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THE NEW ROMANIAN CRIMINAL PROCEDURE CODE

in the current European legal context

THE MAIN DIFFICULTIES ARISING FROM THE ENTRY INTO FORCE OF THE NEW ROMANIAN CRIMINAL PROCEDURE CODE

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This paper is aimed to analyze the main difficulties generated by the entry into force of the new Romanian Criminal Procedure Code[1]. The enouncement will refer to 3 (three) relevant topics for business criminal law practitioners, namely:

I. The new configuration of the defense right
II. The conditions of the preventive arrest
III. The right to a fair trial of third persons - other than the suspect or the defendant - whose assets have been seized

I.

THE NEW CONFIGURATION OF THE DEFENCE RIGHT

- Theoretical considerations -

The defense right as a fundamental principle of the Romanian criminal trial[2] is complying with the international provisions to the right to a fair trial[3], a series of specific guarantees being provided, such as (i) the indispensability of granting the time and facilities necessary to prepare the defense, (ii) the obligation to inform the suspect or the defendant in a criminal file about the offence under criminal

[1] **The new Criminal Procedure Code**, Law no. 135/2010, **was published in the Official Gazette of Romania (O.G. no. 486 on July 15, 2010 and came into force on the 1st of February 2014 by Law no. 255/2013** published in the Official Gazette of Romania no. 515 on the 14th of August 2013 **as further amended and supplemented successively by Law no. 255/2013** for the implementation of the Criminal Procedure Code (Official Gazette of Romania no. 515 published on the 14th of August 2013), **Government Emergency Ordinance (G.E.O.) no. 3/2014** implementing Law no. 135/2010 and other acts (Official Gazette no. 98 published on the 7th of February 2014), **Decision no. 599/2014 of the Constitutional Court of Romania** regarding the exception of unconstitutionality of art. 38 para. (1), letter f) and art. 341, para. (5) - (8) of the Criminal Procedure Code (Official Gazette no. 886 published on the 5th of December, 2014), **Decision no. 641/2014 of the Constitutional Court of Romania** regarding the exception of unconstitutionality of art. 344, para. (4), 345, 346 para. (1) and art. 347 of the Criminal Procedure Code (Official Gazette no. 887 published on December 5, 2014), **G.E.O no. 82/2014** amending and supplementing Law no. 135/2010 on the Criminal Procedure Code (Official Gazette no. 911 published on the 15th of December, 2014), **Decision no. 712/2014 of the Constitutional Court of Romania** regarding the exception of unconstitutionality of art. 211- 217 of the Criminal Procedure Code (Official Gazette no. 33 published on the 15th of January 2015), **Decision no. 663/2014 of the Constitutional Court of Romania** regarding the exception of unconstitutionality of art. 339-348 of the Criminal Procedure Code (Official Gazette no. 52 published on the 22nd of January 2015).

[2] Art. 10 – The defense right: "(1) The parties and main subjects in the criminal procedure have the right to defend themselves or be assisted by a counsel. (2) The parties, main subjects on the proceedings and the counsel have the right to be given the time and facilitations needed for preparing a defense. (3) The suspect has the right to be informed immediately, and before being interviewed, on the offense the criminal investigation is looking into and the legal qualification for that offense. The defendant has the right to be immediately informed on the offense the prosecution is investigating the defendant for, and the legal qualification for that offense. (4) Before being interviewed, the suspect and the defendant must be informed that they have the right to make no statements whatsoever. (5) The judicial bodies have an obligation to ensure full and effective exercise of their right to defense by the parties and main subjects throughout the criminal proceedings. (6) The right to defense shall be exercised in good faith, according to the goal for which the law recognizes it.

[3] The Universal Declaration of Human Rights - art. 11, International Covenant on Civil and Political Rights - art. 14, para. 3, European Convention on Human Rights - art. 6 para. 3.

investigation and its legal classification, or (iii) the guarantee regarding the right of the suspect or defendant to remain silent (not to make any statement).

The defense right keeps the basic configuration of the previous Criminal Procedure Code, being structured on three levels, according to paragraphs (1) and (5) of article 10, namely:

- the self-defense right of the main subjects and of the other parties, within in the criminal trial;
- the right of the above persons to be represented by a lawyer;
- the judicial bodies' obligation to ensure the full and effective exercise of the defense right.

The defense right is approached by the new Code from a common law perspective rather than from a classical viewpoint of the legal assistance and representation, granting the lawyer individuality and instating him with his own rights[4].

Therefor the lawyer is granted the rights provided under art. 92 Criminal Procedure Code[5] in addition to the right to file a complaint against acts and measures of the prosecutor, as pert art. 95 para. (1) Criminal Procedure Code[6], right exercised in his own name. This new approach is undoubtedly a positive one, outlining the role of the lawyer in criminal proceedings, thus the lawyer's direct and personal right to promote a complaint against the acts of the prosecution is recognized. The recognition of the said right is regulated in consideration of the lawyer's capacity as a subject in criminal proceedings, competent from a legal point of view.

[4] Gheorghiță MATEUȚ, *The right to defence and the lawyer, as a distinct participant in the Criminal Trial – elements of novelty in the current Criminal Procedure Code*, p. 1, www.ceeol.com;

[5] Art. 92 - Rights of the suspect's and defendant's lawyers : "(1) During the course of the criminal investigation, the suspect's and defendant's counsels have the right to witness the performance of any criminal investigation act, except for : a) in the situation where special surveillance or investigation methods, set by Chapter IV of Title IV are used ; b) bodily or vehicle searches, in case of in-the-act offenses. (2) A suspect's or defendant's counsel may request to be informed of the date and time when a criminal investigation act is performed or of the hearing conducted by the Judge for Rights and Liberties. Such information takes place through a notification via phone, fax, e-mail or other such means, and a report shall be prepared for this purpose. (3) Absence of the counsel shall not prevent performance of a criminal investigation act or the hearing, if there is proof that they were informed under the terms of para. (2). (4) A suspect's or defendant's counsel has also the right to participate in any hearing of any person conducted by the Judge for Rights and Liberties, to file complaints, applications and memorandums. (5) In case of a home search, the information set by para. (2) can also be transmitted after the criminal investigation body appears at the domicile of the person to be subject to the search. (6) If a suspect's or defendant's counsel is present at the moment when a the criminal investigation is performed, this aspect, as well as any possible objections raised, shall be recorded, and such document shall also be signed by the counsel. (7) During the course of preliminary chamber procedure and of the trial, a counsel has the right to consult documents of the case file, to assist the defendant, to make use of the defendant's procedure rights, to file complaints, applications, motions, exceptions and objections. (8) A suspect's or defendant's counsel has the right to benefit from the time and facilities necessary for the preparation and implementation of an effective defense."

[6] Art. 95 para. (1) : "A counsel has the right to file complaints, as per art. 336 – 339.";

Another novelty element is the imperative of good faith in the exercise of the defense right[7]. The inclusion of the said element is criticized by some practitioners and scholars[8] by arguing that lawmaker had presumed the bad faith in the exercise of this right. Starting from a fundamental and internationally recognized law principle, bad faith cannot be presumed and, consequently, the law most likely considered the reality of judicial practice, where the requests for adjournment are widely used unnecessarily, compromising both the interest of the parties which persist in an uncertain situation and the interest of justice in general.

- Practical issues -

One aspect of the defense right that generates controversy among practitioners is represented by the prosecutor's possibility to restrict access to the case file for an undetermined period as long as the criminal action hasn't been set in motion[9]. Therefore, the suspect can be found in the situation where he cannot fully and effectively exercise his defense right because of the restriction issued by the prosecutor who oversees the criminal investigation. The conditions provided in para. (4) art. 94 Criminal Procedure Code should be taken into consideration and in the case where the prosecution is being conducted without the exercise of the criminal action and the prosecutor restricts the access to the case file without thereby resorting to *analogia legis*. Therefore, for such a measure disposed by the prosecutor to comply with the minimal imperatives regarding the right to an equitable trial, must be on one hand justified by the unfolding of the criminal trial, while on the other hand, the timing and duration for which the interdiction operates must not interfere with the exercise of the defense right[10].

Another topical issue in Romania is that as per the new Criminal Procedure Code, the witness is not seen as the holder of the defense right implemented by the dispositions foresaw in article 10, and the judicial bodies do not accept the layer's assistance of the witness. This matter is important in the situations when the person heard as a witness becomes the suspect, and then the defendant in the same case. The situation was encountered both in Romania and in other Member States of the European Union and is a strategy often used by the prosecution, either because of insufficient evidences or due to convenience, forcing the witness to testify and then, based on that, to prosecute him. Notwithstanding, the European Court of Human

[7] Art. 10 para. (6) : "The right to defense shall be exercised in good faith, according to the goal for which the law recognizes it.";
[8] Gheorghiță MATEUȚ, *The right to defense and the lawyer, as a distinct participant in the Criminal Trial – elements of novelty in the current Criminal Procedure Code*, p. 19, www.ceeol.com.
[9] This resulting in a *per a contrario* interpretation of the last sentence of para. (4) of art. 94 Criminal Procedure Code. which provides that: "(4) During the course of the criminal investigation, the prosecutor may restrict, on a reasoned basis, the case file consultation, if this could harm the proper conducting of the criminal investigation. Following initiation of criminal action, such restriction may be ordered for maximum 10 days."
[10] If the prosecutor would restrict access to the case file, and the suspect would be arrested and sent before the judge of rights and freedoms with a preventive arrest proposal, without having had the possibility of consulting the file is obvious that due process would be virtually annihilated, not just harmed.

Rights pronounced itself on the flagrant violation of the right to a fair trial by the judicial bodies that have resorted to such practices.

II.

THE CONDITIONS OF THE PREVENTIVE ARREST

-Theoretical and practical issues-

Probably the most debated institution of criminal procedure both because of the frequency it is commonly used in legal practice in Romania and also because of the extensive media coverage, especially in big corruption cases in the country, the preventive arrest measure experienced substantial changes at a conceptual level in the Criminal Procedure Code.

The new provisions regarding the conditions in which the preventive arrest measure of the defendant may be ordered in a criminal trial has aroused much controversy among both practitioners and the general public, who was assaulted by information on the topic.

The provisions of the Criminal Procedure Code that generate the most intense debates are (i) the ones regarding the necessity of the existence of evidence establishing **reasonable suspicion** that the defendant has committed the offense he is investigated for and (ii) the ones regarding **the need to remove a state of danger against public order**.

Paragraph 2 of article 223 of the Criminal Procedure Code provides that: "*The preventive arrest measure of the defendant may also be ordered if reasonable suspicion that the defendant committed an intentional crime against life, a crime that caused the injury or death of a person, a crime against national security under the Criminal Code and other special laws, an offense of drug trafficking, arms trafficking, human trafficking, terrorism, money laundering, counterfeiting money or other valuables, extortion, rape, deprivation of freedom, tax evasion, assault of an official, judicial assault, a corruption offense, an offense committed by means of electronic communication or another offense for which the law provides imprisonment for 5 years or more and, based on assessing the severity of the offense, the manner and circumstances of committing the offence, the defendant's entourage and background, criminal history and other circumstances relating to his person,* ***it is established that the defendant's deprivation of freedom is necessary in order to remove a state of danger against public order***."

1. The concept of "reasonable suspicion" has been one of the first aspects of the new regulations that generated critical reactions from persons accused in criminal

cases, from practitioners, particularly from lawyers and finally from a certain segment of society particularly mindful of the balanced nature of justice rather than the finality of imprisonment and isolation of public figures, usually politicians, pursued by ordering preventive arrest.

Therefore, it is relevant to establish if the "reasonable suspicion" could ground an abuse in ordering the preventive arrest measure, setting it aside from its "reasonable" objective.

The concept of reasonable suspicion originates from the case law of the European Court of Human Rights[11]. The Court ruled on the right to freedom and the right to security provided by art. 5 of the Convention in one of the well-known cases in Romania - Dan- Costache Patriciu against Romania regarding his preventive arrest ordered in the ROMPETROL case. The Court ruled that "*the existence of reasonable suspicion implies the existence of indications or facts likely to convince a neutral and objective observer that the person has committed an offence*[12]."

Basically the evidence existing in the case file at the time of the proposal regarding the preventive arrest of the defendant must be such as to rationally assume that the defendant is the person who committed the offence for which he is being prosecuted.

The issue is far from being resolved if we take into consideration the fact that during the procedure for preventive arrest, the evidence is not analyzed (by a judge) in terms of the merits of relevance to the case. Aspects regarding the legality of obtaining and administrating of evidence can be questioned, but only in preliminary room proceedings and, under no circumstances, the exclusive procedural framework that ultimately targets the necessity to order the preventive arrest measure in that respective case cannot be exceeded. However, the necessity to order the preventive arrest measure is mostly analyzed from the judge's subjective perspective.

Hypothetically, we can find ourselves in a situation of a highly publicized case of corruption, in which the preventive arrest measure is ordered for one of the defendants given the fact that the only incriminating evidence is represented by statements given by the other co-defendants. Provided the Criminal Procedure Code no longer requires for the judicial bodies to corroborate the defendants' statements with other evidence in order to create the appearance of the impartiality of the evidence, the judge hearing the preventive arrest proposal may order the most severe

[11] ECHR, Decision from the 17th of January 2012 *in the Dan- Costache Patriciu against Romania case*, para. 62, hudoc.echr.coe.int

[12] ECHR, Decision the 20th of august 1990 *in the Fox, Campbell and Hartley against Great Britain case,* Decision from the 28th of October 1994 *in the Murray against the United Kingdom case,* para. 55 and Decision from the 27th of November 1997 *in the K-F. against Germany case,* para. 57, hudoc.echr.coe.int

measure of deprivation of freedom, in full compliance with the law. In such a situation, it is highly debatable if we can further discuss the "reasonableness" of the order regarding the preventive arrest.

Moreover, the need for the existing evidence to establish reasonable suspicion that the defendant committed the offense for which the deprivation of freedom is proposed raises another important issue, respectively **the impossibility to challenge the legality of the evidence during prosecution, in front of the rights and liberties judge competent to rule on the preventive measure**. Thus, although the preventive arrest measure may be ordered only if the evidence suggests the existence of reasonable suspicion that the defendant committed the offense for which it is prosecuted, the legality of the evidence cannot be challenged before the judge of rights and freedoms which solves the request for the preventive arrest. During prosecution, the evidence can be challenged solely before the prosecuting authorities, basically being in a situation where the accused person cannot defend himself before the judge sworn to decide on his deprivation of freedom, even when serious doubts regarding the legality of the obtaining and administration of evidence exist. This is a consequence of a legal loophole affecting the very exercise of the right of defense of the accused.

The essential flaw of the "reasonable suspicion" concept is the fact that it offers too much discretion to the judge called to decide on the preventive arrest measure, especially in the current socio-political context of Romania, where media pressure and thus the pressure of the public on the justice system is overwhelming. There are numerous decisions ordering preventive arrest and decisions in which the issue of proof is limited to the listing of evidence proposed by the Public Prosecutor. At times, the central element for ordering the measure of deprivation of freedom is ultimately represented by the possibility that the public may have a violent reaction as a response to the court’s decision to allow the defendant to remain in liberty.

Moreover, the courts have a tendency for ordering the preventive arrest measure in most cases brought before them by the Public Prosecutor. In accordance with the principle of proportionality of the severity of the offense allegedly comitted and the necesity to take such measures only in exceptional situations, ordering the preventive arrest of the accused person should be the last resort taken by the courts.

Most of the rights and liberties judges reason their decisions that establish preventive arrest, mostly only by the necessity of removing a danger against the public order. In consequence, it is essential for us to know what the intention of the law was when the danger against the public order condition was introduced among the necessary conditions for preventive arrest.

Starting from the provisions of the final thesis of para. (2) of art. 223 of the Criminal Procedure Code, we can draw conclusions that it is necessary to keep in

sight a **potential danger** against the public order. Besides the personal circumstances of the defendant, there is also a reference to **the way the defendant committed the crime.** Regarding this aspect, it is mandatory that the way the crime was committed must result objectively from evidence and not from the prosecutor's assumptions.

For example, in the case of a money laundering investigation, the Public Minister must reason the preventive arrest proposal of the defendant based on file evidence, not based on a simple theory that implies that by leaving the accused in liberty, the latter would manage to mask the provenience of the illicit funds.

In any case, as we already mentioned above regarding the evidences, there is a major problem in the course of the criminal investigation, because the latter cannot be challenged.

In the vast majority of investigations regarding corruption violations that involve politicians or other public figures, the courts dispose preventive arrest motivating that unrestricting their freedom would eventually lead to public outrage. Nonetheless, we believe that such a motivation does not have solid grounds, mainly because the attitude of the citizens is generated exclusively by the way the mass-media presents the case and also, in absence of other solid arguments from which would result the necessity of preventive arrest, the violent reaction of the public still cannot be assumed, when the right to freedom represents a fundamental human right.

In Romania, **the judges treat the imperative's proportionality of the preventive measure in relation to the gravity of the deed rather superficially,** considering they dispose preventive arrest in most of the cases, even though there are alternatives such as house arrest, judicial control or judicial review with bailment, measures that do not deprive one of his liberties.

III.

THE RIGHT TO A FAIR TRIAL OF THE PERSONS - OTHER THAN THE SUSPECT OR THE DEFENDANT - WHOSE ASSETS HAVE BEEN SEIZED

The main issues related to this topic are: (i) the obligation of the court to summon the people whose assets are subject to seizure so that they may exercise their defense right, (ii) the obligation to respect double degree of jurisdiction and (iii) the lack of complete legal provisions regarding the protection measures that must be guaranteed to the persons in the moment the court orders the seizure of their assets.

With respect to the aspect of subpoena in front of the court, article 366 para. (3) of the Criminal Procedure Code states the right of these persons to be assisted or

counseled by a lawyer. Nonetheless, the Criminal Procedure Code does not provide the obligation of the court to summon these persons, meaning that it is up to the judge's faculty to decide whether or not to summon third persons. The article 353 para. (1) of the Criminal Procedure Code states: *„court may summon other subjects of the criminal trial when their presence is necessary for solving the case".* In light of the above, in the situation concerning the seizure of a third person's assets, the necessity to summon them is obvious so that such persons may exercise their defense right.

Regarding the need to ensure the double degree of jurisdiction, this imperative is established by the European Convention on Human Rights and Fundamental Freedoms concerning the right to an equitable trial and by Protocol no. 7 of the same Convention. This means that in the situation where the assets of these persons are seized directly in the appeal, they cannot resort to a superior grade of jurisdiction.

The problem of warranting the double degree of jurisdiction is tightly connected to the aspect of the legislative insufficiency regarding the guarantee of a fair trial by the Romanian state for the persons whose assets are to be seized.

In Romania, the possibility for a judge to order the extended seizure concerning the assets of a person other than the suspect or the defendant in a criminal trial is established by the law. In the situation the court orders the aforementioned measure, the assets are seized. As per the articles 250 paragraph (1) of the Criminal Procedure Code, the measure of the seizure can be challenged in front of the judge of rights and freedoms, who has the capacity to judge the cause in the first instance. According to the instructions to paragraph (2) and (8) of the same article, the decision of the judge of rights and freedoms does not suspend the execution and it is definitive.

We did encounter situations when the Romanian court order the seizure of assets acquired by third parties before the enforcement of Law no. 63/2012, while the appeal against this order was rejected definitively before the publishing in the Official Gazette of the above mentioned decision of the Romanian Constitutional Court.

According to the new Code, the possibility to review a definitive decision in a criminal trial exists just for the cases when the trial was finalized on merits of the case.

From the moment the seizure was taken during the course of the criminal investigation, the person whose assets make the object of seizure is in the situation where he has to wait months or years until the definitive decision is issued.

Since the person we are referring to does not even have the quality of being a suspect or a defendant in cause, this matter is even more severe.

In the light of the above, we consider that the right of property and also the right to an equitable trial are severely violated. Starting from this situation, it is necessary that the articles of the new Code of Criminal Procedure must be revised to enable these persons to demand the revision of the decision before the issuance of a definitive decision over the report of substantial criminal law.

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