# THE ARREST PROCEDURE IN ACCORDANCE WITH THE DEMANDS OF THE CONVENTION

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**Abstract**

*In order to arrest an individual certain criminal procedural formal and basic conditions must be met. However, due to our country's ratification of the European Convention on Human Rights, besides this criteria, it is also necessary that our domestic law be in accordance with the demands of article 5, paragraph 1, point "c" of "The Convention" and the jurisprudence regarding it. The focus of this project is on the analysis of the indissoluble link between our national criminal law regulations regarding the arrest procedure and the demands of the European Convention for human rights.*

**Keywords:** *the arrest procedure, European Convention on Human Rights, criminal law, reasonable suspicion, evidence.*

## 1. Introduction

Pre trial detention constitutes the most intrusive preventive measure in the Romanian penal procedure.

For this reason, the Criminal Procedure Code clearly states the conditions which have to be met and when the authorities can choose it.

In order to conduct a proper analysis of this institution, certain notions have to defined and grasped such as the standard of proof, reasonable suspicion and the threat to the public.

Also, the judge who is asked to grant an arrest warrant, must account for article 5 of the European Convention For Human Rights (ECHR), provisions which offer certain procedural and mandatory guaranties for the accused.

## 2. Content

According to art. 202 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.

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, should be met.

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 punished by the law with 5 or more years of imprisonment be comitted.

Other factors which are to be analised include the seriousness of the crime, the manner and circumstances of committing it, his entourage and the social environment of the accused criminal history or other circumstances regarding the person, the necessity of the detention in order to prevent public disorder.

Preventive custody may be ordered exclusively by the judge, depending on the procedural stage when the measure is actually analised.

Thus, functional competence belongs to the judge of rights and freedoms, during criminal investigation, preliminary chamber judge during the preliminary procedure and to the court during the actual trial.

Under Article 339, paragraph 10 of the Criminal Procedure Code, after the judgment in the first instance, until the case is appealed, the judge may order, upon request or ex “officio” the arrest of the convicted individual.

In order to execute the arrest mandate, certain general conditions are required for taking preventive measures mentioned in Article 202 of the Criminal Procedure Code:

- evidence or indications showing reasonable suspicion that a person committed the offense;
- the overwhelming necessity for preventive measures in order to ensure normal criminal proceedings, preventing the accused to skip trial or to prevent new crimes;
- art. 16 of the C.p.p. is inaplicable.
- the preventive measure must be in relation to the gravity of the accusation.

Upon analyzing the legal text, it is clear that the burden of proof belongs the prosecutor, who needs to prove only a reasonable suspicion that the accused has committed a crime, which can stems from both direct and indirect evidence.

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It should be noted that the standard of proof is not particularly high, the prosecutor must administer the evidence only to establish reasonable suspicion that the defendant committed the offense and should not prove his thesis beyond any reasonable doubt.

In other words, the evidence supporting the criminal charges made in an arrest request should not be as concrete as the ones needed for a conviction.

In this sense, the High Court of Cassation and Justice has stated that the recognition of *the presumption of innocence* does not exclude preventive measures but in fact ensures that they will only be taken within the framework and under rigorous conditions laid down by the constitutional norms and the provisions of criminal procedure. Reconciliation between the necessity of the pre trial detention and the presumption of innocence throughout the criminal proceedings can be attained by observing the dynamics of the latter, from an abstract notion regarding the guarantee of the fundamental rights of an individual, hereby acquiring substance in the criminal process.[1]

According to Article 97 paragraph. 1, Criminal Procedure Code, evidence is represented by any factual element which serves to determine the existence of a crime, to identify the person who committed it and all the circumstances necessary for a fair settlement of the case and to uncover of the truth.

Evidence is the means provided by the law for stating the facts constituting evidence which can be obtained by the judicial authorities by various methods.[2]

The probation procedures are the legal way of obtaining evidence.

Clues constitute facts which can reveal an event or the guilt of the person who committed the crime.[3]

Domestic legal personalities have stated that conclusive clues can stem from sources outside the normal criminal procedure, such as a complaint, a denunciation, an informative report or during a crime in progress.

The clue is a fact, circumstance, situation which by itself has no evidentiary value, constituting merely the basis for suspicions essential to the judicial activity but which, when part of a sistem of elements in perfect accordance with themselves and with the other existing evidence, can serve to determine the judicial truth.[4]

The court dealing with an arrest request can not validate the legality of the evidence obtained by the prosecution, nor may issue opinions on the accused's defenses related to the merits of the case.

The judicial practice has established that when analysing an arrest request, the evidence administered during the pre-trial stage is indicative of the probable cause that justifies the arrest.

Thus, at this stage the judge is forbidden to analyse if the evidence has been gathered in accordance with our judicial procedures by the investigators or defences which refer to the merits of the case.

Until further notice, the evidence administered by the prosecutor cannot be ruled aut by the judge called upon to decide on the arrest, but merely allowed to examine the existence of probable cause and the other legal conditions, without the possibility of providing an opinion regarding the legality of the evidence, as this is an atribute reserved for the court conducting the actual trial.[5]

Article 53 of the Criminal Procedure Code, also states this: the judge of rights and freedoms is forbidden to analyze the legality of evidence, this activity is to be conducted exclusively by the preliminary chamber judge upon completion of the prosecutorial stage.

Moreover, the rights and freedoms judge can not change the legal classification retained by the prosecutor nor may he consider the application of Article 16 of the Criminal Procedure Code. He can only establish if the legal classification, which derives from the evidence permits the pre trial arrest.

In addition, due to our country's ratification of the European Convention for Human Rights, besides to this criteria, it is also necessary that our domestic law be in accordance with the demands of article 5 paragraph 1, point c) of the Convention and the jurisprudence regarding it.

Article 5 regarding the unlawful deprivation of liberty, can intersect with other fundamental rights protected by the Convention, such as the right to a private and family life, the protection of the individual's home and correpondance –article 8-, the freedom of expression –article 10-, the freedom of assembly and association –article 11- and not lastly the freedom of movement –article 2 protocol no. 4-

Beyond this correlation between the right ot liberty and security guaranteed by article 5 and the other fundamental rights protected by the Convention, there some common points between the warranties provided by this text and those stated in the article 6 which protects the right to a fair trial.[6]

Thus paragraph 2 of article 5 states that ,, Everyone who is arrested shall be informed

[1] I.C.C.J., criminal Division, decision no. 4284/2009, www.legalis.ro
[2] Gheorghe Theodru, *Tratat de Drept procesual penal*, Bucuresti, editura Hamangiu, 2007, p. 300.
[3] The Court of Appeal Cluj, decission No. 127 of 01.11.2011, unpublished.
[4] G. Antoniu, C. Bulai, *Dictionar deDrept penal si procedura penala*, editura Hamangiu, Bucuresti, 2001, p. 219.
[5] C.A. Cluj, dec. pen. Nr. 681/R din 4 noiembrie 2009, www.curteadeapelcluj.ro.
[6] Corneliu Birsan, Conventia europeana a drepturilor omului, editia 2, editura C.H. Beck, Bucuresti, 2010, p. 227.

promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." and paragraph 3 letter a of article 6 establishes the right ,, to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him".

By comparing the two texts, the warranty instituted by article 5 is applicable in the case of a deprivation of liberty, thus establishing the possiblity of analysing the legality of such a measure and article 6 guarantees the right to receive suficient information in order to comprehend the nature of the charge and to mount an effective for the accused.

Thus, this right must be related to another warranty provided by article 6, namely the right for any accused individual to enjoy enough time and facilities for his defence. Both warranties are established by the general right to a fair trial - article 6 - .[7]

Thus, the two, which one may say intertwine,are aplicable at different stages, namely the one provided by article 5 par. 2 from the point the accused is actually deprived of his freedom, whereas article 6 par. 3 for the wholle criminal process whether or not the individual has been arrested.[8]

The same legal reasoning is applicable regarding to the correspondence between article 5 paragraph 3 -,, shall be entitled to trial within a reasonable time or to release pending trial." And article 6 par. 1 ,,everyone is entitled to a fair and public hearing within a reasonable time".

We concur that in the first case that we have discused, the warranty provided by the Convention refers to a detainee and to the necessity of analysing the legality and the opportunity of a preventive measure that is so intrusive.

In regards to the second case, the duration of the wholle criminal case is to be analysed in relation to certain factors, such as the complexity of the case, the conduct of the parties involved and the diligence of the authorities.

The Court emphasized that any preventive measure must be in accordance with the purpose of art. 5 of the Convention, namely to protect the individual against arbitrary deprivation of liberty.

By analyzing the firm statement at the beginning of art. 5 of the Convention, which defines and postulates the presumption of liberty, followed by an complete list of exceptions to this rule, one can establish the universal principle that the state of freedom is the natural state and the deprivation of an individuals freedom has essentially an exceptional character.[9]

Given this legislative postulate and it's jurisprudence, the arrest of the person appears as an exceptional measure and should be accompanied by strong guarantees against the arbitrary.

For that reason, taking into consideration the impact of deprivation of liberty on the fundamental rights of the person concerned, the proceedings should meet the basic requirements of a fair trial.[10]

Thus, par.1 of art. 5 establishes a positive obligation of the state to protect the freedom of its citizens, and if the state acts in a such a manner which leads to a violation of the Convention, it will be held accountable.[11]

The purpose of art. 5 lies in protecting against the arbitrary deprivation of any person of liberty.

The Convention is intended to guarantee rights that aren't merely theoretical or illusory but in fact practical and effective.[12]

The Court stated that, in case of deprivation of liberty, it is particularly important that the general principle of legal certainty be satisfied. Domestic law itself must be in accordance with the Convention, including the general principles expressed or implied therein.

It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[13]

We consider that the principle of legal certainty is respected by our national legal framework applicable in this matter, that national provisions are accessible, predictable, precise and contain sufficient safeguards against arbitrary action.

In the matter of deprivation of liberty, the standard of European Court of Human Rights is more mild than in the case of the extension of such measures.

The Court held that in the case of an arrest for the first time, the courts need not rely on strong presumptions, but may place high faith in aspects such as the severity of the criminal charges, the position of the suspect in society, the nature of the offense.

Thus, taking such measures are necessary only plausible reasons, with no additional conditions.

[7] ECHR, Judegment of 25 March 1999, Case of Pelissier c. France.
[8] Corneliu Birsan, Conventia europeana a drepturilor omului, editia 2, editura C.H. Beck, Bucuresti, 2010, p. 228.
[9] ECHR, Judgment of 6 November 1980, Case of *Guzzardi v. Italy.*
[10] ECHR, Judgment of 13 February 2001, Case of *Schöps v. Germany.*
[11] ECHR, Judgment of 14 October 1999, Case of *Riera Blume and Others v. Spain.*
[12] ECHR, Judgment of 28 April 2005, Case *of Albina v. Romania.*
[13] ECHR, Judgment of 23 September 1998, Case *Steel and Others v. United Kingdom.*

The notion of reasonable suspicion or plausible suspicion is an autonomous concept developed in the jurisprudence of the Court and depends on the particular circumstances of each case.

These plausible reasons must be based on facts and evidence strong enough to satisfy an objective observer that the person concerned may have committed the offence.[14]

According to the conventional standard, authorities are obligated to produce strong evidence to support a criminal charge against the accused, making it impossible to arrest a person based on some simple insights, impressions, rumors and prejudices.

This does not mean that the evidence must justify a criminal conviction, the nature of preventive arrest which doesen't entail a form of early execution of the punishment, but a preventive measure reserved for exceptional situations.

The case law of the European Court of Human Rights has developed four basic acceptable reasons for detaining a person before judgment when that person is suspected of having committed an offence:

- the risk that the accused would fail to appear for trial; [15]
- the risk that the accused, if released, would take action to prejudice the administration of justice;[16]
- the risk of committing further offences;
- the risk of causing public disorder.[17]

The danger of an accused's absconding cannot be assessed only on the basis of the severity of the sentence risked. It is necessary to take into consideration a serious number of factors related to the person's character, his moral values, his home, his occupation, his assets, family ties and all links with the State in which he is pursued.[18]

The risk of the accused disturbing the proper conduct of the proceedings cannot be calculated *in abstracto*, but in fact must be supported by factual evidence.

We appreciate that the court must procede to a concrete analysis of the good conduct of criminal proceedings.

Thus, if the majority of evidence which substanciates the criminal charge has already been administered, the risk that the accused would prevent the rule of justice and hinder the prosecution from the purpose stipulated by Article 285 of the Criminal Procedure Code greatly diminishes.

Regarding the risk of the defendant of commiting new criminal acts, the court must take into account that a criminal history does not lead, automatically, to the conclusion that there is a *ab initio* prooven risk of a new offense in the future. It is true that the existence of prior criminal weights significantly in terms of shaping the risk of committing new crimes, but this must be combined with the overall elements of the case.

In relation to the risk of disturbing the public order, the Court recognized that the particular gravity and public reaction to certain crimes can cause a social disturbance, justifying the need for preventive measures.

However, the reason of social disturbance, even if it is regulated by our domestic law, can not be regarded as relevant if it is not based on concrete facts able to convince a objective observer of the certainty of disturbances to public order, reasoning that the court must assess on a case by case basis.

Although the threat to public order should not be confused with the social ressonance of the crime, they present some common points. Thus, both legal practice and doctrine outlines that concrete danger for the public order is quantified by taking into consideration both the personal circumstances of the accused and the other factual details, such the nature and gravity of the offenses and the negative social resonance produced in the community.

Also, the court must consider the provisions of art. 202, para. (3) Criminal Procedure Code, which state that any preventive measure must be proportionate to the gravity of the accusation against the accused and be necessary in order to obtain the legal purpose of the the measure.

Moreover, according to the jurisprudence of the ECHR, the national court is obliged to take into cononsideration „ex officio" other preventive, alternative and less restrictive measures, prescribed by law, which could lead to the preventive aim in the same measure.

So, we appreciate that the whole arrest procedure regulated by our Criminal Procedure Code is predictable, accessible and clear. Our recent judicial practice prooves that the provisions of Article 5 of the ECHR are applied, in view of the primary role of Convention.

### 3. Conclusions

The arrest procedure in the Criminal Procedure Code represents the result of several decades of refining and reform of the legal text.

So, we appreciate that the whole arrest procedure regulated by our Criminal Procedure Code is predictable, accessible and clear.

However, given the profound intruzive nature of the pre trial detention, with each analysis of an

[14] ECHR, Judgment of 22 October 1997, Case of *Erdagoz v. Turkey.*
[15] ECHR, Judgment of 10 November 1969, Case of *Stögmüller v. Austria.*
[16] ECHR, Judgment of 25 April 1968, Case of *Wemhoff v. Germany.*
[17] ECHR, Judgment of 26 June 1991, Case of *Letellier v. France.*
[18] ECHR, Judgment of 4 October 2005, Case of *Becciev v. Moldova.*

arrest request, the rights and guaranties of article 5 of the ECHR have to be met.

Thus, given the cases in which the European Court for Human Rights has found an article 5 breach of the individuals rights, for the national judge, applying the provisions of the Convention for Human Rights is ever more frequent.

Moreover, our recent judicial practice prooves that the provisions of Article 5, ECHR are applied, in view of the primary role of Convention.

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