

The Nullity Regime in the Criminal Process in Romania

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Abstract

Nullities represent procedural sanctions that intervene if the fundamental principles of the criminal process are not respected. What is imperative to mention is the fact that these procedural sanctions operate only judicially, which means that they must be ascertained by the judicial body. Unlike the old regulation, the new criminal procedure code regulates new cases of relative nullity and essentially changes the procedure for the application of nullities, the new legislator wanting to impose a new technique for approaching the drafting of the rules. Thus, we find the rules that regulate the conduct of the criminal process in the code of criminal procedure, Constitution, special laws, CEDO s.a. With regard to the procedural phase in which these rules may be violated, the cited provisions are applicable from the start of the criminal prosecution in rem, throughout the criminal prosecution, the preliminary chamber, in court, appeal, extraordinary appeals, including in the execution of court decisions.

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1. General considerations

In accordance with art. 280 of the Code of Criminal Procedure, "(1) Violation of the legal provisions that regulate the conduct of the criminal process attracts the nullity of the act under the conditions expressly provided by this code. (2) Acts performed after the act that was declared null and void are in their turn struck by nullity, when there is a direct connection between them and the act declared null. (3) When establishing the nullity of an act, the judicial body orders, when necessary and if possible, the restoration of that act in compliance with the legal provisions."

Thus, considering the erasure of the effects of nullity, we must specify the fact that "in order for the nullity of one act to determine the nullity of another, the following cumulative conditions must be met: the second must be an act performed after the nullity (not before it) and there must be a direct link between it and the void act. The latter condition is fulfilled only when the subsequent act could not be fulfilled in the absence of the void one. The criteria for establishing the direct nature of the link between the acts are similar to those considered for the exclusion of derivative evidence."³

Regarding the restoration of the act, we appreciate that the legal text leaves room for interpretations and subjectivity on the part of judicial bodies, being possible only if certain conditions are met, respectively: the condition of necessity and the condition of possibility.

Considering the classification of nullities, the criminal procedure code regulates absolute

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³ M. Udrioiu (coord.), *Codul de Procedură Penală. Comentariu pe articole*, 3rd ed., Ed. C.H. Beck, Bucharest, 2020, p. 1655; B. Micu, R. Slăvoiu, *Procedură Penală*, 4th ed., Ed. Hamangiu, Bucharest, 2019, p. 296; C. S. Paraschiv (coord.), *Drept Procesual Penal. Partea Generală*, 5th ed., Ed. Hamangiu, Bucharest, 2023, p. 215; I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală*, 2nd ed., Ed. Universul Juridic, Bucharest, 2015, p. 274.

nullity and relative nullity⁴.

2. Absolute nullity

In accordance with art. 281 paragraph (1) of the Code of Criminal Procedure," always determines the application of nullity in violation of the provisions regarding:

A) composition of the trial panel;

B) the material competence and the personal competence of the courts, when the judgment was carried out by a lower court than the legally competent one;

C) the material competence and the competence according to the quality of the person of the criminal prosecution body;

D) publicity of the court session;

E) the participation of the prosecutor, when his participation is mandatory according to the law;

F) the presence of the suspect or the accused, when his participation is mandatory according to the law;

G) assistance by the lawyer of the suspect or the defendant, as well as the other parties, when assistance is mandatory."

The cases that determine the intervention of the sanction of absolute nullity are expressly and limitingly provided, the injury being presumed, the interest in complying with these regulations being of public order.

The composition of the panel of judges refers to the number and quality of the members of the panel of judges (for example: the number of judges, their lack of special quality, etc.).

Inferior material and personal competence presuppose the trial of the case by an incompetent court lower than the legally competent one (for example, the case regarding a crime of qualified murder is tried in the first instance by a court or the case that has as suspect/defendant a judge of of the High Court of Cassation and Justice).

With regard to the publicity of the court session, it is important to state that the absolute nullity intervenes only if the session was supposed to be public and took place in the council chamber, not the other way around.

The substantive and personal competence of the criminal investigation body appears in the criminal procedure code as a result of the Decision of the Constitutional Court of Romania (CCR) no. 88/2019, according to which: "the legislative solution contained in art. 281 paragraph (1) letter B) NCPP, which does not regulate in the category of absolute nullities the violation of the provisions relating to the material competence and according to the person's capacity of the criminal investigation body, is unconstitutional."

Regarding the term until which the exception can be invoked regarding the lack of competence of the criminal investigation body and the nullity of the act of referral to the court and of the investigation documents, in accordance with decision no. 183/A of May 3, 2016, the High Court considered that "this was also invoked and analyzed at the trial court in the preliminary chamber, and, on the other hand, the appeal court, in this procedural framework, does not have the ability procedural to ascertain whether the act of referral to the court or the acts carried out in the criminal investigation phase are likely to be invalidated and to effectively ascertain the requested ones, in this procedural phase. Therefore, these aspects cannot be analyzed in this procedural phase, because they were verified in the preliminary chamber, according to the provisions of paragraph 340. (1) and art. 344 Code of Criminal Procedure, the trial court analyzed the invoked exception and by the conclusion of the preliminary chamber (...) it rejected, as unfounded, the exception regarding the relative nullity of the incompetence of the criminal investigation body according to

⁴ For a comparative level see Anthony Vaughan & Michael Spencer, *Nullity in Public Law: Two Recent Supreme Court Judgments*, „Judicial Review”, 26:4, 2021, pp. 264-276, DOI: 10.1080/10854681.2021.2034349; Annabelle Frazier & Joseph E. Gonzales, *Studying sequential processes of criminal defendant decision-making using a choose-your-own-adventure research paradigm*, „Psychology, Crime & Law”, 28:9, 2022, pp. 883-910, DOI: 10.1080/1068316X.2021.1972107.

the quality of the person, formulated by the defendant (...)".

The presence of the suspect or the defendant, when his participation is mandatory according to the law, operates when the defendant has not requested the trial of the case in absentia, in which case it will be incident art. 364 paragraph (4) Criminal Procedure Code.

The assistance by the lawyer of the suspect or the defendant, as well as of the other parties, when the assistance is mandatory, refers both to the assistance of an elected lawyer and of an ex officio lawyer and regardless of whether we are talking about the defendant, civil party, party civilly responsible for the injured person⁵.

Regarding the manner in which absolute nullity can be invoked, according to art. 281 paragraph (2), it can be invoked upon request, by the parties, procedural subjects, the prosecutor, or it can be invoked ex officio.

The term in which it can be invoked differs depending on the case of nullity. Thus, if we discuss the composition of the trial panel, the material competence and the personal competence of the courts, when the judgment was carried out by a lower court than the legally competent one, the publicity of the court session or the participation of the prosecutor, when his participation is mandatory according to the law, then nullity can be invoked in any state of the process.

If we discuss the material competence and the personal competence of the courts, when the judgment was carried out by a lower court than the legally competent one, the presence of the suspect or the defendant, when his participation is mandatory according to the law, the assistance of the lawyer of the suspect or the defendant, as well as the other parties, when the assistance is mandatory, the nullity can be invoked in compliance with the following terms:

A) until the conclusion of the procedure in the preliminary chamber, if the violation occurred during the criminal prosecution or in the procedure of the preliminary chamber;

B) in any state of the process, if the violation occurred during the trial;

C) in any state of the process, regardless of the time at which the violation occurred, when the court was notified with a plea agreement.

3. Relative nullity

In accordance with art. 282 paragraph (1) Code of Criminal Procedure, "violation of any legal provisions other than those provided for in art. 281 determines the nullity of the act when, by not complying with the legal requirement, an injury has been caused to the rights of the parties or of the main procedural subjects, which cannot be removed otherwise than by abolishing the act."

We therefore observe that the sanction of relative nullity derives from the fundamental principle of the legality of the criminal process.

Unlike absolute nullity, which expressly regulates the cases in which it intervenes, relative nullity is conditioned by the injury caused to the main procedural parties or subjects and which cannot be removed other than by abolishing the act.

According to art. 282 paragraph (2) Code of Criminal Procedure: "relative nullity can be invoked by the prosecutor, suspect, defendant, his other parties, the injured person, when there is a procedural interest of his own in complying with the violated legal provision."

We note another difference, in the case of absolute nullity, the interest is of a general nature and can be invoked both by parties or main procedural subjects, as well as by the prosecutor or the court, ex officio, while, in the case of relative nullity, the party who understands to invoke relative nullity must prove its own procedural interest.

The terms in which the relative nullity can be invoked are the following: until the closing of the preliminary chamber procedure, if the violation occurred during the criminal investigation or in this procedure. If the violation occurred during the criminal investigation, when the court was

⁵ These issues are highlighted in the international literature, see for examples: Herbert L. Packer, *Two Models of the Criminal Process*, „University of Pennsylvania Law Review”, vol. 113, no. 1, 1964, pp. 1–68. JSTOR, <https://doi.org/10.2307/3310562>, accessed 1 Apr. 2024; Ronald J. Scalise Jr., *Rethinking the Doctrine of Nullity*, 74 Louisiana Law Review (2014), pp. 664-718. Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol74/iss3/6>.

notified with a plea agreement, the term for invoking the relative nullity is until the first court term with the legally completed procedure, and if the violation occurred during the trial, until the next term of court with the complete procedure, with the mention that if the party learned about these violations before the terms established by law, it has the obligation to invoke them immediately.

By Decision no. 302/2017, the constitutional court established that "relative nullity is a virtual nullity, which derives from the fundamental principle of legality and results from the violation of legal provisions regarding the conduct of the criminal process, other than those expressly provided by law, which attract absolute nullity. This is characterized by the fact that it intervenes when the rights of the participants in the criminal process (prosecutor, parties and main procedural subjects) have been harmed by violating the legal provisions, that it must be invoked at a certain stage of the criminal process or at a certain moment procedural, provided by law, that this is covered when the holders of the right to invoke it do not exercise this right within the statute of limitations provided by law and by the fact that the procedural subjects who can invoke the relative nullity must have the capacity provided by law, as well as an own procedural interest in complying with the allegedly violated legal provision"

It should be noted that "there are procedural provisions that are invoked more frequently as grounds for applying relative nullities and that play an important role in the conduct of the criminal process, such as those related to: the regulation of basic rules, principles or other requirements that ensures the organization and conduct of the criminal process (except those under the protection of absolute nullity), the competence of judicial bodies (except those under the protection of absolute nullity), the notification of judicial bodies, the form and content of procedural documents (except those under the protection of absolute nullity) , the summoning and communication procedure of procedural documents, as well as the administration of evidence."⁶

In accordance with art. 282 paragraph (5) Criminal Procedure Code, "the relative nullity is covered when:

- A) the interested person did not invoke it within the term stipulated by law;
- B) the interested person has expressly waived the claim of nullity."

Both in the national practice and if we discuss the jurisprudence of the ECtHR, numerous cases were found in which the principle of legality was violated.

By way of example⁷, the preliminary chamber judge of the Bucharest Court of Appeal, First Criminal Section notes the fact that: "regarding the irregularity of the indictment from the perspective of the impossibility of establishing the limits and object of the judgment, according to art. 371 Criminal Procedure Code the judgment is limited to the facts and persons shown in the notification act, and from the interpretation of art. 346 paragraph 3 letter c) Criminal Procedure Code it follows that, if the indictment is drawn up irregularly, without the irregularity being remedied by the prosecutor within 5 days from the communication of the conclusion provided for by art. 345 paragraph 2 Criminal Procedure Code, and the irregularity leads to the impossibility of establishing the object and the limits of the judgment, the judge of the preliminary chamber returns the case to the prosecutor's office."

Regarding the ECtHR⁸ jurisprudence, it was found that "any criminal trial, including its procedural aspects, must present an adversarial nature and guarantee equality of arms between prosecution and defense: this is one of the fundamental aspects of the right to a fair trial. The right to an adversarial criminal procedure implies, for the prosecution as well as for the defense, the faculty to take cognizance of the observations or evidence presented by the other party. In addition, art. 6 § 1 requires the prosecuting authorities to communicate to the defense all relevant evidence at their disposal, whether incriminating or discriminatory [*Rowe and Davis v. the United Kingdom (MC)*, § 60]."

⁶ Al. Zampieri, *Aspecte controversate privind nulitățile în procesul penal – nulitățile absolute, nulitățile relative, sancțiunea excluderii probelor – Comentarii și jurisprudență*, Ed. Hamangiu, Bucharest, 2021, p. 75.

⁷ <https://www.rejust.ro/juris/deg3385d3>, consulted on 1.10.2023.

⁸ European Court of Human Rights, *Ghid privind art. 6 din Convenție, dreptul la un proces echitabil (latura penală)*, https://www.echr.coe.int/documents/d/echr/Guide_Art_6_criminal_ROM, consulted on 1.10.2023, p. 22.

At the same time, the Court held that: "The right to an adversarial procedure basically means the possibility for the parties to know and comment on all the evidence produced, as well as any observations presented to guide the court's decision. It is closely related to the principle of equality of arms and, moreover, the Court sometimes concluded the violation of art. 6 § 1 through a corroborated examination of the two concepts."

In conclusion, we appreciate that nullity in the criminal procedure code is a guarantee of respect for procedural rights, being an evolution in terms of the fair resolution of criminal cases, highlighted by court decisions.

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