# LEGAL TERMINATION IN PREVENTIVE MEASURES

**Nadia CANTEMIR-STOICA**[*]

**Abstract**

*This study will present the institution the legal termination of the preventive measures in light of the new code of criminal procedure, which on the one hand expanded the scope of preventive measures that can be taken against a defendant, and on the other hand has introduced new regulations which we will refer at.*

*We will analyze the situation of each one of the preventive measures by the time the measure will be legally terminated, with reference to the issues that were not covered by the legislature and not least showing contradictions encountered in judicial practice.*

**Keywords:** *preventative measures, custody, reasonable time, preventive arrest, prosecution.*

## 1. Introduction

The realities of juridical law from the period of the 1969 Criminal procedure code have revealed a lack of promptitude while carrying out criminal trials, overloading of prosecuting offices and courts, an excessive periods of time required by the procedures, unjustified delays of trials, suspension of cases because of procedural reasons and significant social and human costs that have thus generated a lack of trust in the ranks of the trial participants regarding the efficiency of the criminal justice act.

Out of these, aspects regarding preventive arrest, the length of the procedures, the arrangement of responsibilities and evidence in criminal matters have been the subject of a number of trials at the European Court of Human Rights in which Romania has participated as a party. Taking all these into consideration, the need to eliminate the deficiencies that have caused Romania's numerous convictions by the European Court of Human Rights has become evident1.

As such, there was a need for an urgent legislative intervention that would confer efficiency to the objectives that were taken into account by the initiators of the new codes, more precisely the acceleration of the criminal procedures, simplifying them and the creation of a unitary jurisprudence in agreement with the jurisprudence of the European Court of Human Rights.

The present modification of the Criminal procedure code are in the spirit of the new trends in international criminal politics preparing the juridical-criminal conditions for a pan-European unification in terms of criminal legislation. We thus observe that the explicit reglementation of the principle of proportionality is being carried out to each preventive measure in terms of the seriousness of the accusation brought upon an individual, as well as the principle of the crucialness of such a

[*] Definitive Attorney – The Bucharest Bar; PhD Candidate – Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **av.nadiacantemir@yahoo.com**).

[1] For further details the Exposition of reasons for the law project regarding the criminal procedure code may be consulted, www.just.ro

measure in order to carry out the legitimate purpose intended through its elaboration.

On the matter of preventive arrest measure, its exceptional character is regulated as well as its subsidiary character in relation to other preventive measures that do not deprive liberty. As such, preventive arrest can be carried out only if the adoption of another preventive measure is not sufficient in pursuing the intended legitimate purpose. As an absolute novelty for the Romanian procedural criminal legislation, a new preventive procedure has been implemented, more precisely the house arrest procedure, adopted from the Italian Criminal procedure code, that aims, by introducing this new institution, to widen the posibilities for individualization of preventive measures according to the particularities of each criminal case and according to the person that represents the accused of a criminal trial.

This study wishes to analyze the institution of right termination of preventive measures from the perspective of the new reglementations, in agreement with the European Convention of Human Rights and in the light of the criticism brought by the Constitutional Court regarding the analyzed subject. We believe that this paper is of special importance as preventive measures seek the limitation or even the deprivation of rights given to citizens that, on the other hand, are in conflict with criminal law at a given time, a situation which triggers the criminal procedure mechanism that allows these preventive measures.

Although a year has passed since the new codes were put into effect, by analyzing the judicial doctrine and practice we observe that many law problems arise when we discuss the matter of the preventative measures instutitution.

## 2. Content

Article 5 of the European convention, art. 9 of the Pact *(everyone has the right to liberty and security of person; no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law)* and art. 6 from the Charter (everyone has the right to liberty and security of person) regulates the right to liberty and security of person for the purpose of preventing arbitrary deprivations of liberty by the authorities towards a person, as well as limiting the length of the liberty deprivation[2]. Although most of the legislations protect citizens' right to liberty, it was necessary to regulate in what situations preventative or liberty depriving measures can be taken against individuals that come into conflict with criminal law.

As such, the legislator has regulated preventive measures and other procedural measures as part of the 5th Section of the General part of the New Criminal procedure code. The procedural measures have been defined[3] as procedural criminal law institutions put at the disposal of criminal judiciary bodies and consisting of certain deprivations and constrainments, personal or real, determined by the conditions and circumstances in which the criminal trial is being carried out. In matters of functionality intended by the legislator, these measures work as legal methods for prevention or elimination of circumstances or situations that are capable of endangering the efficient carrying out of the criminal trial by the

[2] M. Udroiu, O. Predescu, *Protecția europeană a drepturiloe omului si preocesul penal român,* Ed. C.H.Beck, București, 2008, p.388.

[3] V. Dongoroz, et alli, *Explicații teoretice ale Codului de procedură penală român. Partea generală,* vol. V, second edition, Ed. Academiei, Ed. All Beck, București, 2003, p. 308.

obstacles, difficulties and misleading factors they may produce.

By regulating these institutions, the legislator intended to protect the proper development of a criminal trial, thus contributing to attaining the immediate objective of the criminal trial, which is to promptly and completely asses the criminal acts so that any person that has committed a crime will be punished according to their culpability and that no innocent person will be held criminally responsible. At the same time, the ability to guarantee compensations for the individuals who take part in the criminal trial as a civil party was taken into account, in the event they were materially or morally harmed by the committing of a crime.

The criminal procedural code regulates the following measures belonging to this institution: preventive measures, medical safety measures, insurance measures, returning of objects and reestablishing the status quo prior to the realization of the crime.

As this paper wishes to address the institution of right termination on the subject of preventive measures, we have identified in the specialized doctrine an extensive and complete definition that meets all demands. As such, preventive measures are criminal procedural law institutions with a restrictive character, by which the suspect or the accused is prevented from engaging in certain activities that would negatively affect the carrying out of the criminal trial and the fulfillment of its purpose[4].

In article 202 of the C.p.c. the legislator has regulated the fact that preventive measures can be taken if they are necessary for assuring the proper development of the criminal trial, for preventing the circumvention of the suspect or the accused from prosecution and, last but not least, for preventing the committing of another crime. Gradually, preventive measures have went through numerous modifications regarding the category of judiciary bodies that are able to carry them out, (until 2003 there was the possibility that the preventive arrest measure could be carried out directly by the prosecutor) the terms in which they can be put into effect and afterwards prolonged or maintained, the unconstitutionality of certain legal texts. As such, in the present regulation the legislator gives judiciary bodies the option between five preventive measures that can assure, depending on case, the proper development of the criminal trial. More precisely, the measures that can be taken against a physical person are retention, judiciary control, judiciary control on bail, house arrest and preventive arrest; and the ones that can be taken against a legal person are: banning the initiation or, depending on the case, suspending the dissolution or abolition of the juridical person, banning the initiation or, depending on the case, suspending the merger, the division or the reduction of the juridical person's social capital, commenced prior to or during the prosecution, the banning of property transactions that are susceptible to provoke the minimization of the juridical person's assets or insolvency, banning the closure of certain juridical documents, established by the judicial body.

Although the legislator has specifically mentioned what the conditions of taking, prolonging or maintaining preventive measures are, jurisprudential needs have determined him or her to regulate institutions through which direct intervention upon them is possible, more specifically legal termination, dismissal and replacement.

[4] Gh. Theodoru, *Drept procesual penal român. Partea specială*, Al. I Cuza University, Faculty of Law, Iași, 1974, Vol. II, p. 194.

As this paper's objective is to analyse the institution of right termination, we will examine each preventive measure, exposing in which situation the discussed solution intervenes.

Legal termination in preventive measures represents that obstacle against the prolonging or maintain of a measure that the legislator has foreseen. By analyzing the provisions of art. 241 of the C.p.c we can see that the instances in which the preventive measures terminate, the instances for all the five measures and instances that can be applied only to the preventive measure of preventive arrest and house arrest have been regulated.

As such, the preventive measure of retention[5] can be carried out by the criminal investigation body or by the prosecutor in accordance to the provisions of art. 209 of the C.p.c. in conjunction with art. 202 of the C.p.c if there are evidence or valid indicators from which reasonable suspicion that a person has committed a crime can arise and if this measure is necessary for the proper development of the criminal trial, for preventing the circumvention from prosecution or considering the possibility or preventing another crime.

According to art. 209, paragraph 3 of the C.p.c. this measure can be carried out over a period that cannot exceed 24 hours, this interval not including the time needed to take the suspect or the accused to the headquarters of the judicial body. We can observe that the constituent legislator her/himself has felt the need to regulate in art. 23 paragraph 3 of the Constitution what is the maximum time limit in which this measure can be put into effect. By analyzing the legislations of other countries we can observe that the period of retention can be for 24 hours in Luxemburg, Greece, Canada, Columbia or Germany, in Portugal, Russia or Poland the period is for 48 hours and in Brazil 5 days.

At the same time, the legislator felt the need to make the following, absolutely essential specification, which is that in the event that the suspect or the accused has been brought in front of a prosecution body by means of a summons, the 24 hour time limit does not include the period in which the suspect or the accused has been under the summons. The judiciary organ that emitted the summons has the obligation to immediately hear the person that the summons is addressed to and the accused cannot be present at the prosecutor's office for more than 8 hours. As such, in event that a summons has been emitted and the suspect is required to appear in front of the prosecuting bodies from Sibiu to Bucharest, the period in which he or she will be led there will not be subtracted from the period of retention if this preventive measure will be carried out. Continuing with the same example, if at the headquarters of the prosecuting body there would be more than one accused, there is the possibility that the suspect will be heard after 8 hours at most, thus this period as well will not be deducted from the 24 hours of retention. By drawing a comparison with the old regulation[6] we observe that the legislator in the current regulation has deemed fit that the administrative measure of the police headquarters management will not be

[5] A parallel can be made with the French Code of procedure where retainment is defined in art. 62-2 parag. 1 as a constraining measure decided by a judiciary police officer, under the control of the judiciary authority, by which a person upon whom there are one or more plausible grounds for suspicion that she or he has commited or is about to commit a crime or offense punishable with prison is kept at the disposal of the investigators.

[6] Art. 144 paragraph 1 second point of thesis of the c.p.c. From the length of the retention period the time in which the person had been deprived of liberty as a result of the administrative measures of the police heaquarter's management, as defined in art. 31 paragraph 1, lit. B from Law no. 218/2002 regarding the organization and functioning of the Romanian Police, will be deduced.

deducted from the length of the retention measure.

In the Creangă v. Romania case[7], the European Court of Human Rights has established that the length must be set in the exact moment when the interested person had been brought at the headquarters of the criminal prosecution body and had been subjected to interrogation procedures, when the prosecutor had had enough grounded suspicions to justify measures that deprive liberty for reasons of criminal prosecution, and not from the moment when a formal retainment order had been emitted, which took place a full 10 hours after the initial moment; the Court has thus deemed that the deprivation of liberty of the interested person on the date of July the 16th 2003 from 12 pm to 10 am had no legal basis in the internal law and represented a breach of art.5 parag.1 of the Convention.

As such, the first instance in which the preventive measure of retention will be legally terminated is when the term, as stated by the law, will expire, more precisely at the end of the 24 hours, when the suspect or the accused will be released provided he or she is not retained or arrested because of other reasons. Provided that the prosecution bodies deem it is required for the accused person to be under retention for a shorter period of time, nothing prevents them from declaring this period to be, say, 15 hours. Because of this, the legislator has regulated in art. 241 paragraph 1 second point of thesis of the C.p.c. that the preventive measures are legally terminated when the terms established by the judiciary bodies will expire.

As a guarantee of the disposal of this measure over a certain period of time, retention will be disposed by means of an ordinance by the criminal investigation body or by the prosecutor, by means of an ordinance where it is required to mention the reasons that have brought the adoption of the measure, the date and time when the retention commences as well as the date and time when the retention ends. The precise establishment of the initial moment of the 24-hour term is of the utmost importance, considering the extremely strict approach of the European Court towards illegal deprivation of liberty by continued detention after the maximum duration in which a person can be deprived of liberty has ended[8]. Another guarantee provided by the legislator consists in the obligative character of informing the prosecutor about the adoption of the measure by any means possible and as soon as the measure has been taken by the criminal investigation body.

A problem that we wish to bring into attention is the prescribed solution for when the arrested defendant is taken in front of the rights and liberties judge to propose taking the measure of preventive arrest and the judge reaches the decision before the 24 hours of retention have expired of rejecting the proposal to adopt the measure of preventive arrest or of ordering that the measure of judiciary control be taken. As such, two approaches have appeared in judiciary practice, the first in which the rights and liberties judge does not reach a decision regarding the retention measure, and thus it ceases at the end of the 24 hours, and the second approach in which the rights and liberties judge orders the immediate release of the retained accused[9]. We believe that the second approach represents the

[7] www.echr.coe.int

[8] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului si procesul penal român,* ed. C.H.Beck, Bucharest, 2008, p.422.

[9] Closure 270/2014 of the Suceava Court ordered in the criminal file no. 7655/86/2014: Rejection of the proposal of the prosecution office near the Suceava Court to take the measure of preventive arrest for a period of 21 days of

legal one and we offer a text argument, more specifically the provisions of art. 227 paragraph 1 of the C.p.c. known as the rejection of preventive arrest proposal during prosecution when the legislator regulates that in the event the rights and liberties judge deems that the legal conditions for the preventive arrest of the accused are not met, she or he rejects by canceling the prosecutor's proposal and facilitating the release of the retained accused. Thus, although the rights and liberties judge is not invested to pronounce anything regarding the preventive measure of retainment, despite that the legislator has offered him or her the possibility to order the immediate release of the retained person, as such the measure will cease before the expiration of the period stated by the law or ordered by the judiciary bodies.

The preventive measure of judiciary control or judiciary control on bail, newly introduced in the criminal procedure code by name but sharing numerous similarities with the measure of being obliged to not leave the country or the town from the 1969 code can be taken by the prosecutor, the preliminary hearing judge, the rights and liberties judge or the court if this measure is deemed necessary in order to assure the proper development of the criminal trial, to prevent the circumvention from prosecution or trial and, last but not least, to prevent another crime.

This preventive measure can be ordered during the criminal prosecution phase by the prosecutor or the rights and liberties judge for a period of 60 days that can be successively prolonged, its maximum duration cannot exceed one year, if the sentence according to the law is a fine or prison up to five years, and two years if the sentence according to the law is life imprisonment or prison for more than five years. At the same time, the preliminary hearing judge can order the carrying out of this measure for a period that cannot exceed 60 days, and the court can order the measure for the same time length, with the mention that in the preliminary hearing phase the total duration of judiciary control or on bail cannot exceed a reasonable length and, in all these cases, it cannot exceed 5 years from the moment of arraignment.

The institution of the length of judiciary control is regulated inside art. 215 of the C.p.c[1] as it was introduced through art. I point 3 of O.U.G. (emergency ordinance) NO. 82/2014 following the declaration of the unconstitutionality of art. 211-217 of the C.p.c., as the judiciary bodies were offered the possibility to order the preventative measure of judiciary control and judiciary control on bail for unlimited periods of time. As such, the Constitutional Court has deemed in decision 712/2014[10] that the interference generated by the judiciary control institution affects fundamental rights, more exactly the right to individual liberty, the right to free circulation, the right to a private life, the freedom of assembly, labor, the social protection of labor and economic liberty, is regulated by the law, more precisely by art. 211-215 from the Criminal procedure code, has the legitimate purpose

the accused VORNICU IONUȚ ANDREI, as unfounded. On the grounds of art. 227 paragraph 2 from the Criminal procedure code reported to art. 202 paragraph 4 letter b from the Criminal procedure code, orders taking the measure of judiciary control against the accused Vornicu Ionuț Andrei, prosecuted for the crime of perjury as stated in art. 273 paragraph 1 and 2 letter. d Criminal code, with aplication in art. 35 paragraph 1 Criminal code. Is ordered the immediate release of the retained accused Vornicu Ionuţ Andrei provided he is not retained or arrested by other reasons. 2. Rejects the proposal of the Prosecuting office near the Suceava Court to take to measure of preventive arrest for a period of 21 days of the accused BALAN DENISIA, as unfounded. Is ordered the immediate release of the retained accused BALAN DENISIA provided she is not retained or arrested by other reasons.

[10] To be consulted https://www.ccr.ro/files/products/ Decizie_712_2014.pdf

of carrying out criminal instruction, as it is a judiciary measure applicable in the process of criminal prosecution and trial, imposes itself, as it is adequate in abstracto to the legitimate pursued purpose, it is undiscriminating and necessary in a democratic society in order to protect the values of the state law. Still, the analyzed interference is not proportional to the cause that has determined it. In this respect, the Court has deemed that it does not assure a suitable balance between public and individual interest, as it can be ordered for an unlimited period of time. The principle of proportionality, as it is regulated in the specific situation found in art.53 of the Constitution, assumes the exceptional character of restricting fundamental rights and liberties, which necessarily also implies their temporary character. Since public authorities can resort, in lack of another solution, to the restriction of practicing rights, in order to safeguard the values of the democratic state, it is logical for these grave measures to desist the moment the cause has ended. The Court also states that art.241 paragraph (1) letter a) from the Criminal procedure code regulates that the first method of legally terminating preventive measures is the expiration of the terms as stated by law, followed by the expiration of the terms as established by the judiciary bodies. By the systematic interpretation of the previously mentioned norm, in the context of the provisions of art.241 from the Criminal procedure code in its entirety, the need arises for the existence inside criminal procedural law of the length for which each preventive measure can be ordered, regardless if its depriving or non-depriving of liberty character, for which the legislator has not specified in the case of the preventive measure of judiciary control and judiciary control on bail. If in the case of liberty depriving measures the legislator has specified both the lengths for which they can be ordered as well as the maximum period of time for which they can be ordered, in the case of the preventive measure of judiciary control, the provisions of art.211-215 and 241 from the Criminal procedure case do not specify neither the length for which it can be ordered nor its maximum period. As such, the right of judiciary bodies to order judiciary control as a preventive measure for unlimited periods of time appears as evident, such a right presupposing the temporally unlimited restriction of the fundamental rights and liberties that are addressed in the content of this measure. And, according to the previously shown standards for constitutionality, such a restriction is unconstitutional, as the principle of proportionality affects the normative content of the addressed fundamental rights, in other words their substance, as it does not limit itself to the restriction of exercising them.

In the same O.U.G. 82/2014 was it established that the preventive measure of judiciary control and that of judiciary control on bail, which were currently running when the decree was put into effect, are to be continued and maintained until the carrying out of the next control: for a term of maximum 60 days after the decree was put into effect, the prosecutor, in cases that were on the preliminary hearing stage, and the court, in the trial stage, verified by default if the grounds for which the preventive measure of judiciary control and judiciary control by bail were taken still stand, or if new grounds have appeared does justify one of these preventative measure, ordered, according to the situation, the prolonging or the dismissal of the preventive measure. Provided that the judicial bodies have not complied and have not verified the grounding of the preventive measure’s claims in a period of 60 days since the discussed decree had been put into

effect, the preventive measure of judiciary control or judiciary control on bail will be legally terminated.

The legislator's intervention on the issue of judiciary control length was absolutely necessary, taking into account that art. 241 parag. 1 letter a of the C.p.c was lacking applicability on this issue since the preventive measure could not be considered legally terminated on the expiration of the terms as stated by law or established by judiciary control because these could be ordered for an unlimited period of time due to the legislative void. In the present context, after the conforming of the procedural texts according to the considerations of the Constitutional Court's decisions, the preventive measure will be legally terminated at the moment of expiration of the terms as stated by law (60 days) if an extension or maintenance will not be placed into effect or if the maximum length has been reached, more specifically one, two or five years according to the procedural stage we are at. We thus observe that the prosecutor, the preliminary hearing judge and the court have the obligation to verify if the grounds that have been taken into consideration when deciding to adopt the preventive measure of judiciary control still stand, ordering accordingly either the extension or maintenance, if not, the preventive measure will be legally terminated.

At the same time, the preventive measure of judicial control will also be legally terminated if near the end of the criminal prosecution, the prosecutor will order the solution of halting or putting an end to the prosecution or in the event that the court will pronounce a decision of acquittal, of putting an end to the criminal trial, to not offer a sentence, to postpone putting the sentence into effect or to suspend the carrying out of the sentence under supervision, even if not permanently. The measure will also be legally terminated when the decision to sentence the accused has been declared as permanent. It is common-sense that the preventive measure is to be brought to an end when the criminal prosecution phase is over as the purpose of the measure is no longer available at that procedural moment.

As far as the preventive measures of house arrest and preventive arrest are concerned, the legislator has understood to regulate both the general and the particular cases of legal termination. These two preventive measures can be ordered by the rights and liberties judge, the preliminary hearing judge or by the court if the evidence lead to the reasonable suspicion that the accused has committed a crime and that one or some of the following situations are present:

- the accused has fled or has gone into hiding in order to circumvent him or herself from trial or has made any type of preparations to achieve these purposes;
- the accused has attempted to influence another participant in committing the crime, a witness or an expert, or to destroy, tamper with, hide or circumvent material evidence or to determine another person to carry out this behavior;
- the accused is putting pressure on the aggrieved party or is trying to reach a fraudulent agreement with them;
- there is a reasonable suspicion that, following the commencement of criminal actions against her or him, the accused has willfully committed a new crime or is preparing to commit a new crime;
- it can also be taken if from the evidence there arises the reasonable suspicion that he or she has committed a crime against life, by which the bodily harm or the death of a person has been provoked, a crime against national security etc., or any other crime for which the law states a prison sentence of five years or more and, on the

basis of the seriousness of the act, the way and the means by which it was committed, the entourage and environment of the accused, the criminal history and other circumstances surrounding her or his person, it can be affirmed that deprivation of liberty is necessary in order to eliminate a state of danger that targets public order.

The preventive measure of house arrest as well as that of preventive arrest can be ordered with a maximum period of 30 days in the criminal prosecution phase and can be extended only in case of necessity, if the grounds on which the decision was taken are maintained or if new aspects have appeared, the maximum duration being that of 180 days. An absolutely vital aspect is that the duration of liberty deprivation ordered by the measure of house arrest is not taken into consideration in calculating the maximum duration of the preventive arrest measure of the accused in the prosecution phase. As such, a prosecuted accused can be arrested for 360 days, 180 days in house arrest and another 180 in preventive arrest.

In the trial phase, the legislator has understood to regulate in art. 239 C.p.c what the maximum duration of the preventive arrest of the accused is during the initial trials. As such, the total duration of the preventive arrest of the accused cannot exceed a reasonable length and cannot be longer than half of the special maximum as stated by law for the crime that the court has been notified of, but it cannot exceed 5 years. As such, provided that the accused is sent to trial for the crime of homicide which is to be punishable by 10-20 years in prison, although half of the special maximum would be 10 years, the maximum duration of preventive arrest will be 5 years. This term begins either when the court is notified, in the event that the accused is sent to trial while being under preventive arrest, or when the warrant is put into effect in the event the arrest was ordered in the preliminary hearing, the trial phase or of lack thereof.

We can observe that in the criminal procedure code the institution of the maximum duration of house arrest in the trial phase is not regulated, we believe that this is solely an omission from the part of the legislator and that the provisions of art. 239 of the C.p.c will apply *mutatis mutandis* for this preventive measure as well. In the specialized doctrine[11] it is affirmed that in the preliminary hearing phase and in the trial phase the preventive measure can be ordered for an indefinite duration, intervened by the obligation the preliminary hearing judge or the court has to periodically check its legality and groundedness. Such an interpretation lies in contradiction to the considerations of the Constitutional Court's decision that has pronounced itself regarding the unconstitutionality of judiciary control, in the sense that the legislator had not regulated the maximum duration for which this measure could be ordered.

The first situation when these two discussed preventive measures are legally terminated is on the expiration of the terms as stated by law or established by the judiciary bodies or on the expiration of the 30 day term, if the preliminary hearing judge or the rights and liberties judge has not acted towards the verification of the legality and groundedness of the house arrest in this time, respectively on the expiration of the 60 day term, if the court has not acted towards the verification of the legality and groundedness of the house arrest in this time.

In the event it has been ordered for the case to return to the prosecutor, the house

[11] N. Volonciu, ş.a. *Noul Cod de procedură penală comentat*, ed. Hamangiu, 2014. P. 533.

arrest measure and the preventive arrest respectively of the defendant can be maintained even after the case has been returned to the prosecutor, for a period of maximum 30 days which cannot be greater than the difference between the maximum term of 180 days and the time the defendant spent under house arrest, respectively under preventive arrest in the same case, prior to the notification of the court by indictment; provided that throughout the duration of the prosecution the accused's house arrest was 180 days long, after ordering the return of the case to the prosecuting office the preliminary hearing judge cannot maintain the house arrest measure, because otherwise the maximum limit of house arrest during the prosecution, as states in the C.p.c. [12] would be exceeded.

Another situation in which the preventive measures of house arrest and preventive arrest are legally terminated find their applicability towards the end of prosecution when the prosecutor orders the solution of halting or giving up on the prosecution, the criminal trial being thus brought to an end in this this instance and thus a preventive measure cannot exist beyond these barriers. As such, through the ordinance by which the solution of halting or giving up on the prosecution is ordered, the prosecutor will also pronounce in regards to the legal termination of the preventive measure, even in the event that the measure was taken or extended by the rights and liberties judge.

The third situation when the institution of legal termination intervenes is when the court orders one of the following solutions: acquittal, putting an end to the criminal trial, postpone putting the sentence into effect or suspending the carrying out of the sentence under supervision, even if not permanently. The preventive measure will also be legally terminated in the appeal phase if the length of the measure has reached the length of the condemned sentence.

The fourth situation when the preventive measure will be deemed legally terminated refers to when a sentence decision is deemed permanent, as such the person that is deprived of liberty will remain incarcerated, but not because the preventive measure is being maintained, but because it has been converted to a sentence that is about to be carried out.

The legal termination of the preventive arrest measure is also put into effect if the court of appeal allows an appeal requested solely by the accused and sends the case to the first court in order for it to be rejudged, if the length of the sentence pronounced in the first court is equal to the measure of preventive arrest; in this case, as a consequence of applying the *non reformation in peius* principal, the court will not be able to pronounce a sentence longer than the initially pronounced sentence. [13]

We observe that in art. 241 paragr. 1 letter d from the C.p.c. the legislator regulates that preventive measures legally terminated only in other cases as stated by law. By analyzing the provisions of the C.p.c., we believe that by other cases as stated by law we can also consider to be the following situations:

- when the court pronounces a decision to sentence to prison for a duration that is equal to that of the retention and the preventive arrest (art. 399 paragr. 3 letter a from the C.p.c.); we deem that the legislator out of error has not mentioned here the house arrest measure as well and for identity of reason I believe it is necessary for the law to be modified. In such an event, even if the

[12] M.Udroiu, *Procedura penala.Partea generală*, ed. C.H.Beck, Bucharest, 2014, p.528.
[13] M.Udroiu, *Procedura penala.Partea generală*, ed. C.H.Beck, Bucharest, 2014, p.493.

sentence is not definitive, the house arrest or preventive arrest measure will be immediately put to an end as soon as the duration of retention and arrest become equal to the duration of the pronounced sentence.

- when the court pronounces a fine sentence that does not accompany the prison sentence or when it pronounces an educational measure (art. 399 paragr. 3 letters c and d of the C.p.c.);
- also, another case is the one included in the provisions of art. 43 paragr. 7 from Law 302/2004 regarding international judiciary cooperation on criminal matters, which shows that the measure of arrest for rendition is legally terminated if the rendered person is not taken by the competent authorities of the solicited state in a period of 30 days since the agreed upon date for rendition, with the exception of instances of *force majeure* that obstruct the rendition or the collection or the rendered person, an event in which the Romanian authorities and those of the soliciting state will agree upon a new date for rendition;[14]
- considering art. 493 of the C.p.c. legal termination of preventive measures also intervenes regarding measures taken against legal persons; preventive measures towards legal persons can be ordered for a period of maximum 60 days, with the possibility to extend it during prosecution and to maintain it during the preliminary hearing or trial phase if the grounds on which the measure was taken still stand, each extension cannot exceed 60 days.

**The procedure through which a preventive measure is declared legally terminated**

The ones entitled to pronounce a preventive measure as being legally terminated are the judiciary bodies that have ordered the measure, or the prosecutor, the rights and freedoms judge, the preliminary hearing judge or the court that has adopted the case. The judiciary bodies will pronounce themselves through an ordinance (the prosecutor) or through a closure/sentence/decision by default, upon request or at the demand of the administration of the detention place[15].

The judiciary organs will order the solution of legal termination of the preventive measure by ordering, in the case of the retained or preventively arrested, her or his immediate release, providing that he or she is not retained or arrested by other reasons. We thus observe another inconsistency of the legislator that does also mention the situation of the person under house arrest where for the same conditions there must be the same solution.

The rights and liberties judge, the preliminary hearing judge and, last but not least, the court will pronounce themselves by an argued closing statement made in the presence of the accused which will be mandatorily assisted by the prosecutor. It is possible for the judiciary bodies to

[14] B. Micu, A.G.Păun. R. Slăvoiu, *Procedura penală. Curs pentru admiterea în magistratură și avocatură. Teste – grilă,* ed. Hamangiu, Bucharest, 2014, p. 146.

[15] To be consulted decision 206/2015 of the ICCJ (High Court of Cassation and Justice) file nr. 1054/2/2014/a18: Accepts the appeal declared by the accused Chiriţă Mihai Gustin against the closure from the date of February the 3rd 2015 pronounced by the Bucharest Court of Appeal, Second Criminal Division in file no. 1054/2/2014. It completely renders the attacked closure useless and, by rejudging: Accepts the ANP notification and deemes the measure of preventive arrest taken against the accused Chiriţă Mihai Gusti as legally halted. Orders the release of the accused from the under the preventive arrest warrant no. 17/UP/25.11.2013, emitted by the Bucharest Court of Appeal, First Criminal Division. The judiciary expenses remain the responsibility of the state. The partial fee addressed to the defendant named by default until the chosen defendant had been prezented, namely 50 lei, will be suported from the funds of the Ministry of Justice. Permanent.

pronounce while not being in the presence of the accused but it is necessary for him or her to be represented by a chosen or default attorney, no harm will be produced in such a situation but it aims for the prompt solving of the demand or appeal. The judiciary bodies hold the responsibility of immediately notifying[16] the person against which the preventive measure was taken as well as the institutions with the attributes to execute the measure a copy each of the ordinance or the closure/sentence/decision by which the legal termination of the preventive measure had been deemed.

An appeal can be made against the closure by the prosecutor or the accused for 48 hours after the pronouncement for those who were present, respectively from the notification for the prosecutor or accused who were not present at the pronouncement. The appeal made against the closure by which the legal termination of this measure is not suspended from enforcement, the closure being enforceable.

### 3. Conclusions

We believe that we have reached our main objectives stated at the beginning of the present study and we have analyzed in depth the institution of legal termination of preventive measures, praising the legislator when he or she succeeded in regulating the discussed legislation in better conditions compared to the old regulation, but also criticizing the encountered legal inconsistencies, making *lege ferenda* proposals for this purpose.

The institution of legal termination of preventive measures, through its crucial importance, we believe will constitute a subject that shall be tackled in the future by

[16] To be consulted the Ogică v. Romania case (the decision from May 27th 2010): Friday, January the 31st 2003, immediately after the permanent decision that the pronounced sentence will expire at midnight had been pronounced (supra, point 8), the registry of the Bucharest Court of Appeal had written a letter to inform the Bucharest-Jilaba penitentiary about the conditions of the decision for the administration the take necesarry measures. A proceeding elaborated on the same day at 15:10 by the court of appeal registry had referenced the previously carried out procedures on the bases of the previously cited decision. In it it was mentioned that, on the phone, the commander of the Bucharest-Jilava Penitentiary had informed the registry that the secretariat was closed and nobody was there to receive the fax that pertained to the conditions of the decision. According to this proceeding, the commander had directed the call to the prison's on guard officer who had mentioned that a release of the claimant could not be carried out merely on the basis of a phone call, without any written document. After they had received by fax on Monday, February the 2nd 2003, at 07:52, the conditions of the decision from January the 31st 2003, the administration of the Bucharest-Jilava penitentiary had begun to partake in the necesarry procesures and, at 10:40, had released the claimant. In the case, the Court had observed that the definitive decision from January 31st 2003 had sentenced the claimant to a punishment that had the same length to that of the detention he had already executed until that date and that, immediately after pronouncing the decision, the register of the court of appeals had contacted the Bucharest-Jilava penitentiary to take the necesarry measures to foresee the release of the interested party; the Court mentiones that the recording of the failuire of these measure in the proceeding. The Court reminds that, upon the examination of the term for executing the decisions for releasing the claimants in cases in which the requested conditions for release were met at a time were the prison employee that was tasked with the neccesary operations was not present by reasons of work schedule, this did not exclude periods such as evening or night time. It cannot even moreso adopt another approach especially since, unlike the *Calmanovici* case, the registry of the court of appeal had contacter the Bucharest-Jilava penitentiary in the daytime in order to inform the definitive pronounced decision and the necessity to take the necesarry measures for the release of the claimant. The Court cannot accept that, because of the secretariat's work schedule, the administration of a prison did not take measures for receiving, on Friday, at early evening, a fax-sent document that was necessary that the release of a prisoner, being aware that the closing of the secretariat would lead to maintaing the interested party in confinement for a period of over forty-eight hours. In the opinion of the Court, such a delay cannot qualify as „a minimal inevitable delay" for the execution of a definitive decision that had the effect of releasing a person. As such, said detention is not grounded in one of the paragraphs of art. 5 from the Convention. As such, it concludes that art. 5 § 1 had been violated.

criminal procedural law experts and the judiciary practice, through the numerous encountered situations, will offer us new elements that will help draw attention to the signaled aspects.

**References**


- The criminal procedure code.
- The criminal code.
- Law no. 255/2013 for the implemen-tation of Law no. 135/2010 regarding the Criminal procedure code.
- The Romanian Constitution.
- Ion Neagu, Mircea Damaschin, Tratat de procedură penală – Partea generală, ed. Universul Juridic, Bucharest, 2014.
- N. Volonciu și alții, Noul Cod de procedură penală comentat, ed. Hamangiu 2014.
- M. Udroiu – Procedură penală, Partea specială, ed. C.H. Beck, Bucharest, 2014.
- A. Zarafiu, Procedură penală, Partea generala. Partea specială, ed. C.H. Beck, Bucharest, 2014.
- B. Micu, A.G.Păun. R. Slăvoiu, Procedura penală. Curs pentru admiterea în magistratură și avocatură. Teste – grilă, ed. Hamangiu, Bucharest.
- P. Buneci ș.a., Noul Cod de procedură penală Note. Corelații. Explicații., ed. C.H. Beck, Bucharest, 2014.
- V. Dongoroz, ş.a., Explicații teoretice ale Codului de procedură penală român. Partea generală, vol. V, ed. A 2-a, Ed. Academiei, Ed. All Beck, Bucharest, 2003.
- Gh. Theodoru, Drept procesual penal român. Partea specială, Universitatea Al. I Cuza, Facultatea de Drept, Iași, 1974, Vol. II.
- www.ccr.ro
- www.just.ro
- www.echr.coe.int