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Rules regarding the hearing of the defendant

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Abstract. The defendant is the person against whom the criminal action was initiated. The defendant is a part of the criminal incrimination process, both during the criminal investigation and during the preliminary phase or trial phase, being a passive subject of both the criminal investigation and the civil action taken. Authors, co-authors, accomplices, instigators of the crime in the form of a consummated or exhausted attempt, who have criminal capacity, can be accused. Both physical and legal persons can be defendants. One or more persons can acquire the quality of defendants during the criminal investigation. The purpose of the work is to show the important role of taking the defendant's statements and the way of listening to them by the judicial bodies. Unlike the statements of the injured person, which can be considered as having, in principle, more credibility and probative value, the statements of the defendants cannot have this characteristic, taking into account on the application of the procedural provisions and the consideration of the mental resources that determine each category of participants to process of adopting a sincere position or, on the contrary, insincere. With regard to the way of listening to the defendant, we will note that the New Code of Criminal Procedure provides that the following rights and obligations must be made known to him for the first time: the right not to give any statement during the criminal trial, the right to consult the file, the right to have a chosen lawyer, the right to propose the administration of evidence, the obligation to appear at all the summons of judicial bodies, the obligation to communicate any change of address, the obligation to tell the truth.

Keywords. authors, co-authors, accomplices, evidence, investigators

I. General notions regarding the tactics of the hearing of the defendant

The commission of a crime generates obligations and rights for a whole suite of people. The rights and obligations arising within the criminal process are varied and depend on the procedural position of the participants.

A special place in the procedural distribution is given to the parties, who can be defined as physical or legal persons, who have rights and obligations that arise directly from the exercise of the criminal action and the civil action within the criminal process in order to solve their problem. It is what interests them and, to the same extent, the criminal process needs parties to be able to take place ¹.

¹ Udrouiu M., *Criminal procedure. The general part. The New Criminal Procedure Code*, 2nd edition, CHBeck Publishing House, Bucharest, 2015

The participants in the criminal process should not be confused with the participants in the crimes provided for by the New Penal Code. For a better record, the participants in the criminal process are:²

- ✓ Judicial persons:
 - Criminal investigation persons (Prosecutor; Criminal investigation team);
 - The judge of rights and freedoms;
 - The preliminary chamber judge;
 - Courts;
- ✓ The lawyer;
- ✓ The parties:
 - the defendant;
 - The civil part;
 - The civilly responsible party;
- ✓ Main procedural subjects:
 - The suspect;
 - The injured person;
- ✓ Other procedural subjects.

According to art. 32 " *the parties are the procedural subjects who exercise or against whom a judicial action is exercised*" and the entire Code of Criminal Procedure defines the two parties involved in a criminal trial, as well as their rights.

I.1. The defendant in the criminal trial

We have to distinguish between the suspect and the defendant, said RT. 77 defines the suspect as " *the person regarding whom, from the data and evidence in the case, there is a reasonable suspicion that he has committed an act provided for by the criminal³ law* " .

The defendant is the natural or legal person against whom the criminal action was initiated. The defendant is a party to the criminal process both during the criminal investigation and during the preliminary chamber or trial phase, being the passive subject of both the criminal action and the civil action⁴.

Unlike the defendant who is a genuine party in the criminal process, the suspect is next to the injured person, only a main procedural subject, and his rights and obligations are largely those provided for the defendant, but only to the extent that it imposes them. More than that, although at present the term "suspect" is also frequently encountered in non-judicial circles, in the criminal procedure the "suspect" made its appearance with the entry into force of the New Code of Criminal Procedure, in the Code of The criminal procedure previously not existing any provision regarding it. Before the adoption of the current Criminal Procedure Code, a term that defined the person under criminal investigation was that of "accused".

They can have the quality of defendants⁵: authors, co-authors, accomplices, instigators to commit the crime in the form of a consummated or exhausted attempt, who have criminal capacity. Both physical and legal persons can be defendants. One or more persons can acquire the quality of defendant during the criminal prosecution.

² Art. 29, Law 135/2010 on the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 486 of July 15, 2010.

³ Art. 77, Law 135/2010 on the Code of Criminal Procedure

⁴ Ivan Anane, *Elements of criminal procedural law*, Pro Universitaria Publishing House, Bucharest, 2015

⁵ Udriou M., *op. cit.*, 2015

I cannot acquire the quality of defendant:

- ✓ minors who have not reached the age of 14 on the date of the crime,
- ✓ the state,
- ✓ public authorities (Parliament, the President of Romania - seen as the presidential institution, the Government, the central public administration of the specialty or local, the judicial authority),
- ✓ public institutions (for example, the National Bank of Romania, penitentiaries, the National Institute of Magistrates, state or private universities, etc.) - in the latter case, if the crimes were committed in the exercise of an activity that cannot be the object of the private domain ⁶.

The defendant's status is personal and non-transferable, so that upon the death of person or the dissolution of a legal entity, the heirs, respectively the successors in rights, do not acquire the status of defendant, but the prosecutor will order the classification, and the trial court terminated the criminal trial. Due to the personal nature of the criminal liability, it is not possible to confiscate the equivalent value of the asset that was not found from the defendant's legal successors or in the hypothesis that the criminal trial was terminated against the defendant as a result of the motif of death ⁷.

Under the aspect of the civil side, the defendant is the one to whom the deed causing the damages is attributed, thus being the main passive subject and party in the civil side of the case ⁸.

Under the aspect of the civil side, the defendant has certain procedural rights, among which we enumerate: ⁹

- ✓ The right to make statements, formulate requests, raise exceptions, submit memoranda;
- ✓ The right to propose the administration of evidence in combating the civil claim;
- ✓ The right to take cognizance of the file documents;
- ✓ The right to formulate appeals against judicial decisions on the civil side of the case.

The defendant will be responsible for the entire damage caused to the civil party through the crime, even if other persons participated in the commission of the act, who were not sent to trial.

The defendant, with the consent of the civilly responsible party, may recognize, in whole or in part, the claims of the civil party, the prior consent of the civilly responsible party is necessary to avoid situations in which defendants who are deprived of financial institution to fully recognize the claims of the civil party, knowing from the beginning that they are not justified, but knowing that the payments are to be made by the civilly responsible party, who will therefore be prejudiced ¹⁰. In the case of the recognition of civil claims, the court obliges to compensation, to the extent of recognition, with respect to the unrecognized civil claims can be administered as a trial.

⁶ Micu B., *Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2015

⁷ Neagu I., Damaschin M., *Treatise on criminal procedure. General part., Edition II-A*, Publishing House Universul Juridic, Bucharest, 2015

⁸ Gheorghe Buzescu, *Peculiarities of contraventional law*, Sitech Publishing House, Craiova 2017

⁹ Lorincz AL, *Criminal procedural law*, Universul Juridic Publishing House, Bucharest, 2015

¹⁰ Udroi M., *op. cit.*, 2015

If several defendants were sent to the case who contributed by their act to the production of the damage, and during the trial the death of one of them occurs, the court will rule on the civil action, the other defendants being jointly and severally liable for the damage caused. Leaving the civil action unresolved intervenes only in the event that the only defendant sent to trial dies during the criminal trial.

I.2. The rights and obligations of the defendant in the hearing process

The defendant, as a party in the process, has certain obligations and certain rights. In order to meet his obligations, as well as to exercise his rights, the defendant must effectively participate in the criminal process. In certain situations, the procedural activity can only take place in the presence of the defendant.

The criminal investigation represents the first phase of the criminal process and consists of all the activities carried out by the criminal investigation bodies in order to collect the necessary evidence regarding the existence of crimes, identify criminals and establish of their criminal or civil liability, to determine whether or not this is the case order to send them to court.

The criminal prosecution has three procedural stages:

- The stage of investigation of the act ¹¹- with the start of the criminal prosecution in rem until the continuation of the criminal prosecution against the suspect or the initiation of the criminal action;
- The stage of investigating the person – after the prosecution of the suspect or the initiation of the criminal action;
- Resolution of the case by the prosecutor.

During the criminal investigation, according to the New Code of Criminal Procedure, the defendant has the following rights:¹²

- " a) the right not to make any statement during the criminal trial, drawing his attention to the fact that if he refuses to make a statement, he will not suffer any unfavorable consequence, and if he makes a statement, it may be used as evidence against him ;
- b) the right to consult the file, under the conditions of the law;
- c) the right to have an elected lawyer, and if he does not appoint one, in cases of mandatory assistance, the right to appoint a lawyer ex officio;
- d) the right to propose the administration of evidence under the conditions provided by law, to raise exceptions and to draw conclusions;
- e) the right to formulate any other requests related to the resolution of the criminal and civil side of the case;
- f) the right to benefit from an interpreter free of charge when he does not understand, does not express himself well or cannot communicate in the Romanian language;
- g) the right to appeal to a mediator, in cases permitted by law;
- h) other rights provided by law."

In addition to these, the specialized literature and jurisprudence also enumerate the following rights:¹³

¹¹ Ivan Anane, *The investigation of criminal investigation part-takers*, Pro Universitaria Publishing House, Bucharest, 2014

¹² Art. 108, *Law 135/2010 on the Code of Criminal Procedure*

¹³ Olariu M., Marin C., *Criminal procedural law. The general part*, Universul Juridic Publishing House, Bucharest, 2015

✓ The right to be informed about the deed for which it is being investigated and its legal framework. The obligation to inform about the nature and cause of the accusation varies depending on the circumstances of the case; with all this, the defendant must have sufficient elements to fully understand the accusations brought against him, in order to be able to properly prepare his defense¹⁴. The information mentioned by art. 6 paragraph 3 letter a) does not necessarily include the evidence on which the accusation is based¹⁵.

✓ The right to remain silent and the privilege against self-incrimination represents a guarantee of the fairness of the procedure enjoyed by the person accused of committing a crime, both in the case of the procedures carried out before the police officers or the prosecutor, as well as the procedures before the court¹⁶.

The right to remain silent represents that implicit procedural guarantee of the right to a fair trial, arising from the jurisprudence of the European Court in the interpretation of art. 6 para. 1 of the European Convention, according to which the judicial authorities cannot compel a defendant to give statements, while having at the same time a limited power to draw conclusions against them, from the refusal to give statements¹⁷.

The guarantee of the right to remain silent is accompanied by the warning procedure, which presupposes the obligation of judicial bodies to draw the defendant's attention to the fact that what he declares can also be used against him.

The new Code of Criminal Procedure provides that the defendant is made aware, before being heard, of the capacity in which he is heard, the deed provided by the criminal law for the commission of which he is suspected or for which he was set in motion is the criminal action and the legal framework of these, as well as the right not to give any statement during the criminal investigation, drawing his attention to the fact that if he refuses to give a statement he will not suffer any unfavorable consequence, and if he gives a statement, it could be used as a means of it's proof against it¹⁸.

In the matter of preventive measures, before the hearing, the criminal investigation body, the prosecutor or the judge of rights and freedoms is obliged to inform the defendant that he has the right to be assisted by a lawyer chosen or appointed ex officio and the right to do nothing statement, with the exception of providing information about his identity, drawing his attention to the fact that what he declares may be used against him.

The right to remain silent presupposes that the criminal prosecution authorities administer the means of evidence without subjecting the defendant to any coercion, pressure, inhuman or degrading treatment, torture, without using any kind of manipulation that violates the principles of the fairness and loyalty of the administration of the problems (for example , the administration of a substance that affects the ability of the interviewed person to report consciously and voluntarily the fact or factual circumstances)¹⁹.

¹⁴ ***Council of Europe/European Court of Human Rights, Guide on art. 6 of the Convention – The right to a fair trial (criminal aspect), Research Division, 2014, p. 42,
https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ROM.pdf

¹⁵ Idem, p. 169

¹⁶ Little B., *op. cit.*

¹⁷ Udrioiu M., *op. cit.*

¹⁸ Neagu I., Damaschin M., *op. cit.*

¹⁹ Puscasu Voicu, *The right to remain silent and not to incriminate oneself during the criminal process. The condition of the existence of an interrogation* , Universul Juridic Premium no. 4/2016, April 25, 2016

The right to remain silent is closely related to the presumption of innocence, constituting a guarantee of it ²⁰. In view of guaranteeing these rights, in principle, the courts cannot reach conclusions unfavorable to the defendant by interpreting his silence.

✓ The right not to contribute to one's own incrimination (the privilege against self-incrimination) is the implicit procedural guarantee of the right to a fair trial, arising from the jurisprudence of the European Court in the interpretation of art. 6 para. 1 of the European Convention according to which, judicial bodies or any other state authorities cannot force a defendant to cooperate by providing evidence that could incriminate him or that could constitute the basis of a new criminal charge ²¹.

In the doctrine ²² it was mentioned that the right to remain silent and the privilege against self-incrimination must be private as representing two notions that only partially overlap: the right to remain silent is more restricted because it only refers in oral communication, the right not to speak, in time that the right not to incriminate oneself is clearly more comprehensive, since it is not limited to verbal expression, this right also protects individuals against the obligation to hand over documents.

On the other hand, with regard to other aspects, the scope of application of the right to remain silent is wider than the right not to incriminate oneself, as it protects people not only against the obligation to make statements against them, but even against ligatures of to make any kind of statements.

Practice has shown that sometimes even apparently unimportant or insignificant questions are particularly risky for an accused. If he is not careful, there is a greater risk of making involuntary confessions or contradictory statements. They can be used to weaken the defendant's position and can affect the credibility of his statements regarding the essential aspect. Therefore, it is important that the right to remain silent is guaranteed in its pure and absolute form, and not according to a rigid interpretation of the texts.

Obtaining the defendant's statement in violation of the privilege against self-incrimination may attract the sanction of relative nullity if the conditions of art. 282 of the New Criminal Procedure Code, and consequently, the exclusion of evidence.

✓ The right to defense made concrete by the possibility of formulating requests regarding the recusal of criminal investigation parts, the administration of evidence, the revocation or replacement of preventive measures, etc.

The court emphasized the importance of the criminal investigation for the conduct of the criminal trial, to the extent that the evidence administered during the criminal investigation will determine the framework in which the crime charged to the accused will be analyzed during the trial.

Also, the accused is often in a position of particular vulnerability at this stage of the procedure, an aspect amplified by the fact that the legislation in the material of the criminal procedure is becoming more and more complex, especially regarding rules regarding collection and administration means of proof. In the majority of cases, this special vulnerability can be adequately compensated by the assistance of a lawyer, not to contribute to self-incrimination is respected ²³.

²⁰ Ungureanu M., Griga I., *The right to remain silent of the accused or the defendant*, in RDP, no. 1/2005

²¹ Udroi M., *op. cit.*, 2015

²² Micu B., *op. cit.*

²³ CEDO, Judgment of April 23, 2013, in the case of Suzer v. Turkey, para. 74 apud. Udroi M., *op. cit.*, 2015

- ✓ The right to formulate any other requests related to the resolution of the criminal and civil side of the case.
- ✓ The right to benefit from an interpreter free of charge when he does not understand, does not express himself well or cannot communicate in the Romanian language.
- ✓ The right to assist personally or through a lawyer in the execution of criminal investigation documents.
- ✓ The right to give statements regarding the accusation brought against him.
- ✓ The right to file a complaint against criminal prosecution documents.
- ✓ The right to consult the criminal investigation file under the conditions of art. 94 of the New Criminal Procedure Code.
- ✓ The right to be informed about his rights.
- ✓ The right to appeal to a mediator, in cases provided by law.

Along with the allocation of these rights analyzed above, the defendant also has a series of obligations that fall to him within the framework of the criminal investigation:

- ✓ The obligation to appear at the summons of judicial bodies ²⁴, drawing his attention to the fact that, in case of non-fulfillment of this obligation, a warrant of arrest may be issued against him, and in case of absconding, the judge may order his preventive arrest.
- ✓ The obligation to communicate, in writing, within 3 days, any change of address, drawing attention to the fact that, in case of failure to fulfill this obligation, the subpoenas and any other documents communicated to the first address remain valid and are considered to be taken into consideration.
- ✓ The obligation to submit to the measures ordered by the criminal investigation team²⁵ or the judge of rights and freedoms (for example, preventive measures, insurance, body search, home search, etc.) ²⁵.

Continuation of the criminal trial at the request of the defendant is a right of the defendant regarding which, after the start of the criminal prosecution, the renunciation of the criminal prosecution or the classification as a result of the intervention: pre-conviction amnesty, statute of limitations and criminal liability, the withdrawal of the previous complaint, a cause of non-punishment ²⁶ or a cause of imputability.

In the above cases, the defendant may request, within 20 days from the receipt of the copy of the order of renunciation of the criminal prosecution or the continuation of the criminal prosecution. This right does not benefit the perpetrator with regard to whom the classification was ordered (when the classification solution was ordered as a result of the fact that the obstacles listed above were established from the very content of the referral act, without the criminal prosecution being initiated) nor the successors the defendant the deceased, the injured person, the civil party or the civilly responsible party.

If this right, derived from the right of defense, has been exercised within the legal term, the criminal investigation bodies have the obligation to continue the criminal process. As a consequence, it is necessary to rescind the order of classification or renunciation of the criminal prosecution by the case prosecutor and to continue the criminal prosecution. This *sui generis*

²⁴ Gheorghe Buzescu, *Police Law - university course*, Sitech Publishing House, Craiova, 2019

²⁵ Art. 108, *Law 135/2010 on the Code of Criminal Procedure*

²⁶ Udriou M., *Criminal procedure. The special part. The New Criminal Procedure Code*, CHBeck Publishing House, Bucharest, 2014

modality of reopening the criminal investigation does not attract the procedural obligation to submit the revocation ordinance to the confirmation of the preliminary chamber judge²⁷.

In the situation where, after the continuation of the criminal process and the administration of probation, the existence of any of the cases provided for in art. 16 para. (1) lit. a) - d) hypothesis I of the New Code of Criminal Procedure, the prosecutor orders the classification, considering one of these grounds:²⁸

✓ In the hypothesis in which the prosecutor orders the classification noting the existence of a cause of imputability, and after the continuation of the criminal investigation the existence of a justifying case is established, the classification will be ordered, taking into account this obstacle which is a priority;

✓ If the prosecutor ordered the abandonment of the criminal prosecution, and after the continuation of the criminal prosecution, the existence of an obstacle to the initiation or exercise of the criminal action from those provided for in art. 16 of the New Code of Criminal Procedure, the classification will be ordered.

If, after the continuation of the criminal process, the existence of any of the cases provided for in art. 16 para. (1) lit. a) - d) hypothesis I of the New Code of Criminal Procedure, the prosecutor disposes of the classification as a result of the intervention of the amnesty of the previous conviction, the prescription of criminal liability, the withdrawal of the previous complaint or a cause of non-punishment or imputability, or the solution of renouncing criminal prosecution.

I.3. The notion of hearing and the importance of hearing the defendant

In order to solve criminal cases, the judicial bodies need data or information that lead to the conclusion of the existence or non-existence of the crime, the guilt or innocence of the perpetrator, etc. The data or information that helps to solve the criminal case is provided through evidence. Considering their functionality in the criminal process, the evidence is defined as an element with informative relevance on all sides of the criminal case²⁹.

The information provided by the evidence through its content cannot be administered in the criminal process except by certain means provided by the criminal procedural law, which are called evidence means. As can be seen, the test cannot be confused with the means of proof, because the latter constitutes a legal way by which the evidence is administered in the criminal process³⁰.

From the content of the current criminal procedural provisions,³¹ it follows that the means of proof are those means by which the factual elements that can serve as evidence are established, and in the specialized literature they³² are defined as the legal means by which the evidence or legal means used to prove a fact.

²⁷ Udroi M., *op. cit.*, 2015

²⁸ Șandru A., Herinean D., *Complicity. The relationship with the author's deed related to the cases that prevent criminal liability*, published in *Revista Dreptul (Jurist Union)* No. 10 / 2020 of September 17, 2020

²⁹ Theodoru Gr., *Treatise on criminal procedural law*, Hamangiu Publishing House, Bucharest, 2008

³⁰ Neagu I., *Treatise on criminal procedure. The general part*, edition II, Universul Juridic Publishing House, Bucharest, 2010

³¹ See art. 97 of the New Criminal Procedure Code

³² Costin M., Leș I., Minea M., Radu D., *Dictionary of civil procedural law*, Scientific and Encyclopedic Publishing House Bucharest, 1983, Volonciu N., *Treatise on criminal procedure. General part*, Paideia Publishing House, Bucharest, 1999

According to the New Code of Criminal Procedure, the means of evidence admitted in the criminal procedural legislation in force in our country are the following:³³

- ✓ Statements of the suspect or the defendant;
- ✓ Declarations of the injured person;
- ✓ Declarations of the civil party or the civilly liable party;
- ✓ Witness statements;
- ✓ Entries, expert reports or findings, verbal processes, photographs, means of evidence,
- ✓ Any other means of evidence not prohibited by law.

The functionality of evidence in the criminal process reveals their special importance in finding out the truth and, finally, in solving criminal cases. Thus emphasizing the importance of the way of administering the evidence in the criminal trial, the legislator decrees that the evidence obtained illegally cannot be used in the criminal trial.

The palette of procedural guarantees regarding the administration of evidence, the coercive institutions that can be applied to those who break the law on the occasion of the administration of evidence see the importance given by the law to evidence and the means of administering it in the criminal process.

Article I. The defendant's hearing represents the means of evidence that consists in the defendant's account of the deed and the accusation brought to him in connection with it, administered either through listening or through his confrontation with other persons, only the judicial statements, not the extrajudicial constitution evidence in the criminal trial.

At the beginning of the first hearing, the judicial body addresses to the defendant the questions provided for in art. 107, which applies accordingly. This applies including to the injured party:

*At the beginning of the first hearing, the judicial body addresses questions to the suspect or defendant regarding the name, first name, nickname, date and place of birth, personal numerical code, parents' first and last names, citizenship, state civil status, military status, studies, profession or occupation, place of work, the domicile and the address where he actually lives and the address to which he wants the procedural documents to be communicated to him, the criminal antecedents or if he objects to another trial and, if he requests an interpreter in case he does not speak or understand the Romanian language or it cannot be expressed, as well as with regard to any other date to establish his personal situation*³⁴.

II. Hearing and recording the defendant's statements

Listening to the accused is a complex activity that consists in the use, in accordance with the law³⁵, of some specific tactical methods and procedures for the exploitation of evidence, and other it is to them and to the circumstances surrounding the commission of the crime, in order to find out the truth in the case. The tactics of listening to the accused presupposes the preparation of the listening, as well as its conduct.

II.1. Preparation for the defendant's hearing

Ignorance or incomplete or inaccurate knowledge of the particularities of each criminal case in part constitutes the premise of a certain failure of this important criminal prosecution

³³ Art. 97, Law 135/2010 on the Code of Criminal Procedure

³⁴ Art. 107, Law 135/2010 on the Code of Criminal Procedure

³⁵ Law 135/2010 on the Code of Criminal Procedure

activity³⁶. More than that, the rights of the accused-defendant can be seriously prejudiced, if for example the investigator or the magistrate, not knowing that legal assistance in the case he is handling or judging is mandatory, not take the necessary measures to ensure the presence of the defender at the time and place fixed for hearing. Therefore, the judicial body must carry out a thorough preparation activity, which covers a multitude of aspects.

✓ Study of the materials from the case file

Based on the knowledge of the material of the case, and its interpretation, the persons who will be heard as defendants, the facts that are considered in their charge, the participants, the quality and the contribution of each to the commission of the crime, the problems that must be clarified through listening.

At the same time, after studying this material, the investigator will keep the data, the evidence that will be used during the hearing and establish the time, order and manner in which it will be used.

In order to ensure an efficient and complete hearing, the criminal investigation body will study, in addition to the case material and specialized legal literature, to document itself regarding the theoretical aspects but especially, to those related to judicial practice in the matter.³⁷

On the other hand, when investigating, for example, a crime committed in a sector of productive activity, the criminal prosecution body must also document itself with regard to the regulatory acts in the field and internal regulations referring to the organization and development of the production process, to the service attributions of the person in question, the relations between suppliers and beneficiaries, the financial-accounting circuit, etc.

It should also be taken into account the fact that, when the issues for which the defendant is heard are related to other cases, the study will also extend to them.

✓ Organization of listening

From a tactical point of view, the organization of listening involves:

1. The exact determination of the problems to be clarified on the occasion of the hearing, as well as of the data that must be verified on this occasion;
2. Preparation of the evidence material to be used during the hearing - evidence material, photographs, various recordings;

This means of evidence must be carefully selected from the evidence assemblage so as not to compromise the investigation. In every criminal case there is evidence that should not be known by the person investigated in the first phase of the criminal investigation. The investigator³⁸ must reserve the possibility to be present at the right time for the trial, in other words to use what in practice is called the "weapon of surprise".

Before being brought to the knowledge of the person under investigation, the evidence must be thoroughly checked in order not to present false, uncertain, inconclusive evidence, as a result of the negligence of the authorities Research in front of the place or certain circumstances independent of fact.

In general, the use of evidentiary material is determined by the defendant's non-cooperative position in the investigation, based on the belief that there is insufficient evidence,

³⁶ Gheorghe Buzescu, *Rules of police theory and practice*, Pro Universitaria Publishing House, Bucharest, 2016

³⁷ Buneci B., *Respecting the right to defense and to a fair trial through the participation of the expert-party in the performance of the forensic expertise*, published in *Universul Juridic Premium* Nr. 3 / 2021 from March 26, 2021

³⁸ Gheorghe Buzescu, *The place and role of the civil servant in the state apparatus*, Sitech Publishing House, Craiova, 2017

he does not admit to not incurring the responsibility of ȫnala, and the recognition attracts very important changes in life, in family, in society, or public criticism or indiscretion.

In addition to the choice of the evidentiary material to be used, the manner in which it will be presented is also established, depending on the personality of the accused/defendant and the nature of the evidence. The presentation of the evidentiary material is done gradually, starting with those samples which have a smaller importance but which undoubtedly support the guilt.

The moment in which the evidence of guilt is presented remains essential, which must be chosen with great discernment by the investigator, the most appropriate being the one in which the accused/defendant presents Adequate mental health, objectively assessed on a case-by-case basis.³⁹

✓ Establishing the order in which the listening will be done

If there are several accused/defendants in the case, those who have more information will be heard at the beginning. It is often necessary to listen to the witnesses first, with eyewitnesses being the priority. Data can also be obtained from the other activities carried out by the judicial body (investigation at the scene, technical-scientific findings, evidence, etc.).

✓ Establishing the place where the hearing will take place

There are situations when the accused is unable to appear to be heard⁴⁰, so the criminal investigation body decides to move and listen to him at the place where he is. In the other cases, the hearing will take place at the headquarters of the judicial body.

✓ Establishing the method of summoning or bringing, the date, time, the place

where they are to appear for hearing, or the disposition of the measure of bringing, with a view to hearing, on the basis of the summons.

The accused/defendant can be heard in a state of freedom or in a state of preventive arrest, so in the case of the accused/defendant under a state of preventive arrest, bringing him to the place where he will be heard does not raise trouble, while the defendant is at large It is called to be heard by summons or by bringing, respecting the legal provisions.

The choice of the moment to cite or bring the defendant for hearing is important both from a tactical and an organizational point of view and depends on the object of the case and its complexity.

From a tactical point of view, judicial practice has shown that it is better for the subpoena to be served on the day or evening of the day before the date set for the hearing. When there are several accused/defendants in the case who must be heard, they are summoned in such a way as to avoid the possibility of them contacting each other before appearing for the hearing. Many times they try to agree on what they want to declare or try to put pressure on the witnesses or the injured party, even resorting to threats in this sense, thus compromising a quiet. Based on this consideration, the reading must be done at different times or in separate rooms.

The defendant who was legally summoned but did not appear on the set date, can be brought on the basis of a warrant of arrest.

There are situations when the defendant is brought on the basis of the arrest warrant, before being summoned by summons. The motivation of the prosecuting body is to prevent negative consequences, when it has information about the intention of the accused/defendant to

³⁹ Olteanu GI, Voicu C., Păun C., Pletea C., Lazăr E., *Listening to people in the judicial investigation* , AIT Laboratories Publishing House, Bucharest, 2018

⁴⁰ Art. 74, *Law 135/2010 on the Code of Criminal Procedure*

evade prosecution, or when it tries to prevent the discovery of the truth by influencing witnesses, experts, destroying or altering evidentiary material.

II.2. Hearing of the defendant

During the criminal investigation, the hearing of the suspect or the defendant is recorded with audio or video technical means⁴¹. When the recording is not possible, this is recorded in the statement of the suspect or the accused, with the concrete indication of the reason why the recording was not possible.⁴²

The hearing of the defendant must be carried out in accordance with the requirements established by the code of criminal procedure and the rules of criminalistic tactics, which implies that the hearing of the defendant must be done in a certain order, individually, with the assurance of the right to defense, with it has three stages and namely:⁴³

✓ The first stage consists in verifying the identity of the defendant, in the framework of which the aim is also to obtain data related to studies, work, occupation, military status, criminal history and others that give an image of his personality; bringing to the attention of the accusation specifying the text of the law in which the deed is criminalized. He is asked to declare everything he knows about the act and the accusation, asking him to give a personal written statement about it. If the defendant cannot or refuses to give a written statement, it will be mentioned in the verbal process that ends.

✓ In the second stage of the hearing, the accused is left to freely relate everything he has to say in relation to the accusation brought against him. He must be listened to with tact and patience, not to be interrupted except in the situation in which it is established that he departs too much from the deed and the accusation about which he is being listened to. Sometimes, during the free narration, the accused (defendant) can also make statements about other facts and circumstances that exceed the act for which he is accused.

✓ The last stage of listening consists in asking questions and listening to the answers that will be recorded in the written statement. The way the questions will be formulated and addressed (clear, concise, to the point, not to be suggestive, etc.) will also depend on the answers given by the accused and, respectively, the discovery of the truth in the case. The evidence of the accused (defendant) is recorded in written statements by the accused (defendant) and in written statements by the criminal prosecution body.

II.3. The procedure for obtaining the defendant's statements and their role

According to art. 110 of the New Code of Criminal Procedure " *the statements of the suspect or the accused shall be recorded in writing. In the statement, the questions asked during the hearing are recorded, mentioning who formulated them, and the start and end times of the hearing are mentioned each time .*

(2) *If he agrees with the content of the written statement, the suspect or defendant signs it. If the suspect or the defendant has to make additions, corrections or clarifications, these are indicated at the end of the statement, followed by the signature of the suspect or the defendant.*

(3) *When the suspect or defendant cannot or refuses to sign, the judicial body records this in the written statement.*

⁴¹ Ivan Anane, *Management of criminal investigation bodies*, Pro Universitaria Publishing House, Bucharest, 2014

⁴² Art. 110 paragraph (5), *Law 135/2010 on the Code of Criminal Procedure*

⁴³ *The tactics of listening to the accused (defendant)*, <https://legeaz.net/dictionar-juridic/tactica-ascultarii-invinuitului-inculpatului>

(4) *The written statement is also signed by the criminal prosecution body that proceeded to the hearing of the suspect or the defendant, by the judge of rights and liberties or by the president of the court panel and clerk, by the lawyer of the suspect, the defendant, the injured person, the party civil or the civilly liable party, if they were present, as well as by the interpreter when the statement was taken through an interpreter.*"⁴⁴

II.4. The probative value of the defendant's statements

The verification and assessment of the defendant's statements is absolutely necessary to establish their veracity and correct assessment ⁴⁵.

The verification will be done by comparing the statements of the suspect/defendant with other evidence and by carrying out some criminal investigation activities, such as:

- ✓ listening to witnesses;
- ✓ listening to the injured person;
- ✓ technical-scientific confrontation-constancy;
- ✓ expertise;
- ✓ reconstitution;
- ✓ research in front of the place ⁴⁶.

Frequently, by performing the reconstruction, the criminal investigation body can establish the possibility of the suspect/defendant to distort the data, facts or circumstances related on the occasion of the hearing.

Through the disposition of the medico-legal finding, the criminal investigation bodies can administer some evidence - scientific argumentation - regarding the nature of the injuries produced, the characteristics of the object with which they were created, if so there are injuries that put the victim's life in danger, the number of days of medical care It is necessary to heal, judging if his claims are correct or exaggerated ⁴⁷.

The verification of the statements can also be carried out by carrying out other activities apart from those of criminal prosecution, such as: studying some statements from the interviewed person and verifying the activities carried out during the period in which he claims to have been at the scene of the crime.

The evaluation of the statements represents a significant moment in the activity of knowing and appreciating the truth. The analysis operation of a statement is carried out within the framework of the examination and weighing of the entire evidence, this presupposing a comparative study of the established facts reported by the defendant/suspect, as well as a study of the quality of only directly or indirectly from where it originates.

The declarations of the parties shall be evaluated taking into account the extent to which they are corroborated with all the material administered in the case. Only when the statements are in accordance with the evidence in question, it can be concluded that they are consistent with reality and provide information in accordance with reality. When evaluating the statements of the parties, only what they perceived will be taken into account, not their opinion, assumptions or conclusions regarding the facts and circumstances of the case or guilt or the innocence of the suspects/accused.

⁴⁴ Art. 110, *Law 135/2010 on the Code of Criminal Procedure*

⁴⁵ Gheorghe Buzescu, *Elements of public order*, Publishing House Pro Universitaria, Bucharest, 2016

⁴⁶ Olteanu, GI, Voicu, C., Păun, C., Pletea, C., LAZăr, E., *Listening to people in the framework of judicial investigation*, AIT Laboratories Publishing House, Bucharest, 2008

⁴⁷ Stancu, E. *Treatise on criminology*, Universul Juridic, Bucharest, 2007

II.5. Tactical procedures used during the hearing of the defendant

The tactical elements used in questioning the suspect/defendant are ⁴⁸:

- ✓ Listening tactics in the free reporting phase

The judicial body informs the defendant of the facts and circumstances in connection with which he will be heard.

Among the main tactical rules applied are:

- ✓ Listening to the suspect/accused patiently and calmly ;
- ✓ Avoid any gesture, reaction, mime or expression;
- ✓ She helped very tactfully, without suggesting it in any way.

Spontaneous reporting has some advantages, namely: the suspect/defendant can report circumstances unknown to the criminal investigation body until that time, they can appear in cases that result in the commission of others In seven criminal cases where the accused or defendant, the criminal prosecution body has the possibility to study the way in which the defendant formulates his statements and, likewise, you can evaluate his sincerity. ⁴⁹

- ✓ Tactical conduct at the time of formulating questions

The last stage of the hearing is, theoretically, not mandatory.

In practice, however, there are numerous cases in which the judicial body has to formulate questions in order to clarify some unclear, confusing aspects:

- ✓ Completion question they are necessary in cases where the defendant relates less than what he actually perceived;
- ✓ The clarification question refers to the aspect to which the defendant referred, but the lack of clarity requires some details;
- ✓ Helpful questions contribute to reactivating memory, removing distortions;
- ✓ Control questions – check the information;

The addressing of these questions must be done with respect to the tactical rules, similar to those of the hearing of witnesses:

- ✓ the questions must be clear, precise, concise and expressed in a form accessible to the person being listened to;
- ✓ the questions should strictly refer to the facts alleged by the defendant;
- ✓ not to contain intimidating elements;
- ✓ under no circumstances should the answer be suggested. ⁵⁰

For the resolution of many criminal cases, respectively in the conduct of the criminal process, the hearing of the injured party, along with the hearing of the witnesses and the accused, is especially important. The dialogue or judicial duel with them must take place within the limits provided by the law, but following certain specific criminalistic tactical rules.

The application of some tactical rules in these situations also makes the action of the magistrate or the policeman more efficient and quicker in detecting the antisocial act.

III. Peculiarities of hearing the minor defendant

Instrumentation of criminal cases with minor defendants is done according to a special procedure that includes aspects related to some particularities of the prosecution or trial of minor defendants.

⁴⁸ Ivan Anane, *Elements of theory and tactics of criminal investigation bodies* , Pro Universitaria Publishing House, Bucharest, 2014

⁴⁹ Olteanu, GI, Ruiu, M., *Criminal activity* , AiT Laboratories Publishing House, Bucharest, 2009

⁵⁰ Stancu, E., *Treatise on Criminology, Revised and added Vth Ed.* , Universul Juridic, Bucharest, 2010

Thus, according to the provisions of the Code of Criminal Procedure, the prosecution and trial of crimes committed by minors is done in accordance with the rules of ordinary procedure, with the additions and exemptions contained in Chapter II, Title IV of the Special Part of the Code of Criminal Procedure, entitled "Procedure in cases with minor criminals".

Through the approval of *Law no. 284/2020 for the amendment and completion of the Code of Criminal Procedure*,⁵¹ additions were made that provide that the detained or arrested minor must be informed of the right to special conditions of execution, in relation to the particularities of age. The information is also given to: parents or, as the case may be, guardian, guardian or the person in whose care or supervision the minor is temporarily; to another adult who is designated by the minor and accepted in this capacity by the judicial body; to another person chosen by the judicial body, taking into account the best interest of the minor.

Changes have also been made regarding criminal prosecution in cases involving minor criminals:

✓ The procedure in cases with minor criminals also applies to persons who have turned 18, until they turn 21, if they were minors at the time of acquiring the status of suspect, when the judicial body considers it necessary, taking into account all the circumstances of the case, including the degree of maturity and the degree of vulnerability of the person concerned.

✓ The results of the medical examination of the minor suspect or defendant on whom a custodial preventive measure was ordered, carried out in the place of detention, are taken into account in order to assess his capacity to be subject to the acts or measures ordered during the criminal trial.

✓ Supplements are entered regarding the performance of any other act of criminal investigation in which the minor suspect or defendant is cited, with the obligation of the court by the parents or, as the case may be, the guardian, the curator or the person in whose care or supervision the minor is temporarily located, if the judicial body considers that their presence is in the best interest of the minor and is not likely to affect the proper conduct of the criminal trial.

✓

III.1. Hearing and recording the defendant's statements

Both before the criminal investigation body and before the court, the stages of listening to the child in conflict with the law refer to:

- ✓ listening preparation;
- ✓ listening itself;
- ✓ evaluation of the child's statement.⁵²

Before proceeding to the hearing of the child, both the criminal investigation body and the court should gather all the information related to the child's person, the social environment from which he comes, the school situation, his physical and mental capacity, the criminal past, to the relations with the community of which he is a part.⁵³

After collecting the data related to the child as mentioned above, the prosecutor will consider that he has all the necessary elements to hear the accused child and, consequently, will consider the interview preparation stage completed.

⁵¹ *Law no. 284/2020 for the amendment and completion of the Criminal Procedure Code*, published in the Official Gazette of Romania, Part I, no. 1201 of December 9, 2020.

⁵² Pivniceru MM, Luca C., *Guide to hearing the child in judicial proceedings*, Hamangiu Publishing House, Bucharest, 2009

⁵³ Butoi IT, Butoi T., *Judicial psychology*, Romania de Maine Foundation Publishing House, Bucharest, 2003

He can initially interact with the child by detailing the standard questions on the record of the defendant's statement. Thus, the child will be asked questions related to the domicile⁵⁴, date and place of birth, parents, the educational institution where he studies, criminal history; the questioning on these aspects favors the subsequent hearing, through particular questions related to each of the aspects.

Formally, the hearing of the child defendant does not differ from that of the adult defendant, the hearing phases being the same.

Thus, as in the case of hearing the adult defendants, the actual hearing of the child is divided into three stages:

- ✓ checking the data of the person to be listened to;
- ✓ listening to his free account (the actual statement, which during the criminal prosecution phase is transposed, most of the time, into the child's holographic statement, if he knows how to write, and during the trial phase, into the transcribed statement according to the notes made by the judge) ;
- ✓ formulating questions to the child and listening to his answers.

After the prosecutor presents to the child the reason for his hearing, making him aware of the accusation, the child will be invited to freely report on the alleged crime. It is necessary that during the time in which the child narrates the facts it is not interrupted, since, on the one hand, the connection already created could be broken and, on the other hand, since the child loses his concentration faster than the adult.

In this context, there is the possibility that the minor deviates from the questions asked, or digresses the discussion on some issues that are not relevant to the case at hand. That is why the prosecutor will have to return his attention to the issues that interest the case without scolding him or apostrophe for it. The prosecutor's attitude is essential at this stage for capturing the child's goodwill and determining him to declare in accordance with the truth.⁵⁵

Many times, children in conflict with the law sometimes show an attitude and use a vocabulary inappropriate to the place where they are. The narrator must avoid exacerbating the inappropriate expression of the story by using a firm tone, commanding the subject, causing him to change his attitude or tone, so that the story can continue.

In order to listen to the free account of the person in conflict with the law, regardless of the legal age, the prosecutor must respect a series of tactical steps. Thus, it is forbidden to obtain by any means the recognition of the offender that he committed the crime; if the accused will be punished, it is possible for him to admit the commission of a crime which in reality he did not commit.

The free narration of the choir should not be interrupted by formulating new questions, before he has finished the story or by making remarks to those mentioned by the choir.

If it is observed that he is uttering untruths, intentionally straying from the subject, talking about things that are not related to the case, his attention must be drawn to the issues that interest the substance of the case.

If the indictment refers to several cases, then the accused/accused must also be heard in relation to each case. After completing the free account of the episode rhyme, one must proceed to the formulation of questions related to this episode. Only after the complete clarification of

⁵⁴ Ivan Anane, *Elements of computerized records of the person*, Pro Universitaria Publishing House, Bucharest, 2015

⁵⁵ Idem

all the circumstances related to the last question can we move on to listening to the free account of the story with regard to the next episode.⁵⁶

Rotrivit art. 72 of the Code of Criminal Procedure, " *as long as the accused or accused has made the statement, questions are asked regarding the person who forms the object of the case and the accusation brought against him* ". The formulation of the questions represents the most tense moment of listening to the accused.

At this age, the prosecutor's qualities, his readiness to listen to the accused, his reverence, patience, observational streak, riskiness, initiative and his active streak are manifested.

The questions that will be addressed to the students must not suggest the answer, they must be clear and concise, with clear objectives that must be achieved in the desired answers from the student⁵⁷. This is because the minor chord is much more influenceable than the major one.

Before moving on to questions about the concrete way of committing the crime, the court should be asked about the way of behavior before committing the crime (data about the way the crime was committed, in order to establish the criminal or remedied character of the crime). It is also necessary to establish what the criminal did to commit the crime (hid the object of the crime, tried to thwart the criminal investigation, etc.).

In this score, it is recommended that the questions be ordered in three categories, respectively: questions related to certain activities that took place before the commission of the crime, questions that aim to recreate the concrete process of committing the crime and some questions related to the activities carried out by certain hard persons the execution of the farta.

There is no fixed order of questions, therefore, if the conduct of the hearing of the jury is uneventful, the questions will be ordered in the sequence necessary for the hearing in the concrete conditions, the prosecutor being the one who will determine at the moment the appropriateness and necessity of some questions to be asked.

Children can have different attitudes towards the accusation that is brought to them, as follows: the child admits his guilt (completely or partially) and makes true statements; the criminal does not admit that he is guilty and makes true statements, because he is, in fact, innocent; the criminal admits that he is fully or partially at fault, but declares falsely, taking the blame for someone else's fault or hiding the most serious circumstances of the crime he committed. Also in this category is the possibility that the child hides its folds or its faces or the faces of the folds in a more favorable light; the criminal does not recognize that he is guilty and makes false statements in order to incriminate or mislead the prosecutor⁵⁸.

III.2. The particularities of the hearing of the minor

Legal assistance in the case of the hearing of the minor is mandatory⁵⁹ among the following categories of persons:

✓ when the accused/accused is a minor, hospitalized in a re-education center or in an educational medical institute;

⁵⁶ Mitrofan N., Zdrengea V., Butoi T., *Judicial Psychology*, "Şansa" publishing house and press-SRL, Bucharest, 1994

⁵⁷ Butoi IT, Butoi T., *op. quote*

⁵⁸ Gheorghe Buzescu, *Internal and international police cooperation – university course*, Sitech Publishing House, Craiova, 2020

⁵⁹ Art. 90, *Law 135/2010 on the Code of Criminal Procedure*

- ✓ when he is detained or arrested in another case;
- ✓ when the security measure of medical hospitalization or the obligation to medical treatment was ordered against him in another case, or when the criminal investigation body or the court of law finds that the accused or the accused would not do it himself;
- ✓ in other cases reviewed by law.

Among them, there is the obligation of the judicial body to designate and inform the certainty of the date and time when the follow-up activities that require his presence will be carried out.

The hearing of the minor who has not reached the age of 16 is done in the presence of the parents, the representative of the guardianship authority, the guardian, the curator or the person under his care. The reason for such a measure is based on ensuring a climate of safety and trust among the minor to be heard, which facilitates the achievement of psychological contact, ensuring optimal conditions for the judicial interrogation.

The child who has not reached the age of 14 benefits from the absolute legal summary regarding the freedom of reproduction from a legal point of view. In this context, since the penal action is not relevant to it in motion, it seems useless (and, moreover, illegal) to try the penal follow-up. Therefore, since the procedural framework necessary for the administration of labor has not been created, the hearing of the child who has not reached the age of 14 has no binding force except in the context in which there is another person accused in the same case.

However, the criminal will give statements regarding the charge detained in his charge both before the prosecution (in the case of crimes that attract the criminal jurisdiction of the prosecution, revised by art. 209 of the New Code of Criminal Procedure) or criminal investigation team (in the case of the other crime).

The fact that he does not have a criminal record and that he will not be punished by a reprimand or a disciplinary measure does not absolve the criminal investigation body of the obligation to revise all the requirements related to the hearing of minors, taking into consideration, in particular, the age of the child.

Minors who are not criminally responsible, but commit acts reviewed by the criminal law, fall under the scope of the offenses reviewed by *Law no. 272/2004 regarding the protection and promotion of children's rights*, which regulates the protection of children's rights. Chapter V (of this law), entitled "The protection of the children that has committed a crime but won't be indicted"⁶⁰, reviews the measures to be taken by the coril protection commission, namely placement and specialized supervision.

In the case of children between the ages of 14-16, the hearing will be carried out in accordance with the general rules for hearing the choir.

However, in the case of children between the ages of 14-16, the monitoring person will take measures regarding the medico-legal examination, necessary in order to establish the existence or non-existence of discernment in relation to the crime committed, because in art. 113, the Penal Code establishes the limits of the renal circulation of minors. Thus, in article 1, it is stated: "The minor who has not reached the age of 14 years is not responsible." In art. 2 it is established: "The minor who is between 14 and 16 years of age shall be punished only if it

⁶⁰ *Law no. 272/2004 regarding the protection and promotion of children's rights*, published in the Official Gazette of Romania, Part I, no. 159 of March 5, 2014

is proven that he committed the crime with discernment ." Also, art. 3 mentions: " *The minor who has reached the age of 16 years is responsible in accordance with the law* ." ⁶¹

The framework of the penal examination of minors under the age of 18 is thus established, there being an absolute summary of the discretion among minors under the age of 14, a relative summary of the discretion regarding minors between the ages of 14 and 16, which can be overturned in the sense of the presence of judgment if the person in question and the relative summary of judgment in the case of minors aged 16 years.

One of the conditions for the probation of minors who have committed crimes regulated by the criminal law is the preparation of a minor's evaluation report by the probation service. This report is likely to help the court in choosing educational measures in the situation where it will consider that the minor is delinquent and the case is really about a crime. Rotrivit art. 116, para. 1, Criminal Code, " *the report also contains reasoned arguments regarding the nature and duration of the social reintegration programs that the minor should follow, as well as other obligations that may be imposed on him by the court.* "

It is necessary to observe the renal role of the current Penal Code in relation to the problem of taking minors to medica epertise, a role that focuses on correcting the behavior of minors, taking into account their evolution into future adults. It is not a penal politics focused on repression, as it reflects modern concerts in the field of psychology or sociology, according to which the deviant behaviors of minors arise from negative experiences during the course of the relationship, and must be corrected taking into account the age of those who die.

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⁶¹ Law no. 286/2009 regarding the Criminal Code of July 17, 2009 , published in the Official Gazette of Romania, Part I, no. 510 of July 24, 2009

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