THE COMPETENCE OF THE TRAINEE PROSECUTOR IN THE CRIMINAL JUSTICE SYSTEM

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Abstract

This article deals with and analyzes the competence of the trainee prosecutor, related to the provisions of art. 23 para. (2) of Law 303/2004 on the status of judges and prosecutors, according to which trainee prosecutors have the right to draw conclusions in court, to perform and sign procedural acts, under the coordination of a full power prosecutor. If the law seems clear with regard to the prosecutor in terms of functional competence and describes the acts or measures that he can take or approve, the situation is different in the case of the trainee prosecutor. First of all, what kind of act is the coordinating act of the prosecutor, how does it materialize in the criminal case and what is the competence of the coordinator in relation to the criminal investigation activity carried out or conducted by the trainee prosecutor? The procedural criminal law states clearly concerning the way of coordinating the trainee prosecutor's solutions, by countersigning them, the situation of coordinating the procedural acts or that of the conclusions before the court is not the same. It should be noted that during the internship, the prosecutor does not enjoy independence in taking measures and resolving cases, but only in stability, carrying out his activity under the coordination of a full power prosecutor. However, the law does not state how the coordinating prosecutor actually exercises this coordination of the trainee prosecutor, respectively if he issues a procedural act or countersigns the trainee prosecutor's procedural acts, or if he has the possibility to overturn the act which, according to common law, is an exclusive attribute of the hierarchically superior prosecutor. Secondly, how is the requirement of predictability of the law fulfilled in relation to the „coordination act" of the full rights prosecutor? In other words, if the coordinating prosecutor does not issue an act, as seems to suggest disp. art. 23 para. (2) of Law 303/2004, in what way can an interested person become aware of the content of the coordination that he/she exercises, and how can he/she concretely challenge it? What is the limit beyond which coordination becomes the supervision and conduct of criminal proceedings, thus removing the competence of the trainee prosecutor and to what extent are the instructions issued by the coordinator mandatory for the trainee prosecutor?

Keywords: *trainee prosecutor, jurisdiction, hierarchical control, predictability of the law, coordination act, legal detention, function of criminal investigation.*

1. Preliminary aspects

The prosecutor is the judicial body with constitutional status that represents the general interests of society and defends the rule of law, as well as the rights and freedoms of citizens[1]. The prosecutor is part of the judicial[2] authority, given that the role and status of the prosecutor are regulated in Section 2, called „Public Prosecution Service" in Chapter VI - „Judicial Authority". Although the prosecutor does not do

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[1] Article 131 para. (1) of the Romanian Constitution republished.

[2] Derived from the verb to judge, with the etymology in Latin - jūdicāre, iūdicāre, the long infinitive form of the verb iūdicō - to judge, to pass / pass judgment.

justice, which is done exclusively by the courts, the of the Criminal procedure code refers to the prosecutor as a judicial body, along with the judge, respectively the criminal investigation bodies[3].

In the General Part of the Of the Criminal procedure code, the legislator established both the general principles on the basis of which the criminal proceedings are conducted and the general rules of procedure common to the three categories of judicial actors. Each of these bodies will make its own assessment of the facts, acting on the basis of expressly established powers.

The prosecutor initiates and exercises the criminal action in the criminal process, constructing the accusation that he brings to the defendant, carrying out, directly or through the criminal investigation bodies[4], the criminal investigation activity - an investigative approach that involves a set of evidentiary proceedings, establish a plausible factual situation in order to determine whether or not there are grounds for prosecution[5].

According to art. 300 para. (1) of the Of the Criminal procedure code, *the prosecutor, in the exercise of his power to lead and supervise the activity of criminal investigation bodies, ensures that the acts of criminal investigation are carried out in compliance with the legal provisions*, which means that the prosecutor has the functional power to refute the documents drawn up by the criminal investigation bodies and to bring the criminal proceedings back into the sphere of legality.

As such, given that the criminal justice system plays a key role in protecting the rule of law[6], it is necessary for the prosecutor, as the sole holder of the Criminal action, to conduct his activity freely, unaffected by intrusion, in accordance with the principles of legality[7], impartiality and hierarchical control, as it appears from the content of art. 132 para.

(1) of the Romanian Constitution.

These three principles are a corollary of the work of the Public Ministry and are closely linked. Although the principle of legality has constitutional validity[8], it is repeated in the Criminal procedure code[9], and the legislator expressly states the reason for its establishment, consisting in the fact that *the rules of criminal*

[3] Art. 30 The specialized bodies of the state that carry out the judicial activity are:
a) criminal investigation bodies;
b) the prosecutor;
c) the judge of rights and freedoms;
d) the judge of the preliminary chamber;
e) the courts.

[4] Article 55 para. (6) of the Criminal procedure Code, The criminal investigation bodies of the judicial police and the special criminal investigation bodies carry out the activity of criminal investigation under the leadership and supervision of the prosecutor.

[5] Art. 3 para. (4) of the Criminal procedure Code.

[6] Considerations from Recommendation (2000) 19 of the Committee of Ministers of the Member States on the role of prosecution in the criminal justice system.

[7] According to the Decision no. 385/2010of the Constitutional Court, M. Of. no. 317 / 14.05.2010, the principle of legality is, in the sense assigned by the Basic Law, specific to the activity of prosecutors, who, by virtue of it, have the obligation that, in exercising the powers provided by law, must follow the provisions of law act on the basis of opportunity criteria, either in the adoption of measures or in the choice of procedures. Thus, acting on the principle of legality, the prosecutor cannot refuse to initiate criminal proceedings or initiate criminal proceedings in other cases than those provided by law, nor does he have the right to request the court to acquit a defendant guilty of a crime, on reason that political, economic, social or other interests make it inappropriate to condemn him.

[8] Article 1 para. (5) of the Romanian Constitution, interpreted and developed by the Constitutional Court.

[9] Art. 2 of the Code of Criminal Procedure The criminal trial is conducted according to the provisions of the law.

procedure seek to ensure the effective exercise of the powers of the other participants in the criminal proceedings, so as to respect the provisions of the Constitution, of the constitutive treaties of the European Union, of the other regulations of the European Union in criminal proceedings, as well as of the pacts and treaties on fundamental human rights to which Romania is part of[10]. Consequently, the measure of compliance with the principle of legality is given by the observance of the rights of the parties and of the other participants in the criminal proceedings.

The principle of legality is complemented by the principle of hierarchical control, also regulated at a

constitutional level, as well as at the level of organic law, which means that against the acts and measures taken by the prosecutor or as a result of his provisions, the person whose rights or legitimate interests have been affected may address a complaint to the hierarchically superior prosecutor[11].

Two elements are of particular importance, namely: the concrete identification of the act or measure taken, which violates the rights and freedoms of the person, respectively the holder of the act or measure allegedly illegal. These issues provide the future framework for resolving the complaint, by establishing the general and abstract procedural provisions applicable to the challenged act or measure, to which the hierarchically superior prosecutor will refer and which he will use as a standard in the matter.

2. Inaccuracies regarding the legislation of the competence of the trainee prosecutor

If the law seems clear with regard to the full power prosecutor in terms of functional competence and describes the acts or measures that he can take or approve, the situation is different in the case of the trainee prosecutor. Thus, in accordance with art. 23 para. (2) of Law 303/2004 on the status of judges and prosecutors, *trainee prosecutors have the right to draw conclusions in court, to perform and sign procedural and procedural acts, under the coordination of a full power prosecutor*, and in accordance with para. (22) of the same article, *trainee judges and prosecutors do not have the right to order custodial or restrictive measures*.

Regarding the solutions that the trainee prosecutor can pronounce, art. 23 para. (3) of Law 303/2004 provides that *the solutions of trainee prosecutors are countersigned by the prosecutors who coordinate them*. Also relevant is art. 21 para. (8) of the same law, according to which *trainee judges and trainee prosecutors enjoy stability*.

As art. 286 para. (1) of the Criminal procedure code states, *the prosecutor decides on the acts or procedural measures and solves the case by ordinance, unless the law provides otherwise*, and in para. (4) it is shown that *the criminal investigation bodies dispose, by ordinance, on the procedural acts and measures and formulate proposals through the report*. The prosecutor is also the one *in charge and supervised the*

[10] Article 1 para. (2) of the Romanian Constitution.

[11] Regarding the notion of hierarchically superior prosecutor, see Decision no. 18 of June 19, 2020, pronounced by the High Court of Cassation and Justice - Panel for resolving legal issues in criminal matters, published in the Official Gazette of Romania, Part I, no. 869 of September 23, 2020; G.G. BOGDAN, Short assessments regarding the functional competence of the hierarchically superior prosecutor, in „Law" Magazine no. 10/2021.

activity of the Criminal investigation bodies - art. 299 para. (1) and 300 para. (1) Of the Criminal procedure code - *and may request for verification any file from the criminal investigation body* - art. 300 para. (4) of the Criminal procedure code.

From the corroboration of art. 23 para. (2) and art.

(22) of Law nr. 303/2004 on the status of judges and prosecutors with the provisions cited above in the Of the Criminal procedure code, will result in the following conclusions: the trainee prosecutor is competent to carry out the criminal investigation and to supervise the activity of the Criminal investigation bodies of the judicial police, judicial activity, which he carries out under the coordination of a full power prosecutor, but do not have the right to order measures depriving or restricting the liberty of the person.

In the exercise of the judicial function of criminal investigation, provided by the legislator at art. 3 para.

(1) letter. a) in relation with art. 299 para. (1) of the Of the Criminal procedure code, *the trainee prosecutor verifies the legality and validity of the acts performed by the criminal investigation bodies of the judicial police*. The verification is performed not only upon notification of a party or interested person, but also *ex officio*, as the sole holder of the Criminal action. If he finds that an act or measure is unlawful, the trainee prosecutor is obliged to order the annulment of the act, a *legal mechanism that represents the guarantee of the defendant, the injured person and the other parties to a fair trial.*

The verification mechanism implies that *the trainee prosecutor continuously exercises the supervision of the Criminal investigation bodies*, and not exceptionally, when the file is in his possession, and when he finds violations of the law, he immediately takes measures to remedy it. Any violation of the legal provisions in which either the legislator establishes the existence of an injury or the court finds *ex officio* or upon request, must be remedied, with the application of expressly provided sanctions, which are intended to bring the criminal proceedings into the sphere of preeminence of law and ensure the parties have the

right to a fair trial, provided by art. 6 of the Convention, in all its components, as interpreted by the European Court of Human Rights.

There is a real doubt about the two essential elements we referred to earlier, namely the holder of the act or measure taken, respectively the act or measure taken, given that, according to the legal provisions, the trainee prosecutor has the functional competence shared with a coordinating prosecutor. Several issues need to be addressed and treated separately.

First of all, what kind of act is the coordination act of the full power prosecutor, how does it materialize in the criminal case and what is the competence of the coordinator in relation to the criminal investigation activity carried out or conducted by the trainee prosecutor?

The analyzed text concerns a norm of competence of the trainee prosecutor, in fact being included in law no. 303/2004 on the status of judges and prosecutors, a competence that radiates on the manner of exercising the judicial function of criminal investigation, reason for which the predictability and accessibility of the law are mandatory[12]. Essentially, the correspondence between the acts exercised

[12] ECtHR, Judgment of 22 November 1995 in the case of S.W. c. Great Britain, par. 34-36, according to which: the law must first be adequately accessible. The accessibility of the law takes into account the possibility of the

by the trainee prosecutor and the rules of jurisdiction established by the legislator will provide the measure to exercise the specific judicial function and will produce the foreseeable effects, consisting either in pronouncing a solution of dismissal, waiver or prosecution, or in application of specific sanctions, directly by the trainee prosecutor, by the hierarchically superior prosecutor or by the judge of the preliminary chamber, as the case may be.

Therefore, as noted, on one hand, the law must comply with constitutional and human rights standards, ant to provide very clear procedural rules, and on the other hand, it is necessary that the acts be performed in accordance with the law. The principle of legality imposes on the legislator the obligation to provide the procedural rules in an organic law or emergency ordinance, as well as to draft the text clearly and predictably, so that any person can realize which procedural activities falls under the influence of the law and are performed by the judiciary[13].

If the manner of coordination in the case of the trainee prosecutor's solutions is a clear and explicit one, by countersigning them, the situation of coordinating the procedural acts or that of the conclusions before the court is not the same. It should be noted that during the internship, the prosecutor does not enjoy independence in taking measures and resolving cases, but only stability, carrying out his activity under the coordination of a full power prosecutor. However, the law does not state how the full power prosecutor actually exercises this coordination of the trainee prosecutor, respectively if he issues a procedural act, countersigns the procedural acts of the trainee prosecutor, or if he has the possibility to overturn the act which, according to primary legal provisions, it is instructions issued by the coordinator mandatory for the trainee prosecutor?

3. The relevant legal standard

We consider that the wording „under the15an exclusive attribute of the hierarchically superior coordination of a full power prosecutor" is at least prosecutor.

The discrepancy becomes even more obvious at a comparative analysis of the way in which the legislator regulated the competence of the trainee judge, at art. 23 para. (1) and (1^1) of Law no. 303/2004, where it is expressly indicated which are the cases he or she can hear, respectively in what is the shared competence – the trainee judge also attends court hearings with other types of cases than those provided in para. (1) (...), or *prepares an advisory report on the case and may draft the decision, at the request of the president of the panel*[14].

person to know the content of the legal provisions. Secondly, the law must be predictable, that is to say, it must be drafted with sufficient precision in such a way as to allow any person - who may, if necessary, to seek specialist advice - to correct his conduct.

[13] Decision no. 51/2016 of the Constitutional Court, in which it embraced the jurisprudence of the European Court.

[14] Article 23

(1) The trainee judges hear:

a) the actions of the possessor, the requests regarding the registrations and the rectifications in the civil status registers;

b) the patrimonial litigations having as object the payment of a sum of money or the delivery of a good, in case the value of the object of the litigation does not exceed 10,000 lei;

c) the complaints against the minutes of ascertaining the contraventions and of applying the contravention sanctions, if the maximum contravention sanction provided by law is 10,000 lei;

Secondly, how is the requirement of predictability of the law fulfilled in relation to the „coordination act" of the full power prosecutor? In other words, if the coordinating prosecutor[15] does not issue an act, as seems to suggest art. 23 para. (2) of Law no. 303/2004, in what way can an interested person become aware of the content of the full power prosecutor's coordination, and how can he or she concretely challenge it? What is the limit beyond which coordination becomes the supervision and conduct of criminal proceedings, thus removing the competence of the trainee prosecutor and to what extent are the unclear, but it has important procedural implications regarding the legality of the Criminal investigation activity. The Constitutional Court has held in its jurisprudence that any normative act must meet certain qualitative conditions, including predictability, which implies that it must be sufficiently precise and clear to be enforceable[16]. The Constitutional Court has also ruled that the meaning of *predictability* depends to a large extent on the content of the text in question and the scope it covers, both in reference to the case law of the European Court of Human Rights[17].

In the same vein, the European Court of Human Rights has ruled that the law must indeed be *accessible* to the litigant and *predictable* in terms of its effects. In order for the law to satisfy the requirement of predictability, it must specify with sufficient clarity the extent and manner of exercising the discretion of the authorities in that area, taking into account the legitimate aim pursued, so that to provide the person

d) the low value applications, provided in art. 1,026-1,033 of Law no. 134/2010 on the Code of Civil Procedure, republished, with subsequent amendments;

e) the requests having as object the replacement of the contravention fine with the sanction of performing an activity for the benefit of the community;

f) requests for abstention and recusal, as well as requests for review and appeals for annulment in cases falling within their competence;

g) rehabilitation;

h) finding the amnesty or pardon intervention;

i) the offenses provided by Law no. 286/2009 on the Criminal Code, with subsequent amendments and completions, and the special laws, for which the criminal action is initiated upon the prior complaint of the injured person, except for the offenses provided in art. 218 para. (1) and (2), art. 219 para. (1), art. 223, art. 226 and 227, as well as art. 239-241 of Law no. 286/2009, as subsequently amended and supplemented, including complaints against non-prosecution or non-prosecution, requests for confirmation of waiver solutions and requests for confirmation of reopening of criminal proceedings in cases involving such offenses.

(1 ^ 1) The trainee judges also attend court hearings with other types of cases than those provided in par. (1), by rotation, to panels of the court consisting of final judges, established by the president of the court. In the cases he attends, the trainee judge shall draw up an advisory report on the case and may draft the judgment at the request of the full power judge.

[15] The conclusion of 29.10.2020, pronounced in the file no. 13174/236/2020/ a1 by the judge of the preliminary chamber within the Giurgiu Court of First Instance, by which the Constitutional Court was notified with the except of unconstitutionality of the provisions of art. 23 para.

(2) of law 303/2004 on the status of judges and prosecutors in relation to the provisions of art. 1 para. (5) of the Romanian Constitution, invoked ex officio, unpublished.

[16] See, in this sense, Decision no. 189 of March 2, 2006, published in the Official Gazette of Romania, Part I, no. 307 of April 5, 2006, Decision no. 903 of July 6, 2010, published in the Official Gazette of Romania. , Part I, no. 584 of August 17, 2010, or Decision no. 26 of January 18, 2012, published in the Official Gazette of Romania, Part I, no. 116 of February 15, 2012.

[17] See Cantoni v. France, para. 35, Dragotoniu and Militaru-Pidhorni v. Romania, para. 35, Sud Fondi - SRL and Others v. Italy, para. 109.

with adequate protection against arbitrariness[18].

Decision no. 302/2017 of the Constitutional Court may be relevant regarding the powers to coordinate the criminal investigation, stated in art. 1 para. (5) of the Romanian Constitution, in which it held that, in its jurisprudence, it ruled that *the legislator must regulate from a normative point of view both the framework of the Criminal process and the competence of the judicial bodies and the concrete way of accomplishing each subdivision, each stage of the Criminal process,* as a consequence of the provisions of art. 1 para. (5) of the Basic Law, which stipulates the obligation to respect the Constitution, its supremacy and the laws. Thus, the Court found that the legislature must set out exactly the obligations of each judicial body, which must be circumscribed by the concrete manner in which they perform their duties, by establishing unequivocally the operations which they perform in exercising their duties[19].

The Court found that the regulation of the powers of the judiciary is an essential element deriving from the principle of legality, which is a component of the rule of law. This is because an essential rule of law is that the powers or competences of the authorities are defined by law. The principle of legality implies, in essence, that the judiciary acts on the basis of the power conferred on it by the legislature, and subsequently assumes that they must comply with both substantive and procedural provisions, including of the rules of jurisdiction. In this sense, the provisions of art. 58 of the Of the Criminal procedure code regulates *the institution of the verification of competence by the criminal investigation body, which is obliged to verify its competence immediately after the notification, and if it finds that it is not competent to carry out or supervise the criminal investigation, to immediately order the declination of competence or to send the case immediately to the supervising prosecutor, in order to notify the competent body.*

On the other hand, as regards the legislator, the principle of legality - a component of the rule of law - obliges to be very clear when regulating the competence of the judiciary. In this regard, the Court has ruled that the law must specify with sufficient clarity the extent and manner of exercising the discretion of the authorities in that area, having regard to the legitimate aim pursued, in order to provide the person with adequate protection against arbitrariness[20]. However, the Court considers that the task of the legislator cannot be considered to be fulfilled only by the adoption of regulations relating to the jurisdiction of the judiciary. Given the importance of the rules of jurisdiction in criminal matters, the legislator has the obligation to adopt provisions to determine its compliance in the legal practice, by regulating appropriate sanctions applicable otherwise. This is because the effective application of the law can be obstructed by *the absence of appropriate sanctions, as well as by insufficient or selective regulation of the relevant sanctions*.

Moreover, the lack of clarity of the law determines a situation of inequity, in which the person harmed in his rights or

[18] See Judgment of 4 May 2000 in Rotaru v. Romania, paragraph 52, and Judgment of 25 January 2007, in Sissanis v. Romania, paragraph 66.

[19] See Decision no. 23 of January 20, 2016, published in the Official Gazette of Romania, Part I, no. 240 of 31 March 2016, paragraphs 15, 16.

[20] See Decision no. 348 of June 17, 2014, published in the Official Gazette of Romania, Part I, no. 529 of 16 July 2014, paragraph 17.

legitimate interests will be unable to challenge the act of coordination and the reasons underlying it. Of course, it can be argued that the person concerned can challenge the procedural act of the trainee prosecutor, but this compromise does not cover all the situations that may arise and that impose a direct control of the hierarchically superior prosecutor. An eloquent example could be that the trainee prosecutor draws up an act under the coordination of the full power prosecutor, which is subsequently challenged. Like the person concerned, the hierarchically superior prosecutor will be limited and will exercise strict hierarchical control over the act of the trainee prosecutor, being unable to verify the „coordinating act", which forms a common body with the coordinated act.

Likewise, there is no procedural act drafted, act regulated by the legislator, upon which the judge of rights and freedoms or the judge of the preliminary chamber can exercise a legal analysis and, possibly, sanction it as such. It should be noted that this manner of regulating cannot, in any way, ensure the right to a fair trial for parties, so that the activity of criminal prosecution to fall within the established constitutional grounds.

Also, will the coordinating prosecutor be able to lead and supervise directly the activity of the Criminal investigation bodies, with concern to the limitation given by art. 64 para. (4) of law 304/2004[21]? Considering this last legal provision, the answer seems to be that the trainee prosecutor is the only one who supervises the activity of the Criminal investigation bodies, given that there was a provision for the distribution of the case by the hierarchically superior prosecutor. However, the use of the term „under coordination" seems to suggest increased powers conferred to the coordinating prosecutor, without specifying in particular the modalities of coordination. In this case, is it still necessary for the hierarchical prosecutor to assign the case, which in practice remains obsolete?

The doubt is an essential one, as it affects the competence of the prosecutor and criminal investigation bodies, whose violation is sanctioned with absolute nullity, according to art. 281 para. (1) letter b) Of the Criminal procedure code, read in the light of the Decision no. 392/2017 of the Constitutional Court. Such a situation could be the case of the detention of the suspect/defendant by the criminal investigation body. Will the trainee prosecutor be able to supervise the criminal investigation activity in such a case?

4. Implications concerning the fair and debatable application of the law

In accordance with disp. art. 209 para. (13) of the Of the Criminal procedure code, if the detention was ordered by the criminal investigation body, it has the obligation to inform the prosecutor about the taking of the preventive measure, immediately and by any means. Thus, the prosecutor verifies the legality of the preventive measure of deprivation of liberty taken by the police against the suspect/defendant, and in case of finding the illegality of the detention measure, orders the immediate revocation and release, according to art. 209 para. (14) 2nd thesis of the Of the Criminal procedure

[21] The case file assigned to one prosecutor may be transferred to another prosecutor in the following situations:
a) suspension or termination of the capacity of prosecutor, according to the law;
b) in its absence, if there are objective causes that justify the urgency and that prevent its recall;
c) leaving the case unjustifiably unresolved for more than 30 days.

code. Moreover, the legislator expressly provided in par. (14) of the same art. 209 of the Code of Procedure that *against the order of the Criminal investigation body by which the detention measure was taken, the suspect or defendant may file a complaint to the prosecutor supervising the criminal investigation, before its expiration, and the prosecutor shall immediately rule by order*.

Continuing the reasoning, it can be stated that the trainee prosecutor has a „hierarchically superior" position to the criminal investigation body, based on which the trainee prosecutor leads and supervises the criminal investigation activity, gives guidance and instructions to the investigative body, as shown in art. 55 para. (6) of the Of the Criminal procedure code: *the criminal investigation bodies of the judicial police and the special criminal investigation bodies carry out the activity of criminal investigation under the leadership and supervision of the prosecutor*.

It is easy to conclude and there can be no doubt that it is necessary for the trainee prosecutor to have the functional competence to perform these acts on his own, by taking the case in his own criminal investigation, according to the principle *qui potest plus, potest minus*. On the contrary, if the trainee prosecutor cannot perform an act or take a measure on his own, being expressly exempted by the legislator, even less will he be able to carry out the verification of legality and validity of the act or measure taken by the police body.

In such a case, the trainee prosecutor exercises the activity of supervising the criminal investigation carried out by the criminal investigation bodies, but in a limited way, only with regard to the acts of investigation and criminal investigation which he may take or dispose of directly, and in the example provided, strictly regarding the acts performed or the measures taken prior to the detention of the suspect/defendant. After this moment, the trainee prosecutor cannot concretely carry out the activity of supervising the criminal investigation and does not exercise the judicial function of criminal investigation, according to the competences. This is due to the fact that the trainee prosecutor does not have the functional competence to take the measure of detention, as it results from disp. art. 23 para. (22) of Law 303/2004, reproduced above, so that it cannot carry out any verification of the legality and validity of this measure.

This conclusion is based on disp. art. 209 para. (13) and (14) of the of the Criminal procedure code in the light of art. 286 para. (1) and art. 299 para. (1) of the of the Criminal procedure code, from which it follows that the starting point of the non-existence of the concrete supervision of the Criminal investigation is the one when the criminal investigation body notifies the trainee prosecutor regarding the taking of the detention measure against the suspect/defendant. The legislator expressly provided for this way of exercising control by the prosecutor precisely in order to limit as much as possible a possible illegally deprivation of liberty, by remedying the deficiencies.

Moreover, there are serious questions about how the suspect/defendant can complain against the detention measure taken by the criminal investigation body, respectively in which the trainee prosecutor appointed in the case can rule and resolve the complaint, given the limitation of competence established by art. 23 para. (22) of law 303/2004. Objectively, at the moment of notification, the trainee prosecutor is deprived of any leverage to control the legality by which to revoke the measure, in contradiction with the will of the legislator, as it was materialized in art. 209 para. (13) and (14) Of the Criminal

procedure code. Consequently, the situation is equivalent to that in which the criminal investigation body did not notify the full power prosecutor, and who did not verify the legality of the measure and did not resolve the complaint against it.

The same conclusion is required in the situation where the trainee prosecutor draws up the report with a proposal to take the measure of pre-trial detention, that is used to notify the court, in which he considers fulfilled the conditions stated at art. 223 para. (1) or (2) Of the Criminal procedure code. In this act, the trainee prosecutor makes an assessment of a preventive measure, which the legislator has expressly excluded

from its powers, by art. 23 para. (22) of Law no. 303/2004. Also, by drawing up the report, the trainee prosecutor indirectly concludes that the acts performed by the criminal investigation bodies are legal, that the evidence from which the reasonable suspicion results is legally administered, respectively that the measure of pre-trial detention is necessary and proportionate, including the order of taking the detention measure, which, according to the argument, did not have the functional competence to verify it.

Although there have been opinions in judicial practice according to which the competence of the trainee prosecutor exclusively implies the impossibility of taking a custodial or restrictive measure of liberty[22], we consider that the lack of a verification of legality and validity of the detention measure causes serious violations of human rights. The detention measure is a deprivation of liberty and represents a strong interference with the rights and legitimate interests of the suspect/defendant, and in the absence of verification, the measure will remain in force until the expiration of the 24-hour period. If the prosecutor chooses not to notify the judge of rights and freedoms with a proposal for pre-trial detention, the suspect/defendant will have been under the power of a preventive measure of deprivation of liberty without any appeal, and the jurisdiction to assess the need for the measure will rest exclusively with the police.

It should be noted that the detention implies the fulfillment of the conditions established by art. 5 para.

(1) letter c) of the Convention, according to which *no one shall be deprived of his liberty, unless he has been arrested or detained for the purpose of bringing him before the competent judicial authority, where there are reasonable grounds for believing that he has committed a crime or when there are compelling reasons to prevent him or her from committing a crime or fleeing after committing it*.

In other words, the detention has as a premise the need to bring the person before the competent judicial authority, before a judge or another magistrate empowered by law with the exercise of judicial powers, as shown in para. (3) of the same Article 5. However, in the present case, the trainee prosecutor before whom the person is brought does not have, as it was argued before, functional competence to revoke the preventive measure. In this situation, the state of detention will become contrary not only to the Convention but also to national law.

5. Conclusions

As the trainee prosecutor's jurisdiction has been established, he will not be able to

[22] The conclusion pronounced by the panel of the preliminary chamber of the Giurgiu Tribunal in file no. 13174/236/2020 / a1.1, admitting the appeal of the prosecutor's office against the decision.

take the measure of deprivation of liberty of detention or the restrictive measure of freedom of judicial control, which concerns only certain limitations of rights, such as a ban on exceeding a certain territorial limit or to move to certain places established by the judicial body. Following a corroboration of the legal texts, it can be reasonably stated that if the trainee prosecutor cannot find that the conditions for taking the measure of judicial control are met, which is a restrictive and not a custodial one, even less can he find that the conditions for taking the measure of pre-trial detention by the judge of rights and freedoms are met, as a result of the referral by report.

Of course, it can be argued that the trainee prosecutor performed the act under the coordination of a full power prosecutor, but the argument would be unfounded and without substance. According to the above arguments, the law does not specifically states the manner in which this coordination is carried out with regard to the order confirming the continuation of the Criminal investigation and the initiation of criminal proceedings, which first of all must respect the principle of legality, and secondly, that of hierarchical subordination.

Moreover, the thesis that the detention measure was verified by the coordinating prosecutor is not resistant to criticism, as he was not expressly appointed by the higher hierarchical prosecutor to supervise the activity of the Criminal investigation bodies in the case, but the trainee prosecutor. The criticism becomes even more sustainable, given that the distribution of cases is made by the hierarchically superior prosecutor after an analysis based on expressly provided criteria[23], and the distribution of case files to another prosecutor takes place in strictly regulated by law situations, also after the same analysis by the hierarchically superior prosecutor. Without a written statement of intent from the coordinating prosecutor, the hierarchically superior prosecutor is deprived of the attribute of hierarchical control, which is meant to lead to unity of action on the part of the Public Ministry and to ensure the rule of law.

Based on the above arguments, we consider that it is necessary to amend the provisions governing the competence of the trainee prosecutor, in a manner similar to the competence of the trainee judge, by exhaustively listing the cases he can resolve. The express limitation of jurisdiction is recommended both to bring clarity and predictability to the way in which the trainee prosecutor exercises the function of a criminal prosecutor, and to increase the awareness of the work and individual decision-making. On the contrary, the division of the competence of the trainee prosecutor with a full power prosecutor coordinating prosecutor, even exclusively in the way of countersigning the solutions, will continue to raise doubts about the stability of the trainee prosecutor, which can be guaranteed and supported exclusively by the hierarchically superior prosecutor, which is mandatory in the Public Ministry.

[23] According to art. 19 para. (3) lit. b) of the Rules of Procedure of the Prosecutor's Offices of November 14, 2019, criminal cases and other works are distributed to prosecutors based on the following objective criteria: specialization, skills, experience, number of cases in progress and their degree of complexity, the specifics of each case, the cases of incompatibility and conflict of interest, insofar as they are known, as well as other special situations.

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