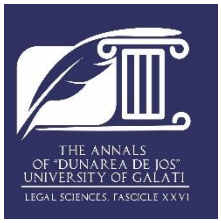


# The Necessity to Administer the Evidence with the Forensic Report in the Cases in which during the Criminal Investigation the Evidence was Administered Consisting of the Technical-Scientific Finding

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**Abstract:** This paper aims to analyze the importance and the need to administer evidence with expertise in criminal trials in which during the criminal investigation was administered the evidence consisting of the technical and scientific finding made by specialists or technicians operating within or in addition to the institution to which the criminal investigation body belongs. Technical and scientific expertise and findings are evidence procedures through which are highlighted factual elements that contribute to the resolution of cases deduced to judgment. Through a rigorous analysis of the relevant legislation, case law and judicial practice, the paper explores the role of evidence administration with expertise in solving criminal cases where, during the criminal investigation, the, it was ordered to make a scientific-technical finding. The paper examines the ways in which evidence with expertise can be effectively managed and exploited in the criminal process, including issues relating to the stage of evidence admission, the rights and obligations of the parties involved. In conclusion, the paper emphasizes that the administration of evidence with expertise in the criminal cases where the evidence was ordered consisting of the technical-scientific finding is an essential element for ensuring a fair and equitable justice.

**Keywords:** forensic report; criminal process; means of proof; technical and scientific finding

## 1. Introduction

In the specialized literature (Grădinaru, 2014, p. 13) it was shown 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, and, making a sustained effort to reconstruct factual situations belonging to the past in detail.

The finding is a probative process of a technical and scientific character that is ordered and is performed when there is a danger of disappearance of some means of proof or of changing some factual situations and is urgent clarification of certain facts or circumstances of the case is necessary.

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The scientific-technical finding can be ordered only during the criminal investigation by the criminal investigation body through the ordinance, during the trial only expertise can be ordered.

The criminal investigation body may use the knowledge of a specialist or technician, ordering, ex officio or upon request, the performance of a scientific-technical finding.

According to art.172 par. 9 C.pr.pen., the situations in which a finding can be ordered are: when there is danger of the disappearance of evidence or of changing factual situations or it is necessary to urgently clarify some facts or circumstances of the case.

It has been shown in the doctrine (Boroi & Negruț, 2022, p. 315) that the administration of the evidence consisting in making a scientific-technical finding is intended to establish whether the elements at the scene constitute clues or present reasonable suspicions to lead the organs judicial to the conclusion that an offence was committed.

The finding is carried out by a specialist in the field in which he is asked for the powers that work within or outside judicial bodies.

Reported to the regulatory manner of the art.179 par. 9 C.pr.pen., we note that the object of the finding is established by the criminal investigation body by ordinance, the defendant not being given the opportunity to propose objectives, the, to have a party expert or to object to the finding report.

As provided for in Article 181, index 1 para. 1 C.pr.pen., in the ordinance must be mentioned the questions to which the specialist appointed by the criminal investigation body must answer, as well as the time limit within which the work must be carried out.

The interference with the defendant's right of defence is motivated by „urgency to clarify some facts or circumstances of the case" or in „pericle of disappearance of some means of proof or change of some factual situations.

The legislator allowed this limitation of the right of defense of the defendant strictly for the purpose provided by Article 172 para. 9 C.pr.pen.

We consider that the criminal investigation body must thoroughly motivate in the ordinance ordering the technical and scientific finding to be carried out the urgency for ordering the administration of this means of proof. At the same time, the criminal investigation body must present the reasons why conducting an expertise is not possible.

More than that, the reasons presented by the criminal investigation body in ordering the administration of this means of proof may be censored by the preliminary chamber judge when solving the requests and exceptions invoked by the defendant.

We cannot share the opinion of courts that consider that the prosecutor is sovereign over the means of proof administered during the criminal investigation, the, and the appropriateness and thoroughness of the disposition of these measures could not be analysed in the course of the prosecution.

In a case of the Court of Appeal of Bacau, by the conclusion of the preliminary chamber of 01.11.2022 pronounced in file no. 3055/103/2021/a1, by, the court ruled on the fact that the real emergency can only be appreciated by the judicial body invested with its resolution, in relation to the concrete circumstances; the case-law has mentioned that the urgency is imposed not by the danger of disappearing the evidence or of changing the factual situation, but by the necessity of the correct orientation of the criminal investigation bodies in carrying out the research activity, these being the only ones able to appreciate, both on the existence, the, the necessity and relevance of the data provided by specialists or technicians in the constructive orientation of the investigations.

In the preliminary chamber procedure, the prosecutor's option to perform or not to perform some evidence during the criminal investigation cannot be censored, whereas the role of the preliminary chamber judge is not to verify whether the prosecution is complete, but if the administration of evidence and the performance of criminal prosecution was carried out in compliance with the legal provisions in the field."

We thus observe a violation of the defendant's right of defense, as well as of the principle of equality of arms related to the fact that the objectives are stability by the criminal investigation body, and the defendant is not allowed to appoint a party expert, nor can he object to the fact-finding report.

The technical-scientific finding report is finalized with the conclusions of the specialist and is a means of proof in the criminal process.

If the conclusions of the technical and scientific finding report are challenged, the defendant has the possibility to request an expertise at the trial stage, according to Article 172 para. 12 C.pr.pen.

The criminal procedural rules do not require that the specialist making the finding meet the minimum requirements of objectivity and independence, in this respect, the current practice allows the technical-scientific finding reports to be carried out by personnel detached from the prosecutors' offices.

Moreover, according to art.172 par. 12 C.pr.pen.after the conclusion of the finding report, when the judicial body considers that an expert opinion is necessary or when the findings of the finding report are challenged, an expert report may be ordered. We appreciate that there is no equality of arms in this situation in the course of the prosecution. The prosecutor establishes the objectives of the finding report, provides the specialist with what materials he deems necessary to substantiate the accusation and, as a rule, obtains a finding report on which the accusation is based.

Obtaining such evidence favorable to the prosecution, the prosecutor will have no interest in admitting the defendant's request for conducting an expertise under conditions of objectivity.

We consider that the legal provision provided by Article 172 para. 12 C.pr.pen. confers the possibility for the criminal investigation bodies to abuse their position.

By law ferenda we propose the modification of the Art.172 par. 12 C.pr.pen. and the insertion of paragraph 13 after the completion of the finding report, when the judicial body considers that the opinion of an expert is required or when the conclusions of the finding report are challenged, the, an expert examination may be ordered. The order rejecting the request for an expertise can file a complaint within 20 days of communication with the hierarchically superior prosecutor.

(13) The person whose complaint against the order rejecting the performance of an expert examination was rejected may lodge a complaint within 20 days of communication, to the preliminary chamber judge from the court to whom it would be appropriate, according to the law, to judge the case in the first instance.

We believe that in order to respect the equality of arms, in case the prosecutor rejects the defendant's request, he can address to a court for censoring a possible abusive refusal of the judicial body.

We point out that the criminal investigation body orders a technical-scientific finding to the detriment of an expertise, as the administration of this evidence is not subject to the principle of adversariality, the, being carried out by a specialist within the parquet.

We appreciate that only by regulating the control of the preliminary chamber judge on a possible abusive refusal of the prosecutor in terms of the administration of evidence with expertise can the equality of arms for the defendant be guaranteed.

## 2. The Need of „Verification" Finding Report by Administering the Sample with Expertise during the Trial

We consider that the need for verification of the means of proof by the court is a requirement that derives from respect for the principle of equality of arms and the right of defence and is presented in the form of a guarantee a posteriori.

In the literature (Grădinaru, 2019, p. 2) it was shown that to acquire real probative value, in a contradictory procedure and in compliance with the principle of equality of arms, in, the data obtained through the technical supervision activity must be able to be analyzed by the judge of the case, including their authenticity, and this goal can only be achieved through a technical or forensic expertise of voice and speech, depending on the particularities of the cause.

In order to properly solve the criminal cases, it is necessary, in some situations, to use the specialized knowledge from extrajudicial areas. Provisions art. 172 C.pr.pen.provide that the performance of an expertise is ordered when the finding, clarification or evaluation of facts or circumstances that are important for finding out the truth in question is necessary and the opinion of an expert.

In the doctrine (Grădinaru, 2021, p. 1) it was appreciated that expertise is an important legal means of proof, consisting in conducting investigations, works, 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.

Thus, the provisions of Article 172 para. (12) C.pr.pen.provide only the possibility and not the obligation to carry out an expertise that meets the requirements of impartiality, independence and certainty.

When ordering the conduct of an expertise during the course of the judgment, the court appoints the experts who will carry out the expertise between official experts from laboratories or specialized institutions or from independent authorized experts in the country, in strictly specialized areas.

The need to request the opinion of an expert is the principle of finding out the truth, enshrined in the provisions of Article 5 (1) of C.pr.pen., according to which the judicial bodies have the obligation to ensure, on the basis of evidence, finding out the truth about the facts and circumstances of the case, as well as about the person of the suspect or defendant.

In the doctrine (Grădinaru, 2017, p. 20), 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 deed, 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.

In contrast to the conduct of the finding, in the event of the expert examination, the parties and the main procedural subjects have the right to request that an expert recommended by them be involved in the performance of the expert. At the same time, as regards the making of the finding, it is noted that the criminal procedural provisions regulate in Article 181 index 1 the object of the finding and the content of the finding report.

Particularly important is that in order for a person to be appointed as an expert, he or she must meet the conditions set out by O.G. 2/2000 On the organization of the activity of judicial and extra-judicial expertise published in the Official Gazette no. 26 of 25 January 2000.

Moreover, in order to be able to manage the sample with expertise, it is necessary to have experts in the field for which the administration of the sample is requested, approved by the Ministry of Justice.

Such a requirement is not found in the expert findings.

There is a possibility that during the criminal investigation, the evidence with the specialized finding in a certain field may be administered, and during the criminal investigation, the, a sample with expertise in the field in which the finding was administered is not possible due to the lack of experts in this specialization.

The parties have the right to request that an expert party recommended by them participate in the performance of the expertise, thus respecting the principle of equality of arms and the right of defence of the defendant.

There are situations in which the conduct of expertise is necessary not in relation to the main fact of the case, but in order to establish the authenticity of the evidence, such as the case of records, and, situation where it can be determined whether there are collages, truncations, alterations in the audio/video material.

In the doctrine (Grădinaru & Gîrbuleț, 2012) it was assessed that it was necessary for the court to request the visualization of audio-video recordings or to listen to audio recordings and thus perceive the evidence in detail, have a greater capacity in finding out the truth than if these evidences are perceived from the documents that recorded them.

## 3. Commented Judicial Practice

In a case of the Court of Appeal of Cluj (Final of February 26, 2015) in the judgment of the appeal regarding the preliminary chamber procedure, the preliminary chamber judge removed the technical and scientific finding report prepared by DIICOT specialists, considering that it was drawn up in violation of Article 172 para. NCPP 12.

Thus, the Court showed that: „there are no incidents in question the provisions of Article 172 para. 9 The CPP and notes that, in relation to the specific circumstances of the case, the criminal investigation was initiated in this file as early as 2012, there was no danger of disappearing evidence or changing facts, and there was also no need for urgent clarification of facts or circumstances of the case".

We consider very important the Court's rule that the rule is that when judicial bodies need an expert's opinion for ascertaining, clarifying, clarifying, or the evaluation of some facts or circumstances that are important for finding out the truth in question, is ordered, according to Article 172 para. 1 CPP, conducting an expertise.

At the same time, the Court argues that the will of the legislator results beyond doubt, from the fact that, in situations where the incidence is found prev. art. 172 para. 9 CPP, previously mentioned, if after the conclusion of the finding report, when the findings of the finding report are challenged, it is mandatory to carry out an expert report, which did not happen in this file.

We note that the criminal investigation file has the objections raised by some of the contesting defendants regarding the conclusions of the technical-scientific finding report prepared by DIICOT specialists and even the objectives of a possible expertise to be ordered in the case by the prosecutor, which was not done.

In this context, the Court found that „criminal investigation bodies have flagrantly violated the mandatory provisions of the law, namely art. 172 para. 12 CPP, and as such, the fact-finding report underlying the allegations made against the defendants, conducted in illegality conditions, not subject to the performance of an expert report, and, as the law expressly provides, it must be removed from the evidence administered in the criminal prosecution phase".

In Decision no. 3584 of 28 June 2023, delivered by the Administrative and Tax Section of the High Court of Cassation and Justice, the supreme court ruled that judicial review of a judgment cannot be exercised if the court of first instance did not examine the case and did not present the arguments it hadhe founded the decision, and this vice affects the approval and administration of the evidence proposed by the parties. In the present case, the supreme court found that the "instance rejected that it was not necessary to administer the evidence with expertise, in relation to the subject matter of the application and the objectives proposed by the applicant,

however, there is an extra-judicial expert report in the file (which was taken into account when the judgment was delivered), as well as the fact that part of the proposed objectives is practically the interpretation of some documents already submitted on file, which do not fall within the competence of the judicial expert and which can be appreciated during the administration of the evidence with documents".

Although the aforementioned decision was pronounced in a case pending before a court of administrative and fiscal litigation, we consider it relevant in this paper, whereas there have been situations in practice where the specialist appointed by the DNA has only analysed the documents on file. We exemplify in this regard in the file no. 3055/103/2021 of the Neamt Tribunal, in which during the criminal investigation, during, the DNA specialist aimed at interpreting the purchase invoices of medical devices that were the subject of public procurement for the purpose of determining the damage.

At the same time, we consider relevant in the context given the judgment of C.E.D.O. of 27.03.2014 delivered in Matytsina case c. Russia in which the Court notes that the defence sought to obtain further expertise from the victim, but the investigator replied, in a summary manner, that further examination was no longer necessary.

The case-law of the Court is well established in the sense that the defence must have the right to study and challenge not only an expert report as such, but also the credibility of those who prepared it by direct interrogation.

If the defence has not participated in the preparation of the original expert report, if the prosecution expert has never been questioned by the defence (in court or otherwise) and if two other experts in the field who have testified orally they recommended an additional psychiatric examination of Ms. SD, the refusal of the national court to order such an examination is questionable.

In that regard, the Court agrees with the government that the principle „equality of arms" enshrined in Article 6 § 1 does not require that the defence has exactly the same powers as the prosecution as regards the collection of evidence. The ways in which the defence and prosecution can participate in the collection of evidence are often different (the Mirilashvili case against Russia).

In the judgment in Khodorkovsky and Lebedev against Russia (no.2), cited above, § 731, the Court pointed out the following:

„It may be difficult to challenge an expert report without the help of another expert in the field. Thus, the simple right of the defence to ask the court to conduct another expertise by experts is not enough. To achieve this right, the defence must have the same opportunity to present its own „expertise evidence".

## 4. Conclusions

Administration of evidence with expertise in criminal trials in which during the criminal investigation a technical-scientific finding was made by specialists or technicians operating within or beside the institution of which belongs to the criminal investigation body is of particular importance for the fair resolution of cases.

Thus, a fundamental aspect of the right to a fair trial is that criminal proceedings are contradictory. At the same time, it is necessary to respect the principle of equality of arms between the prosecution and the defence, so that both the prosecution, the defence must also be given the opportunity to know and challenge the evidence brought by the opposing party.

The administration of evidence with expertise ensures the protection of the rights of the defendant, providing an impartial approach and guarantees respect for the principle of the presumption of innocence and the right to a fair trial.

The principle of equality of arms means equal treatment of prosecution and defence, without one being disadvantaged in relation to the other, it is not enough for the party to take note of the existence of the technical-scientific finding report, but it must have the opportunity to discuss and challenge the finding report before the court, as well, in conditions of contradiction.

It is important that the courts do not place the defence at a disadvantage to the criminal investigation bodies in relation to the fact that the evidence consisting in making a scientific-technical finding is carried out by the provision the criminal investigation body, with the objectives ordered by it and by a specialist within the prosecution offices.

Thus, the rules on taking evidence and presenting it at trial should not make it impossible to defend the exercise of the rights guaranteed by Article 6 of the Convention.

Therefore, it is necessary to administer the evidence with expertise, as this means of proof ensures objectivity in the evaluation of the evidence, eliminating subjective prejudices and interpretations.

Thus, the credibility of the expert in his field increases confidence in the judicial process and in the decisions rendered.

By law ferenda, we propose the completion of art. 172 para. 12 C.pr.pen., with the following aspects: „In this situation, against the prosecutor's order rejecting the administration of the evidence with expertise, the, the defendant may lodge a complaint with the judge of rights and freedoms within 48 hours."

We consider that such a solution is fair and capable of preventing possible abuses of judicial bodies that would not be interested in a reversal of the conclusions of the specialist or technician operating within the framework or in addition to the institution to which the criminal investigation body belongs.

The defendant's right to challenge and request an expertise in the course of the trial is not sufficient to guarantee the right to a fair trial and equality of arms, the principle of finding out the truth being an incident, including during the criminal investigation.

Thus, we consider as unfair the situation in which the defendant must wait for the completion of the criminal investigation, the preliminary chamber procedure and the commencement of the judicial investigation in order to challenge the technical-scientific finding report.

## Bibliography

Boroi, A., & Negruț, G. (2022). *Drept procesual penal. Ediția a 3-a revizuită și actualizată/Criminal procedural law. 3rd edition revised and updated.* Bucharest: Hamangiu.

Grădinaru, S. (2014). *Supravegherea tehnică în Noul Cod de procedură penală/Technical supervision in the New Criminal Procedure Code,*. Bucharest: C.H.Beck.

Grădinaru, S. (2017). *Utilizarea interceptărilor audio sau video cu titlu de mijloace de probă în procesul penal și compatibilitatea reglementării cu exigențele europene și internaționale/The use of audio or video interceptions as evidence in the criminal process and the compa.* Cluj-Napoca: Presa Universitară Clujeană.

Grădinaru, S. (2019). Observații referitoare la expertizarea suporților ce conțin rezultatele activității de supraveghere tehnică/Observations regarding the expertise of the supports containing the results of the technical supervision activity. *Penalmente Relevant nr. 1*, 2.

Grădinaru, S. (2021). Expertiza asupra datelor rezultate din supravegherea tehnica/Expertise on data resulting from technical supervision. *Curierul Judiciar/Judicial Courier no.10*, 1.

Grădinaru, S., & Gîrbuleț, I. (2012). The evidential value of audio recordings or video recordings. *Curentul Juridic, year X, no 1 (48)*.