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CALCULATION OF DEADLINES FOR SUBMITTING THE REQUESTS FOR THE EXTENSION AND KEEPING OF PRE-TRIAL DETENTION

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Abstract: *Under the old Code of Criminal Procedure, there has been no serious debate about the nature of the 5-day time limit within which the prosecutor must submit a proposal to extend the preventive arrest measure and because most courts have considered it to be a recommendation, there was no question regarding its calculation. The discussions focused on the peremptory or the recommandation nature of the term and the authors did not rule on the legal nature of the term in order to establish whether it was a procedural term or a substantive term.*

If we take into account all these views on the interest protected by the legislator by establishing the term in question, according to which the main reason for it is to protect the freedom of the person, we should consider it a substantive term, as it protects an extra-procedural interest and not a procedural one. In this case, the 5-day period should be calculated on full days, and if it expired on a non-working day, it would not be prolonged until the first business day.

However, by Decision no. 20/2017 pronounced following the promotion of an appeal in the interest of the law, the High Court of Cassation and Justice has declared binding: "…in the interpretation and uniform application of the provisions of art. 235 para. (1) of the Code of Criminal Procedure, stipulates that: The 5-day period provided for in Article 235 (1) of the Criminal Procedure Code shall be calculated according to art. 269 para. (1), (2) and (4) of the Code of Criminal Procedure. "

Key words: *arrest measure, proposal to extend the measure procedural term*

1. Introduction

Ensuring the right to liberty of any person during criminal proceedings has arisen with the promotion of the presumption of innocence, since it was natural for a presumed innocent person to be investigated in the state of liberty until the final conviction. More interesting, however, is the emergence and meaning that has been given to the concept of "right to safety". It originates in the Anglo-Saxon law, where it was called habeas

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corpus, which means the guarantee given to each arrested or detained person, to be referred without delay to a jury or judge called to pronounce either releasing the one being accused or keeping him in a state of detention. The concept of the right to safety was included during the French Revolution in the Declaration of the Rights of Man and of the Citizen from 1789 as a fundamental right that represents the guarantee given by the Constitution to the citizens and all people on the territory of the state against any abusive forms of repression and, in particular, against any arbitrary measure by state organs concerning the deprivation of liberty by arrest or detention [Drăganu, T., 1998, p. 159]. The French Revolution promoted ideas of freedom and equality, arguing that, through its principles, it seeks to erase the abuses of the previous monarchic regime against the citizens. This explains the introduction in the Declaration of the Rights of Man and of the Citizen of a concept that is a guarantee against the abuses committed by the state agents towards the citizens (Ghigheci, C., 2014, p. 149).

Among the preventive measures regulated by the new Code, the 5th of the European Convention on Human Rights applies only to detention, pre-trial detention and house arrest while the rest of the measures are not covered by this article. The European Court of Human Rights ruled in Sissanis v. Romania that preventive measures under the old Code consisting of an obligation not to leave the city or country are not deprivation of liberty, but simple restrictions of freedom of movement (Ghigheci, C., 2014, p. 149).

The Code of Criminal Procedure has given to the rights and freedoms judge the resolution of several complaints, appeals or any other notifications regarding the preventive measures depriving of liberty, including: taking the preventive measure of the house arrest and the preventive arrest [(Article 203 para. (3)], appeals against the closure orders for preventive measures during criminal prosecution (Article 204), the replacement of the measure of judicial scrutiny or judicial review by bail with the measure of house arrest or preventive arrest if, while in judicial control, the defendant violates, in bad faith, his obligations or there is a reasonable doubt he intentionally committed a new offense and the criminal action was exercised against him [art. 215 para. (7), Art. 217 para. (9), replacing the house arrest measure with the preventive arrest measure if, during the arrest at home, the defendant violates in bad faith his or her reasonable suspicion of deliberately committing a new offense for which ordered the criminal proceedings to be brought against him [(art. 221 para. (11)], the extension of house arrest[(art. 222 para. (3)], the confirmation of the preventive arrest and the execution of the mandate, the revocation of the preventive arrest or its replacement with one of the preventive measures provided by art. 202 para. (4) lit. b) -d) and release of the defendant, if not arrested in another case, if the defendant's preventive arrest has been disposed of due to a state of health, because of force majeure or a state of necessity, or case, under the conditions stipulated by law [art. 231 para. (7)], the extension of the preventive arrest (Article 234), the settlement of the applications for the cessation of the law, the revocation, the replacement of the house arrest measure or the preventive arrest (art. 242 para. (4)].

It should be emphasized that the rights and freedoms judge from the competent court to judge the merits of cause has the competence to solve the proposal of the prosecutor's office to extend the preventive arrest, regardless of whether he was the

one who ordered the preventive arrest measure, or if this measure was disposed in the appeal of the appeal of the prosecutor by the rights and freedoms judge from the higher court.

2. Decisions of the Constitutional Court of Romania on the deadline for submission of the proposal to extend the preventive arrest measure

According to art. 235 para. (1) C. Proc. the proposal to extend the preventive arrest together with the case file shall be submitted to the rights and freedoms judge at least 5 days before the expiry of the preventive arrest. A similar term is also regulated for the extension of the house arrest measure, in art. 222 para. (4) C. Proc. pen. Also, such a term is also regulated in Art. 207 para. (1) C. Proc. pen, for the notification of the preliminary chamber judge, when the prosecutor ordered the prosecution of the defendant against whom a preventive measure was ordered during the criminal prosecution (the text seems to be considering any preventive measure, not just the arrest).

A text identical to that in Art. 235 para. (1) C. Proc. pen also existed in art. 159 para. (1) of the old Code of Criminal Procedure, when there was discussion in the doctrine of the mandatory or recommendable nature of the 5 days term, in which the prosecutor had to formulate the proposal to extend the preventive arrest measure. Some authors considered the term to be a recommendation [Theodoru, G., 2007, p. 455], while other authors considered the term to be peremptorical, and its non-compliance entailed the sanction of the absolute nullity of the proposal to extend the preventive arrest measure [Neagu, I., 1997, p. 333-334; Mateuț, Gh., 2012, p. 666]. Most Jurisprudence had opted for the first opinion, considering the 5 day term as a recommendation.

The Constitutional Court handled this issue in the Decision no. 336 of April 30, 2015, admitting the exception of unconstitutionality and stating that "the provisions of art. 235 para. (1) of the Criminal Procedure Code are constitutional insofar as the non-observance of the term at least 5 days before the expiry of the preventive arrest warrants the incidence of art. 268 para. (1) of the Code of Criminal Procedure. The Court notes that failure to comply with the proposal to extend the preventive arrest to the judge of rights and freedoms at least 5 days before the expiry of the preventive arrest is likely to cause procedural harm, materialized in violation of the defendant's fundamental right to defense, established in art. 24 of the Constitution and of art. 3 lit. b) of the Convention for the Protection of the Rights and Fundamental Freedoms, on the one hand, and violates the constitutional provisions of art. 124 on the performance of justice, on the other hand".

By decision no. 144 of March 27, 2018, the Constitutional Court of Romania rejected as inadmissible the objection of unconstitutionality of the provisions of art. 207 para. (1) of the Code of Criminal Procedure and stated in the statement that "Regarding the legal nature of the regressive term regulated deart. 235 para. (1) of the Criminal Procedure Code (Article 159 (1) of the Code of Criminal Procedure of 1968) and the consequences of its non-compliance, the Court noted that the quasi-judicial practice described the minimum period of five days for referral to the court for prolonging preventive arrest as

a referral term. Taking into account that the reason for submitting a proposal to extend the duration of preventive arrest is to ensure respect for the arrested defendant's fundamental right to defense and to eliminate arbitrariness regarding the extension of the deprivation of liberty, the Court found that this term has the legal nature of a peremptory term, which is the only interpretation that can determine the compatibility of the criminal procedural rules criticized with the constitutional and conventional provisions on the rights of the defense and the constitutional provisions on the conduct of justice. The Court concluded that failure to comply with the proposal to extend the preventive arrest to the rights and freedoms judge"at least 5 days before the expiry of the preventive arrest" is likely to cause a procedural injury materialized in the violation of the fundamental right to defense of the defendant arrested, so that the criminal procedural norms of art. 268 para. (1) of the Criminal Procedure Code, the sanction for non-observance of this term is the deferment of the prosecutor from the exercise of the right to submit the proposal for extension of the duration of the preventive custody and the absolute nullity of the term overdue (paragraphs 19, 21, 48 and 49).

3. The distinction between procedural deadlines and substantive deadlines.

As it results from the texts reproduced above, the Constitutional Court of Romania seems to have dealt with the question of how to calculate the 5-day term, regulated in the texts in the matter of preventive measures, considering it to be a procedural term.

Under the old Code of Criminal Procedure, there has been no serious debate about the nature of the 5-day time limit within which the prosecutor must submit a proposal to extend the preventive arrest measure and because most courts have considered it to be a recommendation, there was no question regarding its calculation. The discussions focused on the peremptory or the recommandation nature of the term and the abovementioned authors, who supported the pecuniary nature of the term, did not rule on the legal nature of the term in order to establish whether it was a procedural term or a substantive term.

If the term is considered to be a substantive one, it will be calculated on full days and it is irrelevant if the term expires in a working or non-working day. If the five-day period is deemed to be a procedural one, it will be calculated on days off (submission of the extension must be made 7 days before the expiration of the measure) and when the deadline is on a non-working day, it shall be prolonged until the first working day following the submission of the proposal to extend the measure by 8, 9 or even several days before the expiry of the measure, when there are also legal holidays or non-working days.

The most authorised doctrine in our country has shown that the distinction between procedural terms and substantive deadlines is determined by reason, function, and the different interest that dictates their establishment. "Procedural time limits are imposed by purely procedural interests and are necessary for the systematization and discipline of procedural activities, while substantive deadlines concern the protection of extraprocessary rights or interests in situations that bring about the restriction or binding of interests (eg deadlines for preventive measures and precautionary measures,

deadlines for conditional release) "[Dongoroz, V., 2003, p. 384]. Thus, the distinction between the two categories of terms would be the protected interest by establishing them: procedural time limits protects purely procedural interests, while substantive terms protect extra-procedural interests.

4. The legal nature of the 5-day term provided by art. 235 para. (1) C. Proc. Pen.

So far, some opinions have been expressed in the sense that the term would be procedural [Radu, Gh., 2007, p. 225; Ștefan, C. V., 2014, p. 130]. It also appears from the reasoning of the Constitutional Court's decision that it considered the term to be a procedural one, in view of the sanction of the revocation, which the Constitutional Court considered an incident in case of non-observance of the term in question. Is this an issue already solved or is it necessary to look more closely at the legal nature of this term? It would be too easy to understand that it is a procedural term. First of all, it is established that it is regulated in the matter of preventive measures, where general terms of law are generally discussed. On the other hand, it is a term that governs a procedural act, namely the wording of the proposal to extend the preventive measure, and in these cases general procedural terms are discussed. Would it be wrong to consider the term as one of a mixed legal nature to borrow some features from procedural deadlines and others from substantive deadlines?

Although it is difficult to give a clear solution to this problem, I will continue to try to bring some arguments from the criminal procedural theory, from which it can be deduced what the legal nature of this term would be.

It will be possible to answer this question if it is to determine the interest protected by the 5-day deadline set for the submission of the proposal to extend the preventive measure. Does this term protect the person's freedom (which is an extra-procedural interest) or protect any procedural interest? In the latter case, what is the procedural interest protected by the term in question? It should be one of the defendant, because protecting the prosecutor's procedural interest in this term can not be the case. Among the procedural rights of the defendant, the only one that might be considered is the right to defend himself.

On the other hand, it can not be argued that the term in question would not also protect the freedom of the person (defendant arrested), as he is regulated in the matter of preventive measures precisely to provide more guarantees to the defendant when his physical freedom or his freedom of movement is restricted. It could even be argued that the ultimate goal of the term is to protect the freedom of the person (the defendant), and the right to defense is only a means by which the defendant protects his freedom in this particular case (when a preventive measure has been taken against him).

Thus, the question arises as to what it should be taken into account in qualifying the 5-day term: its immediate purpose (protecting the right of defense of the defendant) or his ultimate purpose (protecting the defendant's freedom)? The answer should not be according to which solution would be more favorable to the defendant, but according to the purpose pursued by the legislator by establishing this term, namely by the ratio legis.

According to another prestigious author, "Procedural acts must be fulfilled, in addition to the way or form and place, during the time determined by the criminal law, in order for the criminal trial not to languish, and the reaction or the defense of the society should not be delayed over the time it is absolutely necessary to find the truth, otherwise repression or social defense is no longer effective[Pop, Tr., 1946, p. 28]. "Is this the aim pursued by the legislator by regulating the 5-day deadline for submitting the proposal to prolong the preventive arrest measure? Did the legislature pursue through it that the criminal trial did not "languish" or did it rather aim to ensure more effective protection of the freedom of the person? By setting up the 5-day deadline, the legislator does not seem to be concerned about the criminal proceedings being carried out as a matter of urgency, but rather to provide effective means for the defendant to protect his or her liberty. Under these circumstances, the reason of the law being to protect, firstly, by establishing this term, an extra-procedural right (freedom of the person), the term should be a substantive rather than a procedural one, with all the consequences resulting from that qualification .

This also seems to be the meaning the same prestigeous authors have attributed to similar terms governed at the time when the teacher wrote his treaty. He points out that "this serious violation of the freedom of the citizen, before being declared guilty and punished, must be disciplined in such a way in order to be in addition to the maximum of guarantee and the minimum of suffering; to this end, as a guarantee for the protection of the right to liberty of the accused, but still unpunished, the law prescribes certain terms for the confirmation and reconfirmation of the arrest warrants; the confirmation of the arrest warent is mandatory and must be done within 3 days, and the reconfirmation every month; these deadlines are substantive; because, mainly and directly, they serve to protect the freedom of the citizens (the accused), and only indirectly and secondarily serve also the procedural disciplining of the arrest warrant." [Pop, Tr., 1946, p. 32].

I have fully reproduced the professor's statement precisely in order to see how he qualifies terms in the matter of preventive measures as substantive, even if they are set for "confirmation of the arrest warant", not only when it comes to terms determine the duration of the preventive measure.

Indeed, even the authors who previously claimed the peremptory nature of the 5-day deadline for submitting the proposal to extend the preventive arrest agreed that it concerns "first of all the freedom of the person"[Neagu, I., 1997, p. 333; Mateuţ, Gh., 2012, p. 666], this being their main argument in supporting the point that the term can not be a recommendation, because "all the terms that are guaranteeing its freedom can only be peremptories." [Mateuţ, Gh., 2012, p. 666]. It is also stated that by establishing the 5-day deadline for submitting the prolongation of the preventive measure "The legislator's intention was to make the principle of guaranteeing the freedom of the person an effective and not a declaratory rule"[Neagu, I., 1997, p. 334].

However, if we take into account all these views on the interest protected by the legislator by establishing the term in question, according to which the main reason for it is to protect the freedom of the person, we should consider it as a substantive term as it protects an extra-procedural interest and not a procedural interest. In this case, the 5-

day period should be calculated on full days, and if it expired on a non-working day, it would not be prolonged until the first business day. Moreover, in the matter of preventive measures, the rule is that in their regulation the non-working days should not be taken into account(eg when resolving the proposal to take the measure, to prolong it, to replace or revoke requests, to resolve complaints against conclusions on these measures, etc.). Taking into consideration the deadline for the prolongation of the preventive measure as a procedural one, which would be prolonged until the first working day when it expires on a non-working day, would be a singular case in this area.

It remains to be considered whether this solution would be inconsistent with the motivation of the Constitutional Court's decision no. 336/2015, since it merely ruled on the binding nature of the term in question in the sense that its non-observance violated the defendant's right of defense, but it did not rule on the reason for establishing that term by the legislature and this matter remains to be determined by the interpreter of the law. In fact, the Constitutional Court explicitly states in the statement of reasons for its decision that "The purpose of regulating this term is to allow sufficient time for both the proposal to prolong the preventive arrest and possibly the objection raised by the prosecutor under Art. 204 para. (5) of the Criminal Procedure Code in order to be resolved in compliance with the rights of defense and the individual liberty of the defendant arrested (sn - CG) prior to the expiry of the preventive measure in case of rejection of the proposal to prolong the preventive arrest "(Section 19).

When it comes to the sanction of revocation that the Constitutional Court shows as applicable in the matter of non-compliance with the term above mentioned, this is a sanction typical for the procedural terms, taking into consideration that the art. 268 para. (1) of the Criminal Procedure Code stipulates that it can be applied for the non-compliance with the term enshrined for exercising “a procedural right”. However, as it resulted, the 5-day term does not seem to be a purely procedural one but a substantive one or, at least sui generis, it has a mixed nature (it can resemble to the term of formulating a prior complaint) which would impose a different regime than the one for the procedural terms.

5. Conclusions

All the arguments set out above lead to the conclusion that the opinion that the 5-day term provided by art. 235 para. (1) of the Code of Criminal Procedure is a procedural period, calculated on days off, is a debatable one.

However, by Decision no. 20/2017 pronounced following the promotion of an appeal in the interest of the law, the High Court of Cassation and Justice has declared binding: "To admit the appeal in the interest of the law declared by the Board of Appeal of the Tîrgu Mureş Court of Appeal and consequently: in the interpretation and uniform application of the provisions of art. 235 para. (1) of the Code of Criminal Procedure, stipulates that: The 5-day period provided for in Article 235 (1) of the Criminal Procedure Code shall be calculated according to art. 269 para. (1), (2) and (4) of the Code of Criminal Procedure. "

In order to rule on this decision, the supreme court did not make a very thorough

analysis, but it referred only to the statement of reasons for the Decision. 336 of 30 April 2015, stating that "In the recitals of Decision no. 336 of 30 April 2015 of the Constitutional Court of Romania, published in the Official Gazette of Romania, Part I, no. 342 of May 19, 2015, whereby the objection of unconstitutionality of the provisions of art. 235 para. (1) of the Code of Criminal Procedure, the Constitutional Court held that "Penalties for non-observance of procedural terms derive from the principle of the lawfulness of criminal proceedings, stipulated by art. 2 of the Criminal Procedure Code and sanctioned by the provisions of art. 23 para. (12) of the Basic Law, and are regulated in the criminal procedural norms of art. 268 para. (1) - (3), namely: the deprivation of the exercise of a right, the nullity of the act made overtime and the termination of a temporary procedural measure "(paragraph 26). In the content of the same Constitutional Court decision it was stated that this term has the legal nature of a peremptory term and the failure to observe the deadline for submitting the proposal to extend the preventive arrest to the judge of rights and freedoms at least 5 days before the expiry of the preventive arrest is likely to cause procedural injustice, inciting the criminal procedural rules of art. 268 para. (1) of the Code of Criminal Procedure, the sanction for non-observance of this term being the deprivation of the prosecutor from the exercise of the right to submit the proposal for prolonging the duration of the preventive arrest and the absolute nullity of the act done overtime.

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