

# THE PREVENTIVE MEASURE OF DETENTION

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## ABSTRACT:

*DETENTION IS THE PREVENTIVE MEASURE OF DEPRIVATION OF LIBERTY WHICH THE CRIMINAL INVESTIGATIVE BODY MAY RULE BY AN ORDINANCE AGAINST THE SUSPECT OR DEFENDANT IF THERE ARE SOLID PIECES OF EVIDENCE OR PROOF THAT GIVE RISE TO THE REASONABLE SUSPICION THAT HE/SHE HAS COMMITTED AN OFFENSE AND THAT THE MEASURE IS NECESSARY IN ORDER TO ENSURE THE PROPER CONDUCT OF HIS/HER CRIMINAL PROCEEDINGS, IN ORDER TO PREVENT THE SUSPECT OR DEFENDANT FROM ESCAPING CRIMINAL PROSECUTION OR TRIAL, OR SO AS TO PREVENT HIM/HER FROM COMMITTING ANOTHER OFFENSE<sup>1</sup>.*

**KEY WORDS:** DETENTION, SUSPECT, DEFENDANT, CRIMINAL PROCEDURE CODE

## 1. Introduction

Preventive measures - detention, judicial control, pre-trial judicial control with bail, house arrest, preventive arrest - may be ordered if there is evidence or good reason to believe that a person has committed an offense and if they are necessary for the proper conduct of the criminal proceedings, for preventing the suspect or defendant from escaping criminal prosecution or trial or so as to prevent him/her from committing another offense.<sup>2</sup>

Any preventive measure must be proportionate to the seriousness of the accusation against the person against whom it is taken, and it must be necessary in order to achieve the aim pursued when it was ruled [art. 202 par. (3) Criminal Procedure Code].

Since they directly concern the suspect's or defendant's freedom, concretized in the deprivation of liberty (in the case of detention, house arrest or preventive arrest) or in the restriction of freedom of movement (in the case of judicial control or pre-trial judicial control with bail), the preventive measures are the most important procedural measures regulated in the Criminal Procedure Code<sup>3</sup>.

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<sup>1</sup> M. Udriou, *Procedură penală. Partea generală*, 4<sup>th</sup> edition, revised and updated, C.H. Beck Publishing House, Bucharest, 2017, p. 549.

<sup>2</sup> <http://corneliuturianu.blogspot.ro/search/label/re%C5%A3inerea>

<sup>3</sup> A. Crișu, *Drept procesual penal. Partea generală*, 2<sup>nd</sup> edition, revised and updated, Hamangiu Publishing House, Bucharest, 2017, p. 433.

It must be stated that these categories of preventive measures can only be disposed on the person who is physically responsible from a criminal point of view<sup>1</sup>.

## 2. Detention - definition

Detention is the preventive measure of deprivation of liberty which the criminal investigative body may dispose by an ordinance against the suspect or the defendant if there are solid evidence or proof that give rise to the reasonable suspicion that he/she has committed an offense and that the measure is necessary in order to ensure the proper conduct of his/her criminal proceedings, in order to prevent the suspect or defendant from escaping criminal prosecution or trial, or so as to prevent him/her from committing another offense<sup>2</sup>. It is the only preventive measure that can be taken by the criminal investigation body and, as opposed to the other preventive measures, it can also be ordered against the suspect.<sup>3</sup>

Detention may be ordered only after the commencement of the criminal prosecution, by the prosecutor or by the criminal investigation bodies, by ordinance. The judge of rights and liberties, the preliminary chamber or the court cannot order the measure of detention.<sup>4</sup>

This measure of deprivation of liberty must not be confused with other forms of deprivation of freedom of movement provided in the Criminal Procedure Code, namely<sup>5</sup>:

- *capturing the perpetrator and immediately bringing him/her before the criminal prosecution authorities*. It is the case of the investigative bodies which, in the case of flagrant offenses, have the right to seize the perpetrator and to present him/her immediately before the criminal prosecution bodies [art. 61 par. (2) final thesis Criminal Procedure Code]. Also, according to the provisions of art. 62 par. (3) Criminal Procedure Code, in the case of flagrant offenses, the commanders of ships and aircrafts have the right to seize the perpetrator and to submit him/her before the prosecution bodies, and according to the provisions of art. 310 Criminal Procedure Code, in the case of flagrant offenses, any person has the right to seize the perpetrator, in which case the person who detained him/her must surrender him/her forthwith, together with the material evidence, as well as with the objects and written documents seized, to the criminal prosecution bodies, which draw up a minute;

- *peremptory writ*. According to art. 265 par. (1) Criminal Procedure Code, a person may be brought before a criminal prosecution body or a court of law on the basis of a peremptory writ if, being previously subpoenaed, he/she has unreasonably failed to appear, and his/her hearing or presence is necessary, or if proper communication of the subpoena was not possible and the circumstances unequivocally indicate that the person is evading receiving the subpoena;

- *keeping in the courtroom*, at the disposal of the court, witnesses, experts and interpreters. According to the provisions of art. 381 par. (9) and (11) of the Criminal Procedure Code, the witnesses to be heard shall remain in the courtroom until the court hearing the hearing is completed. These provisions apply similarly to the hearing of the expert or interpreter.

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<sup>1</sup> Al. Boroi, G. Negruț, *Drept procesual penal*, Hamangiu Publishing House, Bucharest, 2017, p. 311.

<sup>2</sup> M. Udroui, *op. cit.*, p. 549.

<sup>3</sup> A. Crișu, *op. cit.*, p. 465.

<sup>4</sup> M. Udroui, *op. cit.*, p. 549.

<sup>5</sup> Al. Boroi, G. Negruț, *op. cit.*, p. 329-330.

## 2. Applying the measure of detention

### 2.1. Conditions

In order to dispose the detention of the suspect or defendant, the following conditions must be met<sup>1</sup>:

- *there must be evidence (direct or indirect) of the reasonable suspicion that a person has committed an offense (regardless of the punishment provided for it by law);*

- *there must be no cause preventing the commencement or execution of the criminal prosecution provided by art. 16 Criminal Procedure Code;*

- *the prosecution for the offense for which there is a suspicion of being committed was commenced, and the criminal investigative body had ordered to continue the prosecution of the suspect;*

According to the Criminal Procedure Code, the commencement of the criminal prosecution is ordered in respect of the offense (*in rem*), and the assertion of the quality of suspect is made when the relevant evidence leads to reasonable suspicion that a person has committed the offence provided by the criminal law, in which case the continuation of criminal prosecution against him/her is ordered.<sup>2</sup>

The measure of detention may also be ordered if the prosecutor ordered the criminal proceedings to be initiated, with the defendant being present.<sup>3</sup>

- *preliminary hearing of the suspect or defendant in the presence of the lawyer elected or appointed ex officio;*

A guarantee of the right of defence is regulated, through his/her own person, as well as through a lawyer, of the suspect or defendant, thus removing the possibility of arbitrarily taking measures of deprivation of liberty and allowing the prosecuting bodies to specify in concrete terms whether the measure is necessary and proportionate to the aim pursued.<sup>4</sup>

For the effective exercise of the right of defence, the criminal investigating authorities have the obligation to notify the suspect or defendant, prior to the first hearing, of the act under the criminal law for which he/she is suspected or for which the criminal action was initiated and its legal classification, as well as of the rights provided by art. 83 Criminal Procedure Code<sup>5</sup>.

According to art. 209 par. (6) Criminal Procedure Code, before the hearing, the criminal investigation body or the prosecutor is obliged to inform the suspect or the defendant that he/she has the right to be assisted by a lawyer elected or appointed ex officio and the right to make no statement, with the exception of providing information about his/her identity, drawing attention to the fact that whatever he/she declares can be used against him/her.

In accordance with art. 209 par. (7) of the Criminal Procedure Code, the suspect or the defendant has the right to personally notify the elected lawyer or to ask the criminal investigation body or the prosecutor to notify him/her. The manner in which the notification is made shall be recorded in a minute. Exercise of the right to personally notify may be refused only for sound reasons, which shall be recorded in the minutes.

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<sup>1</sup> M. Udroui, *op. cit.*, p. 549-551.

<sup>2</sup> *Idem*, p. 550.

<sup>3</sup> *Ibidem*.

<sup>4</sup> *Ibidem*.

<sup>5</sup> *Ibidem*

The elected lawyer, as provided in art. 209 par. (8) of the Criminal Procedure Code, has the obligation to appear at the headquarters of the judicial body no later than two hours after the notification. In the case of non-attendance of the chosen lawyer, the criminal investigation body or the prosecutor appoints an ex officio lawyer.

The lawyer of the suspect or of the defendant has the right to communicate directly with him/her, under conditions which ensure confidentiality [art. 209 par. (9) of the Criminal Procedure Code].

If the suspect/defendant refuses to make a statement, the criminal investigative body must draw up a minute attesting his/her refusal to make a statement; if the suspect/defendant and/or the lawyer elected or appointed ex officio refuses to sign this minute, the criminal investigative body will record this processual attitude in the content of the minutes.<sup>1</sup>

The refusal of the suspect/defendant to make statements does not affect the legality of the preventive measure<sup>2</sup>.

*- the measure of detention must be necessary in order to ensure the proper conduct of the criminal proceeding, to prevent the suspect or defendant from evading criminal prosecution or trial or to prevent him/her from committing another offense (the proper conduct of the criminal proceeding);*

*- the measure of detention must be proportionate to the seriousness of the accusation brought to the suspect/defendant and necessary in order to achieve the aim pursued by its disposal.*

For certain categories of persons, the measure of detention is subject to<sup>3</sup>:

a) the approval of the Chamber to which the Deputy or Senator to be detained belongs, unless the offense is flagrant, when no prior consent is required, but the criminal investigative body has the obligation of informing the Minister of Justice (he/she immediately informs the President of the Chamber) [art. 72 par. (2) of the Constitution of Romania].

b) the approval of the section of the Superior Council of Magistracy to which the judge, prosecutor or assistant magistrate to be detained belongs, unless the offense is flagrant, when no prior consent is required. However, in the latter case, the criminal investigative body which has taken the measure has the obligation to inform the Superior Council of Magistracy (article 95 of Law No. 303/2004 on the status of judges and prosecutors).

c) the approval of the Presidents of the two Chambers of Parliament in case the People's Advocate is to be detained [art. 31 par. (1) of the Law no. 35/1997 on the organization and functioning of the People's Advocate Institution].

## **2.2. Duration**

According to art. 209 par. (3) of the Criminal Procedure Code, detention may be ordered for up to 24 hours. The duration of the detention does not include the time strictly necessary for the suspect or defendant to be taken to the headquarters of the judicial body, according to law.

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<sup>1</sup> Idem, p. 551.

<sup>2</sup> Ibidem.

<sup>3</sup> I. Poiană, I. Păcurariu, *Drept procesual penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2014, p. 185-186.

The order under which the detention was ordered must state the reasons which led to the taking of the measure, the date and time at which the detention commenced, and the date and time when the detention will cease.<sup>1</sup>

Upon expiration of the period for which the measure was ordered (24 hours or less), it ceases, and the law does not provide the possibility of prolongation<sup>2</sup>.

The period for which the detention was ordered shall run from the date when the detention order was issued, if the preventive measure is ordered after hearing the suspect/defendant who was not deprived of his/her liberty; in this case, the suspect or defendant appears voluntarily before the criminal prosecution body as a result of the subpoena received or is brought under a peremptory writ, and after the hearing the order of detention is disposed.<sup>3</sup>

According to art. 265 par. (12) of the Criminal Procedure Code, the persons brought with peremptory writ shall be made available to the judicial body only for the duration of the hearing or for the performance of the procedural act which required their presence, but not more than 8 hours, unless detention was ordered.

The time it takes for the suspect or defendant to be brought to the criminal prosecution office with a forced execution order will not be taken into account neither when calculating the 24-hour period for which detention may be ordered, nor when calculating the eight hours in which his or her freedom may be restricted on the basis of the peremptory writ for the purpose of conducting the proceedings (for example, the time it takes for a person who is in Baia Mare to be brought to Bucharest so as to be heard at the headquarters of the criminal prosecution body)<sup>4</sup>.

### **2.3. Procedural Aspects**

Detention is the only preventive measure available exclusively during criminal prosecution, both by the criminal investigation body and by the prosecutor and it may be disposed both against the suspect and against the defendant.<sup>5</sup>

The measure of detention is ordered by an ordinance. After the ordinance is issued, a detention order is not issued as well.<sup>6</sup>

If the detention was ordered by the criminal investigation body, the latter has the obligation to inform the prosecutor about the taking of the preventive measure, immediately and by any means [art. 209 par. (13) Criminal Procedure Code].

A copy of the detention order is handed over to the suspect or defendant [art. 209 par. (11) Criminal Procedure Code].

The detained person shall be immediately informed in the language he/she understands of the offense of which he/she is suspected and of the reasons for his/her detention [art. 209 par. (2) Criminal Procedure Code].

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<sup>1</sup> M. Udroui, *op. cit.*, p. 553.

<sup>2</sup> Al. Boroï, G. Negruț, *op. cit.*, p. 332. In the procedure for execution of the European Arrest Warrant issued by a foreign authority against a minor, according to art. 100 par. (5) of the Law no. 302/2004 on International Judicial Cooperation in Criminal Matters, the measure of detention may be taken for a maximum of 12 hours and may be extended for up to 8 hours. (M. Udroui, *op. cit.*, p. 552)

<sup>3</sup> M. Udroui, *op. cit.*, p. 553.

<sup>4</sup> Ibidem.

<sup>5</sup> Al. Boroï, G. Negruț, *op. cit.*, p. 329.

<sup>6</sup> M. Udroui, *op. cit.*, p. 554.

The detained person shall be notified, under signature, in writing, of the rights provided in art. 83 of the Criminal Procedure Code, art. 210 par. (1) and (2) of the Criminal Procedure Code, of the right of access to emergency medical assistance, of the maximum duration of the detention measure and the right to file a complaint against the measure, and if the detained person cannot or refuses to sign, a minute will be concluded [art.209 par. 17 Criminal Procedure Code].

During the period of detention of the suspect or defendant, the criminal investigating body or the prosecutor who ordered the measure has the right to take photographs and his/her fingerprints [art. 209 par. (12) Criminal Procedure Code].

By the provisions of art. 210 of the Criminal Procedure Code, a special right of the suspect or defendant is established, in connection with the taking of the preventive measure of deprivation of liberty, namely the right to inform the persons who can provide support during the period of prevention. Given that the suspect or defendant is deprived of liberty, the existence of this right is natural, as he/she needs support from other people in order to exercise his or her defence as effectively as possible<sup>1</sup>.

According to art. 210 par. (1) of the criminal procedure code, immediately after detention, the person detained has the right to personally notify or to request the judicial body that ordered the measure to notify a member of his/her family or another person designated by him/her regarding the taking of the measure of detention and the place where he/she is detained.

In par. (2) of the same article it is provided that if the detainee is not a Romanian citizen, he or she also has the right to notify or request the notification of the diplomatic mission or consular post of the state of which he/she is a national or, as the case may be, of an international human rights organization if he/she does not wish to be assisted by the authorities in his/her country of origin or the representative of the competent international organization, if he/she is a refugee or if, for any other reason, is under the protection of such an organization. The General Inspectorate for Immigration is informed in all cases regarding the provision of the preventive measure for this category of persons.

The provisions regarding the notification of detention also apply accordingly in the event of a subsequent change of the place of detention.

The detained person cannot be denied the exercise of the right to personally make notifications, except for the existence of valid reasons, which will be recorded in the minutes (art. 210 par. (5) Criminal Procedure Code).

Exceptionally, for valid reasons, notification may be delayed for up to 4 hours [art. 210 par. (6) Criminal Procedure Code].

According to art. 107-108 of Law no. 254/2013 on the execution of sentences and detention measures ordered by the judicial bodies during the criminal trial<sup>2</sup>, detention is carried out in the detention and pre-trial detention centres, which are organized and operate under the subordination of the Ministry of Internal Affairs.

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<sup>1</sup> A. Crișu, *op. cit.*, p. 468.

<sup>2</sup> Official Gazette no. 514 of 14 August 2013, as amended and supplemented

### **3. Complaint against the ordinance of the criminal investigation body or of the prosecutor ordering the detention measure**

According to art. 209 par. (14) of the Criminal Procedure Code, against the ordinance of the criminal investigation body by which the suspect or defendant has been detained, he/she may file a complaint with the prosecutor supervising the criminal investigation, before the expiry of the measure's duration. Also, according to art. 209 par. (15) of the Criminal Procedure Code, against the order of the prosecutor by which the suspect or the defendant has been detained, he/she may file a complaint, before the expiry of the measure's duration, with the head of the prosecutor's office or, as the case may be, with the hierarchically superior prosecutor.

In both hypotheses, the competent prosecutor will immediately rule by ordinance. If it is found that the legal provisions regulating the conditions for taking the detention measure are violated, it will be ordered to revoke the detention and immediately release the suspect or defendant<sup>1</sup>.

Regarding the measure of detention, the Criminal Procedure Code does not provide for the possibility of a separate appeal against it before the judge of rights and liberties<sup>2</sup>.

### **4. Revocation of the detention measure**

The revocation of the preventive measure of detention is the procedural measure by which the detaining of the suspect or the defendant is revoked, if the reasons for it have ceased or new circumstances have emerged resulting in the unlawfulness of the measure.<sup>3</sup>

The revocation shall be ordered ex officio or as a result of the filing of a complaint, by ordinance, by the criminal prosecution body that ordered the measure, by the prosecutor in the case of the measure taken by the criminal investigation body or by the hierarchically superior prosecutor to the one who ordered the measure<sup>4</sup>.

If the detention measure is revoked, the criminal investigative body shall order the release of the suspect or defendant if he/she is not detained or arrested in another case<sup>5</sup>.

### **5. Replacing the measure of detention with the measure of judicial control or pre-trial judicial control with bail**

It is the measure which may be ordered by the prosecutor by means of ordinance, on request or ex officio, by which the detention is replaced, before the expiry of the term for which it was ordered, with the measure of judicial control or pre-trial judicial control with bail, if the grounds that led to the taking of the measure of detention have changed. The need to resort to the institution of replacing a preventive measure with another one is due to the fact that no two preventive measures can be enforced simultaneously on a person<sup>6</sup>.

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<sup>1</sup> I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală*, 2<sup>nd</sup> edition, Universul Juridic Publishing House, Bucharest, 2015, p. 612.

<sup>2</sup> M. Udriou, *op. cit.*, p. 558.

<sup>3</sup> *Idem*, p. 559.

<sup>4</sup> *Ibidem*.

<sup>5</sup> *Ibidem*.

<sup>6</sup> *Ibidem*.

If the measure of judicial control is instituted after the expiry of the period of detention, it will be necessary to take the measure of judicial control, not to replace the detention with the measure of judicial control<sup>1</sup>.

If the detention measure is replaced, the prosecutor orders the release of the suspect or defendant<sup>2</sup>.

It is necessary to fulfil the conditions stipulated by law regarding the taking of judicial control or pre-trial judicial control with bail when the measure of detention is replaced by one of these measures<sup>3</sup>.

Detention cannot be replaced by preventive arrest/house arrest (the prosecutor will make a proposal to take the measure of preventive arrest/house arrest, and not to replace detention with preventive arrest/house arrest) or with the non-voluntary medical admission or provisional medical admission (these procedural measures of deprivation of liberty are not, at the same time, preventive measures)<sup>4</sup>.

### **6. Rightful termination of the detention measure**

Detention shall cease de jure at the expiry of the period for which it was ordered, the suspect or defendant being released, if he/she is not detained or arrested in another case.

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<sup>1</sup> Ibidem.

<sup>2</sup> Ibidem.

<sup>3</sup> Ibidem.

<sup>4</sup> Ibidem.