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The content of the preventive measure of home detention

Stanciu Mihai-Alexandru

Chief Prosecutor in the Prosecutor's Office attached to the Constanța Court, "Ovidius"
University of Constanța, Faculty of Law and Administrative Sciences

mihaistanciu1987@yahoo.com

Abstract. The criminal procedural provisions in Romania regulate a number of 5 preventive measures, of which 3 are custodial and two restrictive. Of these, the measure of house arrest, regulated as a novelty at the beginning of 2014, seems to be an intermediate form between judicial control and pre-trial detention, borrowing elements of content from both measures. Compared to the obligations that can be imposed on the defendant arrested at home, certain situations can be left uncovered by the legislator, which can make the measure seem ineffective in practice.

Keywords. obligations, prohibitions, permissions, content

The legal provisions

The legal provisions for the content of the measure of house arrest is Article 221 of the Code of Criminal Procedure.

As it results from the very name of the preventive measure, it consists in the obligation imposed on the defendant not to leave the building where he lives for a certain period of time, without the consent of the judicial organ that took the measure or before which the case is pending and to respect some restrictions imposed by it.

It is stipulated that during the house arrest, the defendant has two obligations, namely to appear before the criminal investigation judicial organ or the judge of rights and freedoms, during the criminal investigation, of the judge of the preliminary chamber, during the preliminary chamber procedure or of the court, during the trial whenever summoned and respectively not to contact the injured person or his family members, other participants in the commission of the crime, witnesses or experts in the case, as well as any other persons fixed by the judicial organ.

The relevant legal provisions provide that the judge of rights and freedoms or, as the case may be, the judge of the preliminary chamber or the court, may require the defendant to wear a permanent electronic surveillance system during the house arrest.

In order for the defendant to be clearly aware of the obligations imposed, the law stipulates that the conclusion ordering the measure must expressly provide for the obligations that the defendant must comply with and it must be pointed out that the breach faith in the measure or its obligations may lead to the replacement of the measure with that of pre-trial detention.

From the analysis of the mentioned legal norms it results that the taking of the house arrest imposes on the defendant the obligatory observance of both certain measures and certain obligations.

Thus, on the one hand, the defendant is required to comply with the very measure of not leaving the building where he lives, without the consent of the court that ordered it and which is the essence of the preventive measure, and on the other hand is required to comply with the two obligations expressly provided by law, of which a positive one consisting in the obligation to appear before the judicial organ before which the case is pending and a negative one not to communicate with the injured person or his family members or, as the case may be, with the other participants in the commission of the crime, with the witnesses or experts in the case or with any other persons fixed by the judicial organ.

In order to better understand the measure of not leaving the house, without the consent of the judicial organ that took it or before which the case is, it is necessary to see under what conditions the law allows the defendant to leave the building.

Thus, it is provided that during the measure, the defendant has the right to leave the building where he lives in order to appear before the courts, at all their appeals, a provision that is supplemented by one of the obligations expressly provided by law.

At the same time, at the written and motivated request of the defendant, the judge of rights and freedoms or, as the case may be, the judge of the preliminary chamber or the court, may order by conclusion his permission to leave the building to appear at work, at courses vocational or educational training or other similar activities or to procure the essential means necessary for their existence, as well as in other duly justified situations, for a specified period of time, if this is necessary for the pursuit of legitimate interests or rights. of the defendant.

Derogatory situations in which the defendant still has the right to leave the home

It is noted that the law distinguishes between three categories of circumstances that may allow leaving the building, namely:

- the sphere of lucrative activities and for ensuring the essential means necessary for existence;
- the scope of vocational or educational training and education activities;
- the scope of well-justified situations that imply the realization of legitimate interests or rights of the defendant.

We consider that regardless of the circumstance invoked by the defendant to leave the domicile, it must be proven and be compatible with the preventive measure itself.

Thus, we consider that a request from the defendant to be allowed to go to work abroad, for example as a navigator, cannot be admissible even if he has an ongoing contract or this is his only specialization, because permission to work abroad for a longer period of time is likely to invalidate the purpose of the preventive measure, namely the proper conduct of the criminal proceedings, which involves, inter alia, making the defendant available to the judiciary, or preventing the defendant from evading at the criminal investigation or at trial.

Proof of gainful employment or of the essential means of subsistence could be provided by the employment contract or by a certificate issued at the place of work, or, as the case may be, by the contract for the provision of services.

We consider that in the case of "undeclared" work, as well as in the absence of any legal form of gainful employment, the defendant's request to allow him to leave his home for this purpose must be rejected as unfounded, because on the one hand the exercise of control over compliance the measure would be hampered by the competent authorities and, on the other hand, the violation of the law cannot be encouraged, even if it takes the form of a misdemeanor.

Proof of participation in training or vocational or educational training activities may be provided by the contract concluded with the entities carrying out the training activities or in the event that no such contract is concluded, for example in the case of seminars, with a certificate issued by the organizers.

Regarding the proof of the duly justified situations that imply the realization of some rights or legitimate interests of the defendant, this can be done in different forms, depending on the situation invoked. Thus, it is possible for the defendant to be a party to a civil or criminal case other than the one in which he is being investigated, in which case he can prove his participation in the trial period or before the criminal prosecution bodies by the summons issued by them. Another situation could be the hospitalization of the defendant or the treatment of a doctor, in which case the proof can be made with the prescription issued by the doctor, with the medical record or any other medical act. Another situation could be attending a family member's funeral or another significant event in the defendant's family, in which case the proof can be made with the death certificate, birth certificate or any other document proving the alleged circumstance.

The duly justified situations that imply the realization of some rights or legitimate interests of the defendant can be very varied, so we appreciate as inspired the option of the legislator to regulate a generic wording that includes any other circumstance invoked by the defendant and which requires his absence from the building in who lives for a certain period of time.

Procedurally, the defendant must make a written and reasoned request to be addressed, depending on the procedural stage of the case, either to the judge of rights and freedoms, or to the judge of the preliminary chamber, or to the court, which orders by conclusion.

We consider that in order to have the strictest control over the defendant's travel, it is necessary that the judicial organ that orders the measure provide as accurately as possible the travel terms, such as the time interval or the route.

Given that the text of the law provides that the request must be made in writing, it can be concluded that the request can be made only after the precautionary measure has been taken. However, we do not see any impediment to the fact that the application could not be filed in the case file and before the measure was taken, during the trial of the prosecutor's proposal to take the preventive measure of house arrest or even pre-trial detention, when the defendant requested milder preventive measure. Thus, we consider that the submission of such a request prior to the ordering of the measure cannot be interpreted as the administration of a means of proof, incompatible with the settlement of the request for ordering the measure, when only the defendant is heard.

It is possible that in certain urgent cases, the formulation and settlement of the application in order to obtain the permission of the judge of rights and freedoms, the judge of the preliminary chamber or the court to leave the building where the defendant lives may last and thus produce unfavorable consequences for him. For these cases, the legislator provided that in urgent situations and for good reasons, the defendant has the right to leave the building, without the consent of the judge of rights and freedoms, the preliminary chamber or the court, but only for the time strictly necessary and with the obligation to immediately inform the designated judicial organ, institution or authority under its supervision, as well as the judicial organ that ordered the measure or to which the criminal case is registered.

In order for the abandonment of the domicile not to be interpreted as a violation of the preventive measure, the defendant must prove that there was a well-founded urgency, which required the abandonment of the building for the time strictly necessary to resolve it. Such situations could be severe injury requiring urgent hospitalization or consultation with a

physician, fire or bursting of a water or gas pipe requiring urgent action to prevent life-threatening or life-threatening injuries of significant damage. The situations that may arise in practice can be extremely varied, so the defendant must be very careful when deciding to leave the building without the consent of the judge of rights and freedoms, the preliminary chamber or the panel of judges, because the violation the measure may have the consequence of replacing the most severe measure with pre-trial detention.

In addition to the obligations mentioned and whose disposition is obligatory, the judge of rights and freedoms, the one of preliminary chamber or the court may order, if it deems it necessary, that in the execution of the house arrest the defendant to wear a permanent electronic surveillance system. Although this possibility is provided in the Romanian legislation since the old criminal procedure provisions, where it was provided for the case of ordering preventive measures of the obligation not to leave the locality or the obligation not to leave the country, so far the law has not been adopted for the implementation of the provision and there is no logistics necessary to order such a measure.

Except for the aforementioned obligations, the defendant has no other obligations during the house arrest.

However, the legal provisions stipulate that the defendant also has the obligation to submit to "restrictions established by the court", without indicating the restrictions that may be imposed or at least their scope. It follows that the judge of rights and freedoms, the judge of the preliminary chamber or the court may impose on the defendant any restrictions it deems necessary, a circumstance that raises issues related to the predictability of the criminal law.

"Restriction" means a measure that limits or restricts a right or a freedom. Thus, a ban on possessing, carrying or using weapons, a ban on using a mobile phone, a ban on using a computer, either in whole or in part, by restricting the right to access certain sites or even the Internet, as the defendant may be prohibited, for example, from drinking alcohol, gambling or any other restriction imagined by the judicial organ taking action.

It is true that the simple obligation imposed on the defendant not to leave the building where he lives, without the consent of the court which took the action or has the case in progress, and with the obligation not to communicate with the parties to the case or other expressly established persons, it can often be ineffective and the purpose of the measure cannot be effectively achieved, which means that in order to better individualize the preventive measure, other restrictions need to be imposed. However, as long as these restrictions constitute a restriction of certain rights or freedoms, we consider that they must be expressly provided by law or at least their scope must be clearly defined and not left to the imagination of the judicial organ ordering the measure.

Proposals to amend the relevant legal provisions

In view of the above, we consider that *by law ferenda* requires the provision of express restrictions from which the judicial organ that orders the preventive measure can choose one or more that it can impose on the defendant during house arrest and thus the preventive measure to achieve its goal.

Moreover, the restrictions, together with the obligations, could be reformulated in relation to the aim pursued by taking preventive measures, namely to ensure that the criminal proceedings are conducted in optimal conditions, to prevent the defendant from evading criminal prosecution or trial or to another offense is prevented.

Many of the restrictions and obligations could be removed from preventive measures of judicial review and judicial review on bail.

In addition, as long as the observance of the measure and the obligations is left to the discretion of the defendant, we see no impediment for which the possibility of establishing a bail aimed at coercing the defendant to comply with the imposed obligations and thus guarantee the smooth running of the criminal process.

Restrictions and obligations to ensure the proper conduct of criminal proceedings and to prevent the defendant from evading criminal prosecution or trial may include the following:

- to appear before the criminal investigation judicial organ, the judge of rights and freedoms, the preliminary one or the court each time he is summoned (this measure aims to ensure the presence of the defendant before the judicial organ for conducting the criminal trial);
- not to be near the injured person or his family members, or other participants in the commission of the crime, or witnesses or experts or other persons designated by the judicial organ and not to communicate with them directly or indirectly in any way (we consider that the obligation in this form is better defined, as it is also provided in the case of preventive measures of judicial control and judicial control on bail, as opposed to the wording “not to communicate with the injured person or his family members, with other participants in the commission of the crime, with witnesses or experts or with other persons established by the judicial organ”, because it is possible for the defendant to meet with the mentioned persons on the occasion of leaving the domicile in legal conditions and thus try to intimidate them, even if he does not communicate with them, as they could communicate with them through intermediaries, and not only directly; This measure is intended to prevent the defendant from influencing the participants in the trial, whatever their quality);
- to have a permanent electronic surveillance system (this measure ensures the control that the defendant does not leave the building where he lives, except in legal conditions);
- to lodge a security in the amount and within the period established by the judicial organ, taking into account the material possibilities and obligations of the defendant (the bail is to ensure compliance by the defendant with the obligations damages caused by crime, fines or legal costs);
- to hand over his identity documents, in particular his passport, and a receipt will be issued proving his identity;

Restrictions to ensure the prevention of the commission of another offense could include the following:

- not to carry out the profession, trade or activity in the exercise of which he committed the deed (this restriction appears appropriate in the situation where the defendant committed the crime in the profession, trade or activity carried out at home because in the absence of such provision, on the one hand, the defendant would not have the interest to ask permission to leave the building where he lives so that the court could reject his request for this reason, and on the other hand the court could not forbid him to carry out the activities that led to the commission crime);
- to periodically communicate relevant information about his means of subsistence (in this way it is verified whether the defendant's income justifies the expenses incurred and thus it can be assessed whether he obtains income in other illegal ways);
- be subject to measures of care, control or medical treatment, in particular for detoxification (this measure is particularly appropriate in the case of the commission of offenses arising from the defendant's medical condition, such as alcohol-related violence or drug use);
- not to drive certain vehicles specifically established by the judicial organ (this measure is appropriate in situations where the defendant leaves the home, under the conditions provided by law);

- not to go to certain places or to go only to the places established by the judicial organ (for the situations in which the defendant leaves the building);
- not to carry, possess or use weapons;
- not to issue checks;
- not to use the telephone, computer or any other means of communication;
- not to possess, use or carry goods that have been used, in any way, or are intended to be used in the commission of an act provided for by criminal law;
- to follow a treatment or a social, educational or psychological course, destined to allow the reintegration and awareness of the society's values.

In connection with the provision of bail, a possibility also provided for in the laws of other States, we consider that the provisions of judicial review on bail could be applied in full.

According to the mentioned legal provisions, the bail must have a value of at least 1,000 RON, a value that is determined in relation to the seriousness of the accusation brought against the defendant, and on the other hand to the material situation of the defendant and the legal obligations he has.

The purpose of imposing a bail is to ensure the defendant's participation in the criminal proceedings and compliance with the obligations imposed, provided that the court must order the confiscation of the bail by the judgment given on the merits if it is found that the measure of judicial control (the measure of house arrest in this case) has been replaced by the measure of house arrest or pre-trial detention (only pre-trial detention in this case), as the restitution of the bail must be ordered in all other situations. The provisions on restitution or confiscation of bail shall apply only to the extent that the bail has not been used for the payment, in order, of monetary compensation established for the reparation of damages resulting from the commission of the offense, court costs or a criminal fine.

Unlike the trial phase, if the prosecutor has a solution of not sending a lawsuit, he has the obligation to order the return of the bail.

If in the execution of the house arrest, the defendant does not comply in bad faith with the obligations imposed on him or there is a reasonable suspicion that he has intentionally committed a new offense for which criminal proceedings have been instituted against him, the judge of rights and freedoms, the pre-trial chamber or the court, ex officio or at the motivated request of the prosecutor, may decide to replace this measure with that of pre-trial detention, under legal conditions.

With regard to the implementation of the measure of house arrest, a copy of the decision of the judge of rights and liberties, of the pre-trial chamber or of the court, by which the measure was taken shall be communicated immediately to the defendant, the police in whose constituency he resides, to the institution, judicial organ, office or authority designated under his supervision, the Community Public Service for the Registration of Persons and Border Bodies.

The institution, judicial organ or authority designated by the judicial organ which ordered the house arrest has the obligation to periodically check the defendant's compliance with the obligations and the imposed measure, and if their non-compliance is found, to immediately notify the prosecutor, as appropriate, the judge of the preliminary chamber or the court, depending on the procedural phase in which the case is.

In order to carry out the surveillance, the police judicial organ has the right to enter the building where the defendant executes the measure, without the need for the consent of the defendant or of the other persons living with him.

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