EVIDENCE, MEANS OF EVIDENCE AND RULES OF EVIDENCE. PREVENTIVE MEASURES AND OTHER PROCEDURAL MEASURES. JOINT ADJECTIVE AND PROCEDURAL ACTS

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Abstract

In order to establish the truth in a criminal case, the judicial bodies are ,based on evidence, to clarify the case in every aspect.

Evidence have no predetermined value and means of evidence that may serve as evidence must not be prohibited by law.

Provisions relating to evidence and means of evidence in the new Code of Criminal Procedure are aimed at the prompt resolution of criminal proceedings and the judicial process efficiency.

In this context, the new regulation waives the restrictive enumeration of means of evidence, thus enabling the administration of any means of evidence needed for finding out the truth.

As for the preventive measures, the new Code of Criminal Procedure applies the principle of proportionality of any measure depending on the seriousness of the person's indictment, and only if that measure is necessary to achieve the purpose of criminal proceedings.

Preventive custody has kept both his exceptional character and the subsidiarity unlike other preventive measures; it is enforced only when other measures are not sufficient and the purpose of ensuring the proper conduct of criminal proceedings cannot be achieved otherwise.

Keywords*: evidence, means of evidence, house arrest, special techniques of surveillance, preventive measures, warrant for arrest of defaulting witness*

Need to regulate a new Code of Criminal Procedure was due both to the lack of celerity of criminal proceedings and the criminal judicial process inefficiency in very many cases.

Under the new regulation,[1] provisions were enacted significant in terms of evidence, means of evidence, preventive measures, but also in terms of joint adjective and procedural acts.

For criminal proceedings to be conducted under normal conditions, the legislator withdrew the restrictive enumeration of means of evidence explicitly showing that it is possible to use any means of evidence the law does not prohibit.

To eliminate potential ambiguities in defining the concept of evidence, the new regulation expressly provides for in the provisions of Art. 97 that evidence shall mean "any actual element which serves to

[1] Law no. 135/2010, published in the Official Journal no. 486 of July 15, 2010 - to be entering into force by the Law enforcing thereof.

establish the existence or nonexistence of a crime, to identify the person who committed it and to assess the circumstances necessary for a fair settlement of the case, and which contributes to revealing the truth in criminal proceedings.

Referring to the subject of probation, the new regulation defines it in the provisions of art. 98 where it shows that this seeks: the existence of the crime and the perpetration thereof by the defendant; deeds relating to civil liability (if any civil party); deeds and actual circumstances law enforcement depends on; any circumstance necessary for the fair settlement of the case.

With regard to producing evidence, compared to current regulation, to ensure the fairness of the proceedings, the legislator expressly stated where the judicial bodies may reject producing evidence, namely when: evidence is irrelevant in relation to the subject of the probation in question; it is estimated that sufficient means of evidence have been produced to prove the actual element that is the subject of evidence; evidence is not necessary, because the fact is notorious; evidence is impossible to get; application was made by a rightless person; producing evidence is against the law.

If the law brings an improvement in the sense of producing evidence, and we refer to the elements shown above, we believe, however, that the application should be accepted where it was made by a **rightless person** whilst the evidence is conclusive and useful for the case to find out the truth and does not delay the criminal case.

As current regulation, Art. 68, prohibits the means of coercion in producing evidence as well as the promises and exhortations in order to obtain evidence, the new regulation (Art. 101 NCCP) has introduced the principle of loyalty of producing evidence which prohibits the use of violence, threats or other forms of coercion, as well as promises and exhortations to obtain evidence, whilst showing in paragraph (2) that methods or listening techniques affecting individual's ability to recall and report knowingly and willingly the facts which are the subject of evidence cannot be used.

Thus, this regulation was made to protect human dignity and also in the sense that the person in question shall receive a fair trial and have the right to privacy (the provision is in line with the provisions concerning the European human rights).

This newly introduced principle is found in the fundamental principle of legality of criminal proceedings, enshrined in Art. 2 CCP, according to which '"criminal trial is conducted in accordance with the provisions defined by law".

Within the general provisions relating to evidence, art. 102 has also introduced the provision regarding the exclusion of evidence obtained unlawfully, those obtained through torture, as well as evidence derived there from.

Where the evidence obtained such unlawfully cannot be used in criminal proceedings, the legislator indicated in art. 102 par. (3) that by way of exception, the provisions of par. (2) shall not apply, however, if the means of evidence faces only form-related flaws or there are other procedural irregularities which do not cause harm to remove the means of evidence concerned. Also, deriving evidence shall be excluded when obtained directly from those got unlawfully, except for those referred to in par. (3) of Art. 102 NCCP.

The new Code of Criminal Procedure has also adopted a series of general rules in the matters of hearing for persons, hearing for the suspect or the accused, the injured party, the civil party and the civilly liable party, as well as the hearing for witnesses.

If according to current code, in many criminal cases it happens that a witness, after being heard, criminal proceedings are initiated against him or her, the provision that gives the witness the right not to be accused has been introduced so that to removed such impediment (art. 118 NCCP), and his or her statement cannot be used during criminal proceeding. Thus, the regulation was put in line with the European Court of Human Rights jurisprudence - see Case *Serves v. France.*

The new procedural provisions make essential improvements for identifying persons or objects, for the search (domiciliary, body, vehicle, computer and access to a computer system), for expertise (forensic and medical, psychiatric, toxicological, DNA expertise, ..., etc.) and for photographing and fingerprinting the suspect, the accused or others.

We deemed necessary to make some more detailed assessment on the special surveillance or research techniques that are being used increasingly often in criminal cases, especially those of corruption.

In the current Code of Criminal Procedure (last amended by Law no. 202/2010) tapings and audio or video interceptions are presented in Section V, Art. 91^{1}-91^{6}, section introduced by Law no 141/1996 and amended by Law no 281/2003.

New Code of Civil Procedure[2] establishes in Chapters IV and V - Special surveillance and research techniques (Art. 138-153) and Preserving computer or telecommunications systems generated data (Art. 154 and 155) – several legal provisions to try to be consistent with the provisions of art. 8 of the ECHR, as well as to solve a number of issues that arise during prosecution.

Provisions of art. 138 NCCP, after listing the special surveillance or investigation techniques (tapping and communications interception - ... identifying the subscriber, the owner or user of a telecommunication system), also details the meaning of some terms, namely: tapping or communications interception, access to a computer system, computer system, computer data, video , audio or photographic surveillance, mail search, controlled delivery.

It also explains what technical surveillance means and that it may be ordered by the judge of rights and freedoms upon the cumulative fulfillment of the conditions laid down in Art. 139 item a) to c) CCP:

- reasonable suspicion of preparing or committing an offense;

- the measure must be proportionate to the restriction of fundamental rights and freedoms (subsidiarity principle - the exception of intromission in the right to privacy);

- evidence could not be obtained otherwise, or obtaining them would involve particular difficulties that would prejudice the investigation or there is a threat to the safety of persons or valuable assets.

Most times, the cumulative fulfillment of the conditions given above is not observed in the judicial practice, and here we mean that for offenses such as corruption, drug trafficking, and human trafficking, technical surveillance on the interception and recording of conversations is ordered from the very beginning. That is why the new regulation is fully in line with the requirements of the European Union as technical surveillance may be ordered only if all the foregoing requirements are met.

Compared to the current regulation in Art. 139 par. (2), technical supervision was extended to cover: falsifying e-payment instruments, extortion, rape, deprivation of liberty, tax evasion, offenses against the financial interests of the European Union, crimes committed through computer systems, and even other offenses for which law provides for the 7 years imprisonment or more.

As can be seen, these types of offenses were added to those listed in Art. 91^{1} par. (2) of the Code of Criminal Procedure in force and we consider that this enlargement and listing were no longer necessary as long as technical surveillance can be used for almost all types of crime.

The new Code of Criminal Procedure solved the problem of whether these specific surveillance or investigation techniques are to be carried out only during criminal prosecution or during the preceding acts as well.

The literature noted that audio recordings that were made prior to criminal prosecution have no probative force, but many times, in practice, judges have sentenced defendants who were prosecuted based on these conversations. In this regard, the High Court of Cassation and Justice stated that "by analyzing provisions of Art. 91^{1} par. (1) and (2) CCP, strictly setting the legal conditions to perform audio or video interceptions and recordings, it follows that legality thereof is not subject to criminal prosecution, but audio or video interceptions and recordings may also be authorized during preliminary acts (criminal Decision no. 10 of 7 January 2008).

The preliminary acts phase was removed under the provisions of the new Code of Criminal Procedure, ordering the initiation of criminal proceedings for the offense (art. 305), so that all activities will take place during the criminal proceedings, observing all rights and guarantees granted to the person subject to investigation.

[2] Law no. 135/2010, published in the Official Journal no. 486 of July 15, 2010 - its entering into force will be set by the Law enforcing thereof).

We believe that the new legal provisions did not fully cover the resolution of situations which will arise when the new Code of Criminal Procedure enters into force.

An expertise of the initial media was required in many criminal cases - Art. 91^3 in conjunction with Art. 91^6 par. (1) - whereas the parties consider that today digital technology allows interventions on copies[3] of such media or the copies made do not fully include the conversations content, thus they can provide criminal investigation bodies with a suitable sense to establish guilt.

In Romania, there are currently four institutions authorized to hold and use means for checking, processing and storage of information, namely: R.I.S. – Art. 8 of Law no. 14/1992, the Ministry of Interior and Administrative Reform (Art. 3 and 10 of G.E.O. no. 307/2007), Ministry of Defence (Art. 13 of Law no. 346/2006) and NAD (Art. 15 of G.E.O. no. 43/2002, as subsequently amended).

Until 2010, expertise could be carried out by RIS and GIRP and, after 2010, also by the NICE - Ministry of Justice, because it was absurd for a person to be able to request the body who had performed the recording to carry out an expertise.

Whilst the current Code speaks of an **initial media**, the word **initial** disappears from the new code, so that the object which is subject to the expertise covers only the material media.

One will never know whether this material media is the original from which copies for the court are to be made, especially since the provisions for checking the means of evidence (Art. 91^6) are no longer contained in the new Code.

Expertise may be requested only pursuant to the provisions of Art. 172 regarding the ordering of carrying out the expertise corroborated with Art. 100 on producing evidence.

We appreciate that this regulation is not the optimal solution for an expertise on the authenticity of the records, because, as noted, the original media will no longer be the subject of expertise, but only the material media.

Also, in the current code, when speaking of certifying records, it is shown that these intercepted and recorded conversations are **presented in full** in a protocol [Art. 91^3 par. (1)].

New Code of Civil Procedure, Art. 143 par. (4) notes that the prosecutor presents the records without making further **reference to the full play** of such conversation or communication. Leaving the playing of conversations at the discretion of the prosecutor or the criminal investigation body, is questioned the observance of the principle of procedures' loyalty in producing evidence (art. 101), and they can be produced in bad faith either by not displaying certain passages that appear in the record (which can totally change the meaning of the sentence) or by using obsessively the bold font for phrases or words, thus inducing the magistrate to have the certainty of that person's guilt.

Some interpretations may arise from recordings made by the parties or others [Art. 91^6 par. (2) of the current Code and Art. 139 par. (3) of NCCP], constituting means of evidence where they concern their own conversations or communications which they have had with third parties, and any other records that may constitute means of evidence unless prohibited by law.

For these records to constitute means of evidence, we consider that, first, the specific criminal prosecution should be initiated for not to fall outside the criminal proceedings and that they also have to be certified as authentic by an expert, similar to the requirement for the records made by the prosecutor [Art. 91^3 par. (2) the Code of Civil Procedure in force and Art. 143 par. (4) of the NCCP][4].

[3] A digital recording is essentially a computer file. As such, unlike the analogue tape, it can be duplicated in an unlimited number of identical copies and can be easily modified and manipulated, mainly similar to a Word document or electronic mail. As in a Word document or e-mail, you can easily delete portions of a digital audio file, or add to a file. Sometimes, changes to a digital audio file can be practically impossible to detect even by a qualified expert. Should an expert have no access to the original record, he or she cannot exclude that a digital audio file was modified, and therefore cannot authenticate the recording. The expert, by examining the authentic media, determines whether it is the original, continuous and unaltered recording - See Bruce Koening expert report in the case *EDF (Services) Limited v. Romania.*

[4] Regarding the records made by the parties or others, one should also consider the provisions of Art. 26 par. (1) of the Romanian Constitution Art. 12 of the Declaration of Human Rights, as well as Art. 8 of the European Convention on Human Rights.

Although the Code does not provide for this, professional certification is required, as the evidence recorded individually and at different times may include digitally undetectable manipulations, such as deletions, reallocations or segment additions, as well as additions of sounds to cover such changes and create the impression that the record was not stopped and was done continuously.

Provisions of Art. 142 par. (6) of the NCCP indicate that the prosecutor will destroy the evidence after a year of the final case disposition if the results of surveillance measures are not related to the deed which is subject to the investigation. In this respect, the article is not clear since there is no penalty for not destroying the technical surveillance results, therefore it is possible that these records will be used over the years in other situations.

During criminal proceedings, the real and effective intervention of procedural measures (which are adjacent to the main activity) shall occur only if there are problems or situations which require such measures. This proves that the institution does not necessarily enter in the basic content of activities related to settling a criminal case.[5]

As for the preventive measures, the novelty of the new Code of Criminal Procedure is that the principle of proportionality of any measure shall apply depending on the seriousness of the person's indictment, and only if that measure is necessary to achieve the purpose of criminal proceedings.

Under the new regulation, in accordance with Art. 202 NCCP, the preventive measures are: the arrest, legal restrictions pending trial, bail subject to legal restrictions pending trial, house arrest, preventive custody, while the persons such measures are enforced against must be informed in writing in order to enjoy the rights that the law gives them, in the sense of challenging thereof before the judge of rights and freedoms, the preliminary chamber judge or during proceedings, before the court.

Preventive custody has kept both his exceptional character and the subsidiarity unlike other preventive measures; it is enforced only when other measures are not sufficient and the purpose of ensuring the proper conduct of criminal proceedings cannot be achieved otherwise.

If the other preventive measures are regulated in the current Code of Criminal Procedure as well, house arrest is one of the new amendments.

The preventive measures are procedural measures to be taken by the judicial bodies during criminal proceedings. Whilst the preventive measures and other procedural measures are found in Title IV, art. 136-170 of the current Code of Criminal Procedure, the New Code of Criminal Procedure[6] these are inlaid in Title IV, Art. 202-256.

Preventive measures, as specified also in Art. 202, may be ordered only if there are evidence or strong indications which show reasonable suspicion that a person has committed an offense and if they are necessary to ensure the proper conduct of the criminal proceedings.

To enforce a preventive measure, there must be no reason to prevent the initiation or exercise of criminal action and it must also be proportionate to the seriousness of the charge against the person concerned.

The preventive measures stipulated for in the current Code are: arrest, order not to leave the locality, order not to leave the country and preventive custody. The new Criminal Code makes a substantial improvement of preventive measures in the sense that, along with arrest and preventive custody (as far the most serious), we have legal restrictions pending trial, bail subject to legal restrictions pending trial, and house arrest.

Even if we no longer have the two preventive measures, namely the order not to leave the locality or the order not to leave the country, these are to be found within the provisions of Art. 215 concerning the contents of legal restrictions pending trial of par. (2) item a), establishing that the defendant shall not exceed a certain territorial limit without the prior consent of the judicial body, and also in par. (5) of the same article, when the prohibition to leave the country or a particular locality is enforced.

These preventive measures were regulated so that future legislation to be consistent with the jurisprudence of the European Court of Human Rights and with the principle of proportionality of any

[5] N. Volonciu, *Treatise of Criminal Procedure*, Paidea Publishing House, Bucharest, 1999, p. 399

[6] Law no. 135/2010, published in the Official Journal no. 486 of July 15, 2010.

preventive measures to the seriousness of the indictment, as well as with the observance of the principle of necessity for achieving the aim pursued through ordering thereof.

House arrest preventive measure may be enforced against the defendant during the criminal prosecution by the judge of rights and freedoms, during the preliminary chamber procedure by the preliminary chamber judge, and during the trial, by the court [Art. 203 par. (3) of the NCCP].

With regard to house arrest institution, the Romanian legislation was inspired by the Italian Code of Criminal Procedure. In Italy, house arrest (arresti domiciliari) is a common practice of detention for suspects, either a detention alternative for those who are close to the end of the imprisonment, or for those whose health does not allow confinement in prison. Thus, provisions of art. 284 of the Italian Code of Criminal Procedure, stipulate that when a judge orders house arrest, the suspect must remain locked in his house, at his domicile, private property, or in any other place of healing or assistance when necessary.[7].

Provisions on home arrest are set out in Art. 218-222 and to enforce such measure, the provisions regarding the preventive custody set out by Art. 223 must be complied with (the defendant fled or went into hiding in order to evade criminal prosecution or the court, attempts to influence another participant in commission of the offense, either an witness or an expert, puts pressure on the injured party or tries a fraudulent deal with the later, there is reasonable suspicion that after the initiation of criminal proceedings the defendant intentionally committed a new crime or prepares the commission a new offense) and this measure is sufficient to ensure the proper conduct of criminal proceedings.

For this measure to be ordered, the judge must assess according to the degree of social danger of the crime, the health, age, family status or other circumstances of the person accused.

The measure can be ordered against any defendant except for those against whom there is a reasonable suspicion that they have committed an offense against a family member or those who have previously been permanently convicted of the crime of escape. [Art. 218 par. (3) CCP]

During criminal prosecution, the house arrest measure can be ordered by the judge of the rights and freedoms attached to the court competent to hear the case in the first instance, subsequent to the reasoned proposal of the prosecutor supervising or conducting the prosecution.

The same measure can also be enforced by the judge of rights and freedoms with the Court having jurisdiction over the place where the crime was found.

Within 24 hours from the registration of proposal, the judge establishes a settlement date in closed session, they hear the defendant if present, and the legal assistance of the accused and the prosecutor's presence are mandatory.

The judge of rights and freedoms may accept the proposal and shall oblige the defendant, for a specific period, not to leave the building he or she resides in without judge's permission and the defendant shall also obey certain restrictions set by the former. [Art. 221 par. (1) CCP]. The defendant may leave the building when required to appear before the judicial authorities, upon their summon.

Should the judge of rights and freedoms reject the prosecutor's proposal through a reasoned hearing report, by the same hearing report, it may order the preventive measure of legal restrictions pending trial or bail subject to legal restrictions pending trial.

The procedure is the same also when the preliminary chamber judge or the court orders the house arrest measure. Hearing for the defendant before those judicial bodies is also compulsory when the later is present at the time appointed, and legal assistance and participation of the prosecution are mandatory.

When ordering this measure, the defendant is also required to comply with the following obligations [Art. 221 par. (2) CCP]:

- the defendant's appearance before the judicial bodies whenever summoned;

- not to communicate with the injured party or family members thereof, other participants in commission of the offense, witnesses, experts or any other persons not ordinarily residing with the defendant or not currently in its care.

[7] In Italy, house arrest is an ancient institution, as we can illustrate with regard to Galileo Michelangelo, whom, because of his Dialogue on Copernicus case was ordered in June 1633 to be placed under "house arrest", first at the residence of the Tuscan ambassador and then at his villa in Arcetri, near Florence, for the rest of his life (he died on January 8, 1642).

As a preventive measure, house arrest has a number of advantages both for the State and for the defendant.

If in what concerns the State, large amounts of money are no longer spent with regard to the detention of the accused, in regard with the defendant, he or she may ask the judge (of rights and freedoms, that of preliminary chamber or the court), through a written and reasoned request, to be able to leave the building either to buy the essential living means or to go to work, to attend educational courses or professional training. The judge shall rule by hearing report whether it agrees with the defendant leaving the building, specifying the period of time also whether is necessary for the achievement of certain rights or legitimate interests of the defendant.

The legislator provided under Art. 221 par. (3) of the CCP that, during house arrest, the defendant may be ordered to continuously wear an electronic monitoring system. This electronic surveillance system exists in most countries that stipulates for house arrest as a preventive measure, but probably due to lack of funds to use such enforcement technology products, the word “may” was introduced.

In some states, such technological product consists of an electronic sensor locked on the defendant’s ankle (ankle monitor) so that, should the subject leave the building he or she lives in, this is recorded by the private companies’ monitoring service (service paid by the defendant) that deals with electronic monitoring of several convicted simultaneously.

Such violation is notified either to the probation officer of the defendant or to the police to take action accordingly. The defendants’ travel either to the judicial bodies or to the meetings with their lawyers or medical checks or weekly religious rituals is allowed in these countries, as well (the electronic monitoring of those placed under house arrest is used widely in the U.S.).

Another method to ensure house arrest that is also used abroad, is using automatic telephone dialing services that do not require human contact to check on the defendant. Random demands are made to the defendant's residence and, when recorded, a comparison with the voice pattern thereof is made. Authorities are notified only if the caller does not answer or if the reply recorded does not match the defendant's voice pattern.

Judge's hearing report ordering the house arrest shall be notified to the defendant and the institution, body or authority designated with the surveillance, the police authority from the district he or she resides in, the community public personal register service, and the border authorities. [Art. 221 par. (8) CCP]. Those who have been designated for the periodically checking of the measure and the defendant’s obligations observance notifies the prosecutor during criminal prosecution or the judge for the other situations where noticing violations of this preventive measure.

Law provides even for the fact that to monitor the observance of the house arrest measure, the police may enter the building without the permission of the defendants or the persons residing with them.

The fulfillment in bad faith of the obligations incumbent the defendant or should the defendant commit a new crime leading to ordering the initiation of criminal proceedings against him or her, upon motivated request of the prosecutor, substitution of the house arrest with the preventive custody measure may be ordered.

We should specify that when ordering substitution of this measure with preventive custody, the presence of the accused is mandatory.

As a preventive measure, house arrest during criminal proceedings can be enforced up to 30 days, measure which may be extended if necessary (keeping the grounds that have determined the enforcement of the measure or when new grounds have occurred) by a period not exceeding 30 days, and the maximum duration of the measure cannot exceed 180 days.

The extension measure referred in the Art. 222 par. (3) shall be enforced under the same terms as provided for in Art. (219) CCP.

The measure of the house arrest shall apply as a preventive measure also for minor defendants.

Since the institution of the house arrest is different from the preventive custody institution, although the same requirements are to be complied with, the length of imprisonment shall not be taken into account in calculating the maximum period of preventive custody of the defendant during the criminal prosecution.

In terms of **joint adjective and procedural acts**, the new Code of Criminal Procedure does not introduce new legal institutions, but in order to have an expeditiously trial, detailed references are to be made about the summoning, the procedural documents and the warrant for arrest of defaulting witness.

With regard to the warrant for arrest of defaulting witness, we can show that, during the criminal proceedings it can be issued by the criminal prosecution body, and during the proceedings, it can be issued by the court.

The legislator has also regulated the case when, for the enforcement of the warrant for arrest of defaulting witness during criminal prosecution, entering without consent in a residence or office is required.

Should such case exists, upon motivated request of the prosecutor, the judge of rights and freedoms, may, in closed session, consent to bring the person required, without summoning the parties, and by a the final judgment, immediately issuing the warrant.

The warrant for arrest of defaulting witness enforcement is performed by the public and national security authorities, when the mandate is issued by the judge of rights and freedoms or the by the court.

For enforcement, the enforcement bodies may enter the home or premises of every person where there is evidence that out there the searched person is located.

If the searched person refuses to cooperate, or for any other justified good reason and proportionate to the aim pursued, he or she hinders execution of the warrant.

The legislator has considered that, in the situation above, this warrant to be also ordered by the judge of rights and freedoms who may order domiciliary searches during criminal proceedings (according to art. (158 CCP).

Such regulation was necessary however with the compliance with the fundamental human rights to settle a criminal case in real time.

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