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## **Social-political context at the basis of adopting current regulations regarding preventive measures in the criminal process**

**Stanciu Mihai-Alexandru**

Chief Prosecutor in the Prosecutor's Office attached to the Constanța Court, "Ovidius" University of Constanța, Faculty of Law and Administrative Sciences

mihaistanciu1987@yahoo.com

**Abstract.** In order for the criminal proceedings to run normally and to achieve its purpose, there may be a need to use means of coercion against the defendant, to prevent him from obstructing the prosecution or the proceedings subsequent to his prosecution or even to prevent him to commit other crimes. This role belongs to the preventive measures aimed to ensure the proper conduct of the criminal proceedings, to prevent the suspect or defendant from evading criminal prosecution or trial or to prevent the commission of another crime. However, preventive measures may be disposed only under the conditions expressly provided by law and only when they are proportionate to the seriousness of the charge against the person against whom they are taken and are necessary to achieve the purpose pursued by their disposition.

**Keywords.** the purpose of the preventive measures, criminal proceedings, legal conditions for disposing the preventive measures

### **1. Theoretical aspects regarding preventive measures. Brief historical approach**

Preventive measures are part of the procedural measures that have been defined in the doctrine as institutions of criminal procedural law made available to criminal courts, consisting of certain deprivations or constraints, personal or real, determined by the conditions and circumstances in which the criminal proceedings are taking place.

It has been shown that through the function pursued by the legislator, these measures work as legal means to prevent or remove certain circumstances or situations that could endanger the efficient conduct of the criminal process through the obstacles, difficulties and confusion they may cause<sup>1</sup>.

The category of procedural measures includes, alongside preventive measures, *medical safety measures*, which can be taken on a provisional basis during criminal proceedings<sup>2</sup>, and *precautionary measures*, which aim at making goods unavailable during criminal proceedings<sup>3</sup> in order to avoid concealment, destruction, alienation or evading their pursuit and which may

<sup>1</sup> V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Ilescu, R. Stănoiu, Explicații teoretice ale Codului de procedură penală român. Partea Generală, vol. V, et. a 2-a, Ed. Academiei, Ed. All Beck, București, 2003, p. 308;

<sup>2</sup> Ibidem și N. Volonciu, A. S. Uzlău și alții, Noul Cod de procedură penală comentat, Ed. Hamangiu, 2014, p. 418;

<sup>3</sup> C.p.p. - Titlul V – Măsurile preventive și alte măsuri procesuale. Capitolul II – Aplicarea provizorie a măsurilor de siguranță cu caracter medical, art. 245 – 248;

be subject to special confiscation or extended confiscation or which may serve to guarantee the execution of the fine or legal costs or to repair the damage caused by the offense<sup>4</sup>. Unlike the previous regulation, the New Code of Criminal Procedure no longer expressly provides for protection measures as procedural measures, but regulates them as obligations incumbent on judicial bodies following their ordering of pre-trial detention.

Procedural measures have the following characteristics: they are *optional*, not mandatory in criminal proceedings, they can be ordered as needed, from situation to situation, they are *adjacent*<sup>5</sup> to the main activity, respectively the performance of procedural acts aimed at establishing the existence of criminal acts, the identification of contravenients and the establishment of their guilt in committing the acts provided by the criminal law, are *temporary* and *reversible*, and may be taken only during the criminal proceedings and revoked whenever it is found that *coercive* character, either personal or real, resulting in a deprivation or, as the case may be, a restriction in the exercise of certain rights by some participants in the criminal proceedings.<sup>6</sup>

Depending on the nature of the restricted rights, procedural measures may be *personal* (eg, detention of a person for a period of 24 hours) or *real* (eg, making goods unavailable by distraint).

As for the preventive measures in the criminal process, they are regulated in the Code of Criminal Procedure, respectively Law no. 135/2010, both within the General Part and within the Special Part.

The legal provisions of the General Part, Title V, Chapter 1, sections 1-7 are intended only for preventive measures that can be taken with respect to the natural person liable criminally, with the stipulation in section 8 of special provisions for the application of preventive measures in regard to minors, while for the hypothesis of engaging the criminal liability of the legal person, the preventive measures that may be ordered against it are regulated in Title IV of the Special Part of the Code of Criminal Procedure, entitled "Special Procedures", Chapter II, art. 493.

With regard to preventive measures, these are binding criminal law institutions, whereby the suspect or defendant is prevented from engaging in certain activities or actions which are likely to adversely affect the conduct of the criminal proceedings or the achievement of its purpose; and namely that of providing the procedural framework for the criminal prosecution of persons who commit acts of an antisocial nature that take the form of crimes.

Due to their coercive nature, preventive measures have been designed as procedural measures made available to the judiciary, which may order them when necessary to ensure the proper conduct of the criminal proceedings, to prevent the suspect or defendant from evading criminal prosecution or trial or prevention of another crime.

Given that these involve a restriction or even a deprivation of human liberty, one of the fundamental social values, preventive measures are governed by conditions whose cumulative fulfillment is required by law in order to be disposed of, conditions which are also guarantees established by on the one hand in favor of the individual and on the other hand against the arbitrary action of the state, all the more so as the measures are taken during the criminal trial, even before the presumption of innocence is removed by a final criminal decision.

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<sup>4</sup> Cu titlu de excepție, măsurile asigurătorii se pot menține și după finalizarea procesului penal;

<sup>5</sup> C.p.p. - Titlul V – Măsurile preventive și alte măsuri procesuale. Capitolul III – Măsurile asigurătorii, restituirea lucrurilor și restabilirea situației anterioare săvârșirii infracțiunii, art. 249 – 256;

<sup>6</sup> I. Istrate, Libertatea persoanei și garanțiile ei procesuale, Ed. Scrisul Românesc, Craiova, 1984, p. 26; I. Neagu, Tratat de procedură penală. Partea generală, ed. a-2-a, Ed. Universul Juridic, București, 2010, p. 540;

Therefore, whenever there is a question of taking, maintaining, extending or confirming a preventive measure, beyond the provisions contained in the Code of Criminal Procedure, other applicable provisions must be taken into account, such as those of the Romanian Constitution (Article 23), those of the European Convention for the Protection of Human Rights and Fundamental Freedoms (especially Article 5 on the right to liberty and security, as interpreted in the case law of the European Court of Human Rights), decisions of the Romanian Constitutional Court or decisions pronounced by the High Court of Cassation and Justice in resolving appeals in the interest of the law or in resolving legal issues.<sup>7</sup>

The new Code of Criminal Procedure, which entered into force on February 1, 2014, regulates a number of five preventive measures that are divided into two categories, namely *deprivation of liberty* (detention, house arrest and pre-trial detention) and *restrictive detention* (judicial review and judicial review on bail).

Preventive measures have always existed in the Romanian criminal procedure laws, but under different names and regulations.

Thus, in the previous Code of Criminal Procedure, in force since 1968<sup>8</sup>, the preventive measures that could be ordered during the criminal process were detention, the obligation not to leave the locality, the obligation not to leave the country and the pre-trial detention, to which were added the measures subsequent to pre-trial detention, namely provisional release under judicial control or on bail.<sup>9</sup>

If the measure of obligation not to leave the locality was introduced with the entry into force of the code, the measure of obligation not to leave the country was introduced on July 1, 2003, by Law no. 281/2003 for the completion and modification of the Code of Criminal Procedure and of some special laws.

The Code of Criminal Procedure of 1936<sup>10</sup> provided for detention<sup>11</sup> and pre-trial detention<sup>12</sup> only as precautionary measures, to which were added measures subsequent to pre-trial detention, namely provisional release under judicial control or on bail.<sup>13</sup>

As regards the Code of Criminal Procedure of 1864, it provided as a precautionary measure the issuance of a warrant for the arrest and which in fact represented a form of detention for a short period of time and the issuance of an arrest warrant for the pre-trial detention of the person under investigation to which was added the measure subsequent to the arrest, namely provisional release, but only on bail.

It is noted that over time, only detention and pre-trial detention were initially envisaged as preventive measures, with the possibility of provisional release from custody, but only with the provision of bail, and then the possibility of provisional release and under a form of judicial control, in order to then introduce another preventive measure, provided separately, namely the obligation not to leave the locality, followed by the obligation not to leave the country.

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<sup>7</sup> N. Volonciu, A. S. Uzlău și alții, *Noul Cod de procedură penală comentat*, Ed. Hamangiu, 2014, p. 418;

<sup>8</sup> M. Udriou, *Procedură penală, Partea Generală*, Ed. C.H. Beck, Ed. a-4-a, p. 548;

<sup>9</sup> N. Volonciu, A. S. Uzlău și alții, *Noul Cod de procedură penală comentat*, Ed. Hamangiu, 2014, p. 420;

<sup>10</sup> Intrat în vigoare la data de 12 februarie 1968, republicat la data de 30 aprilie 1997, rectificat la data de 03 noiembrie 2003 și abrogat la data de 01 februarie 2014; în toată perioada de activitate a codului, normele sale au fost modificate și completate în mai multe rânduri;

<sup>11</sup> Art. 136;

<sup>12</sup> Intrat în vigoare la data de 19 martie 1936, republicat la data de 13 februarie 1948, modificat ulterior în anii 1949, 1952 și 1960 și abrogat la data de 12 februarie 1968;

<sup>13</sup> Cartea I – Dispoziții generale, Titlul VI – Diferite acte și măsuri procedurale, Capitolul IV – Efectuarea actelor de urmărire penală, Secțiunea I – Pornirea procesului penal, Art. 200 – art. 201;

## **2. Social political context in which the new regulations on the preventive measures and the amendments to the subject after the entry into force of the new regulations have been adopted**

According to the explanatory memorandum<sup>14</sup> of the New Code of Criminal Procedure, which entered into force on February 1, 2014, the adoption of new solutions was necessary to create a modern legal system designed to meet the imperatives of creating justice tailored to social needs and increase the quality of which must prove this public service.

It was pointed out that the changes brought about by the realities of legal life at that time revealed the lack of speed in conducting criminal proceedings, the low confidence of litigants in the administration of justice, but also significant social and human costs, all translated into consumption, high financial and time resources, aspects that led to the installation of a climate of distrust in the effectiveness of the criminal process.

According to the Government Decision no. 829/2007, published in the Official Gazette of Romania no. 556 of 14 August 2007, Part I, which adopted the preliminary theses of the draft New Code of Criminal Procedure, states that it was not intended that the new criminal procedure provisions provide for original solutions at any cost, provided that a good some of the existing solutions at that time proved to be appropriate in practice, but to adequately modify those solutions that have become obsolete or have presented certain anomalies in practice and to introduce novelty solutions based on experiences. positive, all as a result of the analysis of the doctrine from the European legal systems.

Thus, as solutions in the particularly important matter of preventive measures, in accordance with the jurisprudence of the ECHR, were expressly regulated, on the one hand, the principle of proportionality of preventive measures with the severity of the accusation brought, and on the other hand, the principle of necessity of them in the realization of the legitimate aim pursued by their taking. As a general rule, the obligation of the judicial bodies to inform in writing the person subject to any of the preventive measures on all the legal rights they have has been regulated.

With regard to pre-trial detention, in principle its exceptional character and, at the same time, the subsidiary nature of the measure compared to other non-custodial preventive measures have been regulated, so that pre-trial detention can be ordered only if other preventive measures are not sufficient to achieve the legitimate aim pursued.

In order to give effect to the stated principles, the competence of the prosecutor and the judge of rights and freedoms has been provided, to order during the criminal investigation the taking of measures of judicial control and judicial control on bail, which are regulated separately as preventive measures, the existing view regarding the institutions of judicial control and bail, which could be applied only in the case of an accused / defendant who has been pre-trial detained. In this aspect, it was specified that the source of inspiration for the regulation was the French Code of Criminal Procedure, which in turn regulates judicial control as an alternative measure to pre-trial detention.

Regarding the institution of bail, it was specified that the novelty is given by the fact that, unlike the previous regulation, it no longer guarantees only the participation in the criminal proceedings of the defendant, but also the payment by him of the fine and damages established for reparation caused by crime, being established at the same time that the payment on bail of the mentioned amounts to have priority over their confiscation, even in the circumstance of

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<sup>14</sup> Expunerea de motive a Noului Cod de procedură penală, cuprinsă în Hotărârea Guvernului nr. 829/2007, publicată în Monitorul Oficial al României nr. 556 din 14 august 2007, Partea I;

replacing, on grounds of bad faith, the judicial control on bail with house arrest or pre-trial detention.

Compared to the jurisprudence established by the European Court of Human Rights, but also by reference to the Criminal Procedure Codes of the member states of the European Union, the adoption of the new criminal procedural provisions aimed at reformulating the cases and conditions in which the measure of pre-trial detention may be ordered.

Thus, they were provided as general cases in which a person's deprivation of liberty can be decided, situations in which there is a danger of evasion from the criminal process, the danger of influencing the conduct of criminal proceedings and the danger of committing another crime. At the same time, in the case of offenses considered to be serious (for example, those committed against life and those punishable by imprisonment for more than 5 years), a special case of deprivation of liberty was provided, namely that of the existence of a concrete danger to the order. publish.

Compared to the old regulation, the new provisions establish the legal criteria by which the danger to public order is assessed and, at the same time, establish a new legal feature of it, namely its current character, which implies its proof when disposing of deprivation of liberty.

As a novelty, a new preventive measure was regulated, house arrest, inspired by the Italian Code of Criminal Procedure, thus ensuring the extension of concrete possibilities to individualize preventive measures.

The explanatory memorandum also states that in compliance with the predominantly preventive nature of arrest as a preventive measure, following the example of the Italian Code of Criminal Procedure, the maximum time limits within which pre-trial detention may be ordered in the trial phase have been provided.

At the same time, the obligatory presence of the defendant was regulated only at the procedure of solving the request to replace the preventive measure with another heavier preventive measure, because in cases such as solving the requests for revocation of the preventive measure or appeals filed by the defendant against the findings by which it was decided on the proposal to order / extend the pre-trial detention, on the replacement of a preventive measure with a milder preventive measure or on the revocation of the pre-trial detention, their solution to be done, in principle, without the obligatory presence of the defendant and the prosecutor.

With regard to minors, the exceptional nature of their pre-trial detention has been regulated, only if the effects that such measures have on their personality and development would not be disproportionate to the purpose pursued by the measure.

The explanatory memorandum stated that the sources of inspiration for the elaboration of the new criminal procedure provisions were international normative instruments, including the French, German, Italian, Serbian and Bosnian Herzegovina Criminal Procedure Codes, as well as the European Convention for the Protection of Human Rights and fundamental freedoms.

Specifically, the measure of house arrest is a preventive measure that can be ordered against the defendant during the criminal process and which consists on the one hand, in the obligation imposed on him not to leave the home where he lives, at least not without the consent of the judicial organ that took the measure or before which the case is before, and on the other hand, in the obligation to respect some restrictions.

During the preventive measure, the defendant is obliged to appear at all calls of the criminal investigation judicial organ, of the judge of rights and freedoms, of the judge of the preliminary chamber or of the court and not to contact the injured person or family members,

with the other participants in the commission of the crime, with the witnesses or experts in the case, as well as with other persons established by the judicial judicial organ.

In addition, it is provided that the judge or court may require that during the execution of the measure of house arrest the defendant permanently wear an electronic surveillance system, but this measure has no practical applicability due to lack of technical means.

At the written and reasoned request of the defendant, the judge or court may allow the defendant to leave the building for purposes such as attending work, attending training or education courses or other similar activities, such as to procure the essential means necessary for its existence, as well as in any other duly justified situations, for a determined period of time, but only if this is necessary in order to achieve the legitimate interests or rights of the defendant.

However, it is provided that in urgent cases and for justified reasons, the defendant has the right to leave the building without the prior permission of the judge or court, but only for the time strictly necessary and with the obligation to know immediately, on the one hand, the authority or judicial organ designated with its supervision, and on the other hand, the judicial judicial organ which ordered the measure of house arrest or before which the case is pending.

The institution, judicial organ or authority designated by the judicial judicial organ that took the measure of house arrest shall be required to periodically verify the defendant's compliance with the measure and obligations, and in the event of non-compliance, to immediately notify the judicial organ. before which the case is pending.

In carrying out the supervision of the measure of house arrest and the obligations imposed on the defendant, the police judicial organ has the right to enter the building where the measure is executed, without the consent of the defendant or other persons living with the defendant.

In cases where the defendant does not comply in bad faith with the measure of house arrest or the obligations incumbent on him or there is a reasonable suspicion that he has committed a new offense for which a criminal action has been instituted against him, the judge or the court, upon request or ex officio, may decide under the legal conditions to replace the measure of house arrest with that of pre-trial detention<sup>15</sup>.

With regard to the period of time during which the measure of house arrest may be taken, the legal provisions provide that it shall be ordered in the criminal investigation phase for a maximum period of 30 days, which may be extended if the grounds which determined the disposition of the measure or other new grounds have appeared, but each extension cannot exceed 30 days, the maximum duration during the criminal investigation phase being 180 days.

During the preliminary chamber and the trial, the house arrest is ordered for a period of 30 days, which can be maintained, without the total duration of the measure exceeding half of the special maximum provided by law for the crime with which the court was notified and in no case more than 5 years<sup>16</sup>.

In our country the prohibition not to leave the domicile for a certain period is regulated only as a preventive measure, which can be taken during the criminal trial until the final trial of the case, when it is necessary for the proper conduct of the criminal investigation or trial. to prevent the defendant from evading criminal prosecution or trial or to prevent the commission of another crime.

On the other hand, in the legislation of other states, as we will see below, this is also incidental in the execution phase of the sentence, either as an alternative way of executing the

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<sup>15</sup> Art. 221 C.p.p.;

<sup>16</sup> Art. 222 și 239 C.p.p.;

prison sentence, in house arrest, and not in a penitentiary system, either as an intermediate measure between the execution of the prison sentence in penitentiary detention and conditional release, in order to facilitate the gradual social reintegration of the convict.

### **References**

- [1] Stanciu Mihai, *Arestul la domiciliu*, ed. Universul Juridic, 2020;
- [2] Marian Alexandru, *Procedură Penală, Partea Generală, Noul Cod de Procedură Penală*, Editura Pro Universitaria;
- [3] Mihail Udrioiu, *Procedură Penală, Partea Generală, Ediția 4*, Editura C.H. Beck;
- [4] Mihail Udrioiu, *Procedură Penală, Partea Specială, Ediția 4*, Editura C.H. Beck;
- [5] Nicolae Volonciu, Andreea Simona Uzlău, ș.a., *Noul Cod de Procedură Penală*, Editura Hamangiu;
- [6] Grigore Theodoru, *Tratat de drept procesual penal*, ed. Hamangiu, 2013;
- [7] Anastasiu Crișu, *Drept procesual penal, Parte generală*, ed. Hamangiu, 2018;
- [8] Anastasiu Crișu, *Drept procesual penal, Parte specială*, ed. Hamangiu, 2019;
- [9] Alexandru Boroi, Gina Negruț, *Drept procesual penal*, ed. Hamangiu, 2017;
- [10] A. Zarafiu, *Procedură Penală. Parte generală. Parte specială*, Editura C.H. Beck, 2014.