The Rights and Freedoms Judge and the Preliminary Chamber Judge. 
The Investigating Judge and the Judge for Liberty and Custody.
Comparative legal aspects.

FRANCOISE TOILLON
The Institute for General Administration Preparation
Strasbourg University
47, Avenue de la Foret Noire F-67082 Strasbourg Cedex
FRANCE
francoise.toillon@justice.fr

MARIAN DRILEA-MARGA
Law Faculty
Transilvania University
Brasov, 25th Eroilor Avenue
ROMANIA
drilea.marian@gmail.com

RAMONA LORENA PARASCHIV
Law Faculty
Transilvania University
Brasov, 25th Eroilor Avenue
ROMANIA
ramona_paraschiv@yahoo.com

Law No. 135/2010 regarding the Criminal Code, published within the Official Gazette of Romania, Part I, no. 486 of July 15th 2010 introduces two new categories of judges: the rights and freedoms judge and the preliminary chamber judge. The French legal system is familiar with both the investigating judge as well as with the liberty and custody judge, the latter having similar attributions to the ones the judge of freedoms and rights has within the Romanian criminal Code.

Key-Words: Judge, preliminary chamber, prevention measure, assuring measure, safety measure.

1 Introduction
By adopting the new Criminal Procedure Code, by Law No. 135/2010, published in the Official Gazette of Romania, Part I, no. 486 of July 15th 2010, two new categories of judges were created: the rights and freedoms judge and the preliminary chamber judge.
According to the dispositions set forth by art. 603 paragraph 1 of Law No. 135/2010, the new Criminal Code is entering into force at a date that shall be established through its law of application. According to the dispositions of paragraph 2 of the same normative act, the law draft for the application of the Criminal Procedure Code shall be submitted for approval to the Parliament within 12 months, calculated from the date of July 15th 2010 – the date when the law no. 135/2010 was published in the Official Gazette of Romania, Part I.
According to the dispositions set forth by art. 124 paragraph 3 and art. 125 paragraph 1 of the Romanian Constitution, with the subsequent completions and additions, Law of modification of the Romanian Constitution no. 429/2003, and art. 2 of Law No. 303/2004 concerning the statute of the judges and prosecutors, the judges are irremovable, independent, they obey to the law only and must be impartial. The Superior Council of the Magistracy – guaranteeing the justice’s independence, is the one suggesting the President of Romania the appointment of the judges and prosecutors, except for the trainees, in the conditions provided by the law.
The French judicial system which is a result of the Revolution of 1789 and of the Napoleonic period, was modified many times in order to be adaptable to the society evolution and to comply with the European standards, especially with the European Convention of Human Rights and Fundamental Freedoms.

According to the dispositions of article 64 of the French Constitution, the judicial authority is independent. The separation of powers and this status of the judges allow the exertion of their rights by the citizens and the compliance of the equality principle before the Law. The President of the Republic stand as guarantor of this independence, being assisted by the Superior Council of the Magistracy. In the constitution it is mentioned the fact that there is an organic law which describes the magistrates’ status. That is why the magistrates who are not civil servants, benefit of a specific status which results from an ordinance of December 22nd 1958. This text was modified several times in the past fifty years. The fact that it is issued from an organic law guarantees that the amendments adopted by the Parliament will be necessarily submitted to the Constitutional Council validation before promulgation.

If the presiding judges are irremovable and independent, the public prosecutors (prosecutors or substitutes) must submit to the hierarchic authority of Attorneys General and of the Ministry of Justice which dictates the national criminal policy.

The competences of the investigating judge are regulated by the dispositions set forth at art. 79-84 of the French Criminal Code and the competences of the liberty and custody judge are envisaged by art 137 -137 -3 and art. 143-1 – 144 of the French Criminal Code.

2 The rights and freedoms judge and the preliminary chamber judge, in the light of the new Criminal Procedure Code

According to the dispositions set forth by art. 30 of the new Criminal Procedure Code, two new institutions are specified, that accomplish the legal activity. In this manner, beside the criminal research bodies, prosecutor and the judges, the rights and freedoms judge and the preliminary chamber judge are mentioned.

2.1 The rights and freedoms judge
«The rights and freedoms judge is the judge who, within the Court, according to its competence, solutions, during the criminal pursuit, the requests, proposals, claims, appeals or any other notifications concerning the preventive measures, the assuring measures, the safety measures of temporary nature, the entrust of the searches, of the special surveillance techniques or researches or other probational proceedings according to the law, the anticipated administration of the evidence, as well as other situations expressly provided by the law », according to the dispositions set forth by art. 53 of the new Criminal Procedure Code.

2.1.1 Prevention measures in the conception of the new Criminal Procedure Code

In the regulation of the new criminal Procedure Code, the following categories of prevention measures that could be applied for the suspect or defendant, natural person are contained: detention – the prevention measure that could be enjoined, for the suspect or defendant, by the criminal prosecution authority or by the prosecutor; the legal restriction on bail – it can be applied, for the defendant, along with the prosecuting charges by the prosecutor and the rights and freedoms judge, in the preliminary chamber procedure by the preliminary chamber judge, and during the judgement by the judging Court; the house arrest and the detention under demand – can be applied for the defendant, during the criminal pursuit by the rights and freedoms judge, in the preliminary chamber procedure by the preliminary chamber judge, within the judgment by the judging Court.

According to the new regulations, prevention measures could be applied also for a legal person, if there are valid reasons that justify the reasonable suspicion that the legal person committed an offence as set forth by the criminal law and that is only for assuring the good deployment of the criminal trial. Thus, the following prevention measures could be taken: the suspension of the dissolution or liquidation of the legal person, started previously or during the criminal pursuit; the suspension of the fusion, division or reduction of the legal person’s registered capital, started previously or during the criminal pursuit; the prohibition of some patrimonial operations, susceptible of easing the decrease of the patrimonial assets or the liquidation of the legal person; the prohibition of conclusion of some legal documents, established by the legal organ; prohibiting the development of the activities similar to that in the context of which the criminal offence took place.
2.1.2 The competence of the rights and freedoms judge concerning the prevention measures, the assuring measures, the safety measures of a temporary nature and in the procedure of the technical surveillance warrant issuance

Should the preventive measure of the legal restriction be applied in an exceptional manner by the prosecutor, temporarily, within a maximum of 5 days and the minimum of 3 days before the expiry of this date, the prosecutor notifies the rights and freedoms judge from the competent court to solution the case in the view confirming the measure applied to the defendant. The rights and freedoms judge solutions in the council chamber, with the summons of the defendant and their hearing if present, and the mandatory participation of the defendant’s lawyer and by conclusion being able to confirm or revoke the measure applied by the prosecutor.

The rights and freedoms judge can apply the prevention measure of the legal restriction toward the defendant and the motivated proposal of the prosecutor.

Nevertheless, should they reject the detention under remand, home detention or the legal restriction on bail, the rights and freedoms judge can apply to the defendant the legal restriction measure.

The rights and freedoms judge is the legal competent body for solution of the home detention proposal or the detention under remand of the defendant, along the criminal pursuit.

The proposal of home detention finds its solution within the council chamber, with the summons of the defendant, their hearing when present, and the mandatory participation of the prosecutor and the chosen or nominated.

In case of the detention under remand measure, the presence of the defendant at the proposal’s solution is mandatory, with the exception of the situations when the defendant is absent with no justification, is missing, evades or because of health reasons, force majeure or necessity, they are either not present or cannot be brought before the judge.

Regarding the legal person, the rights and freedoms judge can obligate them to the payment of a bail consisting in an amount of money that can’t be lower than 10,000 lei, in order to ensure the observance of the prevention measures applied.

The prevention measures can be applied for a legal person, by the rights and freedoms judge, during the criminal pursuit, on a period of at most 60 days, with extension possibility for the same period maximum, are applied through motivated conclusion dictated by the council chamber, with the summons of the legal person and the mandatory participation of the prosecutor.

During the criminal pursuit, the rights and freedoms judge, of the competent Court, utters a solution for the appeal formulated against the prosecutor’s ordinance through which it has been enjoined taking of an insurance measure. The appeal is formulated within 3 days from the date in which measures ordinance was communicated or from the date of fulfilling it as the rights and freedoms judge. The file related to the case is submitted within 24 hours from the request, and its solution is received in the council chamber, with the summons of the person that formulated the appeal and of the interested persons, with the mandatory participation of the prosecutor. The appeal must be executed. The rights and freedoms judge gives his decision through motivated conclusion, which is final.

Regarding the temporary decisions of obligation to medical treatment or of the measure of temporary medical hospitalisation for the suspect or for the defendant, the competent body which applies this, during the criminal pursuit, is the rights and freedoms judge, at the motivated proposal of the prosecutor.

To assuring measures are taken against a legal person, by the rights and freedoms judge, at the motivated request of the prosecutor.

At the request of the prosecutor, the technical surveillance can be applied, during the criminal pursuit, by the rights and freedoms judge. This measure can be applied for at most 60 days, with possibility of extension at the motivated request of the prosecutor, each extension can’t exceed 30 days, of a total duration of at most 1 year, with the exception of the measure of video, audio surveillance or taking pictures in private spaces, which can’t be applied to a period of more than 120 days.

The request addressed to the judge for right and liberties shall receive a solution from them, in the same day, in the council chamber, without summons of the parties, with the mandatory participation of the prosecutor. The rights and freedoms judge gives a resolution through conclusion that can’t be submitted to any way of appeal, and as effect of the acceptance of the technical surveillance request, the technical surveillance warrant shall be issued immediately.

The prosecutor can authorise, in the conditions expressly provided by the code, surveillance measures on a period of at most 48 hours. In this situation, the measures must be confirmed by the rights and freedoms judge, which shall be notified by the prosecutor in at most 24 hours from the moment of the measure’s expiry. The rights and freedoms judge shall confirm or infirm the measure
of technical surveillance applied by the prosecutor, through a conclusion which can’t be submitted to any mean of appeal.

2.2. The preliminary chamber judge

"The preliminary chamber judge is the judge who, within the court, according to its competence, examines the legality of what has been disposed by the prosecuting attorney, examines the samples administration legality and the proceedings performance by the criminal pursuit bodies, solves the claims against the solutions for non-pursuit or non-arraignment, solves all the situations expressly stipulated by law", according to the stipulations mentioned in article nr. 54 from the New criminal procedure code.

The procedure duration in the preliminary chamber is between 15 and 30 days from the cause recording date at court. The cause solution term within the preliminary chamber procedure is established by the judge, according to the complexity of the file.

The preliminary chamber procedure object is constituted by the examination of the court notification legality and the samples administration legality or by the proceedings performance by the criminal pursuit bodies.

The preliminary chamber judge decides by means of a motivated closure, in the council chamber, without the prosecuting attorney’s and defendant’s participation.

2.2.1 The preliminary chamber judge’s competence regarding the prevention measures, assuring measures, temporary safety measures

Within the preliminary chamber procedure, the competence of disposing of the legal restriction prevention measures, the bail legal restriction, home detention or the defendant’s detention under remand, belongs to the preliminary chamber judge.

These measures can be applied ex officio or under the prosecuting attorney’s motivated demand, according to the case, with the defendant’s notification and hearing if he is present, with the prosecuting attorney’s and the defendant’s advocate mandatory participation. In the case of the detention under remand, the defendant’s presence to the proposal’s solution is mandatory, except for the situations in which the defendant is inexcusably absent, disappeared, avoids or due to health reasons, force majeure or necessity is not present or cannot be brought in front of the judge.

When towards the defendant a prevention measure had been applied, the preliminary chamber judge examines the legality and the reliability of the prevention measure, and gives his resolution, ex officio or under demand, concerning the maintenance, replacement, repeal or the rightful cessation of the prevention measure in this case.

Regarding the legal person, the prevention measures applied in the preliminary chamber procedure represent the preliminary chamber judge’s competence.

The assuring measures can be applied by the prosecuting attorney during the criminal pursuit, the preliminary chamber judge within the preliminary chamber procedure or by the court during the trial.

Against the accomplishment method for the insurance measure adopted by the preliminary chamber judge, the prosecuting attorney, the suspect or the defendant may submit an appeal to this judge, within 3 days from the execution of the measure. The appeal does not suspend the execution, it receives a solution in public meeting within 5 days from the appeal registration date, with the prosecuting attorney’s participation. After the final decision, an appeal may be forwarded according to the civil law only regarding the insurance measure accomplishment method.

The assuring measures applied for the legal person, within the preliminary chamber procedure, represent the preliminary chamber judge’s competence.

Within the preliminary chamber procedure, the competent legal body to take the temporary mandatory measure for the medical treatment or the temporary hospitalization measure, towards the suspect or the defendant, is the preliminary chamber judge, at the prosecuting attorney’s motivated proposal.

3 The investigating judge and the liberty and custody judge, in the French procedure code sense

Being independent magistrate, the investigating judge is entitled to investigate, both for the prosecution and for the defence, all the crimes and certain offences which were submitted to him by the prosecuting Attorney or by complaint of the victim, creating civil party.

For ten years, the investigating judge has been reducing his intervention field. He doesn’t perform in other cases than criminal cases or financial, economic, environmental, prostitution network or drugs traffic offences.

If only 5% of criminal cases are entrusted to an investigating judge, this magistrate becomes the symbol of revelation and of processing the political and financial cases.

The public prosecutor having the title of vice-president of the Judge liberty and custody is
considered “an independent judge” which arbitrates in the case that an individual liberty is concerned. He has criminal attributions, especially regarding the temporary detention, but other non-criminal attributions as well, especially regarding the residency permits for the foreigners in France and the public health permits (medical care for insane persons).

3.1. Amendments regarding the investigating judge institution

The judge who acts alone, who is irrevocable and independent and who makes use of important powers is often criticized.

In 1987, a commission formed by university representatives and presided by DELMAS MARTY, already begun to propose the revocation of the investigating judge. But the commission stated as previous condition the reinforcement of public prosecutors statutory guaranties. The independence is the centre of the magistrate institution in order to guarantee the individual liberties.

The law from June 15th 2000 or The Guigou Law” on the “innocence presumption” creating "The judge for Freedoms and detention " has drastically reduced the powers of the investigating judge. This one does not beneficiate anymore from the power of placing the concerned person in temporary detention. To do this, the investigating judge has to refer the matter to the Judge for freedoms and detention who will make a decision regarding the placement in temporary detention by means of a contradictory debate between the Prosecution Office and the concerned person and his lawyer, debate which shall take place in public session. The decision of the judge for freedoms and detention may be taken again into court in front of the Investigating Chamber of the Appeal Court.

In 2007, by creating the “investigating poles” by means of the implementation of the investigating judge’s corporatism, the law managed to change the investigating judge individualism. The judicial institution dysfunctions were underlined in "the Outreau case" when many persons were sent before the presiding judge for committing offences such as pedophilia and afterwards got acquitted. This case, known as a major judicial error, discredited the investigating judge and the temporary detention.

In January 2009, the President of the French Republic, Nicolas SARKOSY, announced the revocation of the investigating judge. The head of state declared he wanted to entrust the criminal investigations to prosecutors.

All the investigations and especially the investigations regarding complex cases would be conducted by the Prosecution Service. The judge’s intervention is allowed only in order to establish the facts in detriment of the individual freedom: searches, phone-calls listening, temporary detention, etc.

However, the prosecutors’ status remains unsolved, the magistrates having to submit hierarchically to the executive.

Or, the Great Chamber of the European Court of human right has again condemned France for the detention of Medvedyev for the statute of his public Ministry. At July 10th 2008, it already had addressed a notification for the French government affirming that the French prosecutor « wasn’t a legal authority, lacking the sufficient independence regarding the executive power, in this manner qualified». This jurisprudence was only reflecting matters about their French case, the conception that the Court is constituted according to the legal authority: does not reveal the fact that the independent magistrates are not submitted during the exercise of their function to an exterior influence, like the one of the executive power.

If they are suppressed and if we considerably raise the powers of the members of the courts toward the lawgiver, in parallel we must raise their statuary guarantees of independence.

As the old Justice Minister Robert Badinter says: "lacking it, the power shall reinforced itself through this reform about the criminal justice but also in what concerns the individual liberties"

That day, the reform shall not seem as updating.

4 Conclusions

The Romanian lawgiver wished, through the modification of the Criminal Procedure Code, to ensure an efficient exercitation of the legal bodys’ attributions, with the guarantee of the observance, for the parties and participants at the trial, of the Romanian Constitution, of the constitutive treaties of the European Union, of the European Union’s regulations in the trial-criminal matter, also of the pacts and the treaties concerning the fundamental human rights, which Romania signed. The French lawgiver wishes a regulation as efficiently as possible of the institutions of Law system or of Law. It follows for us to notice in what measure the legal modifications, from the Romanian and also the French state, shall lead to giving a celerity legal and based resolution of the criminal cases.
References:
[2] The French Criminal Code, art. 79-84, art 137 - 137 -3 and art. 143-1 – 144;
[3] Romanian Constitution, with the subsequent completions and additions - Law of modification of the Romanian Constitution no. 429/2003, art. 124 paragraph 3 and art. 125 paragraph 1;
[4] Law No. 303/2004 concerning the statute of the judges and prosecutors, art. 2;
[5] Frech Constitution, art. 64;