The Judicial Control on Bail

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The judicial control on bail belongs to the preventive measures category provided by the New Criminal Procedure Code; together with the simple judicial control, it is a freedom restrictive measure used by the judicial authorities in order to ensure a good development of the criminal trial.

Key words: preventive measure**,** Criminal Procedure Code, defendant, bail, real warranties

Part 1. – Introduction

The preventive measure called judicial control is provided by article 216-217 Section 4 of the New Criminal Procedure Code.

Some voices[75] rightfully said, about the general aspects of this preventive measure, that the judicial control on bail is a special form of the judicial control, containing the same obligations that must be forcedly or freely accepted by the defendant, according to art. 216 paragraph 3, with reference to art 215 of the New Criminal Procedure Code.

On the other hand, there major differences between the two preventive measures. According to art 217 of the New Criminal Procedure Code, for judicial control on bail, the defendant shall deposit a bail set by the court depending on the case characteristics, the accusation severity brought against the defendant, his financial status and his legal obligations. Also, the article states that the bail value shall not be inferior to 1.000 lei.

The conditions that must be complied with, for the enforcement of the judicial control on bail, are different from those of the simple judicial control; the first measure can be applied provided the circumstances for preventive arrest and home arrest measures are observed.

As the specialized literature showed[76], the New Criminal Procedure Code creates, without reasonable explanations, a difference between the conditions and the cases necessary for the enforcement of the judicial control preventive measure and the ones provided for the enforcement of the judicial control on bail.

Although the judicial control on bail is a preventive measure completely identical to the judicial control, there is a supplementary condition, concerning the bail deposit. If, for judicial control, art 211 of the New Criminal Procedure Code mentions the general provisions of art 202 of the same Code, art 216 of the New Criminal Procedure Code, for the judicial control on bail, makes reference to the necessary conditions for preventive arrest and home arrest.

The solution is surprising, given the logic of gradual regulation of the preventive measures in the new code; thus, for three preventive measures, with different degrees of restriction of the defendant's personal freedom, are mentioned the same conditions for their enforcement.

It means that adoption of any one of these preventive measures is not founded on certain well defined criteria in order to identify the most appropriate preventive measure, left to the judgment of the judicial authority, depending on necessity or proportionality.

We think this is bad as it leads to a rather unequal practice where, with similar circumstances and causes, a judicial body should consider the enforcement of a freedom restrictive measure, more exactly, the judicial control on bail, and another body should consider more suitable to decide a freedom privative measure, more exactly the preventive or home arrest.

We consider that the lawmaker should intervene here and provide us with a certain degree of predictability about the adoptable preventive measure.

I.1. Necessary conditions for adopting the judicial control on bail

A. Aspects on adopting the judicial control on bail when the public order is not considered endangered

The following requirements shall be met in order to rule the preventive measure of judicial control on bail in this case:

- the existence of evidence for a reasonable suspicion that the defendant committed a crime;

[75] *Comments on Criminal Procedure Code*, coordinators Nicolae Volonciu, Andreea Simona Uzlău, Hamangiu Publishing House, 2014, page 468

[76] *Criminal Procedure. General Part. Criminal Procedure Code,* Mihail Udroiu, 2nd edition, C.H.Beck Publishing House, Bucharest 2015, page 628

- the absence of a case to prevent the beginning or the exercise of the criminal prosecution provided by art 16 of the New Criminal Procedure Code;
- the criminal action already begun;
- the presence of one of the cases provided by art. 223 paragraph 1 letter a-d of New Criminal Procedure Code, more exactly:
- the defendant fled or hid to avoid prosecution or judgment, or made preparation of any kind for these actions;
- the defendant is trying to influence another person that took part to the crime commission, another witness or an expert or he is trying to destroy, alter, hide or eliminate material evidence or to determine a person to do so;
- the defendant puts pressure on the victim or tries to make a illegal deal with him/her;
- there is reasonable suspicion that, after the beginning of the criminal prosecution against him/her, the defendant intentionally committed a new offence or is preparing the commission of a new one.
- the defendant has already deposited the bail set by the judicial body;
- the measure of judicial control on bail is sufficient to have alternative purposes satisfied in order to adopt preventive measures provided by art 202 paragraph 1 of the New Criminal Procedure Code, having a good development of the criminal trial, the prevention of the defendant elusion from the criminal prosecution or judgment, or the prevention of committing another offence;
- the measure of the judicial control on bail is proportionate with the severity of the accusation brought against the defendant and is necessary to meet the purpose of its adoption;
- preliminary hearing of the defendant in the presence of the ex office lawyer.

B. Aspects on adopting the judicial control on bail when the public order is endangered by the defendant

The following requirements shall be met in order to rule the preventive measure of judicial control on bail in this case:

- the existence of evidence for a reasonable suspicion that the defendant committed one of the following crimes: a deliberate crime against human life; a crime which caused body injury or the death of a person; a crime against the national security provided by Criminal Code and other special laws; a crime of drugs, weapons or persons trafficking, actions of terrorism; money laundry; counterfeiting of coins or other values; blackmail; rape; deprivation of freedom; tax evasion; grave injury; judicial injury; corruption offence; IT means offence; another offence punished by prison for 5 years or more;
- the absence of a cause which prevents the beginning or the application of the criminal action provided by art 16 of the New Criminal Procedure Code;
- the beginning of the criminal action in case of the offence for which there is the suspicion that the defendant is the author;
- the necessity to have a judicial control on bail in order to eliminate a dangerous situation for the public order; the lawmaker sets the conditions for such situation considered dangerous for the public order in art 223 paragraph 2: the severity of the offence; the way and the circumstances the crime was committed; the entourage and the environment of the defendant's origin; the defendant's criminal record; any circumstance regarding the defendant; the measure of judicial control on bail is sufficient to have alternative purposes satisfied in order to adopt preventive measures provided by art 202 paragraph 1 of the New Criminal Procedure Code, having a good development of the criminal trial, the prevention of the defendant elusion from the criminal prosecution or judgment, or the prevention of committing another offence;
- the measure of the judicial control on bail is proportionate with the severity of the accusation brought against the defendant and is necessary to meet the purpose of its adoption;
- the preliminary hearing of the defendant in the presence of the ex office lawyer.

In terms of the necessity to adopt such measure to eliminate the dangerous status for the public order, the European Court of Human Rights stated that, given the special severity and the public reaction towards it, some crimes can determine social troubles that can justify preventive arrest (moreover, if the Court considers that it s possible to have a freedom preventive measure, it is also possible to adopt a measure that causes a small deprivation of human rights and freedoms such as judicial control on bail), at least for a certain period of time.

This must be considered very important and sufficient if it is based on actions that prove that by letting the defendant free, it would cause real social disturbance of public order.

Furthermore, the deprivation of freedom will be legal provided the public order is not threatened, as it cannot be used as an anticipation of the punishment by prison[77] .

[77] CEDO, Decision of 26 June 1991, Letellier /vs/ France, paragraph 51

The Court appreciated[78] that the danger for the public order can be also assessed by relating it to other circumstances, such as the character, the morality, the residence, the profession and the family liaisons of the defendant.

The concept of menace for the public order is initially based on the severity of the offence which decides a powerful reaction of the public opinion, but the application of this measure is legal as long as the analysis of other criteria, concerning the defendant, supports the idea that the absence of a preventive measure would lead to a certain public disturbance and would endanger the social relations and their normal development.

C. The defendant ran or hid in order to avoid being criminally prosecuted or judged, or he made preparations for such actions

It is necessary that evidence in the case prove that the defendant ran or hid, knowing about the existence of a trial against him/her. Now the preventive measure shall be subjected to the debate, as the defendant is absent or made preparations to avoid the procedure, and the purpose was not satisfied.

The specialized literature states[79] that absconding risk is the case when the defendant leaves his residence hurriedly and secretly, when he moves to another town, country or abroad, without evident reason, in order to escape from possible restrains of the criminal trial.

When the defendant changes his residence and his identity it means he is hiding[80]. In jurisprudence, the action of hiding also means when he hides inside the dwelling, in certain places, leaving the impression that he is not living there anymore.

The risk to avoid criminal procedure cannot be measured only by relating it to the severity of the action taken into account when being sentenced; it must be assessed by taking into account other elements such as the defendant's personality, his morality, residence, profession, financial resources, his relationship with his family and any other relation with the state where the criminal prosecution takes place[81].

When a person[82] is a foreign citizen or stateless or has no connection to Romania, or the country where he is accused of committing an offence, this is not sufficient to draw a conclusion about the existence of an absconding risk; clues or proofs are needed in order to support the defendant's intention to flee or hide.

When assessing the necessity of adopting the preventive measure, the judge will have regard to the possibility to eliminate such risk by other means, such as lodging a bail or the judicial control[83].

We think the application of the judicial control or the one on bail is a little difficult and strange if the defendant already ran or did preparation for this in order to abscond from the criminal procedure begun against him.

We are not sure that, by adopting such preventive measures, defendants will be discouraged to avoid the criminal law and change their behavior to accept it. This situation is rarely met in the jurisprudence given the social and family connections; the defendants prefer to be judged, even sentenced, rather than living a long period of time with the fear of being discovered by the authorities, especially nowadays, when the persons identifying means are more and more sophisticated for a better, quick and efficient cooperation between countries.

D. The defendant is trying to influence another participant to crime commission, an witness or an expert, or is trying to destroy, alter, hide or abscond material evidence, or to determine a person to do so

It doesn't matter whether the persons have already been heard or are to be heard, and if they have been heard, whether their statements are against or in favor of the defendant or another participant, if the statements regard the criminal or civil side.

Also, this case is incident no matter if the material evidence have been taken or not form the scene site or are held by the judicial bodies or other persons. Nevertheless, special attention must be paid to the possibility of the defendant to hide the truth by altering the proofs, meaning the impact on the judicial and procedural situation as the result of the modification already or not yet done on the evidence.

Influencing persons that can testify in the case can be done in different ways: by putting pressure or by expressing threats on them or their family members or closed friends, by corruption, illegal deals, urges or requests.

[78] CEDO, Decision of 28 March 2006, Jose Gomes Pires Coelho
[79] *Comments on Criminal Procedure Code*, coordinators Nicolae Volonciu, Andreea Simona Uzlău, Hamangiu Publishing House, 2014 pag. 502
[80] ibidem
[81] CEDO, Decision of 28 March 1968, Neumaister /vs/ Austria parag. 10
[82] *Criminal Procedure. General Part. Criminal Procedure Code* Mihail Udroiu, 2nd edition, C.H.Beck Publishing House, Bucharest 2015 pag. 468
[83] CEDO, Decision of 27 August 1992, Tomasi /vs/ France, paragraph 98

Jurisprudence showed[84] that it is necessary to pay more attention to the nature and severity of the crime, to the circumstance of the suspicion about the crime commission, given the possibility to put pressure on witnesses who testified and the approaches made by the defendant to identify protected witnesses.

This risk[85] can lead to adoption of the arrest measure but it must be periodically assessed because, if it is diminished or even gone, after the hearing of witnesses and without evidence of pressure put by the defendant, this measure is no longer justified.

Talking about the hypothesis of destroying, altering or absconding evidence[86] (objects that prove the crime, object used or destined to be used to commit a crime, objects that are the product of a crime or any other object that can help to find the truth), we must prove that the defendant's activity bore this intention, of hiding the truth in the case.

E . The defendant puts pressure on the victim or tries to reach an illegal agreement with him/her

Here the purpose is to protect the victim (case 1) or to avoid the risk to lose the opportunity to find the truth (case 2). In both cases, the evidence (witnesses' testimonies, minutes of the telephone conversations, minutes of the criminal prosecution or even the clues resulted from the substantial alteration of the victim statement, in absence of a likely explanation) must prove that the defendant committed, directly or indirectly, personally or by means of other people actions in order to influence the victim not to support the criminal accusations against him/her, for hindering the truth in the case.

The patrimony agreement between the offender and the victim cannot be a reason for the adopting of the preventive measure, in case of crimes for which the criminal action begins when the complaint is lodged or when the reconciliation can appear.

Reconciliation cannot be fraudulent[87] if it is allowed by law and is carried out without the procedure provided by this. Reconciliations within legal frame can become fraudulent if they use blackmail, threats, if they mislead the victim or appeal to other illegal actions.

At the same time[88] the agreement in civil part of the case, allowed in cases where the victim claims a damage caused by the defendant deed, would become fraudulent if the victim is forced to have an incorrect behavior during the procedure, such as taking back statements, refusing to make others or stating untruthful things in order to help at exonerating the defendant from the criminal liability or to determine an attenuation of this liability.

F. The presence of a reasonable suspicion that, after the beginning of the criminal procedure against him/her, the defendant willingly committed a new crime or is preparing to do it

Here there are two cases: either the defendant has already committed another crime, or he is preparing to commit one in the future.

Bothe cases start from the idea that the defendant is already under prosecution for a committed crime and he/she continues to have an antisocial attitude, by committing another crime or making preparation for it.

If the defendant mentioned, in his first statement, that he had tried to commit similar deeds afterwards, we cannot draw the conclusion of incidence if there are no other data[89] .

Also, there must be the reasonable suspicion that the defendant is clearly preparing to commit another crime.

If the defendant has already committed a new crime, it is not necessary[90] that both crimes, the one that is the object of the criminal case for which there is a preventive measure adopted, and the new one, belong to the same case file. Also, it is not necessary that the criminal prosecution begins for the new crime

Yet[91], it is necessary to prove the commission of the new crime or the preparations for it after the defendant is informed, as the necessity of the preventive measure doesn't result from the commission of concurrent crimes, but from the behavior of the defendant who, under the accusation of commission of a

[84] *Criminal Procedure. General Part. Criminal Procedure Code* Mihail Udroiu, 2nd edition, C.H.Beck Publishing House, Bucharest 2015 page 469
[85] CEDO, Decision of 26 June 1991, Letellier /vs/ France paragraph 37-39
[86] *Criminal Procedure. General Part. Criminal Procedure* Code Mihail Udroiu, 2nd edition, C.H.Beck Publishing House, Bucharest 2015pag. 470
[87] *Comments on Criminal Procedure Code*, coordinators Nicolae Volonciu, Andreea Simona Uzlău, Hamangiu Publishing House, 2014, pag. 506
[88] *Comments on Criminal Procedure Code*, coordinators Nicolae Volonciu, Andreea Simona Uzlău, Hamangiu Publishing House, 2014, pag. 506
[89] Court of Appeal Braşov, Criminal Section, Conclusions no 6/2003, mentioned in *Criminal Procedure. Generalities. Criminal Procedure Code* Mihail Udroiu, 2nd edition, C.H.Beck Publishing House, Bucharest 2015, pag. 471
[90] *Comments on Criminal Procedure Code*, coordinators Nicolae Volonciu, Andreea Simona Uzlău, Hamangiu Publishing House, 2014, pag. 507
[91] ibidem

crime and being the object of a judicial procedure against him/her, willingly keeps on having an illegal behavior, placing himself/herself in a state of danger for society.

Part II – Bail

II.1 – Definition and General Terms

According to art 217 paragraph 1 of the New Criminal Procedure Code, the bail represents a sum of money that is put at the disposal of the judicial body or by setting a real warranty, securities or real estates, within the set limits of sums of money, for the same judicial body.

The defendant or the procedure substitute is the persons who can deposit the bail. The bail deposit is a warranty for the presence of the person under the judicial control before the bodies of criminal prosecutors or the court, the good development of the justice, as well as the observance of the obligations provided by law or the judicial body[92].

According to legal provisions, the minimum limit of the bail is 1.000 lei. Bails that exceed this limit are to be set by the competent judicial body, based on the severity of the accusation, the financial status and his legal obligations.

The jurisprudence of the European Court of Human Rights considered that for the bail setting, it is important cu know the financial status of the defendant, his resources and also, if losing the bail will be an obstacle strong enough to prevent the culprit from avoiding the procedure[93].

Any piece of evidence can be used by the criminal prosecution bodies in order to determine the incomes of the defendant in case he/she refuses to revel them.

II.2 – Bail Refund

Bail is refundable as it follows[94]:

- the moment the judicial control on bail is revoked;
- the moment the criminal prosecution is classified or dropped out;
- when a decree, even not final, rules the renouncement to punishment application or postponing, to acquitting or ceasing the criminal trial; this is not applicable if it has been decided that the damages caused by the committed crime, the judicial costs or the fine be paid for with money taken from the bail.
- when the decree rules the sentence by prison or by paying a fine; this is not applicable if it has been decided that the damages caused by the committed crime, the judicial costs or the fine be paid for with money taken from the bail.
- any other situation where bail seizure is not ruled in the decree.

II.3 – Not-Reimbursable Bail

Impounding the bail is made pursuant to art. 217 paragraph 5 of the New Criminal Procedure Code if the judicial control on bail has been replaced by the preventive arrest or the home arrest due to the fact that the mala fide defendant hadn't complied with his obligations set by the judicial control or if there is reasonable suspicion that he had committed a new crime which caused the beginning of the criminal procedure against him[95].

The solution to be ruled on the merits is not important; the seizure can be ruled even if the adopted solution envisages the renouncement to the punishment application or delay, acquittal or cease of the criminal trial.[96]

Also, we must underline that breaching the obligations ruled by the judicial control on bail doesn't necessary lead to a harder preventive measure; it is also possible to maintain the judicial control on bail and to rule new obligations or increase of the bail quantum[97]. Art 217 paragraph 5 of the New Criminal Procedure Code states that only the Court can rule this measure. Jurisprudence and specialized literature stated 2 different opinions regarding the competent judicial body ruling the bail seizure. One opinion states that only a decision of the first phase of judgment can seize the bail. The other opinion states that giving this right only to the court is a writing mistake of the lawmaker.

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[92] Criminal Procedure. General Part. Criminal Procedure Code Mihail Udroiu, 2nd edition, C.H.Beck Publishing House, Bucharest 2015, page 637

[93] Criminal Procedure. General Part. Criminal Procedure Code Mihail Udroiu, 2nd edition, C.H.Beck Publishing House, Bucharest 2015, page 638

[94] idem

[95] *Comments on the New Criminal Procedure Code*, coordinators Nicolae Volonciu, Andreea Simona Uzlău, Hamangiu Publishing House, 2014 page 478

[96] *Criminal Procedure. General Part. Criminal Procedure Code* Mihail Udroiu, 2nd edition, C.H.Beck Publishing House, Bucharest 2015 page 639

[97] *Comments on the New Criminal Procedure Code*, coordinators Nicolae Volonciu, Andreea Simona Uzlău, Hamangiu Publishing House, 2014, pages 476-477

About the impossibility to seize the bail only by the court decision, they say that on the contrary, art 217 paragraph 5 and 6 of the New Criminal Procedure Code regulates the situation where bail seizure and reimbursement during the judgment phase without limiting or forbidding the seizure during other trial phases.

During the criminal prosecution phase, the judge for rights and freedoms and the judge of the preliminary chamber, through the conclusion stating the replacement of the judicial control on bail with another arrest measure, shall also decree the seizure of the money deposited as bail, based on provisions of art 216 paragraph 1 and 3, related to art 215 paragraph 3, art 217 paragraph 4 and 9 and art 242 paragraph 3 and 9 of the New Criminal Procedure Code[98].

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