Jurisdiction in Criminal Trials in Romania

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Abstract

The present study aims to provide an introduction into the system of criminal courts and their jurisdiction in Romania. The approach is an attempt to accommodate foreign public audience with the peculiarities of the national criminal justice system.

Keywords: *function, jurisdiction, courts, judges, criminal trial*

I. Introduction

In accordance with Article 3 para. (1) of the Criminal Procedure Code (`CPC`) "the following judicial functions shall be exercised in criminal proceedings:

a) the function of criminal prosecution;

b) the function of ruling on the fundamental rights and freedoms of the person during the criminal proceedings;

c) the function of verifying the legality of the referral or non-referral of the case before a court;

(d) the function of trial".

The function of trial is the most important one, belonging to the magistrate-judge called upon to rule a decision on the merits of the criminal process. Article 3 para. (7) CPC states that: "The trial shall be conducted by the court in legally constituted panels". This text is the expression of the constitutional rule in Article 126 para. (1), according to which "justice shall be administered by the High Court of Cassation and Justice and by the other courts established by law", i.e. first instance courts (*judecătorii*), tribunals, courts of appeal, military courts [see also Article 2 para. (2) of the Law no. 304/2022 on judicial organisation[1].

The separation of powers within the judicial system is based, as seen below, on a material (seriousness of the offence) or personal (status of the offender) criterion. These criteria structure the judicial system vertically, namely in courts of different degrees of jurisdiction.

II. Functional jurisdiction of the Romanian Courts

1. Functions (functional jurisdiction) of the first instance court

This court lies at the bottom of the pyramid of the judicial system and has two functions (Article 35 CPC):

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[1] O. J. no. 1104 of 16 November 2022.

- it judges at first instance;
- it rules on other cases specifically provided for by law.

The first function, to judge at first instance, is shared with all the other courts in the system. As will be shown below, both tribunals and courts of appeal, as well as the High Court of Cassation and Justice, have first instance jurisdiction. In order to delimit *ratione materiae* between the courts, additional (jurisdiction) criteria have been introduced. Thus, from a substantive point of view, the first instance court (*judecătorie*) tries all offences regardless of their nature and seriousness, except those ascribed by law to the other courts. Although the law does not lay down criteria *ratione personae*, this court tries any person, irrespective of his or her status, except in situations where a particular quality of the person is required by law to give jurisdiction to another court. In brief, the jurisdiction of this court is determined by a general provision, which gives the court a full jurisdiction with regard to first instance proceedings. This means that if an offence is provided for in a special law, without indicating which court has jurisdiction, this court will have jurisdiction.

The second function, that of ruling upon a case, must be distinguished from the judgment itself. To rule upon a case means, in legal semantics, something other than to judge. Essentially, to adjudicate concerns the merits of the case, i.e. the resolution of the criminal situation at issue. To rule on a case means to pronounce a decision in matters that go beyond the merits of the case, such as those relating to preventive measures, enforcement of a criminal sentence, rehabilitation, release on probation etc.

2. Functions (functional jurisdiction) of the Tribunal

This court, as a court of second instance, has three functions (Article 36 CPC):
- it tries at first instance;
- it exercises the prerogatives of a court of review on matters not related to the merits of the case;
- it decides other cases specifically provided for by law.

The power to judge at first instance is shared *ratione materiae* with the first instance court (*judecătorie*), according to the seriousness of the offence. Thus, in principle, less serious offences fall within the jurisdiction of the first instance court and more serious offences fall within the jurisdiction of the tribunal. The criterion is not a strict one, but is shaped by the current demands of criminal policy. Thus, the following fall within the jurisdiction of the tribunal:

(a) offences provided for by the Criminal Code in Article 188 to 191 (intentional offenses against life), Article 209 to 211 (slavery, trafficking in persons and minors), Article 254 (aggravated destruction), Article 256^1 (crimes against property with extremely serious consequences), Article 263 (trafficking in migrants), Article 282 (torture), Article 289 to 294 (corruption offences), Article 303 to 304 (disclosure of state and official secrets), Article 306 to 307 (illegal obtaining and misappropriation of funds), Article 309 (corruption and service offences with particularly serious consequences), Article 345 to 346 (non-compliance with the regime of nuclear, radioactive and explosive materials), Article 354 (transmission of AIDS), Article 360 to 366 (offences against the security and integrity of information systems and data) and Article 367 (establishing an organised criminal group);

offences committed with malice aforethought resulting in the death of a person (assault occasioning death, rape, robbery, deprivation of liberty followed by the death of the victim etc.);

(b) offences for which the D.I.I.C.O.T.[2] or the D.N.A.[3] has conducted the criminal investigation, if they are not assigned by law to other higher courts;

(c) money laundering offences and tax evasion offences referred to in Article 9 of Law no. 241/2005 on preventing and combating tax evasion[4];

(d) offences in respect of which the criminal investigation has been carried out by the European Public Prosecutor's Office under Council Regulation 2017/1939/EU of 12 October 2017 implementing a form of enhanced cooperation in relation to the establishment of the European Public Prosecutor's Office (EPPO);

(e) other offences ascribed by law within its jurisdiction[5].

As regards jurisdiction *ratione personae*, any person, irrespective of his or her capacity, participating in the commission of an offence for which the court has express jurisdiction shall be tried by that court, except in cases where by law a particular capacity of the person necessarily entails the jurisdiction of a higher court.

The Tribunal also concentrates limited prerogatives of control. Although at present, due to the change in the procedural architecture, the courts of appeal have general powers of judicial review on the merits, tribunals have also retained such a prerogative. However, this prerogative does not relate to the merits of the case, but to the settlement of conflicts of jurisdiction between first instance courts within its jurisdiction, where the tribunal is a common superior court, and to the settlement of appeals against decisions handed down by the first instance courts in cases provided for by law (pre-trial detention, rehabilitation, release on probation etc.).

Finally, the tribunal also rules on other cases specifically provided for by law, e.g. the abstention statement of the judge of the first instance court when no judge can be appointed within the court to decide on this statement [Article 68 para. (8) CPP].

3. Functions (functional jurisdiction) of the Court of Appeal

The Court of Appeal, as a court of the third degree, has four functions (Article 38 CPC):

- it judges at first instance;
- it hears appeals;
- it exercises the prerogatives of a court of review on matters not related to the merits of the case;
- it rules on other cases specifically provided for by law.

The power to judge at first instance is shared *ratione materiae* with the first instance court and the tribunal, according to the seriousness of the offence. The most serious offences in the criminal legislation, in terms of the applicable criminal sanctions, fall within the jurisdiction of the courts of appeal, namely the offences provided for by the Criminal Code in Article 394 to 397 and Article 399 to 412 (offences against national security, with the exception of the offence of high treason), those provided for by

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[2] Literally, the Directorate for Investigation of Organised Crime and Terrorism, a specialised subsidiary of the National Prosecution Service.

[3] Literally, the National Directorate for Investigation of Corruption Offences, a specialised subsidiary of the National Prosecution Service.

[4] O. J. no. 672 of 27 July 2005.

[5] The offences of outrage (Article 257 of the Criminal Code) and judicial outrage (Article 279 of the Criminal Code) do not fall within the express jurisdiction of the tribunal, even though they include murder in their constitutive content. For discussion, see F. Ciopec, *Observații privind un caz de competență a tribunalului în materie penală* [Observations on a particular case of criminal jurisdiction of the tribunal], in Annals of the West University of Timișoara, Law series no. 2/2014, pp. 21-26.

Article 438 to 445 (offences of genocide, against humanity and war), to which are added the offences concerning the national security of Romania, provided for in special laws (e.g. Law no. 51/1991 on the national security of Romania[6], republished).

As regards jurisdiction *ratione personae*, the courts of appeal have special jurisdiction for the following offences:

- offences committed by judges of the first instance courts and tribunals and by prosecutors of the Public Prosecutor's Offices attached to those courts;
- offences committed by lawyers, notaries public, bailiffs, financial controllers of the Court of Auditors and external public auditors;
- offences committed by heads of religious communities organised under the law and other members of the High Clergy who are at least of the rank of archpriest or equivalent;
- offences committed by assistant magistrates of the High Court of Cassation and Justice;
- offences committed by members of the Court of Auditors, the President of the Legislative Council, the Ombudsman, the Deputy Ombudsman and the Police Superintendents.

Courts of appeal are courts with general jurisdiction to hear appeals against first instance court judgments and tribunal judgments. The CPC has concentrated judicial review (appeal – as an ordinary remedy) in the jurisdiction of the courts of appeal. Previously, the tribunals used to exercise this prerogative, rendering meaningless the expression "courts of appeal", established as appellate courts since 1993. After 2014, criminal litigation before the courts of appeal has increased substantially since courts of appeal started to act as institutions capable of ensuring a unified judicial practice in the territorial legal area over which they exercise jurisdiction.

Courts of appeal also exercise, in a similar way to tribunals, the functions of supervisory courts in matters not related to the substance of the criminal dispute, i.e. they settle conflicts of jurisdiction between courts within their jurisdiction, when they are joint superior courts, as well as appeals against tribunal decisions in cases provided for by law (pre-trial detention etc.).

Finally, the courts of appeal also have special, but not exclusive, jurisdiction to address applications for the transfer of a case from one court to another, in situations established by law.

4. Functions (functional competence) of the High Court of Cassation and Justice

The High Court of Cassation and Justice sits at the top of the judicial pyramid, exercising supreme control over criminal law enforcement and criminal procedure in Romania. Its powers are as follows (Article 40 CPC):

- it judges at first instance;
- it rules on appeal;
- it exercises exclusive prerogatives in the administration of justice;
- it exercises the prerogatives of a court of review on matters not related to the merits of the case;
- it decides other cases specifically provided for by law.

The jurisdiction of the Supreme Court to judge at first instance is limited *ratione materiae* to only one offence, that of high treason (Article 398 of the Criminal Code), committed by the President of Romania or by a member of the Supreme Council of

[6] O. J. no. 190 of 18 March 2014.

National Defence. Law no. 535/2004 on preventing and combating terrorism also brought within the jurisdiction of the Supreme Court the prosecution of terrorist offences (Article 40 of the special law).

Ratione personae, the supreme court tries at first instance offences, regardless of their nature, committed by Romanian senators, deputies and members of the European Parliament, members of the Government, judges of the Constitutional Court, members of the Superior Council of Magistracy, judges of the High Court of Cassation and Justice and prosecutors of the Public Prosecutor's Office attached to High Court of Cassation and Justice, as well as judges of the Courts of Appeal and prosecutors of the Public Prosecutor's Offices attached to Courts of Appeal.

The High Court of Cassation and Justice rules on appeals against criminal judgments handed down at first instance by the courts of appeal, the Military Court of Appeal and the Criminal Division of the Supreme Court, sharing jurisdiction to exercise judicial review on the merits with the courts of appeal.

The High Court of Cassation and Justice has exclusive jurisdiction to hear appeals in cassation against final criminal judgments, appeals in the interest of the law (sitting in a panel of 21 judges), as well as appeals against non-final judgments or judicial acts of any kind which cannot be challenged in any other way and where the course of the proceedings have been interrupted before the courts of appeal.

The High Court of Cassation and Justice, retains exclusive jurisdiction over applications for a preliminary ruling on questions of law (sitting in a panel of 9 judges), applications for a renewal of judgments of the High Court of Cassation and Justice (in the Joint Sections) and may refer to the Constitutional Court for review of the constitutionality of laws before their promulgation (Article 27 of Law no. 304/2022 and Article 11(a) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court[7], republished).

All these prerogatives are related to the unique role of the Supreme Court within the national judicial system: a court called upon to ensure the unified interpretation of criminal law and criminal procedure. This objective is achieved both *inter partes*, as a court of cassation, by hearing appeals aimed at the annulment of final judgments handed down by the courts of appeal, and *erga omnes*, as a court of justice, by deciding appeals in the interest of the law and applications for preliminary rulings on issues of criminal law and criminal procedure.

The High Court of Cassation and Justice resolves conflicts of jurisdiction in cases where it is the joint superior court of the conflicting courts, requests for transfer of a case from one court to another (which are not within the jurisdiction of the courts of appeal), as well as appeals lodged against decisions handed down by the courts of appeal in cases provided for by law (pre-trial detention etc.).

In brief, as to its name, the Supreme Court is a High Court because it has exclusive jurisdiction to try offences committed by state's officials and it is a court of cassation because it has exclusive jurisdiction to hear appeals in cassation, while it is a court of justice because it delivers criminal justice as a court of last resort.

5. Functions (functional jurisdiction) of the military courts

The military court system is a parallel judicial system to that of the civilian (criminal) courts. In principle, this system is organised on the basis of personal jurisdiction

[7] O. J. no. 807 of 3 December 2010.

determined by the status of the participants in a crime, i.e. the military members of the national armed forces and other categories of persons governed by a militarised regime (e.g. policemen, financial guard commissioners, members of the intelligence services, military firemen etc.).

Recent years' legislative developments have considerably reduced the persons falling under the jurisdiction of military courts. Firstly, Law no. 360/2002 on the status of police officers[8] demilitarised the police force, making them civil servants. The commissioners of the Financial Guard also became civil servants, as a result of O.U.G. no. 91/2003 on the organisation of the Financial Guard[9]. Then, as of 1 January 2007, in Romania, during peacetime, the execution of compulsory military service was suspended and the military service was switched to voluntary service (Article 12 of Law no. 395/2005[10]).

Criminal litigations involving military personnel have thus decreased considerably, judging by the fact that the workload of a judge in ordinary courts was more than 15 times that of a judge in military courts between 2012 and 2015[11]. The abolition of military courts has thus been questioned, being argued that their reduced workload involves unnecessary budgetary resources, as both financial and human resources could be used in the ordinary courts, which are very busy. In addition to the argument of reduced activity, other arguments are added. Military judges, as the Romanian judicial system is constructed, do not seem to meet the guarantees of independence and impartiality. Military careers, like the budget of military courts, belong to the military system, not the justice system.

Moreover, the practice of the European Court of Human Rights has also raised questions about the independence of military judges where such courts exist[12]. Last but not least, in the European Union, many Member States do not have military courts, but specialised panels in ordinary courts.

However, the new criminal procedure legislation retained the military court system, still reorganised it. Thus, the Territorial Military Court, a court of equivalent rank to the civil tribunal, was abolished and the military courts of Bucharest, Cluj, Iaşi and Timişoara became equivalent in rank to the first instance courts (Article 20 of Law no. 255/2013 for the implementation of Law no. 135/2010 on Criminal Procedure Code[13]). After the reform, a military court will judge at first instance all offences committed by military personnel up to and including the rank of colonel, with the exception of those given by law to the jurisdiction of other courts (Article 37 CPC).

The Military Court of Appeal will try at first instance offences concerning the national security of Romania provided for in the Criminal Code and in special laws committed by military personnel, offences committed by military court judges and military prosecutors of the military prosecutor's offices, as well as offences committed by generals, marshals and admirals. As an appellate court, it will hear appeals against criminal decisions rendered by the military court (Article 39 CPC).

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[8] O. J. no. 440 of 24 June 2002.

[9] O. J. no. 712 of 13 October 2003. The Act was approved by Law no. 132/2004 (O. J. no. 372 of 28 April 2004).

[10] Law no. 395/2005 on peacetime suspension of compulsory military service and transition to voluntary military service (O. J. no. 1155 of 20 December 2005).

[11] (*http://www.evz.ro/soc-csm-propune-desfiintarea-instantelor-militare.html*) posted on 19 June 2016.

[12] E.Ct.H.R., case-law *Maszni vs Romania*, decision of 21 September 2006, para. 56, 59 (*www.hudoc.echr.coe.int*).

[13] O. J. no. 515 of 14 August 2013.

6. Territorial jurisdiction of the courts

Another criterion used to separate courts' jurisdiction is the territorial criterion, which distinguishes courts of the same level horizontally. In this area, there are distinct provisions for offences committed on national territory and abroad respectively.

In the first case, jurisdiction according to territory is determined, in order, under the Article 41 CPC:

(a) by the place where the offence was committed (the place where all or part of the criminal activity took place or where its consequences occurred);

(b) by the place where the suspect or defendant was caught;

(c) by the place of residence of the suspect or accused natural person or, where applicable, the place of business of the suspect or accused legal person, at the time when the offence was committed;

(d) by the place of residence or, where appropriate, the place of business of the damaged person.

Where an offence has been committed in the jurisdiction of more than one court, any one of them has jurisdiction to try it. Where two or more courts are referred to simultaneously, jurisdiction shall lie with the court established in the order of priority indicated above. Where none of the places indicated is known or where two or more courts are referred in succession, jurisdiction shall lie with the court first seized.

An offence committed on a Romanian-registered ship shall be subject to the jurisdiction of the court where is located the first Romanian port in which the ship anchors, unless otherwise provided by law. An offence committed on a Romanian-registered aircraft shall fall within the jurisdiction of the court where is located the first landing place on Romanian territory. If the ship does not anchor in a Romanian port or if the aircraft does not land on Romanian territory and jurisdiction cannot be determined on the basis of the order of priority established under Article 41 CPC, jurisdiction shall lie with the court first seized.

For offences committed abroad, where Romanian law is applicable by virtue of the principles of personality, reality or universality (Article 9 to 11 of the Criminal Code), jurisdiction is determined according to the rules of Article 42 CPC:

- offences shall be tried by the courts where the residence[14] of the defendant (natural person) is located or, as the case may be, the place of business of the defendant (legal person) is located;

- if the defendant does not live or, as the case may be, does not have his or her place of business in Romania, and the offence falls within the jurisdiction of the first instance court, it shall be tried by the First Instance Court of Sector 2 Bucharest (special jurisdiction) and by the court having jurisdiction in the Municipality of Bucharest according to the seriousness of the offence or according to the status of the person (i.e. the Bucharest Tribunal and the Bucharest Court of Appeal), unless otherwise provided by law.

By Law no. 6/2021 on measures enforcing Council Regulation 2017/1939/EU of 12 October 2017 implementing a form of enhanced cooperation in relation to the establishment of the European Public Prosecutor's Office (EPPO)[15], it was established

[14] Article 42 para. (1) CPC also refers to the suspect's home. This is a legislative oversight as long as the suspect cannot be tried before the court, and therefore cannot determine the court's jurisdiction.

[15] O. J. no. 167 of 18 February 2021.

that in the case of offences for which prosecution has been carried out by the European Public Prosecutor's Office under the EPPO Regulation, territorial jurisdiction is vested to:

- Bucharest, Cluj, Iaşi and Timiş tribunals – as regards first instance proceedings which are not given by law to the jurisdiction of other courts according to the status of the person;
- the courts of appeal of Bucharest, Cluj, Iaşi, Timişoara – as regards the hearing of appeals against criminal judgments rendered at first instance by the tribunals referred to in the above point, as well as the hearing at first instance where jurisdiction according to the status of the person is conferred to the courts of appeal;
- the High Court of Cassation and Justice – as regards trials at first instance and appeals where its jurisdiction is based on the status of the person.

7. Functions (functional jurisdiction) of the Judge of Rights and Liberties

Article 3 para. (5) CPC stipulates that the acts and measures in criminal proceedings which restrict the fundamental rights and liberties of the person shall be ordered by the judge designated for this purpose, except in the cases provided for by law. This judge, called the Judge of Rights and Liberties (JRL), is a new player in Romanian criminal procedure. His role is designed to give effect to Article 1 para. (2) CPC and Article 8 CPC, according to which: "the rules of criminal procedure aim to ensure the efficient exercise of the powers of judicial bodies while guaranteeing the rights of the parties and other participants in the criminal process, so that the provisions of the Constitution, the founding treaties of the European Union, the other European Union regulations on criminal procedure and the covenants and treaties on fundamental human rights to which Romania is a party are respected" and, respectively, "the judicial bodies are obliged to conduct the criminal prosecution and trial with respect for procedural guarantees and the rights of the parties and the subjects of the proceedings (...)".

The criminal process is the theatre of sometimes dramatic confrontations between the public interest, which is concerned with the timely and complete establishment of facts and the punishment of persons who have committed offences, and the private interest, which is concerned with ensuring an effective defence able to remove or at least mitigate the charges. In this respect, the criminal trial represents a legal restriction of fundamental rights and freedoms, equivalent to a genuine hardship for them [Article 53 para. (1) of the Constitution]. The balance between these two equally important objectives in the process must be ensured from the outset of the criminal proceedings, namely the investigation stage. The public prosecutor, who is almost absolutely sovereign at this stage, does not enjoy the guarantees of independence required for being appointed as a magistrate within the meaning of the case-law of the European Court of Human Rights[16].

It was thus necessary to introduce a judge in the investigation phase, with the role of dealing with all requests, proposals, complaints, appeals or any other referrals concerning:

(a) preventive measures;
(b) precautionary measures;
(c) provisional security measures;

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[16] E.Ct.H.R., case-law *Pantea vs Romania*, decision of 3 June 2003, para. 237-238 (*www.hudoc.echr.coe.int*); case-law *Vasilescu vs Romania*, decision of 22 May 1998, para. 40-41 (*www.hudoc.echr.coe.int*).

d) acts of the public prosecutor, in the cases provided for by law;

e) the authorisation of searches, the use of special surveillance or investigation methods and techniques or other evidentiary procedures in accordance with the law;

f) the procedure of early hearing;

g) other situations expressly provided for by law (Article 53 CPC).

The JRL is not an investigating judge, in the sense that he does not conduct the criminal investigation, which remains the exclusive competence of the judicial police and the prosecutor. There are exceptions to this rule. The procedure of early hearing (Article 308 CPC) is an investigative procedure that derogates from the above-mentioned rule and is applied when there is a risk that the injured person, civil party, civilly liable party or witness could not be heard during the trial for objective reasons (imminent death, chronic illness, permanent departure abroad etc.) and when it is therefore necessary to preserve evidence in advance for the trial.

The main task of the JRL is to ensure that fundamental rights and freedoms (the right to liberty and physical safety, the right to property, the right to private life and the inviolability of the home and correspondence etc.) are respected. The JRL may also intervene to censure the inefficiency of the criminal investigation by having the power to rule on the appeal concerning the duration of the trial (Articles 488^1-488^6 CPC).

The territorial jurisdiction of the JRL is determined according to the criteria assigned to the court to which he belongs. By way of exception, derogations are provided for whereby an alternative territorial jurisdiction is established between the JRL of the court which would have jurisdiction to hear the case at first instance and the JRL in whose jurisdiction the prosecutor's office is located [Article 140 para. (1) CPC, Article 147 para. (1) CPC, Article 158 para. (1) CPC, Article 168 para. (2) CPC]. In matters of preventive or house arrest, alternative territorial jurisdiction lies with the JRL of the court which would have jurisdiction to hear the case at first instance or with the JRL within whose jurisdiction the place where the offence was committed or the prosecutor's office is located [Article 219 para. (1) CPC and Article 224 para. (2) CPC].

8. Functions (functional jurisdiction) of the Preliminary Chamber Judge

Article 3 para. (6) CPC provides that the preliminary chamber judge shall rule on the legality of the indictment and the evidence on which it is based, as well as on the legality of decisions not to refer a case to trial, in accordance with the law. The Preliminary Chamber Judge (PCJ) is also a new player in criminal proceedings in Romania.

The Constitutional Court held in a *dictum*[17] that "[...] in the light of the procedural powers entrusted to the preliminary chamber judge, in the context of the separation of judicial functions under the above-mentioned law, the Court concludes that it is incumbent upon him to verify the legality of the referral or non-referral for trial and that, in the legislator's conception, this new procedural institution belongs neither to the criminal prosecution nor to the trial, being equivalent to a new phase of the criminal trial".

This new phase has two objectives. On the one hand, to verify the legality of the referral ordered by the prosecutor and the legality of evidence and the procedural acts carried out by the prosecution. From this point of view, the preliminary chamber judge is a legality filter separating the investigation phase from the trial phase. In brief,

[17] Constitutional Court Decision no. 641 of 11 November 2014 (O. J. no. 887 of 5 December 2014), para. 27.

the innovation introduced by the CPC is a positive one, as the trial should not begin if there are legality flaws in the evidence gathered during the prosecution phase. Here the CPC is consistent with the principle of separation of judicial functions. The public prosecutor and the judicial police are responsible for carrying out the object of the criminal prosecution, e.g. gathering the necessary evidence on the existence of offences, identifying the persons who have committed an offence and establishing their criminal liability, in order to refer the case to trial [Article 285 para. (1) CPC], the preliminary chamber judge checks the referring to trial (indictment) and orders the trial to begin, and the sitting judge rules upon the case.

Check of legality refers strictly to formal legality, namely regularity [Article 346 para. (3)(a) CPC]. The formal conditions of the indictment, as an act of bringing defendants before the court, are laid down in Article 328 CPC. The finding of an irregularity may lead to the return of the case to the prosecutor, if it will be impossible for the court to determine the act and the person who have been referred for trial.

What is missing from the control exercised by the PCJ is the censorship of the indictment from the point of view of its substantial consistency (merits), e.g. how well-founded the indictment is from the evidentiary point of view. Romanian law is not seriously concerned with this essential component of a proper prosecution. Article 285 CPC refers to the determination of "whether or not it is appropriate to refer the case to trial", without explaining what this assessment consists of. Article 327 CPC sets out a number of criteria for the referral for trial, namely when it is established that:

- the legal provisions guaranteeing the truth have been respected;
- the criminal prosecution is complete;
- there is the necessary and legally supplied evidence;
- it is clear from the investigation files that the offence exists, was committed by the accused and the latter is criminally liable.

These criteria, even if not entirely capable of setting a standard of proof required to be met in order for the case to be referred to trial, are nevertheless elements capable of constituting a standard for verifying the consistency of the indictment. Resistance of performing such filter, however, comes from PCJ itself, recruited from among former and current judges. They often share the same vision, incompatible with the different functions they are supposed to exercise. This situation is not attributable to the judges, but to the law, as long as the principle of separation of judicial functions has been infringed by allowing the PCJ to participate to trial as a sitting judge [Article 3 para. (3) CPC]. It follows that the PCJ is not yet in line with his function of censoring the indictment, a natural function in the original system of the pre-trial chamber. Thus, in the adversarial system, the role of the Pre-Trial Chamber (Indictment Chamber) is to block evidentially inconsistent indictments, considering that there is a need to control abuses by the prosecution. As a result, under the national law, it is not within the PCJ's jurisdiction to check the completeness of the criminal investigation, but rather the responsibility of the trial judge.

The second objective of the pre-trial chamber is to check the decisions not to prosecute or to waive prosecution ordered during the investigation phase.

This prerogative was gained following the decision[18] of the Constitutional Court, which, in interpreting Article 21 of the Fundamental Law on access to justice, ruled that "the law does not provide for any legal remedy against the decision rendered to

[18] Constitutional Court Decision no. 486 of 2 December 1997 (O. J. no. 105 of 6 March 1998).

the complaints filed with the first prosecutor or the superior prosecutor. However, the acts and measures taken by the public prosecutor in the course of the criminal proceedings must be subject not only to hierarchical control within the Public Prosecutor's Office, but also to control by the courts. Therefore, a person who is dissatisfied with the outcome of his complaint within the Public Prosecutor's Office has the right, under Article 21 of the Constitution, to apply to the courts to defend his rights, freedoms and legitimate interests. Attention must also be paid to the provision of Article 21 para. (2) of the fundamental law that states «No law may restrict the exercise of this right». Accordingly, the provisions of Article 278 of the former Code of Criminal Procedure are unconstitutional in so far as they close off the possibility for a person who is dissatisfied with the outcome of his complaint by the Public Prosecutor's Office to bring an action before the courts". The decision had a praetorian character, configuring a control over the acts of the prosecutor, the Court itself acknowledging that "of course, it would be necessary for the legislator to intervene, regulating the right of the person to apply to the competent court, when he or she is dissatisfied with the solution given to his complaint against the acts of the public prosecutor".

The Constitutional Court's ruling was important because it ensures the pre-eminence of the principle that justice is done only by the courts. The prosecutor, although a magistrate under national law, is not an absolute sovereign in the investigation stage and does not have a monopoly on whether a person needs to be investigated or not.

According to Article 340 para. (1) CPC: "The person whose complaint against the decision not to prosecute, issued by order or indictment, has been rejected in accordance with Article 339, may lodge a complaint, within 20 days from the date of communication, with the preliminary chamber judge of the court which would be competent, according to the law, to judge the case in first instance". As a consequence:

- when the criminal prosecution has not been initiated, the PCJ may uphold the complaint, quash the contested decision and refer the case to the prosecutor to initiate or complete the criminal investigation, or, where appropriate, to initiate the criminal prosecution and complete the criminal investigation [Article 341(6)(b) CPC];

- where criminal prosecution has been initiated, the preliminary chamber judge may uphold the complaint, set aside the contested decision and refer the case to trial, when the evidence legally submitted is sufficient [Article 341(7)(c) CPC].

In the case of decisions to waive prosecution, the control procedure is no longer a provoked one, but automatic. According to Article 318 para. (12) CPC: "The order to waive prosecution, verified in accordance with para. (10), shall be copied, where appropriate, to the person who made the complaint, the parties, the suspect, the injured person and other interested persons and shall be forwarded for confirmation, within 10 days from the date it was issued, to the preliminary chamber judge of the court which would be competent, according to the law, to judge the case in first instance". After verifying the legality and merits of this decision, the PCJ may grant or reject the request for confirmation made by the prosecutor. If he rejects it:

- annuls the decision to waive prosecution and refer the case back to the prosecutor to initiate or complete the investigation or, as the case may be, to initiate the prosecution and complete the investigation, or

- annuls the decision to waive prosecution and orders dismissal of the case.

Under the provisions of Article 54 CPC, the PCJ also deals with other situations provided for by law:

- verifies the legality and the merits of the order to reopen the criminal proceedings [Article 335 para. (4) CPC];

- decides on issue to maintain or not preventive measures during the pre-trial chamber (Article 207 CPC);

- orders the special confiscation or the destruction of certain documents if the prosecutor has issued a decision not to prosecute or waive prosecution (Article 5491 CPC);

- decides on issuing, confirming, replacing or terminating the provisional safety measures provided for in Article 109 or Article 110 of the Criminal Code if the prosecutor has decided not to prosecute [Article 246 para. (13) CPC].

References

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2. Law no. 395/2005 on peacetime suspension of compulsory military service and transition to voluntary military service (O. J. no. 1155 of 20 December 2005).

3. *http://www.evz.ro/soc-csm-propune-desfiintarea-instantelor-militare.html*) posted on 19 June 2016.

4. Constitutional Court Decision no. 486 of 2 December 1997 (O. J. no. 105 of 6 March 1998).

5. O. J. no. 440 of 24 June 2002.

6. E.Ct.H.R., case-law *Maszni vs Romania*, decision of 21 September 2006, para. 56, 59 (*www.hudoc.echr.coe.int*).

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8. O. J. no. 712 of 13 October 2003.

9. O. J. no. 672 of 27 July 2005.

10. O. J. no. 807 of 3 December 2010.

11. O. J. no. 515 of 14 August 2013.

12. O. J. no. 190 of 18 March 2014.

13. Constitutional Court Decision no. 641 of 11 November 2014 (O. J. no. 887 of 5 December 2014), para. 27.

14. O. J. no. 167 of 18 February 2021.

15. O. J. no. 1104 of 16 November 2022.