SPOTLIGHTS ON RES IUDICATA NATURE OF THE DECISION OF THE PRELIMINARY CHAMBER JUDGE

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Received 30.10.2023; accepted 24.11.2023

https://doi.org/10.55516/ijlso.v3i1.121

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Abstract
Res judicata is frequently linked to the court's decision which adjudicates the merits of the criminal process. This paper explores the limits within the final decisions of the preliminary chamber judge on the legality of the prosecution are binding for the trial court or the limits within these decisions should be considered in a new preliminary chamber procedure.

Key words: res iudicata, criminal action, preliminary chamber judge

INTRODUCTION
The res iudicata authority is enshrined in the Criminal Procedure Code as a general principle of criminal procedure (Article 6), as well as an impediment to initiate or to exercise the criminal action against the culprit [section 16 paragraph 1 letter i), and even as a ground for an extraordinary appeal for annulment (section 426 letter i). However, there is no legal rule enshrining the authority of res judicata of the preliminary chamber judge's decision.

The case-law has recognized that there are also judgments handed down by the judge of rights and freedoms or the preliminary chamber judge which may enjoy, under certain conditions, a relative (temporary, limited to the period of time during which the facts or different legal grounds remain unchanged in relation to the subject-matter of the judicial examination) authority of res judicata in subsequent proceedings, although these do not adjudicate the very substance of a criminal accusation.
I. THE VIEW OF THE CONSTITUTIONAL COURT ON THE AUTHORITY OF RES IUDICATA OF THE PRELIMINARY CHAMBER JUDGE’S DECISION

The courts of law have neither uniformly assessed the concept of res judicata related to the preliminary chamber judge’s decisions, if any, nor have they considered a set of binding benchmarks to understand its limits.

On the other hand, the Constitutional Court’s decision No. 812/2021\(^1\) emphasized some clarifications regarding the particularities of res iudicata in relation to the judgement of the preliminary chamber judge, holding, in essence, as follows:

a. “res iudicata is associated only with those final judgments which deal with the merits of the case”.

Per a contrario, the Constitutional Court does not recognize, as a matter of principle, the res judicata effect for those decisions rendered by the preliminary chamber jurisdictions, in the exercise of their peculiar judicial powers, namely those decisions rendered pursuant to sections 346 and 347 of the Criminal Procedure Code.

b. "the power of the trial judge to call into question, during the trial, those issues of legality previously ruled by the preliminary chamber’s judgement, pursuant to section 346 of the Criminal Procedure Code or, as the case may be, section 347 of the Criminal Procedure Code, must be recognized insofar as the provisions of procedural law on nullities are applicable. This kind of a challenge may concern the rulings under the preliminary chamber judgement handed down even by the trial judge in his former capacity as pre-trial judge, or to the judgment delivered by the pre-trial jurisdiction of a higher court (or, as the case may be, the competent panel of the High Court of Cassation and Justice)".

On one hand, the Constitutional Court considers that, insofar the nullity of the acts ruled by the preliminary chamber judge may still be held to exist, their annulment must be ordered by the court.

On the other hand, the Constitutional Court seems to remain silent regarding the effects that a trial court decision invalidating the acts of the preliminary chamber judge may have and does not specify whether or not the reassessment of legality is judicial review under condition – related to potential new grounds – or whether it regards the same grounds examined by the preliminary chamber judge.

c. "judgment delivered in the proceedings governed by ss. 344 - 347 of the Criminal Procedure Code has the authority of res iudicata only within the limits established by the Constitutional Court, namely as regards the order to bind the defendant over for trial and the impossibility of returning the case to the prosecutor, i.e. the legality of the indictment; all other findings of the preliminary

\(^1\) Published in the Official Journal of Romania, Part I, no. 200 of 1 March 2022.
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chamber judge, which may concern the legality of the investigation acts and gathering of evidence, may be subject to review during the trial on the merits, in accordance with the rules applicable to the nullities and do not enjoy the authority of res judicata before the court of first instance or the court of appeal”.

Thus, on one hand, the Constitutional Court has limited the effects of the preliminary chamber judge’s decision and, on the other hand, has ruled out the possibility of returning the case to the public prosecutor's office after the trial court has found that there is a case of nullity, even if it concerns both the criminal trial proceedings and the preliminary chamber procedure.

II. THE CRITICAL APPRAISAL OF CONSTITUTIONAL JURISDICTION’S “PURE REASON”

It Under a closer examination, the recitals of the Constitutional Court's decision No. 812/2021 reveal shortcomings in the representation of the diversity of situations in which the preliminary chamber judge's decisions settle issues of legality and fairness of proceedings and do not take into account the need to respect the principle of security of legal relations. We will now present some hypotheses that reveal the inapplicability of the decision of the Constitutional Court.

Primus, the Constitutional Court's assessment of the res judicata nature of the preliminary chamber judge's finding as to the legality of the court's referral (which implies that the subject-matter and limits of the proceedings can be determined) is incongruent to the decision of the Court of Justice of the European Union in the ZX case (C 282/20, judgment of 21 October 2021), which held that: “article 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 provide for a procedural means of remedying, errors and deficiencies in the indictment which prejudice the right of the accused person to be provided with detailed information about the charges following the pre-trial hearing in a criminal case. Article 6(3) of Directive 2012/13 and article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as requiring the referring court to give an interpretation of the national rules on the amendment of the charges, as far as possible in a manner consistent with that law, so as to enable the prosecutor to remedy errors and omissions in the content of the indictment at the trial, while at the same time actively and genuinely safeguarding the rights of the defense of the accused person. Only if the referring court considers that such an interpretation is not possible should it disregard the national provision prohibiting the suspension of court proceedings and refer the case back to the public prosecutor in order for the latter to draw up a new indictment.”
Thus, whether a national trial court of law would comply with this decision of the EU jurisdiction, I believe that, regardless the irregularity of the indictment was invoked in the preliminary chamber phase, the trial court shall follow those steps to clarify the accusation no later than before commencing the debates on the merits of the case, when it finds that the ambiguities and gaps in the content of the indictment affect the defendant's right to defense and constitute an obstacle to pronounce a decision in the case. If the court considers that, due to the nature and particularities of the case, the deficiencies regarding the description of the fact(s) and the ambiguities regarding the concrete accusations brought against the defendant could not be fulfilled, directly applying the binding rulings of the Court of Justice of the European Union, it will be able to order the referral of the case back to the prosecutor's office, this kind of a ruling being a derogation from the res judicata authority of the judgement passed by the preliminary chamber judge, which considered that the object and the limits of the adjudication were unequivocally established.

Secundus, following the amendment made by Law No. 201/2023, it should be borne in mind that certain cases of absolute nullity, as well as cases of relative nullity, cannot be invoked at the trial stage, hence the assessment of the preliminary chamber judge being final. Thus, the provisions of section 281(2) (a) of the Criminal Procedure Code and of article 281 (3) of the Criminal Procedure Code do not apply. Section 281 para. (3) and (4) of the Criminal Procedure Code provide, on the one hand, that all the cases of absolute nullity provided by para. (1) of the Criminal Procedure Code which occurred at the preliminary chamber stage may be invoked throughout this stage or even at the trial stage in first instance or on appeal, just as those which occurred at the trial stage, in first instance, may be invoked at this stage or at the appeal stage. In this regard, section 386\(^1\) of the Criminal Procedure Code introduced by Law No. 201/2023 also provides that, when the trial jurisdiction ascertain the absolute nullity of the preliminary chamber proceedings, this court shall invalidate the ruling to bind the defendant over for trial and shall establish the limits under the proceedings shall be resumed. This decision is subject to appeal under section 425\(^1\) of the Criminal Procedure Code.

On the other hand, if the violation of the legal provision occurred during the early stage of the criminal proceedings and the defendant is binded over for trial by an indictment, the cases of absolute nullity set forth under section 281 para. (1) (b\(^1\)), (e) and (f) of the Criminal Procedure Code may be invoked until the end of the proceedings in the preliminary chamber phase. Therefore, following the entry into force of Law No. 201/2023, the court will not be able to overrule the assessment of the preliminary chamber judge with reference to these cases of absolute nullity (for example, the violation of the rules relating to the material, personal and functional lack of competence of the prosecution bodies in relation to the acts carried out or the evidence gathered during the investigation was
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unduly limited and can be invoked only during the preliminary chamber phase, and not at any stage of the proceedings).

It remains uncertain whether this legislative intervention would withstand a future constitutionality review given that following the Constitutional Court decision No. 302/2017\(^2\) the violation of the legal rules concerning the material, personal and functional competence of the investigation bodies could also be censured at the trial stage.

It should also be borne in mind that under the decision No. 802/2017\(^3\), the Constitutional Court held that the elements of unlawfulness provided for in section 101 of the Criminal Procedure Code may be invoked, including at the trial stage. Thus, this court may carry out an analysis of the lawfulness of the proceedings at the prosecution stage in order to determine the legality of the evidence to be assessed during the deliberation.

Thirdly, the unlawfulness of the initiation of criminal proceedings in the absence of the authorization provided for under section 9 para. (3) of the Criminal Code and section 10 para. (2) of the Criminal Code may be invoked at the trial stage in order to obtain a decision to terminate the criminal proceedings, even if it was not invoked or examined at the preliminary chamber stage, but the judge held that the referral of the case to the court was lawful, even though, given the facts of the case, it was obvious that the referral of the case to the court was unlawful in the absence of the Attorney General's authorization.

In this regard, the Supreme Court stated that "in the preliminary chamber proceedings, it is verified whether the acts of criminal prosecution may be submitted to the court, whether a court may examine the content of the charges and what the limits of the submission are (what material acts are part of the content of the offences, who are the victims of these material acts, what are the evidence to be examined, directly, in a public and adversarial procedure, to determine whether guilt exists or not). Once the preliminary chamber procedure has been completed, the judicial inquiry will verify whether the charge is grounded, i.e. whether the offences referred to the court in the indictment have the typical elements required by law to give rise to criminal liability, i.e. what the consequences of criminal liability are, as well as the elements deriving from the provisions of article 396 para. (6) of the Code of Criminal Procedure and which lead to the termination of criminal proceedings. The rules for the application of criminal law in space, relied on by the defense, are laid down by the law to establish the conditions under which the Romanian authorities have jurisdiction to examine the criminal proceedings and fall within the scope of article 16 (1) letter e) of the Criminal Procedure Code. The specific legal nature of the conditions to be examined (belonging to substantive law, e.g. double criminality under the

\(^3\) Published in the Official Journal of Romania, Part I, no. 116 of 06 February 2018
principle of the personality of criminal law, or belonging to procedural law, e.g. authorization of the public prosecutor to initiate criminal proceedings) does not preclude the application of article 396(2), (6) of the Criminal Procedure Code with reference to article 16 para. (1)(e) of the Criminal Procedure Code and, consequently, the criticism can be examined on appeal” (I.C.C.J., Criminal Division, Decision No 174/A/2022, www.scj.ro).

**CONCLUSION**

The *res judicata* nature of the preliminary chamber judge’s decision will remain a controversial issue even after the legislative changes made in summer of 2023.

We further note that the legislator has failed to consistently determine the effects of final judgments handed down in the preliminary chamber stage, while the Constitutional Court has ruled in this area by excessively limiting *res iudicata*.

We will certainly also see forthcoming unconstitutionality rulings in this area, which will give the Constitutional Court the opportunity to (un)set new limits on *res iudicata* in relation to final judgments of the preliminary chamber judge.

**BIBLIOGRAFIE:**

1. Criminal Procedure Code;
2. I.C.C.J., Criminal Division, Decision No 174/A/2022;
3. Constitutional Court's decision No. 812/2021;