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# Pre-trial detention. Motion for pre-trial detention

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**Abstract**. The crime is the most serious antisocial act that entails the application of criminal law and sanctions specific to criminal law, thus occupying a special place within the field of violations of the norms of behavior established by law. The repressive action of public authorities to restore the rule of law is and must be conditional and clearly delineated, ensuring that individual freedom is protected and that no innocent person is affected. Justice has the role of deciding situations arising from the violation of laws since ancient times. For social life to be conducted in accordance with the rules, it is essential to have a competent authority that knows, interprets and applies them when they are breached. To this end, several procedural safeguards have been put in place to ensure the smooth conduct of the criminal proceedings. Pre-trial detention is the preventive procedural measure referring to the deprivation of liberty of an individual, before the final resolution of a criminal case, in order to conduct the criminal proceedings in good conditions or to prevent the defendant or suspect from absconding from criminal prosecution, trial or execution of the sentence. As it represents a significant restriction of personal liberty during criminal proceedings, pre-trial detention may only be ordered by a magistrate and the magistrate's powers shall be exercised only in accordance with the law. Pre-trial detention is also ordered only in certain circumstances, such as when there is a well-founded suspicion based on evidence that the person concerned has committed a criminal offence, or when it is established that the accused has absconded from trial or is in hiding, or when the actions of the accused give rise to a suspicion that he/she: steal, degrade, destroy or falsify material evidence; unlawfully influence co-defendants, witnesses or experts, or induce others to do so, thereby making it difficult to establish the truth.

**Keywords**. preventive measures, preventive arrest, code, suspect, defendant

## 1. General notions

### 1.1. Taking pre-trial detention

For a threat to the effective conduct of criminal proceedings to trigger the adoption of a preventive measure, the conduct of the criminal proceedings must be an offence punishable by imprisonment in accordance with the law and circumstances where the offence is punishable by a fine alone or where imprisonment is an alternative to a fine cannot be taken into account.[1]

When a person commits several crimes, it is sufficient for one of them to be punished by law with imprisonment.

The determination of the preventive measure to be taken is carried out taking into account its purpose, the degree of social danger of the crime, age, health, history and other factors related to the person against whom the measure is taken.

[1] Coraș Leontin, Preventive arrest, C.H. Beck Publishing House, Bucharest 2006

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The purpose of the preventive measure is defined as the precise risk to be avoided or eliminated, and the judicial body must select the most appropriate and sufficient means to achieve this objective.Gravitatea presupusei infracțiuni în raport cu cadrul legal și cu circumstanțele specifice în care a fost comisă se numește gradul de pericol social al infracțiunii.

Preventive measures are undertaken by order of the criminal investigation body and by conclusion by the court, and the act adopting the preventive measure must specify the act that is the subject of the accusation or indictment, the text of law to which it belongs, the punishment provided by law for the committed crime, as well as the concrete reasons for taking the measure.

These entries in the act by which the preventive measure is taken represent a crucial procedural guarantee for the freedom of individuals, since they serve to carry out a hierarchical control over the taking of preventive measures and an opportunity to prove the circumstances in which the preventive measure was taken.

Thus, by indicating the fact and the text of the law to which it falls, preventive measures are avoided for acts that do not constitute crimes; by indicating the punishment prescribed by law for the offence committed, it is ensured that the condition is that the punishment is imprisonment within the limits required by law for taking preventive measures; and by indicating the concrete reasons for taking the preventive measure, it is ensured that the objective of the measure and, consequently, the regularity with which it was chosen is known.

Pre-trial detention may be ordered if there is reasonable suspicion that the defendant has committed an intentional crime against life, an offence causing bodily harm or death, an offence against national security provided for in the Criminal Code and other special laws, an offence of drug trafficking, arms trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of money or other values, blackmail, rape, deprivation of liberty or any other offence punishable by a term of imprisonment of 5 years or more, if it is established that deprivation of liberty is necessary to remove a state of danger to public order, based on an assessment of the seriousness of the crime, the manner and circumstances in which it was committed, the person's entourage and background, previous criminal history and other circumstances relating to him or her.[2]

If the prosecutor considers that the legal requirements have been met, he or she must prepare a reasoned proposal for pre-trial detention of the defendant, citing the legal basis.

The file is forwarded to the president of the court competent to hear the case on the merits or to the president of the court within whose jurisdiction the place of detention is situated. If the defendant is detained, the president or a liaison judge determines the place and time of the trial until the expiry of the 24 hours of detention. The date and time will be communicated to both the defence lawyer and the prosecutor, who will have to ensure the presence of the detained defendant before the judge.

When hearing the case, the judge of rights and freedoms sets a deadline for ruling on the proposal for provisional detention, including the date and time when the decision will be taken.

When an accused person is in custody, the time limit for deciding on the proposal for provisional arrest must be set before expiry of the detention period. The prosecutor will also be notified of the date and time and will ensure that the defendant appears before the judge of rights and freedoms. The defendant's lawyer will also be notified of the date and time and will have access to the case file upon request.

[2] Code of Criminal Procedure, Article 23, paragraph 2

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The participation of the public prosecutor and a lawyer chosen or appointed ex officio is mandatory throughout the hearing.[3]

The judge of rights and freedoms personally hears the defendant about the crime he is accused of, as well as about the reasons why the prosecutor proposed pre-trial detention.

Before hearing the defendant, the judge must inform him of the charge against him and of his right not to make any statement, while warning him that what he says may be used against him. If the judge of rights and freedoms considers that the legal requirements have been met, he accepts the prosecutor's proposal and orders the arrest of the defendant on the basis of a reasoned decision.

The defendant could be detained for up to 30 days. Detention shall not be deducted from the time spent in custody.[4]

After the measure has been taken, the defendant must be informed immediately, in a language he understands, of the reasons for the decision on pre-trial detention.[5]

After the measure of preventive arrest has been taken, it must be communicated to the defendant, i.e. it is communicated in writing, under the signature specifying the specific rights of the defendant. The defendant also has the right to emergency medical care, the right to challenge the measure and the right to request that the arrest be replaced by another preventive measure, with a report drawn up if he is unable or refuses to sign.

The judge of rights and freedoms of the court or higher court that ordered the measure notifies a family member of the defendant or another person of his choice immediately after taking the measure of pre-trial detention. The notification shall be recorded in writing.

As soon as the defendant is taken to a place of incarceration, he has the right to inform the persons mentioned above of his whereabouts.

The provisions will also apply in the event of a subsequent change of place of detention, with effect immediately after the change.

The administration of the place of detention is obliged to inform the detainee in custody of the regulations provided for above and to keep a record of how the information was provided.

Where pre-trial detention is used in the case of an accused person caring for a minor, a person subject to a restraining order, or a person in need of assistance due to age, illness or other factors, the competent authority must be notified immediately so that legal measures can be taken to protect that person.

The judge of rights and freedoms of the first instance or the superior court that took the measure of preventive detention is obliged to notify the measures taken, and the fulfillment of this obligation is recorded in a report.

Also, the judge of rights and freedoms of the first instance or, where appropriate, the higher court immediately issues the order for pre-trial detention on the basis of the decision ordering the pre-trial detention of the defendant.

A warrant will be issued for each defendant if several defendants have been remanded in custody by the same judgment.

If pre-trial detention is ordered in the absence of the accused, two original copies of the warrant issued must be handed over to the police for execution.

The police must arrest the person named in the warrant, hand over a copy of the warrant to him or her and hand it over within 24 hours to the judge of rights and freedoms who ordered

[3] Code of Criminal Procedure, Article 225, paragraph 6
[4] Anane Ivan, Elements of criminal procedural law, Pro Universitaria Publishing House, Bucharest 2015
[5] Anane Ivan, Elements of criminal procedural law, Pro Universitaria Publishing House, Bucharest 2015

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the pre-trial detention or, where appropriate, to the judge of the preliminary chamber or panel before which the case is pending.[6]

The police may enter the home or residence of any natural person without their permission and the premises of any legal person without the permission of their legal representative, in order to execute a preventive arrest warrant, if there are reasonable grounds to suspect that the person mentioned in the warrant is in that dwelling or residence.[7]

### 1.2. Legislative framework for pre-trial detention

In Romania, the legislative framework for pre-trial detention is regulated in the Constitution and the Code of Criminal Procedure. Pre-trial detention is defined as the period between the first arrest by the police or prosecutor and the final sentence.

If the prosecutor considers that a person in police custody should be placed in custody for more than 24 hours, he/she must notify the judge 6 hours before the deadline, requesting that the person be placed in pre-trial detention.[8]

The Code of Criminal Procedure supports the notion of implementing this measure, stating that any restriction of freedom must be used only as an exception and in accordance with the law, as pre-trial detention is never necessary.[9]

In addition, the Code of Criminal Procedure established a number of new organisations that have an impact on decisions on pre-trial detention. During the criminal investigation phase, the rights and freedoms judge will rule on the prosecutor's recommendation.

At the end of this phase, the preliminary chamber phase begins, an intermediate phase preceding the trial, and the preliminary chamber judge will examine the legality of the evidence obtained, deciding whether it can be used in court.

Both the rights and freedoms judge and the preliminary chamber judge have the authority to order the defendant's pre-trial detention as long as the case is within their jurisdiction.

The Code of Criminal Procedure provides for other alternatives to pre-trial detention, such as: judicial control, judicial control on bail and house arrest.[10]

The judge decides to remand a defendant in custody during a hearing at which the prosecutor and defence lawyer must be present. The accused has the right to attend the trial, but his presence is not mandatory, and before the first hearing on pre-trial detention, the defence lawyer may request access to the file. If the accused was not present at the hearing, he or she may appeal against the decision within 48 hours of its delivery or of the moment it was brought to his attention. The appeal does not prevent the implementation of the arrest order and the court must rule on the appeal at a hearing within 5 days. If pre-trial detention is ordered, the accused may request its replacement if the reasons for its imposition no longer exist or if new circumstances arise which require a more lenient measure.

In order to obtain the replacement of pre-trial detention by another preventive measure, the detainee must submit a formal written application to the judge. The competent court will decide on the application after hearing the defendant. At the hearing, the defendant has the right to be present with his lawyer, and the presence of the prosecutor is absolutely necessary.[11]

[6] Buzescu Gheorghe, Elements of Public Order, Pro Universitaria Publishing House, Bucharest, 2016
[7] https://lege5.ro/Gratuit/geztkobvha/arestarea-preventiva-codul-de-procedura-penala?dp=gqztimjrgazdq
[8] Code of Criminal Procedure, Article 219, paragraph 16
[9] Code of Criminal Procedure, Art.9, para.2
[10] Code of Criminal Procedure, Articles 215, 216, 217, 218, paragraph 3
[11] Code of Criminal Procedure, Art.242, para. 8-9

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### 1.3. National and international regulatory framework governing pre-trial detention as a procedural measure

Since pre-trial detention is the most severe preventive measure, the subject of arrest is addressed in the legislation of all states and is used in judicial practice.

The normative framework governing pre-trial detention consists of the international normative framework[12], which includes all treaties and conventions, universal, regional or bilateral agreements to which states are parties, as well as of the domestic normative framework of each state, which consists of all domestic normative acts, which, in turn, must not contradict the international normative framework that has been accepted by the state concerned.

The international regulatory framework establishing pre-trial detention consists of acts such as:

-The European Convention on Human Rights provides in art. 5 that everyone has the right to liberty and personal security and that this right may be violated only in the cases and under the conditions provided for by law.[13]

Moreover, since freedom is not absolute, its restriction does not allow any Member State of this Convention freedom to assess situations limiting that freedom, which are specifically and fully referred to in that international instrument.

Article 5 of that convention lays down the basic principle that 'no one shall be deprived of liberty' and exceptions to that rule, such as pre-trial detention.

Several general notions emerge from the provisions of the Convention, including:

The purpose of deprivation of liberty is to bring the offender within the reach of a body capable of holding him criminally responsible for the act committed;

Deprivation of liberty must be carried out only in accordance with the legal forms and procedures established by the law of each State;

Deprivation of liberty should be limited in time, so that the preventive measure lasts as little time as possible until criminal cases are finally resolved;

The arrested person has the right to challenge the deprivation of liberty before a judge and interested parties have the right to appeal.

-The Universal Declaration of Human Rights states that every human being has the right to life, liberty and security, in accordance with Article 3, and no one shall be arbitrarily arrested, detained or exiled in accordance with Article 9 of the same Convention. [14]

- Convention against Torture and Other Cruel, Inhuman or Degraded Treatment or Punishment.

The term 'torture' is clearly defined in this Convention, which implies that all Contracting Parties to the Convention interpret it in the same way.

Upon acceptance of this Convention, the State shall take legislative, administrative, judicial and other measures to ensure that torture is punished and eradicated. The above-mentioned Convention leads us to conclude that no exception to an act of torture can justify its use against a person.

Regardless of the reason for arrest, in order to find out the truth, the person may not be tortured or subjected to other inhuman or degrading treatment.

[12] Buzescu Gheorghe, Police law - university course, Sitech Publishing House, Craiova, 2019
[13] European Convention on Human Rights, Article 5
[14] Universal Declaration of Human Rights, Articles 3 and 9

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Furthermore, the dignity of the arrested person must not be diminished or disrespected. All these safeguards required by law ensure the suspect's right to safety. Any information or statements obtained from a suspect through physical or mental coercion may not be used as evidence.

Torture shall be considered a criminal offence as stipulated in the Convention.

Another piece of international legislation is the International Covenant on Civil and Political Rights, which states in Article 7 that "no one shall be tortured or subjected to cruel, inhuman or degrading treatment or punishment", which implies that the authorized body cannot and must not use these cruel treatments to find out the truth.

On the other hand, Article 9 of the same Covenant provides that 'no one shall be deprived of his liberty except for good reasons and in accordance with the procedure laid down by law'.

This article not only provides that a person's freedom may be restricted by arrest, but also lists the procedural guarantees available to the arrested person (the right to be informed of the reasons for arrest, trial within a reasonable time, the possibility to challenge the measure used and the right to compensation) [15].

În legislația privind arestul preventiv din țările europene sunt incluse următoarele constante:

Arestul preventiv este reglementat de legislație, cel mai adesea prin Codul de procedură penală, și consolidat de textul Constituției (Germania, Italia, Franța și alte țări).

Convenției Europene a Drepturilor Omului îi este recunoscută o valoare normativă superioară reglementărilor naționale care protejează drepturile fundamentale ale omului (Germania, Elveția, Olanda, Belgia etc.).

Constituția japoneză, prevede că "nimeni cu excepția cazurilor de flagrant delict, nu poate fi reținut fără un mandat emis de un organism juridic competent care să menționeze în mod specific infracțiunea imputată".[16]

According to the Spanish Constitution, "pre-trial detention may not exceed the period strictly necessary for examining the facts and in any circumstances". The arrested person must be released or made available to the judicial authorities within 72 hours.[17]

The Italian Constitution provides that "no detention, control or search of the person, nor any other limitation of personal liberty, shall be authorised, unless such a measure is imposed by a reasoned act of the judicial authority and not only in the cases and in the manner provided for by law".[18]

The Authority may adopt interim measures in extraordinary situations of necessity and urgency specifically defined by law, which must be submitted to the judicial authorities within 48 hours, and if the latter do not confirm them within 48 hours, they will be declared repealed and without effect.

In addition to the constitutions of states that directly or indirectly control specific parts of pre-trial detention or that provide for a certain general concept, such as freedom and security of the person or inviolability of the person, etc., there are their own procedural regulations for each state.

[15] Anane Ivan, Management of criminal prosecution bodies, Pro Universitaria Publishing House, Bucharest, 2014

[16] Constitution of Japan, All Educational 1997, Art.33
[17] Constitution of Spain, Article 17, paragraph 2
[18] Constitution of the Italian Republic, Art.13

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Therefore, the regulatory structure controlling pre-trial detention reflects the binding nature of these laws, as it is a more severe measure that must be rigorously applied within the limits of the law.

## 2. Arrest of suspect during criminal investigation

### 2.1. Substantive conditions

The appearance of the first codes, namely the Code of Criminal Procedure of 1936, signals the transition to the consolidation of specific language (suspect or defendant), which is also used in the current code.[19]

The main difference between the two is that the suspect is the person against whom criminal proceedings are carried out as long as criminal proceedings have not been initiated against him, and the defendant is the person against whom criminal proceedings have been initiated, as well as the act by which he becomes a party to the trial.[20]

The nature of the concept of suspect was defined in this context by the unique method of organizing the criminal process, which included the following phases: preliminary investigations, preparatory investigation, trial and execution of sentence.

The order of preventive detention of the suspect requires the fulfillment of all substantive conditions forming the guarantees of immunity of the freedom of the person.

The possibility of the suspect being arrested by the court is regulated by Article 147 of the Code of Criminal Procedure.

If the criminal investigation body fails to complete all the tasks necessary to obtain the evidence necessary to initiate criminal prosecution within 24 hours of detention, the law allows the suspect to be detained for a certain period of time.

The presence of the concepts of suspect or defendant is not intended to describe different degrees of guilt, but rather to indicate the position of the passive subject of the criminal procedural law relationship in relation to the different phases of the criminal process.

The person subject to criminal proceedings shall be presumed innocent from the moment of referral or self-referral to the judicial authorities until the final judgment.

This criterion is implemented by ensuring the rights of the suspect, in accordance with the presumption of innocence and fulfilling the purpose of the criminal proceedings.

The rights of the accused may include the following::

- Giving declarations;

The suspect may use his words to defend himself and his own interests against the charges against him. He also cannot be forced to make statements in any way and therefore cannot be forced to reveal the truth; He is also informed that he has the right to refuse to make any statement and that everything he says can be used against him.[21]

- Refusing to sign declarations when disagreeing with their content.

The prosecuting body cannot refuse the defendant's request to make a new statement or to make specific changes to it, as this would amount to prohibiting the defendant from exercising his rights of defence.[22]

- Participation in the conduct of the on-site investigation.[23];

[19] Radu Iuliana, PhD thesis, Detention and Preventive Arrest, Bucharest, 2014
[20] Codul de Procedură Penală, Art.82
[21] Code of Criminal Procedure, Art.69, Art.70
[22] Code of Criminal Procedure, Article 73, paragraph 1
[23] Anane Ivan, *Investigation of criminal investigation bodies, Pro Universitaria Publishing House, Bucharest, 2014 Criminal Procedure Code, Art.177, para.1*

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The suspect will be given the opportunity to keep up to date with the progress of the criminal trial;[24]

- Request for suspension of prosecution;

If the suspect suffers from a condition or illness that prevents him from participating in the trial, according to the judgement of a medical expert. The nature of the disease or its source (which could be caused by the suspect himself) is irrelevant.[25]

- To be notified of the termination of criminal prosecution;

It includes the option to lodge a formal complaint against the decision (even with regard to the legal basis on which the choice was made). I conclude that this right also applies where a decision terminating criminal proceedings has been issued and an administrative penalty has been imposed.[26]

- Request for continuation of criminal proceedings in case of amnesty, prescription or withdrawal of the prior complaint;[27]

This privilege could be used by the suspect to prove his innocence and obtain a moral and even financial reward for being exposed to a criminal trial.

If we refer to the natural conduct of criminal proceedings, it is necessary for each participant to respect the responsibilities expressly provided by law, as well as those resulting from the way criminal proceedings are conducted.

Thus, we outline the primary obligations incumbent on the suspect:

- To appear when called by the criminal investigation bodies; Despite the fact that this responsibility is directed against the defendant, we consider that it also applies to the suspect. The presence of the suspect is also necessary for the information he can provide in the investigation.[28]
- To present documents or objects; which means that everyone is obliged to submit the objects or documents requested by the competent body.[29]

The suspect's failure to fulfill his responsibilities is sanctioned both by measures specific to criminal procedural law and by criminalizing such crimes and violations, as follows:

- For a number of offences constituting misconduct (failure to produce objects or documents, failure to comply with the requirement to produce, failure to retain the goods forming the returned evidence), a judicial fine is imposed.[30]
- The suspect may be placed in custody if he does not comply with the order not to leave the locality in an attempt to prevent the truth from being found.

As regards the substantive conditions, the first criterion is that the act being prosecuted is punishable by imprisonment in accordance with the law.

Secondly, recourse to this approach is essential and motivated by the possibility of data from the prosecution body to obtain the evidence necessary to find out the truth.

In order for the judge to order the suspect's pre-trial detention, the following requirements must be met:

- The arrest of the suspect is essential in the interests of prosecution;

[24] Code of Criminal Procedure, Article 177, paragraph 1
[25] Code of Criminal Procedure, Art.239
[26] Code of Criminal Procedure, Art.6
[27] Code of Criminal Procedure, Art.13
[28] Code of Criminal Procedure, Article 237, paragraph 2
[29]Code of Criminal Procedure, Art.198, para. 3, lit. c.
[30] Buzescu Gheorghe, Particularities of contravention law, Sitech Publishing House, Craiova 2017

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- The standards laid down in Article 143 of the Code of Criminal Procedure must be met, namely that there must be evidence or firm indications that the defendant has committed criminal conduct;

Danger to public order has been defined as a category of dangers that would affect social order either by inciting public outrage (as in the case of widely publicised crimes, crimes with significant material or human consequences, such as large-scale fraud affecting a large number of people) or by generating, maintaining or exacerbating a state of stress among the general public or a large number of people.[31].

We understand that the judge must not confuse excessive publicity ordered or ordered in order to alter the act of justice from its natural course, with the need to take or not the measure of preventive detention.

The release of the accused may also be considered to constitute a threat to public policy if crucial witnesses who have testified or are about to testify unfavourably against the accused are subject to particular psychological strain and, as a result, to a sense of unease.[32]

**2.2. Procedural aspects**

For the suspect to be arrested, criminal proceedings must be initiated against him or he must be identified in an existing criminal case.

In accordance with Section 229 of the Code of Criminal Procedure, the person being prosecuted is called a suspect as long as no criminal proceedings have been initiated against him.

The suspect appears to be a broader procedural subject than the perpetrator, who has rights and duties that allow him to be actively involved in the criminal process.[33] If none of the cases preventing the initiation of criminal proceedings provided for in art. Art. 10 of the Code of Criminal Procedure, the notified criminal investigation body orders the initiation of criminal proceedings.

When the prosecuting authority is alerted ex officio, a report is drawn up which serves as an act initiating criminal proceedings. The order for the suspect to be remanded in custody shall be taken by means of a decision which must be justified by demonstrating the concrete reasons for the action.

After hearing the suspect in the presence of the defence lawyer, the prosecutor directing or supervising the prosecution should submit a reasoned request for the suspect's pre-trial detention during the criminal proceedings.

The file, together with the proposal for pre-trial detention made by the public prosecutor directing or supervising the prosecution, must be forwarded to the president or liaison judge by the president of the appropriate court in whose jurisdiction the place of detention, the place where the crime was committed or the office of the prosecutor conducting the prosecution is located.

As a result of the above, the court has an alternative jurisdiction to deal with the proposal for pre-trial detention of the suspect, which is justified by the need to act quickly and avoid delays caused by the movement of the suspect from the place of detention to the court competent to hear the case on the merits.

[31] Buzescu Gheorghe, Place and role of the civil servant in the state apparatus, Sitech Publishing House, Craiova, 2017
[32] Coraș Leontin, Preventive arrest, C.H. Beck Publishing House, Bucharest 2006
[33] Volonciu Nicolae, Treatise on Criminal Procedure, Paideia Publishing House, Bucharest 1996

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Following the submission of the file by the prosecutor, the president of the court or the liaison judge sets the date and time at which the proposal for pre-trial detention will be established, which will last until the expiry of the suspect's 24-hour detention period if he is detained.

We are aware that a random assignment is not necessary in this circumstance and the case will be resolved by the service player according to the calendar. The date and time of the trial of the proposal for pre-trial detention must be communicated to both the appointed lawyer and the prosecutor. The public prosecutor is obliged to ensure that the suspect appears before the judge if he or she is detained. Regardless of the nature of the crime, the proposal for pre-trial detention is decided in council chamber by a single judge. The suspect is taken before the judge and given the opportunity to defend himself.

If the defence counsel chosen does not appear in court, it is recommended to make a request to the Bar Association for the appointment of ex officio defence counsel upon receipt of the file and to specify the day and time for processing the proposal.

In order to put an end to the delegation of defence counsel appointed ex officio, I consider it necessary not only to present the delegation of counsel chosen but also to actually present it in the courtroom.

If the suspect cannot be brought before the judge because of his state of health, force majeure or necessity, the request for arrest will be examined in his absence, in the presence of his lawyer, who will be given the floor to draw conclusions.

The judge will hand over the arrest warrant to the suspect before hearing him. The court has the duty to hear the suspect and maintain his position and arguments in relation to the crime committed, at which point the facts of the crime can be highlighted, highlighted by art. 148 of the Code of Criminal Procedure, which was invoked by the prosecutor.

During the appeal hearing, the judge will allow the prosecutor to present his case, then the defendant's defense lawyer to make observations, and the suspect will have the final say.

If, during deliberation, the substantive conditions for arresting the suspect are met, the judge shall by order determine his pre-trial detention, explaining in concrete terms the reasons justifying the measure of pre-trial detention and determining its duration, which may not exceed 10 days.

The judge must mention in conclusion the case provided for in Art. 148 of the Code of Criminal Procedure, and if the proposal for pre-trial detention is rejected, the judge may order the measure of obligation not to leave the locality or country if the conditions provided by law are met.

Following acceptance of the proposal by the judge, an urgent arrest warrant is issued which includes the suspect's first and last name, as well as the length of time he will be detained.

A suspect who does not speak or understand Romanian language or who cannot express himself or herself has the opportunity to find out about the crime for which he or she is being investigated, its legal framework, prepare his defence and appear in court through an interpreter, all free of charge.

If the president of the court considers that a criminal offence has been committed and that the culprit has been identified, arrest may be ordered as part of the judicial investigation.

The identification of the perpetrator and the finding of crimes are made through a report which is then sent to the prosecutor. If the prosecutor orders the suspect to be remanded in custody, we consider it essential to draw up a new indictment and the suspect is immediately handed over to the prosecutor together with the report and arrest warrant.

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We consider that the court must issue a separate order for the arrest of the suspect, similar to the arrest of the defendant in the course of the criminal investigation, which must be appealed within 24 hours of pronouncing with the suspect present.

The suspect will be assisted by a defence lawyer and the measure will be implemented only after the judge hears the case. If the suspect is absent, abroad or trying to avoid prosecution, he does not need to be heard.

The arrest of the suspect may not last longer than ten days, unless these ten days include the time spent in custody.

Therefore, the calculation method differs from the old law on provisional pre-trial detention by the prosecutor, which allowed the suspect's detention and arrest to last up to 11 days.[34]

**2.3. Duration, extension and termination of pre-trial detention for suspect and accused person**

If the proposal for pre-trial detention is accepted, it is for the court to determine its duration.

If we talk about the preventive arrest of the suspect, it cannot last more than 10 days, while in the case of the defendant it cannot exceed 30 days. If the suspect has previously been detained, his arrest may be ordered for a maximum period of time.

According to the Romanian Constitution, the competent court may decide that the accused shall be remanded in custody for a period of 30 days and may also extend this period by 30 days at a time without exceeding a total of 180 days. The new codes specify the maximum period of pre-trial detention, which varies depending on whether it is applied during the prosecution or trial phase of a criminal trial.

Thus, if the arrest was ordered after hearing the defendant or suspect, the time limit begins on the day on which the warrant was issued, and if the arrest was ordered in his absence, the time limit begins on the date of execution of the arrest warrant.

The execution of the warrant for the person arrested in absentia was intended only for the suspect or accused person who has disappeared, is abroad or is evading criminal prosecution, as is apparent from the wording of Articles 149 and 152 of the Code of Criminal Procedure, and not for the person already detained or arrested as an accused person.[35]

Pre-trial detention during trial may not exceed half of the maximum sentence prescribed by law for the offence for which the defendant is charged, nor may it exceed five years. According to Article 149, pre-trial detention during criminal proceedings may not exceed 30 days, unless extended in accordance with the law.

The defendant's pre-trial detention may be extended by the court which would be competent to hear the case on the merits or by the corresponding court of the same grade whose jurisdiction includes the place of detention, the place where the offence provided for by criminal law was committed or the seat of the public prosecutor's office to which the prosecutor directing or supervising the prosecution relates.

If the grounds for initial arrest still require deprivation of liberty or if there are new grounds justifying deprivation of liberty, the court must take into account Article 155 of the Code of Criminal Procedure, which provides that detention may be extended with reasons

[34] Coraș Leontin, Preventive arrest, C.H. Beck Publishing House, Bucharest 2006
[35] Code of Criminal Procedure, Articles 149 and 152

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during criminal proceedings if the reasons for initial arrest still require deprivation of liberty or if there are new grounds justifying deprivation of liberty.

The public prosecutor directing or supervising the prosecution should make a reasoned request for an extension of pre-trial detention. At the same time, he will be notified by the criminal investigation body at least 8 days before the expiration of the preventive arrest period, in order to propose an extension.

The case file, together with the request for extension of pre-trial detention made by the prosecutor conducting or supervising the criminal investigation, must be submitted to the court at least 5 days before the expiry of the pre-trial detention period.

The defendant will be required to appear in court and his lawyer will be able to access the file. At the same time, the defendant is brought before the judge and will be assisted by counsel. When the arrested defendant is hospitalised and cannot be brought before the judge because of his state of health, or if his travel is not possible for justified reasons, the proposal will be considered in the absence of the defendant, but only in the presence of the defence lawyer, who will have the floor to formulate conclusions. The court must decide on the proposal and rule on the extension within 24 hours of receiving the file.[36]

If the chosen defence counsel is absent without leave at the time of the trial and does not provide a replacement during the trial, the court takes steps to appoint a replacement defence counsel, allowing at least 3 days to prepare the defence, ensuring that the proposal to extend pre-trial detention is heard within 5 days.

According to the legislation in force, in order for the extension of preventive arrest to be admitted, the following provisions must be cumulatively fulfilled:

- The measure of arrest was legal and justified.

Although the verification of the legality and merits of the arrest whose extension is requested is not expressly mentioned, it is clear that, before examining the reasons put forward by the prosecutor, the judge must verify the legality and merits of the arrest and it is inadmissible for an illegal measure to be prolonged.[37]

- The arrest warrant was executed and the duration of the arrest did not expire.

This requirement stipulates that the prosecutor must inform the court at least 5 days before the expiry of the arrest period, and the judge must make a decision within 24 hours of receiving the file.[38]

However, it was argued that it is irrelevant whether or not the defendant is actually in custody at the time of prolongation of pre-trial detention, since there may be situations where, although pre-trial detention has been ordered and an arrest warrant has been issued, the measure has not been implemented, which does not prevent the prolongation of the pre-trial detention measure in question, provided that the duration of the arrest at the time of extension has not expired. In addition, both legal literature and judicial practice have expressed the view that compliance with the conditions for prolonging the defendant's detention is essential, as are the grounds for it, but not the presence of a state of emergency. In particular, an extension could be granted even after the initial detention has ended.

This view has been challenged on the basis that only an arrest that has not ceased can be prolonged, making it impossible to prolong a non-existent state. Moreover, in a literal sense, the term 'extension' refers to an element of continuity and not to a discontinuity.

[36] Code of Criminal Procedure, Art.197
[37] Code of Criminal Procedure, Article 139, paragraph 2
[38] Code of Criminal Procedure, Article 159, paragraph 1

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- The original grounds still require deprivation of liberty or there are new grounds justifying it

An extension of detention may be authorised only if the reasons for the first arrest still require the loss of liberty or if new reasons justify deprivation of liberty.[39] The prosecution has not been completed for objective reasons.

If the principle of expediency requires judicial bodies to resolve cases quickly and fairly, regardless of whether the defendant is at liberty or in pre-trial detention, in cases where pre-trial detention has been ordered, this principle must be put first, requiring the prosecuting authority to make every effort to complete the prosecution before the expiry of the detention period.

Unfortunately, the extension of detention is granted without a review of the reasons given in the application, without taking into account the specific circumstances of the case, but rather with references to general cases in which prolongation of pre-trial detention may be ordered, such as the complexity of the case, the need for additional evidence, the lack of time for drawing up the report on the conclusion of criminal proceedings or the indictment, and so on.

It is not admissible that, after primary arrest, the prosecution rarely or not at all carries out acts of prosecution after the initial arrest, and then requests an extension of the arrest depending on the complexity of the case. The preventive measure loses its procedural character with a clear purpose and, as a result, becomes a pre-conviction sanction without legal basis and has a significant impact on the freedom of the individual.

According to Article 140 of the Code of Criminal Procedure, preventive measures end in the following cases:

- If the court has not verified the legality and merits of pre-trial detention within the time limit prescribed by law or set by the judicial authorities, or if the court has not verified the legality and merits of pre-trial detention within the period provided for in Article 160;
- If the prosecution is dropped, the criminal proceedings are terminated or the defendant is acquitted.

Pre-trial detention also automatically ceases after the duration of detention has reached half of the maximum penalty authorised by law for the offence with which the defendant is accused, without being able to exceed, in the course of criminal investigation, the cases provided for by law.

In the cases mentioned above, the court, ex officio or at the request of the public prosecutor, or the prosecutor, in case of detention, ex officio or following information received from the criminal investigation body, is obliged to order the immediate release of the detained or arrested person by sending to the administration of the place of detention a copy of the operative part or order, or an extract containing the following information:

- Information necessary to identify the defendant or suspect;
- Arrest warrant number;
- Number and date of the order, warrant or decision ordering release and legal basis for release.

The Code of Criminal Procedure, as revised and supplemented, sets out a number of circumstances in which preventive measures cease de jure, with the effect expressly provided for by law, without other conditions being met.

[39] Code of Criminal Procedure, Art.155

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The termination of preventive measures differs from both replacement and revocation of preventive measures in that the latter allows the court to determine whether the reasons justifying the measure have changed or whether the measure has disappeared. If preventive measures cease, the judicial body must follow a legal situation resulting in the removal of the preventive measures imposed.

The automatic cessation of preventive measures raises two important issues: the identification of cases in which this institution operates and the legal procedure for the release of the person subject to the measure.[40]

The circumstances in which preventive measures cease as a matter of law can be identified by examining the provisions of Article 140 of the Code of Criminal Procedure, and these vary depending on the procedural stage in which they are used.

a. At the prosecution stage, the preventive measure ceases de jure:

- When time limits set by law or judicial authority expire. For example, the law states that "the detention of a person may not exceed 24 hours", which indicates that the measure ceases when this period expires, unless it has been used against him as a pre-trial detention measure as a suspect or defendant.[41]
- If the prosecution is interrupted or stopped as a result of the application of Article 10 of the Code of Criminal Procedure or as a result of the intervention of a case, because the preventive measure becomes ineffective.

b. At the trial stage, the legal termination of preventive measures occurs:

- Where the duration of pre-trial detention has reached half of the statutory maximum penalty for the charge before a conviction is handed down at first instance;
- In case of acquittal or closure of criminal proceedings;
- When the court imposes a custodial sentence equal to the duration of detention and pre-trial detention;[42]
- When a sentence of imprisonment, suspension of execution or execution at work is imposed;[43]
- When a fine penalty is handed down;[44]
- When is pronounced an educational measure;[45]
- When the sentence of imprisonment was ordered, with the application of a full pardon.

On the one hand, preventive measures must cease when the time limits imposed by legislation or judicial authorities expire.

In circumstances where preventive measures have been ordered for the maximum duration of legal deadlines, such as when the measure of preventive detention of the suspect has been taken for 10 days and this period has expired, the statutory time limits are deemed to have expired. If we refer to the duration of the defendant's arrest, it cannot exceed 30 days, and when this term expires, the court may decide whether this measure will be maintained and at the same time it has the obligation to decide to extend the arrest. According to the Code of Criminal Procedure, "the court, ex officio or at the request of the prosecutor, or after informing the

[40] Coraș Leontin, Preventive arrest, C.H. Beck Publishing House, Bucharest 2006
[41] Code of Criminal Procedure, Article 140, paragraph 1, letter a.
[42] Code of Criminal Procedure, Article 350, paragraph 3, letter a.
[43] Code of Criminal Procedure, Article 350, paragraph 3, letter b.
[44] Code of Criminal Procedure, Article 350, paragraph 3, letter c.
[45] Code of Criminal Procedure, Article 350, paragraph 3, letter d

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criminal investigation body, has the obligation to order the immediate release of the detained or arrested person". [46]

As mentioned above, in this case, the administration must be notified of the place of detention or detention, as well as a copy of the warrant or order, or an extract containing the data necessary to identify the accused person, the number and date of the warrant or decision ordering release, and the legal basis for release.

If the defendant has been sentenced to a term of imprisonment equivalent to the duration of pre-trial detention, he or she shall be released as soon as the term of imprisonment is equal to the duration of the arrest.

Even if the length of detention equivalent to the sentence imposed takes place before the verdict is final, this release is necessary. It should be noted that in this case, the judge's decision takes effect only from the date of delivery of the decision and is not final.

In addition, the administration of the place of detention shall pursue and order the release of the defendant who has been remanded in custody in order to give full effect to the provisions of Art. 350 para.6[47]. For this purpose, the court must notify after delivery a copy of the provisions of the judgment and the place of detention.

**2.4. Replacement and revocation of pre-trial detention**

When the reasons for implementing the preventive measure change, it is replaced by another preventive measure. At the same time, when a preventive measure is imposed in violation of the law or when there is no longer any reason to maintain it, it must be annulled ex officio or upon request, and in case of detention and pre-trial detention, the accused must be released, unless arrested for another reason.[48]

If the preventive measure has been imposed during the criminal proceedings, either by the court or by the public prosecutor, the investigating body must immediately notify the public prosecutor of any change or termination of the grounds for imposing the preventive measure. When the prosecutor finds that there are no longer grounds for imposing the preventive measure, he/she must apply ex officio to the court for the replacement or revocation of the preventive measure ordered by it.

In addition, if the court determines, on the basis of a forensic expertise, that the person under preventive arrest suffers from a condition that cannot be treated in the medical network of the General Directorate of Penitentiaries, the court may, upon request or of its own motion, order the revocation of pre-trial detention.

Instead of preventive detention, one of the remedies provided for in art. 136 para. (1) lit. b) and c) C. proc. pen. Even if the judicial body declines jurisdiction, the rules of the preceding paragraphs shall apply.

The defendant is obliged to comply with the following obligations throughout the duration of the obligation not to leave the locality:

- When requested, to appear before the prosecuting authority or, where appropriate, the court;

[46] Code of Criminal Procedure, Article 140, paragraph 3
[47] Anane Ivan, Elements of computerized evidence of the person, Pro Universitaria Publishing House, Bucharest, 2015
[48] Coraș Leontin, Preventive arrest, C.H. Beck Publishing House, Bucharest 2006

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- To report to the police body designated for supervision by the judicial body that ordered the measure, in accordance with the police body's surveillance program or when called;
- Not to change their home without the permission of the legal authority that authorized the measure;
- Not to possess, use or carry any category of weapons.

Throughout the duration of the order not to leave the locality, the judicial body that issued it may require the defendant to comply with one or more of the following obligations:

- Carry an electronic surveillance system at all times;
- Not to participate in certain sporting events, cultural shows or other established places;
- Not to approach the injured party, his/her family members, the person with whom he/she committed the crime, witnesses, experts or other persons, as defined by the judicial body, or communicate with them directly or indirectly;
- Not to drive any or certain established vehicles;
- Not to be in the injured person's home;
- Not to exercise the profession, profession or activity in the exercise of which he committed the act.

Unless extended by law, the period of application of the preventive measure during criminal proceedings may not exceed 30 days. The measure of the obligation not to leave the locality may be extended for the duration of the criminal proceedings, if necessary and only justifiably. The public prosecutor directing or supervising the prosecution must order an extension, each extension not exceeding 30 days.

During criminal proceedings, the maximum period of pre-trial detention is one year.

Exceptionally, if the penalty imposed by law is life imprisonment or imprisonment for ten years or more, the maximum duration of the obligation not to leave the locality is two years. On the same day, a copy of the prosecutor's order or, where applicable, of the judge's or court's decision shall be communicated to the defendant, to the police station in whose jurisdiction the defendant lives, to the gendarmerie, to the community police, to the bodies responsible for issuing passports, to border authorities and other institutions, in order to ensure compliance with their obligations.

The order or order specifically describes the defendant's obligations and also draws his attention to the fact that in case of malicious breach of the measure or obligations incumbent upon him, he will be remanded in custody. If the applicable measure or obligations are violated, the measure of obligation not to leave the locality shall be replaced by the measure of preventive arrest, according to the law. The defendant's compliance with the measure and his obligations is regularly checked by the police body designated by the judicial body that ordered the measure, and if violations are discovered, the matter is immediately referred to the public prosecutor during criminal proceedings or to the court during trial.

If, during the period of validity of the order not to leave, circumstances arise which justify either the imposition of new responsibilities or the replacement or termination of existing ones, the public prosecutor or the court must order this in a reasoned order or decision. The defendant may be remanded in custody, in accordance with the law, if the measure implemented or the requirements imposed by the judicial body are maliciously violated.

In the absence of an express text controlling the duration of the two preventive measures, an order not to leave the locality and an order not to leave the country, the reasonable conclusion that can be drawn is that they last until trial and are therefore limited in time. We consider that

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such an approach does not violate either the provisions of Article 25 of the Romanian Constitution on free movement or the international treaties that Romania has ratified in this area. Unlike Article 23 of the same normative act, Article 25 of the Romanian Constitution does not establish any restrictions on the right to free movement, stating instead that the legislation establishes the conditions for its exercise.[49] The court must order, in accordance with Article 300 para. (2) of the Code of Criminal Procedure, that the reasons for arrest have ceased to exist and provide grounds for such a finding when ordering the revocation of the defendant's preventive detention.

In this respect, the absence of a criminal record, the fact that the arrest has had sufficient preventive effect so far, as well as the prospect of being arrested again if the defendant commits other crimes or evades prosecution are considered to be outside the legal criteria. According to art.300 para. (2) C. proc. pen. If the court finds that the reasons for pre-trial detention have disappeared or that there are no new reasons justifying the restriction of freedom, it revokes pre-trial detention by order. The preventive measure implemented shall be replaced by another preventive measure when the reasons for taking the measure change, in accordance with art. 139 para. (1) C. proc. pen.[50]

Although allowing an appeal and referring the case back to the court of first instance for a retrial prolongs the trial, this does not constitute a basis for replacing pre-trial detention with a measure prohibiting them from leaving the country, if the reasons for arrest remain.

## 3. Special provisions for minors

### 3.1. *Prosecution against juvenile defendant*

The institution of minors is regulated differently by criminal law because, given their mental capacity, the aim is to re-educate them and prevent them from carrying out antisocial activities more than in the case of other categories of offenders.[51]

According to Article 99 of the Code of Criminal Procedure, minors under 14 years of age are not criminally liable, minors between the ages of 14 and 16 are liable only if it can be proven that they committed the crime with discernment, and minors over the age of 16 are criminally liable.

Criminal regulations on the institution of minorities also comply with criminal procedural regulations by providing for a special procedure for the prosecution and trial of juvenile offenders. Such exceptional restrictions are justified by the fact that the minor lacks the mental maturity, intellectual development and experience necessary for the effective enforcement of procedural rights established by law.

The purpose of adopting these procedures was to provide minors with additional procedural guarantees that would be effective in integrating the repressive and educational aspects of the criminal process. In accordance with Article 480, the prosecution and trial of crimes committed by minors, as well as the enforcement of judgments handed down against them, shall be carried out in accordance with the normal procedure, with the additions and exclusions provided for in Articles 481 to 493.

The prosecution of juvenile offenders is carried out according to the standard procedure, reinforced by two additional provisions [52], relating to:

[49] Constitution of Romania, Art.25
[50] Code of Criminal Procedure, Art. 300 para. (2)
[51] Radu Iuliana, PhD thesis, Detention and Preventive Arrest, Bucharest, 2014
[52] Code of Criminal Procedure, Articles 481 and 482

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- Convening persons to hear minors;
- Obligation to carry out a social survey.

With regard to persons called upon to hear minors, where the suspect or accused person is a minor under 16 years of age, the prosecuting authority may summon the representative of the guardianship authority, as well as the parents and, where appropriate, the guardian, trustee or person in whose care or supervision the minor is placed, to any hearing or confrontation of the minor, if the prosecuting authority considers it necessary. Therefore, summoning such persons is optional and is ordered only if the prosecuting body considers it necessary.

According to legal literature, the presence of these persons at the hearing of the minor is intended to avoid complications that may arise during the hearing due to exaggerated emotion or age-specific tendency to exaggerate and distort reality. However, when presenting the prosecution material, it is necessary to summon the persons indicated above.

The justification for this regulation is that, during the presentation of the material to a minor who has the right to make new requests and statements, the minor may be assisted by the persons summoned in exercising his procedural rights. The absence of persons duly summoned to hear or confront the minor or to present the prosecution material shall not prevent such prosecution activities from taking place. [53]

In judicial practice it has been decided that if the accused minor has reached the age of 16 by the time the prosecution material is presented, it is no longer necessary to summon the guardianship authority representative, parents or guardian, trustee or person in whose care or supervision the minor is placed.

### 3.2. Own rights and special scheme for minors

In addition to the rights established by law for pre-trial detainees over the age of 18, minors detained or remanded in custody shall be guaranteed their own rights and a single pre-trial detention regime adapted to their age, in such a way that the deprivation of liberty measures imposed on minors in order to guarantee the effective conduct of criminal proceedings or to prevent them from evading prosecution, trial or execution of punishment does not jeopardise the physical, mental or moral development of the minor.[54]

In all cases where a defendant or a minor suspect is detained or remanded in custody, the judicial authorities are obliged to order the appointment of a legal aid lawyer, if the minor has not chosen one, so that the lawyer can have direct contact and communicate with the arrested minor.

If the detention or pre-trial detention of a minor suspect or accused person is ordered, the minor's parents, guardian, person in whose care or supervision the minor is or other persons specified by him or her must be notified immediately in case of detention and within 24 hours in case of pre-trial detention. Minors shall be kept separately from adults during their detention or provisional detention in premises exclusively for minors in pre-trial detention.

The control of a judge specifically designated by the president of the court, the visit by the prosecutor to the places of preventive arrest, as well as the control of other bodies authorized by law to visit preventive arrestees ensure the observance of their rights and of the special regime provided by law for minors detained or remanded in custody.[55]

[53] Code of Criminal Procedure, Art.481, para. 3
[54] Code of Criminal Procedure, Art.160
[55] Coraș Leontin, Preventive arrest, C.H. Beck Publishing House, Bucharest 2006

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### 3.3. Detention of the minor at the disposal of the criminal investigation body or prosecutor and preventive arrest of the minor

Exceptionally, a minor aged between 14 and 16 years who is criminally liable may be detained at the disposal of the public prosecutor or criminal investigation body only when there are certain indications that he or she has committed an offence punishable by life imprisonment or imprisonment for ten years or more only for a duration not exceeding ten hours. Detention can be extended for a maximum of 10 hours only if the prosecutor issues a reasoned order.

During criminal proceedings, a minor defendant aged between 14 and 16 years is detained for a maximum of 15 days, and the legality and merits of pre-trial detention are checked during the trial periodically, but no later than 30 days. The extension of this measure during criminal prosecution or its persistence during trial may be ordered only in extreme circumstances. During the criminal investigation, the preventive detention of the minor may not exceed a reasonable period of time, i.e. more than 60 days, while each extension may not exceed 15 days. The preventive detention of a juvenile defendant aged between 14 and 16 years during criminal prosecution may be extended up to 180 days in exceptional circumstances, where the penalty prescribed by law is life imprisonment or imprisonment of 20 years or more. During criminal prosecution, a juvenile offender over the age of 16 may be remanded in custody for up to 20 days. During criminal prosecution, the duration of the preventive measure may not be extended each time by more than 20 days.

During criminal proceedings, pre-trial detention of a juvenile defendant may not exceed a reasonable period of time, and not more than 90 days. Pre-trial detention of a juvenile defendant during criminal proceedings may be extended up to 180 days in exceptional circumstances, such as when the penalty imposed by law is life imprisonment or imprisonment for ten years or more. The legality and reasons why a juvenile defendant over the age of 16 is held in pre-trial detention are checked regularly, but no later than 40 days.[56]

In accordance with Article 160 paragraph 1 and the introduction of paragraph 2, this amendment to the Code of Criminal Procedure aimed to eliminate the non-unitary practice, the legislator recognizing that the special regime applicable to minors relates to the physical and psycho-moral development of the person at the time of taking the preventive measure, and not at the time of committing the crime.

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