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NEW REGULATIONS REGARDING THE JUDICIAL AUTHORITIES DECIDING ON PREVENTIVE DETENTION

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Abstract: *The new Romanian Criminal Procedure Code, ruling from 1st of February 2014, brings a new philosophy regarding the judicial authorities that may order preventive detention within criminal investigation proceedings. The previous regulations simply enumerated the judicial authorities responsible for deciding preventive detention while the new law describes the judicial duties of these authorities, allowing the lawmakers much more flexibility in designating the authorities in charge with preventive detention.*

Key words: *preventive detention, judicial police, prosecutor, authority, criminal investigation.*

1. Introduction

According to article 209 paragraph 1 of the Criminal Procedure Code, the detention of a person, as a preventive measure, shall be ordered by the criminal investigation body or by the Prosecutor.

The prosecutor and the criminal investigation bodies, as stated within articles 29 and 30 of the Criminal Procedure Code, are specialized state bodies that perform judicial workings and also take part in criminal proceedings alongside lawyers, parties, main procedural subjects and other procedural subjects.

The criminal investigation bodies referred to in article 209 paragraph 1 of Criminal Procedure Code, are investigation bodies of the judicial police and special criminal investigation bodies as stipulated within article 55.

Unlike the Criminal Procedure Code from 1968, the ruling Criminal Procedure Code defines the investigation bodies of the judicial police and special bodies of criminal investigation in terms of their duties.

Thereby, the responsibilities of the judicial police investigators are performed by skilled workers of the Ministry of Administration and Interior specifically designated under the special law that received the assent of the General Prosecutor's Office attached to the High Court of Cassation and Justice or the assent of the prosecutor assigned in this regard.

2. Criminal investigation bodies

Law no. 364 from 15 September 2004 on the organization and operation of the judicial police is the rule that establishes the general running of the criminal

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investigation bodies of the judicial police and their general duties. Thus, the judicial police consist of police officers and agents specialized in finding offenses, collecting data to commence prosecution and criminal investigation, acting as criminal investigation bodies of the judicial police.

The law also provides the manner of designation for the criminal investigation bodies mentioned above.

So, as police investigation bodies shall operate specialized workers of the Ministry of Administration and Interior specifically appointed by the Minister, with the favorable opinion of the General Prosecutor's Office attached to the High Court of Cassation and Justice and operating under the authority of the General Prosecutor's Office attached to the High Court of Cassation and Justice or they are designated and work otherwise, according to special laws. The same law provides that the judicial police investigation bodies are organized and operate within the structure of the central unit of the Ministry of Administration and Interior (now the Ministry of Internal Affairs), the structure of the General Inspectorate of Romanian Police, General Inspectorate of Romanian Border Police and their territorial units.

The prosecution authority of the criminal investigation bodies of the judicial police is, therefore, a general one, except where the law assigns authority to perform prosecution to the criminal investigation special bodies or to the prosecutor.

It implicitly results that the criminal investigation bodies of the judicial police have the authority to order procedural measures within criminal prosecution, including preventive detention of a person.

The duties of the criminal investigation special bodies are achieved by officers expressly designated under the law, which received the assent of the General Prosecutor's Office attached to the High Court of Cassation and Justice.

The criminal investigation bodies of the judicial police and the criminal investigation special bodies operate under the direction and supervision of the prosecutor.

Related to their duties, investigative judicial police may order the detention measure for commitment of any offense that is not given, by law, within the authority of the criminal investigation special bodies or the prosecutor, corroborating specific responsibilities stipulated by articles 57 and 209 paragraph 1 of the Criminal Procedure Code. In this respect, the competence of the judicial police is a general one.

Using the same interpretation, the criminal investigation special bodies or the prosecutors may decide preventive detention measures only if they are conducting criminal proceedings under article 55 paragraphs (5) and (6) of the Criminal Procedure Code, corresponding to the specialization structure they belong to, where offenses committed by the military or in the case of corruption and duty's offenses provided in the Criminal Code and committed by crew of the civilian Navy if the act had or could have endangered the safety or navigation of the ship or its staff .

Per a contrario, it follows that for those offenses on which the authority of performing criminal prosecution lies with the criminal investigation special bodies, the detention measure may be taken only by those criminal investigation special bodies, and not by the criminal investigation bodies of the judicial police, including by applying the dictum *exceptio est strictissimae interpretationis.*

As the Criminal Procedure Code from 1968 stated, special investigation bodies were represented by, according to article 208:

a) The officers specially appointed by military unit commanders and the commanders of these units for the military subordinates;
b) the heads of the garrison commandants and officers specially appointed by these, for the offenses committed by the military personnel outside military units;
c) military commanders and officers specially appointed by these, for crimes within the jurisdiction of military courts, committed by civilians about their military obligations;
d) border police officers, specially appointed for border offenses;
e) harbor captains, for crimes against water navigation safety and board discipline and for duty offenses committed by the staff of civilian navy if the act had or would have posed a threat to the safety of the ship or to navigation.

The current Criminal Procedure Code synthesized the exhaustive enumeration of the Criminal Procedure Code previously used, starting from specific duties of the criminal investigation bodies, judicial or special police, thus the new rule provides greater flexibility in determining these judicial bodies.

Prosecutor may order preventive detention measures both in the causes within which he conducts compulsory prosecution and in the causes in which he performs supervision while the prosecution is carried out by the criminal investigation bodies of the judicial police or by the criminal investigation special bodies.

Regarding the last point stated, I consider that, according to article 56 of the Criminal Procedure Code, the prosecutor directly manages and controls the criminal investigation activities of the judicial police and special criminal investigation bodies, prescribed by law. Also, the prosecutor supervises the criminal proceedings so as to be lawfully performed.

The same article provides that the prosecutor may perform any criminal proceeding in the cases under his leadership and supervision.

This last provision, although limiting in terms of criminal proceedings that can be performed by the prosecutor in the cases where prosecution is carried out by the criminal investigation bodies, does not preclude, in my opinion, the possibility that the prosecutor himself should take the measure of preventive detention against the suspect or the culprit, a procedural measure par excellence.

In this respect, I invoke the provisions of Chapter III from the Criminal Procedure Code, ”prosecutor’s management and supervision over the activity of criminal investigation bodies".

By virtue of these dispositions, referred to within article 299, the prosecutor shall exercise supervision of criminal investigation bodies so that no suspect or defendant may be detained except for the cases and under the conditions provided by the law. It is noted that the prosecutor is obliged to censorship *ex officio* detention measure taken by the criminal investigation bodies he oversees, not only in terms of drawing a complaint related to this measure.

In his duty to lead the prosecution, the prosecutor takes the necessary action or instructs the criminal investigation bodies taking these measures, being able to assist in performing any criminal investigation proceedings or to personally perform it. In my opinion, the ability to perform any criminal investigation proceedings also encloses the one of ordering preventive detention measures, inclusive under the circumstances in which the prosecutor holds the cause for performing criminal prosecution.

The same provisions state that the prosecutor may decide on the performance of any criminal investigation proceedings made by the judicial police or the special criminal investigation bodies, as appropriate, the instructions given by the prosecutor towards conducting criminal investigations being mandatory and precedent for the investigation body and also for the other bodies that have statutory responsibilities in ascertaining offenses.

The law reinforces this last provision by expressly stating that the upper organs of the judicial police or criminal investigation bodies cannot give guidelines or provisions for criminal investigations.

In cases performing mandatory prosecution, the prosecutor is the only one who can take preventive measures to arrest the suspect or the culprit, this representing a procedural act that cannot be the subject of a letter rogatory or delegation.

Criminal Procedure Code limits and expressly provides within article 56 paragraph 3 the cases where prosecution must be carried out by the prosecutor. To these may be added the cases retained by the prosecutor so as to conduct the prosecution himself, although general jurisdiction would be subject to judicial police or special criminal prosecution bodies. Likewise, the prosecution of crimes committed by the military is compulsorily performed by the military prosecutor.

There is, however, a restriction on the prosecutor's authority to perform prosecution and thus to order preventive detention.

Thereby, according to article 56 last paragraph, competency to perform or, as applicable, to manage and supervise prosecution belongs to the prosecutor of the prosecutor's office corresponding to the court that judges the cause in the first instance, unless the law provides otherwise.

3. Judicial police of specialized structures

Returning to the criminal investigation bodies of the judicial police, I consider necessary the assessment of the situation as regards the judicial police within the National Anticorruption Directorate, the Directorate for Investigating Organized Crime and Terrorism and Anti-Corruption General Directorate from the Ministry of Internal Affairs.

According to article 5 of Law no. 364/2004 on the organization and operation of the judicial police, the judicial police of the National Anticorruption Directorate is organized and operates under special law of the National Anticorruption Directorate. Within the content of the Government Emergency Ordinance no. 43 from 4th of April 2002 regarding the National Anticorruption Prosecution Office, article 10 stipulates that within the National Anticorruption Directorate operate police officers forming the judicial police of this Directorate and having the specific purpose of promptly and thoroughly performing the activities of disclosure and prosecution of corruption offenses.

They operate only within the National Anticorruption Directorate and can perform only those criminal investigation proceedings ordered by the prosecutors of the National Anticorruption Directorate. Obviously, judicial police officers and agents are working under the direct management, supervision and control of the prosecutor, his provisions being binding for the judicial police officers who cannot get any task from superior authorities.

It is important to say that the documents issued by judicial police officers, under the prosecutor's written disposition, are made on his behalf.

In these circumstances, may these judicial police bodies take, under the provisions of the prosecutor, the measure of preventive detention of a person? Obviously, the answer is no.

Even if they operate under a special law, the judicial police of the National Anticorruption Directorate obey general procedural regulations. Thus, according to article 56 paragraph 3 letter d, the prosecution of crimes within the jurisdiction of the National Anticorruption Directorate is compulsorily performed by the prosecutor.

In such conditions, the preventive detention measure, as procedural measure, cannot be delegated, even when the documents issued by judicial police officers, under the prosecutor's written disposition, are made on the prosecutor's behalf.

Similar provisions are stipulated in Law no. 508/2004 on the establishment and organization of the Directorate for Investigating Organized Crime and Terrorism within the Public Ministry, in which the DIOCT's judicial police was created. Under the provisions of article 27 of the above mentioned law, " The Ministry of Administration and Interior shall nominally designate, with the assent of the General Prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice, the judicial police officers and agents who will work under the supervision of the prosecutors of the Directorate for Investigating Crimes Organized Crime and Terrorism."

These police officers are working within the Romanian Police, the Directorate for Combating Organized Crime, having general duties that do not derogate from the provisions of the Criminal Procedure Code as does the NAD judicial police's authority, although the article 9 of Law no. 508/2004 provides that the judicial police officers and agents specially appointed according to article 27 perform only those criminal investigation proceedings ordered by the prosecutors of the Directorate for Investigating Organized Crime and Terrorism, under their direct coordination and control.

I consider that the judicial police of the Directorate for Combating Organized Crime also conduct prosecution for criminal offenses not falling within DIOCT's jurisdiction, under the supervision of prosecutors within the Prosecutor's offices.

Obviously, these judicial police bodies cannot take any action on the proceedings, including the measure of preventive detention, if the prosecution of the criminal offenses shall be carried out by prosecutors within DIOCT.

Apparently a similar situation is the one of the criminal investigation bodies from the judicial police within the Anticorruption General Directorate located in the Ministry of Administration and Interior.

The organization and operation of the AGD is governed by Emergency Ordinance no. 120 from 1st September 2005 on the operationalization of the Anticorruption General Directorate within the Ministry of Administration and Interior.

Under the provisions of this act, the Anticorruption General Directorate is the specialized structure of the Ministry of Administration and Interior, with legal personality, to prevent and combat corruption among ministry staff.

Regarding the material jurisdiction, it has been established that judicial police workers within AGD are qualified to perform, under the terms of the law, prevention and disclosure activities, as well as criminal investigation proceedings ordered by the prosecutor with responsibilities for crimes described by Law no 78/2000 on corruption prevention,

disclosure and enforcement, amended and supplemented, committed by personnel of the Ministry of Administration and Interior Based on the above provisions, the AGD's judicial police cannot prosecute in its own name, but under the supervision of the prosecutors who have material competence stated by Law no. 78/2000, with amendments for performing prosecution of such crimes. Moreover, by the above-mentioned rule, the authority of the judicial police working in the AGD is restricted to offenses stipulated by Law no. 78/2000, committed by the Ministry of Internal Affairs' staff.

So, the quality of an active subject of those crimes that can be investigated by the AGD's judicial police should be restricted to staff of the Ministry of Internal Affairs, crimes under Law no. 78/2000 committed by other individuals should not be investigated. On the basis of these provisions, it appears that either the AGD's judicial police cannot order the preventive measure of detention to a person, this responsibility belonging to the prosecutor.

4. Legal doctrine interpretation

In terms of strict regulations on judicial bodies that may decide the preventive detention measure, is there any possibility that other judicial bodies may take this measure? May the judge of rights and freedoms, the preliminary chamber's judge or the court, order the detention of the culprit according to the principle *qui potest plus, potest minus*? In the legal literature, the view that the detention measure may also be taken by the court, an otherwise singular opinion, was expressed.

According to this point of view, it makes sense for the court to decide the deprivation of liberty of a person for a period of 24 hours, as long as the court is able to order the deprivation of liberty for a longer period of time and exercise judicial review over preventive measures. An example has been given considering the possibility of accused detention for an offense of audience.

Another argument put forward by the author of the above-mentioned opinion was that the court has the right to exercise judicial control over preventive measures. However it should be noted, that the court may not decide on detention measure, as this authority belongs only to the prosecutor who supervises the criminal investigation or upper ranked prosecutor, according to article 140 from the Criminal Procedure Code.

This point of view was rejected by the majority doctrine. According to one of the authors, this opinion cannot be agreed upon. Thus, if in the case of the prosecutor the logical interpretation given prior to Law no 281/2003 was also based on legal arguments, then, *a fortiori* argument for *a maiori ad minus* approach (who can do more, can also do less) cannot be applied and it cannot be alleged that the law ruling before the year 1969 provided that the detention may be ordered also by the court when the prosecution had decided the accusation's extension to other facts or other persons.

In his argumentation, the author of this singular opinion shows that before the court, the person may be accused only under article 299 of the Criminal Procedure Code from 1968, namely when an audience's offense is committed while the hearing takes place, in which case, according to article 147 from the previous Criminal Procedure Code, the court may order the arrest of the accused by a written conclusion. Otherwise the article 144 paragraph 2 of the previous Criminal Procedure Code stipulates that the measure of detention is either decided by ordinance or taken by the criminal investigation body or the prosecutor.

If the court orders the arrest of the accused in the case described above, he would be immediately sent to the prosecutor for prosecution proceedings under the old law.

Thereby, the question is for what purpose the court would detain the accused.

Considering its release, it seems clear that the court may not perform any procedural act, which is why the detained accused should be immediately sent to the prosecutor.

But the detention measure requires that the accused should be available to the judicial body that ordered it.

Likewise, up-to-date doctrine argues that the rights and freedoms' judge, the preliminary chamber's judge or the court may not order the preventive detention measure.

5. Conclusion

I conclude by emphasizing that, although the law allows it, if flagrant crime is committed, any person has the right to apprehend the perpetrator and bring him before the authorities. This type of detention shouldn't be considered equivalent to the preventive detention measure, just as any apprehension of the perpetrator by the ships' and aircrafts' commandants, provided by article 62 of Criminal Procedure Code, or by the border police agents cannot be treated as preventive detention, which can occur only in criminal proceedings.

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