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Pregledni članak
UDK: 343.121(4-12)
Primljeno: 24. septembar 2012. god.

MEASURES TO SECURE THE PRESENCE OF DEFENDANT AND FOR UNOBSTRUCTED CONDUCT OF CRIMINAL PROCEEDING:[2] NEW SERBIAN CPC AND REGIONAL COMPARATIVE ANALYSIS

The subject of this paper are criminal procedure issues relating to securing the presence of defendant and unobstructed conduct of proceedings. From its structural aspect the subject issue has been addressed through two groups of questions and deliberations in conclusion. The first group relates to general observations concerning these measures where particular attention was dedicated to presentation of the issue of: concept, type and nature of measures; general rules on application thereof, and similarities and disparity in normative amplification in the new Serbian CPC on one hand, and in its previous criminal procedure legislation and legislation of three countries of the region (Croatia, BiH and Montenegro) on the other.

The second - central group of issues - is dedicated, but not limited to individual normative analysis of six of the seven of such possible measures provided under the new Serbian CPC (summons, order to bring [a defendant in], ban to approach, meet and communicate in respect to particular individual, ban to leave temporary residence; bail, and ban to leave abode). Among the number of issues analyzed in this part of the paper the following particularly stand out: require-

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Views expressed in the paper are those of the authors and do not necessarilly reflect the views and policy of the OSCE Mission to Serbia.

2 The paper does not analyse detention on remand as a special measure of this character.

ments for application, duration and manner of decision-taking regarding each of these measures. Moreover, as in the case of the first group of issues, the issues in this part of the paper are analyzed both from the aspect of the new Serbian CPC and from the aspect of previous criminal procedure legislation and the legislation of the countries in the region (Croatia, BiH and Montenegro).

The paper concludes with deliberations where authors give a summarized presentation of the results they have arrived at in analyzing the subject topic.

Key words: measures to secure presence, defendant, criminal procedure, court, public prosecutor, bail, order to bring, summons, ban to leave, abode, detention, legislation, Serbia, region

General observations on the measures

The new Criminal Procedure Code, adopted in 2011 and applied in Serbia as of 15 January 2011 in cases prosecuted by bodies with special jurisdiction for organised crime and war crimes, has in numerous essential elements recast and reformed the entire criminal procedure in Serbia.[3] Changes also affected the measures for securing presence of defendant and unobstructed conduct of proceedings (hereinafter also intermittently referred to as - security measures),[4] where absence of adequate stipulation would inhibit efficiency of proceedings and, often, fail to provide the fundamental prerequisites for its conduct, or protection of the rights of the defendant and other participants in the proceedings.

The subject of this paper are measures the new Code (hereinafter - new CPC, or 2011 Code, or 2011 CPC) enacts and regulates, analysis thereof and comparison with the 2001 CPC, which once the new CPC comes into force for all criminal proceedings, will cease to be applied,, as well as their analysis in respect to corresponding criminal procedure laws or codes of three countries in the region - Bosnia and Herzegovina, Croatia and Montenegro.

3 "Official Gazette of the RS", no. 72 /11 and 101/11, (hereinafter – new CPC). The Code sets forth in art. 608 that the it shall apply to all other cases as of 15 January 2013

4 "Security measure" will be used throughout the text as an English translation for the original term in Serbian - "*mere obezbeđenja*". It should be noted that the term security measure is also used to refer to measures belonging to substantive criminal law, which in Serbian read as "*mere bezbednosti*" Security measure in the latter sense of substantive criminal law, set forth by the Criminal Code, not Criminal Procedure Code, are measures that belong to the realm of criminal sanctions, as opposed to security measure under a criminal procedure code refered to in this text, and their purpose is to eliminate circumstances or conditions that may have influence on an offender to commit criminal offences in future (defined in Article 78 of the 2006 Serbian Criminal Code).

Measures that may be applied against the defendant to secure his/her presence and unobstructed conduct of proceedings provided under the new CPC (Article 188)[5] are:

1) summons,
2) order to bring [a defendant in],
3) ban to approach, meet and communicate in respect to particular person,
4) ban to leave temporary residence,
5) bail,
6) ban to leave abode,
7) detention on remand.

The new CPC provides seven types of measures, unlike the five provided under the 2001 CPC. Two or more measures may be ordered concurrently (Article 189, para 2). The novelty is that in the 2001 Code these measures were grouped together under the heading "Ban to leave abode or place of residence" in Article 136 thereof (which provided for and regulated, under its 11 paragraphs, a number of measures that were similar to each other, however with crucial differences in their nature, requirements and application), whilst now they are split into three autonomous types of measures: ban to approach, meet and communicate in respect to particular person, prohibition to leave temporary residence, and ban to leave abode. The last measure was contained also in the above mentioned Article 136, but is now more amplified in detail, with augmented requirements for its order and amplified judicial control over ordering and expanded domain of applicable instruments (such as ban on use of telephone or internet). Another novelty is in the possibility to order bail in situations where grounds for detention exist pursuant to point 4 of Article 211 of the new CPC (in case of offences punishable by a term of imprisonment of more than ten years, or more than five years if the committed offence is with elements of violence, or if the pronounced sentence is five years or more and the manner of commission of the offence and gravity of consequences resulted in disturbance of the public).

The list of possible measures is very much alike the catalogue of measures provided in the codes of the region with which the new CPC will be compared to, with one key difference that in these codes, similar to Article 136 of the 2001 CPC, the mentioned bans are mainly stipulated within the same article, which will be elaborated in further text. One should mention that both BiH and Croatian codes provide also for the measure prohibiting certain business activities or official duties that the Serbian and Montenegrin codes do not have.[6] Without going into deeper

5 Article without title of the legal text refers to the new Serbian CPC.

6 Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of BiH, no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09,

analysis of this measure stipulated in the above codes in the region, it does appear that, in certain situations, it could be an effective measure to, for example, deter the defendant from repeating or completing the felony when such felony is coupled with undertaking of certain activities or discharge of duties without having to resort to harsher measures. Hence, it remains unclear why this measure has not been included previously, nor now into the measures in Serbia.

As the new CPC introduces prosecutorial investigation, i.e. an altered role of the prosecutor and, to some extent, of the defense in the proceedings, these changes impacted - as elsewhere in the region - also on competencies and procedure to order security measure. Thus, in addition to the court, now also the prosecutor has powers to decide on security measures and to order them, which is common (with certain specific requirements) to all national systems - which will be elaborated in further text in respect to all countries of the region being compared herein.[7]

As in any legal system, stipulating measures to secure unobstructed conduct of proceedings and presence of the defendant, and subsequent enforcement thereof, must constantly balance between two often conflicting requirements. One being the duty of the State to ensure efficient judicial proceedings, protect the integrity of proceedings and rights of all participants therein, as well as the public interest, and the other being the duty of the State to protect the rights of the defendant, in this context primarily relating to right to liberty and right to a fair trial.

Some of the fundamental principles deriving from human rights standards, particularly the right to liberty set forth in Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, require non-imposition of a stricter measure if the same purpose may be achieved with a more lenient measure. The former has been explicitly attested by the case law of the European Court of Human Rights, particularly in respect to detention as courts should always consider pronouncing of less severe measures when deliberating detention.[8] Justification of the measure needs to be first determined by existence of statutory

16/09, 93/09 (hereinafter - BiH CPC), article 126a.Codes of entities and Brcko District provide the same measure.

See also Criminal Procedure Code, NN 152/08, 76/09 (hereinafter - Croatian CPC), art. 98, providing prohibition to perform certain activity. In Serbia there is only the measure to prohibit discharge of vocation, activity and duty provided as a security measure (in the sense of substantive criminal law, as explained in footnote 4 *supra*) under Article 85 of the Criminal Code.

7 Certain countries have bodies and services specific to such countries that are empowerd to summon and order and enforce other measures, such as a court secretary in Croatia or court police in BiH.

8 Judgement of the European Court of Human Rights (hereinafter - ECrHR), Witold Litwa v. Poland, 26629/95, 4 April 2000, para.78, availabe at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58537, Jablonski v. Poland, ECHR, 33492/96, 21 December 2000, para 83, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59096.

requirements for its ordering. The measure is revoked ex officio when reasons for its ordering cease, and must be replaced by another, more lenient measure whenever conditions to do so exist. Any decision ordering detention on remand or alternative measures must be reasoned.[9] The new CPC embodies all these principles, in Article 189, and further on in articles for each individual measure, in the same way as the 2001 CPC and the codes in the region.[10]

In the context of general observations on measures in light of the new CPC, joint provisions on deciding on measures deserve attention. These relate to competence and procedure for deciding on and duration of the ban to approach, meet and communicate with a particular person, ban to leave place of residence, ban to leave abode, and bail. The issues have been resolved, with certain alterations identically. Their foremost characteristics are reflected below.

- Decision on ordering any of these measures is taken by the court at the motion of the public prosecutor, and after confirmation of indictment it can also be taken ex officio. During investigation the reasoned decision ordering, extending or revoking measures is taken by the judge for preliminary proceedings, after preferring of indictment by the presiding judge, and at trial by the chamber. An exception, as it will be explained further in the text, is the ban to leave abode as this measure is decided by the panel after preferring of indictment and not by the president of the panel (Article 209 para 2).

- As in the 2001 CPC, if the measure is proposed not by the prosecutor but by the defense, and the proceedings are conducted for a criminal offense prosecuted ex officio, an opinion of the public prosecutor shall be sought prior to taking of decision. Parties and defense counsel may appeal the decision ordering, extending or revoking the measure. A public prosecutor may also appeal the decision rejecting the motion to order a measure. In case of bail, the decision to set, collect or revoke bail, as well as the decision rejecting the motion for this measure may be appealed by the parties, defense counsel or person giving the bail (Article 205, para 3). The appeal shall not stay enforcement of any of the measures.

- All measures may last as long as there is a need for them. This is provided by the Code explicitly under each of the measures, except for bail, however this derives also from the general provision on basic principles for determination of measures referred in Article 189. The new CPC adds to each of the measures that it

9 Recommendation (2006) 13 of the Committee of Ministers of the Council of Europe, Section II.14.1.

10. Criminal Procedure Code, Official Gazette of the FRY, no. 70/2001 and 68/2002 and Official Gazette of the RS, no. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007, 20/2009, 72/2009 and 76/2010 (hereinafter - 2001 Serbian CPC) article 133, Article 95 of the Croatian CPC, Article 123 of the BiH CPC. Criminal Procedure Code, Official Gazette of Montenegro no. 57/2009 and 49/2010 (hereinafter -Montenegrin CPC) article 163.

may last until judgment becomes final and/or until remand of the defendant to serve a criminal sanction comprising of deprivation of liberty, and in case of bail, until commencement of serving of sentence (Article 207, para 3).

- The Code sets the timeframe wherein the court is required to periodically re-examine the justification of duration of the measure. As compared to the 2001 CPC where this timeframe was every two months,[11] in the new CPC it is extended to three months and is valid for all measures, except bail - for which the timeframe is not defined. The two-month timeframe is set forth also in criminal procedure codes of BiH, Montenegro and Croatia.[12] It seems that the three-month timeframe is unjustifiably long especially for re-examining the ban to leave abode, the measure that will be elaborated further in the text, but it may also be said that there is no principled justification in respect to other measures either to make this timeframe longer than before or longer than recognised by comparative legislation in the region. Although these other measures are less restrictive than ban to leave abode ("house arrest") or, certainly, detention, they may certainly to significant extent restrict freedom of movement and communication. Consequently, the need for economic management and efficiency of procedure in this case should not outweigh the protection of the rights of the defendant who is already subjected to a security measure.

II. Specific measures and the new CPC

a) Summons

Summons represents the basic and least severe measure to secure presence of the defendant in the proceedings and/or to ensure conduct of proceedings. It is executed, as in all legal systems in the region, by sending, by the court or prosecution,[13] and delivery of sealed written summons (or electronic format) to the defendant ordering him/her to appear before that body. The summons per se does not restrict freedom of movement or other rights of defendants and participants in the proceedings, however avoiding accepting the summons or failure to comply with the summons carries a penalty and restriction of freedom through application of stricter measures to secure compliance, commencing with the order to bring in the defendant.

Provisions on summoning of witness, expert witness or other participants in proceedings have been set apart in the new CPC in a specific provision within the Chapter regulating security measures (in Article 193), a divergence from the 2001

11 Art.136 (7) of the 2001CPC.

12 Art. 126b (6) BiH CPC, art. 166 (8) of the Montenegrin CPC, art. 98(6) of the Croatian CPC.

13 In Croatia the secretary of the court is the person who, based on court order, sends the summons to the defendant for evidentiary hearing, hearing of the evidentiary panel, pre-trial hearing and trial (art. 175, para 4 of the Croatian CPC).

CPC or laws in the region.[14] Regardless of the absence of a particular provision on summoning other participants in criminal proceedings in the section governing summoning, it is self-evident that in these systems too this measure also ensures presence of other participants in criminal proceedings - witnesses, injured party, expert witnesses, expert professionals, interpreters, legal representative, proxy, citizens from whom information is obtained during investigation.[15] Therefore, according to the new CPC, a witness, expert witness or other participant in proceedings is summoned during the phase preceding raising of indictment by the public prosecutor or, if the prosecutor fails to do so, by the pre-trial judge at the motion of the defendant or his defense counsel (Article 193 para 1). After raising of indictment, participants are summoned by the court, if decided to question them or - introduced as a novelty - by the parties or defense counsel if they undertake the obligation to do so (Article193 para 2). This new possibility - for the parties and defense counsel to summon witnesses, expert witnesses and other participants in proceedings after raising of indictment - clearly reflects one of the foremost intentions of the lawmaker and the spirit of the new CPC directed at enhancing responsibility and involvement of parties in proceedings. This provision may facilitate condensing of the time necessary for summoning and increase efficiency of proceedings.[16]

The new CPC has retained the provision whereby the defendant, if unable to respond to the summons due to illness or other compelling reason, shall be questioned in place of residence, or transport shall be provided to the building where the body conducting the proceedings is located or other location where the activity is undertaken (Article 192 para 2). Criminal procedure codes of Bosnia and Herzegovina and Montenegro also contain such provision, whilst the 2008 Croatian CPC does not (unlike the previous Croatian CPC from 1997).[17]

The new Serbian CPC stipulates within this Chapter, unlike the 2001 CPC where this was done in the section relating to summoning of witnesses in the chapter dedicated to evidentiary actions (in Article 101), a special form of summoning of persons under the age of 16 as witnesses by setting forth that serving of summons

14 In Croatia, the summons of a defendant as a measure to secure presence in proceedings is merely referred to in the chapter on such measures, while it is regulated in detail in the section on serving of case files (art. 96, referring to art. 175 of the Croatian CPC).

15 Commentary to the criminal procedure codes in Bosnia and Herzegovina, Council of Europe and European Commission, Sarajevo 2005, p. 383.

16 Radmila Dragićević-Dičić, Mere za obezbeđenje prisustva okrivljenog i za nesmetano vođenje krivičnog postupka u novom Zakoniku o krivičnom postupku, Zbornik "Nova rešenja u krivičnom procesnom zakonodavstvu - teoretski i praktini aspekt" Serbian Association for Criminal Law Theory and Practise, Belgrade 2011, p. 40.

17 Art. 124(5) of the BiH CPC and art. 164(6) of the Montenegrin CPC. Compare articles 96 and 175 of the Croatian CPC from 2008 with art. 88, para. 5 and 6 of the previous CPC from 1997 (Criminal Procedure Code, NN 110/97, 27/98, 58/99, 112/99, 58/02, 143/02).

to be done through parents or legal guardians of that person, except when not possible due to exigencies of proceeding or other justifiable reasons (Article 193 para 3). Such provision is found also in codes of the region.[18]

A participant in proceedings avoiding receipt of summons may be fined up to 150,000 RSD, with the proviso that this provision is not applicable in case of juveniles (Article 193 paras 4 and 6). The ruling on the fine is passed by the court.

A novelty within this measure is also the possibility to serve summons through public notice. The authority in charge of proceedings, i.e. police or prosecution, if having reasonable grounds to suspect a criminal offence, may by posting a public notice in media summon persons having knowledge of perpetrator and circumstances of the event to respond (Article 194). This possibility is not provided in criminal procedure codes of countries in the region.

b) Order to bring [a defendant in]

Bringing of the defendant, as the next measure to secure his presence in proceedings that is ordered by the court and public prosecutor, is regulated by the new CPC (in Articles 195 and 196) in a way that does not essentially differ from the 2001 CPC or from the codes of the countries in the region. The order to bring is issued in three cases: if a duly summoned defendant does not appear and fails to justify his absence, if proper serving of the summons could not be performed and it evidently ensues from the circumstances that the defendant is avoiding receipt of the summons, and if an order to remand in detention is issued. Thus, except in case when detention has been ordered for the defendant, this measure must be preceded by the measure of summoning of the defendant, followed by a determination that the defendant is avoiding to respond. The Croatian code recognizes another situation where this measure is ordered, namely bringing of the defendant to the hearing always when deciding on ordering, revoking or extending detention during investigation, unless he is unavailable or lacks legal capacity.[19]

In Croatia, the order to bring (a defendant in) is issued by the court, and only exceptionally by the prosecutor or police. The latter may bring the defendant coercively only if he previously fails to respond to the summons in which he was cautioned on coercive bringing or if circumstances evidently indicate that he is refusing to receive the summons.[20] In Bosnia and Herzegovina, the order to bring may be issued by a prosecutor only exceptionally, in exigent circumstances, if the duly summoned person fails to respond and does not justify his absence, and this

18 Art. 173 Croatian CPC, art. 173, art. 81 BiH CPC and art. 112 of the Montenegrin CPC.

19 Art.97(1) referring to art. 129(2) of the Croatian CPC..

20 Art. 97(3) referring to art. 208(3) of the Croatian CPC.

order must be approved by the judge for preliminary proceedings within 24 hours from time of issuance;[21] however the CPC of Republika Srpska does not contain such requirement to submit the order for approval by the judge for preliminary proceedings.[22] In BiH the order to bring is executed by the judicial police.

In Serbia, the order is executed by the police. Regarding exceptions to enforcement of the order to bring with respect to members of certain government bodies as defendants, one notices more precise defining in the new CPC. In addition to the stipulation that bringing in of police officers, military personnel and prison guards is executed by their command or institution - as provided in the 2001 Serbian CPC, or in the Montenegrin CPC,[23] now there is an explicit addition that this manner of enforcement of this measure is applied also to members of the Security and Information Agency, Military Security Agency and Military Intelligence Agency (Article 196 para 3). This eliminates a potential dilemma regarding action against personnel of these security/intelligence agencies that do not have status of military or police personnel.[24]

As in summons, the measure of coercive bringing may also be ordered by the competent authority in the proceeding in respect to other participants in the proceeding (witness, expert witness) in order to ensure their presence in case of their unjustified absence or refusal to appear in the proceedings, although the application of this measure against the above participants is regulated in other provisions of the CPC.

Ban to approach, meet and communicate with particular individual

The ban to approach, meet or communicate with particular individual is set forth under the new CPC as a separate measure. In the 2001 CPC it was provided within the catalogue of measures under the article on measures prohibiting leaving of abode or place of residence and could have been ordered, pursuant to that Code,

21 Art. 125(2) BiH CPC, art. 125(2) Brcko District CPC (Criminal Procedure Code of Brcko District, Official Gazette of BD no. 10/03), art. 139(2) BiH Federation CPC (Criminal Procedure Code of BiH Federation, Official Gazette of F BiH no. 35/03).

22 Art. 182 of the Republika Srpska CPC (Criminal Procedure Code of of Republika Srpska, Official Gazette of RS no. 50/03).

23 Art. 165(5) of the Montenegrin CPC.
Insofar as Croatia is concerned, the previous Croatian Criminal Procedure Code contained a provisio, in article 89(5), that no order to bring shall be issued against military, police and judicial guard personnel, and that their command or institution will be notified to bring them in. The current Croatian 2008 CPC does not contain such provision, hence such personnel may be brought based on the order to bring. See Z. Konjić, A. Pavićić, Prisilne radnje i mjere - mjere osiguranja i dostava, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 15, no. 2/2008, p. 893.

24 Military Security Agency and Military Intelligence Agency Act, Official Gazette of the RS, no. 88 dt 28 October 2009, 55/12., article 40: "Members of the MSA and MIA are professional personnel of the Army of Serbia, civil servants and employees."

also as an additional measure to the measure prohibiting leaving of abode or residence,[25] and as an autonomous measure when requirements for it have been met.[26]

The reasons for ordering of this measure is the existence of circumstances indicating that a defendant could disrupt the proceedings by exerting influence on an injured party, witnesses, accomplices or concealers or could repeat a criminal offence, complete it or commit a criminal of fence he is threatening to commit (Article 197). The reasons remain the same as in Article 136 para 11 of the 2001 CPC for ordering this measure as an autonomous one.[27] The legislative provisions no longer contain the risk of absconding and hiding as grounds for this measure, which were present in the 2001 CPC for ordering this measure as supplementary to prohibition to leave abode or residence (in Article 136 para 2 of the 2001 CPC). These circumstances are still present as grounds for this measure in Croatian, BiH and Montenegrin codes.[28]

The solution detaching this measure in normative terms as a separate one differentiates the new CPC not only from its 2001 predecessor, but also from the codes in the region, where manner and requirements for its ordering are not separately stipulated but it continues to exist within the framework of other measures of supervision (Montenegro), precautionary measures (Croatia) and measures of interdiction (BiH). Thus, for example, in Croatia "precautionary measures" (in Croatian - mjere opreza), as is the statutory term for this category of measures to ensure presence of the defendant and unobstructed conduct of proceedings, are grouped in one article of the code and encompass the ban to leave residence, restraint to approach a particular person, ban to visit a certain place or area, duty to report to a certain person or government authority, prohibition to engage in certain business activity, seizure of travel document (passport) or driving license.[29] The reason to detach this measure into separate norms in the new CPC may be found in that this measure both by reasons, where there are no grounds for risk of absconding or hiding, by its purpose, concept and by manner of enforcement is different from the prohibition to leave abode or residence, or seizure of driving license with which it was also joined in the 2001 Code.[30]

25 Art. 136, (2) of the 2001 CPC.

26 Idem. para 11

27 Idem.

28 Article 98 and 123 of the Croatian CPC, article 126, 126a and 126b of the BiH CPC, and article 166 of the Montengrin CPC .

29 Art. 98 of the Croatian CPC.

30 Some of the reasons for separating these measures are also given by the authors of the preface to the new Criminal Procedure Code, who were also membes of the working group for drafting the the new Code. See: Criminal Procedure Code, with preface by Slobodan Beljanski, Goran P. Ilić, Miodrag Majić, Official Gazette, 2012, Second amended edition, pp.24-25.

Alongside this measure the new CPC provides that the court may order the defendant to periodically report to the police, an officer of the administration for enforcement of criminal sanctions or other public authority defined by law (art. 197 para. 2).

A stricter measure may be ordered against the defendant if in breach of the pronounced ban to approach, meet or communicate with a particular person, and the defendant is so cautioned in the ruling ordering the measure. The ruling is also delivered to the person in relation to whom the measure against the defendant was ordered (Article 198 para. 3).

Control of enforcement of the measure is done by the police. Montenegrin and Croatian CPCs require that in issuing the ban to approach or meet certain persons the court, and - in Croatia - other body with competent jurisdiction, define also the distance under which the defendant may not approach these persons.[31]

If failing to adhere to the barring measure, or comply with the pronounced measure, in BiH an additional measure or detention is ordered, and in Croatia investigative detention as mandatory.[32] In Montenegro an additional measure may be ordered or detention.[33] An interesting solution is provided under Croatian law, which has been present also before, that the court - or more precisely "investigating magistrate" according to the terminology of the Croatian law (sudac istrage - in Croatian) - may prohibit activities to a person other than the defendant that infract upon security measures against the defendant and fine such person if he/she acts contrary to such prohibition.[34]

Although no longer explicitly with this measure, it should be implicit, having in mind the right of access to defense counsel, that the measure may not restrict the right of defendant to communicate with his attorney. Although this measure should not be ordered in a way restricting communication with close relatives, unless in the interest of their protection, it would be worthwhile to precisely define, as in Croatia, that in respect to this and other measures communication may not be restricted in respect to spouse, common law spouse, children, parents, adopted children or adoptees, unless proceeding are conducted for act committed to the detriment of these persons.[35]

31 Art. 167 of the Montenegrin CPC, art. 99(4) of the Croatian CPC.

32 Art.126f of the BiH CPC. Art. 98 (1) Croatian CPC. Duty to replace security measure (precautionary measures) with detention in case of failure to comply was introduced by the new Croatian CPC in 2008, while the previous CPC of Croatia contained an optional possibility to order other security measures or detention. See also Konjić, Pavićić, *op.cit*, p. 894.

33 Art.166 (6) of the Montenegrin CPC

34 Art 101 (3) of the Croatian CPC.

35 Art. 98 (3) of the Croatian CPC.

Separating this measure and requirements for ordering from the ban to leave abode or residence expands the range of possible application of more lenient measures in criminal proceedings in Serbia. This measure, now in use to enable unobstructed conduct of proceedings, and not to ensure presence of defendant, augments the options replacing detention. When risks giving grounds for ordering detention and which coincide with reasons for ordering of this measure are not so high and when considered that the purpose may be achieved also through a more lenient measure, then this measure should be ordered. Thus this measure could be applied if circumstances indicate risk of obstruction of proceedings or influencing witnesses, or danger that the person will complete, repeat or commit the criminal offence he is threatening are not so distinct to, as the law stipulates, order detention.[36] This measure is advisable for ordering in criminal offences with elements of violence or threat of violence where the victim or endangered person may be targeted for continuing assault by the perpetrator; it may effectively deter conspiracy with other person to commit crimes or prevent influence on witnesses, without having to resort to detention. It effectiveness may be augmented in part by the provided possibility to order the defendant to periodically report to the police or other public authority, as set forth in Article 197 para 2.

d) Ban to leave temporary residence

The above measure provided under Article 199 of the new Code comprises a ban for the defendant to leave temporary place of residence or the territory of the Republic of Serbia. This measure may be augmented with barring the defendant to visit certain places or he may be ordered to periodically report to certain state authority His travel document or driving license may also be temporarily seized. If violating the ordered ban a harsher measure may be pronounced against the defendant (Article 200 para 3).

This measure, together with the ban to approach, meet or communicate with a particular person and ban to leave abode, was provided under Article 136 of the 2001 Code, whilst now being detached, as the other two above measures, into a separate article. It is now amplified with the inclusion of ban to leave the territory of Serbia. A similar measure that in practice means ban to leave the territory of Bosnia and Herzegovina is recognized, after amendments in 2007, also in the Code of this country and is separated from other measures.[37] This novelty provides wider

36 Grounds for custody in art. 211 (1) points 2 and 3 of the new Serbian CPC.

37 Art. 126 BiH CPC, particulalry regulating the ban to leave residence and ban on travel. Other "barring measures", as is the statutory title in BiH, are encompassed by article 126a, and are similar in Croatia and Montenegro: ban to undertake certain business activities or duties, ban to visit particular places or areas, restraint to meet certain individuals, duty to periodically report to particular government authority and temporary revocation of driver's license. Article 126g of the BiH CPC provides temporary seizure of travel documents and personal ID with ban on issuing new documents by order of the prosecutor, only exceptionally and in exigent circumstances, particularly in case of offences carrying a sentence of 10 years of imprisonment or more.

possibilities both in selecting measures alternative to detention, as well as in respect to effective prevention of absconding of defendant. In order to be effective, it would be indispensable that this measure is applied together with seizure of passport. In principle, this measure by reach is more extensive than seizure of passport, which existed also before, as the state border may sometimes be crossed also with other document and not only with a passport.

The measure barring leaving of temporary resident may be ordered, as in the 2001 Code, if circumstances exist indicating that the defendant could abscond, hide, depart for unknown destination or abroad. The same catalogue of reasons exists also in criminal procedure codes in BiH and Montenegro, while this measure is applied in Croatia, as are all other measures embraced by the measures of caution and contained in the same article of the code,[38] if reasons exist to order investigative detention or if the latter has already been ordered, which is certainly a more comprehensive range of grounds.[39] A moot point is why this measure should not be applied in Serbia, as in BiH and Montenegro, also when there is risk of obstructing proceedings by destruction or concealing evidence, influencing witnesses or accomplices, or if there is risk of repeating or completing the crime.[40] Obligation of the state to provide for and consider application of more lenient measures prior to resorting to restrictive ones justifies statutory enabling of such an option. Ban on leaving residence and country, as well as the ban to visit certain places, duty to report to state authority and seizure of passport and driver's license, could prove sufficient and adequate - naturally, depending on the offence in question and circumstances of each and every particular case - to prevent, in certain situations, influence on witnesses or repetition or completion of the offence and similar risks.

The new CPC has retained the provision, found in other countries of the region, whereby the ban to leave residence cannot restrict a defendant's right to live in his abode, to meet family members, close relatives and defense counsel without hindrance (Article 199 para 3).

In a similar way a provision was carried over from the 2001 CPC whereby the court may return a travel document to a defendant with urgent need to travel abroad if the defendant appoints a proxy to receive correspondence in Serbia, or gives bail (Article.200 para 4). Still, a difference exists as the text of the 2001 CPC

38 Art. 98 of the Croatian CPC (ban to leave residence, restraint to approach a certain person, ban to visit particular places or areas, ban to undertake certain business activities, seizure of travel document or driver's license, duty to report to particular person or public authority).

39 See art. 123 of the Croatian CPC on grounds for ordering investigative detention.

40 For critical commentary of the same solution in the BiH CPC, see OSCE Report "The Law and Practice of Restrictive Measures: Justification of Detention Bosnia and Herzegovina", Organization for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina, August 2008, p. 14.

addresses bail in this situation cumulatively ("and gives bail ") with the other two guarantees, while the new CPC gives this alternatively ("or gives bail"). This provision creates a framework granting flexibility to the regime of the measure in respect to the defendant, while retaining certain warranties that he will not avoid summons from the court or use his travel abroad to abscond.[41]

Insofar as temporary seizure of driver's license is concerned, which now has a dedicated article (Art. 201) within the measure of prohibition to leave residence, the possibility of ordering the latter as an autonomous measure has been retained.[42] The provision whereby the period of seizure of driver's license from the defendant shall be calculated in the duration of the penalty of seizure of driver's license or security measure of ban to drive a motor vehicle (Article 201 para 2) also remains. This autonomous measure now has two own requirements for ordering and differs from the 2001 CPC in the following. First, according to the new CPC, it is no longer required that the malicious action of endangerment of public traffic, which remains as a requirement for ordering of this measure, has resulted in serious consequences. The other difference is that a new ground for ordering this measure as an autonomous one is now introduced: if proceedings are being conducted for a criminal offence in whose commission or preparation a motor vehicle was used (art. 201 para 1, point 1). Both autonomous requirements are specific to the Serbian CPC in respect to Croatia, BiH and Montenegro whose codes do not provide it.

What gives rise to concern is the introduction of the aforementioned new grounds for temporary revocation of driver's license - circumstances that proceedings are conducted for felony in whose commission or preparation a motor vehicle was used. Not only has this provision been set up too broadly, but its link with the need for unobstructed conduct of criminal proceedings is difficult to perceive. The very fact that a motor vehicle was used in commission of the crime (the Code does not even specify that it was the defendant using it), should not be the reason to temporarily seize someone's driving license, i.e. deprive him/her possibility to drive a motor vehicle. Considerable discretion is left in interpreting to what extent was the use of vehicle itself of significance or vital impact on the offence and consequences thereof, hence it could be ordered any time when in some phase of an offence a vehicle was used. Even when a specific vehicle was a significant means, i.e. if the vehicle may be used in evidence in the proceedings, it may be, in any case, seized temporarily for that purpose (Article 147). Therefore, it is difficult to find reasons why freedom of movement should be restricted and the possibility to drive as such. Consequently, it resembles punishment for use of vehicle in commission of felony, which of course should not be the purpose of application of any of the measures. If restriction of movement of the defendant is necessary due to likelihood that he

41 See R. Dragićević-Dičić, op.cit, p. 42.

42 Art. 136, (9) of the 2001 Serbian CPC.

leaves the country, absconds or hides, then there is no justification, nor practical need to distinguish such a situation, in case of felony committed with use of vehicle, from the same risk in case of any other felony.

e) Ban to leave abode

This is the third measure that was bunched up in the 2001 CPC with other security measures in Article 136, and is now, in the new CPC, detached as a separate measure, expanded particularly in respect to statutory grounds for its application, and is regulated in more detail. The measure comprises a ban by the court on the defendant to leave the abode wherein he lives without permission. It may be augmented by stipulating requirements under which the defendant may reside in the apartment, such as barring the defendant to use a telephone and internet or to receive other persons in the abode (Article 208).

The new Code provides that the ban to leave abode may be ordered if circumstances exist indicating that the defendant may abscond, or "circumstances provided under article 211, para 1, point 1, 3 and 4 hereof".A part of the requirements for ordering of this measure has, therefore, to be sought among some of the grounds for detention found in the above Article 211 referred to in the provision on this measure, namely:

a) if the defendant is in hiding or his identity cannot be established or in the capacity of defendant he is clearly avoiding appearing at the trial or if there exist other circumstances indicating a flight risk (point 1, article 211 para 3);

b) if particular circumstances indicate that in a short period of time he will repeat the criminal offence, or complete an attempted criminal offence, or commit a criminal offence he is threatening to commit (point 3);

c) if the criminal offence with which he is charged is punishable by a term of imprisonment of more than ten years, or a term of imprisonment of more than five years for a criminal offence with elements of violence, or he has been sentenced by a court of first instance to a term of imprisonment of five years or more, and the way of commission or the gravity of consequences of the criminal offense have disturbed the public to such an extent that this may threaten the unimpeded and fair conduct of criminal proceedings (point 4).

The requirements for ordering this measure coincide with the requirements in Article 136 of the 2001 CPC in respect to risk of flight and hiding. Now these are in part explicitly extended to cover a similar requirement - avoidance to appear at trial. The key novelty is that now this measure is amplified to include risk of repeating, completion or commission of criminal offense, as well as manner of commission or gravity of consequences of the crime carrying a statutory high penalty that have led to disturbance of the public. The last requirement given under c), specified in point 4 of Article 211 para 3 of the new CPC, represents in itself one of the fore-

most novelties of the 2011 CPC in respect to detention as it introduces a number of cumulative reasons among which is the one that the manner of commission and gravity of consequences have already led to disturbance of the public that may threaten unobstructed and fair conduct of the trial. The benchmark for determination of this reason has now been set higher than in the 2001 CPC, or the previous 1977 CPC, that also contained the element of disturbance of the public.[43] As one of the papers in this publication is specifically dedicated to grounds for detention, we shall not analyze this issue here.

Evidently, the measure may not be ordered if circumstances exist indicating that the defendant will destroy, conceal, alter or falsify evidence or traces of the criminal offense, or if particular circumstances indicate that he will obstruct proceedings through influencing witnesses, accomplices or concealers, as this ground for detention (specified in point 2, Article 211) is not found among the grounds for ordering this measure in Article 208 of the new CPC. We are of the opinion that there are no reasons why these circumstances (known also as risk of collusion) should not also imply ordering of this measure, as is the case in Croatia and Montenegro. Reducing freedom of movement only to abode, amplified by bar to use telephone, internet as well as to receive other persons in the abode, in addition to other conditions permissible under this measure, may in many cases adequately preclude interference with witnesses or destroying of evidence and traces.

Ban to leave abode is not provided in BiH laws, neither as a separate measure nor within the framework of other security measures, but is stipulated in Montenegro and Croatia. Thus, in Montenegro, the court may order ban to leave abode if circumstances exist that the defendant could flee, hide, depart to another country or unknown place or obstruct conduct of proceedings.[44] This is a narrower sphere of reasons for this measure than in the new Serbian CPC. These reasons may also be deemed less strict in comparison to reasons for ordering detention pursuant to the new Serbian CPC, as it suffices to have only indications that the defendant might hide or flee, and not to be already in hiding as it is provided for the grounds for detention in Serbia.[45] In Croatia this measure is called "house pre-trial detention" (istražni zatvor u domu - in Croatian). The latter, as the closest alternative to detention, may be ordered if grounds exist for detention that, unlike the Serbian CPC, include also the risk of destroying or concealing evidence and interfering with

43 Criminal Procedure Code, Official Gazette of the SFRY no. 4/77, 36/77, 14/85, 26/86, 74/87, 57/89, 3/90 and Official Gazette of the FRY no. 27/92, 24/94, 13/01, art. 191 (4).

44 Art. 166, (2)(1), CPC Montenegro.

45 Art. 166 of the Montenegrin CPC. Drago Radulović, Commentary to the Criminal Procedure Code of Montenegro, Podgroica Law Faculty, p. 209, indicating that there are also views, without attribution, that grounds for ordering of this measure and grounds for remand in custody pursuant to the Montenegrin CPC are almost the same.

witnesses.[46] Another reason for this measure and grounds for detention that remains broadly defined in Croatia, as was the case in Serbia prior to enactment of the new CPC, are particularly aggravating circumstances of the offense punishable by long-term imprisonment. The particularity of the Croatian solution is reflected, inter alia, also in the duty of the court to request from the defendant, prior to ordering of the measure, written consent of persons of age who reside in the defendant's abode on technical devices used for purposes of monitoring application of this measure.[47]

After raising of indictment the ban to leave abode is decided by the trial chamber, out of trial or at trial, and not by the presiding judge (Article 209 para 2), as is the case with the other two security measures (ban to approach and ban to leave residence). The lawmakers have opted to raise the decision-making threshold to the level of trial chamber due to severity of the measure.[48]

Detention may be ordered to the defendant if in violation of this ban (Article 206 para 3). The defendant may leave his abode without permission if so necessary due to urgent medical intervention for him or person residing with him, or to avoid or prevent serious danger to life or health, or property of greater value (Article 208 para 2). In this case the defendant is obligated to notify without delay an officer from the administration for enforcement of criminal sanctions about leaving his abode, reasons and place where currently located.

A key novelty of the 2011 CPC in this area is the introduction of electronic monitoring of compliance with the ban to leave abode. The court may order electronic surveillance of the defendant to control compliance with ordered restrictions, which is set forth under Article 190. The possibility of electronic surveillance is now restricted to this measure only, and may no longer be ordered to control enforcement of ban and ban to leave residence, as was provided in the 2001 CPC.

Electronic monitoring is done by placing a locating device, i.e. a transmitter (so-called bracelet) onto the wrist or ankle of the defendant. The defendant must be given detailed instructions pursuant to provisions of Article 190 on the manner of operation of the device. Electronic monitoring is done by a government administration body with competence for enforcement of criminal sanctions or other government authority defined by law, and a professional officer monitors movement of the defendant and his location via a receiver. Of the other analyzed codes in the region only the Montenegrin CPC, in addition to the new Serbian CPC, provides surveillance through electronic monitoring not only over enforcement of the ban to leave abode but also over other measures.[49]

46 Art. 119 (1), referring to Article 123(1), points 1-4 of the Croatian CPC.

47 Idem. Art. 119 (3)

48 R. Dragičević-Dičić, op.cit, p.46.

49 Art. 166, para 3 of the Montenegrin CPC. Electronic monitoring is also applied in enforcement of the measure of ban to leave residence, visiting a certain place or area or meeting with particular person, or the durty to periodically report to specified government authority.

By its content this measure is akin to detention, both by its extent and imposed restrictions, and by grounds for its determination. Hence its colloquial name "house arrest" or “home detention“. A point of debate is to what extent it, by nature of its restrictiveness, can be equated with detention. As it imposes very strict restrictions of freedom, limiting it only to the abode of the defendant, the European Court of Human Rights ruled in several of its cases that it must be considered deprivation of freedom, the same as detention.[50] Consequently, the court should apply this measure whenever it is possible in replacement of detention. On the other hand, due to its restrictiveness and nature that is deemed deprivation of freedom, courts should in practice afford regard and continuously re-examine the reasons for duration of this measure and to replace it by a more lenient one whenever possible. To this end, as already mentioned in the general observations at the beginning of the text, the authors are of the opinion that the provision of the new CPC whereby the court is required to examine every three months whether this measure is still justified (Article 209 para. 4), grants the court a timeframe which is disproportionately long having in mind the restrictiveness of this measure. The timeframe for re-examination of its justifiability should be shorter and similar to time intervals for re-examining detention.

f) Bail

The new Serbian CPC introduces novelties also in regard to bail as a measure to ensure presence of the defendant, both in expanding possibilities to order bail and in respect to the procedure for its ordering. Namely, Article 202 of the new CPC provides that detention may be replaced with bail if remand in detention is ordered on two statutory grounds provided in Article 211: 1) if the defendant is in hiding and or his identity cannot be established or if he is clearly avoiding appearing at the trial or if there exist other circumstances indicating a flight risk; 2) if the defendant is charged with a criminal offense punishable by a term of imprisonment of more than ten years or a term of imprisonment of more than five years for a criminal offence with elements of violence, or he has been sentenced to a term of imprisonment of five years or more, and the way of commission or the gravity of consequences of the criminal offense have disturbed the public to such an extent that this may threaten the unimpeded and fair conduct of criminal proceedings. If in the deliberation of the court the purpose of detention could in such cases be achieved with bail, as a more lenient measure, it shall leave the defendant at liberty, i.e. release him if in custody, if the defendant personally or someone for him posts bail that he will not

50 Judgement of the ECrHR Lavents c. Lettonie, ECHR, Requête no 58442/00, 28 novembre 2002, para. 63, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-6536; ECrHR judgement Vachev v. Bulgaria, ECHR, 8 July 2004, para.64, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61877.

flee before conclusion of proceedings and the defendant himself promises not to go in hiding or leave place of residence without permission of the court.

Thus, in respect to the 2001 CPC, which restricts the possibility of bail as an autonomous measure only to situations when risk of flight or evading appearance at trail exists, the new CPC expands application of this institute also to situations of hiding of the defendant, impossibility to determine his identity or offenses carrying a stipulated penalty of ten or more years of imprisonment, and/or five years where the manner of commission or gravity of consequences led to disturbance of the public that may threaten unobstructed and fair conduct of trail. This novelty is particularly important as it eliminates the possibility of exclusion of bail only on grounds of seriousness of offence and/or circumstance of perpetration of offense and brings the new CPC in line with the case law of the European Court of Human Rights (ECrHR). Pursuant to the 2001 CPC the possibility of bail was excluded, inter alia, in respect to a person under reasonable suspicion of committing a criminal offense punishable by more than ten years imprisonment, or over five years for a criminal offense with elements of violence and if so justified due to particularly aggravating circumstance of the criminal offense.[51] Although this solution does not negate the possibility of bail only on grounds of severity of stipulated penalty, which would in terms of ECrHR case law be deemed unacceptable discrimination of a particular category of persons,[52] and requires also the existence of particularly aggravating circumstances of the criminal offence, even the cumulative meeting of these requirements is not enough to permanently exclude bail. Namely, in summation of its earlier case law the ECrHR clearly underscored in the case of Kislitis v. Russia "as regards the courts' reliance on the gravity of the charges as the decisive element Š…„this reason cannot by itself serve to justify long periods of detention. Although the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence".[53]

As the new CPC also introduces a general provision contained in Article 189 para 2 whereby two or more measures may be cumulatively ordered, where necessary, bail may be ordered also with other measures. Here the new CPC contains, as did the 2001 CPC,[54] also an explicit provision setting forth that bail may

51 Art. 137 (1) of the 2001 CPC Serbia.

52 Judgement of the ECrHR, *Boicenco v. Moldova*, ECHR, 41088/05, of 11 October 2006, para. 134-138, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76295.

53 Judgement of the ECrHR, *Kislitsa v. Russia*, ECHR, 29985/05, 19 June 2012, para 36, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111523.

54 Art. 137 (2) of the 2001 Serbian CPC provides that bail may be ordered also as a security measure for compliance with restrictions in Art.136, para 2 and 10; art. 136 (5).

be ordered if a travel document is returned to a defendant under the measure of ban to leave residence for the purpose of urgent travel abroad.

The second important novelty relating to bail is granting the possibility to the court to ex officio and independently of motions by parties determine a pecuniary amount to be posted as bail (Article 204 para 2). Motions for determination of bail may be made by the defendant and his counsel, the prosecutor, and person posting bail and in absence of such motion bail may be determined by the court following opinion obtained from the parties. It is regarded that such solution affirming a more active role of the court and granting the court the possibility to determine by itself a pecuniary amount to be posted as bail will have a positive effect in practice and resolve many dilemmas and incontinences that have been present to date.[55]

The ruling on bail must be issued in form of reasoned decision that may be appealed by all persons who are entitled to file a motion for bail, however such appeal shall not have

Insofar as lifting and forfeiting bail as well as content of bail is concerned, the new CPC brings no significant changes, with the exception that in defining the amount of bail the court shall no longer be guided by severity of offense but by the degree of flight risk that the bail is set to avert (Article 202 para 3). The other two circumstances taken under consideration by the court, and which remain unchanged from the 2001 CPC, are personal and family circumstances of the defendant and the financial circumstances of the person posting bail. It must be underscored that in determination of the amount of bail in practise the court must take under consideration that the purpose of bail is not nor can be providing of funds for damage compensation that he caused through commission of the offense, but ensuring his presence during the trial. It is for this very reason why the amount of bail must be proportionate to its purpose and must be defined in relation to the defendant, his property and his relationship with persons standing for bail,[56] and not in respect to obtained gain or caused damages. In the case of Toshev v. Bulgaria the ECrHR underscored that the amount of guarantee must be adequately reasoned and that the court in determining bail must take into account the assets of the defendant. The omission by the court to assess, in determining the amount of bail, the capacity of the defendant to pay a certain amount represents a violation of the Convention.[57] On the other hand, ECrHR is establishing through its case law the existence of an

55 See R.Dragičević-Dičić, op.cit, p. 44.

56 Judgement of the ECrHR Neumeister v. Austria, ECHR, 1936/63, 27 June 1968, As to the Law para. 14, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57544; Mangouras v. Spain, ECHR, 12050/04, 28 September 2010, para 78, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100686 .

57 Judgement of the ECrHR Toshev v. Bulgaria, ECHR, 56308/00, 10 November 2006, para. 68 et seq., avialable at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76687.

obligation of the defendant to submit to the court all information that are verifiable and necessary for determination of the adequate amount of bail.[58]

However, the ECrHR allows exceptionally the possibility to still take under consideration the amount of caused material damages in setting the amount of bail, as long as it does not constitute the deciding factor. Namely, in the case of Mangouras v. Spain from 2010 the ECrHR, recalling its earlier decisions, found that "while the amount of the guarantee provided for by Article 5 § 3 Šof the Convention„ must be assessed principally by reference to the accused and his assets it does not seem unreasonable, in certain circumstances, to take into account also the amount of the loss imputed to him".[59] Still, the decision of the court in this case should be viewed in light of the exceptional circumstances and accordingly value its precedential power and import with constraint.

In regard to duration of bail, it needs to be underscored that bail, and any other measure stipulating release of defendant, may be ordered only if justifiable grounds for detention exist, rationale for bail must be subject to same judicial control as in the case of detention.[60] Consequently, it should be noted that the new CPC does not contain, with the exception of a general provision setting out that any measure to secure presence of defendant shall be revoked ex officio or replaced with more lenient measure when conditions to do so materialize, does not contain any particular provision requiring the court to periodically re-examine justification of bail or amount thereof. On the other hand, in case of other measures to secure presence of the defendant, dedicated provisions regulate the duty of the court to periodically re-examine the justification of such measures (a more detailed explanation is given in other sections of this paper).

In regard to forfeiture of bail, the new CPC differs from the 2001 CPC (which provides forfeiture of bail in case of absconding of defendant) in that it now provides forfeiture of bail if the defendant violates the promise given at setting of bail i.e. if he is in hiding or leaves residence without permission. It remains unclear from the text of the law as to what is the fate of the bail if it has been ordered cumulatively with another measure to ensure presence of defendant or unobstructed conduct of criminal proceedings. The same dilemma is present also in respect to the 2001 CPC which provides ordering bail as a security measure for compliance with the ban to visit certain places, meet or approach particular persons.[61]

58 Judgement of the ECrHR Iwanczuk v. Poland, ECHR, 25196/94 , 15 November 2001, para. 66, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59884.

59 See, Mangouras v. Spain, cited judgment, para.81.

60 Judgment of the ECrHR, Musuc v. Moldova, ECHR, 42440/06, 6 November 2007, para. 42, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83081; Aleksandr Makarov v. Russia, ECHR, 15217/07, 14 September 2009, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91758

61 Art. 137 (2) of the 2001 CPC.

Insofar as lifting of bail is concerned the new CPC provides, as did the 2001 CPC, that in case the defendant fails to comply with duly served summons or if in duration of bail grounds for detention occur different from those for initial setting of bail, bail shall be lifted and detention ordered (Article 207 para 1).[62] It is our view in respect to this situation, and in line of harmonisation with the European Convention on Human Rights, that a much better solution may be found in the Croatian CPC which provides that in case of occurrence of new grounds for custody allowing bail, a new amount of bail, appropriate to new circumstances, will be set.[63]

In respect to regulation of bail in countries of the region it may be concluded that solutions adopted in Montenegro and BiH are by far more restrictive in comparison to those in the new Serbian CPC or Croatian CPC. The Montenegrin CPC regulates bail in entirety like the Serbian 2001 CPC in force, both in terms of grounds for setting bail (i.e. contracting the possibility to order bail only to risk of flight and failure to comply with summons), and in regard to its content and procedure for ordering.[64] On the other hand, the BiH CPC is even more restrictive in that bail may be ordered only on grounds of risk of absconding.[65] In all other segments it does not differ from the Montenegrin CPC or the 2001 Serbian CPC.

According to the Croatian solution the possibility to set bail is provided in respect to a defendant against whom remand in detention is ordered (the term used in the Croatian CPC is investigative detention) not only in case of risk of absconding but also when there is risk that the defendant will impede unobstructed conduct of criminal proceedings by destroying, altering or concealing evidence or influencing witnesses and expert witnesses,[66] or if there is risk of repeating, completing or committing a new criminal offense.[67] This amplification of grounds for setting bail to situations of "collusive and interactive" risk[68] is the result of the intention of the Croatian lawmaker to resolve the problem of "overcrowding of the prison system" and to ensure respect for the right to liberty as an ultimate human right, which implies use of custody only as "a last resort".[69] In a recent decision the Constitutional Court of Croatia, on the motion to assess constitutionality of certain provisions of the Croatian CPC, has found that this restriction of grounds for replacing custody with bail is contrary to the Constitution of the Republic of Croatia and to the European Convention on Human Rights. Namely, in the deliberation of the Croatian

62 Compare with art. 139 (1) i (2) of the 2001 CPC.
63 Art. 105 (2) of the Croatian.
64 Art. 170 – 173 of the Montenegrin CPC.
65 Art. 127 of the BiH CPC.
66 Art. 123 (2) of the Croatian CPC.
67 Idem, para 3.
68 See Z. Konjić, A. Pavičić, op.cit, p. 896.
69 Idem.

Constitutional Court, exclusion of possibility to set bail in situations where investigative detention is necessary for unobstructed conduct of proceedings due to particularly aggravating circumstances of commission of the offense punishable by long-term imprisonment, is unconstitutional as the lawmaker was "most probably guided by the seriousness of the criminal offense…Šthat„ in itself is not a constitutionally viable reason for statutory exclusion of bail".[70] In the obiter dictum of the decision the Constitutional Court also concludes that the possibility to set bail in situations when a duly summoned defendant avoids to attend the trial (this possibility is not provided under Croatian CPC but is in Serbia and Montenegro) would be contradictory to the very purpose of granting bail as a guarantee that the person will be present at trial.[71]

In addition to situations where bail may be set, the dissimilarity is visible also in the content of the pledge given by the defendant to the court. Whilst the Serbian solution (both CPCs) require the defendant not to go in hiding and not to leave residence without permission of the court, the Croatian also adds a pledge from the defendant "that he will not interfere with criminal proceedings and that he will not commit a new criminal offence".[72]

A further important difference between the Croatian and the Serbian CPC is reflected in situations where bail is forfeited. The Croatian CPC is considerably stricter as it provides the possibility for the court to order with the bail "one or more precautionary measures as terms of bail", compliance with which is monitored by the police and in case of violation bail is forfeited. The Croatian lawmaker went a step further by providing for collection of bail "also if there is a serious possibility that the defendant will act contrary to the terms of the ruling on bail".[73] This provision was also under deliberation of the Constitutional Court of Croatia as the petitioners deemed that "ordering investigative detention requires reasonable suspicion that a certain person has committed a criminal offence and, therefore, same legal standard would be also required for determination of the fact that the defendant has acted contrary to terms of bail".[74] Quoting the case law of the ECrHR, the Constitutional Court ruled that the possibility to collect bail also when there is probable cause that terms of bail shall be violated is unconstitutional because by doing so "forfeiture of bail is transformed into an additional penalty as the person, in addition to deprivation of liberty, is further financially penalised whilst requirements for doing so have not been met".[75]

70 Constitutional Court of the Republic of Croatia, Number: U-I-448/2009, U-I-602/2009, U-I-1710/2009,U-I-18153/2009, U-I-5813/2010, U-I-2871/2011, Zagreb, 19 July 2012 p. 60 para 79.

71 Idem.

72 Art. 102 (1) of the Croatian CPC.

73 Art.104 (2) in fine of the Croatian CPC.

74 See Constitutional Court of Croatia, decision of 19 July 2012, p. 61, para 81.

75 Idem, p. 62.

A further difference exists also in respect to circumstances taken under advisement in determination of the amount of bail since the Croatian law does not provide for the financial status of the person standing for bail as one of the determining factors for the amount of bail. Furthermore, the possibility of personal recognizance of one or more persons to pay the set amount of bail is excluded.

It may be concluded that the Croatian CPC is more precise as it specifically regulates the moment when the defendant whose detention is replaced by bail is released.[76] The 2011 Serbian Code remains in these terms incomplete with a further imprecision reflected in the absence of a provision that would regulate the "fate" of detention after passing of the ruling on bail. Namely, unlike the Croatian solution which explicitly states that after the decision on bail becomes final and the amount of bail is posted, a separate decision is issued on revocation of detention, the new Serbian CPC does not give a precise answer whether detention is revoked by separate decision or by the one setting bail.

Conclusion

Measures to ensure presence of the defendant and unobstructed conduct of proceedings from the new Serbian Criminal Procedure Code that have been analysed in this paper have been set forth so to consistently reflect some of the basic conceptual precepts of the lawmaker in respect to transition to prosecutorial investigation and adversarial trial. In this they are similar to solutions in the region where this transition has been effected to higher or lesser degree. Certain solutions, such as the possibility for the parties and defence counsel to summon witnesses, expert witnesses and other participants in proceedings after raising of the indictment - which is beneficial in terms of efficiency of proceedings - are a result of this reform process. What the court and parties will have to take under advisement is that security measures do not compromise the possibility and right of the defence to conduct their own investigation and collect evidence, including questioning of witnesses, and to participate in other ways more actively in the proceedings than was the case to date and thus meet the expectations placed before the parties by the new CPC.

The changes introduced by the new CPC through regulation of security measures are a step forward in finding the balance between the need for more efficient criminal proceedings on one hand, and the right to liberty and other rights of the defendant, on the other. The balance must be founded on the standards established by the European Convention on Human Rights, but has to also rely on the most appropriate solutions from domestic and comparative legislation and jurisprudence. In view of elaboration of particular measures and requirements for their

76 Art. 103 (2) of the Croatian CPC.

ordering, this Code somewhere follows the existing well-established rules and solutions proven in practise that are concurrently, and most often with unbroken legal heritage, present in other countries of the former Yugoslavia, and in some instances enacts new ones or elaborates them in detail in a way distinguishing it from its neighbours. Some solutions deserve praise whilst some criticism in terms of a need to consider, re-examine or afford additional attention in practise. As the provisions governing measures have been analysed and compared in detail, we would now summarise below some of the key observations.

The time frame for re-examining justification of further application of measures is increased from two to three months, the longest in the region, appears an unjustifiable constriction of protection of the defendant who is subjected to measures. This time frame should be particularly reconsidered and shortened in respect to the measure of ban to leave abode, which is most similar to detention.

There is no reason to introduce temporary revocation of driver's license as a measure if the vehicle was used for commission or preparation of offense. These are excessively broad grounds and they foster arbitrariness, and - most importantly - are not in correlation with the risk of obstructing proceedings or non-appearance of defendant.

A positive element in the new CPC is the provision of a broader spectrum of measures that may be ordered cumulatively and that some of the measures are now provided as separate, with detailed stipulation of requirements and manner of their application, including also remote electronic monitoring and duty to report to the police or other public authority. Grounds for ordering some of the measures have been augmented, and consequently the field of their application. Of particular importance is the broadening of the field of application of bail. All of the above provides a broader alternative to detention as the strictest measure that should also be ordered only exceptionally, and also grants a general possibility to replace restrictive measure with ones that are less restrictive. This improves the status of defendants and provides a stronger guarantee for respect of their rights, particularly the right to liberty. With the exception of bail, and ban to leave abode in most of its requirements, the other measures do not require the same grounds for application as in case of remand on detention, and may hence be also applied when there is lesser risk, i.e. in absence of those particular circumstances that are stipulated for detention.

On the other hand, in might be proven beneficial in practise and even more broaden the choice of effective measures if the ban to engage in certain activities was introduced, as recognised in Croatian and BiH laws. Furthermore, a question may be raised why is the risk of concealing and destroying traces and influence on witnesses recognised as a requirement, in addition to custody, only in the measure of ban to approach, meet and communicate (and even here only in respect to influence on witnesses). Why should not the ban top leave residence, particular "house

arrest" with potential associated restrictions for the defendant, be one of the options, even a more effective one, in case of so called "collusion risk" (interference with evidence and witnesses) prior to resorting to detention? Remand on detention in any case remains an almost automatic option when such risk is present in practise, and this does occur in a large number of cases.

Increasing the options for ordering various security measures should lead to reduction of cases with detention ordered and the number of detainees, which was one of the intentions of the lawmaker and the Ministry of Justice of Serbia. Not only is the replacing of detention with less restrictive measures, whenever there are grounds to do so and an adequate alternative, a tendency prescribed by the case law of the European Court of Human Rights, but it has also become, inter alia, one of the ways to resolve the issue of prison overcrowding in Serbia. Thus the 2010 Strategy of the Government of Serbia for reduction of overcrowding of prisons in Serbia (concluding that frequent ordering of detention is one of the key reasons for overcrowding in penal institutions) recognises that one of the ways to resolve this issue lies in broadening the grounds for ordering bail, more precise statutory requirements for ordering ban to leave abode or residence, as well as in regulation of the system of electronic monitoring of the defendant under a security measure.[77] The Strategy includes among the solutions also professional training of judges and prosecutors.[78]

The duty of the courts to consider ordering more lenient measures when deliberating detention is not, however, a novelty introduced only by the new CPC. It has existed from before. Thus, it was an issue of courts' jurisprudence if, how and when these alternatives were taken in consideration. There are expectations that solutions in the new CPC will be more articulate and enhance court practise and, thus, status of the defendant, and that Article 136 of the 2001 CPC was creating certain vagueness and ambiguities and causing problems in court practise.[79] In any case, it remains for case law, and also initiatives of the parties in proceedings, to demonstrate whether normative advances in terms of various options for security measures will be followed by application of these very norms in the spirit in which these were enacted. Certain experiences from countries of the region, such as Bosnia and Herzegovina, indicate that after amending of the criminal procedure

77 The Strategy of the Government of Serbia to reduce overcrowding in institutions for enforcement of penal sanctions in the Republic of Serbia from 2010 to 2015, Official Gazette of Republic of Serbia, no. 53/2010, pp. 9-10.
The Strategy presents the fact that of the overall number of persons sentenced to imprisonment up to 3 years and who commenced serving their sentences in 2008, 34% were in detention during proceedings. Idem, p.5.

78 Idem, p.11.

79 R. Dragičević-Dičić, op. cit., p

codes a part of court practise displayed a tendency to apply the broader spectrum of security measures, while the other remained more reticent.[80] Hence, one should have moderate expectations from the text of the law itself and wait for what jurisprudence is going to demonstrate. At the same time, the guidelines of superior courts and prosecutions to lower-instances, proactive proposals of defence, and also training of judges, prosecutors and attorneys should direct the practise towards genuine embracing of all measures provided in the CPC, particularly those that are a replacement for detention.

80 Research conducted by the OSCE Mission to Bosnia and Herzegovina showed that prosecutors and judges of the Court of BiH, after enactment of amendments to the BiH CPC, used measures alternative to detention more frequently, op.cit, p.14