SOME CONSIDERATIONS REGARDING ON THE PROBATIVE ROLE OF THE FINDINGS REPORT DRAWN UP BY ANTI-FRAUD INSPECTORS WITHIN N.A.F.A. IN THE CRIMINAL TRIAL IN ROMANIA

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ABSTRACT: *In the field of the working tools made available to the participants in a criminal trial, the evidence holds a highly important role, therefore within the rules of evidence we may find a series of ways to obtain the information and data relevant to the clarification of the situation, with a predominantly technical, specialized character, which imply the appealing to specialists and their opinions. It's about: performing an expertise; requesting the opinion of a specialist; drawing up findings.*
In the field of the modalities for obtaining specialized information used especially in the branch of the court files on the economic crimes, the technical-scientific findings are also comprised, their results being materialized in a report of technical-scientific findings, with express reference to the ones performed, and respectively prepared by the antifraud inspectors within N.A.F.A. Generally speaking, the findings represent a procedure used in an emergency and preventive situation, when there is the danger that some means of evidence would disappear or the danger of changing factual situations or there's the need to urgently clarify some facts or circumstances of the case. The findings are made by a specialist who works within or outside the judicial bodies.
Thus, the use of such a procedure in the evidence of a criminal trial, especially when specialists not related to criminal investigation bodies intervene, raises a series of problems regarding the observance not only of the fundamental principles regarding the evidence but also the compliance with the fundamental principles of the criminal trial such as the principle ensuring a fair trial, the right to defense, the principle of equality of arms, the principle of contradictory nature. This study will analyze the issues regarding the use of the evidence in the criminal trial - evidence consisting of the technical-scientific reports drawn up by the anti-fraud inspectors - also in terms of the criminal case law and of the Constitutional Court of Romania.

KEY WORDS: *evidence; findings; technical-scientific report; anti-fraud inspector.*
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The current Romanian Criminal Procedure Code[1] strictly regulates the issues related to the rules of evidence and probation, respectively the evidence, the means of proof and

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the probative procedures that can be used legally in a criminal trial, all of them, including those mentioned above, which must comply with the fundamental principles regarding evidence, such as legality, loyalty, respect for human dignity.

In the course of the criminal trial, *evidence* has an *essential role*, a role based on the obligation of the judicial bodies to solve (lawfully) the case under all aspects, based on them, in order to find the truth (Article 97 paragraph 1 Criminal Procedure Code), as well as in the consideration of the provisions of Article 5 Criminal Procedure Code (respectively of the obligation of the judicial bodies to ensure the finding of the truth regarding the facts and circumstances of the case and of the suspect or the accused, *based on evidence*).

The evidence is defined in Article 97 paragraph 1 Criminal Procedure Code as "*Any factual element serving to the ascertaining of the existence or non-existence of an offense, to the identification of a person who committed such offense and to the knowledge of the circumstances necessary to a just settlement of a case, and which contribute to the finding of the truth in criminal proceedings represents evidence*". Practically, the evidence (facts or circumstances (Udroiu, 2013) provides with the *data and information* necessary and capable to lead to the conclusion of the existence or non-existence of the crime, to the identification of the perpetrator, of the perpetrator's guilt or innocence and to the knowledge of the circumstances necessary for the just settlement of the case (Neagu, 2013), with the purpose of finding out the truth.

The means of proof are defined in case law as "*means provided by the law establishing facts or the circumstances that constitute evidence*" (Udroiu, 2014).

Given that neither the old Criminal Procedure Code nor the current Criminal Procedure Code define them merely by listing them (Valea, 2019), the means of evidence have received other doctrinal definitions as well (they are "*the legal means by which the competent judicial bodies come into contact with the evidence"* (Crișu, 2011)*; "the means provided by law establishing the facts or the circumstances that constitute evidence"* (Udroiu, 2013)*;" legal modalities used to prove the facts*"[2]).

The means of proof are listed (as an example (Udroiu, 2014) (Udroiu, 2016)) in Article 97 paragraph 2 Criminal Procedure Code and they are:

- statements (of the suspect or the accused, of the injured person, the civil party, the parties with civil liabilities, witnesses, experts);
- documents, reports of expertise or fact-finding, minutes, photographs, means of evidence;
- any other means of proof that is not prohibited by law (eg: audio, video recordings even made by parties or other persons when it comes to their own conversations (Article 139 para. 3 Criminal Procedure Code); community witnesses[3], etc.).

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[1] The Criminal Procedure Code of Romania - adopted by Law no. 135/2010, published in the Official Gazette no. 486 of 15 July 2010 and entered into force on 1 February 2014, with subsequent amendments and supplements.

[2] Constitutional Court Decision no. 383 of 27 May 2015, published in the Official Journal no. 535 of 17 July 2015.

[3] Although the current Criminal Procedure Code does not expressly regulate the institution of the community witness, there are texts that lead to them. Thus: according to Article 159 para. 15 Criminal Procedure Code requires the presence of a community witness when it is desired to be carried out a house search in a space where no person is living; according to Article 159 para. 1 Criminal Procedure Code, when the person to whom the search is carried out is detained or arrested and cannot be brought to the place of the search, it will be

The probationary procedure *is the legal (actual) method by which a means of evidence is obtained* (Article 97 para. 3 Criminal Procedure Code). The frequently used probationary procedures are: *the hearing* of a person; *performing* specialized scientific and technical operations (expertise); the search; *re-enactment; confrontation; field search, collection* of objects and records, *video conferencing, identification* of the person or objects, special methods of *surveillance*; supervised *delivery*; *use* of undercover investigators; *taking the fingerprints* of the suspect, defendant or other persons, *photographing*; *retention*, *delivery* and *search* of postal items (Theodoru, 2007) (Udroiu, 2013) (Neagu & Damaschin, 2014)[4].

In certain criminal cases, in order to ensure a fair settlement and to establish the truth, it is necessary to appeal to the knowledge or opinion of a specialist, thus, expertise and fact-finding find their place within the means of evidence and the probationary procedures regulated by the current Criminal Procedure Code.

A. Aspects regarding the legal conditions required for the use of a specialized fact-finding

It should be noted under the current regulations, that the carrying out of the technical-scientific findings (specialized (Mateuț, 2019)) has an exceptional character, the law regulating the expertise with priority, as a means of proof (Article 172 para. 2-8 of the Criminal Procedure Code). Analyzing the provisions of this legal text, we consider that the logical interpretation should be that the expertise will represent the rule, and the drawing up of a fact-finding should be the exception only if one of the three special situations, provided in para. 9 of Article 172 Criminal Procedure Code exists (danger of evidence disappearance; danger of changing a state of affairs; urgent clarification of facts and circumstances is required).

In this regard, the Constitutional Court has also passed a judgment (Decision no. 437 of 28 June 2018, paragraphs 26-27), within the meaning: "Thus, from the teleological interpretation of the criminal procedural regulations the Court has ascertained that the rule is that, the moment the judicial bodies, in the course of the criminal prosecution, need the opinion of an expert for finding, clarifying or evaluating certain facts or circumstances that are important for finding out the truth in question, an expertise is ordered, and not a fact-finding. Thus, the disposition to carry out the fact-finding will always be the exception, this can be achieved only if the conditions provided by Article 172 para. (9) of the Criminal Procedure Code are fulfilled".

From the regulations of the current Criminal Procedure Code (Article 172 paragraphs 9 and 10) it follows that four cumulative conditions must be met in order to legally carry out a fact-finding (Mateuț, 2019):

1. the danger that some means of proof would disappear or that factual situations could change
2. it is necessary to clarify urgently some facts or circumstances of the case
3. the clarification can only be provided by a specialist (from the criminal prosecution body or apart from it)

carried out in the presence of a representative or community witness; according to Article 159 para. 10 Criminal Procedure Code, the person searched has the right to be assisted or represented by a reliable person.

[4] Also, see Decision of the Constitutional Court no. 383 of 27 May 2015, published in the Official Gazette no. 535 of 17 July 2015.

4. the case should be in the criminal prosecution phase.

These legal provisions find their application also regarding the disposition and the carrying out of a technical-scientific finding by the anti-fraud inspectors within the N.A.F.A. seconded to the Prosecutors' Offices. By Decision no. 835 of 14 December 2017[5], the Constitutional Court held that "the provisions of Article 3 paragraph (3) and para. (4) letter a) of the Government Emergency Ordinance no. 74/2013 must be interpreted and applied in conjunction with the provisions of the Criminal Procedure Code applicable in this matter, so that the technical-scientific findings carried out by the anti-fraud inspectors within the Anti-Fraud Directorate can only be ruled in exceptional cases, when there is the danger of disappearance of some means of evidence or the change of some factual situations or the urgent clarification of certain facts or circumstances of the case is necessary."

In conclusion, the technical-scientific findings drawn up by the anti-fraud inspectors on secondment within the N.A.F.A. (National Agency for Fiscal Administration) can only be ordered in exceptional cases and only if there is an emergency.

The decree of the prosecutor ordering the execution of such a fact-finding that does not justify the emergency shall be found null and void, therefore the report drawn up on its basis must be excluded as illegal.

For example, an emergency situation cannot be considered the necessity of establishing the ghost-like behavior of the companies that provided the tax invoices in the conditions in which the so-called "suspicious elements" of these invoices that had to be analyzed by the anti-fraud inspector, were analyzed and already included in the fiscal inspection report prepared 4 years ago that accompanied the criminal complaint made in this case (Coman, 2018).

B. Criticisms of independence and impartiality

Basically, by not carrying out an expertise, which would have provided numerous procedural guarantees, the right to defense and the principle of "equality of arms" between accusation and defense (principle that represents the basis of a fair trial, together with the right to defense) is violated flagrantly, respectively disrespected, by a fact-finding carried out by a specialist (within the Fraud Control Division – N.A.F.A. (National Agency for Fiscal Administration), on secondment to the Public Prosecutor's Office) who does not enjoy the guarantees of independence and impartiality offered by an independent expert. Moreover, it does not imply the possibility of formulating its own objectives, therefore, the fact-finding represents not only the exclusive point of view of the accusation, but, moreover, being drafted by an anti-fraud specialist within N.A.F.A., an institution that has the quality of a civil party in this file, practically it's all about the evidence constituted *pro cauza*. In the situation of the finding report, the participation of an expert party representing the interests of the defendant in the procedure of carrying out the fact-finding is not allowed.

The case law has established that "the reports of findings, like any other means of evidence, before it can constitute an integral part of the probative material evaluated by the judge in the deliberation process, must be submitted for analysis having as objective the ensuring compliance with the standards imposed by the principle of equality of arms and by the adversarial principle, from the perspective of the judicial bodies' obligation to

[5] Published in Official Gazette no. 510 of 21 June 2018.

ensure a fair trial[6] (Blaj & Crișu, 2015), imposed by Article 6 paragraph 1 of the ECHR. The principle of equality of arms, in essence, means the equal treatment of the accusation and the defense[7] (Chiriac & Blaj, 2018), without one being disadvantaged in relation to the other, and the adversarial principle means that the party takes notice of the existence of the technical-scientific fact-findings report, but it also implies the possibility for the parties in a process to discuss and contest the fact-findings report. By ensuring the compliance with these two principles, the aim is to avoid putting the court in the situation of resolving the case only on the basis of the finding report drawn up by the DNA specialists, because the judgment must be passed based on the verification and evaluation of all the probative material administered in the case. Analyzing the compliance with the two principles in question, the Court found that the parties were deprived of the possibility of challenging by administering another means of evidence, the reports of the findings carried out during the course of the criminal prosecution, when the criminal prosecution body rejected the request to carry out the expertise. The deprivation of the defendants from the possibility to challenge the reports of findings determined the break of the balance between accusation and defense in the administration of the evidence, therefore the violation of the principle of equality of arms."(Cluj Court of Appeal, File no. 271/231/2010, Criminal Decision no. 1589/A/18.12.2015, p. 46).

The European Court of Human Rights has ruled on the conduct of an expert's report without the defendant's participation, that the indirect possibility of discussing an expert report through memoirs or oral means does not ensure the right to participate in the expert report, therefore the applicant lacked the real opportunity to comment effectively an essential piece of evidence (Cottin v. Belgium, 2 June 2005, paragraphs 31-32).

In conclusion, it can be argued that once the awareness about carrying out a technical-scientific finding in order to submit objectives is missing, there was also no possibility to propose the participation of an expert party, the copy of the Report on the technical-scientific finding drawn up by the anti-fraud specialist on secondment is not handed over to the interested/targeted person. The report on the technical-scientific finding drawn up by the anti-fraud specialist represents an evidence administered illegally and it is required to be excluded from the case file (pursuant to Article 346 para 6, Criminal Procedure Code related to Article 102 Criminal Procedure Code and the Constitutional Court Decisions no. 22/2018 and no. 72/2019).

Such evidence does not display the guarantees of independence and impartiality required by the observance of the procedural rights of the persons charged with a criminal offence.

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[6] In consideration of a fair trial - for details see also Blaj, S. B. & Crișu, A., „*Respectarea principiilor privind procesul penal și a drepturilor omului în procedura extrădării*", in „Curierul Judiciar" Journal, Issue 4/2015, pp. 210-214.

[7] In consideration of the equal treatment of the accusation and the defense - for details see also Chiriac, L. & Blaj, S. B., „T*he philosophy of the society in the application of penalties in implementing the criminal law*", in „Curentul Juridic" Journal, Issue 2/2018, pp. 90-92.

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