THE JUDICIAL EXPERTISE - A MANDATORY PART OF LEGAL INVESTIGATIONS

Dragoș CHILEA[*]

ABSTRACT :*Both the Civil Procedure Code and the Criminal Procedure Code as well as their application in criminal, civil, commercial and contraventional cases, state the use of scientific evidence in finding out the truth, consisting in the judicial expertise.*

Unless the law expressly provides for the obligation to carry out an expertise, and we consider here the forensic expertise - meant to establish the days of medical care provided, or the cause of death, or establishing the identity of a person based on the expertise of biological traces, in various other cases the procedural legislation does not oblige the court to administer scientific evidence, leaving the choice to its discretion or, where appropriate, to the criminal investigation body.

However, even if there are no provisions that expressly oblige the use of judicial expertise, we consider that both the investigation and prosecution body, the policeman or the prosecutor, as well as the courts, are obliged to order the performance of a judicial expertise when the facts deduced through the investigation or judgment cannot be clarified otherwise than on scientific basis and using the knowledge of experts in the respective domain.

Beyond the classical forensic expertise of writing, namely the graphoscopic expertise, of ballistic expertise and automotive technical expertise on the dynamics of the occurrence of driving accidents - our list is not exhaustive - which are commonly carried out in both civil files, but especially in criminal cases there are situations in which we believe that it is necessary to administer scientific evidence to find out the truth.

No matter how well prepared the person who finds and investigates a contravention or a crime, is, or those who are called upon to rule on civil cases, they cannot rule on technical issues, the existence of chemicals or possibly prohibited substances, as well as the overcoming of accepted decibels or the existence of products that could be considered waste - and the list could continue with other examples.

However, in practice the tendency of those called to perform the act of justice is increasingly observed, to be limited to the mere findings made "with their own senses" by agents, local police or national police workers, employees of the Environmental Guard. These so-called technical findings or observations do not have the value of judicial expertise and cannot supplement such evidence by scientific quality or by objectivity, as long as they are drawn up by individuals who do not have the necessary and recognised level of scientific training, and are part of the bodies who only observe and note the facts and sanction them or send them to competent bodies for resolution.

[*] PhD., Professor, George Emil Palade University of Medicine, Pharmacy, Science, and Technology of Targu Mures, ROMANIA.

Consistent with European jurisprudence, we believe that finding out the truth involves the use of independent and objective judicial experts, highly trained specialists, or recognized and independent laboratories of expertise.

1. LEGAL PROVISIONS

1.1. In accordance with the Civil Procedure Code, the judicial expertise is regulated in Articles 330-340, where we find the procedural rules on the court's approval of expertise in general.

Thus, Article 330 (1) of C.pr.civ lays down the rules for the approval of an expertise: "*When, in order to clarify factual circumstances, the court deems it necessary to know the opinion of specialists, appoint, at the request of the parties or ex officio, one or 3 experts*."[1]

The legislator does not provide a clear definition of expertise, but sets out how to appoint experts in art. 331 Cpr.civ., of their recusal or replacement in the content of art. 332-333 C.pr.

As regards the expert report, Article 336 provides: *"Reasoned findings and conclusions of the expert or laboratory or specialized institute who has been asked to carry out the expertise will be recorded in a written report, which will be filed at least 10 days before the deadline set for the trial. In urgent cases the deadline for submitting the expert report may be shortened."*

We specify that the provisions of the code of civil procedure in the matter of judicial expertise are applicable both in the field of commercial law and in contravention matters.

1.2. Judicial expertise in criminal matters is regulated in Chapter VII of the Criminal Procedure Code, in the content of Articles 172-191.. Thus, in art.172 para. (1) C.pr. pen., the lawmaker states how the procedure of the expertise is commenced: *"It will be required to carry out a judicial expertise when it is necessary for the ascertainment, the, clarification or evaluation of facts or circumstances that are important for finding out the truth in question to obtain the opinion of an expert."*, then continuing with the rules of appointing or replacing experts.

The procedure for conducting expertise in criminal matters is regulated by art. 177 (1) C.pr.pen., according to which its execution is ordered by the criminal investigation body or by the court, who establish a deadline on which the parties and the designated expert will be summoned. According to paragraph (2) of the same article : *"At the appointed date, the prosecutor, the parties, the main procedural subjects and the chosen expert shall be notified, of the topic of the expertise and the questions that the expert is to answer, and they are informed that they have the right to comment on these questions and that they may request their modification or completion. Also, as the case may be, the expert is shown the elements to be analyzed."*

The prosecutor appoints an expert and the court chooses him randomly from the list of experts of the Tribunal within the jurisdiction of which the criminal or civil proceedings are conducted. We mention that there is a possibility, according to Article 181 (1), to

[1] Civil procedure code of 2010, an integral part of Law 134/2010, republished in the Official Gazette, Part I no. 247 of 10 April 2015, as amended

perform a new judicial expertise when the conclusions of the expert report are unclear or contradictory. [2]

Both in criminal and civil cases, the expert examination may be attended, by request, by the parties to the case and by a recommended expert or a third party expert. The expert report shall contain both the expertise and conclusions of the official expert and the report and conclusions of the recommended or third party expert.

1.3. *Institutions in the field of judicial expertise*

By H.G.n. 368/03.07.1998 (which came into effect on 01.08.1998), was established the National Institute of Criminalistic Expertise Bucharest (INEC), subordinated to the Ministry of Justice.

I.N.E.C. is affiliated, starting with March 2001, to the European Network of Institutes of Legal Sciences - European Network of Forensic Science Institutes (ENFSI).

The *purpose* of the Institute is to carry out the following types of forensic expertise: the expertise of writing and documents; the expertise of banknotes, coins, public credit titles, cheques, cheques, as well as titles of any kind for making payments; expertise of digital footprints, palmar and plantar; expertise of traces left by beings and objects; expertise of firearms and ammunition; physical-chemical expertise of material evidence; biological trace expertise; traffic accident expertise; explosion, fire and accident expertise; voice and speech expertise; photo and video recording expertise; expertise of other traces, except those subject to forensic expertise.[3]

At the national level, through the Ministry of Justice, there are lists of experts authorized to the courts of each county - persons recognized with scientific training and having the capacity of judicial expert. At the same time, expertise can be carried out by specialized laboratories in various fields, such as chemistry, environmental law and others.

We recall that this study does not have the character of an exhaustive presentation. We also specify that we are not analyzing the kind of expertise that is classically and habitually carried out, forensic, ballistic, forensic expertise on various traces, the expertise of writing.

Most judicial expertises are in the financial-accounting domain, but regarding their procedure we observe a real reluctance on the part of the judicial bodies that prefer the findings drawn up by specialized bodies who do not have the capacity of judicial expert and, what is worse, they are part of the institutions that carry out the investigation.

The consequence is that the institution that triggers the investigation, makes the first findings and refers the matter to the judicial bodies, is also the one that draws up the finding and is also a civil party, a circumstance which removes the objective character of that finding and is fought against as a practice by the European Court of Human Rights.

In the following, we will exemplify by presenting a few cases, the way in which the judicial expertise was carried out led to a radical change in the solution originally envisaged and led to the finding of the truth and the delivery of a correct sentence. We mention that these cases are presented in a manner that cannot lead to the identification of

[2] Criminal procedure code of 2010, an integral part of Law 135/2010, published in the Official Gazette, no. 486 of 15 July 2010, as amended

[3]https://www.google.ro/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.just.ro/wp-content/uploads/2021/08/Strategie-INEC.doc&ved=2ahUKEwjHmM77kaKFAxVP7AIHHXqRBH0QFnoECCcQAQ&usg= AOvVaw1WFneJDIczrIJnZrr-NTO2, accessed on 01.04.2024

the subjects of the cases, neither of the alleged perpetrators nor of the research bodies involved.

1. The raid and flagrant apprehension in the parking lot next to the National Institute for Physics and Nuclear Engineering "Horia Hulubei" of an alleged organized crime group that allegedly trafficked dangerous toxic substances on the list such products have generated a dossier handled by research and prosecution bodies investigating the causes of organized crime and terrorism.

It was claimed that the defendants had smuggled 600g of selenium into the country, a substance considered dangerous and among those provided by GD 1408/2008, into the country, a normative act establishing the legal framework in the matter.[4]

Throughout the course of the criminal investigation, the defense has repeatedly requested, based on the criminal procedural provisions, to carry out an expertise of the product found on those concerned, precisely to demonstrate the lack of toxic and dangerous content of the receipt found during the flagrant action.

Both the research bodies and the prosecutor obstinately refused to carry out an expertise, a circumstance that was perpetuated before the first court - the Tribunal - that sentenced each of the 6 defendants to punishment between 2 and 7 years imprisonment with execution, considering the particularly serious facts. Subsequently, in the appeal, only the Court of Appeal admitted to conducting an expertise having a single and simple objective, to establish whether the product found on the defendants at the time of their apprehension was a chemical element among those on the list of prohibited products due to its toxicity and hazard.

The conclusion of the chemical analysis in the judicial expertise report was categorical, in the sense that the material in the possession of the defendants was not the one provided in the list of prohibited substances, and the ruling of the court of appeal that remained final, was diametrically opposed to the judgment of the first court and consisted of the acquittal of the 6 defendants, after more than 8 years of judicial proceedings.

2. The border police forces together with the ANPC inspectors and prosecutors from the Court of Appeal have repeatedly notified that second-hand garments are introduced into our country in containers coming from overseas, being imported from a state on the North American continent, ordered by gender and category, but without including any underwear.

The garments were sanitized, cleaned, having accompanying documents and proof of provenance and hygienic and sanitary measures carried out before export, as well as checks of the competent organs of the export state. However, the goods were unpacked at random from the 50 kg bales and it was considered that, on the basis of empirical, random, subjective criteria, they would have the characteristics of some waste, some, being brought to our country to be destroyed and harm the environment. Although the importing company proved that the entire quantity of goods was sold wholesale so that later specialized stores from all over the country would sell them in detail by presenting documents in this respect accounting, investigation and prosecution continued without admitting to conducting an expertise.

[4] Directive 76/769/EEC and Council and Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC of the European Commission

In these circumstances, the defense carried out an extra-judicial expertise with an environmental and ecology expert who drew up a report with a devastating conclusion: not only could those goods not be classified as waste, not only were they not harmful to the environment, but moreover, the conclusion was that the reuse of these clothes ensured environmental protection : *"From the perspective of environmental protection, the analyzed goods have beneficial effects on the environment. The vast majority of clothes are woven from synthetic yarns and fibers. They are produced on an oil basis. The production of synthetic yarns, the production of fabrics, the resulting textile waste, the energy consumption for making a new garment is highly polluting. The carbon footprint is very high. Thus, the reuse of clothes by other people reduces by 100% the pollution resulting from the production of new clothes. In my personal opinion this activity should be encouraged because it is beneficial for the protection of the environment."* [5]

Moreover, the European Commission has initiated the adoption of a directive to oblige clothing manufacturers to take all measures to ensure that clothing has prices that will lead users to reuse, to reduce as much as possible the replacement of clothing items, so as to reduce the pollution generated by their manufacture.

3. Following the notification regarding the existence of noise sources exceeding the limit provided by law, the local police body intervened and using their equipment, they measured the noise level and established the existence of a contravention, classified under Article 96 para 2 item 14 of OUG no. 195/2005, criminalizing and sanctioning the violation of the obligations of *"individuals and legal entities to provide special measures and facilities for the isolation and sound protection of noise and vibration-generating sources, to check their efficiency and to put into service only those that do not exceed the sound threshold allowed;"*.

The act was described as infringement of Article 96 (3) item 1 of OUG no. 195/2005 and sanctioned on this legal basis by the contested report, the ascertaining agent retained *"..by the report determining the sound pressure level, the, it was concluded that* ***special measures and facilities should be provided to isolate and protect noise sources from noise and vibration*** *and to comply with the Environmental Authorisation"*.

The alleged offender was sanctioned with a fine of 50,000 lei.

During the lawsuit, the court refused to conduct a judicial examination, arguing that a finding of the local policeman is sufficient to establish the existence of the offense.

Only after the defense submitted an out-of-court expert report, conducted by an authorized noise level laboratory of expertise could the court be persuaded to order a judicial expertise and to appoint an official expert specialized in this field. Thus, according to the report submitted to the court, it is found that a correct measurement involves at least the elimination of background noise.

"From a technical standpoint, two measurements are made, at the same spot, the first with the noise source turned on, the second with the noise source turned off. The logarithmic difference between the two values is the value attributed to the noise source. Given that the conditions and procedures followed for the measurement are not mentioned in the determination reports, I consider that the noise level determined by the Constanta

[5] Fragment from the conclusions of the expert report made in the case presented

Local Police through the determination reports is erroneous, incorrect and can not be used to establish the violation of current legislation."[6]

And in this case, based on the extrajudicial expertise reports, namely that of the expert-recommended laboratory - but also of the expert report of the official expert appointed later by the court, but who delivered conclusions in the same sense, it was stated that the local police agent did not comply with the procedure for using the noise measuring device and wrongly recorded the noise level, respectively the decibels that were issued by the alleged infringing company.

Thus, the performance of a judicial expertise led to the cancellation of the contravention report, the consequent fine, and the contravention fine of 10,000 euros.

4. Local police agents "specialized" in environmental matters found through" their own senses" that an economic carrier would have supposedly "eliminated" inert waste on a private area of land, upon request and under the direct guidance of its owner. Thus, within the report of the contravention, it is found that the economic agent disposed of the waste consisting of a mixture of earth with the remains of construction materials and plant debris, in spaces other than those (un)authorized, respectively on the lands of another person.

Considering that the act committed was the one provided for in Article 20, paragraph 4 of OUG no. 92/2021 on waste: *"The disposal of waste outside the premises authorized for this purpose is prohibited."* [7] , deeds sanctioned by art. 62, paragraph 1, letter b of OUG 92/2021 on waste, the alleged offender was fined 50,000 lei and the authorities ordered the confiscation of 4 vans, heavy trucks and their trailers.

The defense consistently called, during all proceedings initiated under the presidential order or in the complaint against the report, for a judicial expertise to be performed, in order to ascertain in a scientific manner whether the material transported and downloaded to the particular land where it was used for straightening/leveling the land, could be classified as inert waste or was earth excavated from construction sites, the application being rejected.

That is why the defense carried out an out-of-court expertise that was drawn up by a scientific research expert at an agronomic institute, which took samples from the land in question from different areas of the soil and had it subjected to laboratory analysis, as well as in-depth scientific research within the agronomic institute.

Thus, in the conclusions of the expert report, it is clearly described that: *"By the analysis of laboratory samples, it follows that the soil is alkaline, with a low humus content and variations in nutrient availability, and, having a structure influenced by a balance between sand, dust and clay. The relatively high content of carbonates may indicate a calcareous origin of the soil. The small humus content may indicate a soil coming from deeper horizons. The land transported and unloaded on that soil* ***is not inert waste****."* [8]

The conclusion of the report is clear in the sense that the material transported and downloaded under the above conditions does not constitute inert waste, which clearly contradicts the conclusions of the empirical statement based on subjective perception, without scientific support of the local police agent devoid of any scientific training in the field of environment.

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[6] Excerpt from the extrajudicial expertise report in the present case

[7] Art. 20 par. (4) OUG 92/2021 on waste

[8] Excerpt from the judicial expertise carried out in the present case.

CONCLUSION

All these examples come to demonstrate the need to conduct judicial expertises, which on a scientific, objective basis, can provide the research body, the prosecutor, the judge, the court, the court, with certain data leading to the delivery of a legal decision.

No sanctioning or punishment measures may be ordered, or taking of insurance measures with major implications both in terms of individuals and legal entities, only on the basis of assumptions and subjective perceptions, as long as there are highly scientific-trained specialists in all areas of findings and the court is able to order the relevant investigations or jurisdictional proceedings.

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