact that the legislator's intention was to establish terms for checking the legality and judiciousness of the precautionary measure, pursuing thus the elimination of arbitrariness upon maintaining for an unlimited period of time a right restrictive measure, in the judicial practice two opinions became prevalent: the opinion we also share, namely that the absence of a check within the term provided by law results in lawful termination of the precautionary measure, and the opinion we disagree with, namely that absence of a check within the term provided by law does not result in any sanction, the legislator not mentioning expressly any such sanction.

Besides the non-uniform practice in such matters, HCCJ, the Panel for solving some law issues, under the dec. no. 30/2022 in the case no. 664/1/2022, pronounced on 25.05.2022, ordered the dismissal as inadmissible of the complaint filed by Alba Iulia CA, crim. s., in the case no. 4184/107/2017/a9.1, whereby it requested to pronounce a preliminary decision for solving the following law issue: „*Upon construction of art. 250^2 CPP, what is the legal nature of the 6-month term in course of the criminal prosecution, respectively, 1 year in course of adjudication, within which is necessary to check periodically the subsistence of grounds that determined taking or maintaining the precautionary measure?*".

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Therefore, considering that, on the one hand, up to the present, specialist literature has not approached the legal aspects related to the nature of terms referred to under art. 250^2 CPP, and also the sanction applicable as a consequence of violating such terms and, on the other hand, considering the non-uniform mode of construction and application of the provisions under art. 250^2 CPP, we consider that this article contributes to the clarification of these theoretical aspects.

2. Content

Precautionary measures are real process measures, whose effect is to freeze movable and immovable goods belonging to the suspect, defendant or the civilly responsible party, for the purpose of their avoidance, concealment, destruction, disposal or evasion during prosecution. Such measures are ordered, pursuant to art. 249 para. (3)-(5) CPP, in order to guarantee the punishment by fine is enforced, in view of special seizure or extended seizure, or for the purpose of repairing the damage caused by the crime, and in order to guarantee fines and judicial expenses, which could be ordered in the ruling of the relevant case, would be paid.

For achieving this end, precautionary measures consist in freezing the goods considered, by establishing their sequestration. As an effect of establishing sequestration, the owner of such goods loses the right to sell or encumber them, such measure affecting, therefore, the attribute of legal and material disposition, for the entire duration of the criminal trial, until the final ruling in the case. As showed by the HCCJ – the Panel with jurisdiction to adjudicate the appeal in the interest of law, under the dec. no. 2/2018, „*the notion of freezing, referred to in the provisions under art. 249 para. (2) CPP, involves that the holder of the asset is no longer able to dispose of it freely, in the meaning that he is no longer able to sell, encumber, donate, lease it, being prohibited in general from any voluntary act that might lead to a devaluation of the asset or its evading the prosecution. The assets are not removed from, but they remain in the civil circuit, being suspended for the duration of implementing the measure, only the right of voluntary disposition over them belonging to the owner*".

Further, under dec. no. 894/17.12.2015[1], regarding the objection of unconstitutionality of the provisions under art. 249 para. (1) first thesis CPP, the Court has retained that the interference generated by ordering sequestration of the movable and immovable goods of the suspect, defendant, the civilly responsible person or of other persons the goods are owned or possessed by regards fundamental rights, namely the right to property, is governed by law, namely by art. 249 *et seq.* CPP, has as its legitimate purpose the performance of criminal discovery, being a judicial measure that is applicable in course of the criminal trial, is required, being adequate *in abstracto* for the legitimate purpose pursued, is non-discriminatory, and is necessary in a democratic society, for the protection of the values of the state of law. Further, the interference under review is proportional to the cause that determined it, given that precautionary measures are temporary in character, for they are ordered for the duration of the criminal trial, while the Court, reviewing the proportionality principle in its constant case-law, retained that this involves the exceptional character of restricting the exercise of fundamental rights or freedoms, a fact involving necessarily also their temporary character (para. 30).

Likewise, under the dec. no. 24/20.01.2016[2], CCR has retained that, in the absence of ensuring an efficient court control over the measure of freezing the goods in course of a criminal trial, the state fails to fulfill its constitutional obligation to guarantee the private property of the natural/legal person.

Based on the facts described above, we may conclude that precautionary measures are real process measures, temporary and provisional in character, which have the purpose to guarantee the repair of the damage caused by the crime, to enforce the fine punishment, to enforce the measure of special seizure or extended seizure, as well as to guarantee payment of legal expenses generated by the deployment of the criminal legal proceedings. At the same time, these are right restrictive measures, being a restriction of the right to property in the component of the right of voluntary disposition over the frozen goods.

Pursuant to the provisions under art. 250^2 CPP: „*Throughout the criminal trial, the prosecutor, the Pre-Trial Chamber judge or, as the case may be, the court of law should check periodically, but not later than 6 months in course of criminal prosecution, respectively, one year in course of adjudication, whether the grounds that determined taking or maintaining the precautionary measure subsist, ordering, as the case may be, maintaining, restricting or extending the measure ordered, respectively, lifting the measure ordered, the provisions under art. 250 and 250^1 being applicable accordingly*."

[1] Published in the Official Gazette of Romania, Part I, no. 168/04.03.2016.
[2] Published in the Official Gazette of Romania, Part I, no. 276/12.04.2016.

Thus, by the new regulation, the legislator intended to establish some terms of 6 months, respectively 1 year, for disciplining and systematizing the process activity regarding precautionary measures.

The reason for which terms were established for checking the legality and judiciousness of the precautionary measure is to respect the proportional character of such measure, subject to the duration and evolution of the proceeding, respectively, to eliminate arbitrariness with regard to maintaining for an unlimited period of time a right restrictive measure.

All the more so given that maintaining the precautionary measure in the criminal trial should respect the proportionality exigencies imposed by ECtHR, the Court from Strasbourg stating that *„lifting the precautionary measure should be possible when its effective duration is exaggeratedly long by comparison with the duration and evolution of the proceeding, and the consequences it generates exceed the normal effects of such a measure"*[3].

The immediate purpose of the terms established under art. 250^2 CPP is the protection of the accused person's right to use their goods, in order to avoid the imposition of an excessive individual burden. Therefore, by establishing the term, the legislator's priority was respecting the proportionality of the duration of the precautionary measure, by restricting the right to property.

Therefore, as we will explain I detail hereinafter, the sanction for not respecting the terms mentioned is the one set forth in the provisions under art. 268 para. (1) CPP; thus failure to respect them results in withdrawing the judiciary authorities the right to check the precautionary measure, respectively the nullity of the act performed for this purpose, by exceeding the term.

Also with regard to the sanction for not respecting the terms, under the dec. no. 16/2018[4], HCCJ emphasized that *„subject to the effects they generate, procedural terms were classified into peremptory or imperative terms – those within the duration when an act should be fulfilled or performed, a term creating a limitation, given that the act should be performed before the term expires; the sanction applicable if the term is not respected is withdrawing the exercise of the right and the nullity of the tardy act [art. 268 para. (1) CPP; dilatory or prohibitive terms – those allowing the fulfillment or performance of an act only after their duration expires; the sanction applicable for not respecting the term is the nullity of the unexpected act [art. 268 para. (1) CPP]; arranged or recommended terms – those terms that establish a period of time for the performance of some process or procedural acts, in view of the proper deployment of the criminal trial, while not respecting them does not result in process sanctions with regard to the validity of the act fulfilled*".

We consider thus that the **terms provided under art. 250^2 CPP are imperative**, the consequence being the lawful termination of the measure when the check was performed outside the relevant term.

Further, an essential aspect for establishing the sanction for not respecting the obligation to check the precautionary measure consists in establishing the nature of the term set forth by the legislator, whether such term is a substantial term, or a recommended term.

Substantial terms are the ones protecting off-court rights, prerogatives and interests, existing prior to the criminal trial and independent of it, limiting the duration of some measures or conditioning the fulfillment of some acts or the promotion of some actions that would annihilate an off-court right or interest. Substantial terms (of material or substantive law) should be determined pursuant to the provisions under art. 186 CP, based on the natural computation system (*computado naturalis*) when the term is stated in days or weeks (a day is considered 24 hours, while a week 7 days) and based on the civil computation system (*civilis computado*), when the term is stated in months or years.

Unlike substantial rights, procedural terms are terms that protect the process rights and interests of participants in the criminal trial and contribute to disciplining and systematizing the process activity, in view of ensuring that the purpose of criminal trial is achieved timely and justly. All the terms provided by the Code are procedural terms, apart from the ones previously mentioned.

Our opinion is that, given that the matter is about protection of some preexisting off-court rights, the maximum terms of 6 months and 1 year within which the precautionary measure should be checked **are substantial terms**.

The mode of computation of such substantial terms is governed by the provisions under art. 271 CPP, according to which *„upon the computation of terms regarding preventive measures or any right restrictive*

[3] Case *Forminster Entreprises Limited v. The Czech Republic*, judgment of 09.01.2009, para. 76-78.

[4] Published in the Official Gazette of Romania, Part I, no. 927/02.11.2018.

measures, the time or day the term starts from or ends with forms its duration". Consequently, these shall be computed as full days, in the meaning that the term starting day (*dies a quo*) and the term ending day (*dies ad quem*) are within its computation.

The fact that the legislator did not provide in the newly inserted law text also a sanction for not respecting such terms does not grant them the nature of some recommended terms, insofar as the legal provisions under discussion govern an obligation and not only a possibility.

As we stated, precautionary measures are right restrictive process measures, given that they prejudice the attribute of disposition specific to the right to property, while any right restrictive measure may not prejudice the existence of the right itself, according to art. 53 para. (2) in the Constitution. Or, the absence of a term for which a restriction of rights may be established amounts to a deprivation of the right itself.

Should the terms be considered only recommended ones, this would mean that the judiciary authority would not have in reality any obligation to check the precautionary measure. This would mean that the precautionary measure may be maintained *sine die* for the entire duration of the trial, which would amount to a loss *de facto* of the attribute of disposition itself, specific to the right to property.

Moreover, such construction (recommended terms) contravenes to the purpose itself for the introduction of terms for checking precautionary measures in the Criminal Procedure Code by the Law no. 6/2021.

Thus, should the legislator have considered the terms for checking as recommended terms, he would not have mentioned explicitly „*checks periodically, but not later than*". According to the same construction, we consider that he could have said „*checks periodically whether the grounds subsist*", without any term and, in such a case, it would have been logical that the judiciary authority performs the check when considered necessary, even more so when the absence of checking would not result in any sanction.

Even if in the regulation under art. 249 *et seq.* CPP there is no explicit mention of the type „*the precautionary measure should be taken for the duration of*", the very obligation of checking it „*not later than*" shows the legislator's clear intention to have the precautionary measure taken or maintained only for a certain limited term.

Our contention is confirmed also by a similar situation that existed within the scope of the old Criminal Procedure Code in the matter of preventive measures.

Thus, under GEO no. 109/2003, in the old Criminal Procedure Code was inserted art. 160b, which required the court to check, in course of adjudication, periodically, „*but not later than 60 days, the legality and judiciousness of remand custody*".

At that moment, art. 140 para. (1) letter a) CPP 1968 did not provide the sanction for the failure to respect the checking term (this was introduced subsequently, by the Law no. 356/2006).

In this context, HCCJ pronounced the Appeal in the interest of law no. 7/2006, stating that the fact the court failed to check, in course of adjudication, the legality and judiciousness of the remand custody of the major defendant before the expiry of the 60-day duration, referred under art. 160b CPP 1968, „*results in the lawful termination of the remand custody measure, taken against the defendants, and their immediate release*". The High Court motivated then, inclusively by reference to the provisions under art. 23 para. (6) in the Constitution, whose wording is similar to the one under art. 250^2 CPP („*in the adjudication phase, the court is required, according to law, to check periodically and not later than within 60 days the legality and judiciousness of remand custody and to order forthwith the release of the defendant, if the grounds that determined remand custody ceased, or if the court establishes that there are no new grounds justifying maintenance of privation of freedom*").

Last but not least, in relation to this issue, we invoke also the Minutes of the meeting of the presidents of criminal sections of the High Court of Cassation and Justice and of appellate courts at Craiova, on 3-4 June 2021, when „*the attendees agreed on the ruling, in the meaning that the absence of a check within the term provided by law should result in the lawful termination of the precautionary measure*."

The opinion presented in this article is shared also by the judiciary practice in such matters, namely:

- **crim. dec. no. 330/C/08.11.2022, Galați CA, crim. s. and for cases with minors, the case no. 9987/3/2016/a49**, according to which: „Reviewing the case in light of the reasons invoked by complainants, as well as ex officio, in all *de facto and de jure* aspects, the Court considers – contrary to the opinion stated by the court of first instance in the ruling appealed – that the one-year term set forth by the provisions under art. 250^2 CPP for checking – in course of adjudication –the subsistence of the grounds that determined taking or maintaining the precautionary measure, is an imperative term and not at all a recommended one, the wording used by the legislator being completely unequivocal from this point of view.

Precautionary measures, even if not genuine criminal sanctions, by their very nature generate interference in the legitimate rights and interests of the persons the goods subject to such measures belong to. Thus, as in the case of any other interference, the court should ensure a just and fair balance between the purpose pursued by the measure and the individuals' interests. In this case, the de jure problem referred to the Court's review is the moment when the precautionary measures established during 2015 were checked, pursuant to the provisions under art. 250^2 CPP, introduced by the Law no. 6/2021[5](…). According to this legal provision, throughout the criminal trial, the prosecutor, Pre-Trial Chamber judge or, as the case may be, the court of law should check periodically, but not later than 6 months in course of criminal prosecution, respectively, 1 year in course of adjudication, whether the grounds that determined taking or maintaining the precautionary measure subsist, ordering, as the case may be, maintaining, restricting or extending the measure ordered, respectively, lifting the measure ordered, the provisions under art. 250 and 250^1 CPP being applicable accordingly. Reviewing first the request for establishing the lawful termination of precautionary measures ordered in the case, the Court has found that the precautionary measures were established in the case under ordinances issued during 2015 and checked previously at the term on 23.04.2021 (related case a39), when the court ordered maintaining as legal and judicious the previously ordered precautionary measure. Subsequently, the court of first instance omitted to act according to art. 250^2 CPP, insofar as the review of subsistence of the grounds determining taking precautionary measures and maintaining them as such took place after 23.04.2022, the deadline by which the court notified by address should have pronounced itself on the precautionary measures ordered in the case. This finding does not result, according to regulation of precautionary measures, a specific sanction, like in the case of preventive measures. However, the Court is not able either to accept the contention according to which a procedural sanction not provided in the Criminal Procedure Code may not be applied. In the opinion of the Court, it is not acceptable that, by establishing a term for checking precautionary measures, the legislator would have intended this to be only a recommended term, while exceeding it would not result in any consequence with regard to the precautionary measure. The term set forth in the provisions under art. 250^2 CPP is not only a term for expediting proceedings, but a term protecting substantial rights among the fundamental ones, so that protection should be materialized, by considering that, upon the expiry of such maximum legal duration, in the absence of a disposition maintaining the measure, the measure is lawfully terminated. As regards the contention that some precautionary measures whose creation is mandatory may not be removed, such contention cannot be retained as grounded, given that it would fully invalidate the provisions under art. 250^2 CPP. The acceptance as such of these contentions would lead, in fact, to eluding the provisions under art. 250^2 CPP, the failure to comply with would not result practically in any consequence. Or, in the opinion of the Court, such construction is inadmissible. In this respect, the Court notes, in addition, that in the recent practice of the supreme court[6] was stipulated that, even if ordering precautionary measures for tax evasion crimes is mandatory *ope legis*, these may not be maintained *sine die*, unless reviewing their purpose and proportionality against the duration of the interference in the right of disposition of goods (). Consequently, under art. 425^1 para. (7) item 1 letter b) CPP, the Court is to admit the appeals filed by the defendants, is to rescind partially the session ruling dated 29.04.2022 of Brăila Trib. and upon re-adjudication: is to remove from the content of the appealed ruling the provisions regarding maintaining the precautionary sequestration measure, established on the goods belonging to the defendants. The Court is to establish as lawfully terminated the precautionary sequestration measure (...)".

- **dec. 547/20.09.2022, HCCJ, crim. s., case no. 5588/2/2018/a6**, according to which: «The fact that the legislator did not provide in the newly introduced law text also a sanction for the failure to respect these terms does not impart them the nature of some recommended terms, insofar as the legal provisions under discussion govern an obligation and not a mere possibility. Consequently, exceeding the one-year peremptory term provided under art. 250^2 CPP shall result in withdrawing the criminal judicial authority the exercise of the process right to order maintaining the precautionary measure, as well as the nullity of the process act performed after the term, and, from a substantial standpoint, the lawful termination (*ope legis*) of precautionary measures. The legal nature of this term is given by the purpose of regulation, the term being established in order to discipline and systematize the process activity with regard to precautionary measures. To this effect is also the Statement of Reasons in the Law no. 6/2021, which sets forth that „in practice, were reported other cases in which ANABI

[5] Published in the Official Gazette of Romania no. 167/18.02.2021.

[6] HCCJ, crim. s., crim. dec. no. 260/20.04.2022, available on the website *www.scj.ro*.

was addressed requests for sale of some goods frozen for over 5 years, which became valueless, becoming over time unmarketable, and the management costs exceeding the value of goods. In order to increase the efficiency of measures available to ANABI, it was necessary to regulate checking *ex officio* whether a precautionary measure generates disproportionate losses or costs."».

3. Conclusions

Given the importance of the fundamental rights under discussion, by establishing precautionary measures, we note that protection of property is a fundamental right in the legal order of the European Union, being safeguarded both by the provisions under art. 17 in the Charter of Fundamental Rights, and by art. 1 in the First Additional Protocol to the European Convention on Human Rights. Further, the person's private property is safeguarded also by the Romanian Constitution in the provisions under article 53 par. (2).

Therefore, the immediate purpose of the term established under art. 250^2 CPP is the protection of the accused person's right to use their goods, in order to avoid the imposition of an excessive individual burden. Thus, by establishing the terms, the legislator's priority was respecting the proportionality of the duration of the precautionary measure with restricting the right to property.

Taking into account that the reason for the terms provided under art. 250^2 CPP is to ensure respecting the proportionality of the duration of the precautionary measure with restricting the right to property of the person against whom the measure was taken and to remove arbitrariness with regard to its maintenance, these terms have the legal nature of a procedural and peremptory term, and not of a recommended one, this being the only construction that determines the compatibility of the process norm with the conventional and constitutional provisions regarding protection of the person's property.

Exceeding the peremptory terms of 6 months and, respectively, 1 year provided under art. 250^2 CPP shall result in withdrawing the criminal legal authority the exercise of the process right to order maintaining the precautionary measure, as well as the nullity of the process act performed after the term and, from a substantial standpoint, the lawful termination (*ope legis*) of precautionary measures.

References

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- CPP – Romanian Criminal Procedure Code, Law no. 135/2010, published in the Official Gazette of Romania no. 486/15.07.2010.