Considerations regarding the Contesting of the Protective Measures within the Old Legislation and the Actual Rewriting of the New Criminal Law

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Abstract: The idea of this material came as a consequence of the way in which some of the courts of law concluded requests formulated during trial that regarded the introduction of some protective measures. This paper deals with the contesting protective measures taken during criminal proceedings at the request of the civil party. Authors consider that it is the right of the civil party to request for such measures to be taken with regard to the assets of the defendant and to those belonging to the party liable under the civil law. Moreover, the civil party can contest the manner in which the court applies this request.

Keywords: civil party; defendant; injury; protective measures; contesting the measure.

1. Introduction

The idea of this material came as a consequence of the way in which some of the courts of law concluded requests formulated during trial that regarded the introduction of some protective measures.[1]

The protective measures, as they are provisioned by the formulation in article 249 of the New Criminal Law, consist in the sequestration of the mobile and immobile goods of the suspect, of the defendant, and the responsible civil party or belonging to any other persons to whom these belong.

The new element is that the protective measures were expressly provisioned as to dispose for the special or broader confiscation by e that establishing that these measures cam be taken in what regards the goods of the suspect, the defendant, or any other persons in whose property the

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[1] The old legislation defined the protective measures as being the measures taken during the criminal trial regarding the guaranteeing of the effective realisation of the compensation for the wrong done through crime or of the execution of the punishment with a ransom (Volonciu, 1993, p. 441).

goods that are about to be confiscated are (The New Criminal Law explained, 2014, p. 422).[1]

The enforcement of the New Criminal Code[2] has brought by a series of institutional changes which in many cases are not profound, but only superficial, and such changes are the kind able to generate juridical analysis and constitutional analysis. If, regarding the general conditions of the institution of the preventive measures, the legislative elements resemble those of the old legislation, there is an element of novelty, that could be overlooked at first sight, but which has relevant consequences regarding the concrete effects.

2. The Analysis of the Introduction of the Preventive Measures within the Present Legislation in Relation to a Concrete Situation

Regarding those stated above, in a file in trial at the Court of Galati regarding the judging of a cause regarding the performing of the crime of cheating with very severe consequences, which according to its indictment had produced a severe prejudice, the injured party turned into civil party requested in court the initiation of the sequestration as a protective measure against the criminals and the civil responsible party, as a measure to repair the damage produced by their crime.[3]

By the concluding of the meeting (unpublished), the Court of Law of Galati rejected the request of putting the goods of the criminal under sequestration as a preventive measure as being inconsistent. At the end of the conclusion, the court of law mentioned that the respective decision could be appealed again in court separately through recourse. Against the concluding of the meeting already mentioned the civil party made a recourse by showing that the decision was illegal and not justified and it asked the institution of the sequestration as a protective measure, as stated above.

By criminal decision no. 1719/R of December, the 20th 2013 (unpublished) of the file no. 8929/121/2012 of */, The Court of Law Galati rejected the recourse as means of exception as being inadmissible. The respective solution, as well as its motivation made me take into consideration the

[1] The explained text of the Code can be consulted online at the following address: onhttp://www.mpublic.ro/sites/default/files/PDF/NOILE_CODURI/ncpp.pdf.
[2] Law 135/2010 regarding the New criminal Code, published in the Official nr. 486 of July, 15 iulie 2010, enforced since February, 1st 2014, brought up to date.
[3] The goods that are subject of the institution of the preventive measures are unueable in the way that he who owns them loses one's right to sell them or dispose of them in any way (Neagu, 2013, p. 628).

following aspects of that decision. Firstly, the recourse was considered to be inadmissible because "the concluding of October, 31st 2013 by which the request of the civil party (…) to institute preventive measures was an interlocutor that can be attacked by means of the decision given regarding the elements of the cause and not separately". This decision showed that, according to the provisions stated in article 168, lines 1 and 2 of the Criminal Code of 1969, only the decisions of the court of law that admit complaints addressed by the chargeable, the defendant, the civil responsible party, as well as any other interested person can be attacked by means of recourse.

It was considered that since the taking of the preventive measures was rejected in court, the request of appeal was not admissible, as the legislator makes the possibility of making the appeal separately with recourse only if the preventive measure was taken and not in the situation that it was rejected.

I consider that the interpretation given in such a situation is wrong. It is true that from the economy of the text a law one could understand that separate recourse only envisages the preventive measure that was taken and eventually the way of accomplishing it, but in order that a preventive measure may be taken in court during the trial, it must be firstly admitted by the court of law.

The fundamental discussion regarding this aspect, from my point of view, regards the possibility of attacking separately with recourse both the admitting and the rejecting of the preventive measure, as well as of not admitting, and rejecting such a request.

I consider that the legislator intended to bring under regulation within the old legislation, according to the Criminal Code of 1969, the possibility of attacking separately with recourse the conclusions by which a request of taking some preventive measure is admitted at any time during trial, as well as of the conclusions by which such a request is rejected.

Anyway, the taking of the preventive measures is a possibility provisioned by the legislator in the favour of the creditor, in this case of the injured party as civil party in the criminal trial. The interest of the creditor (the civil party) in having the possibility to be given back the loss after the trial was over, even in the situation of foreclosure, has to be protected during the entire trial when it is possible that the obligor, as in my situation the

defendant or he civil responsible party should alienate the goods that could make the subject of foreclosure.[3]

By not allowing the creditor (the civil party) to attack separately a conclusion by which the court refuses the taking of the protective measure it seems to be against logic and the scopes of the regulation of the institution of the preventive measures.

Moreover, there have been cases, including the present cause, when the court of law admitted only partly the request of the institution of the preventive measures, formulated by the civil party, in the way that the preventive measure was partly admitted and it was taken only regarding certain goods, and meanwhile being rejected regarding other goods.

In this situation, the separate recourse of the civil party, formulated against this conclusion, was considered as being inadmissible also by the court of law of Galati through file no. 8929/121/2012/a3 (the conclusion of July, 31st 2013 of the Court of Law of Galati and the conclusion of October, 14th 2013 of the Court of Law of Galati, unpublished).

The New Criminal Code does not provision the possibility of separate attack in court by recourse of the conclusions of the court of law. In this way, according to the provisions of the article no. 250, line (6) n. of the Criminal Code against the way of bringing under regulation of the protective measures taken by the preliminary chamber judge or the court of law can be contested by the suspect, the prosecutor, the defendant or *any other interested party*.

In this case, the contestation is to be introduced to the preliminary chamber judge or the court of law with a deadline of three days after the date of the institution of the preventive measure. If the legislator brings under regulation the way of solving the contestation, it only creates the possibility of separate appeal with recourse, as in the old writing of the Criminal Code in 1969.

With the new regulation, the issue in discussion remains partly without its cause in what regards the possibility of the appeal with recourse. But I consider that the issue under discussion stays actual regarding the possibility of asking for the preventive measures to be instituted and the contesting of the conclusions of these requests, as well as if it were the case of the way in which they were accomplished.

[3] The preventive measures regarding the civil compensations intend to offer protection to the civil party against this risk and they guarantee the possibility of effectively realising the civil action by blocking the alienation of the goods by any (see N. Volociu, op. cit., p,442).

Secondly, the Court of Appeal of Galati considered that recourse was inadmissible because "(…) the provided text (article 168, line 1 and line 2 of the Criminal Code not offer the injured party of the civil party the procedural quality in order to be able to make such a complaint or to attack by means of recourse a decision taken regarding the solving of the complaint".

I believe that this assessment is also wrong, as the text of the article 168, line 1 of the Criminal Code of 1969 represents an enumeration that is illustrative (an example) and not limitative, exclusive and, as a consequence, it does not limit the right of the injured party or the civil party to make such a complaint or to attack separately by means of recourse the decision of solving it. However, the text of the article 168, line 1 of the Criminal Code of 1969 shows that such a possibility belongs to *any interested person*. It is obvious that the civil party is very much interested in requesting the institution of the preventive measures and in keeping trying by means of recourse during the trial to attack the conclusions and the way in which such requests are solved and after all the way in which such measures are being taken.

The discussion is also valid within the New Criminal Code which in article 250 shows that the prosecutor, the suspect, the defendant or *any other interested person* can make an appeal against the preventive measures. The expression "any other interested person" is used by the legislator in both writings of the Criminal Law, the old and the new; therefore the discussions remain actual in the present days. Because of this I believe that the legislator forbids the possibility of contesting the preventive measures to the civil party, as well as their extent and the way of accomplishing them.

3. Conclusions

Starting with the considering that the objective of taking these preventive measures, according to the new regulation, is in order to avoid hiding, destroying, and the alienation of the goods or avoiding criminal prosecution in the situation where the respective goods are the object of special or extended confiscation or they can serve as means for the guaranteeing of the execution of the punishment or the fine, or the juridical expenses or the compensation for the loss produced by crime, as a consequence of all the thing analysed above, I consider that the approach of this issue can be of much interest to the practitioners and not only to them, even with the actual regulation provisioned by the new Criminal Law, and

it opens the possibility for new interpretations meant to clarify the meaning and sense of these institutions.

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