
JUDICIAL CONTROL AND JUDICIAL CONTROL ON BAIL IN LIGHT OF THE PROVISIONS OF LAW NO. 135/2010 THE CODE OF CRIMINAL PROCEDURE

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Abstract: Compared to the provisions of the Code of Criminal Procedure. above, where the legislature has provided two alternative ways of achieving provisional release, i.e. release pending trial and bail, now we find that by the provisions of Law no. 135/2010 on the Code of Criminal Procedure, the non-custodial preventive measures have undergone some changes which have complemented efforts of the Romanian legislature to diversify the types of preventive measures that can be arranged during trial.

Keywords: principle of separation of judicial functions, the participants in the criminal case, preventive measures, judicial control, judicial control on bail.

1. General considerations

In the provisions of Law no. 135/2010 on the Criminal Procedure Code¹ were introduced, along with classical principles (of finding the truth, of presumption of innocence, of the right to defense, of compliance with human dignity) new principles such as the right to a fair trial conducted into a reasonable period of separation of the judiciary functions in criminal proceedings, of the obligation of criminal action closely related to the subsidiary of opportunity, of the right to liberty and security, ne bis in idem, and in probation matters, of loyalty in obtaining evidence.

In line with the need to respect the highest international standards of criminal procedure or standards of the European Court of Human Rights², the provisions of art. 3 of the Code of Criminal Procedure governs the manner in which it is carried in the trial court following functions: of prosecution (through enforcement investigation and prosecutor), of dispose of the rights and freedoms during prosecution (by the judge of right and freedom), of verify the legality of sending or non-sending to trial (by the procedure of preliminary room) and judgment (by the courts). This separation of judicial functions is not materializing an organic concept of judicial separation, but it makes way for the exercise of judicial functions, which during criminal proceedings is incompatible with other judicial functions, exception to this rule making the legality function of sending or non-sending to trial that is compatible with the court.

Closely related to the exercise of these judicial functions, we should mention that unlike the previous regulation, the content of art. 29 Code of Criminal Procedure provides which are the distinct participants in criminal proceedings, namely: judiciary bodies, counsel, the parties, the main proceedings, subjects and other proceedings subjects. As judiciary bodies, the legislature provided for in article 30 Code of Criminal Procedure, the following specialized state bodies performing judicial work: criminal investigation bodies, prosecutor, judge of the rights and freedoms, judge of preliminary room, and also courts, these having specific responsibilities regarding disposal of preventive measures.

2. Aspects of criminal procedural law concerning disposition of judicial control measure and judicial control on bail

¹ Published in the Official Gazette no. 468 from July 15th 2010

² Reason on the draft Code of Criminal Procedure, available online in www.just.ro

Unlike previous provisions of the Criminal Procedure Code, Law no. 135/2010 brings significant changes in the content of categories of preventive measures that may be ordered against a person when there is evidence or clues which show reasonable suspicion that a person has committed a crime and are necessary to ensure the proper conduct of the process criminal of preventing theft suspect or the defendant from prosecution or judgment or to prevent the perpetration of another crime. Thus, the categories of preventive measures that can be arranged are: detention, judicial control, and judicial control on bail, house arrest and preventive detention.

Regulation of the two institutions of criminal procedure, namely judicial control and judicial control on bail by the provisions of Law no. 135/2010 the Code of Criminal Procedure, changes de optic on the institutions of judicial control and on bail, respectively, which formerly applied only if the defendant was taken into custody in advance, following the currently popular French Code of Criminal Procedure³, which governing judicial control as an alternative to preventive detention.

In terms of conditions for judicial disposition, they are provided by the provisions of art. 202 of the Criminal Procedure Code, namely: to be evidence or clues which show reasonable suspicion that a person has committed a crime; there is a cause which prevents the exercise of criminal action or criminal proceedings under Art. 16 Code of Criminal Procedure; to set in motion the prosecution for the offense for which there is reasonable suspicion that the defendant has committed it; prior hearing of the defendant in the presence of the lawyer chosen or appointed ex officio; judicial preventive measure is proportionate to the seriousness of the accusation to the defendant and judicial bodies to evaluate the preventive measure of judicial control would help ensure the normal course of criminal proceedings, to prevent the perpetration of other crimes and to prevent theft of the suspect or of the defendant in the prosecution or judgment.

Preventive measure of the judicial control may be ordered against the defendant, during prosecution, by the prosecutor and the judge of rights and freedoms, in preliminary proceedings room and by the judge of preliminary room, and during the trial, by the court of law, provisions in the art. 203 paragraph 2 of Law no. 135/2010 with the amendments set out in the provisions of Law no. 255/2013 for implementation of Law no. 135/2010 the Code of Criminal Procedure and for amending and supplementing certain acts which would be criminal procedure provisions⁴.

Against conclusions by which the judge of rights and freedoms orders preventive measures, the defendant and the prosecutor may submit an appeal during the criminal investigation within 48 hours of ordering or, where appropriate, from the communication to judge of rights and freedoms which pronounced the conclusion appealed. Also, the accused and the prosecutor may appeal the decision within 48 hours of ordering or, where appropriate, from the communication against rulings by the judge of preliminary room who ordered on preventive measures.

Under the provisions of article 215 paragraph 1 Code of Criminal Procedure, as long as under judicial control, **the defendant must meet the following cumulative requirements:** to present to the prosecution body, to the judge of preliminary room or court whenever it is called; immediately inform the judicial authority who ordered or before which the case is,

³ Art. 137 of the French Code of Criminal Procedure., person prosecuted, presumed innocent, may be released. However, depending on the need to conduct a criminal investigation or detention can be forced to execute one or more measures of judicial review. If they are considered to be insufficient, it may order preventive custody ". Available online in www.adminet.com

⁴ Published in the Official Gazette no. 515 from August 14th 2013

about moving the house; to report to the police assigned with the supervision by the judicial body that ordered the measure, according to the surveillance program drawn up by the police body or whenever is called.

Also, the judicial body which ordered the measure **may require the defendant** that during judicial control, to comply with one or more of the following obligations: not to exceed a certain limit, set by the judicial body, unless prior approval thereof; do not go to certain places set by the judicial body or move just in places determined by it; always wear an electronic monitoring; not return to the family home, to stay away from the injured party or family members, other participants in the crime, witnesses or experts or other persons appointed by the judicial body and not to communicate with them directly or indirectly, by any means⁵; not practice the profession or not work in pursuit of the offender; regularly communicate relevant information about its means of subsistence; be subject to control measures, care or treatment, especially for rehabilitation purposes; not to participate in sports or cultural events or other public gatherings; not to drive certain vehicles especially established by the judicial body; not hold, not use and not carry weapons; not issue checks. Supervision of compliance of the defendant of these obligations is for the institution, body or authority designated by the judicial body that ordered the measure.

If during the order of the measure of judicial control, the accused maliciously breach its obligations or there is reasonable suspicion of having committed a new offense to intentionally ordering the initiation of criminal proceedings against him, the judge of freedoms and rights, judge of preliminary room or court, at the request of the prosecutor or ex officio, may have to replace this measure with house arrest or preventive arrest, as provided by law.

The second way of judicial control is the judicial control on bail, which took over the former Code of Criminal Procedure both procedural provisions of the measure of obligation not to leave the city or the country, as well as provisions governing bail, as which may be ordered by the prosecutor to the defendant during the investigation, by the judge of preliminary room, in the preliminary procedure room or by court during the trial.

Order of measure of judicial control on bail is whether the general conditions of the arrangement of a preventive measure, i.e. evidence showing reasonable suspicion that the defendant had committed a crime; there is a case to prevent the initiation or pursuit of criminal proceedings as stipulated in Art. 16 Code of Criminal Procedure; was put in motion the criminal proceedings for the offense for which there is a suspicion that was committed by the defendant. Besides these general conditions of the arrangement of this measure, as if the house arrest disposition measure and preventive arrest have the conditions laid down by the legislature expressly and exhaustively in art. 223, paragraph 1 and 2 of the Criminal Procedure Code. Thus, according to article 223, paragraph 1 Code of Criminal Procedure for the measure of judicial control on bail, must be met one of the conditions, namely: the defendant fled or went into hiding in order to evade prosecution or trial, or made provision for any liable for such acts; defendant attempting to influence another party to the crime, a witness or an expert or destroy, alter, hide or to escape as evidence or to determine any person to take such behavior; defendant puts pressure on the injured person and try to make a fraudulent deal with it; reasonable suspicion that after the initiation of criminal proceedings against him, the defendant intentionally committed a new crime or is preparing to commit a new crime.

⁵ This paragraph was amended by the provisions of section. 144 of article 102, Title III of Law no. 255 of 19 July 2013

Also, the measure of judicial control on bail against the defendant may be ordered, and if the evidence in the reasonable suspicion that he had committed a deliberate crime against life, a crime that has caused injury or death to persons, a crime against national security under penal Code and other special laws, a crime of drug trafficking, arms trafficking, human trafficking, terrorism, money laundering, counterfeiting or other values, extortion, rape, deprivation of liberty, tax evasion, assault, judicial outrage, a crime of corruption, a crime committed by means of electronic communication or other offense for which the law provides imprisonment of five years or more and, based on assessing the seriousness of the crime, the manner and circumstances of its commission, his entourage and the environment from which it comes, a criminal history and other circumstances relating to his person, it is found that deprivation of liberty is necessary to remove a condition of danger to public order.

We must mention that in comparison with the conditions of the arrangement of the preventive measure of judicial control, in the cause of judicial control on bail must be fulfilled **the same conditions that must be met for the order of the measure of house arrest or preventive arrest, according to Art. 223 Code of Criminal Procedure**, although as stated by the legislature by the provisions of article 202 paragraph 3 Code of Criminal Procedure, any preventive measure must be proportionate to the seriousness of the offense of the person against whom the accusation is made and necessary for achieving the goal of ordering it. Or if the measure of judicial disposition on bail, what differentiates the two measures, aims the deposit of a sum of money representing the amount of bail that the defendant is required to submit to the judicial body or constitute a collateral security or property within an amount determined in favor of the judicial body.

In fact, the last part of the text of Article 5, paragraph 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that the release of a person detained may be **subject to a security deposit to ensure its presentation at trial**, basically, text of the Convention referring to the institution releasing a person "on bail". This guarantee needed to put the freedom of the person detained is not limited to an amount in cash, detention may be ordered when there is risk of absconding accused by the prosecution or the court. Also, the amount of bail must be assessed by the court, by reference to the resources of the defendant, in this respect, requiring assessment of damage caused by the offense alleged. On the other hand it is considered that the level of security to be lodged by the defendant is to ensure the accused presence at trial and damages in the amount of the bail conditions must relate both to the accused person, the financial resources, the links with the people asked to give bail⁶.

In the Law no. 135/2010, regarding institution security, the novelty is the fact that, unlike the old regulation, it guarantees only the participation of the defendant in criminal proceedings, but also pays compensation for repairing damage caused by the offense and the fine. It is kept, also, in accordance with article 217, paragraph 3⁷ Code of Criminal Procedure, the defendant's obligation as long as it is under judicial control to the obligations laid down in Article 215, paragraph 1 and 2 of the Criminal Procedure Code.

On the return of the security deposit prior to the changes we stated that the provisions of Law no. 281/2003 on amendment of the Criminal Procedure Code and some special laws⁸

⁶ Corneliu Barsan, European Convention on Human Rights. Comment on articles, vol. I - Rights and freedoms Publishing CH Beck, Bucharest, 2005, p. 367-368

⁷ This paragraph was amended by the provisions of section of article 48. 102, Title III of Law no. 255/2013

⁸ Law no. 281/2003 (published in the Official Gazette. No. 468 of 1 July 2003) brought the amendment of Law no. 29/1968 on the Code of Criminal Procedure, published in the Official Bulletin No. 145-146 of November 12, 1968, republished in the Official Gazette No. 78 of April 30, 1997, now repealed by the entry into force of Law no. 135/2010 the Criminal Procedure Code, published in the Official Gazette. No. 486 of 15 July 2010, amended

bail shall be released when the prosecutor finds ordinance and the court is concluding that there were no grounds justifying preventive custody, in which case only court, by a finding could have found the lack of these grounds⁹.

On the other hand, the provisions of article 217, paragraph 9 Code of Criminal Procedure provide that if during measure of judicial control on bail, the defendant violates in bad faith its obligations or reasonable suspicion of having committed a new offense to intentionally ordering the initiation of criminal proceedings against him, the judge of rights and freedoms and the judge of preliminary room or court, upon reasoned request of the prosecutor or ex officio, may have to replace this measure with house arrest or preventive arrest, as provided by law, in this case the court orders confiscation of bail by court and in other cases, the decision may order the return of bail. In this regard, it was determined that the payment of the bail previously set is prioritized to its seizure, even in the replacement measure of judicial control on bail with house arrest or preventive arrest¹⁰.

We appreciate in this sense the failure to comply this principle of proportionality of preventive measures ordered according to the gravity of the offense committed by the defendant, and that in the same conditions that must be met, it can not be ordered a different preventive measure, although in terms of the provisions of article 211, paragraph 1 Code of Criminal Procedure, are met the general conditions of the arrangement of a preventive measure such judicial control, the same conditions being necessary also for the measure of judicial control on bail. We note also that according to Article 215, paragraph 7 Code of Criminal Procedure in the case of judicial control, if the defendant maliciously violate its obligations or reasonable suspicion of having committed a new offense to intentionally ordering the initiation of criminal proceedings against him, the judge of rights and freedoms of preliminary room or court judge, at the request of the prosecutor or ex officio, may have to replace this measure with house arrest or preventive arrest, as provided by law. And this is also inconsistent, since the need to respect the same principle of proportionality requires that in this measure, bad faith breach of the obligations incumbent on the defendant to have the bud by the preventive measure of judicial control on bail, and no preventive measure to house arrest or preventive detention, although according to an opinion¹¹, it is possible to replace judicial control and judicial control on bail with the detention measure that can be decided only during the criminal investigation by the prosecutor, operating the replacement actually a preventive measure with another preventive measure that is based upon the requirements of article 202, paragraph 1 Code of Criminal Procedure, as in criminal proceedings against a person can have only one preventive measure listed expressly limited by the legislature in article 202 paragraph 4 Code of Criminal Procedure.

Conclusions

the provisions of Law no. 255/2013 for implementation of Law no. 135/2010 the Code of Criminal Procedure and amending and supplementing certain acts which would be criminal procedure, published in the Official Gazette. No. 515 of August 14, 2013

⁹ Ion Neagu, Treaty of Criminal Procedure, General Part II Edition, Legal Publishing House, Bucharest, 2010, p. 607; Anca Lelia Lorincz, Criminal Procedural Law - the legal changes made by Mica reform and references to provisions of the New Code of Criminal Procedure, Third Edition, Publishing House Law, Bucharest, 2011, p. 249

¹⁰ The explanatory memorandum to the Act no. 135/2010 the Criminal Procedure Code, available online in www.cdep.ro

¹¹ See Mihail Udroi, Criminal Procedure. General part. The new Criminal Procedure Code, Ed C. H. Beck, Bucharest, 2014, p. 549 and 573

Bringing together elements of preventive measures restricting freedom of the former Code of Criminal Procedure, namely the measure of obligation not to leave the city or country and provisional release under judicial control or on bail and according to the European Court of Human Rights, we find a qualitative leap in terms of the types of preventive measures that can be available during the trial, but at the same time we find that the desire to diversify the types of preventive measures and the need to establish different criteria for their application have been some violations of the principle of proportionality disposition of such action to the seriousness of the accusation of the person against whom a preventive measure is taken, i.e. the person accused. We believe that to these requirements, the extent of judicial control and judicial control on bail, in accordance with article 202 paragraph 4 Criminal Procedure Code, are provided as preventive measures, alternative to preventive arrest or home arrest, for which disposition conditions differ, the legislature expanding the possibility of their application by the judge of rights and freedoms and also by the judge of preliminary room, also emerging institutions in the Code of Criminal Procedure.

References:

- Corneliu Bîrsan, European Convention on Human Rights. Comment on articles, vol. I - Rights and freedoms, Publishing CH Beck, Bucharest, 2005
- Anca Lelia Lorincz, Criminal Procedural Law – with the legal changes made by Little reform and references to provisions of the New Code of Criminal Procedure, Third Edition, Universul Juridic Publishing House, Bucharest, 2011
- Ion Neagu, Treaty of Criminal Procedure, General Part, Second Edition, Universul Juridic Publishing House, Bucharest, 2010
- Mihail Udroi, Criminal Procedure. General part. New Criminal Procedure Code, C. H. Beck Publishing House, Bucharest, 2014