

# THE PREVENTIVE ARREST OF A PERSON IN PREVENTIVE DETENTION STATUS

Bogdan MICU\*

## Abstract

*The paper addresses a practical issue of great relevance, namely that of opportunity and utility of preventive arrest of a person who is already in detention in another case. The issue is also extended and other preventative measures and is related to the fulfillment of the requirement of “threat to public order” imposed to be met in this matter.*

**Keywords:** *preventive arrest, house arrest, danger to public order, preventive measures.*

## 1. Introduction

In judicial proceedings in the field of criminal law, it is often found the need to have and enforce preventive measures aimed mainly to ensure the proper conduct of the criminal trial. Under no circumstances, however, such measures, which have a negative impact on the rights and freedoms of the persons referred to may be taken if the general and special conditions required by the law are not met.

As indicated by art. 202 para. (4) Criminal Procedure Code, the preventive measures are: arrest, judicial review, judicial review on bail, house arrest and preventive arrest. The choice of either of these measures with regard to a concrete situation will be taken based on the fulfillment of the legal conditions, but also in agreement with the principle of proportionality also provided for in art. 202 para. (3): “any preventive measure shall be proportionate to the seriousness of the accusation of the person to whom it is taken and it is needed for the

achievement of the aim pursued through its disposition.”

In recent jurisprudence, we could notice the trend of taking the measure of preventive arrest, the most severe of the preventive measures, with regard to persons who were already in the custody of the State, either they were in the situation of serving a sentence, or they were the subject of another preventive arrest warrant. With regard to this practice, we appreciate that it is inconsistent with the conditions under which it may order the preventive arrest. To argue this opinion, we will proceed, first of all, to analyze the conditions that must be met for the preventive measure of arrest to be ordered.

## 2. The conditions under which the preventive arrest of a person may be ordered

Thus, firstly, to take the preventive measure of arrest in the custody of the State, it needs to be found that the measure is necessary to ensure the general goal of

---

\* Associate Professor, PhD, Faculty of Law, „Nicolae Titulescu” University of Bucharest (e-mail: bogdanmicu@mnpartners.ro).

preventive measures, as shown in art. 202 paragraph (1) Criminal Procedure Code. According to the quoted text, any preventive measure may be ordered: “if there is evidence or reasonable indications which show reasonable suspicion that a person has committed a criminal offense” and if it is necessary “in order to ensure the proper conduct of the criminal trial, of preventing the circumvention of the suspect or defendant from prosecution or trial or to prevent the committing of another crime.”

Given the provisions included in article 202 para. (1) to (3) Criminal Procedure Code, we have to find that for taking the preventive measure of arrest all general conditions of preventive measures should be fulfilled:

a) to have solid evidence or indications showing a reasonable suspicion that a person has committed an offense [art. 202 para. (1) Thesis 1 Criminal Procedure Code]. The condition was assessed in the specialized doctrine as superfluous because preventive measures necessarily imply the existence of a procedural framework which cannot exist without evidence or solid clues that show that a certain offense was committed<sup>1</sup>.

However, we also notice in the specialty doctrine that the wording “there are strong clues” which shows a reasonable suspicion that a person has committed an offense is similar to that contained in article 5 paragraph 1 letter c) thesis 1 of the European Convention for the defense of human rights and fundamental liberties

“there are credible reasons” to believe that a person has committed an offense<sup>2</sup>. In the case law of the European Court of human rights it is stated that “credible reasons” means the existence of reliable data or information, to convince an objective observer that it is possible that the investigated person committed the offense, the reasoning inferred in the circumstances of each cause<sup>3</sup>.

b) the measure involving deprivation of liberty to be necessary in order to ensure the proper conduct of the criminal trial, circumvention of the suspect, or defendant from criminal prosecution or trial or prevention of committing another crime [art. 202 para. (1) thesis 2 Criminal Procedure Code]. Obviously, by these provisions the legislator has set the determinant goal of taking a preventive measure, which is to ensure the proper conduct of the criminal trial<sup>4</sup>, the legal nature of the preventive measures being that of the “means of activating the criminal prosecution, the criminal process generally”<sup>5</sup>.

About the assumption “to prevent the circumvention of the person committing the offense from prosecution or trial”, the doctrine shows that it might be missing because the proper conduct of the criminal trial implies the presence of the suspect or defendant in prosecution or trial activities<sup>6</sup>. At the same time, views have been expressed, according to which the basis relating to the prevention of committing another offense, being a too general

<sup>1</sup> I. Neagu, M. Damaschin, “Tratat de procedură penală, Partea generală”, Universul Juridic Publishing House, Bucharest, 2014, p. 587.

<sup>2</sup> A. Țuculeanu, C. Sima, “Condițiile reținerii și ale arestării preventive în reglementarea noului Cod de procedură penal”, in “Revista Dreptul” no. 3/2015, p. 61 and the followings.

<sup>3</sup> C.E.D.O., “Cauza Fox, Cambell, Hartley contra Marii Britanii”, Decision of 30 August 1990, www.echr.coe.int; C.E.D.O., Cauza Varga contra României, Decision of 11 March 2008 www.echr.coe.int.

<sup>4</sup> I. Neagu, M. Damaschin, op. cit., p. 588.

<sup>5</sup> Constitutional Court, Decision no. 81 of 27 January 2011, published in the Official Gazette of Romania, Part I, no. 133 of 22 February 2011.

<sup>6</sup> G. Radu, “Măsurile preventive în dreptul procesual penal Român”, Hamangiu Publishing House, Bucharest 2007, p.6.

formulation, may not be accepted as a distinct basis for deprivation of liberty of a person, but rather a circumstance that can serve, adapted to the conditions of article 223 para. (1), letter d), final thesis of the Criminal Procedure Code, to the arrest of the defendant<sup>7</sup>.

c) The preventive measure shall be proportional to the seriousness of the charges of the person against whom it is taken and it is needed for the achievement of the aim pursued through its disposition. [art. 202 para. (3) Criminal Procedure Code] The doctrine notes that among the prevention measures and the system of criminal sanctions, there should be a certain resonance because the status of freedom during criminal trial must correspond to a certain extent to the one existing after the application of criminal sanction, even showing that the criminal repression begins during the prosecution or trial of the case<sup>8</sup>.

However, the requirement of proportionality of the measure in relation to the seriousness of the accusation is reflected in articles 53 para. (2) thesis II of the Constitution of Romania, under which the restriction of the right to freedom may only be ordered if the restriction is proportional to the situation that caused it, is non-discriminatory and shall not affect the existence of that right. The deprivation of

liberty of a person is optional, being a serious measure, it is justified only if, in the circumstances of the case as a whole, other measures, less severe, are insufficient to achieve the goal shown in art. 202 para. (1) Criminal Procedure Code<sup>9</sup>.

Moreover, art. 202 para. (4) Criminal Procedure Code lists in a certain order the preventive measures. The sequence used by the legislator also indicates the severity of the measure within the framework of preventive measures, the order of preference being given to measures which provide a lower level of interference on the rights and freedom of the person.

d) there is a cause that prevents the beginning of the criminal action or the exercise of criminal action [art. 202 para. (2) Criminal Procedure Code]. The condition is characterized as being unnecessary in the context the existence of any of the causes of the art. 16 Criminal Procedure Code<sup>10</sup> stops the whole course of the criminal procedure under which such a measure of prevention could be ordered<sup>11</sup>.

e) the suspect or defendant should be heard in the presence of the lawyer chosen or appointed ex officio, insofar as he / she does not evade prosecution and does not exercise his /her right to silence.

These general conditions listed above must be met for the disposition of any

<sup>7</sup> A. Țuculeanu, c. Sima, URop.cit., p. 61 and following.

<sup>8</sup> I. Neagu, M. Damaschin, op. cit., p. 588.

<sup>9</sup> A. Țuculeanu, c. Sima, URop.cit., p. 61 and following.

<sup>10</sup> According to article 16 Criminal Procedure Code, the criminal proceedings may not be started, and when it was started it can no longer be exercised if: a) the deed does not exist; b) the deed is not specified by the criminal law or has not been committed with the laid down by law; c) there is no evidence that a person has committed the offense; d) there is a justifying cause (self-defense, state of necessity, exercise of a right or the fulfillment of an obligation, the consent of the injured person) or non-liability (physical coercion, moral coercion, non-attributable excess, minority of the perpetrator, irresponsibility, unintentional poisoning with alcohol or other psychoactive substances, error, unforeseeable situation); e) prior complaint is missing, authorization or referral to the competent body, or some other condition prescribed by law, necessary to start the criminal action; f) amnesty, prescription or death of the suspect or defendant; g) prior complaint was withdrawn, reconciliation, or a mediation agreement was signed; h) there is a cause of impunity; i) there is an authority of judgment; j) there has been a transfer of proceedings to another state, according to the law.

<sup>11</sup> I. Neagu, M. Damaschin, op. cit., p. 589.

preventive measure, regardless of its seriousness. Specific conditions of each of the measures to be ordered are added to all these.

Regarding the preventive arrest of the defendant, the special conditions are indicated by art. 223 Criminal Procedure Code: a) to have solid evidence or clues which show reasonable suspicion that a person has committed an offense; b) preventive arrest measure is necessary in order to ensure the proper conduct of the criminal trial, to prevent the circumvention of the defendant from prosecution or trial, avoid committing a crime; c) to record alternative performance of any of the situations referred to in article 223 Criminal Procedure Code.<sup>12</sup>

The specialty doctrine shows that in the Criminal Procedure Code there are two main categories in which the preventive arrest may be ordered, each having its own conditions<sup>13</sup>. The two categories are: assumptions of preventive arrest separate from the threat condition for public order [provided for in article 223 para. (1) letters a) - d) Criminal Procedure Code], namely, assumptions of preventive arrest ordered in consideration of danger to public order posed by the defendant [provided for in article 223 para. (2) Criminal Procedure Code].

I. Assumptions of preventive arrest separate from the threat condition for public order [provided for in article 223 para. (1) letters a) - d) Criminal Procedure Code] involving the meeting the following requirements:

a) there should be evidence indicating reasonable suspicion regarding the commission of an offense by the defendant.

The requirement stresses that for taking the measure of preventive arrest, as the most severe of the preventive measures, it is not enough to have strong indications that an offense has been committed, as evidence is needed<sup>14</sup>.

d) to be one of the situations listed in article 223 para. (1) letters a) - d) of the Criminal Procedure Code:

- the defendant fled or hid in order to evade the prosecution or trial, or has made any preparations for such actions;

- the defendant attempts to influence another participant in the offense, a witness or expert or to destroy, alter, conceal or steal material evidence or determine another person have such behavior;

- the defendant pressures the injured person or tries to reach a fraudulent agreement with him / her;

- there is reasonable suspicion that, after the beginning of the criminal action against him, the defendant has committed intentionally a new crime or is about to commit a new crime.

As related to these issues, it is not enough to invoke them in an abstract manner, but factual evidence should be presented<sup>15</sup>. For example, in the case of Griskin against Russia, the arrest was based on the existence of a threat of destruction or forgery of evidence. However, the authorities have made reference to this threat without indicating concrete reasons to justify that the defendant could abuse the freedom to commit acts of destruction or forgery of evidence, and for this reason, the breach of conventional provisions has been found<sup>16</sup>.

II. The hypotheses of preventive arrest ordered in consideration of danger to public

<sup>12</sup> Idem, p. 628.

<sup>13</sup> M. UdROIU, *Procedură penală, Partea generală*, Editura C.H. Beck, București, 2014, p. 402.

<sup>14</sup> I. Neagu, M. Damaschin, *op. cit.*, p. 629.

<sup>15</sup> C.E.D.O. Case Tase against Romania, Decision of 10 June 2008, [www.echr.coe.int](http://www.echr.coe.int); Case Calmanovici against Romania, Decision of 1 July 2008, [www.echr.coe.int](http://www.echr.coe.int).

<sup>16</sup> C.E.D.O. Case Griskin against Russia, Decision of 24 July 2012, [www.echr.coe.int](http://www.echr.coe.int).

order which the defendant poses [provided for in article 223 para. (2) Criminal Procedure Code]

In the case of certain serious offenses, paragraph (2) of art. 223 of the Criminal Procedure Code provides for the possibility of taking the measure of preventive arrest of the defendant and in the other case, in compliance with the following conditions:

a) there should be evidence indicating a reasonable suspicion that the defendant has committed a crime that falls within the categories listed in article 223 para. (2) Criminal Procedure Code. As we the specialty doctrine provides, the offenses referred to in paragraph (2) of article 223 of the Criminal Procedure Code are also found in paragraph (1) of article 223 Criminal Procedure Code, being included in the generic formulation used by the legislator in paragraph (1) of article 223 Criminal Procedure Code: "the defendant has committed an offense," without further details. The difference between the two texts - paragraphs (1) and (2) of article 223 Criminal Procedure Code consists in establishing different situations (grounds) that legitimate the preventive arrest of the defendant<sup>17</sup>.

Thus, basis of depriving the defendant of his liberty, as follows from paragraph (2) of article 223 Criminal Procedure Code refers to the following offenses: an intentional crime against life, a crime which has caused personal injury or death to a person, an offense against national security laid down in the Criminal Code and other laws, offenses of drug trafficking<sup>18</sup>, weapons smuggling, human trafficking, terrorism, money laundering, counterfeiting of money or other values, blackmail, rape, illegal restraint, tax evasion, abuse, legal

abuse, corruption, an offense committed by means of electronic communication, or any other offense for which the law provides for punishment by imprisonment of 5 years or more.

b) there is no cause that prevents the beginning or the exercise of criminal action of those provided for in article 16 Criminal Procedure Code;

c) the criminal action should have been started for the crime for which there is a reasonable suspicion that it has been committed;

d) the measure is necessary to ensure the proper conduct of the criminal proceedings, to prevent the circumvention of the defendant from prosecution or trial or to prevent him commit a new crime (the proper conduct of criminal proceedings);

e) the measure is proportional to the seriousness of the accusation against the defendant and it is required for the achievement of the aim pursued in ordering it;

f) defendant was heard by the judge in the presence of the lawyer chosen or appointed ex officio;

g) defendant's deprivation of liberty would be necessary for the removal of a threat to public order.

This requirement is particularly of interest for this study, which is why we will analyze it in a thorough manner.

Thus, the doctrine notes that by this requirement, the legislator has established a legal alternating criterion which it reports for the incidence of situations that legitimate the deprivation of liberty, as appropriate, in the circumstances referred to in article 223 para. (1) letters a)-d) Criminal Procedure Code or, in their absence, the complex character

<sup>17</sup> A. Țuculeanu, c. Sima, URop.cit., p. 61 and following.

<sup>18</sup> The Constitutional Court admitted the exception of unconstitutionality regarding the phrase "drug trafficking" mentioned in the provisions of art. 223 para. (2) Criminal Procedure Code by Decision 553/2015 .

referred to in article 223 para. (2) Criminal Procedure Code<sup>19</sup>.

For the purpose of the threat for public order, the judge of rights and freedoms, the preliminary chamber judge, or the court will have to take into account the following criteria: the seriousness of the offense, the manner and circumstances of committing the offense, the entourage and environment from which the defendant comes, criminal history and any other circumstances relating to the defendant, hypotheses of preventive arrest measures ordered in consideration of danger to public order posed by the defendant [provided for in article 223 para. (2) Criminal Procedure Code].

However, we cannot fail to notice that there is no legal definition for the term “public order”. In the Explanatory Dictionary [DEX], the term “public order” means political, economic and social order in a state which is ensured through a set of rules and special measures and translates by the normal functioning of the state apparatus, maintaining the peace of the citizens and compliance with their rights<sup>20</sup>.

In the specialty doctrine, it is shown that the public order disturbance, to a certain extent, is related to the things felt by public opinion and not only by the objective data justifying this placement in detention as an exceptional measure. In doing so, the judge need not necessarily be insensitive to the public opinion, but he must provide a balance between the conflicting interests of the victim and the offender, for the purpose of respecting the rights of each party and the public interest<sup>21</sup>.

Against this background, according to a separate opinion, the public order is understood as a component of the rule of law and it concerns the proper conduct of life in society, ensuring public safety and security of citizens<sup>22</sup>. In the same way, it has been shown that the assessment of threat to public order should be considered evidence on record showing the exterior elements made or to be made, and that would demonstrate the existence of a present danger for a collectivity of people so that the arrest is necessary to eradicate the hazard in question<sup>23</sup>.

As regards the existence of a threat to public order, and in the case law of C.E.D.O., several emphases were made. For example, the Court found the breach of the provisions of art. 5 of the Convention because the authorities did not show any actual circumstance (negative) on the defendant, and the existence of a threat to public order arises only from the seriousness of the offense, the cause not being complex<sup>24</sup>.

The domestic case law showed in a concrete situation that leaving at liberty the defendant investigated for illegal restraint and blackmail, poses danger for public order, considering the circumstances of committing the offense and the defendant. For this, the Court pointed out that the defendant exercised violence on the victim, confined him illegally, by transporting him to a basin dam and threatening him to throw him in the lake if he did not pay his debt. The danger to public order also results from the defendant’s quality, under-officer with I.S.U. Instead of acting, according to his

<sup>19</sup> A. Țuculeanu, C. Sima, *Rop.cit.*, p. 61 and following.

<sup>20</sup> Explanatory dictionary of the Romanian language, Bucharest, 1996, p. 726.

<sup>21</sup> M. Udroui, *op.cit.*, . 416.

<sup>22</sup> A. Țuculeanu, c. Sima, *URop.cit.*, p. 61 and following.

<sup>23</sup> Gh. Mateuț, *Tratat de procedură penală. Partea generală*, vol. II, C.H. Beck Publishing House, Bucharest 2012, p. 369-370.

<sup>24</sup> C.E.D.O. Romanova against Russia, Decision of 20 October 2005, [www.echr.coe.int](http://www.echr.coe.int).

professional status, to save his fellows, he acted to the contrary, causing suffering to the victim of the crime. In the absence of a resolute response, such actions would encourage crime climate and would lessen citizens' confidence in the authorities<sup>25</sup>.

### **3. The necessity to find the existence of the current danger to public order**

We may find that in terms of the danger requirement for public order, there are principle changes compared with the previous Code of Criminal Procedure, which we do not find in the legal practice reflected properly.

Thus, in art. 223 para. (2) of the Criminal Procedure Code in effect, the term used by the legislator is: "it is found that the deprivation of liberty would be necessary for the removal of a threat to public order." Differently, art. 148 paragraph (1) letter f) of the Criminal Procedure Code 1968 shows that preventive arrest could be ordered if the general conditions of preventive measures were fulfilled: f) the defendant committed a crime for which the law provides for life imprisonment or jail for more than 4 years and there is evidence that his discharge is a real danger for the public order".

Under the previous Criminal Procedure Code, the assessment of danger was made by reference to the further behavior of the person, related to which the question of preventive arrest arose. Based on the appreciation elements made available to the Court it is shown that leaving the defendant free would cause danger to public order. This way, the phrase "danger to public order" designated a state that would endanger in the future the normal conduct of the social cohabitation rules, if the defendant was free, aiming at all social values protected by the criminal law. With regard to

the fulfillment of this requirement, two elements had to be taken into consideration: the practical danger of the action and the perpetrator.

Differently, the new Criminal Procedure Code uses the expression: "it is found that the deprivation of liberty would be necessary for the removal of a threat to public order." In this way, on the occasion of analyzing the need of taking the measure of preventive arrest, it is no longer taken into consideration the social behavior of the defendant. Under the new provisions, it must be noted that at that time, the defendant's freedom is a danger for public order, danger in full swing, and that the only way to stop this danger is deprivation of freedom.

### **4. About the impossibility of ordering the preventive arrest in consideration of danger to public order posed by the defendant for persons already arrested**

In these circumstances, it appears as surprising the common practice of preventive arrest of a person who is already in the custody of the State, either under a different preventive arrest warrant, or even under a writ of execution of a punishment applied in another case. We believe that such a practice does not represent anything other than a manifestation of inertia in implementing legal provisions better known from the previous Criminal Procedure Code, whereas the new provisions cannot cover such practice.

Our affirmation considers that it is excluded to find as fulfilled the requirement: "his deprivation of freedom is necessary for the elimination of a threat to public order with regard to a person who is already in the custody of the authorities. In no case, one cannot assert about a person held in a

<sup>25</sup> I.C.C.J., Criminal Section, Conclusion no. 3802/10 November 2009, Case Law Bulletin, p. 845.

detention center and preventive arrest or even in a prison that his freedom since that time presents real danger for public order, for the simple reason that the condition of freedom does not exist at the time of the evaluation. In these circumstances, the new measure of preventive arrest cannot be regarded as necessary for the removal of a state of danger, which is why it appears as unlawful because it does not comply with the requirements for taking such measures.

We are unable to accept any possible motivation which would refer to the need for the new arresting warrant that would ensure the prevention of possible future circumvention of the person in detention but that could be released either because the preventive measure would reach the maximum period, would be revoked, replaced or the person would be released under parole or released as the punishment period would be fulfilled. Even in such cases, we may not talk about a real danger for public order, but about a future and possible danger. In these circumstances, the danger could be ascertained only after the release of the person placed in detention, making it impossible to be proved prior to the release.

An arrest warrant issued if the person to which it refers is already in the custody of the State is meaningless and lacking real efficiency, because it may not be enforced. Moreover, it shall comply with the general scheme and be extended or checked within

the terms specified by law, since it has a limited period in time. We believe that it is a useless legal effort to order a preventive measure which does not have the effectiveness imposed by art. 202 Criminal Procedure Code and it is even more useless to verify a measure that was never enforced.

It would be even more difficult to accept the assumption that following a request of preventive arrest by the Prosecutor's Office, the Court would appreciate that this is not proportional with the seriousness of the situation analyzed and orders house arrest. In this case, the person for whom the measure was taken is already in the custody of the State, and at the same time, he would not be allowed to leave the house.

## 5. Conclusions

We appreciate that the preventive arrest may not be legally ordered in consideration of danger to public order posed by the defendant in respect of a person who is already arrested preventively or who is imprisoned to serve time, whereas such a measure is unlawful. The element of unlawfulness relates to the failure to comply with the special condition indicated in art. 223 para. (2): Criminal Procedure Code. "it is found that the deprivation of liberty would be necessary for the removal of a threat to public order."

## References

- I. Neagu, M. Damaschin, "Tratat de procedură penală, Partea generală", Universul Juridic Publishing House, Bucharest, 2014, p. 587.
- A. Țuculeanu, C. Sima, "Condițiile reținerii și ale arestării preventive în reglementarea noului Cod de procedură penal", in "Revista Dreptul" no. 3/2015, p. 61 and the followings.
- Constitutional Court, Decision no. 81 of 27 January 2011, published in the Official Gazette of Romania, Part I, no. 133 of 22 February 2011.
- G. Radu, "Măsurile preventive în dreptul procesual penal Român", Hamangiu Publishing House, Bucharest 2007, p.6.



- M. Udriou, Procedură penală, Partea generală, Editura C.H. Beck, București, 2014, p. 402.
- Gh. Mateuț, Tratat de procedură penală. Partea generală, vol. II, C.H. Beck Publishing House, Bucharest 2012, p. 369-370.