Practical aspects concerning the new preventive measure of judicial control on bail

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Abstract: This material deals with preventive measure judicial review on bail, in terms of how it is regulated in the new Code of Criminal Procedure, which entered into force on February 1, 2014, its correspondence with existing preventive measures in the previous regulation and under appearance issues were already raised in the judicial practice of the entry into force of the law.

Keywords: preventive measures; judicial control on bail; the New Code of Criminal Procedure.

Introduction

The work deals with new preventive measure of judicial control on bail, in terms of how it is regulated in the New Code of Criminal Procedure, its correspondence with existing preventive measures in previous legislation, as well as in terms of the issues that have been raised already in judicial practice after the entry into force of the law.

The analysis is conducted from the perspective of criminal procedural legislation and is structured around the following themes deriving from this topic: appeal against the measure of judicial control on bail ordered by the prosecutor, the procedure for taking the measure of judicial control on bail by the judge, the judicial body competent to dispose on the obligations changes, the length of the judicial control on bail.

1. The concept and types of preventive measures provided by the New Code of Criminal Procedure

Preventive measures are measures of coercion available to criminal judicial bodies to ensure the smooth operation of the criminal process, in order to prevent the suspect or defendant from evading prosecution or the Court, or to prevent the committing of a crime.

The New Code of Criminal Procedure provides a number of five preventive measures, three being of imprisonment (detention, house arrest and preventive arrest), and the other two being restrictive of rights (judicial control and judicial control on bail).

Compared to the Previous Code of Criminal Procedure, it is established that a preventive measure of absolute novelty has been implemented (house arrest). At the same time, the obligation not to leave town and order not to leave the country are no longer referred to as preventative measures in its own right, but as obligations which may be imposed on the culprit (optional) when against him will be ordered the measure of judicial control (simple or on bail), while the extent of provisional release under judicial control (simple or on bail) turns out from a measure subsequent to preventive arrest in a stand-alone measure-judicial control (simple or on bail), which can be ordered without the defendant having been necessarily deprived of liberty.

Beyond these general changes, for each individual preventive measure there have been a number of changes with regard to their content, sometimes with regard to duration, or the judicial authorities who may order it and others [1].

2. General issues relating to judicial control on bail

Preventive measure of judicial control is newly introduced into our legislation process, by taking over a significant part of the liberation on bail under judicial control and preventive measures of the obligation not to leave the town or not to leave the country.

As substantial differences compared with the measure of liberation on bail under judicial control provided by the Previous Code of Criminal Procedure, we note the following:
- judicial control on bail can be ordered as an autonomous preventive measure, without being conditional to the existence, before the disposition, of a preventive measure involving deprivation of liberty (old regulations provided this possibility only for the preventive arrest to obtain release on bail under judicial control) [2];

- judicial control on bail can be ordered regardless of the crime for which the culprit is accused (as long as the general conditions laid down in article 202 of the New Code of Criminal Procedure are satisfied), as the previous code regulated exceptions from the benefit of the measure in relation to the type of crime committed, the punishment prescribed by law, the form of guilt the crime was committed;

- judicial control on bail may be ordered only in relation to the culprit, being, therefore, necessary to set in motion the criminal action against those suspected of committing the crime;

Preventive measure of judicial control on bail does not involve deprivation of liberty, the culprit enjoying the physical freedom, but being subjected, by setting up a set of obligations and, sometimes, of bans, to the monitoring of the judiciary, with the aim to attain the goal set by law through the establishment of this measure.

Through its contents, judicial control is more severe than holding a person, but easier than judicial control on bail, house arrest and preventive arrest [3].

3. Practical aspects concerning the application of the preventive measure of judicial control on bail

3.1. The appeal against the judicial control on bail measure ordered by the prosecutor. Judicial control on bail measure may be ordered at the stage of prosecution, by a Prosecutor by Ordinance (ex officio or on the proposal of criminal investigation body) or by a conclusion of the judge of the rights and freedoms endowed with settlement of a proposal of disposing or extension of a preventive measure involving deprivation of liberty (or in the settlement of an appeal against a conclusion that was willing to grant such a measure).

If the Prosecutor has ordered during the criminal investigation, the taking of the measure of judicial control on bail against the culprit, the law allows an appeal against it solely by the culprit, the appeal being the complaint, the period prescribed by law being 48 hours from the communication of the Ordinance to the culprit.

The complaint is addressed to the judge of rights and freedoms from the Court which would return the competence to solve the case, to which goes such competence to settle the appeal declared by the culprit.

The complaint will be solved by the judge in the Council Chamber, through a conclusion; solutions that can be adopted by the judge of rights and freedoms are either rejecting the complaint (as inadmissible, late or unfounded) or admission and revocation of the preventive measure, if it will be found that it has been taken in contravention of legal provisions.

Analyzing the provisions of art. 216, reported to article 213 of the New Code of Criminal Procedure, we find that, in fact, it doesn't convey in an exhaustive manner what solutions may be ordered by the judge of the rights and freedoms called to settle the complaint made by the culprit. Moreover, marginal name "the appeal against the measure of judicial control ordered by the prosecutor (s.n.)" is not outside any criticism, whereas the appeal is against the ordinance of the prosecutor through which the measure is ordered, not against the procedural measure, and the hypothesis of cancellation preventive measure is the consequence of the acceptance of the complaint and the abolition of the ordinance against which the appeal was lodged.

In the absence of a comprehensive enumeration of solutions that might be disposed by settling the complaint, we appreciate that it is possible and lawful also the solution for the admission of the complaint made by the defendant without having as consequence the revocation of the measure, but only changing the content of the judicial control on bail, for the purpose of alleviating the obligations imposed [the ones the prosecutor or judge has the right to designate and over which they may order (optionally) - for example, extending the territorial limit that the defendant is not allowed to exceed, according to art. 216, reported to 215 para. (2) let. (a) of the New Code of The Criminal Procedure, from the territory of a city to the entire territory of Romania], or even the removal as being excessive, unnecessary for the fulfilment of the goal pursued by taking the measure of some of the obligations that may be arranged optionally according to article 216 reported to 215 para. (2) of the New Code of Criminal Procedure. This is because, on one hand, the judge of rights and freedoms, by checking the conditions of taking the measure, verifies also the meeting of the requirement of proportionality and necessity (including through the prism of what obligations have been placed), and, on the other hand, according to art. 216 reported to article 215 paragraph (8) of the New Code of Criminal Procedure, after taking the measure, the prosecutor, ex officio or at the request of the defendant, can intervene and modify the contents of the judicial control on bail, meaning its aggravation or
mitigation (judicial control on bail as a preventive measure, remains, but it will be an intrusion on the obligations that give content to this non-custodial preventive measure).

After the solution of the case, the file given to the judge of rights and freedoms by the prosecutor (the original or certified copies after its acts) shall be returned to the criminal investigation body within 48 hours, the procedural term so charged being one of recommendation and taking care that, by resolving the appeal, the celerity in the criminal process to be minimally affected.

According to the article. 204 of the New Code of Criminal Procedure, conclusions ordering the preventive measures in the course of criminal proceedings shall be subject of the appeal as a complaint, within 48 hours from the decision for those present, or communication for those missing. Therefore, in the jurisprudence and doctrine [4] it was expressed the majority opinion, that the conclusion pronounced by the judge of rights and freedoms may be appealed by complaint. The complaint is subject to the general regime provided by art. 204 of the New Code of Criminal Procedure.

In practice there is a minority opinion, in the sense that the conclusion given in the resolution of this complaint by the judge of the rights and freedoms shall be final, with no possibility of appeal against it, such complaint following to be rejected as inadmissible.

The arguments concerned were, first of all, that the conclusion pronounced by the judge of the rights and freedoms, under art. 216 reported to article 213 of the New Code of Criminal Procedure, is a judgment already given in the resolution of an appeal (the complaint), and in the new code (as opposed to the previous one) there haven't been covered other situations where the appeal finds two separate degrees; even in the case of more serious preventive measures (for example, in matters of pre-trial detention, the law recognized the possibility of a single way of appeal against the instrument by which the judicial authority ordered the taking of the measure).

On the other hand, it was noted that the provisions of art. 204 of the New Code of Criminal Procedure are not applicable in question, since they relate to decisions by which, during criminal investigation it is ordered the preventive measures as the main referral, or, in the case of conclusion covered by article 216, reported in article 213 of the New Code of Criminal Procedure, it is ordered mainly over the legality and solidity of the previous ordinance issued by the Prosecutor by which he had taken preventive measure.

3.2. The procedure for taking the measure of judicial control on bail by the judge. The procedure for taking judicial control measure on bail is, apparently, the same as the onemaking judicial control measure, the text of article 216 para. (3) of the New Code of Criminal Procedure making reference to the implementation in this direction of the provisions of art. 212 and art. 214 of the same code (which governs the disposition of the judicial control).

The text of the law, however, is objectionable, because of the absence of specific rules of procedure for the disposal of the judicial control on bail measure - in particular as regards the procedure to be followed in the hypothesis in which jurisdiction to dispose comes to a magistrate judge - in Preliminary Chamber stage or during trial, or even at the stage of prosecution, when the judge of rights and freedoms shall be entrusted with the settlement of a claim or proposal regarding taking, extension or replacement of a preventive measure involving deprivation of liberty. This is because the bail deposit is a prerequisite for ordering the preventive measure, but the bail cannot be ascertained and filed directly by the defendant, the amount of it being settled also by the judicial body, situation that generates the need to resolve this proposal of taking this preventive measure of judicial control in two distinct phases:

a) verification of admissibility in principle- verification of the fulfillment of the conditions required by law to dispose this preventive measure; if the request is considered as admissible in principle, fixing the amount of the bail and setting the deadline for the deposit of it by the defendant is mandatory;

b) the disposition of the measure of judicial control on bail, when the fulfillment of the condition of paying the bail laid down by the judicial body has been ascertained.

A form of the procedure to order judicial control on bail was governed by the criminal legislator only in the hypothesis of art. 242 paragraph (10) to (13) of the N CCP, namely when there is required the replacement of a custodial preventive measure (house arrest or preventive arrest) with the measure of judicial control on bail; in the absence of other express provisions, we appreciate that the same procedure can be applied to the (direct) taking of the mentioned preventive measure.

3.3. The judicial authorities competent to order on the changes of obligations. In judicial practice it had been issued the matter of competence to order the modification of obligations in the situation when the measure of judicial control on bail was ordered by the judge of rights and freedoms, after rejecting the proposal of preventive arrest.
Although there are arguments to support both opinions, we appreciate that, in the absence of explicit provisions, it can be followed the Supreme Court's interpretation of a relatively similar situation, in which, in relation to the Previous Code of Criminal Procedure, it has looked at the problem of the judicial body which became competent to order, in the course of criminal proceedings, the extension of the preventive measure of not leaving the city or not to leave the country, in the situation when such a measure was taken by a judge [5].

In the reasoning of the solution, the High Court of Cassation and Justice noted that the legal provisions did not set up an alternative competence of the judge and the prosecutor in taking the preventive measure not to leave the city or not leaving the country, during the prosecution, compared with the one taken in the course of judicial investigation. In such a situation, the power to order the measure obliging not to leave the city or not leaving the country remains to the judge, in the course of the prosecution, only in the cases expressly provided in art. 146 para. (111) and art. 139 paragraph (1) of the Previous Code of Criminal Procedure, namely when the proposal of preventive arrest of the accused/culprit is rejected, or when the grounds leading to the taking of the preventive arrest measure have been changed. As a result, it was held that, taking into account the restrictive nature of interpretation of procedural rules, it is necessary to note that regardless of the judicial authority which ordered the preventive measure of not leaving the city or country (prosecutor or judge), in the course of the prosecution the extension of this measure shall be ordered by the Prosecutor who conducts or supervises the prosecution.

In the same way can be regarded the considerations of the Supreme Court expressed in the resolution of a prior question to a legal matter with which it was referred [6]. Although the solution to the referral relating to interpretation of the provisions of article 215 paragraph (8) of the Code of Criminal Procedure, in the sense of revealing if, during prosecution, the jurisdiction to dispose on new obligations for the defendant or the replacement or termination of those ordered originally comes to the judge of rights and freedoms which has taken the measure or, conversely, to the prosecutor, was dismissing as inadmissible on the grounds that it is only an incidentally matter of which does not depend the explanation of the case on first instance, the judge-rapporteur opinion expressed in the reasoning of the decision is to the effect that, pursuant to the provisions of article 215 paragraph (8) of the Code of Criminal Procedure, in the course of criminal proceedings, the jurisdiction over some new obligations for the defendant or the termination or replacement of the ones initially ordered comes to the prosecutor, regardless of whether the procedural measure of judicial control was taken by the prosecutor or the judge of rights and freedoms.

### 3.4. The duration of judicial control on bail.

A brief analysis of the provisions governing preventive measure of judicial control on bail highlights the lack of a maximum duration for which this measure can be taken during criminal prosecution.

By comparison, in the previous legislation, for the most similar preventive measure under legal aspect with the judicial control on bail, were laid out the duration for which it could be ordered initially, and a procedure for the extension and a total maximum duration during prosecution.

Thus, in the previous Code of Criminal Procedure [article 145 paragraph (2) and art. 1451 paragraph (2)], the duration of the measure obliging not to leave the city and not to leave the country (measures in which finds its correspondence in part judicial control on bail), could not exceed 30 days, unless it was extended in accordance with the law. The two measures could be extended in the course of criminal proceedings, in the case of necessity and only motivated. The extension was ordered by the prosecutor that performed or supervised the prosecution, each extension couldn't exceed 30 days. The maximum duration of these measures in the course of prosecution was one year. In exceptional cases, when the punishment provided by law was life imprisonment or imprisonment of 10 years or more, the maximum duration was two years.

In the current rules, judicial control on bail, once ordered by the public prosecutor or the judge of rights and freedoms, shall be maintained throughout the duration of criminal prosecution, until the disposition of a solution of not sending to Court by the prosecutor, and during Preliminary Chamber. If it is disposed the sending to Court, these preventive measures shall be maintained until an eventual disposition for revocation or replacement delivered in Preliminary Chamber or during trial or until legal termination of the preventive measure.

In our opinion, the inexistence of a maximum duration for which judicial control or the judicial control on bail may be ordered, may raise problems in terms of compliance with national and international provisions with superior legal force, which regulates a number of fundamental rights of the person, by taking such measures being possible to affect, as appropriate, the right to free movement (article 2 of Protocol No. 4 to the European Convention for the protection of human rights and fundamental freedoms and article 25 of...
the Romanian Constitution) and the right to respect for private and family life (article 8 of the Convention and article 26 of the Romanian Constitution).

Thus, according to art. 216 reported to article 215 paragraph (2) of the New Code of Criminal Procedure, in addition to the obligations laid down in paragraph (1), the judicial body which ordered the measure may require the defendant that, during judicial control on bail, to respect other obligations, such as: to not move in places specifically laid down by judicial authority or to move only in the places established by it [b]; to bear an electronic system for monitoring permanently [c]; not to return to his family home, not to come close to the injured person or their family members, other participants in the committing of the crime, witnesses or experts or other persons designated by the judicial body and not to communicate with them directly or indirectly, in any way [d].

Even if the rights guaranteed by the provisions of article 8. and article 11 of the Convention and art. 2 of the Protocol No. 4 at the Convention are not absolute freedoms, interference of the State in the exercise of these rights is permissible only if it is prescribed by law, pursues one of the legitimate purposes set out in the texts of the Convention (that is national security, public safety, defense and maintenance of public order, the prevention of criminal offences, the protection of health or morals, or the protection of the rights and freedoms of others), and the measure is necessary in a democratic society (namely the interference meet a compelling social needs), being proportional to the legitimate aim pursued.

In the same way, there are articles. 53 of the Constitution of Romania providing that "the exercise of certain rights or freedoms may be restricted only by law and only if it is necessary, where appropriate, for: defence of national security, order, health or public morals, rights and freedoms of citizens; conducting criminal investigations; preventing the consequences of a natural calamity, a disaster or a sinister particularly badly. According to paragraph 2 of the same article "the restriction may be ordered only if it is necessary in a democratic society. The measure should be proportional to the situation that caused it, to be applied in a non-discriminatory manner and without prejudice to the existence of that right or freedom".

From the perspective to respect the exigency of proportionality of the interference with the legitimate aim pursued, we appreciate that non-imposition of a maximum duration for which judicial control on bail may be ordered during the prosecution is likely to confer an excessive nature of this preventive measure.

Therefore, to comply with legal standards with superior legal force, it is not sufficient that the measure which prejudices the fundamental rights to circumscribe to certain cases specified in the law, but it must be limited in time.

In our opinion, considering that in the case of the rights affected by the arrangement of two preventive measures occurs only a restriction on them, as opposed to the measure of preventive arrest, involving deprivation of liberty, imposing a maximum duration would be sufficient to meet the requirement of proportionality of measures to the legitimate purpose pursued.

As far as we are concerned, we believe that the maximum duration of this measure in the course of criminal proceedings can not exceed a reasonable period, which in the light of the gravity of the offense reflected in the punishment provided by law may be different, namely 1 year where the penalty prescribed by law is a fine or imprisonment not exceeding 5 years and 2 years where the penalty prescribed by law is life imprisonment or imprisonment of more than 5 years.

In the same context of compliance with the requirement of proportionality of interference with the legitimate aim pursued, it can be invoked also the lack of provisions through which to be established periodically control of the Court entrusted with the settlement of the fund in order to verify whether the grounds for taking the measure of the judicial control or judicial control on bail still subsists or if there are no new grounds justifying such measures.

In this sense, during trial, the principle of proportionality of the measure taken with a legitimate aim pursued can be satisfied through warranties that accompany those two measures, the possibility of a mandatory periodic judicial control occupying an important place among them. Similar to pre-trial detention and home arrest, this constant control by the Court invested with dealing the case should be carried out every 60 days, the change being possible to be made in the article 208 paragraph (4), governing periodical verification of the pre-trial detention measure, and the measure of home arrest ordered against the culprit by using generic notion of "preventative measures".

At the same time, from the perspective of the issues analysed, we believe it is useful to clarify the provisions of art. 207 para. (2) of the Code of Criminal Procedure in the sense to result that the verification performed by the Preliminary Chamber judge regards also the preventive measures in question, given the fact that they are not ordered on fixed period of time. According to the provisions referred to, "within three
days from the registration of a file, the judge of the Preliminary Chamber checks ex officio the legality and the merits of preventive measure before its term expires, with the attendance of the culprit”.

Conclusions

In this material was analyzed and interpreted the new preventive measure of judicial control on bail, in terms of how it is regulated in the New Code of Criminal Procedure, which entered into force on 1 February 2014, its correspondence with existing preventive measures in previous legislation, as well as in terms of the issues that have been raised already in judicial practice after the entry into force of the law. Thus, there are analyzed aspects regarding the appeal against the measure of judicial control on bail ordered by the prosecutor, the procedure for taking the measure of judicial control on bail by the judge, the judicial body competent to dispose on the obligations changes, the length of the judicial control on bail.

Without issuing the claim that through our intercession the theme has been addressed fully, we appreciate that through advanced theoretical considerations we have managed to bring into focus the main issues which will follow from the application of the institutions and to identify possible preferable legislative solutions.

References