CONTROVERSIES ON REMEDIES AGAINST COURT REFERRAL IN PRE-TRIAL PROCEEDINGS

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Abstract

Considering the particular importance of the pre-trial chamber procedure in criminal proceedings, in relation to the legal consequences deriving from the fulfilment of the judicial function specific to this procedural stage prior to trial, this article aims to answer the legal issues giving rise to controversies both at doctrinal and jurisprudential level regarding remedies against the court referral. The jurisprudential upheaval caused particularly by the intervention of the Constitutional Court has led to a reconfiguration of the relevant legal framework. As a result of the failure of the lawmaker to align the wording of the law that was declared unconstitutional with the Constitution, the legal instruments remaining at the disposal of the judge hearing the case before the pre-trial chamber were no longer functionally capable of specifically meeting the requirements imposed by the Constitutional Court. Against this background, starting from the need to achieve a clear outline of the functional competences of each judicial body actively participating in the pre-trial chamber procedure, this paper aims at a broad analysis of the logical and legal mechanisms that allow the identification of the appropriate procedural remedies for the new judicial realities, able of representing an effective remedy of any irregularities in the court referral.

Keywords: *remedy of court referral, functional jurisdiction, referral of the case back to the prosecution, implied irregularity, mandatory procedural time limit, penalty*

1. Introduction

In the dynamics of judicial activities specific to the pre-trial chamber procedure, the remedy against the court referral is the procedural instrument that remove any legal flaws which affect its very functional attribute. The essential role of this remedial mechanism is to ensure that the court is provided with an indictment able of establishing, in a concrete and unequivocal manner, the procedural framework, the subject-matter and the limits within which the trial is to be conducted.

However, due to some legislative gaps caused by the substantial amendments made to the Criminal Procedure Code adopted by Law No. 135/2010, i.e. abandoning the traditional tripartite structure of the criminal trial and implementation of a novel preliminary chamber procedure, certain doctrinal and jurisprudential controversies have arisen regarding how to remedy court referrals.

In this respect, the paper aims to clarify the controversial issues related to the limits of judicial functions in this matter, the legal nature of the act by which the irregularities in the court referral are remedied, as well as

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the time limit under Article 345 para. (3) of the Criminal Procedure Code for the performance of this legal operation, as well as the penalty applicable in case of failure to comply with the legal deadline.

At the same time, the reconfiguration of the normative framework regarding the pre-trial chamber procedure, as a reflection of the jurisprudential upheaval at the hands of the Constitutional Court, coupled with the lack of active intervention by the lawmaker to align the declared unconstitutional text of the law with the Constitution, gave rise to procedural difficulties in the application and realisation of the judicial function specific to this procedure.

The existing normative shortcomings in this area that persist even today, despite calls from both national and conventional courts (with reference to the case law of the Court of Justice of the European Union), continue to be based in the lack of legal instruments functionally capable of meeting the requirements enshrined into law.

In this context, the study also aims to provide adequate solutions to the essential problem of the ineffectiveness of the current legal instruments that are regulated by criminal procedural law.

2. Preliminary aspects regarding the regulatory framework and the role of preliminary chamber procedure

In view of its functional role as a procedural act that invests the court with the aim of achieving the purpose of the criminal proceedings, the indictment must fulfil the role of legality review, which aims at an evaluation from the perspective of its legality (but not its validity), the review being exclusively related to the compliance with the formal (extrinsic) and substantive conditions intrinsic to the indictment.

However, the procedural act that includes the prosecutor's order to send the case to trial, as a consequence of the materialisation of the entire activity specific to the criminal prosecution stage, will be able to inform the court in order to resolve the legal conflict and, implicitly, to concretely outline the procedural framework in which the trial is to take place, by clearly establishing the subject matter and limits of the trial, according to Article 371 of the Criminal Code.

In order to ensure the full functionality of the court referral in accordance with Articles 328 and 329 of the Criminal Procedure Code, the legislator has regulated a novel preliminary procedure as part of the current system of criminal procedural law, to take place prior to the commencement of the trial, which allows a judicial review of the legality of the indictment, falling within the exclusive remit of a specialised official subject, namely the pre-trial chamber judge.

The normative framework in which this pre-trial stage operates and which regulates the set of rules prescribed for the participants in this procedure is represented by the provisions of Articles 342-348 of the Code of Criminal Procedure.

Considering the limits of the review under Article 342 of the Criminal Procedure Code, the object of the verifications carried out by the pre-trial chamber judge concerns four essential aspects for the subsequent conduct of the trial: the competence of the court, the legality of the court referral, the legality of the adducing of evidence by the prosecution and the legality of the criminal investigation acts.

These aspects exhaustively listed by the lawmaker in the aforementioned wording of the law jointly constitute the subject-matter of the main task of the judicial function of the pre-trial chamber judge.

Essentially, the procedural aspect of the effective realisation of the preliminary chamber judge's review is to be found in the

wording of Article 345 of the Criminal Procedure Code, which regulate the actual pre-trial procedure.

This procedural framework becomes active only in the hypothesis in which requests and exceptions have been formulated or they have been raised ex officio, despite the fact that, as correctly held in the doctrine[1], in the preliminary chamber procedure there may be two *distinct procedural conjunctures* depending on the nature of the participants involved - whether or not requests and exceptions have been formulated or they have been raised ex officio by the judge within the time limits under Article 344 para. (2) or (3) of the Criminal Procedure Code.

Otherwise, in the absence of any criticisms regarding the legality of the court referral, the adducing of evidence or the performance of the acts of criminal prosecution, the judge will order, in consideration of Article 346 para. (1) of the Criminal Procedure Code, the opening of the trial.

Therefore, according to Article 345 para. (3) of the Criminal Procedure Code, if the pre-trial chamber judge finds irregularities in the indictment or if they sanction, under Articles 280-282, the acts of criminal prosecution carried out in violation of the law or if they exclude one or more pieces of evidence, within 5 days from the communication of the decision, the prosecutor shall remedy the irregularities in the indictment and shall inform the pre-trial chamber judge whether they maintain the decision to send the case for trial or requests the return of the case.

This intermediate stage regulated by the aforementioned legal text is an incidental procedure, a remedial procedure by which the pre-trial chamber judge gives the prosecutor the opportunity to express their judicial views, even after the completion of the criminal prosecution stage, in order to remedy the irregularities in the indictment and to state their procedural position on whether or not to maintain the indictment.

However, it should be noted in advance that the remedy is of a limited nature, as it cannot apply to all aspects of illegality found by the pre-trial chamber judge, but only to those which have been shown to be genuine irregularities in the court referral[2].

Although this procedural mechanism regulated by Article 345 para. (3) of the Criminal Procedure Code, the legislator has established a positive procedural obligation for the prosecutor to remedy the indictment within the limits set by the pre-trial chamber judge, allowing them to request clarification of the issues related to the concrete determination of the subject matter and limits of the trial, this does not represent a transfer of judicial powers to the prosecution.

By the conclusion pronounced on the requests and exceptions, in the context of sanctioning the legality flaws of the indictment, in this incidental procedure, the pre-trial chamber judge does not disqualify themselves and thus does not create the premises for reactivating the judicial function of criminal prosecution, implicitly vesting the prosecutor to perform specific acts of the first procedural phase, but only performs a form of interaction between these judicial bodies, limited to the procedural form provided by law.

[1] Ion Neagu, Mircea Damaschin, *Criminal Procedure Treatise. Special Part (Tratat de procedură penală. Partea specială)*, Universul Juridic Publishing House, Bucharest, 2015, p. 214.

[2] Andrei Zarafiu, *Criminal Procedure. General part. Special part*, 2nd edition (*Procedură penală. Partea generală. Partea specială*, ediția a 2-a), C.H. Beck Publishing House, Bucharest, 2015, p. 385.

This form of interaction takes place exclusively with the public prosecutor, not with the public prosecutor's office, which is not a case of resumption of criminal prosecution covered by Article 334 of the Criminal Procedure Code, which implies an act of reactivation of the judicial function specific to the criminal prosecution stage. The case is only returned to the prosecution when the pre-trial chamber judge, following the incidental procedure under Article 345 para. (3) of the Criminal Procedure Code, orders one of the remedies set out in Article 346 para. (3) of the Criminal Procedure Code.

The law does not allow for a temporary transfer of judicial powers, as long as the judge was not disqualified, so that, from a functional standpoint, the prosecutor can only resume acting once their natural function, previously lost by the issuance of the indictment, is reactivated following the pronouncement of one of the decisions to return the case to the prosecutor's office under Article 346 para. (3) of the Criminal Procedure Code.

In our judicial system, the functional competence can be established, according to the main regulations imposed both at constitutional level - art. 131para. (2) and (3) of the Constitution - and in principle - Article 3 of Law No. 304/2004 - only by law, as the establishment or extension of powers by judicial means is prohibited.

Therefore, from the point of view of the prosecutor's authorisation to act judicially in the pre-trial chamber procedure, we emphasise that **only the pre-trial chamber judge has an active function during this procedure.**

3. Considerations on the legal nature of the remedial act

The essential premise that determined the need for a broad debate on the concrete establishment of the functional limits within which the powers conferred by law on each judicial body must be exercised, in order to comply with the principle of separation of judicial functions provided under Article 3 of the Criminal Procedure Code, has taken into account, both at the doctrinal and especially at the jurisprudential level, the emergence, since the emergence of the Criminal Procedure Code in the active legislative background, of controversies regarding the legal instrument that allows the removal of these legality flaws that are subject to the preliminary chamber procedure.

Thus, one first aspect that required essential clarification concerned the legal nature of the act by which the prosecutor can remedy the indictment. In the absence of an express legal text laying down the procedural act to perform a remedy, the solutions approached in courts were varied.

Initially, it was considered that the prosecutor's obligation to remedy must take the same form and fulfil the same conditions as those required for the issuance of the indictment. On a practical level, this guideline took the form of issuing of a new referral document in which the initial irregularities were removed.

Since such a solution was clearly contrary to the mandatory provision of Article 328 para. (3) of the Criminal Procedure Code, which requires the prosecutor to issue a single indictment regardless of whether the criminal prosecution proceedings concerned several offences or several suspects and defendants or even if different outcomes were to be envisaged, this solution was subsequently nuanced.

Thus, at an early stage, a part of the doctrine initially considered that 'If the irregularity concerns the content of the indictment forming the subject matter of the trial (...) we consider that the prosecutor

must communicate a new original copy (with the required dissemination copies) of the original indictment, but which contains the elements found to be missing. In the latter case, there must be one and the same original indictment - with the additions required by law - and not another indictment'[3].

Although the time factor has played a significant role in the evolution of this institution of criminal procedural law in enshrining a unanimously accepted judicial practice, which excludes the indictment from the acts that can fulfil the procedural function of remedy in the incidental procedure under Article 345 para. (3) of the Criminal Procedure Code, this opinion now seems to have been only partially abandoned at the doctrinal level, with echoes of the previously expressed opinion continuing to be heard.

Thus, some specialised works[4] continue to state that the act drawn up by the public prosecutor in order to remedy the specific irregularities found by the judge, appearing as an addition to the initial notification and generating, in the opinion of the authors, the same legal effects, cannot have a different form from that of the initial referral. Since the indictment of the defendant is not made by order, but by issuing the indictment, the indictment can only be maintained - as the authors of the scientific paper argue - only by means of an act with the same legal value.

In our opinion, even this solution is not free from legality criticism. First of all, the indictment is the specific procedural act exclusively specific to the criminal prosecution phase, which includes one of the solutions restrictively provided under Article 327 of the Criminal Procedure Code, which the prosecutor may order at the end of this procedural phase as conclusion of the entire investigative activity. It is a legal act with an autonomous character, regulated by Article 328 of the Criminal Procedure Code, which we find in Title I – 'Criminal Prosecution' - of the special part of the Criminal Procedure Code, being part of the set of legal norms that regulate the conduct of judicial activities in this procedural phase.

Second, the indictment simultaneously fulfils the legal effects of two different judicial functions: on the one hand, it leads to disinvestment of the prosecution, representing the final act of the first stage of the proceedings, and on the other, it leads to sending of the case to the pre-trial chamber. As a consequence, the representative of the prosecution, having no functional competence at this pre-trial procedural stage, can no longer issue a new procedural act incorporating the reference order, and cannot temporarily extend its own competences on its own.

Moreover, the re-establishment of any procedural act implies that it was previously declared void. However, in the incidental procedure under Article 345 para. (3) of the Criminal Procedure Code, the judge of the pre-trial chamber does not nullify the court referral, but merely finds that there are irregularities. It is not by chance that in these provisions, the lawmaker uses the concept of 'remedy' and not 'restoration', the latte naturally implying the return of the case to the prosecution in order to reactivate the appropriate judicial context in which the prosecution function can be resumed, which would allow the prosecutor to resume their judicial role.

[3] Nicolae Volonciu, *Code of Criminal Procedure with comments. Anniversary edition (Codul de procedură penală cu comentarii),* Hamangiu Publishing House, Bucharest, 2017, p. 1027.

[4] Cătălin Marin, *Preliminary Chamber Procedure (Procedura camerei preliminare),* Universul Juridic Publishing House, Bucharest, 2024, p. 338-340.

On the other hand, the issuing of a new indictment could require the entire pre-trial chamber procedure to be restarted, from the randomisation of the case, the creation of a separate file and the start of a new pre-trial chamber procedure[5], which the lawmaker clearly did not take into account, and which is also contrary to the reason why it was deemed necessary to create this pre-trial procedural stage.

The majority opinion of the doctrine[6], which confirmed the arguments above, was also steered in the same direction.

In fact, the basis of the above-mentioned arguments is established as Supreme Court case law, as the High Court of Cassation and Justice, through its binding case law, definitively settled this controversial legal issue.

Thus, by Decision No. 23/4 May 2022[7], the High Court, in a panel of criminal-court judges, stated inter alia that, unlike the act of referral to the court, the act of remedying irregularities in the indictment has a different role and purpose. 'It does not contain a solution given to the criminal case and does not aim at a new referral to the court, but only clarifies the scope and particulars of the provisions contained in the indictment, thus aiming to preserve the effects already produced by the original referral and to avoid returning the case to the prosecutor in other situations than those restrictively provided by law'.

Thus, the solution that seems to meet the requirements of legality as correctly as possible, in the absence of an express provision by the lawmaker, involves issuing a separate act from the indictment (either a separate order, notes, clarifications, report, etc.), but which is a common document.

As far as we are concerned, we are reluctant to consider the order as valid in the incidental procedure under Article 345 para. (3) of the Criminal Procedure Code - as a procedural act through which irregularities are remedied - even if, according to Article 286 of the Criminal Procedure Code, it is the main procedural act through which the prosecutor can exercise their role.

The rationale is precisely that the prosecutor's order is the reflection of an active judicial function of criminal prosecution, which cannot operate while the pre-trial chamber judge still has an active role. In the procedure governed by Article 345 para. (3) of the Criminal Procedure Code, the judge does not ask the representative of the prosecution to issue a new indictment, but only to specify their procedural position on whether or not to maintain the order already issued in the course of the criminal proceedings by means of the indictment.

The omission of the lawmaker to regulate the legal nature of the procedural act by which the prosecutor will remedy the irregularities in the court referral, as well as the substantive and formal conditions that it must fulfil, has also generated serious controversy regarding the mandatory nature of its legality and validity review by the hierarchically superior prosecutor, as an essential requirement of validity.

Until recently, it has been considered that the prosecutor's act remedying the irregularities in the indictment must be subject to a legality and validity review by the hierarchically superior prosecutor,

[5] Grigore Gr. Theodoru, Ioan Paul Chiș, *Criminal Procedure Law Treatise*, 4th edition (*Tratat de drept procesual penal,* ediția a 4-a), Hamangiu Publishing House, Bucharest, 2020, p. 736.

[6] Bogdan Micu, Radu Slăvoiu, *Criminal Procedure (Procedură penală),* Hamangiu Publishing House, Bucharest, 2019, p. 397. Mihail Udroiu, *Criminal Procedure Summaries. Special Part (Fișe de procedură penală. Partea specială),* C.H. Beck Publishing House, Bucharest, 2020, p. 277; A. Zarafiu, *op. cit.*, p. 386.

[7] Published in the Official Gazette of Romania, No. 665/4 July 2022.

following the procedure for verification of the indictment under Article 328 para. (1) sentence II of the Criminal Procedure Code [8], on the grounds that 'the particulars contained in the document in which the prosecutor states that they remedied the irregularities found by the judge, being a common document with the indictment and having the same legal value as the latter, must fulfil all the formal requirements of the indictment'[9].

As it was not a requirement that had a legal basis, but rather was adopted judicially on the basis of doctrinal interpretations up to that time, this circumstance generated an inconsistent judicial practice that required, in the end, the intervention of the Supreme Court to clarify this matter of law.

Therefore, by the same Decision No. 23/4 May 2022 referred to above, in addition to clarifying and underlining the major difference between court referral and the procedural act of remedy, from the perspective of the legal nature and the effects that the two acts produce, the High Court of Cassation and Justice has also definitively settled the issue of the need for a legality and validity review by the hierarchically superior prosecutor. In this regard, the court ruled that 'The act by which the prosecutor remedies the irregularities in the indictment, in accordance with Article 345 para. (3) of the Criminal Procedure Code, is not subject to a legality and validity review by the hierarchically superior prosecutor'.

In order to give such a solution, the High Court started from the clarification of the nature and limits of the competences of each judicial body in the preliminary chamber procedure, emphasising the arguments set out in the introductory part of this article.

Thus, the Supreme Court stated that 'Although carried out by the prosecutor - as the holder of the prosecution function and of the power to prosecute - the remedying of irregularities in the indictment does not, however, represent an effective procedural initiative of this judicial body. Such procedural activity takes place exclusively at the request of the preliminary chamber judge, is carried out within the strict limits laid down by the interim judgment settling the applications and objections, and is ultimately subject to the same judge's legality review'.

Moreover, 'given that the lawmaker intended to confer on the judicial body under Article 54 of the Code of Criminal Procedure the exclusive competence to review the legality of the court referral and to request, when it finds irregularities in this document, that the prosecutor remedy them, it follows that the pre-trial chamber judge is the only one entitled, by law, to rule on the legality of the remedial act and its ability to effectively remove the aspects of initial irregularity of the court referral.'

This conclusion is legally supported not only by the explicit content of the provisions relating to the competence of the pre-trial chamber judge, but also by the solutions that they may order in the light of Article 346 para. (3) and (4) of the Criminal Procedure Code. Thus, the High Court states that 'the latter provisions reaffirm the lawmaker's intention to confer on the pre-trial chamber judge the exclusive power to assess the remedial act, in order to determine whether it regularises the indictment and, if the answer is no, to decide to what extent the persistent irregularity entails or not the impossibility of establishing the subject matter or the limits of the trial, with the

[8] Grigore Gr. Theodoru, Ioan Paul Chiș, *op. cit.*, p. 735.
[9] Mihail Udroiu, *op. cit.*, p. 276.

consequence of whether returning the case to the prosecutor or to start the trial'.

'With the court referral, the legislative basis of the right of the head of the prosecutor's office to examine the legality and validity of the acts drawn up by the subordinated prosecutors no longer exists. The resolution of the case by the drafting of the indictment marks the final moment of the criminal prosecution, after which the prosecutor no longer has the possibility to order a possible new solution, which, by virtue of the principle of hierarchical subordination, is subject to a review by the head of the prosecution service'.

Therefore, following a systematic interpretation of the procedural rules governing the preliminary chamber procedure, the Supreme Court emphasised that 'the institution of regularisation of the indictment lies in a procedural phase which is no longer under the control of the head of the prosecution service, but of the preliminary chamber judge, the latter having the exclusive competence to decide on the legality and soundness of the acts drawn up at their behest".

The same opinion has been expressed in the legal literature[10], where it is argued that 'the remedial act does not need to meet the formal requirements of an indictment, even though it must be drafted by the same prosecutor who conducted or supervised the criminal investigation. For instance, it is not subject to review in terms of legality and soundness by the head of the prosecutor's office to which the issuing prosecutor belongs, or by the hierarchically superior prosecutor, as is the case with the indictment'.

Accordingly, the procedural act by which the prosecutor remedies the irregularities in the indictment found by the pre-trial chamber judge is not subject to review by the hierarchically superior prosecutor.

4. The legal nature of the deadline regulated by Art. 345(1) of the Code of Criminal Procedure.

In relation to Article 345(3) of the Code of Criminal Procedure, we note that the procedural obligation of the prosecutor to remedy the court referral is time-bound, with a deadline within 5 days from the ruling the pre-trial chamber judge to remove any legality flaws and communicate whether they maintain the indictment or requests the return of the case.

The 5-day deadline is a procedural time limit which, in relation to the provisions of Article 269 para. (2) of the Criminal Procedure Code is calculated on free days, not including the day from which it starts to run or the day on which it ends.

With regard to the acts deemed to be carried out within the time limit by the prosecutor, the provisions of Article 270 para. (3) of the Criminal Procedure Code regulates a special situation in that, with the exception of appeals, the point of reference is not the filing or transmission of the acts, but the moment when they are entered in the outgoing register of the prosecution.

With regard to the legal nature of this term, some authors of the doctrine[11] have considered that we are in a scenario of a term of recommendation. In support of this assertion, it was held that 'based of art. 268 para. (1) of the Criminal Procedure Code regarding the consequences of failure to comply with the time limit, one notes these legal provisions refer to the exercise of a

[10] Gheorghiță Mateuț, *Criminal Procedure. Special Part (Procedură penală. Partea specială),* Universul Juridic Publishing House, Bucharest, 2024, p. 260.

[11] Nicolae Volonciu, *op. cit.*, p. 1026.

right. However, the court does not exercise rights, but fulfils legal obligations. Therefore, the disqualification does not apply to acts carried out by the criminal prosecution authorities after the mandatory or recommended deadlines have elapsed'.

Against these arguments, our opinion is in favour of affirming the mandatory nature of the procedural time limit under Article 345 para. (3) Criminal Procedure Code, by reference to the procedural sanction applicable in the event of non-compliance, namely the disqualification of the prosecutor from the right to proceed to remedy the irregularities in the court referral.

The prevailing opinion in legal doctrine[12] also supports this interpretation, endorsing the view that 'the deadline within which the prosecutor is required to remedy procedural irregularities and to inform the preliminary chamber judge of their decision regarding the indictment is a mandatory procedural time limit, the breach of which results in forfeiture'.

However, with regard to the disqualification, we believe that a nuanced analysis is required in relation to the specific particularities of the pre-trial chamber procedure.

Thus, according to Article 268 para. (1) Criminal Procedure Code - general provisions on procedural time limits - the failure to comply with the legal time limit for the exercise of a procedural right entails forfeiture of that right and invalidity of the act submitted after the time limit has elapsed.

However, Article 346 para. (3)(c) sentence II of the Criminal Procedure Code regulates an express sanction in the event of failure by the prosecutor to comply with the 5-day procedural time limit, which only applies at this procedural stage prior to the trial, namely *the return of the case to the prosecution service when the prosecutor fails to respond within the time limit under Article 345 para. (3) of the Criminal Procedure Code.*

Therefore, the imperative nature of the 5-day procedural deadline under Article 345 para. (3) Criminal Procedure Code follows precisely from the express sanction regulated by Article 346 para. (3) Criminal Procedure Code.

Therefore, even if the special rule does not expressly include the notion of '*disqualification*', it follows from the aforementioned provisions that the generic sanction of disqualification which applies in the event of failure to comply with a mandatory time-limit continues to exist, except that it is utilised judicially not by rejecting as untimely the procedural act performed after the time-limit, but by a sanction adapted to the procedure of the pre-trial chamber, namely the return of the case to the prosecution. The prosecutor is thus deprived of the right to exercise their power.

It should be noted that, in our opinion, in order for the sanction of returning the case to prosecution under Article 346 para. (3)(c) of the Criminal Procedure Code, it is not necessary to fulfil the additional condition under Article 346 para. (3)(a) of the Criminal Procedure Code, namely that the irregularity which remained unaddressed makes it impossible to establish the subject-matter and limits of the trial.

This additional condition concerns only the case where the prosecutor replies within the 5-day procedural time limit but fails to or only partially remedies the irregularities. It is only in these circumstances that the return of the case to the prosecution is conditional on the fulfilment of this additional requirement that the irregularities continue to prevent the

[12] Gheorghiță Mateuț, *op. cit.*, p. 259.

determination of the subject-matter and limits of the trial.

However, in the absence of a response within the mandatory procedural deadline under Article 345 para. (3) of the Criminal Procedure Code, this condition is no longer applicable, since the return of the case to the prosecution derives from the forfeiture of the prosecutor's right to remedy the irregularities found, in the sense that the consequence of the return is the result of the passivity of the prosecution or its failure to respond within the time limit, not as a result of the impossibility of establishing the procedural framework.

5. Exclusion of illegally administrated evidence. Sanction and appropriate procedural remedies.

As regards the power of the pre-trial chamber judge to carry out a legality review in the light of the limits under Article 342 of the Criminal Procedure Code, we note that the scope of the checks is not limited only to the legality of the court referral, but also concerns the legality of the adducing of evidence and the performance of the criminal investigation. These latter checks follow a legal regime separate from that relating to the verification of the legality of the indictment, which boil down to the mechanism of nullity.

Thus, when dealing with the requests and objections raised in the pre-trial chamber procedure or with the objections raised ex officio, the judge may find, on the basis of the criminal file and the evidence adduced in this incidental procedure governed by Article 345 para. (1) of the Criminal Procedure Code, the applicability of the procedural sanction of absolute or relative nullity of all the evidence obtained in the course of the criminal prosecution or the procedural or procedural acts carried out by the prosecution, or only some of them.

Once some evidence was found null and void per art. 102 para. (2) and (3) of the Criminal Procedure Code, they can no longer be used in the criminal proceedings, therefore will be excluded.

However, this sanction, derived from the procedural sanction of nullity, must not only take the form of a legal exclusion, but it must be effectively realised through the physical removal of evidence obtained in violation of the law.[13]

In this regard, the Constitutional Court has clarified this issue, calling in the recitals of Decision No. 22/ 2018[14] of the need to physically remove them both from the body of evidence and from the indictment or from other procedural acts on which the charges were based.

In the reasoning of the decision, the Court, admitting the exception of unconstitutionality against Article 102 para. (3) of the Criminal Procedure Code, held that although 'the legal exclusion of evidence obtained unlawfully from the criminal trial appears to be a sufficient guarantee of the aforementioned fundamental rights, this guarantee is purely theoretical in the absence of the actual removal from the case file of the evidence obtained unlawfully' [para 23], thus being 'insufficient for an effective guarantee of the presumption of innocence of the accused and their right to a fair trial' [para 24].

The Constitutional Court states that 'the physical removal of evidence from criminal files, once with the exclusion of the evidence in question, by declaring it null and void, in accordance with article 102(3) of the

[13] See also Gheorghiță Mateuț, *Criminal Procedure. General Part (Procedură penală. Partea generală),* Universul Juridic Publishing House, Bucharest, 2019, p. 1017-1018.

[14] Published in Official Gazette of Romania, No. 177/26 February 2018.

Code of Criminal Procedure, an exclusion which entails a two-fold dimension to the meaning of the concept of 'exclusion of evidence' - namely the legal dimension and that of physical elimination - is such as to effectively guarantee the fundamental rights referred to above, while at the same time ensuring that the text criticised is clearer, more precise and more predictable. Therefore, the Court holds that it is only in those circumstances that the exclusion of evidence can fulfil its purpose, which is to protect both the judge and the parties from issuing legal judgments and reaching solutions directly or indirectly influenced by potential information or conclusions arising from the judge's empirical examination or re-examination of the evidence declared invalid' [para. 27].

In the light of these rulings of the Constitutional Court, it follows that it is not sufficient merely to physically exclude the unlawful evidence from the body of evidence, but that it is also necessary to physically remove any references to it, both from the of the court referral and from other procedural documents on which the charges were based.

Otherwise, to order the commence the proceedings in a case in which the procedural documents on which the order for reference for a preliminary ruling is based on excluded evidence is to disregard Decision No. 22/2018 of the Constitutional Court, the recitals of which are generally binding *erga omnes.*

We note therefore that, by the aforementioned decision, the Constitutional Court has reconfigured the playing field within which the exclusion of illegally obtained evidence must be approached.

As mentioned above, even if, in principle, the sanction of nullity and, implicitly the exclusion of evidence obtained in violation of the law is, in fact, enforced by the pre-trial chamber judge after a legality review of the evidence, and not a matter of irregularity of the indictment, in reality, however, the maintenance in the indictment, but also in other procedural documents (indictments, acts of continuation of the criminal prosecution, etc.) of any text taken from or references to such evidence excluded in the light of Article 102 para. (2) and (3) of the Criminal Procedure Code, as well as Decision No. 22/2018 of the Constitutional Court, specifically determines *an implicit irregularity of the court referral.*

Therefore, the mere physical exclusion of evidence from the criminal proceedings is not sufficient to satisfy the requirements imposed by the Constitutional Court, since the procedural documents by which the prosecutor has established the criminal charges against the defendant still contain factual circumstances resulting from the evidence unlawfully or unfairly adduced. In such a hypothesis, we consider that the *cognitive effect* referred to by the Constitutional Court in Decision No. 22/2018 has not been removed, as the effective guarantee of the presumption of innocence of the defendant and their right to a fair trial is only ensured in deceptive manner, which, in our opinion, becomes a flaw of the complaint as a whole.

This aspect is evoked in different forms by the judicial practice of the High Court of Cassation and Justice, stating, in essence, that 'the elimination of those mentions from the procedural documents is also required for the same reasons considered in Decision No. 22/2018, because, otherwise, the very effect of the physical exclusion of the means of evidence would be nullified, given that the existence and even the content of the evidence is expressly detailed in the indictment and the order of regularisation of the court referral. In other words, contrary to the reasons for the removal of evidence whose invalidity

was established, the facts and circumstances revealed by the excluded evidence would still be known and evidenced by acts essential for the outcome of the case. However, in the present case, in addition to simply indicating those modes of proof and the manner in which the authorisation of the technical surveillance measures was ordered, the indictment contains a detailed analysis of those modes of proof and a broad description of the content of the evidence obtained via the technical surveillance measures. (...) Considering the reasoning behind the Constitutional Court's Decision No. 22/2018, keeping these entries in the two procedural documents would cancel the consequences of the exclusion of unlawful evidence and would have the opposite effect to that sought by the Constitutional Court in the aforementioned decision, leading implicitly to damaging of the presumption of innocence and the defendant's right to a fair trial'.[15]

In agreement with our arguments is also the position in the literature, considering that 'if the excluded evidence finds its way in the indictment, in view of Decision No. 22/2018, the entire indictment will also be found as irregular'.[16]

The fact that the binding rulings delivered by the Constitutional Court in Decision No. 22/2018 have not yet been transposed into law has led to a legislative gap in the procedural mechanism by which this irregularity can be remedied in the pre-trial chamber procedure.

The existing mechanism under Article 345 para. (3) of the Criminal Procedure Code is not sufficient in the current legislative framework, since this form of irregularity does not stand on its own, but as an effect of the finding and application of the penalty of exclusion.

On the other hand, referring to the solutions exhaustively described in Article 346 para. (3) of the Criminal Procedure Code, we note that the only legal instrument granted by the lawmaker to the pre-trial chamber judge for the removal of evidence and references to it from the procedural documents is the return of the case to the prosecution pursuant to Article 346 para. (3)(b) of the Criminal Procedure Code, but only if the exclusion concerns all the evidence adduced during the criminal investigation.

If the sanction of nullity and, implicitly, the exclusion as a derivative sanction, is partially enforced, only with regard to certain pieces of evidence, and the prosecutor's procedural position communicated in consideration of Article 345 para. (3) of the Criminal Procedure Code is in favour of maintaining the indictment, the pre-trial chamber judge will have to order the trial to commence on the basis of an indictment and of procedural acts in which passages and/or reproductions of the excluded evidence are still to be found in the indictment. Moreover, the irregularity of the indictment also derives from the fact that their physical exclusion may cause serious flaws in the factual basis of the allegations, in the sense of the failure to fulfil the rules of the entire the evidence on which the decision to refer for trial is based.

In the absence of express provisions laying down the procedural manner of remedying these irregularities, the provisional solution adopted only judicially, without a normative basis, was that of a *direct intervention of* the prosecutor on the procedural acts in order to fulfil the order of

[15] Judgment No. 31/C of 27.09.2018 delivered by the High Court of Cassation and Justice - Panel of 2 pre-trial chamber judges.

[16] Mihail Udroiu, *op. cit.*, p. 275.

the pre-trial chamber judge to physically exclude any unlawful or unfair evidence, which, in reality, conflicts with other procedural mechanisms. Such a solution is not, by itself, functionally capable of meeting the requirements imposed by the Constitutional Court.

Thus, to be effective, direct intervention requires two cumulative conditions. On one hand, the activation of the appropriate procedural context allowing the exercise, by a judicial body which has already lost its competence following the committal for trial, of judicial powers and, on the other hand, the objective suitability of this remedy to achieve the objective of physically or materially removing the excluded evidence.

As shown above, from the point of view of the prosecutor's authorisation to act judicially in the pre-trial chamber procedure, one must note that only the pre-trial chamber judge has an active function during this procedure. The law *does not allow for a temporary transfer of judicial powers* as long as the pre-trial chamber judge has not lost competence, so that, functionally, the representative of the prosecution can only manifest themselves once their natural function, previously lost, is reactivated.

However, the only procedural means of reactivating the function which would allow the prosecutor to issue or intervene in the acts which have given rise to the criminal charge which is the subject of the indictment is the resumption of the criminal prosecution, which is determined by the return of the case to the prosecutor.

At the same time, even from the point of view of its substantive purpose, direct intervention does not actually remove the information rendered ineffective by exclusion, since the indictment and the other indictments remain unchanged.

Whether it takes the form of a report to rectify a clerical error or a report with a note to exclude certain data, this intervention remains ineffective because it operates exclusively at judicial level.

However, the essential premise of Constitutional Court Decision No. 22/2018 regards the need for the actual, physical removal of any media containing unlawful or unfair evidence. It is only by removing material evidence that the risk of insidious, cognitive utilisation of judicially unactionable evidence is completely eliminated.

From this perspective, the inclusion in the pleadings of text from the excluded evidence can only be remedied by issuing new documents.

However, such operations can only be carried out by the prosecution, as they are the exclusive prerogative of the public prosecutor, and at this procedural stage, the latter no longer has the functional competence to carry out such steps.

In this context, in order to give effect to the rulings of the Constitutional Court in Decision No. 22/2018, but also to prevent the commencement of the trial based on a flawed indictment based on evidence that was already ruled out, in our opinion, the only appropriate procedural remedy that had the ability to remove any irregularity is only the one that requires the case to be returned to the prosecution and, therefore, the reactivation of the judicial function of criminal prosecution, so that the representative of the prosecution, if they wish to maintain the court referral, can review the procedural documents and issue a new indictment, in which they can remove any text from the indictment or references to evidence given in breach of the law.

This solution that we propose is the only one that effectively fulfils the requirements imposed by the Constitutional Court in Decision No. 22/2018.

The preference for the use of this procedural remedy of returning the case to

the prosecution, which would trigger the reinvestigation of the case by the prosecution, appears to be the optimal solution that has the real ability to prevent the commencement of the trial and the submission to the court of an indictment whose legality flaws cannot be removed only through the *direct intervention of* the prosecutor, which would significantly hinder the court's ability to dispense justice.

As such hypotheses have often been encountered in judicial practice, it should be noted that even the Court of Justice of the European Union dealt with this issue in case of ZX and Spetsializirana prokuratura (Specialized Public Prosecutor's Office, Bulgaria), application no. C-282/20, ruling that Art. 6(3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation which does not regulate a procedural route capable of enabling, after the hearing of the pre-trial chamber in a criminal case, the correction of the ambiguities and omissions in the contents of the indictment, which affect the right of the defendant to be provided with detailed information concerning the charge.

The CJEU's judgement complements the case law on the right to information of defendants as set out in Directive 2012/13. In the Grand Chamber Judgment of 05.06.2018 in Case C-612/15 Nikolai Kolev, Milko Hristog and Stefan Kostadinov v Nikolai Kolev (hereinafter Kolev Judgment), it was held that art. 6(3) of Directive 2012/13 requires that defendants receive detailed information on the charge even after the indictment has been lodged as a court referral, but before the examination of the merits of the case has begun and the opening of the hearing or even after the opening of the hearing but before the deliberation stage, where the information thus communicated is subject to subsequent amendments, provided that the court takes all necessary measures to ensure that the rights of the defense are respected and that the fairness of the proceedings is guaranteed.

When comparing these requirements in the established case law of the Court of Justice of the European Union to the current system of Romanian criminal procedural law, we note that all the rules governing the criminal procedures at the trial stage do not provide an adequate remedy to ensure respect for the rights arising from the aforementioned conventional rules.

In the absence of express legal provisions, the maintenance of the court referral, together with the order to start to trial, and the issuing of an indictment whose legality flaws, by their very nature, cannot be removed by *direct intervention* by the prosecution (with reference to all the arguments set out above), create the premises for a legal conflict between national and conventional rules.

In the same way, such a situation is an obstacle for the courts to proceed to an objective and impartial reassessment of the charges contained in the court referral, based exclusively on the evidence adduced in compliance with all procedural guarantees of legality and loyalty, with the removal of all evidence and references to it from the procedural documents, which are sanctioned by the judge hearing the case with absolute nullity.

The case law of the Court of Justice of the European Union is still not reflected in criminal procedural law, even despite a recent intervention of the lawmaker in this area.

Thus, with the entry into force of Law No. 201/2023 amending and supplementing Law No. 135/2010 on the Criminal Procedure Code, and amending other normative acts, as it results in paragraph 47

of the law, a new article is added after Article 386 of the Criminal Procedure Code, namely Article 386[1], which reads: 'If, during the course of the trial, the absolute nullity of the preliminary chamber proceedings is established, the court shall rule to quash the act by which the commencement of the trial was ordered and shall establish the limits within which the proceedings shall be resumed, the decision being subject to appeal under Article 425[1]'.

Although this new regulation, given the marginal denomination of the legal text under which it finds its functionality - "*Resumption of the preliminary chamber proceedings*" - could create the appearance of a procedural remedy intended to remove the legality flaws that escaped the preliminary chamber proceedings and which affect the very legality of the court's competence, in reality it limits the exercise of this procedural function only to the cases of absolute nullity exhaustively regulated by Article 281 para (1) of the Criminal Procedure Code, that arise in the course of the preliminary chamber proceedings.

For example, the resumption of the preliminary chamber procedure is ordered, per Article 386[1] of the Criminal Procedure Code, in the event of a breach of the rules on the composition of the court panels, when the preliminary chamber procedure was not conducted before a specialised judge, although the court referral concerned corruption offences which fall within the exclusive purview of specialised panels according to Article 29 para. (1) of Law No. 78/2000.

Therefore, this procedural flaw does not operate as a compensatory mechanism to remedy any irregularities in the court referral that are found after the pre-trial chamber procedure.

Conclusions

The reconfiguration of the normative framework regarding the pre-trial chamber as a reflection of the jurisprudential upheaval at the hands of the Constitutional Court, coupled with the lack of active intervention by the lawmaker to align the declared unconstitutional text of the law with the Constitution, gave rise to procedural difficulties in the application and realisation of the judicial function specific to this procedure.

In view of the arguments expressed in this scientific paper, we consider that a firm intervention of the lawmaker in this matter is called for by the need to implement compensation procedural mechanisms that meet the requirements imposed by both the Constitutional Court and the Court of Justice of the European Union, and which make it possible to remove all irregularities in the court referral, including those which were missed by the preliminary chamber procedure and were found by the court, so that the subject-matter and limits of the trial can be clearly established.

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