ELECTRONIC MONITORING OF PERSONS SUBJECT TO PREVENTIVE MEASURES - AN EFFICIENT ALTERNATIVE TO PREVENTIVE ARREST[1]

Ramona Mihaela COMAN*

ABSTRACT: *The legislator provided for several preventive measures that can be taken, leaving the judge to opt for the one who is best responsible for the need for prevention, but taking into account the fact that the measure of pre-trial detention can only be taken when no other easier preventive measure meets the requirements of adequate prevention. With the entry into force of the Code of Criminal Procedure in 2014 in Romania, the preventive measure of house arrest, similar to preventive arrest, was regulated, both in terms of their inclusion in the category of preventive measures and in terms of their custodial nature, the identity of the causes and conditions under which the two measures may be ordered and of the similar manner of their arrangement and extension.*

However, national case law denotes a great reluctance of magistrates to apply this lighter deprivation of liberty, or to replace it even after months of pre-trial detention, considering her too gentle when it comes to serious accusations. However, the reluctance to apply alternative measures to pre-trial detention is largely due to distrust of the actual possibilities of the police to verify the fulfillment of the obligation not to leave the home by the person arrested at home.

Precisely to avoid these inconveniences, the Romanian legislator, inspired by the laws of other states, adopted the law on the use of electronic monitoring systems for persons under house arrest or judicial control. The possibility of continuous effective monitoring of the person arrested at home through the electronic monitoring system makes this preventive measure an effective alternative, the measure of pre-trial detention should only be taken in extreme cases, when no such monitoring would be sufficient.

KEYWORDS: *Electronic monitoring; pre-trial detention; home arrest; electronic bracelets; preventive measures.*
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* Associate Professor at the University”George Emil Palade” from Targu Mures, Lawyer in Mures Bar, ROMANIA.

In the European system of human rights protection, the concept of freedom has two components: the first is that provided for in Article 5 of the Convention, which guarantees the freedom and security of the person, these on his physical freedom, namely the right of every person not to be detained or abusively arrested; the second concerns restrictions on freedom of movement, which falls within the scope of Article 2 of Procotol No. 4 in addition to the Convention. There are no differences in nature or essence between deprivation of liberty and the restriction of freedom of movement but only in the difference in degree or intensity [2].

Conform art.2 paragrafele 2 din Protocolul nr.4 adiţional la Convenţia Europeană a Drepturilor Omului, orice persoană este liberă să părăsească orice ţară, inclusiv pe a sa. Paragraful 3 al aceluiași articol, statuează că „exercitarea acestor drepturi nu poate face obiectul altor restrângeri decât acelea care, prevăzute de lege, constituie măsuri necesare, într-o societate democratică, pentru securitatea naţională, siguranţa publică, menţinerea ordinii publice, prevenirea faptelor penale, protecţia sănătăţii sau a moralei, ori pentru protejarea drepturilor și libertăţilor altora."

According to Article 2, paragraphs 2 of Protocol No 4 in addition to the European Convention on Human Rights, any person is free to leave any country, including his own. Paragraph 3 of the same article states that „ the exercise of these rights may not be subject to restrictions other than those provided by law which constitute necessary measures, in a democratic society, for national security, public safety, maintaining public order, preventing criminal acts, protecting health or morality, or protecting the rights and freedoms of others. "

The need for a preventive measure, even non-custodial, only restrictive, cannot relate to the gravity of the act, but to one of the three aspects: 1.if necessary in order to ensure the smooth running of the criminal trial, 2. of preventing the theft of the suspect or of the defendant from the criminal investigation or from the trial or 3. of preventing the commission of another crime.

The proportionality of the preventive measure requires the magistrate to analyze which of the preventive measures ordered by the legislator are appropriate to the concrete case. Following the legislative construction of art. 202 Criminal Procedure Code (purpose of preventive measures), we note that preventive measures, regardless of their nature, are taken primarily for the proper conduct of criminal proceedings, and only if the judicial body demonstrates in the judicial framework (and not according to abstract assessments, "media impression", or "subjective wishes" of non-laws or the press) reasonable suspicion that a person has committed an offense (Coman, 2022).

The European Court of Human Rights has promoted in its decisions the principle that pre-trial detention must be seen as having an exceptional character (*ultima ratio).* For example, in the decision Ambruszkiewicz vs. Poland[3], The Court ruled that "the arrest of a person is a measure that must be taken into account when other less severe measures have been considered insufficient to defend the individual and public interest, interest which may require the person concerned to be arrested. This means that it is not enough

[2] Case Guzzardi c/a Italiei, Decision of 6.11.1980, cited in the judgment of 25.01.2007 in the case Sissanis vs. Romania.

[3] Case of Ambruszkiewicz v. Poland (dec.) - 38797/03 Decision of 4 mai 2006.

for deprivation of liberty to be in accordance with national law, and that it must be in line with the circumstances".

Resolution 2077 (2015) of the Parliamentary Assembly of the Council of Europe, on the misuse of preventive arrest in some signatory states to the European Convention on Human Rights has since emphasized the negative effects of pre-trial detention for both detainees, but also for society, effects that materialize, for example, through the risk of losing the arrested person's job, the negative economic impact on his family correlated with the consequences of separation; the risk as the suspect/the defendant to be subjected to violence during incarceration by other detainees or the staff of the place of detention or to affect the right to a fair trial, as guaranteed by art. 6 of the Convention; or in terms of the negative impact on the society: the high costs involved in pre-trial detention, the economic losses deriving from the removal of the detainee from the economic circuit, but also the fact that pre-trial detention unaccompanied by strict control creates the premises for corruption, which is likely to affect public confidence in the efficiency of the criminal justice system (Oancea, 2018).

With the entry into force of the Code of Criminal Procedure in 2014 in Romania, the preventive measure of house arrest was regulated, similar to preventive arrest, both in terms of their inclusion in the category of preventive measures and in terms of their custodial nature, the identity of the causes and conditions under which the two measures may be ordered and of the similar manner of their arrangement and extension. The Constitutional Court of Romania[4] found a lack of importance of the place and of the conditions in which the two preventive measures are executed, from the perspective of the possibility of their assimilation. At the same time, by another decision[5], the Constitutional Court noted that both those in pre-trial detention and those in house arrest are in a form of deprivation of liberty, and from the perspective of their nature / substance, effects, manner of execution and intensity, conditions and cases of their taking, the two measures represent a major interference in the person's right to individual freedom. By the same decision, paragraph 22, it was established that house arrest is an intrusive measure that may affect other fundamental rights and freedoms, respectively free movement [art. 221 para. (1) and (2) of the Code of Criminal Procedure], family and private life [art. 221 para. (9) 10 (from the Code of Criminal Procedure), the right to education and work and social protection of work [art. 221 para. (6) of the Code of Criminal Procedure].

However, national case law denotes a great reluctance of magistrates to apply this lighter deprivation of liberty, or to replace it even after months of pre-trial detention, considering her too gentle when it comes to serious accusations. However, the reluctance to apply alternative measures to pre-trial detention is largely due to distrust of the actual possibilities of the police to verify the fulfillment of the obligation not to leave the home by the person arrested at home.

Precisely to avoid these inconveniences, the Romanian legislator, inspired by the laws of other states, adopted the law on the use of electronic monitoring systems for persons under house arrest or judicial control.

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[4] Decision no. 740 / 3 november 2015, regarding the exception of unconstitutionality of the provisions of art. 222 para. (10) of the Code of Criminal Procedure, Constitutional Court, Published in Official Monitor of Romania no. 927 of December 15, 2015.

[5] Decision no. 361 of 7 may 2015, published in the Official Monitor of Romania, part1, no. 419 of june 12, 2015.

First national regulations on the possibility of using electronic surveillance systems (electronic surveillance devices or bracelets for electronic monitoring) in order to ensure compliance with the obligations imposed during the judicial review or house arrest, were introduced by Law no. 135/2010 on the Code of Criminal Procedure. Then followed Law no. 253/2013 on the execution of sentences, which had a non-unitary regulation, establishing that the supervision of the fulfillment of the obligation is made under the conditions established by the special law (when it referred to the judicial control) respectively by the law enforcement regulation, (when referring to house arrest), regulations that were late in appearing.

Subsequently, by Law no. 146/2021[6] regulated the establishment, organization and operation of the Electronic Monitoring Computer System as well as the use of electronic surveillance devices and the mode of action in case of generating alerts. They started to be used in Romania only from October 1, 2022, and until 2024, these bracelets are available only for Bucharest and the counties of Iași, Mureș and Vrancea, as a pilot project.

According to art. 3 of Law no. 146/2021, the electronic surveillance device is used in such a way as not to restrict the exercise of the right to privacy, more than is inherent in the nature and content of the electronic monitoring process, or not to intentionally cause physical or mental damage or suffering to the supervised person, other than those inherent in the nature and content of the electronic monitoring process.

The mobile electronic surveillance device is mounted on the ankle of the supervised person. By way of exception, the mobile electronic surveillance device is mounted on the person's arm when mounting on the ankle is not physically possible or is medically contraindicated. At the same time, a fixed electronic surveillance device is mounted in the building where the measure of house arrest is executed. The supervised person is instructed on how to use electronic surveillance devices, as well as on the obligations he has in case of receiving an alert.

The supervisory body and / or the technical operator have the right and obligation to verify unannounced, at any time of the day, periodically or upon notification, the electronic surveillance devices allocated to the supervised person; the verification of the electronic surveillance devices is done at the building in which the measure of house arrest is performed.

When required to appear before the courts, at their call, the supervised person must inform the supervisory body thereof before leaving the building.

Within the Electronic Monitoring Computer System, various alerts may be generated in the case of persons arrested on remand: alert to leave the property, generated as a result of the finding of the presence of the electronic surveillance device carried by the supervised person, outside the building; perimeter exceeding alert, generated as a result of the finding of the presence of the electronic surveillance device carried by the supervised person, in addition to the established itinerary or territorial limit, failure alert, generated as a result of the loss of the signal of the electronic surveillance device or the finding of any other faults in connection with its optimal operation.

The alert signal triggered by the electronic monitoring system is not in itself evidence that the defendant subject to these measures has left home or removed the electronic

[6] Law no. 146 of May 17, 2021 on electronic monitoring in criminal judicial and executive proceedings, published in Official Monitor of Romania no. 515 of May 18, 2021.

bracelet (and implicitly a evidence of the escape offense) (Lattanzi, 2020). However, this alarm signal makes it possible for the police to verify, as soon as possible, the defendant at home and a direct finding of his presence or absence, implicitly taking the necessary measures.).

The notified public policy bodies have the obligation to verify immediately the observance of the surveillance measure. The intervention of the notified public law enforcement bodies is performed according to the principle „ the nearest body intervenes ". At the same time, he has the obligation to contact the supervised person by phone, to ask him for explanations regarding the trigger of the alert and to guide him on the way of action.

Undoubtedly, the supervision of a person subject to a preventive measure, such as house arrest, is incomplete if it is done using police personnel directly on the spot through unannounced checks, but can be extremely effective if it is performed with „ electronic bracelet ", which ensures continuous surveillance of the suspect at home.

The benefits are also of an economic nature, the state not being obliged to allocate financial resources to provide decent conditions for detainees. However, the high cost of these systems, at least at the initial time, of their implementation is not to be ignored. Thus, in Romania, as it results from the Reason of Law no. 146/2021, only for the pilot phase (3 counties and the municipality of București), a total of over € 3 million has been estimated: an estimated total of € 3,490,000 for the pilot phase, including hardware, software, subscriptions and licenses (some over 3 years), mobile devices for intervention organs and 500 pieces of electronic surveillance devices (electronic bracelets)[7]. Obviously, in 2024, when they were to be implemented at national level, the costs would be much higher.

The issue of costs is explicitly raised by Recommendation (2014) to the Committee of Ministers of the Council of Europe on electronic surveillance, which in the second subparagraph provides that in some countries the costs of the device installed on the suspect or defendant are fully borne by the State, while in other countries the person concerned is obliged to pay a contribution; provides, however, that in this case the amount of the contribution is proportionate to the financial conditions of the person, to avoid discrimination[8].

The use of these devices may raise certain issues, which it is useful for the authorities to consider when implementing the law. In the Italian system, for example, where they have been used for a long time, the problem of the insufficiency of electronic devices has been raised. Art. 275 bis Code proc.pen. Italian provides that house arrest with electronic arm arrest monitoring applies after the judge has previously verified the availability of the device to the judicial police. However, the problem arose: what should be done if they are not available?

In Italian doctrine (Cesari, 2019), in such cases several alternatives have been proposed, based on judicial practice, namely: the first would be for the judge to resort to house arrest in a simple form (easier restriction of personal liberty, due to the impossibility of electronic monitoring); another option was to apply in these cases pre-trial detention (the

[7] Reason for the law, heading: Financial impact on the general budget.
[8] Pct. III.11 of the Recommendation of the Committee of Ministers CM / Rec (2014) 4 to the Member States on electronic monitoring, adopted by the Committee of Ministers on 19 February 2014.

transition to a higher level of restriction of freedom, although it would initially be considered not to impose); some also proposed the formation of waiting lists for detainees, who had to wait for the devices to become available.

United sections of the Italian Supreme Court[9] stated that in such cases, the judge must re-examine the need for a preventive measure and re-choice between house arrest and pre-trial detention. However, the solution was criticized (Guerini, 2016), showing that, as long as electronic monitoring is a way of applying the measure of home arrest, their lack of availability should not affect the necessary and sufficient nature of this preventive measure and a more serious measure can be ordered, therefore a review of the measure applied and the application of a more restrictive measure would not be allowed.

The use of electronic surveillance systems is not a new preventive measure, but a way of implementing the measure of house arrest, in order to give it efficiency. Electronic monitoring does not physically limit a person, so some believe that dangerous criminals would be able to commit other acts before the authorities can intervene. Also, conditions of home detention with electronic monitoring may cause some victims and the population to perceive some criminals as being treated with too much gentleness. (Black & Smith, 2003). However, the judge seised of a request for pre-trial detention by the prosecutor, or with a request to replace the measure of pre-trial detention with an easier preventive measure, it must not submit to a judicial automatic in the decision, but must analyze in concrete terms the situation of the defendant, of the act of which (is accused not only of the legal classification) and to assess the need for the chosen preventive measure.

The legislator provided for several preventive measures that can be taken, without specifying the need to take one or another preventive measure whenever a person is accused of a certain act. The severity of the preventive measure is not automatically chosen in relation to the gravity of the act on which the defendant is accused. Even if the judge is free to choose between the preventive measures provided by the legislator, this discretion is not absolute, the judge will have to opt for the one who is best responding to the need for prevention, but taking into account the fact that the measure of pre-trial detention can only be taken when no other easier preventive measure meets the requirements of adequate prevention (Giarda & Spangher, 2017). Or, the possibility of continuous effective monitoring of the person arrested at home through the electronic monitoring system makes this preventive measure an effective alternative, the measure of pre-trial detention should only be taken in extreme cases, when such monitoring would be no sufficient.

REFERENCES

Black, M. & Smith, R., 2003. Electronic monitoring in the criminal justice system. Trends & issues. *Crime and criminal justice,* Volume 254.

Cesari, C., 2019. Editoriale: L'impatto delle nuove tecnologie sulla giustizia penale – un orizzonte denso di incognite.. *Revista Brasileira de Direito Processual Penal,* set./dez., vol. 4(n 3), pp. p. 1167-1188,.

[9] Cass. Sez. Un., Decision no. 20769 of April 28, 2016.

Coman, V., 2022. Specificul și importanţa motivării în cazul individualizării judiciare a măsurilor preventive. *Dreptul* , Issue 6.

Giarda, A. & Spangher, G., 2017. *Codice di procedura penale comentato.* s.l.:Ed. Wolters Kluwer.

Guerini, I., 2016. Più braccialetti (ma non necessariamente) meno carcere: le Sezioni Unite e la portata applicativa degli arresti domiciliari con la procedura di controllo del braccialetto elettronico. *www.penalecontemporaneo.it,* 24 june.

Lattanzi, G., 2020. *Codice di procedura penale – Annotato con la giurisprudenza.*. s.l.:Giuffre Francis Lefebvre,.

Oancea, G., 2018. Arestul preventiv ca ultima ratio în practica judiciară din România. *Dreptul,* Issue 12.