PRECAUTIONARY MEASURES IN CRIMINAL TRIAL - MATTERS REGARDING THE PROCEDURAL AND SUBSTANTIVE TIME-LIMITS

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Abstract

Given that the judicial practice is non-unified with respect to the time-limit in which the precautionary measure ordered in criminal cases must be verified, I consider it appropriate to analyse in terms of interference with the suspect/defendant's patrimony the possibility of the judicial bodies to maintain the measure, both before the deadline established by law has expired, as well as after, in order to unify/standardise the application of the legal provisions in the matter.

In other words, the judicial practice is non-unified with respect to the time-limit in which the grounds, which were the basis for taking the precautionary measure in criminal proceedings, can be verified, meaning that there are theories according to which the previously mentioned time-limit is a recommendation time-limit, and not a substantial one which would result in the loss of the right to maintain the measure, after its fulfilment.

Keywords: *precautionary measures, substantive time-limits, procedural time-limits, non-unified judicial practice.*

1. Introduction

On the occasion of the research in order to write this paper, I find that even in the specialised doctrine there are several opinions regarding this subject, with arguments both in favour and against the previously stated matters, both from the perspective of the effects and from the procedural perspective.

Regarding the applicability of the CPP provisions, more precisely the phrases/terms used by the legislator, we come to the conclusion that they impose on the judicial bodies the obligation to verify the precautionary measure within certain terms to be analysed.

The importance of the study of this issue is given by the intrusion into the fundamental rights and freedoms of the person, by violating the ECHR and the established ECtHR practice regarding property rights.

Starting from the rights conferred by the Romanian Constitution, one may notice that, beginning even with art. 44, they state that the right to property is guaranteed by the state, its violations not being allowed, except in the situations expressly and limitedly provided by law.

The establishment of precautionary measure on the assets of the suspect/defendant is a violation of the constitutional provisions and a serious infringement of the right to property, if the measure is disproportionate or unfounded in relation to the seriousness of the accusation brought.

Through this paper I propose to analyse the conditions under which precautionary measures can be taken in criminal trial, their purpose, the time-limits in which they must be checked, and also their reasonable or unreasonable duration, by reference to the ECtHR jurisprudence, the national jurisprudence, and from the perspective of the specialised doctrine in relation to this institution.

With the adoption of the current Code of Criminal Procedure, the Romanian legislator understands that they must comply with all European conventions and treaties to which Romania is a party and harmonise domestic legislation by offering securities regarding the person accused of committing an act provided for by the criminal law, as the ECtHR rules through all the judgments it pronounces.

2. Aspects regarding the matter of precautionary measures

The seat of the matter can be found in art. 249-256 CPP, Chapter III, articles which regulate the general conditions for taking such precautionary measures, their challenge depending on the stage of the proceedings, their verification, the procedures, but also the special cases of capitalization of goods, return of items or restoring the previous situation.

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Precautionary measures are procedural measures with a real character and can be ruled by the prosecutor during the criminal investigation, by the judge of the preliminary chamber in the procedure of the preliminary chamber and by the court, in order to seize the movable or immovable assets belonging to the suspect or the defendant, to the civilly responsible party or other persons, followed by order of the special or extended confiscation, the repair of the damage produced or the execution of the fine or court costs.

Therefore, the purposes for which such measures can be ruled are expressly and limitedly provided by law, without the possibility of being ordered for reasons other than those stated previously.

By establishing such precautionary measures, the patrimonial assets of the suspect/defendant or the aforementioned persons are sought to be made unavailable/to be seized, with the result that the court will reap the benefits of their value through the decision it will rule, if necessary.

In other words, in the case where the court reaches the conclusion that the accused person has committed the crime beyond any reasonable suspicion, and their conviction is to follow, it will also order special or extended seizure, under the conditions provided by the provisions of art. 112 and 112[1] CP.

The decisions ordering the precautionary measures are enforceable, establishing some provisional procedural measures to avoid the concealment, destruction, alienation, or evasion of the assets which may be the object of the previously stated precautionary measures or which may serve to guarantee the execution of the fine or of the legal expenses or the reparation of the requested and admitted civil damage.

By establishing these measures, the aim is to make movable or immovable assets unavailable, *i.e.,* prohibiting their transfer until a final decision is issued, the Court holding that the precautionary attachment also affects the attributes of *usus* and *fructus*, when the assets, object of the seizure, are collected and handed over to specialised institutions[1] for safekeeping.

In the specialised doctrine[2] it was correctly noted that the analysis of taking a precautionary measure must meet 3 cumulative conditions:

- the precautionary measure must be necessary in order to avoid the concealment, destruction, alienation, or evasion of the assets;
- the goods on which the measure is ordered should be subject to special seizure or extended seizure, or can be used to guarantee the execution of the fine or legal expenses or the repair of the damage caused by the crime;
- the requirement of proportionality, by analysing it in relation to the restrictive effect in terms of the property and the intended purpose.

I am of the opinion that the precautionary measure must be analysed by reference to the requirement of proportionality before any other analysis, given the interference with the property/ownership right of the person which they have/own? and the limitation in the absolute of the measure in terms of transfer or encumbrance of the asset object of the precautionary measure.

In other words, I believe proportionality is analysed, primarily, by reference to the seriousness of the accusation brought, which will necessarily be analysed through the lens of the immediate interference with the right to property. By establishing such measures, as I mentioned before, the property will no longer be transferred during the criminal trial; or, if the measure is disproportionate in relation to the seriousness of the act, we note a direct impact on the patrimony, which violates the constitutional provisions of a democratic state, but also the constant ECtHR jurisprudence.

By dec. no. 19/RIL/2017, HCCJ held that *„The introduction of a precautionary measure holds the judicial body to establish a reasonable ratio of proportionality between the purpose for which the measure was ordered (for example, in order to seize the assets), as a way to ensure the general interest, and the protection of the right of the accused person to use their property, in order to avoid imposing an excessive individual burden. Proportionality between the purpose sought when the measure was instituted and the restriction of the accused person's rights must be ensured regardless of how the legislator assessed the necessity of ordering the seizure, as arising from the law or as being left to the discretion of the judge. The condition follows both from art. 1 of the First Additional Protocol to the ECHR, as well as of art. 53 (2) of the Constitution of Romania, republished (the*

[1] M. Udroiu, *Sinteze de procedură penală. Partea generală*, C.H. Beck Publishing House, Bucharest, 2018, p. 1035.
[2] *Idem*, p. 1036.

measure must be proportional to the circumstance that determined it, be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom)"[3].

Moreover, noting the provisions of art. 250^2 CPP, we find a legislative amendment brought by art. 19 point 2 of Law no. 6/2021, consisting of an intervention of the legislator, justified by the fact that whenever there is a precautionary measure during the criminal trial, the judicial bodies have the obligation to periodically check whether the grounds taken into account when taking such measure are still valid.

Assuming this article will take into account the non-unified judicial practice of the courts with regard to the time-limits provided by the provisions of art. 250^2 CPP, following an analysis of whether this deadline is a recommendation or if it is a deadline the non-compliance of which attracts *de plano* the impossibility of the judicial bodies to maintain the precautionary measure.

The Criminal Procedure Code explains, through the lens of art. 268, the consequences of non-compliance with the general time-limits:

1. „when for the exercise of a procedural right the law provides for a certain deadline, failure to comply with such deadline entails the decay of the exercise of the right and the invalidity of the act made after the deadline";

2. „when a procedural measure can only be taken for a certain period of time, the expiration of such period resulting automatically in the termination of the effect of the measure";

3. „for the other procedural time-limits, in case of non-compliance, the provisions regarding invalidity shall apply"[4].

In my view, I consider it appropriate to bring into discussion the classification of the time-limits in the Code of Criminal Procedure, both to be able to give efficiency to the provisions found in Chapter II, and to understand the difference in the effects, of which violation could imply.

In other words, it must be analysed with priority if the time-limits provided by the legislator for the precautionary measures are recommendable or if they could attract the consequences provided for in art. 268 CPP.

In the hypothesis provided by para. (1) of art. 268 CPP, we can observe that the legislator intends to set certain time-limits within which the proceedings or procedural acts can be carried out, and failure to comply with it entails the loss of the right to perform it and the invalidity of the act.

Correctly, the Romanian legislator applies the sanction of the loss of the right to perform the act done beyond the time-limit established by law, through the lens of the artificiality of carrying out the procedures in violation of the legal provisions, proclaiming the express invalidity of the act done, directly harming the interests protected by the legal regulations.

Moreover, the criminal procedure code offers the possibility to carry out proceedings and procedural acts within a certain period, in compliance with the conditions provided by law, for the purpose of ensuring a good conduct of the criminal trial, offering sufficient guarantees regarding the exercise of proceedings and procedural rights, without understanding that this sanction would, in concrete terms, punish the recipient of the criminal procedural law, being a just sanction for the passivity the latter shows in defending their rights and freedoms.

The penalty of forfeiture establishes the existence of the right, without being able to affect it, but intervenes during the proceedings in order to protect the scheme of the criminal trial, in order not to create artificial procedures.

As for paragraph II of the same article, the Romanian legislator separates the procedural time-limit from the proceedings time-limit, in that it directly shows the consequence of the legal termination of the effect of the measure.

That being the case, after clarifying the aspects regarding the procedural time-limits and the substantive time-limits, it will be established which provisions are applied to the procedural measures, synchronising the institutions provided for in the Code of Criminal Procedure.

In my opinion, the failure to check the precautionary measures during the proceedings entails the termination of the right, with the consequence of their removal.

[3] HCCJ RIL dec. no. 19/2017.

[4] Art. 268 para. (1), (2) and (3) CPP.

It is true that the legislator did not provide, in art. 250^2 CPP, the solution of establishing the legal termination of the precautionary measure, as they provide in the case of precautionary measures in art. 241 CPP, but it provides for the solution of removing the precautionary measures.

The removal of precautionary measures, being provided as a solution in art. 250^2 CPP, may be the consequence of the disappearance of the grounds which led to their taking/maintaining during the procedures or of the illegal nature of the measures, revealed on the basis of new circumstances, which lead to this conclusion.

I am of the opinion that the removal of precautionary measures can also be the consequence of their legal termination, when the judicial bodies reach such a conclusion.

This being so, I note the fact that the text under art. 250^2 CPP establishes as an obligation for the judicial bodies the verification of the existence of the grounds which determined the taking or maintenance of precautionary measures, for the reasons shown in the statement of reasons (absence of an express legislative provision that imposes verification of grounds); that the text of the law in question establishes deadlines by which the judicial body is obliged to proceed with the evaluation of the precautionary measures, from the perspective of the existence of grounds, and that non-compliance with such deadlines entails the legal termination of the measures.

It is true that art. 250^2 CPP does not expressly provide for the situation in which the judicial body can determine the legal termination of precautionary measures, but art. 268 para. (2) CPP (text of a general nature and applicable in terms of all procedural measures) provides as a sanction the termination of the effects of procedural measures when they can only be taken for a certain period, if such period has expired.

To reach this conclusion, I consider that the precautionary measures are not taken for a certain period, as is the case with preventive measures or surveillance measures, but, after taking the precautionary measures, the failure to fulfil an obligation established by law, namely that of verification of the existence of the grounds taken into account when taking the measure, entails its legal termination, in accordance with the provisions of art. 268 para. (2) CPP, since the period in which the verification is mandatory, *i.e.*, 6 months or a year, becomes a time-limit in which the precautionary measure can be taken.

Only an interpretation of this kind may be consistent with the purpose for which the verification obligation was established, as well as the protection conferred by the Constitution on the right to property.

Regarding the date from which the time-limit obliging the judicial body to verify the existence of grounds is calculated, if the cases have been suspended, I am of the opinion that precisely art. 367 CPP, which establishes the obligation to verify precautionary measures during the trial, establishes also *mutatis mutandis* the obligation to verify the existence of the grounds which led to the taking/maintenance of precautionary measures, given the fact that both preventive measures and precautionary measures are intrusions into the fundamental rights of the accused, respectively the right to freedom and the right to property, on the one hand.

By dec. no. 336/30.04.2015, CCR ruled in para. 24: *«as regards the definition of the „time-limit", in the matter of criminal procedure, means the time interval within which or until which certain activities or acts can or must be carried out in the criminal trial, it is also the date on which or the time interval within which or until which can be fulfilled, it is not allowed to be fulfilled or must be fulfilled an act, an activity or a procedural measure or exercised a procedural right, a sanction or a measure of criminal law, as applicable.*

By establishing the time-limit, as regulated in art. 268-271 CPP, the law ensures the fulfilment of procedural acts within the time intervals imposed by the natural sequence of procedural stages, intended to guarantee the execution of the act of justice. Unlike the substantive deadlines, which ensure the protection of legitimate rights and interests in the event of their restriction, the procedural deadlines require that all operations specific to each procedural phase be carried out at a reasonable pace, in order to achieve the purpose of the criminal trial (…)», and in para. 25 that, *„in relation to their character and effects, the procedural time-limits were classified into peremptory (imperative) terms - those within which an act must be fulfilled or performed, a time-limit which creates a limitation, the act must be performed before the time-limit is fulfilled; regulatory (recommended) deadlines - those deadlines which fix a period of time for the performance of certain proceedings or procedural acts, but may attract disciplinary sanctions or a judicial fine for the person who had the obligation to comply with it"*.[5]

[5] CCR dec. no. 336/30.04.2015, published in the Official Gazette of Romania no. 342/19.05.2015.

According to the definitions given by the Constitutional Court, the time-limits ensuring the protection of legitimate rights and interests in case of their restriction, are substantive and not procedural time-limits, and with regard to the provisions of art. 250^2 CPP, they were enacted precisely to guarantee the protection of the right to property, by imposing on the judicial bodies the obligation to verify the existence of grounds, in terms of precautionary measures.

As I have already shown, the obligation to verify precautionary measures must be placed in the same field as that of verifying the existence of the grounds that determined the taking/maintaining of precautionary measures [art. 208 para. (4) CPP], for the reason that, on the one hand, the intrusions concern fundamental rights of the accused, and on the other hand, the verification obligations are identically regulated, even regarding the term in which the verifications can be made, in the sense that both regulations establish by using the phrase „but not later" the obligation to check within the time-limits provided by the relevant texts [art. 250^2 CPP and art. 208 para. (4) CPP].

This being so, we note that the time-limit is not one of recommendation, but one that lays down the obligation of the judicial bodies to verify the precautionary measures, and the sanction for failure to fulfil the obligation cannot be other than that provided for in art. 268 para. (2) CPP, respectively termination of the effects of the precautionary measures.

We also note that the reasoning presented in this work is appropriated by the HCCJ itself, by dec. no. 547/20.09.2022) from file no. X, they retaining, in essence, the following:

«The provisions of art. 268 para. (2) CPP shows that when a procedural measure can only be taken for a certain period, and its expiration automatically results in the termination of the effect of the measure. Even if in the regulation of art. 249 *et seq.* CPP there is no explicit mention of the type, „the precautionary measure is taken for a duration of", from the very obligation of its verification, „no later than" the clear intention of the legislator that the precautionary measure be taken or maintained only for a certain limited time. Substantial time-limits are those which protect rights, prerogatives and extra-procedural interests, pre-existing to the criminal trial and independent of it, limiting the duration of some measures or conditioning the performance of acts or the promotion of actions that would annihilate a right or an extra-procedural interest. Substantial time-limits (of material or substantive law) are calculated according to the provisions of art. 186 CP, according to the system of natural computation (*computado naturalis*), when the time-limit is expressed in days or weeks (the day is counted as 24 hours, and the week as 7 days), and according to the system of civil computation (*civilis computado*) when the time-limit is expressed in months or years. The fact that the legislator did not provide in the newly introduced legal text a sanction for non-compliance with these deadlines also, does not give them the nature of recommendation deadlines, as long as the legal provisions in question regulate an obligation, and not just a possibility. Consequently, exceeding the peremptory time-limit of one year provided for in art. 250^2 CPP, will entail the forfeiture of the criminal judicial body from exercising the procedural right to order the maintenance of the precautionary measure, as well as the nullity of the procedural act made after the deadline and, from the point of view of substantive view, termination by law (*ope legis*) of the precautionary measures.

The legal nature of this term is given by the purpose of the regulation, being established for the discipline and systematisation of the procedural activity regarding the precautionary measures. This is also the Explanatory Memorandum of Law no. 6/2021, which shows that, in practice, cases have been reported in which ANABI was notified with requests for the capitalisation of goods seized for over 5 years, which no longer had value, the goods becoming unsalable over time, and the costs of administration exceeding the value of the goods. In order to increase the efficiency of the measures available to ANABI, it was necessary to regulate the *ex officio* verification if a precautionary measure generates losses or disproportionate costs. Compared to the effects it produces, the one-year term is a peremptory one, since a procedural activity must be carried out within it (verification of the legality and validity of the precautionary measure). This term holds the judge of the preliminary chamber, respectively the court, to order the verification of the legality and validity of the criminal seizure before its expiration. The reason for the one-year term established to verify the legality and validity of the precautionary measure is to respect the proportional nature of the measure in relation to the duration and evolution of the procedure, respectively to eliminate arbitrariness as regards the indefinite maintenance of a measure restricting rights.

At the same time, the maintenance of the precautionary measure in the criminal trial must comply with the proportionality requirements imposed by the ECtHR, the Strasbourg Court showing that „the lifting of the precautionary measure should be possible when its effective duration is excessively long in relation to the

duration and evolution of the procedure and the consequences it produces go beyond the normal effects of such a measure" (Case *Forminster Enterprises Limited v. Czech Republic*, judgment from 09.01.2009, p. 76-78).

The immediate purpose of the time-limit established by art. 250^2 CPP is the protection of the accused person's right to use their assets, in order to avoid the imposition of an excessive individual burden. So, by establishing the time-limit, the legislator was primarily concerned with respecting the proportionality of the duration of the precautionary measure with the restriction of the right to property. Therefore, the sanction for non-compliance with the indicated time-limits is the one provided by the provisions of art. 268 para. (1) CPP, so that failure to comply with it entails the forfeiture of the judicial bodies from the right to verify the precautionary measure, respectively the nullity of the act carried out in this regard by exceeding the deadline.

With regard to the fact that, by the conclusion of the meeting on March 14, 2022, pronounced by the CA Bucharest, 1st crim. s., in file no. X, the requests made by the defendants, to declare that the precautionary measures taken in the criminal investigation file no. Y of the PICCJ - DNA, Anti-corruption Section, and by dec. 552/14.09.2022, HCCJ, crim. s., rejected the appeals filed by the defendants, the supreme court appreciates that the existence of a *res judicata* cannot be retained under this aspect, the judicial body called to analyse the existence of the grounds for taking or maintaining a precautionary measure, should ensure that the legality of such measure is observed. Although it was requested by the defendants to remove the precautionary measure regarding aspects including their legality and proportionality, the High Court, in majority opinion, will no longer proceed with their analysis, considering the solution ruled.[6]»

3. Conclusions

Transposing the considerations of the HCCJ decision above mentioned, we are going to note that regardless of the procedural phase we are in, the time-limits established by the legislator for verifying the existence of the grounds for precautionary measures (either 6 months - during the criminal investigation, or 1 year - in the phase of the preliminary chamber and the trial) is an imperative one, of forfeiture.

In order to reach this conclusion, in the interpretation of the provisions of art. 250^2 CPP, I used the reasoning *a pari causa*, which allows the deduction of some consequences, in order to be able to draw a parallel between two similar situations, in the absence of an express rule, which regulate one of them, and in the present case, the lack of regulation refers to the consequences of not complying with the obligation to verify the precautionary measures, consequences which are regulated in the matter of precautionary measures and which are also applicable in the case of the first measures.

In this regard, we note the provisions of art. 271 para. (1) CPP, with the marginal title „*Calculation of deadlines in the case of privative or restrictive measures of rights*", which provides that „in the calculation of deadlines regarding precautionary measures or any restrictive measures of rights, the time or the day from which it begins to run and the day on which the time-limit ends is included in its duration", text of law that places precautionary measure (restrictive of rights) in the same regulatory field as custodial measures.

In conclusion, as the HCCJ rightly held, the time-limits established by the legislator for the verification of the grounds that were the basis for taking the precautionary measures are substantial time-limits of forfeiture, and their violation must be materialised, mandatorily, by establishing their legal termination.

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