REPLACING THE JUDICIAL CONTROL WITH THE PREVENTIVE ARREST

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Abstract

In the practive of the courts, there are situations where, due to a violation of the obligations imposed by the measure of the judicial control or the case of the commission of new offenses, it is questionable to replace the judicial check with a heavier preventive measure, namely preventive arrest or home arrest.

The present study aims to adress the steps to be followed in this procedure and to analyze the relevant issues and incidents which may arise.

Keywords: *preventive arrest, judicial control, criminal prosecution; European Convention on Human Rights; criminal law.*

Introduction

The measure of judicial control is the least intrusive preventive measure, since it does not infringe upon the personal freedom.

The judicial control indeed interferes with the defendant's right to free movement, which is why we consider that the provisions of art. 2 of the Additional Protocol no. 4 to the European Convention on Human Rights are applicable, according to which: anyone who is lawfully on the territory of a state has the right to move freely and freely elect his residence; any person is free to leave any country, including his own; the exercise of these rights may not be subject to any restrictions other than those which, by law, are necessary measures in a democratic society, or fot the interest of national security, public security, public order, crime prevention, and others; the rights recognized in paragraph 1 may also, in certain specified areas, be subject to restrictions which, under the law, are justified by the public interest in a democratic society.

Content

According to art. 211 and art. 202 of the Criminal Procedure Code, in order to institute the measure of judicial control, there must be evidence to raise a reasonable suspicion that the defendant has committed an offense, the measure of judicial control must be proportionate to the seriousness of the accusation brought against the person concerned and necessary for the purpose of good unfolding of the proceedings, preventing the eviction of the defendant, preventing the commission of another offense, and if there is no reason to prevent the criminal proceedings.

While under judicial control, the defendant has to comply with the following obligations: to appear before the criminal investigative body, the preliminary chamber judge or the court, or as soon as he is called; to immediately inform the judicial authority which has taken the measure the change of adress; to appear before the police body designated with his supervision by the judicial body that ordered the measure, according to the program prepared by the police or whenever he is called.

The defendant may be the subject of, depending on the particularities of each case, other obligations: not to exceed a certain territorial limit, fixed by the judicial body, except with its prior consent; not to go to specific places established by the judicial body or to move only to the places set by it; to wear a permanent electronic surveillance system; not to return to the family home or to approach the injured party or members of his / her family, other participants to the offense, witnesses or experts or other persons specifically designated by the judicial body and not to communicate with them directly or indirectly; not to practice the profession, to do the job or not to carry out the activity in the exercise of which he has committed the deed; to periodically communicate the relevant information regarding his means of existence; to undergo control, care or medical treatment measures, particularly for detoxification purposes; not to attend sporting or cultural events or other public gatherings; not to drive specific vehicles established by the judicial authority; not to not use or to wear weapons; not to issue checks.

In order to ensure the predictability of the necessary conduct, the judicial body, which has taken the measure of judicial control, will specify in the act of taking the measure (ordinance or minute) what are the obligations that the defendant has to observe and will be reminded that in case of violation in bad faith of his obligations, that the measure of judicial control can be replaced by the measure of house arrest or the measure of preventive arrest.

According to art. 215 par. 7 Code of the Criminal Procedure, all throughout the duration of the measure, should the defendant infringe upon in bad faith his obligations or there is a reasonable suspicion that he

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intently committed a new crime for which criminal proceedings have been brought against him, the rights and liberties judge, preliminary chamber judge or court, at the request of the prosecutor or ex officio, order the replacement of this measure with house arrest or arrest, as provided by law.

Regarding the replacement of preventive measures, art. 242 of the Code of Criminal Procedure is applicable. A preventive measure is replaced ex officio or upon request, with a harder one, if the conditions provided by law for taking it and the evaluation of the concrete case and the conduct of the accused during trial, is established that the measure the harsher preventive measure is necessary to achieve the goal provided by art. 202 par. 1. According to art. 202 of the Criminal Procedure Code (C.p.p.), preventive measures, which include the arrest procedure, may be adopted if there is evidence or indications which point to the reasonable suspicion that a person has committed a crime and are necessary to ensure normal criminal proceedings, preventing the accused to skip trial or to prevent new crimes.

Any preventive measure must be proportionate to the seriousness of the accusation against the person to whom it is taken and necessary to achieve the aim pursued by its disposal.

In order to arrest an individual during criminal prosecution, reasonable suspicion should emerge from the evidence that the defendant perpetrated an offence and the conditions art. 223 letter. (a), (b), (c) or (d), Criminal Procedure Code, are met.

Thus, in order to fulfill the prerequisite condition for replacing the measure of judicial control with the measure of preventive arrest, it must be demonstrated that the defendant: either escaped or hid in the purpose of escaping from the criminal prosecution or trial, or did preparations of any kind for such acts; attempts to influence another participant in committing the offense, a witness or expert, or to destroy, alter, hide or evade material evidence or cause another to engage in such behavior; puts pressure on the injured person or tries to make a fraudulent deal with him; there is a reasonable suspicion that after criminal action has been initiated against him, he has comitted a new offense or is preparing a new offense.

However, in order for pre-trial detention, only a reasonable suspicion that the accused person has comitted an offence from the list mentioned in art. 223 paragraph (2) of C.p.p. is necessary, or that an offence punishable by law with 5 or more years of imprisonment be comitted.

Regarding the case of the measure of preventive arrest provided by art. 223 par. 1 lit. D C.p.p., we note that it contains two theses. The first sentence assumes the existence of a reasonable suspicion that the defendant intentionally or prataer-intentionally committed a new offense after the criminal proceedings had been initiated before him. Although the law does not provide, we consider that in this situation it should be both the initiation of criminal prosecution and the prosecution *in persona*, since it is only in these circumstances that a reasonable suspicion of committing a new offense committed by a particular person can be established.

The second thesis, referring to the fact that the defendant is preparing a criminal offense, refers to the execution or comitting acts of execution with no independent criminal meaning. If these preparatory acts were incriminated separately, either as separate crimes or as attempts, we would not consider the situation as preparations of new offenses, but as new offenses themselves.

The second situation provided by art. 223 par. 1 lit. D Cpp., regarding the preparation of a crime, was established by the New Criminal Procedure Code, and was not mentioned by the art. 148 par. 1 lit. D of the former Criminal Procedural Code of 1968.

This solution was imposed - the possibility of ordering the preventive arrest in the case of merely preparing to commit a new crime - because in this case the defendant has the intention to commit a new offense and the preventive measure is justified precisely to prevent such a risk of repetition of criminal behavior[1].

If the defendant mentioned in a preliminary statement that he has indeed tried to commit similar acts, it cannot be concluded that this arrest warrant is necessary in the absence of other data. This case of arrest does not take into account the situation in which the defendant also committed other criminal acts before the criminal action was initiated, but only when the criminal activity is prolonged in time, after the moment when there is evidence of the offense and the criminal action is in motion[2].

As the preparation of criminal acts is under discussion, in this second hypothesis of the case for preventive arrest, it would not be necessary to have any criminal prosecution commence. However, under such circumstances, the judicial authorities should use this case with caution, as it is necessary to establish the probability of a criminal offense committed by the defendant on the basis of the data and information presented, which may not be the same as establishing a presumption of guilt.

If the defendant does not commit an intentional crime and no criminal acts are reported, but the criminal investigating authorities have data regarding the risk of committing a new intentional offense, we consider that art. 223 par. 2 C.p.p Instanţa applicable.

Also, in case of committing a non intentional criminal offense after the criminal action has commenced, it should not be possible to order the preventive arrest in the case of the original offense, but only after the criminal action for the new offense is initiated, can the conditions for the admissibility of the arrest measure regarding art. 223 par. 2 C.p.p. be analyzed.

[1] Nicolae Volonciu – Noul Cod de Procedură Penală,editura Hamangiu, București 2014, pag. 506.
[2] M. Udroiu, Porcedură penală, Partea geerală, 2014, pag. 413.

From the procedural point of view, the arrest proposal will be formulated in the case in which the criminal action was already in motion and not in the new case. This should be done precisely in order to comply with the condition provided by art. 223 C.p.p., which refers to the existence of the defendant in question.

The doctrine has showed that[3] it is necessary to prove that the commission of the new crime or the carrying out of preparatory acts that have are not criminalised separately takes place after informing the defendant of his new quality. The need for preventive arrest stems not from committing concurrent offenses but from the unlawful conduct of the defendant who, although subject to judicial proceedings and is accused of committing a crime, is drawn to his attention to the procedural obligations under art. 108 par. 2 C.p.p., chooses to continue to pursue with perseverance an intentionally illicit, dangerous conduct for society.

Thus, the criminal procedural law provides for the possibility of replacing the preventive measure of judicial control with a heavier preventive measure, namely the measure of home arrest or preventive arrest.

However, due to inconsistencies between the legal texts, in the practice of the courts, difficulties have arisen regarding the uniform application of the legal provisions.

Thus, the source of the practical difficulties is the lack of correlation between Article 223 1 lett. D C.p.p. , which provides that the preventive arrest (as well as the replacement of a preventive non-custodial measure with preventive arrest) may be ordered when there is a reasonable suspicion that after the criminal proceedings have been initiated, the defendant intentionally committed a new offense or is preparing to commit an offense and Art. 215 par. 7 C.p.p. It provides that if during the judicial control there is a reasonable suspicion that the defendant intentionally committed a new offense for which the criminal action was initiated, it shall be necessary to replace the judicial control with the house arrest measure or the preventive arrest under the conditions provided by law.

Thus, this provision introduces an additional condition, namely that for the new intentional offense committed that the criminal action should be ordered. The phrase "*under the conditions provided by law*" refers to the general conditions for taking and replacing preventive measures, which, as we have seen above, do not require the prosecution of the criminal action for the new committed act.

As a consequence, we believe that Art. 215 par. 7 C.p.p., is a separate case of replacing the preventive non-custodial measure with a deprivation of liberty, which does not, however, limit the general rule in the matter, provided by art. 242 par. 3 C.p.p. in relation to art. 223 par. 1 and 2 C.p.p..

A different interpretation of these legal provisions would lead to unjust situations in which, in the event of a new intentional offense not covered by Art. 223 par. 2 C.p.p. and without having the criminal action set in motion, against a defendant who has no judicial control to be able to order the replacement of the measure and the taking of the measure of preventive arrest, as opposed to another who is under the control of the judiciary and not receive a replacement of the measure with that of the preventive arrest.

Another difficulty in judicial practice is represented by the way in which the relation between the situation of the preventive arrest, mentioned in art. 223 par. 1 lit. d C.p.p. and that provided by art. 223 par. 2 C.p.p.

According to art. 223 par. 2 C.p.p., the measure of preventive arrest can be taken if the evidence raise a suspicion that the defendant has committed one of the offenses referred to in para. 2 or another offense for which the law provides for a five-year or longer sentence and, on the basis of an assessment of the seriousness of the offense, the manner and circumstances of the offense, the entourage and environment in which the defendant originates, his criminal history and other circumstances, it is noted that his deprivation of liberty is necessary for the removal of the danger for the public order.

For a more accurate analysis, we will look at a case with practical implications.

Thus, there is a criminal case concerning a defendant sent to court under judicial control for committing the offense of disturbing the order and public peace, as stated in art. 371 Criminal Code, an offense not fulfilling the conditions of art. 223 par. 2 C.p.p.

During the measure of judicial control, the defendant carries out a new intentional offense by applying a punch to the injured person.

In regards to the legal classification, the second offence meets the constitutive elements of the offense mentioned by art. 193 par. 1 of the Criminal Code.

Due to the fact that the medical / legal certificate mentioning the existence of traumatic injuries was not issued in a timely manner, the prosecutor can only ask in regards to the original offense, that the measure of judicial control be replaced with the measure of preventive arrest, on the the grounds of art. 242 par. 3 C.p.p. in relation to art. 223 par. 1 lett. d C.p. and if the prosecution of the criminal action was initiated under art. 215 par. 7 C.p.p.

Assuming that this replacement proposal was admitted and that it was ordered to replace the measure of judicial control with the preventive arrest measure, is it possible that, in the second case, regarding the offense of commiting acts of violence mentioned in art. 193 alin 2 Criminal code (legal provision applicable only after the issuing of the medical certificate which stipulates the existence of a certain amount of days of medical care) to be requested in accordance to art. 223 par. 2 C.p.p. in order to arrest the same defendant. It

[3] Nicolae Volonciu, op cit., pag. 507.

would lead to two preventive measures against the same person for committing the same act of striking the injured person.

In our opinion, in order to solve the problem, first it must be pointed out of all that the provisions of Art. 223 para. 1 lit. d C.p.p. and art. 223 par. 2 C.p.p. contain distinct theses of taking or replacing preventive measures.

Thus, the two cases for preventive arrest are not mutually exclusive because they are based on different legal bases.

The first, the one provided by art. 223 par. 1 lit. d. C.p.p., is meant to sanction the conduct of the defendant, who, although aware of the fact that he is under legal invesgation, commits a new offense, in disregarding the norms of cohabitation and the restrictions and exigencies of the initial preventive measure.

The second case of preventive arrest refers to the existence of a danger to public order. The protection of the public order is regarded as a pertinent and sufficient element for the deprivation of liberty of a person, if it is based on facts capable of showing that the release of the person would actually disrupt the public order. The concept of danger to the public order is a prediction, an appreciation of the defendant's future behavior. In some cases, the seriousness of the offense committed may be sufficient to outline the assessment that the defendant is dangerous to public order. In other situations, the criminal record can lead to the conviction that the defendant will commit a new offense.

Hence, unlike the first case of the preventive arrest measure, which sanctions the repetitive illicit conduct of the defendant, the second case seeks to protect society against defendants who present a real and concrete danger to public order.

This interpretation, we consider that it is circumscribed to the purpose of the norms under consideration, and it is not a double application of the preventive measures for the same act, because in its essence, the basis of taking the preventive arrest measure only in the second case, with regard to the first case, is based on the grounds of the misconduct of the defendant.

In support to this legal reasoning, the issue of a case that prevents the prosecutorial endeavour, such as the withdrawal of the criminal complaint by the injured person, may be dealt with.

Starting from this hypothesis, in the case in which the preventive arrest was ordered on the grounds of danger to public order, the measure would be revoked, since it involves a cause that prevented the continuation of the criminal proceedings.

On the other hand, in the case of replacing the judicial control with the measure of preventive arrest, we do not think we are in the case of revoking the preventive measure. As pointed out above, the measure has been replaced due to the defendant's conduct and not because of the legal characteristics of the offense.

3. Conclusions

Analyzing the legal provisions regarding the replacement of the measure of judicial control with the preventive arrest, it should be noted that the non-custodial preventive measure can be replaced by the preventive arrest measure if the conditions stipulated by the law are met (Article 223 paragraph 1, 2, C.p.p.) and following the assessment of the concrete circumstances of the case and of the procedural conduct of a defendant, it is considered that the heavier preventive measure is necessary for achieving the goal provided by art. 202 par. 1 C.p.p..

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