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Compliance with the Principle of Equality of Arms regarding the Expertise and Findings made during the Prosecution

Sandra Gradinaru[1]

Abstract: The paper addresses from a jurisprudential perspective the respect of the principle of equality of arms in the situation of administration, during the criminal investigation, of a specialized finding by a specialist working in the interests of the Public Ministry and the defendant disputes the conclusions of such a report. There are many situations in the judicial practice in which the defence challenges such reports even from the course of the criminal investigation and subsequently before the court of law, however, the judicial bodies do not administer technical expertise by independent experts to confirm or repel the findings of such a report. We appreciate that the criminal procedural law does not ensure the observance of the right to a fair trial of the defendant. Its possibility to challenge the contents of the specialized report is left during the criminal investigation at the discretion of the prosecutor, the defense being placed in an unfair situation. On the one hand, the subjectivism of the judicial body is noted in the assessment of the need to administer an expertise to confirm the issues contested by the defendant. Equally, by ordering the performance of a specialist finding, the defendant is deprived of the opportunity to formulate objectives or to benefit from the participation of a party expert. We believe that the exercise of the defendant's rights of defence during the criminal investigation cannot depend in a decisive way on the assessment of the case prosecutor. This paper includes proposals *de lege ferenda* to restore the balance between the prosecution and defense and ensure a fair trial for the defendant. The paper is addressed to professionals (judges, prosecutors, lawyers), as well as to theoreticians and litigants.

Keywords: equality of arms; judicial expertise; specialized findings; the right to a fair trial

[1] Associate Professor, PhD, "Alexandru Ioan Cuza" University of Iaşi, Romania, Address: 11 Carol I Blvd, Iași 700506, Corresponding author: sandra.gradinaru@yahoo.ro.

1. Administration of Evidence Consisting of an Expert Report by Virtue of the Observance of the Right to a Fair Trial – Analysis of National Legislation and Proposals for Ferenda Law

Equality of arms is a guarantee deriving from the right to a fair trial provided for by Article 6 of the European Convention on Human Rights.

According to the case-law of the Strasbourg Court, equality of arms implies respect for a „just" balance consisting in the obligation of states to provide the necessary means for each party to be given the opportunity toand present case – including evidence – under conditions that do not place it in a manifestly disadvantageous situation to the opposing party (c. Dombo Beheer B.V. against the Netherlands, p. 33).

We consider that the principle of equality of arms is violated if the prosecutor administers, during the criminal investigation, a proof consisting of a technical-scientific finding report and the defendant is not given the opportunity to challenge the report drawn up, situations common in the national jurisprudence.

According to the literature, the need for verification of the means of proof by the court is a requirement deriving from respect for the principle of equality of arms and the right of defence and is presented and presented in the form of a guarantees a posteriori (Gradinaru, 2019, p. 35).

We consider that the provisions of Article 172 para. 12 C.pr.pen.which stipulate that after the conclusion of the finding report, when the judicial body considers that the opinion of an expert is necessary or when the conclusions of the finding report are challenged, an expert examination is ordered does not contain sufficient guarantees to ensure the right to a fair trial of the defendant.

In the literature of specialty, it was appreciated that "simple contestation is not capable in itself to lead to the obligation to perform an expert report, it is necessary that the parties and the procedural subjects explicitly indicate relevant objectives of the expertise and the whole of the administered evidence to satisfy the need for the utility of the proof" (Udroiu, 2018, p. 541).

This is also the opinion of the national courts that consider that "the criminal investigation body or the court have the possibility to order the performance of an expert examination when the parties or main trial subjects contest the conclusions of the report of expertise drawn up, the simple challenge is not capable in itself to lead to the obligation to conduct an expert report, and, it is necessary that the parties or

the procedural subjects explicitly indicate relevant objectives of the expertise and towards the administered probative assembly to satisfy the requirement of the utility of the proof" (Dolj Court, The conclusion of the preliminary chamber judge on 11.05.2021).

The doctrine showed that probation consists in establishing the truth and clarifying the cause in all aspects, during the criminal investigation there being the concern of gathering the necessary evidence to establish the facts, the, making a sustained effort to reconstruct factual situations belonging to the past in detail (Gradinaru, 2014, p. 13).

We appreciate that the national legislation places the defendant in a disadvantageous situation, in violation of the rights of the defence, as well as the right to a fair trial.

On the one hand, the defendant must justify the need to administer the evidence with technical expertise, provided that, in the case file there is a technical-scientific finding report which is the basis of the statement of the accusation. Thus, the objectives that can be considered "relevant" or "useful" case have already been ordered during the prosecution by the prosecutor.

Most of the time the accusation is built on the conclusions of the specialized report, or the relevance, usefulness, the relevance of a piece of evidence in the criminal proceedings is related to the legal classification and the factual situation presented in the act of referral of the court. In these circumstances, identifying additional objectives to those who have been the subject of the specialized report may prove to be difficult.

At the same time, requesting the administration of an expert report with identical or similar objectives to those that were the subject of the specialized report seems to be useless and necessary for some courts. Thus, the defendant's path to challenge and prove possible errors of the specialized report is limited by the rigors of admissibility of evidence in the criminal trial.

On the other hand, the, the defendant cannot be put in a position to explicitly indicate where the specialist who drew up the technical and scientific finding report was wrong just to justify the necessity and usefulness of the evidence administration with expertise.

The analysis of the correctness of the technical and scientific finding report can be made only by an expert in the same specialization as that of the specialist who drew

up the initial report and not by the defendant who, in most cases he does not have such specialized knowledge.

Thus, "a expertise" finding report drawn up during the criminal investigation only to justify the need to draw up an expert report during the court investigation appears as a genuine diabolical probatio in charge of the defendant.

As regards the guarantee of the principle of equality of arms (derived from the right to a fair trial), the case-law of the European Court of Human Rights is unanimous in the sense of the need for expertise by an independent expert:

"56. The Court also notes that the applicant was not able to challenge the findings of the committees, because his application for the appointment of an independent expert by the courts was rejected on the grounds that the committees had already carried out an appropriate assessment of the documentation in the applicant's medical file. The Court of Appeal confirmed this decision of the court of first instance, noting also that it was based on the views of the committee. This left the opinions of the committee as the decisive proof on which the courts rely to establish the problem in a case that, of course, requires specialist knowledge, he said, argued that it is not at hand in court itself. This reasoning of the national courts also underlines the dominant role of the Institute's invalidity committees (see, similarly, Placi, cited above, § 78). In that regard, the fact that the national court also heard the applicant's testimony and considered other elements of the file before rejecting the application, was, it is not sufficient for the Court to decide that the procedure was in accordance with the requirements of the Convention.

57. The Court is therefore not able to conclude that the applicant's procedural position was equal to that of his opponent, a state-run social protection body, in accordance with the principle of equality of arms.

Consequently, there was a violation of Article 6 of the Convention" (Cause Korosec c Slovenia)".

Compliance with the principle of equality of arms is naturally also complemented by the principle of adversariality, both of which are components of a fair procedure, as was also stated in the case-law of the Strasbourg Court:

"Each party has the right not only to be aware of all the elements that are necessary for it to support its claims, but also to take cognizance and to discuss any act of the file presented to the judge to help him or his influence to make a decision. From this point of view, the Court considered that the respect of adversariality does not

necessarily require the right for the parties to participate together with an expert in the realization of the expertise, however, it imposes the possibility of contesting its conclusions before the court. The Court points out that the field of expertise is a technical one, unknown to the judge who will naturally incline to give credence to the report of expertise, so the possibility of discussing it at odds is essential for the fairness of the" procedure (Cause Mantovanelli against France).

To prevent Romanian convictions at the European Court of Human Rights, we consider that an amendment of the national legislation is required.

A solution that would be contrary to the principle of free assessment of evidence, but that would prove to be effective would consist in removing the possibility of court appreciation regarding the need to administer evidence with expertise when the defendant disputes the report of finding made during the criminal investigation.

Incidentally, the Criminal Procedure Code provides situations in which the administration of evidence with expertise is not left to the judgment of the court, but is mandatory: conducting a psychiatric examination is mandatory in case of particularly serious murder, as well as when the criminal investigation body or the court has doubts about the mental state of the accused or defendant (art. 117 para. 1 Code of criminal procedure).

By law ferenda we propose to amend paragraph 12 of art. 172 Code of criminal procedure under the following manner:

After the conclusion of the finding report, when the judicial body considers that the opinion of an expert is necessary, an expert examination may be ordered. If the finding report is contested by the parties or main procedural subjects, it is mandatory to conduct an expert examination.

A solution that would not prejudice the principle of free assessment of evidence, but that would encourage „prin ricoseu" the criminal courts to order an expertise could consist of limiting the evidentiary force of the specialized reports, in a manner similar to the investigators' statements, the, protected collaborators and witnesses:

The judgment condemning, renouncing, or deferring the application of punishment cannot be based to a decisive extent on the statements of the investigator, the collaborators or the protected witnesses (art 103 par. 3 Code of Criminal Procedure).

If the conviction judgment cannot be determinedly based on the conclusions of a finding report drawn up by a non-independent specialist, it being necessary to

corroborate it with other evidence administered in the case, the arrangement of an expert report will be assessed as necessary and useful to solve the case.

Thus, by lege ferenda we propose to supplement the provisions of art.103 para. 3 C.pr.pen.by listing and finding reports prepared by specialists operating within judicial bodies:

The judgment condemning, renouncing or deferring the application of punishment cannot be based to a decisive extent on the statements of the investigator, the collaborators, the employees, of protected witnesses or on specialized reports prepared by specialists operating within judicial bodies.

We believe that in the absence of the intervention of the legislator it is only a matter of time before Romania will again be condemned by the European Court of Human Rights for the violation of the right to a fair trial, for violation of the principle of equality of arms.

2. The Need to Administer the Evidence with Expertise in Case of Contesting the Specialized Report Drawn up by Non-Independent Specialists

In a case pending before the Bacau Court, having as its object the offence of tax evasion, the court rejected the request of the defence regarding the administration of an accounting expertise report, given that during the criminal investigation a finding report was administered that meets the objectives proposed by the defendant.

In the reasoning of the decision rejecting the requested evidence, the court noted that in the case being debated, a finding report was drawn up in the criminal investigation phase, which established that the defendant had drawn up unreal more balance sheets, invoices, statements, and receipts.

Also, the point of view of a specialist within the Prosecutor's Office attached to the Court of Appeal of Bacau was requested.

Analyzing the requests made by the defendant, the court in question noted, on the one hand, that the defendant did not contest the report made in the criminal investigation phase and, on the other hand, that, that there are no uncertainties or conflicting provisions between the content and conclusions of the fact-finding report and it is not shown to what extent the assessment made by it is erroneous.

It is also noted that the finding report, drawn up by a specialist, answers the determining questions in the present case, as well as some of the objectives indicated by the defendant (that is, if the companies in Bucharest are registered for VAT purposes in the analyzed period, which is the value of the alleged damage). Therefore, the court will reject the evidence with accounting expertise as not useful to the case (Completion of the hearing on 23.04.2024 of the Bacau Court).

We consider that such a motivation of the courts is flawed and in disagreement with the principle of finding the truth, the right to a fair trial, the equality of arms and adversariality.

The fact that the defendant due to the debate did not contest during the criminal investigation the report of finding in the accounting specialty does not imply that he has reached the conclusions of this report.

In the doctrine it was appreciated that the truth finding principle is a corollary of the fundamental guidelines of the criminal process, because the judgment must reflect in its pages the truth about the act, the fact, the circumstances of the case and the person of the perpetrator, otherwise it cannot be appreciated that knowledge of the legal truth has been reached (Gradinaru, 2017, p. 20).

Provisions of Article 172 para. 12 C.pr.pen. does not set a deadline for challenging the finding report. Incidentally, using such reasoning would imply that any evidence administered during the course of the prosecution, and which was not contested by the defendant prior to the referral cannot be challenged in the course of the judgment.

Moreover, in some cases, such a statement of reasons is equivalent to a pre-pronunciation of the substance of the charges, and the criminal procedural legislation should oblige the magistrate to verify whether the findings of the finding report are correct and to provide the defendant with the opportunity to challenge in a real way the issues ascertained by such a probation.

At the same time, to ask the defendant to present arguments to combat the conclusions of the specialist who drew up the specialized report constitutes an excessive request from the court.

The defendant does not have specialized knowledge to be able to indicate to the court where the specialist was wrong.

Identification of possible mistakes of the specialist is the reason why it is required to carry out the expertise by an independent expert.

The decision of the court is also critical in terms of the need to administer the evidence with the accounting expertise. Thus, although the finding report meets the objectives proposed by the defendant, the principle of finding out the truth and removing any doubt regarding the subjectivism of the specialist required the verification of the ascertainment report through an accounting expertise drawn up by an independent expert.

We consider that the reasoning of the courts on the solutions of admission or rejection of important evidence such as the administration of the evidence with judicial expertise cannot be a lacunar one, but must be correlated with the administered evidence.

In the literature it was appreciated that expertise is an important legal means of proof, consisting in conducting investigations, papers, analyses, assessments and technical conclusions. The activities are carried out by a specialist in a particular field and are carried out from the disposition of the criminal investigation body or courts, or, for the purpose of clarifying facts or circumstances which form or which would form the subject of a process (Gradinaru, 2021 p. 1).

We propose by lege ferenda that in all cases where a specialized report was made during the criminal investigation, it is confirmed during the judicial investigation by a judicial expertise.

3. Conclusions

Until the intervention of the legislator, the possibility of the defendant to challenge a finding report drawn up by a specialist operating within the judicial bodies is left to the discretion of the courts.

Without denying the principle of free assessment of evidence by the judge, we appreciate that the national courts should show increased attention regarding the challenge by the defendants of the finding reports drawn up by non-independent specialists.

The justification for this reasoning derives from the fact that the defendant is placed in a disadvantageous situation, being placed in front of a specialized opinion (most often unfavorable to the defendant) based on purely technical knowledge that he does not have.

Having regard to the importance of a proof consisting of a technical-scientific finding report in the economy of a criminal case, as well, the free appreciation of the judge in the administration of the evidence with the expertise can make the difference between a conviction solution and an acquittal solution.

Or, this free assessment often involves considering technical knowledge, which the judge of the case does not have.

Thus, the rejection of the evidence with the expertise requested by the defendant could leave room for the arbitrariness, the judge vested with the resolution of the case being able to decide at any time the termination of the judicial investigation, considering that the evidence administered is sufficient, and such a move cannot be stopped.

The free appreciation of the judge must not be demonstrated, the latter being not bound to motivate it. In these circumstances, a judicial review of the decision to reject the evidence with the expertise cannot be exercised.

Thus, by lege ferenda we propose to modify paragraph 12 of art. 172 Code of criminal procedure under the following manner:

After the conclusion of the finding report, when the judicial body considers that the opinion of an expert is necessary, an expert examination may be ordered. If the finding report is contested by the parties or main procedural subjects, it is mandatory to conduct an expertise.

We consider that the right to a fair trial of the defendant would be ensured also by completing the article 103 para. 3 Code of criminal procedure by enumeration and finding reports prepared by specialists operating within judicial bodies:

The judgment condemning, renouncing, or deferring the application of punishment cannot be based to a decisive extent on the statements of the investigator, the collaborators, the, of protected witnesses or on specialized reports prepared by specialists operating within judicial bodies.

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