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## Judicial review

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**Abstract.** Individual freedom, together with the security of the person, are values to which the fundamental law of the State grants a character of inviolability. This recognition of the significance of value has led to the establishment in the Constitution of general points in which one can deviate from the principle of inviolability of freedom: nature of preventive measure, duration, competent judicial body. The constitutional principle stated is known at the level of law in Article 5 of the European Convention on Human Rights, in order to ensure a uniform level of interpretation of the legal norms regarding any restriction of the freedom of the individual. The right to liberty – as proclaimed in Article 5 of the Convention concerns, of course, the physical freedom of the person, and the stated purpose of protection is to ensure that no human being can be deprived of this right. Despite these views, the post-December criminal procedure legislation has failed to harmonise with the European spirit nor to fully satisfy the principles resulting from the case-law of the Strasbourg Court. It took a major legislative invention to bring back to normality the provisions contained in the Criminal Procedure Code and the enforcement laws and to show that Romania respects its arrogant international obligations in the field of criminal procedure law. The legislator itself noted, in justifying the revision of the legal norms (substantive and procedural), that the amendments aimed to ensure a unitary protection of the freedoms guaranteed by the Constitution and international legal instruments, to streamline the criminal process and, at the same time, the fair conduct of judicial proceedings for all participants in the criminal process. As a method of governing state power, coercion has priority, conviction having an auxiliary role, but it is ubiquitous. Any state-organized society has a coercive force, varying only the forms of coercion, its intensity, and the relations between coercion and conviction.

**Keywords.** judicial review, defendant, code, judge, warrant

### **1. General aspects of preventive measures and judicial review of pre-trial proceedings**

#### **1.1. Preventive measures**

The new preventive measures, which are not consistent with the previous regulation on judicial review, can only be taken by the public prosecutor vis-à-vis a defendant during the prosecution and by the judge of rights and liberty in the preliminary chamber procedure. During the trial, the measure may be adopted by the court.

House arrest and pre-trial detention may be ordered against the defendant by the judge of rights and liberty during criminal prosecution.

The judge of the preliminary chamber in the preliminary chamber proceedings and the trial court in the course of the trial may take preventive measures against the defendant.

The reasoned order represents the act by which the criminal investigation body and the prosecutor order preventive measures.

A reasoned conclusion is the act by which, during the criminal investigation and preliminary chamber proceedings, applications, suggestions, complaints and appeals relating to preventive measures are resolved. On the other hand, the reasoned conclusion constitutes the act by which the court decides on preventive measures.

The legislature clarified the meaning of appeal against ends by deciding on preventive measures during criminal prosecution by means of Article 204 of the NCoD of Criminal Procedure.

The old Code of Criminal Procedure confirms this option by complaint against the order of the criminal investigation body or prosecutor regarding the measure of detention, art. 1401 of the Old Code of Criminal Procedure; complaint against the prosecutor's order taking into account the preventive measures present in Article 136<sup>1</sup>. By the law setting in motion the NCoD of Criminal Procedure, it was established that appeals pending 2 by trial on the date of entry into force of the new law declared to counter-judgments during criminal prosecution regarding preventive measures remain incompetent to the court and are judged according to the rules written in the old law. In the event of admission of the appeal and quashing of the conclusion, action is taken to retry the case according to the new law, noting that the court may take any of the preventive measures imposed by it, art. 17, para. (2) From the choice of application.

The implementing law clarifies by art.18 regarding the appeal filed against the conclusions by which preventive measures originated during the trial and which are pending at the date of entry into application of the new law, an appeal that remains in the competence of the same court, the judgment being made in relation to the rules present in the old law. For the admission of this method and the quashing of the conclusion, the court has the right to make decisions on preventive measures established by the new law, the decision is made according to the rules.<sup>2</sup>

The legislature was interested in proving preventive measures. In this respect, Article 207 of the New Code of Criminal Procedure investigated preventive measures in the preliminary chamber procedure. The old Code regulates this inspection by the provisions of Article 160 position on maintaining the arrest of the accused and by Article 3001 on maintaining the arrest of the accused upon receipt of the file. Contextually, the legislator turned to the verification of preventive measures during the trial through Article 208 of the New Code of Criminal Procedure, being a continuous element of the provisions of Articles 160b and 3002 regarding evidence regarding the arrest of the defendant during criminal investigation and checks regarding the arrest of the culprit.

The general conditions established in Article 211 refer to the general conditions for the application of all categories of preventive measures and the measure is mandatory in order to achieve the purpose of a proper conduct of a trial, to restrain the escape of the suspect or accused from criminal prosecution or trial or to prevent the commission of another act. The conditions of provisional release under judicial control from the old law written in Article 160 correspondent in the provisions of Article 211 of the new regulation mentioned in them the

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<sup>1</sup> Code of Criminal Procedure, art.136

<sup>2</sup> Niculae Ioana Nicoleta, *Legal ways to ensure the recovery of damages in the criminal investigation phase*, PhD thesis, Bucharest, 2016

possibility of granting release only for acts committed by fault, as well as for intentional offenses for which the law provided for imprisonment not exceeding 18 years.

The conditions of temporary release under judicial control from the old law provided in Article 160 of the new regulation had in their content signaling the possibility of granting release only for acts created by fault, as well as for intentional acts for which the law provided for imprisonment of approximately 18 years.<sup>3</sup>

Adopting judicial control by the judge of the preliminary chamber or by the court governed by the provisions of Article 214 of the New Code of Criminal Procedure, he discovers his rule in the provisions of Article 160 of the old law relating to the body that decides on provisional release; the application for provisional release and the body competent to carry it out; examining and admitting in principle the application and solving the application, with the mention that, in confrontation with the old regulation, the preliminary chamber judge before whom the criminal act is located, may order, by completion, the measure of judicial control against the defendant, the notification being *ex officio* or at the request of the prosecutor.

## **1.2. Concept, evolution, goals and peculiarities of legality control in criminal proceedings**

Judicial review is a measure that is present in the new Code of Criminal Procedure.<sup>4</sup>

The current regulation dealing with judicial review has changed the old view of the procedural institution of judicial review. So, if in the previous legislation to be provisionally free from the point of view of judicial control it was accepted only in the case of a perpetrator under preventive arrest. Currently, judicial control appears as another solution to pre-trial detention, as it is not conditional on pre-trial detention. In other words, judicial review is a measure of just existence unrelated to pre-trial detention.

The rule defining the adoption of this measure is that of assessing whether another measure is necessary in order to achieve the stated purpose of Article 202 paragraph 1 of the Code of Criminal Procedure. Therefore, if evidence is found or the most conclusive indications show that a person has committed a crime and if it is necessary to ensure the proper functioning of the penal system, to stop the suspect or accused from absconding from judicial prosecution or trial or to prevent the commission of another act, one of the measures may be ordered.

If a person has initially been remanded in custody, he or she may make a request to the Judge of Rights and Freedoms to change a measure to that of judicial control.

Judicial review was defined in a comprehensive and unequivocal formula by Professor I. Stoenescu and S. Zilberstein as "the right and obligation of higher courts within a judicial system to verify, under the conditions and procedure established by law, the legality and merits of judgments handed down by courts inferior to them and to reverse or modify those decisions that are wrong or to confirm those what are legal and thorough. In a summary formula, the same authors conclude, judicial review as "the control exercised by higher courts over the acts of jurisdiction of lower courts".

An important conclusion can be drawn from this definition, namely that judicial review concerns decisions handed down by bodies forming part of the same system of public

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<sup>3</sup> Neagu Ion, *Treatise on Criminal Procedure*, PRO Publishing House, Bucharest, 1997

<sup>4</sup> Ivan Anane, *Elements of criminal procedural law*, Pro Universitaria Publishing House, Bucharest, 2015

authorities<sup>5</sup>. In other words, we are dealing with homogeneous control and not heterogeneous as is the case with judicial review.

The conclusion drawn from the clarifications made by the doctrine is that a categorical distinction must be drawn between judicial review and judicial review.

### **1.3. Periodic verification of preventive measures by the court**

The purpose of the national legislature to impose the obligation on the courts to carry out a periodic verification of the issues justifying the incidence of a preventive measure is not for the first time written in the Code of Criminal Procedure in use since 1 February 2014, having written similar regulations in the past, consequence of settled case-law of the Constitutional Court, and adoption of other judgments established by the European Court of Human Rights.

Existing legislative precedent, through Law nr. Under Article 281/2003, under Article 3001 of the previous Code of Criminal Procedure, the court was obliged to verify *ex officio*, in the Council Chamber, the correctness of the adoption or continuation of pre-trial detention within 48 hours of the file being registered with the court. According to paragraph 2 of the same law, 'if the court finds that a further extension of detention is justified, it shall order, by reasoned conclusion, the extension of the duration of detention until the first day of appearance, which may not exceed 30 days'.<sup>6</sup>

In a very short time after the adoption of Law nr. 281/2003, the Criminal Procedure Code was again changed by Government Emergency Ordinance nr. 109/2003, among the texts of the Code of Criminal Procedure changed on this occasion, including the text of art. 3001 which, in its new version, relating to the continuation of the arrest of the accused on receipt of the file, stated the following content: "After registering the file with the court, in cases where the defendant is sent to trial in custody, the court is obliged to verify *ex officio*, in the council chamber, the legality and merits of pre-trial detention before expiry of the duration of pre-trial detention.' If the court decides that the grounds for pre-trial detention have stopped or that there are no new objectives proving the deprivation of liberty, it requires, by conclusion, the annulment of pre-trial detention and the immediate release of the accused. When the court decides that the objects giving rise to the arrest still require deprivation of liberty or that there are new objectives attesting to the deprivation of liberty, the court upholds, by reasoned conclusion, the pre-trial detention of the accused. All this can be found in the provisions of Article 159.

The Code of Criminal Procedure, which came into force on 1 February 2014, presents a similar regulation, without important changes in terms of content regarding the order, extension and verification of the preventive arrest measure, being imposed another preventive measure of custodial nature (house arrest), but also two other auxiliary measures whose importance during the criminal investigation is left to the prosecutor's decision (judicial control, i.e. judicial review on bail).<sup>7</sup>

Therefore, regarding the obligation of the court to verify the preventive measure, Article 362 para. (2) The Code of Criminal Procedure shall be decided as follows: "In the recitals where a preventive measure has been decreed *vis-à-vis* the accused, the court is obliged

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<sup>5</sup> Gheorghe Buzescu, *Place and role of the civil servant in the state apparatus*, Sitech Publishing House, Craiova, 2017

<sup>6</sup> Bîrsan Cristian, *European Convention on Human Rights. Commentary on articles*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2005

<sup>7</sup> Udroi Mihai, *Criminal procedure. General part. The New Code of Criminal Procedure*, C.H. Beck Publishing House, Bucharest, 2014

to verify, during the trial, in open court, the purpose and validity of the preventive measure, proceeding in accordance with the provisions of Article 208.

In addition, having regard to the decisions of Article 208 para. (4) The Code of Criminal Procedure, throughout the trial, the court, by conclusion, shall constantly verify, but not exceeding 60 days, whether the objectives that led to the continuation of the preventive arrest measure and the house arrest measure imposed on the accused persist or whether new objectives have emerged to justify the continuation of these decisions.

According to paragraph 5, throughout the proceedings, the court shall inquire by conclusion, constantly, but not exceeding the 60-day period, whether the grounds which led to the adoption of judicial review or judicial review on bail remain, or whether new reasons have arisen which could confirm the continuation of this measure. The provisions of Article 207 para. paragraphs 3 to 5 shall be implemented accordingly.<sup>8</sup>

Continuing the line of regulation inaugurated by Law nr. 281/2003, these documents of the current Code of Criminal Procedure oblige both the first instance and the court notified with the appeal to prove the legality and objectivity of the preventive measure in question, prior to the expiry of the period of time for which the measure was kept.

Another view of these provisions of the Code of Criminal Procedure shows that there are obligations conditioned by a previous provision, with the objective of maintaining the preventive measure, without verification for 60 days, provided that the sanction of legal termination of the preventive measure is affected and therefore without the possibility to verify the legality and reason of the preventive measure on the date preceding the measure of judicial review.

It is reached the moment when, according to the provisions of Article 241 para. (1) of the Code of Criminal Procedure, preventive measures may end by themselves

a) at the end of the time interval provided for by law or imposed by the investigating bodies or, during the criminal investigation or at the time of trial at first instance, when the period of time according to law is approaching;

b) if the prosecutor orders a way in which no trial is reached or the court establishes an assumption of fixation, of stopping the criminal proceedings, or of being lax with regard to the punishment imposed in the first phase or postponement regarding the application of the punishment or a contravention sanction<sup>9</sup>, which does not refer to imprisonment.

c) when they convicted the defendant;

d) in various cases related to the Law.

Even if the point of view can be strengthened by numerous arguments according to which judicial review can be continued if the accused person against whom this measure was imposed in the first phase is arrested or placed under house arrest in another case, the question arises about which we still want to know how that person could comply with obligations that are at the heart of the measure of judicial review.

According to Article 215 para. (1) of the Code of Criminal Procedure, while under judicial control, the defendant must comply with the following obligations:

a) appear before the prosecuting body, the judge of the preliminary chamber or the court whenever called;

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<sup>8</sup> Bîrsan Cristian, *European Convention on Human Rights. Commentary on articles, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2005

<sup>9</sup> Gheorghe Buzescu, *Particularities of contravention law*, Sitech Publishing House, Craiova, 2017



b) immediately inform the judicial body which ordered the measure or before which the case is pending of the change of residence;

c) report to the police body designated with his/her supervision by the judicial body that ordered the measure, according to the surveillance program drawn up by the police body or whenever he/she is called.”

The affirmation that in the content of the measure of judicial control, an obligation of the nature of this measure could be ordered towards the person sent to trial, such as to stay away from the victim or his/her family, accomplices to the crime, other witnesses or qualified persons or other persons determined by the judge<sup>10</sup> (Art. 215 para. (2) lit. d) Code of Criminal Procedure), and to ensure compliance with this measure by the accused person can be achieved only by maintaining the measure of judicial control, although in the meantime the person has not been released under another preventive measure much more conclusive, can in no way justify the solution of maintaining judicial control. As long as a much more severe measure has been ordered against the accused person which allows his conduct to be controlled in a much more restrictive manner, and the person can no longer submit to the obligations which form the essence of judicial review.

Given the regulations ordered, several problems have arisen in the practice of the courts related to the verification of the legality and merits of preventive measures, especially if there is a reason for the legal termination of the preventive measure.

All these grounds may violate the law of the principle of legality of preventive measures, especially if the basis justified before the first instance, prior to the approach of a decision against which an ordinary appeal can be exercised, but the finding of legal termination under the conditions of art. 241 para. (2) of the Code of Criminal Procedure, takes place precisely before the court of appeal, some time after the date of the intervention of the purpose of legal termination, but in the absence of a basis that would have justified the maintenance of the measure.<sup>11</sup>

In the current jurisdiction, such cases are often encountered, especially when the accused person is sent to trial under the control of one measure and before the first instance, against the same person, in another case a much more restrictive preventive measure is ordered, even the same person is incarcerated to be deprived of liberty applied by a decision that has become final, prior to the resolution of the case in which the accused person was different from justice under judicial supervision.

It is also important that in such situations, although an appeal was lodged against the decisions by which the first instance ordered the maintenance of the preventive measure, the court hearing the appeal did not find the incompatibility existing between the measure of judicial review and the specific regime of preventive detention or the regime governing the execution of the custodial sentence, consistently taking the view that it is necessary to maintain the measure of judicial review, in full agreement with what was wrongly held by the court of first instance as regards the preventive measure;

Even if it can be argued with arguments and a point of view that the measure of judicial review can be maintained only if the defendant can initially be ordered to that measure, is arrested or placed under house arrest in another case, one nevertheless wonders how this person could be subject to obligations which are at the heart of the measure of judicial review.

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<sup>10</sup> Udrioiu Mihai, *Criminal Procedure. General part*, C.H. Beck Publishing House, Bucharest, 2015

<sup>11</sup> Bîrsan Cristian, *European Convention on Human Rights. Commentary on articles, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2005

According to art. 215 para. (1) of the Code of Criminal Procedure: "while under judicial supervision, the defendant must comply with the following obligations:

a) appear before the prosecuting body, the judge of the preliminary chamber or the court whenever called;

b) immediately inform the judicial body which ordered the measure or before which the case is pending of the change of residence;

c) report to the police body designated with his supervision by the judicial body that ordered the measure, according to the surveillance program drawn up by the police body or whenever he is called<sup>12</sup>."

As these obligations are of the essence of the measure of judicial review, not only of the nature of the measure, and are therefore inherent in any judicial control, we believe that the defendant who is under preventive arrest, under house arrest or even serving a prison sentence<sup>13</sup>, for objective reasons can no longer be subject to these obligations and therefore the non-custodial preventive measure can no longer be maintained, being practically empty of content.

The fact that in the content of the measure of judicial control, an obligation of the nature of this measure may be applicable to the person sent to trial, for example not to approach the injured person or his/her family members, witnesses or experts or other persons specifically designated by the judicial body (Art. 215 para. (2) lit. d) Code of Criminal Procedure), and the enforcement of this measure by the person can only be achieved by maintaining the measure of judicial control, even if in the meantime the person has been deprived of liberty under another preventive measure, cannot justify in any way the solution of maintaining the judicial control. As long as a more severe measure has been ordered against the accused person allowing control of his conduct at a more restrictive stage and the person can no longer submit to the duties which form the essence of judicial review, I believe that this preventive measure ceases on the date on which a measure involving deprivation of liberty is ordered against the same person.

#### **1.4. General provisions on judicial review**

The judicial review of the criminal investigation procedure consists in the verification by an independent and objective court, seized in the manner provided by law, of the actions of the criminal investigation body and of the body carrying out operative investigative activity in order to detect and remove human rights violations still at the criminal investigation stage and to ensure respect for rights, freedoms and legitimate interests of participants in proceedings and other persons.<sup>14</sup>

The control of the legality of the actions of the criminal investigation body and of the body exercising the operative investigative activity constitutes in itself not only an realization of the person's right to access to justice, a right guaranteed by Article 20 of the Romanian Constitution and Articles 5, 6 and 13 of the European Convention on Human Rights, but also an efficient way to detect and remove any violation of human rights still at the criminal investigation stage. In the Decision No. 20 of 16 June 1997 of the Constitutional Court "On the deviation of unconstitutionality of Art. 97 para.4, Code of Criminal Procedure", it was mentioned, inter alia, that removing the possibility to appeal to the court leads to restricting the access to justice of citizens who consider that their rights and legitimate interests have been

<sup>12</sup> Gheorghe Buzescu, *Police law - university course*, Sitech Publishing House, Craiova, 2019

<sup>13</sup> Ciobanu Viorel Mihai, Nicolae Marian, *The New Code of Civil Procedure. Commented and Annotated, vol. I*, ed. 2, Universul Juridic, 2016

<sup>14</sup> Mitrache Constantin, Mitrache Cristian, *Romanian criminal law – general part. According to the new Criminal Code*, third edition revised and added, Universul Juridic, Bucharest, 2019



violated in criminal prosecution. In this respect, addressing the court of the person who considers that a right has been violated during the criminal investigation refers to the constitutional right of the person to freely appeal to justice.<sup>15</sup>

The judicial review of pre-trial proceedings is carried out by the investigating judge working in the district courts. According to the provisions of Article 6, item 24 of the Code of Criminal Procedure, the investigating judge is the judge empowered with certain duties proper to criminal prosecution, as well as judicial control over procedural actions carried out during criminal investigation. The investigating judge has a unique status with the other judges in the district courts provided for in the "Law on the Status of Judges", and is distinguished only by his competence. In the incompatibility of the investigating judge is regulated by the provisions of Article 33 of the Code of Criminal Procedure.

At least one investigating judge works in each court, and in courts where the investigating judge has not yet been appointed, his duties are exercised by a practicing judge, appointed by order of the president of that court pursuant to Article 27 para. (1) (a) H of Law No 544 of 6 July 1995 on judicial organisation.

## **2. Considerations concerning the conditions of judicial review**

### **2.1. Law enforcement bodies to order the measure of judicial control**

The extent of judicial review may be determined at each step of the trial by the magistrate handling the case at that stage. Therefore, judicial review can be ordered by the prosecutor in the case, the rights judge and the preliminary judge. Thus, according to art. 211, during the judicial investigation, the prosecutor has the right to decide on the adoption of judicial control against the defendant, if this preventive measure is necessary to achieve the purpose set out in art. 202 para. 1 of the NCod of Criminal Procedure.

According to Article 202 paragraph 1 of the NCod of Criminal Procedure, a preventive measure may be ordered only if there is sufficient evidence or solid evidence, from which the reasonable probability arises that "a person has committed a crime" and "if it is mandatory to ensure the proper conduct of a criminal trial, to stop the exit of the accused or accused in fact from the beginning of the judicial investigation or trial or to inform that another illegal thing has been committed".

Currently, the fact related to the scope of judicial control and competence of the investigating judge is presented in paragraph 1 of the SCJ Decision on maintaining judicial control by the investigating judge in the criminal investigation process. Therefore, the judicial review of the criminal prosecution procedure consists in the verification by an independent and impartial court, perceived in the manner provided by law, of the actions of the criminal investigation body and of the body carrying out operational investigation activity in order to find out and remove human rights violations still at the stage of criminal investigation and to ensure respect for the rights, legitimate interests of the trial member and other people.

The judicial review of the pre-judicial procedure is carried out by the investigating judge, who works in the district courts, and in the cases provided for by law – also by the appeal court, which corresponds to the legality of carrying out this control.<sup>16</sup>

The judge of rights and freedoms may take this measure if he designates preventive arrest or house arrest. Therefore, the preliminary judge, at the time of the preliminary chamber

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<sup>15</sup> Tudorel Toader, *Criminal Code. Code of Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2012

<sup>16</sup> Mitrache Constantin, Mitrache Cristian, *Romanian criminal law – general part. According to the new Criminal Code*, third edition revised and added, Universul Juridic, Bucharest, 2019

proceedings, or the court, during the trial, may impose the measure of judicial control against the defendant, if the conditions set out in art. 211 para. 1 of the NCod of Criminal Procedure.<sup>17</sup>

In the case of judicial review, there are certain differences depending on whether the measure is adopted by the public prosecutor or by the preliminary chamber judge. Thus, if judicial control is adopted by the prosecutor, he requires summoning the accused who is at liberty or bringing the accused into custody. The accused shall be notified, as soon as possible, in the known language, of the act of which he is accused and the reasons for the measure of judicial review.

It must be said that the judge of rights and freedoms cannot designate the measure presented directly, at the request of the prosecutor, because he can take this measure himself at the criminal investigation stage. The judge of rights and freedoms could take this preventive measure, however, when ordering pre-trial detention.

The institution was changed from the first project, by the Law on Implementation nr. 255/2013. Thus, judicial review in its primary form under the new Code was a measure attributed only to the judge of rights and freedoms. In special cases, at the criminal investigation stage, the prosecutor could decide in the first phase for a short term by order, the measure of judicial control against the accused for at least 5 days.

The judge of rights and freedoms was warned by the prosecutor at least 3 days before the end of the 5-day term for which the decision is adopted, summoned the culprit without his presence being necessary, but the legal assistance of the defendant and the prosecutor had to be present.

According to the first draft, if the accused was present, he was to be heard by the judge of rights and freedoms, and the judge would make a decision by the expiration of the 5 days on the legality of the prosecutor's order, moreover, managing to prove the measure ordered by the prosecutor only if it was decided in compliance with the provisions, cancelling if the legal provisions refeiring the conditions for its adoption were violated<sup>18</sup>. The case file is returned to the prosecutor within approximately 48 hours.

It is especially important that the measure of judicial review can be decided only after hearing the defendant, in the presence of the lawyer chosen or appointed *ex officio*.

The prosecutor orders judicial review by which a justified order, which is brought to the notice of the accused. Against the decision taken by the prosecutor adopting judicial control, within the limited period of 48 hours from the communication of the accused, he may submit a written complaint to the judge.

The judge of rights and freedoms thus notified sets a deadline for settlement in the council chamber and orders the summons of the defendant. Let us not forget that the absence of the defendant does not prevent the judge of rights and freedoms from ordering the measure taken by the prosecutor<sup>19</sup>. The judge of rights and freedoms may annul the measure only if the legal restrictions establishing the conditions for taking have been violated.

If judicial review is adopted by a preliminary judge or by a trial, the following is done: at the reasoned request of the prosecutor or the preliminary judge/court before which the case is pending, may order, by conclusion, the measure of judicial review against the accused.

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<sup>17</sup> Bîrsan Cristian, *European Convention on Human Rights. Commentary on articles, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2005

<sup>18</sup> Ivan Anane, *Management of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

<sup>19</sup> Udroi Mihai, *Criminal Procedure. General part*, C.H. Beck Publishing House, Bucharest, 2015

Each investigating judge shall be assisted by a registrar. Since the investigating judge carries out judicial review of the prosecution and is obliged to ensure that the secrecy of the prosecution is maintained, each investigating judge must have an office equipped with anteroom, computer and other means to ensure his service in such a way that, when solving stages of authorising criminal prosecution or investigative operative activities, access to other persons to the maximum is restricted Information related to the prosecution.<sup>20</sup>

The investigating judge must be provided with safes in which he will keep as confidential as possible the procedural documents, registers and other materials that need to be kept confidential.

The activity of the investigating judge regarding judicial control in criminal prosecution is divided into 5 directions:

- Duties related to the examination of the prosecutor's requests regarding the authorization to carry out criminal procedural actions or to exercise the operative activity of investigations;
- Duties specific to the criminal investigation body;
- Duties related to the application of coercive measures;
- Duties related to solving complaints against illegal acts of criminal investigation bodies, bodies practising operative investigative activity, as well as complaints against illegal actions of the prosecutor;
- Powers of the investigating judge at the enforcement phase of court decisions.

## **2.2. Scope of judicial review and competence of the investigating judge.**

At present, the fact related to the sphere of judicial control and the capacity of the investigating judge is present in paragraph 1 of the SCJ Decision on the practice of ensuring judicial control by the investigating judge in the criminal investigation process no.7 of 04.07.2005. Thus, the judicial control of the criminal investigation procedure consists in the verification by an independent and impartial court, established in the manner provided by law, of the actions of the criminal investigation body and of the body carrying out operative investigative activity in order to discover and remove human rights violations still at the stage of criminal investigation and to ensure respect for rights, fundamental freedoms and interests of participants in the process and other persons. The judicial review of pre-trial proceedings is carried out by the investigating judge, who works in the district courts, and, in cases provided for by law, also by the appeal court, which verifies the legality of carrying out this control.

This regulation was not maintained by the 2013 amendments, taking into account that it is not decided to take the measure, thus increasing the package of prosecutor's powers in judicial prosecution. The measure may also be addressed by the preliminary judge or the court where the reason for trial is presented may take a decision by conclusion as in previous situations, the approach of the measure of judicial review towards the accused, at the justified request of the prosecutor. The hearing of the accused is imperative if he will be present on the appointed date, at the same time the presence of the accused's lawyer and the assistance of the prosecutor are indispensable.

Judicial review can only be carried out against the accused, not against suspects, so when he wants to adopt this measure, the prosecutor must present by order the initiation of criminal proceedings in question.

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<sup>20</sup> Udroi Mihai, *Criminal procedure. General part. The New Code of Criminal Procedure*, C.H. Beck Publishing House, Bucharest, 2014

According to Guceac I., the freedom and security of the person, the inviolability of private life and other values are the object of activity within the judicial review of the pre-judicial procedure. In particular, for the effective work of the investigating judge, it is imperative to address institutions such as Habeas corpus, the need for the domicile; secrecy of communications; ownership. Taking into account the extensive jurisprudence of the European Court of Human Rights in the field of Article 5 of the Convention, the national judge must be acquainted with the most important decisions in the field of individual freedom, including the subject of detention enforcement, balanced suspicion, time limit to match before the judge, motivation of the decision, Applying other solutions to arrest.<sup>21</sup>

As Novac T. tells us, the activity of the investigating judge regarding judicial control in criminal prosecution is divided into four directions:

- attributions related to the examination of prosecutor's requests regarding the delegation of criminal procedural actions or the exercise of operative investigative work<sup>22</sup>;
- attributions specific to the criminal investigation body;
- attributions related to the application of procedural measures of coercion;
- Duties related to solving complaints against illegal acts of criminal investigation bodies, bodies exercising operative investigative activity, as well as complaints against illegal actions of prosecutor.

From the above, it is deduced the legal text of Article 300 of the Code of Criminal Procedure of the Republic of Moldova, which tells us that in the sphere of judicial control, the investigating judge has the following competences:

- examines the prosecutor's steps regarding the authorization to carry out criminal prosecution actions, special investigative measures and administration of procedural measures of coercion that restore the constitutional rights and freedoms of the person.
- examines complaints against illicit acts of criminal investigation bodies and bodies performing special investigative activity, if the person<sup>23</sup> is not reconciled with the result of examination of his/her complaint by the prosecutor or has not received a reply to his/her complaint from the prosecutor within the scendency provided by law;
- verifies complaints against illegal acts of the prosecutor who directly prosecutes if the person is not consistent with the result of the prosecutor's examination of his/her complaint or has not received a response to his/her complaint from the prosecutor within the time stipulated by law.
- examines requests for urgent prosecution.

### **2.3. Examination of the conditions under which judicial review is ordered, extended or continued.**

Numeration:

Systematically examining the provisions of Articles 202, 211-214 and 207-208 of the Code of Criminal Procedure, it appears that, in order to order, extend and continue the measure of judicial control, the following must be fulfilled at the same time:

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<sup>21</sup>Bîrsan Cristian, *European Convention on Human Rights. Commentary on articles, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2005

<sup>22</sup> Ivan Anane, *Investigation of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

<sup>23</sup> Ivan Anane, *Elements of computerized evidence of the person*, Pro Universitaria Publishing House, Bucharest, 2015

- The existence of evidence or decisive indications from which there is a reasonable suspicion that the defendant has committed a crime;
  - The measure of judicial control should be commensurate with the seriousness of the accusation brought against the defendant against whom it is ordered;
  - The measure of judicial control must be indispensable for the purpose of the proper conduct of the trial, of stopping the evasion of the accused from prosecution or trial or of preventing the commission of another crime;
  - A case preventing the initiation or exercise of criminal proceedings is not present;
  - Taking, extending or continuing the measure by the competent investigating body;
  - Justification of the act of taking or prolonging, keeping reasons or the emergence of new reasons;
  - Hearing of the defendant.<sup>24</sup>
- Condition research:
- Finding out evidence or deep indications from which a reasonable suspicion arises that the defendant has committed a crime.

In the case of taking, prolonging or continuing the measure of judicial review, the legislator is less rigorous than in the case of preventive arrest and house arrest. Thus, while in order to order the latter preventive measures it is necessary to have evidence from which to establish a reasonable suspicion that the defendant has committed a criminal offence, in the case of taking, prolonging or continuing the measure of judicial review, it is sufficient to have strong indications that the defendant has committed a crime. The appropriation of the accused implies the initiation of criminal proceedings.

Decisive clues consist of data or references from which it is presumed that the defendant has committed the crime with which he is accused. More specifically, decisive indications exist when examination of the references revealed by the evidence handled in the case shows as plausible a suspicion that the person against whom the criminal proceedings have been committed has committed the offence for which he is being investigated.<sup>25</sup>

The condition examined thus implies the existence in the case file of data or references obtained by means of evidence established by law (statements of witnesses, information, minutes showing the relevance of the records, expert reports and others).

The condition under consideration will be deemed to have been effected if there is evidence from which there is a reasonable suspicion that the defendant has committed the crime with which he is accused.<sup>26</sup>

By convenient suspicion we mean the existence of data or references capable of convincing an objective and just witness that there is a plausible possibility that the accused has committed the crime that is the subject of the accusation. The case-law of the European Court of Human Rights is for this purpose.

The term evidence has a common reason, namely that of a factual substrate that helps to ascertain the presence or absence of a crime, to find out the person who did it and to know

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<sup>24</sup> Tudorel Toader, *Criminal Code. Code of Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2012

<sup>25</sup> Udriou Mihai, *Criminal procedure. General part*, C.H. Beck Publishing House, Bucharest, 2015

<sup>26</sup> Mitrache Constantin, Mitrache Cristian, *Romanian criminal law – general part. According to the new Criminal Code*, third edition revised and added, Universul Juridic, Bucharest, 2019



the circumstances necessary for the correct solution of the problem and which helps to verify the truth in criminal proceedings<sup>27</sup> (art. 97 para. (1) Code of Criminal Procedure).

○ Equality of measure with seriousness of the accusation sown against the defendant against whom the measure is ordered:

The condition of equality must be verified by reference to the circumstances of the case, taking into account in particular the conceptual and palpable gravity of the offence of which the accused is accused.

As regards the specificity of the crime committed, from an abstract perspective, I consider that it is necessary to take into account the place that the crime allegedly committed has, in the hierarchy of social values, which is identified by means of the right harmed or harmed by the crime of which the defendant is accused. In other words, the court will examine the social danger of the crime, starting from its abstract aspect, and only then will the concrete aspect of the danger of the crime that is the object of the accusation be analyzed, using as benchmarks the special limits of punishment, the circumstances of the case (possible mitigating or aggravating circumstances).

In verifying the condition of proportionality, the court may also be guided by some of the criteria contained in art. 318 C.Pp. For example, the content of the act and the concrete circumstances of committing the act; the manner and means of committing the act, the results issued or which would have borne fruit by committing the crime.<sup>28</sup>

We would like to point out that, unlike preventive arrest and house arrest, where the judicial body analyses the condition of proportionality by reference to a high degree of concrete and abstract social danger, when analysing the condition of proportionality of the measure of judicial review, a concrete and abstract degree of medium social danger may be sufficient.

When considering the condition of proportionality of judicial review, account must be taken of constitutional provisions guaranteeing the exercise of basic rights and freedoms. This concerns in particular the provisions of Articles 23, 26, 25, 39, 41 and, in particular, Article 53 of the Fundamental Law. Indeed, fundamental rights are not fully represented by nature, they are ceded to convenient limitations by a moral limit.

Regarding the incidence of Article 53 of the Constitution, regarding the measure of judicial control, the Constitutional Court established the following: "from the analysis of this constitutional text, the conditions to be met for restricting the exercise of certain rights or freedoms emerge, namely: the field should concern only fundamental rights, and not any subjective rights of legal or conventional nature; restriction of the exercise of these rights may be achieved only by law; the restriction may operate only if it is imposed and only if it would be necessary within the democratic society, the restriction may operate only in one of the limiting suppositions listed by Article 53 of the Constitution; the restriction be equal to the cause, the restriction equal in all respects; the restriction does not affect the essence of the right. The Court notes that the interference generated by the institution of judicial control derives essential rights, such as the right to individual freedom, the right to free movement, the right to intimate, family and private life, freedom of assembly, work and social protection of labor and economic freedom, is established by law, respectively Articles 211-215 of the Code of Criminal Procedure, has as its fundamental purpose the activity of criminal investigation, This being a

<sup>27</sup> Ciobanu Viorel Mihai, Nicolae Marian (ed.), *The New Code of Civil Procedure. Commented and Annotated*, vol. I, ed. 2, Universul Juridic, Bucharest, 2016

<sup>28</sup> Udroui Mihai, *Criminal procedure. General part. The New Code of Criminal Procedure*, C.H. Beck Publishing House, Bucharest, 2014



judicial measure applicable during prosecution and trial, it is ordered, it is non-discriminatory and should be necessary within democratic society, in order to defend the qualities of the rule of law (...)"<sup>29</sup>

○ The measure of judicial control is necessary in order to ensure the proper conduct of criminal proceedings, to prevent the defendant from evading criminal prosecution or trial or to prevent the commission of another crime:

It seems to me that this condition requires verification of aspects principally relating to the defendant's conduct. It is an aspect that does not need to be demonstrated here, namely that the defendant's behavior reveals aspects that must be assessed by the court when deciding on the measure of preventive detention. The relevance of the defendant's conduct, with regard to the condition of necessity, must be assessed from several points of view. Among the benchmarks relating to the person of the defendant to be taken into account when ordering the measure of judicial review: the purpose pursued by committing the offence, the motive of the offence, conduct prior to the commission of the offence, conduct during the commission of the offence, subsequent conduct. It can be said that this condition is fulfilled if, in the recent criminal biography of the defendant, conduct is stated on the basis of which it can be decided that there is a risk that he will adversely influence the course of the criminal proceedings, evade prosecution or trial, or commit new crimes.<sup>30</sup>

○ There is no cause preventing the initiation or exercise of criminal proceedings<sup>31</sup>

When analysing this condition, it shall be verified that one of the reasons hindering the movement or exercise of criminal proceedings referred to in Article 16 of the Code of Criminal Procedure does not date.

○ Reasons for taking or prolonging and subsistence of reasons or emergence of new reasons if the measure of judicial review is maintained

According to Art. 212 para. (4) C. proc. pen., the public prosecutor may order the adoption of the measure of judicial review by reasoned order.

According to art. 214 para. (1) The C. proc. pen., the judge of the preliminary chamber or the court before which the case is pending may, by way of conclusion, order the measure of judicial review against the defendant, at the reasoned request of the prosecutor or ex officio.

○ Hearing of the defendant present

The hearing of the defendant present is a guarantee of his rights of defence, which means that it is a condition to be taken into account when ordering the taking, extension or continuation of the measure of judicial review.<sup>32</sup>

According to art. 212 CPP., judicial review is adopted only after hearing the accused, in the presence of counsel chosen or appointed ex officio.

Also, Art. 213 para. (4) C. proc. pen., the judge of rights and freedoms hears the accused when he is present. Legal assistance for the accused and the presence of the prosecutor are indispensable.

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<sup>29</sup> Tudorel Toader, *Criminal Code. Code of Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2012

<sup>30</sup> Cioclei Valerian, *Criminal Law. Special Part I, Crimes against the person and crimes against patrimony*, C.H. Beck Publishing House, Bucharest, 2020

<sup>31</sup> Mitache Constantin, Mitache Cristian, *Romanian criminal law – general part. According to the new Criminal Code*, third edition revised and added, Universul Juridic, Bucharest, 2019

<sup>32</sup> C. Birsan, *European Convention on Human Rights. Commentary on articles, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2005

And according to art. 213 para. (5) C. proc. pen., the judge of rights and freedoms may revoke the measure, if the legal provisions governing the conditions for taking it have been violated, or may modify the obligations contained in the content of the judicial review.

### **3. Judicial review as a preventive measure during criminal prosecution**

#### **3.1. Conducting criminal prosecution**

According to Article 20 of the Code of Criminal Procedure, if, when conducting criminal prosecution or trying a specific case, there is a danger of violation of the reasonable term, the participants in the trial may submit to the investigating judge or, as the case may be, to the court hearing the case on the merits a request to accelerate the criminal investigation or the procedure for judging the case.<sup>33</sup> The examination of the application is carried out in the absence of the parties, within 5 days by the investigating judge or, as the case may be, by a judge or a panel other than the one examining the case. The investigating judge or the court decides on the application by means of a reasoned conclusion, either obliging the investigating body or, as the case may be, the court hearing the merits of the case to undertake a procedural act, fixing, where appropriate, a certain deadline for speeding up the proceedings, or rejecting the application. The conclusion shall not be subject to appeal and shall become irrevocable from the moment of its adoption. According to art. 300 para. Art. 3/1<sup>34</sup> Code of Criminal Procedure The competence of the investigating judge also includes the examination of requests for speeding up criminal prosecution. The party who considers himself affected by an unjustified delay in criminal prosecution shall refer the matter to the investigating judge at the place where the criminal investigation or special investigative measure was carried out.

The investigating judge, examining such a complaint, adopts a reasoned conclusion obliging the criminal investigation body to accelerate the performance of the necessary criminal investigation acts, which are required from the content of the case within a reasonable time. This conclusion of the court is mandatory for enforcement by the prosecuting body and by the prosecutor conducting the prosecution in this case.

According to Article 311 of the Romanian Code of Criminal Procedure, the appeal against the conclusion of the investigating judge regarding the application or non-application of preventive arrest or house arrest, regarding the extension or refusal to extend its duration, regarding provisional release or refusal of provisional release shall be submitted by the prosecutor, the accused, his/her defender, his/her legal representative in the court that adopted the conclusion or through the administration of the place of detention, within 3 days from the date of adoption of the conclusion. For the arrested person, the 3-day term starts to run from the date of handing over the copy of the conclusion.<sup>35</sup>

The administration of the place of detention, having the appeal, has to register it and send it to the court as soon as possible, which adopted the conclusion, putting the prosecutor in question. The concluding court, having received the appeal, shall, within approximately 24 hours, send it, attaching copies of the documents examined for the adoption of the contested conclusion, to the court of appeal, setting the date for hearing the case and informing the prosecutor and defence counsel thereof. The appeal court, having received it, requests from the prosecutor and from the defence party copies of documents confirming or denying the need to

<sup>33</sup> Ciobanu Viorel Mihai, Nicolae Marian (coord.), *New Code of Civil Procedure. Commented and Annotated, vol. I*, ed. 2, Universul Juridic, Bucharest, 2016

<sup>34</sup> Udroi Mihai, *Criminal procedure. General part. The New Code of Criminal Procedure*, C.H. Beck Publishing House, Bucharest, 2014

<sup>35</sup> Tudorel Toader, *Criminal Code. Code of Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2012

apply the preventive measure or to extend its duration. After verification of the appeal, the accumulated materials are preserved in the criminal case.

The judicial control of the legality of the investigating judge taking into account the preventive measures applied and the extension of the term, adopted under Articles 308-310, is carried out by the superior court, the group consisting of 3 judges. The court will hear the appeal for 3 days from the moment of its claim.<sup>36</sup>

The judicial review of the legality of the arrest is carried out during a closed session with the participation of the prosecutor, the accused and his representative. The absence of the suspect who is not deprived of liberty and the legal representative, being summoned in the manner prescribed by law, as well as of the accused who does not stop the examination of the appeal. The hearing may be attended by witnesses and guests requested by the prosecutor, lawyer, the absence of which does not pose difficulty in examining the appeal.

When the court hearing begins, the president determines which appeal will be checked, determines whether the persons at the hearing are clear about their rights. Then, if he goes to the hearing, he lodges his appeal, then the rest of the people sitting are heard. The conduct of the court hearing shall be recorded in a report, made under the conditions provided for in Article 336, which shall be correspondingly applied. The judicial review is carried out within the limits of the materials submitted by the prosecutor and examined by the investigating judge, with the participation of the defence party. In exceptional cases where circumstances did not exist at the time of examination of the application by the investigating judge, the appeal court, at the request of the parties, may examine other materials, providing the parties in advance with the opportunity and necessary time to get acquainted with them and to expose themselves on them.

Following the judicial review carried out, the Board of Appeal shall issue one of the following decisions:

1. upholds the appeal by:
  - a) annulment of the preventive measure ordered by the investigating judge or annulment of the extension of its duration and, if necessary, release of the person from custody;
  - b) application of the respective preventive measure, which was rejected by the investigating judge, with the issuance of the arrest warrant or extension of the arrest, or the application of another preventive measure, at the discretion of the appeal court, but not harsher than the one requested in the prosecutor's request, or with the extension of the duration of the measure;
2. Dismisses the appeal.

If no materials confirming the legality of applying the preventive measure or extending its duration were presented at the court hearing, the appeal court shall issue a decision annulling the preventive measure ordered or, as the case may be, extending its duration and release the detained or arrested person<sup>37</sup>. The copy of the decision of the court of appeal or, as the case may be, the arrest warrant or the arrest warrant shall be handed over to the prosecutor, to the accused immediately, and if a decision annulling the preventive measure or annulling the extension of its duration has been issued, the respective warrant shall be sent without delay to the place of detention of the arrested person or, respectively, at the police station at the place of residence of the suspect, accused. If the person in respect of whom pre-trial detention or

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<sup>36</sup> Neagu Ion, Mircea Damaschin, *Treatise on criminal procedure. The Special Part*, Universul Juridic, Bucharest, 2015

<sup>37</sup> Neagu Ion, Mircea Damaschin, *Treatise on criminal procedure. The Special Part*, Universul Juridic, Bucharest, 2015

house arrest has been cancelled or who has been provisionally released attends the hearing, he or she shall be released immediately from the courtroom.

If the appeal is dismissed, the examination of a new appeal concerning the same person in the same case shall be admissible at each time the duration of the preventive measure in question is extended or upon the disappearance of the grounds for applying or prolonging the detention.

Also, the criminal procedure law lists persons who can submit complaints to the investigating judge for illegal actions and acts of the criminal investigation body and bodies exercising special investigative activity: The latter are:

Suspected, accused, accused. Inculpatul este figura cenala, the subject indispensabil al proces penal, in eaga activitate procesuala unfolding around the fapte produse de aceasta persoana. In det village, legislația procesuală a Romania recunoaște calitatea procesuală de subiect (participant) al procesului penal, a suspect dar and a accused, care are dotați cu o gama largă de drepturi and obligaprocesuale. Astfel, the institution of the accused will be evidentaza in mod deosebit prin punerea in light a aspectelor juridico-penale and procesual-penale. In teme art 65 alin (1) of the Criminal Code, the accused este persoana physio față de care s-a emis, in conformitate cu prevederile codului de procedură penala, o ordonanță de punere under charge. Moment pere a accale penale cebuie confundat cu ceperea penale penale ceepenale ceperea penale<sup>38</sup>. There is a major difference between these two forms of dissonance, consisting in the reconciliation of the differences in the dissonance, but also in the reproduction of a distinct consensus. We agree with the point of view, it is mentioned that the treatment of the accusation of kidney disease is contrary to the legal reviewers, because the legal basis of the judicial examination does not constitute The brother went to court, and the judge's decision was taken in this case. Thus, due to the re-indictment order, in essence, the initial thesis of the accusation remains final, it is accompanied by red flags in the court of the judge in view of the support rii. For this reason, we do not support the intention that the renal follow-up body (renal follow-up officer) has the function of suing, but not blaming, in the renal system.

1. The injured party. At this time, in accordance with the legal revisions in force, art. 58 of the Criminal Procedure Code of 2003 echoes the sentence of conviction. In the social literature, the victim's behavior is treated in the framework of the connections between the kidney disease and psychology (the victim's experience, the attitudes of the professionals or volunteers who intervene, the rubrics of the victim), but also among the international norms, the "domicile address", and the norm national, is "address of residence", tearing up the wounds of the victim.

Thus, the victim has the right to have the application registered immediately in the established manner, to be solved by the criminal investigation body, and after this to be informed of the results of the settlement.<sup>39</sup> The victim also benefits from the following instructions: to return from the certified renal follow-up organ of the fart that she has addressed to the greenhouse or to a soria of the re-verbal-recess of the greenhouse oral age; to resist the burden, ordinary and other means of slavery in the confirmation of his serer; to address with a surlimenter serer; to be informed, in the evening, by the renal investigation body, or, as far as possible, by the district court of the resolution of his case, of all the decisions handed down it

<sup>38</sup> Ciobanu Viorel Mihai, Nicolae Marian (ed.), *The New Code of Civil Procedure. Commented and Annotated, vol. I*, ed. 2, Universul Juridic, Bucharest, 2016

<sup>39</sup> Mitache Constantin, Mitache Cristian, *Romanian criminal law – general part. According to the new Criminal Code*, third edition revised and added, Universul Juridic, Bucharest, 2019

refers to his dreams and interests; to review free of charge, upon request, such matters, summary and the decision to continue or leave the renal system in the restrictive case, to not continue the renal follow-up, the decision to re-sentence, decision or by another final court decision<sup>40</sup>; to evening from the renal follow-up organ, to be resounded with the injured part in the renal sauz; to demolish the evening in order to be recognized as a civil artist in the renal system; to retire in the cases provided by the law; to remain certified in the registration of his family and in the registration of the renal follow-up or in the order of non-registration of the renal follow-up; to attach the order not to follow the renal follow-up within 10 days from the moment of the re-issue of the restrictive order and to take cognizance of the materials on the basis of which this order was issued ; to be treated by the actions prohibited by the law in the manner seen in the treatment of the renal red blood cells; to be assisted, at the public events and her retirement, by an elected attorney; to refer to a mediator in accordance with the law.<sup>41</sup>

### 3.2. What the defendant needs to know

The judicial review may be adopted by the judge of the preliminary chamber or by the court, by conclusion, only after hearing the defendant present at the fixed time, in the presence of the lawyer chosen or appointed *ex officio*.<sup>42</sup>

- He has the right to be informed by the judicial bodies as soon as possible (and in his native language) of the crime for which he is being investigated and of the reasons for taking the measure of 'judicial review'".
- He has the right not to make any statement – with the stipulation that he will not suffer any adverse consequences if he invokes the "right to silence".
- He has the right to lodge – within 48 hours from the notification of the prosecutor's order ordering the measure of "judicial review" – a complaint against this procedural act, to the judge of rights/freedoms of the court where he would be prepared to judge this case on the merits.
  - It has the right to lodge – within 48 hours of delivery or, as the case may be, service – an appeal against the conclusions by which the judge of rights and freedoms or the preliminary judge has decided on the measure of "judicial review".
  - It has the right to request the judicial body that ordered the preventive measure to modify the "judicial review", if there are good reasons justifying it.
  - It has the right to ask the judicial body which ordered the measure of "judicial review" to allow it to leave the territorial limit set by it.
  - He has the right to lodge a complaint against the prosecutor's order extending the duration of the measure of 'judicial review' before the judge of rights and freedoms of the court competent to hear the case on the merits.
  - He has the right to appeal against the decisions by which the judge of rights and freedoms or the judge of the preliminary chamber ordered the extension of the duration of the measure "judicial review".

With regard to the "judicial control on bail", which is usually ordered by the judge of rights and freedoms, the judge of the preliminary chamber or the court, in the case of

<sup>40</sup> Udriou Mihai, *Criminal procedure*. General part, C.H. Beck Publishing House, Bucharest, 2015

<sup>41</sup> Cioclei Valerian, *Criminal Law. Special Part I, Crimes against the person and crimes against patrimony*, C.H. Beck Publishing House, Bucharest, 2020

<sup>42</sup> Cioclei Valerian, *Criminal Law. Special Part I, Crimes against the person and crimes against patrimony*, C.H. Beck Publishing House, Bucharest, 2020



applications to replace the measure of "preventive detention", you should bear in mind the following:

1. There is a preliminary phase, admissibility in principle, in which hearing the accused, in front of the lawyer chosen (or ex officio), is mandatory and concerns the grounds on which the application is based.

2. If the application is granted in principle, by conclusion:

- the amount of bail is established – at least 10,000 lei, taking into account the seriousness of the crime, the material situation of the defendant and his legal obligations;

- The period for payment of the security shall be fixed, which shall run from the date on which the conclusion of admission in principle becomes final.

3. If the application has been granted in principle, a new procedure (in council chamber) is carried out at the time set for lodging bail in which the court only checks the lodging of bail and decides by reasoned conclusion, setting out the defendant's obligations (while drawing his attention to the consequences of non-compliance).<sup>43</sup>

### **3.3. Complaints against actions**

Complaints against illegal actions and acts of the criminal investigation body and bodies exercising special investigative activity may be submitted to the investigating judge by the suspect, accused, defender, injured party, other participants in the trial or by other persons whose rights and legitimate interests have been violated by these bodies, if the person does not agree with the result of the examination of his/her complaint by the prosecutor or does not received a response to his complaint from the prosecutor within the time limit provided by law.<sup>44</sup>

Persons have the right to appeal to the investigating judge:

1. refusal of the criminal investigation body

a) to receive a complaint or denunciation regarding the preparation or commission of the offence;

b) to satisfy the steps in cases provided for by law;

c) to prosecute;

d) to release the detained person, to release the detained person in violation of the period of detention or the period for which the arrest was authorized<sup>45</sup>

2. orders terminating criminal prosecution, closing the criminal case or removing the person from criminal prosecution;

3. other actions affecting the constitutional rights and freedoms of the person.

The complaint may be forwarded within 10 days to the investigating judge at the location of the body which admitted the infringement. The complaint is examined by the investigating judge within 10 days, with the participation of the prosecutor and summoning the person who filed the complaint, as well as the persons whose rights and freedoms may be affected by admitting the complaint. The failure of the person who lodged the complaint and/or of persons whose rights and freedoms may be affected by the admission of the complaint shall not prevent its examination. The prosecutor is obliged to submit appropriate materials to the court. During the examination of the complaint, the public prosecutor and the person lodging

<sup>43</sup><https://www.avocatis.ro/> Criminal side / what the defendant needs to know in case of judicial control measure

<sup>44</sup> <https://www.universuljuridic.ro/> Precautionary measures in criminal proceedings General aspects

<sup>45</sup> Udroui Mihai, *Criminal procedure. General part. The New Code of Criminal Procedure*, C.H. Beck Publishing House, Bucharest, 2014



the complaint, as well as persons whose rights and freedoms may be affected by the admission of the complaint, give explanations.

The investigating judge, considering the complaint well founded, adopts a conclusion obliging the prosecutor to liquidate the detected violations of human rights and freedoms or of the legal person and, where appropriate, declares the contested act or procedural action null and void. Finding that the contested acts or actions were carried out in accordance with the law and that the rights or freedoms of man or of the legal person were not violated, the investigating judge shall issue a decision rejecting the complaint. The copy of the conclusion shall be sent to the person who filed the complaint and to the prosecutor.<sup>46</sup>

The conclusion of the investigating judge is irrevocable, except for the conclusions concerning refusal to initiate criminal prosecution, removal of the person from criminal prosecution, termination of criminal prosecution, closure of the criminal case and resumption of criminal prosecution, which may be appealed to the court of appeal within 15 days from the date of delivery.

### **3.4. Optional measures of judicial review**

As an additional measure, Article 215 para. Article 2 provides that the investigating body which adopted the measure may compel the accused person, during the judicial review, to comply with all of the following obligations:

”a) not exceed a certain territorial limit, fixed by the judicial body, except with its prior consent;

b) not to go to specific places determined by the judicial body or to travel only to places determined by it<sup>47</sup>;

c) carry at all times a surveillance device;

d) not to return to the family home, not to approach the injured person or his/her family members, accomplices in committing the act, witnesses or experts or other persons specifically designated by the judicial body and not to communicate, directly or indirectly, in any way;

e) not to exercise the profession, profession or activity in the exercise of which he committed the act;

f) to communicate periodically relevant information about its means of subsistence;

g) undergo control, care or medical treatment, in particular for the purpose of detoxification;

h) not to participate in sports or cultural events or other public gatherings;

i) not to drive vehicles specifically determined by the judicial body;

j) to have, not to use weapons;

k) not to issue cheques;”

Optional measures include a wide range of prohibitions and obligations, the body taking the measure being the only one which, depending on the particularities of the case, may decide on the necessity of imposing them.

### **3.5. Replacement of judicial review by pre-trial detention**

According to Art. 242 para. (3) of the Code of Criminal Procedure, the preventive measure shall be replaced, ex officio or upon request, by a heavier preventive measure, in case of compliance with the numerous criteria stipulated by the law for taking it and, following the

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<sup>46</sup> Udriou Mihai, *Criminal procedure. General part*, C.H. Beck Publishing House, Bucharest, 2015

<sup>47</sup> Gheorghe Buzescu, *Internal and international police cooperation*, Sitech Publishing House, Craiova, 2020

assessment of the concrete circumstances of the case and the procedural conduct of the defendant, it is considered that the heavier preventive measure is necessary to achieve the goal provided in Article 202 para. (1).

Judicial review is a much easier measure than preventive detention and normally it will be necessary, when the criteria are valid to take the measure of preventive detention and the culprit is under judicial control<sup>48</sup>, the latter measure to be replaced by judicial control. Suppose that the culprit, under judicial control, intentionally commits another offence and neither the offence for which judicial review was decided nor the last intentional offence are of those referred to in Art. 223 para. (2) of the Code of Criminal Procedure – for which preventive detention could be decided immediately. According to Article 242 of the aforementioned Code of Criminal Procedure, judicial control may be replaced by preventive detention only if certain conditions for addressing preventive detention, provided for in Article 223 para. (1) letter d) of the Code of Criminal Procedure, according to which preventive detention may be adopted if there is a suspicion that after the initiation of criminal proceedings against, the guilty person has intentionally committed a new offence or is preparing a new offence.<sup>49</sup> Given that judicial review can only be adopted against the culprit, it is obvious that any offence while the defendant has been decided on the measure of judicial review is made after the criminal proceedings have been initiated. Therefore, judicial review may replace it with pre-trial detention, without fulfilling conditions other than those already communicated. Therefore, the latter offence should not be prosecuted, or therefore prosecuted or prosecuted, as the clues play a very important role and are sufficient to prove the guilt of the defendant. This conclusion is evident from the fact that, in order to take the measure of preventive detention pursuant to Art. 223 para. (1) letter d) of the Code of Criminal Procedure does not require exact indications regarding the commission of a new crime, but sufficient indications that a new crime was being prepared, in which case there is no name of guilty or suspect given that the crime has not been committed. If we confine ourselves to the aforementioned legal texts, the procedure of replacing preventive measures can also be applied in the situation of replacing judicial control with preventive detention.<sup>50</sup>

Even so, the legislature made things more complex when it cited, in the regulation of judicial review, the conditions that will need to be respected in order for the measure to be replaced by pre-trial detention. According to art. 215 para. (7) of the Code of Criminal Procedure, if, during the judicial review, the accused does not comply with the duties imposed on him or her or there is a reasonable suspicion that he has deliberately committed another crime for which criminal proceedings have been ordered contrary to it, the judge of rights and freedoms, the preliminary judge or the court, at the request of the prosecutor or ex officio, may recommend changing the initial measure to that of house arrest or preventive arrest, as provided by law.<sup>51</sup> On the one hand, the legislation contradicts the general conditions for replacing preventive measures, discussed above, since it introduces the condition that criminal proceedings must also be initiated for the new offence committed under judicial supervision. On the other hand, by the expression "under the conditions provided by law", the text refers to the general conditions, that is, those that do not require that for the new action committed to be

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<sup>48</sup> Mitrache Constantin, Mitrache Cristian, *Romanian Criminal Law – general part. According to the new Criminal Code*, third edition revised and added, Universul Juridic, Bucharest, 2019

<sup>49</sup> Ciobanu Viorel Mihai, Nicolae Marian (coord.), *New Code of Civil Procedure. Commented and Annotated, vol. I*, ed. 2, Universul Juridic, Bucharest, 2016

<sup>50</sup> Neagu Ion, *Treatise on criminal procedure. General part*, Universul Juridic, Bucharest, 2008

<sup>51</sup> Udroi Mihai, *Criminal procedure. General part*, C.H. Beck Publishing House, Bucharest, 2015

started the movement of criminal proceedings . If, however<sup>52</sup>. Art. 215 para. (7) of the Code of Criminal Procedure is intended to constitute a solution to the general conditions for replacing preventive measures, leaving hidden both the hypothesis in which the defendant is under judicial control, preparing to commit a crime, in which case the criminal action initiated cannot be taken into account, as well as the other moments when the defendant is in any other situation provided by art. 223 of the Code of Procedure Criminal.<sup>53</sup>

For the purposes of Article 215 para. (7) of the Code of Criminal Procedure, judicial control may not be replaced by preventive detention if the defendant prepares to commit a new crime, but preventive detention may be decided on a culprit who is not under judicial control and who, after the beginning of criminal proceedings, prepares to commit a new crime. Using the same reasoning, a culprit who has not been subject to a preventive measure can only be arrested on the basis of reasonable evidence that a new offence has been committed, whereas a defendant under judicial supervision cannot be arrested only if criminal proceedings have been initiated for the latter offence. It is difficult to understand that a defendant against whom judicial control has been ordered, i.e. with reference to whom the judicial body has decided that he poses a threat either to the proper conduct of the criminal investigation or to public order, may be redirected to pre-trial detention under more restrictive conditions than a defendant against whom the judicial body initially decided that no preventive measure should be taken.<sup>54</sup>

In our day, a request to substitute judicial review for finding plausible evidence that the defendant intentionally committed a new offence for which no criminal proceedings were initiated could be granted under § 242 rap. Article 223 of the Code of Procedure or could be rejected pursuant to Art. 215 para. (7) of the Code of Criminal Procedure. Such a decision cannot depend on a choice between two legal texts which impose the same situation differently.

A legislative amendment is needed to standardise the conditions for replacing judicial control with pre-trial detention with those for replacing preventive measures in general.

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