CONSIDERATIONS REGARDING THE PREVENTIVE MEASURE OF JUDICIAL CONTROL ON BAIL.

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Abstract

The judicial control on bail is one of the five preventive measures provided by the New Criminal Procedure Code. The faulty way of regulating the preventive measure of judicial control on bail has determined an extremely low applicability of this preventive measure in the judicial practice of our country.

Both in doctrine and jurisprudence there is controversy over the procedure to be followed in order to take the measure of judicial control on bail. In a doctrinal opinion it was shown that there is a preliminary stage of admissibility in principle and that the provisions of art. 242 C.P.P. shall be applied by analogy. This is one of the problems we intend to analyze in our study.

In the Western countries legislation, such a measure is widespread, being considered a viable alternative to the deprivation of liberty. The threat of losing a very large amount of money will obviously cause the defendant to weigh heavily the way he respects the obligations imposed by the judicial bodies.

The jurisprudential controversies previously described with regards taking this measure, controversies born from the very wording used by the legislator, prompted many prosecutors to be reluctant to order / take such a measure.

We hope that in the future, the regulation of judicial control will be given greater attention and this preventive measure will truly become a genuine alternative to custodial preventive measures.

Keywords: *preventive measures, bail, judicial control, prosecutor, court.*

1. Introductory notions

Judicial control on bail is one of the 5 preventive measures regulated by the Romanian criminal procedural law. This measure may be ordered during the prosecution, as a rule, by the prosecutor.

The judge of rights and freedoms may also impose judicial control during the criminal proceedings but only if he / she rejects the proposal for preventive arrest / home arrest and takes the measure of judicial control on bail or disposes the replacement of the preventive arrest / home arrest with judicial control on bail (either on the occasion of the rejection of the proposal to extend the preventive arrest / home arrest or on the occasion of solving a separate request for replacement).

The judge of rights and freedoms will never be notified by the prosecutor with a proposal to take the measure of judicial control on bail. In the preliminary chamber procedure, the competence to rule on judicial control on bail lies with the judge hearing the preliminary hearing and at the trial stage with the court.

With regards the conditions to be fulfilled in order for this measure to be taken, we find that while judicial control is a restrictive measure, the conditions are identical to those required for measures of imprisonment or house arrest / preventive arrest.

Thus, for taking this preventive measure, there must be at least one of the following cases:

- The defendant fled or was hiding in order to evade the criminal investigation or trial, or to make preparations of any kind for such acts;
- The defendant tried to influence another participant to the incriminated act, an expert or witness or tried to destroy, alter or conceal evidence or lead another person to have such a behavior;
- The defendant puts pressure on the injured party or tries to make a fraudulent deal with him;
- There is reasonable suspicion that, after the criminal proceedings have been initiated against him, the defendant intentionally committed a new offense or he/she is preparing to comit a new offense;
- If it stemms out of the evidence collected the reasonable suspicion that he /she has committed any of the offenses provided by art. 223(2) Code of Criminal Procedure (C.P.P.) and on the basis of the assessment with regards: the seriousness of the offense, the manner and circumstances of committing the offense, the entourage and the environment from which the defendant originates, the criminal history and other circumstances concerning the person, it is concluded that taking the preventive measure of restricting one's freedom is necessary to remove a state of danger for the public order.

We consider that the legislator's option is open for criticism and we see no justification for the existence of any differences between the conditions for imposing judicial control and the conditions for judicial control on bail. De lege ferenda, we believe that only the general conditions provided for in art. 202 Criminal Code (C.C) should apply: that there is sufficient evidence or sound clues from which it would result a reasonable suspicion that the defendant has committed an offense; that criminal proceedings have been

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initiated; the judicial control on bail is necessary to ensure the proper conduct of the trial, preventing the defendant absconding from prosecution or trial or to prevent commission of another offense; the judicial control on bail must be proportionate to the seriousness of the accusation brought to the person against whom it is taken and necessary to achieve the aim pursued by its disposition; there must be no cause that would prevent the initiation or prosecution of the criminal action; the defendant has been previously heard in the presence of an attorney elected or appointed ex officio.

2. The procedure for judicial control on bail in the course of the criminal prosecution stage

Both in doctrine and jurisprudence there is controversy over the procedure to be followed in order to take the measure of judicial control on bail. In a doctrinal opinion it was shown that there is a preliminary stage of admissibility in principle and that the provisions of art. 242 C.P.P. shall be applied by analogy. At this stage the prosecutor determines the value of the bail and sets the payment term for this amount. Subsequently, after the bail has been paid, the prosecutor would have ordered this preventive measure, setting out the obligations and measures that the defendant must respect[1].

However, jurisprudence is almost unanimous in considering that all steps in ordering the measure of judicial control on bail take place in a single stage. Thus, in a case filed by ICCJ, it was shown that in the case of the replacement of the preventive arrest with the measure of judicial control on bail, the legislator provided for a special procedure distinct from just taking the measure of judicial control on bail. Thus, if in the first situation it is necessary to go through the admissibility phase in principle and to lodge the bail before the replacement (Article 242(10) C.P.P), in the second situation the measure is taken without going through distinctive steps such as the admissibility in principle (art. 216 rap. to art. 212-216 C.P.P.) [2].

Likewise, it has been shown that the measure judicial control on bail is ordered uno ictu by the prosecutor through a reasoned order which shall contain the duration of the measure, the obligations imposed on the defendant, the amount of bail and the conditions of deposit. The legal provisions in force do not provide for a stage of admissibility in principle nor the need to obtain the defendant's consent[3].

The jurisprudence identified at the level of the Supreme Court, since the entry into force of the new Code of Criminal Procedure to this date, shows that, in all cases, the prosecutor has issued ordinances to take the measure of judicial control uno ictu, without passing through the stage of admissibility in principle. The same case-law shows that the court, by examining the lawfulness of the measure, on request of the defense or on its own initiative, did not rely on the absence of the admissibility stage in principle as a vice in the proceedings and the deposit of the bail was not considered a sine qua non condition for the ascertainment of the measure. (...) This procedure of taking the measure of judicial control on bail uno ictu is not inconsistent with the hypothesis of replacing the measure of preventive arrest, separately regulated in the Criminal Procedure Code Article 242, paragraph 10. The abovementioned text is of a special nature - special generalibus derogation. The fact that the text is not applicable in the procedure for the taking of the measure of judicial control on bail also results from a simple systematic interpretation, seeing the place of the norms in the sections of Title V, chapter I. Thus, at the time of replacing the preventive arrest measure with the measure of judicial control on bail, the same legislator introduces an additional condition, the early payment of the bail, at a distinct stage of admissibility in principle. The distinct situation in which the legislator foresees for the stage of admissibility in principle, namely the replacement of the preventive arrest measure, supports the usefulness or opportunity of the early deposit of the bail. The different prerequisites (replacing the preventive custody / taking the measure of judicial control on bail) justify the different optics of the legislator. As a consequence, the measure of judicial control on bail is ordered by the prosecutor by reasoned ordinance, which will contain the duration of the measure, the obligations imposed on the defendant, the amount of the bail and the conditions of the deposit[4].

What distinguishes the judicial control from the judicial control on bail is the obligation to deposit the bail. The most controversial issue with regard to the judicial control on bail is to determine when the bail must be paid, namely whether the measure can be ordered only after the defendant has paid the bail or whether the prosecutor can order the measure and the defendant will subsequently deposit the set amount.

In the doctrine, the first opinion is almost unanimous. It has been shown that the depositing of the set sum is one of the conditions stipulated by the law in order to proceed with the preventive measure; it was found erroneous the practice of some judicial bodies of taking the measure for a certain period by setting of a term for the deposit that begins to run after the beginning of the measure.

This latter interpretation is contradicted by the express provisions of Art. 216 (1) C.P.P. that lists the conditions under which the prosecutor may order

[1] V. Pușcașu, C.Ghigheci, *Proceduri penale*, vol. I, Ed. Universul Juridic, Bucharest, 2017, p. 753-754; also, C. Voicu în N. Volonciu, A.S.Uzlău, *Codul de Procedură Penală comentat,*Ed. Hamangiu, Bucharest, p. 551.

[2] I.C.C.J, court decision from 4.03.2014, unpublished.

[3] I.C.C.J., court decision no. 210 from 14.03.2016, unpublished.

[4] I.C.C.J., court decision no. 286 from 6.04.2016, unpublished.

judicial control on bail. If the defendant does not deposit the sum set as bail, there is no impediment in making a proposal for taking a custodial preventive measure, since the preventive measure of judicial control has already been considered insufficient to achieve the purpose of preventive measures. Moreover, it would be contrary to the principle of "*nemo auditur propriam turpitudinem allegans*" that the guilty pasivity of the defendant in the depositing of the bail would lead to the creation of a more favorable situation for him/her by taking a less restrictive measure of rights[5].

As regards the jurisprudence of the Supreme Court, a single solution was given in this respect. As such, the judge of rights and freedoms found that from the provisions of art. 216 (1) C.P.P. it follows that the deposit of the bail by the defendant is a precondition for the legality, which must be fulfilled in order for the measure of judicial control on bail to be ordered. Even though the abovementioned legal provisions do not stipulate that this measure could be taken by the prosecutor only at the initiative of the defendant, however, since the defendant can not be compelled to deposit the bail, the judge of rights and freedoms finds that this measure cannot be taken during the criminal prosecution stage legally by the prosecutor alone, but only with the consent or at the request of the defendant.

However, without being subjected to a custodial perventive measure, it is logical that the defendant will not be interested in requesting to take the measure of judicial control on bail against him and thus to deposit a bail. He /she would be interested in requesting the application of this preventive measure only if he/ she would had been subject to a measure depriving him/her of his/her freedom; in such a case the replacement of the measure of preventive arrest or of home arrest with the measure of the judicial control on bail would be ordered under the conditions provided by art. 242 (10) and (11) of the C.P.P., either by the judge of rights and freedoms, by the judge of the preliminary chamber or by the Court, and not by the prosecutor. It follows that, during the criminal prosecution, in theory, the measure of judicial control on bail ordered by the prosecutor may be taken, as provided by the provisions of Art. 216 (1) C.P.P. However, in practice, in the absence of the defendant's agreement or request, the consequence is the failure to comply with the condition for prior deposit, and therefore the illegality of the measure, the possibility for the prosecutor to dispose of this measure becomes an illusory one, as it is the case here[6].

The practice of the Supreme Court is in the sense of ordering judicial control on bail also prior to the payment of bail, as such until the defendant makes the deposit, the precautionary measure is manifested as a simple judicial control. It has been shown that the current legislator, following the analysis of previous regulations and its reflections in judicial practice, found the usefulness of reforming the institution. Thus, the current legislator has explicitly and willingly abandoned the admission phase in principle, and the grammatical interpretation of the final sentence of art. 216 (1) C.P.P. can not lead anymore to the conclusion of the need for the early deposit of the bail. Such an interpretation would be tantamount to adding to the law or to enactment, the current legislator's will being to take the measure of judicial control uno ictu and simplify the procedure. Such an interpretation would be tantamount to the enactment of the admissibility procedure in principle according to the structure and conditions of the repealed legal provision, in the context in which the legislator waived this provision and the case-law created in the light of the repealed text. (...) The deposit of the bail, which requires personal actions of the defendant, as successive actions to the obligation imposed by the judicial body, is made after its establishment through the only ordinance that the procedure provides. Asking the prosecutor to issue two ordinances, a first as to establish the bail (no other obligations) and a second for the actual taking of the measure and the determination of the rest of the obligations to be imposed to the defendant, has no coverage in the current legislation and comes in flagrant contradiction with the text requiring the establishment of all obligations, including amount of the bail, through a single act[7].

In another case, the judge of rights and freedoms stated that considering that the measure of judicial control on bail would come into force only after the bail had been deposited would lead to the illogical situation in which a defendant who is subject to regular judicial control complies with all the obligations imposed from the moment the ordinance was issued, while a defendant who is subject to judicial control on bail, hence a heavier preventive measure, would only comply with all the obligations imposed at a later time, after the deposit of the bail. Until the time the defendant deposits the bail, the measure of judicial control on bail has same efects, namely obligations imposed, as the regular judicial control[8].

In our opinion, this latter opinion is also the correct one. Thus, the urgency of preventive measures is taken into account. For example, if the prosecutor considers that it is necessary for the proper conduct of the criminal proceedings that the defendant should not contact certain persons and not leave the territory of the country, it is only natural that such restrictions occur immediately. Allowing the defendant to delay the execution of these obligations until the payment of the

[5] C. Jderu, în M. Udroiu (coordonator), *Codul de Procedură Penală. Comentariu pe articole,* Ed. C.H.Beck, Bucharest, 2017, p. 1046-1047; also, M. Udroiu, *Procedură Penală. Partea Generală,* Ed. C.H. Beck, Bucharest, 2016, p. 681, B. Micu, R. Slăvoiu, A.G. Păun. *Procedură Penală. Curs pentru admiterea în magistratură şi avocatură,* Ed. Hamangiu, Bucharest, p. 196; C. Voicu în N. Volonciu, A.S.Uzlău, quouted work., p. 551.

[6] I.C.C.J., court decision no. 145 from 24.02.2016, unpublished.

[7] I.C.C.J, court decision no. 286 from 6.04.2016, unpublished.

[8] T. Prahova, court decision no. 475 from 6.10.2016, unpublished.

bail would be practically a way of undermining the purpose of the criminal proceedings. Practically, the interpretation given by this last opinion, which we have embraced, is the only one that allows the practical application of the institution of judicial control on bail.

3. Appealing the ordinance to the judge of rights and freedoms

The prosecutor's ordinance throught which the preventive measure was ordered may be appealed through a complaint lodged with the judge of rights and freedoms belonging to the Court that would have jurisdiction to hear the case at first instance.

The period within which the prosecutor's ordinance may be appealed is 48 hours from the communication of the ordinance by which the preventive measure was taken.

The judge of rights and freedoms sets a deadline and orders the defendant's summoning. The complaint will be settled in the council chamber. The complaint must be resolved within 5 days of registration. The citation of the defendant is mandatory, but its absence will not prevent the complaint from being judged. The participation of the prosecutor is mandatory. The judge of rights and freedoms listens to the defendant when he / she is present. The legal assistance of the defendant is mandatory.

The main issue that triggered controversy in practice regarding this procedure is the ability of the judge of rights and freedoms to analyze the amount of bail imposed by the prosecutor. In the doctrine, it has been shown that the defendant can not challenge the amount of the bail fixed by the prosecutor, because the measure can be taken only after the bail has been deposited. If the measure is taken, it means that the defendant has deposited the bail, hence implicitly accepting its value; the dissatisfaction with the amount fixed by the prosecutor can be expressed by the refusal to deposit the bail, which means that the measure will not be taken[9].

As we have seen before, depositing of the bail is not a prerequisite for taking the preventive measure of judicial control on bail, so it can not be argued that the defendant has accepted the amount of the bail. From the examination of the jurisprudence of the High Court it is observed that a unitary practice has been formed regarding the possibility of the judge of rights and freedoms to reduce the amount of the bail in the procedure provided by art. 216 rap. to art. 213 C.P.P.

In another opinion, it was found that, during the appeal procedure, the judge of rights and freedoms has the power to examine only the questions regarding the legality of this preventive measure when dealing with the complaint against the prosecutor's ordinance ordering the measure of judicial control. Therefore, the judge of rights and freedoms can not censor the prosecutor's assessment of the amount of bail imposed but can only check whether the measure has been taken in compliance with the legal provisions[10].

To the contrary, it was found that the judge of rights and freedoms, when examining the complaint, may censure the unlawfulness of the bail, for example if the sum is outside the legal ceilings or groundless related issues relating to an excessive amount in relation to the personal or financial situation of the defendant[11].

In another case, the Supreme Court held that the amount of bail of 500,000 lei (approximately 111,000 EUR), set by the prosecutor, reported to the seriousness of the accusations made to the defendant, to its material situation (which has approximately 53,400 EUR annual total income - 13,400 EUR annual salary income plus 40,000 EUR annual income from other self-employment activities, as evidenced by its latest wealth declaration filed on file), but also to its legal obligations (which are not to be neglected since the defendant has 5 children), is an excessively high value, which is impossible to pay for the defendant. By making a simple calculation, it was found that the defendant could raise this sum if it would save all the income earned over two years, and this entailing no expenditure with daily maintenance and current expenses. A second option for setting the amount of the bail, as provided by the provisions of art. 217 (2) C.P.P., namely the creation of a real, movable or immovable collateral, within the limit of this amount of money, can not be taken into account, since the defendant does not own any immovable or movable property of such a value (other than family jewels, which, in addition to not being in its personal property, have a total value of 40,000 EUR, less than half of the value of the set bail) [12].

On the same issue, another Court has stated that the amount of the bail imposed by the prosecutor, namely 300,000 lei, can be censored in the appeal procedure, and from the analysis of the situation of all the defendants it is established that the bail was set differently for each defendant, without motivating the criteria that were taken into account in establishing the amounts. In the absence of criteria for differentiation between defendants, the judge of rights and freedoms considers that it is necessary to amend the amount set as bail in relation to the seriousness of the accusations made against them and the amount of the prejudice held for each defendant. Therefore he proceeded with the establishment of a set amount of 10% calculated from the amount of the prejudice, for all defendants in accordance with the principle of equal treatment, considering that these amounts are not excessive and impossible to be paid by the defendants. Thus, in

[9] B. Micu, R. Slăvoiu, A. G. Păun, quouted work., p. 197.
[10] I.C.C.J., court decision no. 855 from 4.11.2015, unpublished; also, I.C.C.J., court decision no. 568 from 12.06.2014, unpublished.
[11] I.C.C.J., court decision no. 286 from 6.04.2016, unpublished.
[12] I.C.C.J., court decision no. 145 from 24.02.2016, unpublished.

relation to the situation of the defendant for which an estimated loss of 1.615.680 lei, consisting of profit tax 646.272 lei and VAT 969.408 lei, the judge of rights and freedoms considers that the amount of the bail must be reduced from 300.000 lei to 160,000 lei, taking into account the damage caused to the state budget, as estimated in the preliminary investigation report drawn up by anti-fraud inspectors[13].

In our view, this latter opinion is the correct one, the defendant's ability to challenge the fact that he/she has been forced to pay a sum of money is a clear representation of an appeal against the violation of his /her civil rights and obligations (including property rights); such appeal would enable the defendant to address the situation to a judge, according to art. 6 C.E.D.O. Moreover, the purpose of establishing the procedure regulated by art. 213 C.P.P. is to allow the judge of rights and freedoms to fully analyze the issues covered by the prosecutor's ordinance. Also, given the fact that the judge of rights and freedoms, according to the law, rules on obligations that are often insignificant (for example, that the defendant does not use arms), a fortiori it's obvious that he should be able to analyze if the amount of the bail imposed by the prosecutor, which in some cases also amounts to several millions of lei[14], is not disproportionate.

4. The bail. Notion. Restitution and forfeiture.

Depositing the bail shall be made on the defendant's behalf through a deposit of a sum of money at the disposal of the judicial body or by the creation of a real, movable or immovable collateral, with the same value as the set amount, in favor of the same judicial body. The amount of the bail is of at least 1,000 lei and is determined in relation to the gravity of the accusation, the material situation and the legal obligations of the defendant. The bail guarantees the defendant's participation in the criminal proceedings and compliance with the obligations established by the judicial body that ordered the measure.

The bail is returned when the prosecutor concludes that the case shall not be trialed. In this case, the bail will be refunded even in cases where the judicial control on bail was replaced with the measures of preventive arrest or home arrest, namely if the defendant violated in bad faith his/her obligations or because there was a reasonable suspicion that he/ she intentionally committed a new offense for which criminal proceedings were initiated. There will be no deductions (for example for the judicial costs set in charge of the defendant) from the sum set as bail. However, nothing prevents the prosecutor from taking precautionary measures upon the sum set as bail.

The bail shall also be returned when the Court reaches a final decision, if the measure of judicial control on bail has not been replaced with the measure of home arrest or preventive arrest. The bail shall be returned in full, provided there are no provisions in the Court's decision that out of this sum there wil be deducted, in the following order, compensation for damages caused by the offense, judicial costs or fines.

The bail is seized when the measure of judicial on bail is replaced by the measure of home arrest or preventive arrest, and the defendant / case has been sent for trial. The bail is seized in full insofar as it has not been ordered by the Court to deduct from the amount set as bail, in the following order, compensation granted for the repair of the damages caused by the offense, the judicial costs or fines.

5. Conclusions.

The faulty way of regulating the preventive measure of judicial control on bail has determined an extremely low applicability of this preventive measure in the judicial practice of our country. In the Western countries legislation, such a measure is widespread, being considered a viable alternative to the deprivation of liberty. The threat of losing a very large amount of money will obviously cause the defendant to weigh heavily the way he respects the obligations imposed by the judicial bodies. The jurisprudential controversies previously described with regards taking this measure, controversies born from the very wording used by the legislator, prompted many prosecutors to be reluctant to order / take such a measure. While it is not the subject of the present study, we can not abstain from emphasizing the fact that, although it is theoretically possible to apply judicial control on bail when requesting / extending the preventive measure of preventive arrest or home arrest, practically this is impossible. We hope that in the future, the regulation of judicial control will be given greater attention and this preventive measure will truly become a genuine alternative to custodial preventive measures.

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[13] T. Prahova, court decision no. 475 from 6.10.2016, unpublished.

[14] I.C.C.J., s.pen., încheierea nr. 286 din 6.04.2016, unpublished, the bail established by the prosecutor was 59 000 000 lei (aproximately 13 millions euro);

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