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Controversies in Jurisprudence regarding the Establishment of the Object of the Contestation Formulated on the Base of art. 347 of the Criminal Procedure Code

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Abstract

Through this article, we want to analyze a legal issue that has generated different judicial practice regarding the establishment of the object of the challenge formulated on the basis of art. 347 of the Criminal Procedure Code. The legal issue regarding the establishment of the object of the appeal formulated on the basis of art. 347 of the Criminal Procedure Code consists in the interpretation of the mandatory or optional nature of the mention in the appeal statement of both the intermediate conclusion pronounced by the judge of the preliminary chamber based on art. 345 para. 3 of the Criminal Procedure Code, as well as of the final decision pronounced according to art. 346 of the Criminal Procedure Code.

***Keywords**:* preliminary chamber, statement of appeal, object of the appeal, establishment of the object of the appeal, intermediate conclusion of the preliminary chamber, final conclusion of the preliminary chamber.

Introductory considerations

The current criminal procedure code explicitly provided for a new phase of the criminal process, namely that of the preliminary chamber procedure. This procedural phase is located between the criminal investigation phase and the

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trial phase and takes place only in the situation where the notification to the court is carried out by means of an indictment. The purpose of the preliminary chamber consists in the verification by the judge of the preliminary chamber, after ordering the indictment of the accused, of the jurisdiction of the court and of the criminal investigation bodies, of the regularity of the indictment, of the legality and loyalty of the administration of the evidence and the legality execution of procedural and procedural documents by the criminal prosecution bodies.

In relation to the subject of the preliminary chamber procedure, requests and exceptions can be raised by the prosecutor, the parties and the injured person. Also, the pre-trial chamber judge may ex officio invoke exceptions regarding the subject matter of the pre-trial chamber procedure.

For the resolution of requests and exceptions formulated or invoked ex officio, the judge of the preliminary chamber will fix a term in the council chamber with the summoning of the parties, the injured person and the notification of the prosecution unit that drew up the indictment.

If the preliminary chamber judge finds irregularities in the indictment, if he sanctions according to art. 280-282 criminal investigation documents carried out in violation of the law or if it excludes one or more administered evidence, it will pronounce a conclusion by which it will order that within 5 days from its communication, the prosecutor will remedy the irregularities of the notification document and communicate to the judge of the preliminary chamber if he maintains the disposition of referral to court or requests the restitution of the case.

Later, if the judge of the preliminary chamber finds that the indictment is not drawn up according to regulations, that the irregularities were not remedied within the previously mentioned 5-day period and that these irregularities make it impossible to establish the object or limits of the trial, then he will order by another conclusion that the entire case be returned to parquet.

Also, the solution is the same if all the evidence administered during the criminal investigation was excluded or if the prosecutor requests the restitution of the case or if he did not respond that he maintains his disposition to be sent to court within the 5-day period provided by law.

Therefore, we find that in the presented situation, the judge of the preliminary chamber will issue two conclusions, respectively an intermediate

conclusion based on art. 345 para. 3 of the Criminal Procedure Code, and a final conclusion pronounced on the basis of art. 346 of the Criminal Procedure Code.

After the communication of the final conclusion pronounced on the basis of art. 346 of the Criminal Procedure Code, the prosecutor, the parties and the injured person can file an appeal within 3 days. This appeal may also concern the way of resolving requests and exceptions.

The problem that arose in the judicial practice of the courts was whether, when an appeal is declared, the holders of the right of appeal should or should not make the express statement that they are declaring an appeal both against the final decision of the preliminary chamber and against the intermediate decision or is it is enough to declare an appeal, being considered as being directed against both previously mentioned conclusions.

The legal issue is very important as it has in mind the establishment of the framework of the judgment regarding the eventual analysis or not by the judges of the preliminary chamber notified with the settlement of the appeal of the legality and the validity of the interim conclusion.

Incidental legislation

Law no. 135 of July 1, 2010 regarding the Criminal Procedure Code [Law no. 135 of July 1, 2010 regarding the Criminal Procedure Code, with subsequent amendments and additions, published in the Official Gazette of Romania, Part I, no. 486 of July 15, 2010]

ART. 342. The object of the procedure in the preliminary chamber. The object of the procedure of the preliminary chamber is the verification, after the referral to court, of the competence and legality of the referral to the court, as well as the verification of the legality of the administration of evidence and the execution of documents by the criminal prosecution bodies.

ART. 345. Procedure in the preliminary chamber

(1) At the deadline established according to art. 344 para. (4), the judge of the preliminary chamber solves the requests and exceptions formulated or the exceptions raised ex officio, in the council chamber, based on the works and material from the criminal investigation file and any new documents presented*), listening to the conclusions of the parties and the person injured, if present, as well as the prosecutor's; (2) The judge of the preliminary chamber pronounces in the council chamber, through a conclusion, which is immediately communicated to the prosecutor, the parties and the injured person; (3) If the judge of the

preliminary chamber finds irregularities in the notification act or if he sanctions according to art. 280-282 the acts of criminal investigation carried out in violation of the law or if it excludes one or more administered evidence, within 5 days from the communication of the conclusion, the prosecutor fixes the irregularities of the referral act and informs the judge of the preliminary chamber if he maintains the disposition of sending to court or requests the restitution of the case.

Art. 346. Solutions

(1) If requests and exceptions were not made within the terms provided for in art. 344 para. (2) and (3) and did not ex officio raise exceptions, upon the expiration of these terms, the judge of the preliminary chamber ascertains the legality of the notification to the court, the administration of the evidence and the execution of the criminal investigation documents and orders the trial to begin. The judge of the preliminary chamber pronounces in the council chamber, without summoning the parties and the injured person and without the participation of the prosecutor, by means of a conclusion, which is immediately communicated to them.

(2) If he rejects the requests and exceptions invoked or raised ex officio, under the conditions of art. 345 para. (1) and (2), by the same conclusion, the judge of the preliminary chamber ascertains the legality of the referral to the court, the administration of the evidence and the execution of the criminal investigation documents and orders the trial to begin.

(3) The preliminary chamber judge returns the case to the prosecutor's office if:

a) the indictment is drawn up irregularly, and the irregularity was not remedied by the prosecutor within the term stipulated in art. 345 para. (3), if the irregularity leads to the impossibility of establishing the object or limits of the judgment; b) excluded all evidence administered during the criminal investigation; c) the prosecutor requests the restitution of the case, under the conditions of art. 345 para. (3), or does not respond within the term stipulated by the same provisions.

(4) In all other cases in which he found irregularities in the notification act, he excluded one or more administered evidence or sanctioned according to art. 280-282 criminal investigation documents carried out in violation of the law, the preliminary chamber judge orders the start of the trial.

(41) In the cases provided for in para. (3) lit. a) and c) and para. (4), the judge of the preliminary chamber pronounces by conclusion, in the council chamber, with the summons of the parties and the injured person and with the participation of the prosecutor. The conclusion is communicated immediately to the prosecutor, the parties and the injured person.

(42) In the case provided for in para. (3) lit. b), the return of the case to the prosecutor is ordered by the conclusion provided for in art. 345 para. (2). (5) Excluded evidence cannot be taken into account in the substantive judgment of the case; (6) If he considers that the referred court is not competent, the preliminary chamber judge proceeds according to art. 50 and 51, which apply accordingly; (7) The preliminary chamber judge who ordered the start of the trial exercises the function of trial in the case.

Art. 347. Appeal

(1) Within 3 days from the communication of the conclusions provided for in art. 346 para. (1)-(42), the prosecutor, the parties and the injured person can appeal. The appeal can also concern the way of solving requests and exceptions.

(2) The appeal is judged by the judge of the preliminary chamber from the court hierarchically superior to the one referred to. When the court referred to is the High Court of Cassation and Justice, the appeal is judged by the competent panel, according to the law.

(3) The appeal is resolved in the council chamber, with the summoning of the parties and the injured person and with the participation of the prosecutor. The provisions of art. 345 and 346 apply accordingly.

(4) In the resolution of the appeal, no other requests or exceptions may be invoked or raised ex officio than those invoked or raised ex officio before the judge of the preliminary chamber in the procedure carried out before the court notified by indictment, except for cases of absolute nullity.

Analysis of the problem and opinion of the authors

The procedure of the preliminary chamber is structured, as a rule, in three stages, namely: the stage of preliminary measures (art. 344 of the Criminal Procedure Code), the stage of resolving the requests and invoked exceptions (art. 345 of the Criminal Procedure Code) and the stage of resolving the object of the procedure of the preliminary chamber (art. 346 of the Criminal Procedure Code).

In the first stage, the case is distributed randomly, the legal assistance of the parties and the injured person is ensured, if applicable, the notification is communicated, the term is established in which they can make requests or invoke exceptions.

In the second stage, the settlement of the requests and exceptions formulated or invoked ex officio takes place in a non-public meeting, with adversarial and oral procedure, with the judge of the preliminary chamber pronouncing an intermediate conclusion that is communicated to the prosecutor, the parties and the injured person.

In the situation where the judge of the preliminary chamber finds some irregularities in the indictment, sanctions the criminal investigation documents or excludes some evidence, this interim conclusion is communicated to the prosecutor for their remedy or to decide whether to maintain the provision of referral to court or whether to request the return of the file. This interim conclusion cannot be challenged with a separate appeal, as the legislator does not explicitly provide for an appeal that can be directed against this decision.

In the third stage, after the notification of the interim conclusion, the judge of the preliminary chamber proceeds to resolve the object of the preliminary chamber, pronouncing a new, final conclusion, by which he can order the start of the trial, return the case to the prosecutor's office or decline the jurisdiction to resolve the case.

The provisions of art. 347 para. 1 of the Criminal Procedure Code provide that both the final decision of the preliminary chamber (ordering the start of the trial or the return of the case to the prosecutor's office) and the intermediate solution (ordering on the requests and exceptions formulated or invoked by the parties, the injured person or raised ex officio in the case). This conclusion can be deduced from the final sentence of the previously mentioned legal text, which provides the following: “The appeal may also concern the way of resolving requests and exceptions”.

The interpretation that both conclusions pronounced by the judge of the preliminary chamber can be challenged by way of appeal is unanimously accepted both in the doctrine and in the judicial practice.

In the doctrine, it was shown that the object of the appeal can concern both the way of solving the requests and exceptions formulated by the parties or the injured person or invoked ex officio by the judge in the procedure provided by art. 345 of the Criminal Procedure Code, as well as the decision to start the

trial ordered in the procedure provided by art. 346 of the Criminal Procedure Code. It has also been shown that this appeal can concern both objects, or only one of them. [Udroiu Mihail, Synthesis of criminal procedure. The special part, Volume I, Second Edition, C. H. Beck Publishing House, Bucharest, 2021, p. 310]

During the professional meeting of the judges, the participants agreed with the opinion of I.N.M. according to which the criminal procedural provisions provide that the parties can contest both the final (disinvestment) and the intermediate conclusion, regarding the way of resolving claims and exceptions. [Minutes of the Meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and the Bucharest Courts of Appeal, February 27-28, 2023, p. 81, available at https://inm-lex.ro/wp-content/uploads/2023/03/Minutes-meeting-presidents-criminal-departments-Bucuresti-February-2023.pdf (inm-lex.ro)]

Also, during the professional meeting of the prosecutors, the participants agreed to the same opinion of I.N.M. according to which the holders of the right of appeal can contest both the decisions of the preliminary chamber (intermediate and final) within the 3-day period provided by law, since the legislator did not foresee the possibility of formulating a separate way of appeal against the intermediate decision. [Minutes of the meeting of the chief prosecutors of the section of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism and the prosecutor's offices attached to the Bucharest Courts of Appeal, April 3-4, 2023, p. 80, available at https://inm-lex.ro/wp-content/uploads/2023/05,Minuta-intalnire-procorori-3-4-aprilie-2023-Bucuresti.pdf (inm-lex.ro)]

In the judicial practice of the High Court of Cassation and Justice, the following were observed: “Only the conclusions by which the judge resolved the case in the preliminary chamber and pronounced one of the solutions provided in art. 346 para. 1-42 of the Code of Criminal Procedure, the other conclusions not being subject to appeal separately, but only together with the conclusion pronounced under art. 346 para. 1-44 of the Criminal Procedure Code, by which the preliminary chamber procedure was resolved”. [High Court of Cassation and Justice, Criminal Section, Decision no. 742 of September 8, 2021, www.scj.ro]

The same interpretation is confirmed by the jurisprudence of the Constitutional Court, which ruled that “through the appeal provided by art. 347

of the Criminal Procedure Code, legality control is ensured regarding a series of final conclusions pronounced in the preliminary chamber procedure, as a guarantee of compliance with the requirements of the principle of legality of the criminal process enshrined in art. 2 of the Criminal Procedure Code, which, in turn, is based on the provisions of art. 1 paragraph (5) of the Constitution regarding the principle of legality. The purpose of the appeal in the preliminary chamber procedure is to correct the errors of law committed by the preliminary chamber judge when verifying, after being sent to court, the legality of the referral to the court, as well as the legality of the administration of evidence and the execution of documents by the criminal prosecution bodies , errors that must be corrected within the same procedural phase, considering the reasons for which the preliminary chamber procedure was instituted." [The Constitutional Court of Romania, Decision no. 18 of January 17, 2017, paragraph 19, published in the Official Gazette of Romania, no. 312 of May 2, 2017]

However, regarding the establishment of the object of the appeal formulated on the basis of art. 347 of the Criminal Procedure Code, different opinions were expressed.

Thus, in the doctrine, the opinion was expressed according to which, in all cases, the prosecutor, the injured person or the parties must explicitly indicate, in the act declaring the appeal, which decision is being appealed. If it is stated in the content of the appeal that only the final decision is being challenged, the one pronounced on the basis of art. 346 of the Criminal Procedure Code and not the intermediate one provided by art. 345 of the Criminal Procedure Code, then this latter conclusion becomes definitive by not contesting, and criticisms regarding the way of resolving requests and exceptions can no longer be formulated in the appeal. [Udroiu Mihail, Synthesis of criminal procedure. The special part, Volume I, Second Edition, C. H. Beck Publishing House, Bucharest, 2021, p. 310]

In the recent professional meetings of judges and prosecutors, previously specified, the opinion agreed by I.N.M. according to which, even if the prosecutor, the parties or the injured person did not file an appeal within the 3-day period provided by law against the interim conclusion, the appeal directed against the final preliminary chamber conclusion is considered to be also filed against the intermediate conclusion.

In the judicial practice of the supreme court, it was noted that "in relation to the provisions of art. 347 para. 1 of the Criminal Procedure Code – according to which, within 3 days from the communication of the conclusions provided for

in art. 346 para. 1-42, the prosecutor, the parties and the injured person can file an appeal, and the appeal can also concern the way of resolving requests and exceptions-, compliance with the 3-day deadline regarding the final conclusion pronounced by the judge of the preliminary chamber based on art. 346 para. 3 letter a) of the Criminal Procedure Code allows the panel of 2 judges of the preliminary chamber vested in the appeal to also examine the intermediate conclusion by which the requests and exceptions were resolved, even if the intermediate conclusion was not distinctly indicated in the appeal, in the term provided for in art. 347 para. 1 of the Criminal Procedure Code, but only in the grounds of appeal". [High Court of Cassation and Justice, Criminal Section, Decision no. 779 of November 20, 2020, www.scj.ro]

The opinion of the authors of this paper is that the holder of the right of appeal must explicitly mention that he is declaring an appeal both against the final decision of the preliminary chamber, respectively against the one pronounced on the basis of art. 346 of the Criminal Procedure Code, as well as against the intermediate conclusion, respectively the one pronounced on the basis of art. 345 of the Criminal Procedure Code.

We appreciate that the legislator did not explicitly provide in the case of the ordinary way of appealing the appeal that the declaration of the appeal against the final conclusion of the preliminary chamber is considered to be made also against the intermediate conclusion of the preliminary chamber by which it disposes of the requests and exceptions formulated or invoked by the parties, person injured or removed from the office in question.

We believe that the legislator should have explicitly provided for this, since when he wanted to do it, as is the case with the appeal, nothing prevented him. Thus, according to art. 408 of the Code of Criminal Procedure, the appeal declared against the sentence is also considered against the conclusions.

Or, if in the case of a criminal sentence, the legislator clearly explained that the declaration of the right of appeal is considered to be made also against the previously pronounced conclusions, even more so, we appreciate that in the case of a conclusion it should have expressly stated whether have wanted this.

If we consider that the declaration of the appeal against the final decision of the preliminary chamber is considered to be made also against the intermediate decision of the preliminary chamber, then we appreciate that, by adding to the law, procedural rules are created that do not comply with the provisions that regulate the matter of appeals.

Moreover, from the analysis of the provisions of art. 4251 of the Criminal Procedure Code that regulates the way of appeal, it does not follow that the provisions of art. 408 para. 3 of the Criminal Procedure Code is also applied appropriately in the case of appeal, the legislator clearly indicating that only the provisions of art. 411 para. 1, art. 415, art. 416 and art. 418 of the Criminal Procedure Code applies accordingly. Therefore, if the legislator had wanted the provisions of art. 408 para. 3 of the Code of Criminal Procedure to be properly applied, nothing would have prevented him from doing so.

In support of this interpretation, we consider that the considerations of the Constitutional Court are relevant in the sense that "in resolving the challenge formulated, pursuant to art. 347 para. (1) of the Code of Criminal Procedure, analyzing the legality and validity of the solutions ordered in the background of the preliminary chamber and – to the extent that it is disputed – the way of solving the requests and exceptions invoked by the parties and the injured person, it is obvious that the judge at the court hierarchically superior will take into account all the criticisms invoked by the appellants regarding the concrete conduct of the preliminary chamber procedure in the first instance, including the aspects related to the administrative measures taken by the preliminary chamber judge within this procedure, the way in which the preliminary chamber judge solved any procedural issue, other than those invoked by way of requests or exceptions formulated by the parties and the injured person, since these aspects are the basis of the legality of the solutions provided by the conclusions provided for in art. 345 and 346 of the Criminal Procedure Code." [The Constitutional Court of Romania, Decision no. 376 of June 18, 2020, paragraph 28, published in the Official Gazette of Romania, no. 914 of October 7, 2020]

Therefore, the Constitutional Court retained the possibility of the panel of two judges of the preliminary chamber from the hierarchically superior court to analyze the way of solving the requests and exceptions invoked in the preliminary chamber procedure, but only in the situation where this is contested, not being able to extend from office the appeal of the appeal to other decisions, such as the case of the intermediate conclusion of the preliminary chamber.

It is also relevant that the participants in the professional meeting of the prosecutors, although they agreed with the point of view of the I.N.M., finally recommended to the prosecution units, in order to manage the appeals, the need to mention in the act through which is declared to be an appeal both the resolution of the preliminary chamber and the resolution of the exceptions,

when they understand to formulate criticisms with regard to the latter as well. This conclusion actually confirms the continued existence of different practices at the level of national courts in the sense that the point of view expressed and agreed at the meeting is not, however, embraced by some magistrates. [Minutes of the meeting of the chief prosecutors of the section of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism and the prosecutor's offices attached to the Bucharest Courts of Appeal, April 3-4, 2023, p. 81, available at https://inm-lex.ro/wp-content/uploads/2023/05,Minuta-intalnire-procorori-3-4-aprilie-2023-Bucuresti.pdf (inm-lex.ro)]

Conclusions

Finally, we consider that it is mandatory for the holder of the right of appeal to explicitly state in the statement of appeal that he is declaring an appeal both against the conclusion by which the final preliminary chamber solution was pronounced, as well as against the conclusion by which the intermediate solution was pronounced on the requests and exceptions formulated or invoked by the parties, injured person or ex officio in question.

In order to remove the legal controversy and ensure a unified practice at the national level, we consider, by law ferenda, that it is necessary to supplement the Criminal Procedure Code by mentioning by the legislator that the statement of appeal against the final conclusion of the preliminary chamber, respectively against the one pronounced on the basis of art. 346 of the Criminal Procedure Code, it is considered to be made also against the intermediate conclusion, respectively the one pronounced on the basis of art. 345 of the Criminal Procedure Code or by expressly mentioning that the provisions of art. 408 para. 3 of the Criminal Procedure Code is also applied accordingly in the case of appeal.

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