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Comments on the Conduct of Expert Examinations of Accounts before the Prosecution Authorities and Judicial

Victor Andrei CĂRCĂLE[1]

[1]Lecturer PhD,"Stefan cel Mare" University of Suceava, Romania, victorcarcale@litere.usv.ro

Abstract: *In the present article, limiting ourselves only to accounting expertise and taking into account the provisions of the Code of Criminal Procedure, which has made important changes to the way in which expertise is granted, we propose to highlight the principles that the prosecution authorities in particular must follow when administering this evidence.*

Keywords: *accounting expertise; prosecution; court.*

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The practice of criminal prosecution bodies shows that among the means and methods used by these bodies to discover crimes, to administer evidence, to determine the degree of innocence of the perpetrators, forensic expertise is becoming increasingly important.

The prosecution and judicial authorities have the difficult task of establishing the truth about an event that took place in the more or less distant past (Teodoru, 2008).

The gathering of evidence regarding the commission of the offence, the identity of the offender and the establishment of guilt must be done only for those facts and circumstances which are directly related to the subject matter of the trial (Toader, 2011). The limits of the investigation at the prosecution stage and of the judicial inquiry before the court are determined by the relevance of the various facts and circumstances, which only the prosecuting authority, at the prosecution stage, and only the court, at the trial stage, can assess whether or not it is appropriate to prove (Conescu, 1963); The ascertainment of the truth in every judicial case is a basic requirement for the administration of justice according to the principles of criminal procedural law (Articles 1 to 12 of the Criminal Procedure Code). This process of establishing the truth is a complex process (the truth must be proved in order to be true, according to legal doctrine) (Tonoiu & Pârvu, 1973).

In some cases, the judicial body or the judge will not be able to uncover all the aspects of the specific facts themselves, will not always be able to establish the causes which gave rise to them, etc. This is why, in a number of cases, knowledge in certain fields of science, the use of the most varied apparatus, special methods of scientific investigation, forensic expertise, etc. are necessary. In such cases, when the prosecution and the court do not have the necessary specialist knowledge, they have recourse to the knowledge of other persons, called experts or specialists.

At the present stage, science is in a position to provide the prosecution service or the judge with sufficient resources to enable them to gain a better and more complete knowledge of the facts, phenomena and objects which they will have to examine in criminal proceedings. Scientific discoveries in recent years, such as those in the fields of nuclear physics, acoustics, chemistry, physics or any other scientific field, have considerably broadened the possibilities of scientific investigation of evidence. Forensic techniques are succeeding in providing tacticians with an increasingly wide range of means and possibilities for questioning suspects, hearing witnesses, conducting searches, carrying out expert examinations, etc. As a result, the 'list' of evidence (objects, traces, documents, etc.) that can be used in

criminal proceedings has grown considerably. This general development of the sciences has necessarily been accompanied by an expansion and broadening of the scope of forensic expertise.

In addition to these, it should also be noted that the use of data made available by the various scientific branches for the investigation of crimes, the systematic use of the achievements of a particular science in the interests of justice, have led to the creation of special branches of these sciences, such as forensic medicine, forensic psychiatry, economic law, business law, etc. The development and refinement of the methods of these sciences have meant that, on the one hand, the examination of criminal objects in the context of chemical or physical forensic expertise can be carried out more completely and, on the other, the possibilities of identifying objects that can be subjected to expertise are constantly increasing.

In this context, it should be emphasised that, in order to establish the exact existence and seriousness of offences against justice, the prosecution and judicial authorities use witnesses and experts, in addition to other means of evidence (Udroiu, 2020). In this respect, we ask: who can be an expert?

In our opinion, the answer to this question could be as follows: the expert is a competent person, specialised in a particular field of knowledge, who is invited to participate in the investigation and court proceedings in order to clarify the various issues requiring such knowledge[1] (Rosca, 1976). As such, an expert can be any natural person who has a specialist training and is recognised by law, an accountant, a member of CECCAR[2] .

Experts will be appointed by the prosecuting authorities using the list of official experts. It is not permitted to ask parties to nominate their experts, but this does not mean, of course, that the parties could not do so and that the courts would be prevented from appointing experts proposed by them. The expert or experts, once appointed, may be dismissed by the parties in the limited cases set out in articles 67 and 176 of the Criminal Procedure Code.

From an examination of how the legislator has considered the notion of expert, it follows that experts are not subjects of the procedural activity, nor are they investigative or judicial bodies. They are persons called

[1] Here, we recall that the witness, the expert, as well as the interpreter have as a premise of their judicial activity good faith. Good faith was defined by Cicero as sincerity in words (veritas) and fidelity (constatia) in commitments.

[2] Ordinance No 65/1994 on the organisation of chartered accountancy and authorised accountants. https://ceccar.ro/ro/

upon to speak on certain matters in their field of specialisation when such matters need to be clarified during the criminal investigation or trial.

In what follows we aim to distinguish between auditing and expert accounting, because in practice they are often confused, which means that auditors (nowadays specialist referees) are unfairly used as experts.

As such, the review is an activity of state bodies which, in principle, precedes the criminal prosecution, whereas the expert opinion can only be ordered after the criminal proceedings have begun. The review derives from the control function and its task is to verify the state of the records of the assets and values of a certain establishment over a certain period of time. Expertise is limited to the clarification of a specific issue of interest to the prosecution or the court. Expertise is the expert's investigation of various issues requiring special knowledge. As is well known, the specific nature of the expert's conclusions, which distinguishes them from all other sources of evidence, is "the presentation by the expert to the court or the prosecuting authority of a conclusion/theory deduced from his experience in the field of his specialisation, in which he frames the facts of the case he is investigating".

When carrying out their expertise, experts must comply with certain rules of criminal procedure, while reviewers (expert reviewers) are governed by the laws governing their work.

Expertise is a means of proof, as such, unequivocally provided for in Articles 100, 172 et seq. C.pr.pen., whereas a review constitutes evidence in criminal proceedings only to the extent that this activity has uncovered missing money[3] (Fidiaca & Musco, 1996) or valuables in the management and has been referred to the prosecution authorities (Antoniu & Toader, 2016).

The expert reviewer/reporter may be called as a witness in the trial, if he is required to be heard, whereas the expert occupies a special position, incompatible with the quality of witness[4] (art. 46 of the Criminal Procedure

[3] However, we feel it is necessary to point out that, in our opinion, in matters of embezzlement (Article 295 of the Criminal Code), the activity of the offender must damage the assets of the establishment by causing material damage. Without the existence of material damage, the offence of embezzlement does not exist. We consider that the argument of the text is decisive and as such, it can be stated that the use, as well as the appropriation, must produce a harmful result. In this regard, see also the opinion of the author Giovani Fiandaca, Enzo Musco.

[4] We underline that, by Decision no. 87/2019, published in the Official Gazette no. 498 of 19 June 2019, the Constitutional Court admitted the exception of unconstitutionality and found that the legislative solution contained in the provisions of Article 174 paragraph 1 of

Code). The prosecutor decides on the request for recusal during the prosecution phase and the court decides on the request for recusal during the trial phase. Any other objections raised in connection with the conduct of the expert or counter-expertise shall be resolved by the prosecution.

In the light of the above, the prosecution authorities must take account of the special nature of these two activities and not entrust the experts with matters which fall within the competence of the auditors/reporters.

As is well known, the object of expert accounting in criminal cases is the economic and financial activity reflected in the accounting records and linked to the participation in this activity of the various persons whose acts have become the subject of criminal proceedings. The accounting experts must therefore check the records of a management, in order to establish whether goods or sums of money are missing from that management, as well as the way in which the goods entrusted to them by the managers have been kept. Expertise can therefore be used whenever there is a need to clarify factual issues relating to management in any area of activity.

It should be noted that it follows from the provisions of Article 172 of the Criminal Procedure Code that expert opinions are only required when it is necessary to clarify certain issues for which an expert opinion is required. The expert must be given the necessary material from the outset, after prior examination by the prosecuting authority, and must be given a precise task. Otherwise, the expert will work as he sees fit and will not clarify the issue of interest to the investigator. As a rule, the work of the accounting expert is limited to examining material evidence, documents, registers, etc. This research is carried out directly.

The accounting expert's report can only be authorised and carried out after the criminal proceedings have begun, in rem. Before the criminal proceedings begin, the following may be requested: an audit of the accounts, the collection of information and any other checks to establish whether or not an offence has been committed.

Once criminal proceedings have begun, it is important to choose the right time for the expert's report, which should be as close as possible to the time when the criminal offence was committed. Prosecuting authorities must

the Criminal Procedure Code, which does not provide for the application of the cases of incompatibility provided for in Article 64 of the same normative act and with regard to the specialist working within or outside the judicial bodies, who makes the finding under Article 172 paragraph 10 of the Criminal Procedure Code, is unconstitutional.

be very careful in choosing this time, as timely expert evidence will enable the crime to be discovered quickly.

In addition to these clarifications, we also wonder: how will the prosecution authorities act once they have found it necessary to carry out the accounting expertise? The answer to this question is that, once the prosecution has concluded that an accounting expert opinion is necessary in a case, it will order one. The order by which the prosecuting authority orders the expert opinion to be carried out must contain the provisions laid down in Article 1723 of the Criminal Procedure Code.

It is also necessary to point out that questions such as the following are not formulated in judicial practice: "to establish how a sum of money was taken from the house" or "to draw conclusions from the report of the audit".

The first of the above questions is wrongly formulated, because determining how a sum of money was taken is a matter for the prosecuting authorities and not for the experts, who can only draw conclusions as to the amount of the sum taken, the period of time during which it was taken and the person responsible for the missing person.

The second question does not contain any concrete tasks, so the expert will not know what the prosecution wants to know.

It should also be noted that after the work is completed, the expert's report is submitted to the prosecuting authority, which must check it in all seriousness. In view of the above, the methods of verification are as follows: it is examined whether the report is based on the documents; it is examined whether the report clarifies the issues raised by the expert; the report is compared with the evidence in the file.

If the prosecuting authority finds inconsistencies, it summons the expert to clarify them. The expert is heard by the judicial body on these inconsistencies and on unclear points in the expert report.

The judicial body must check the references to the various documents in the file, follow the logic of the expert's thinking and see whether he has used fair methods. It is not permissible to receive the expert's report on trust without checking it. If the judicial body does not agree with the expert's report, it may not remove it without any explanation, but must give detailed reasons for its disagreement when deciding the case. When the prosecution or the court discovers new material or it is found that the experts have examined the material on file incompletely, an additional expert report shall be carried out in accordance with Article 180 of the Criminal Procedure Code.

The expert's report, i.e. the expert's conclusions on the matter referred to him for investigation, drawn up by the expert after investigating the circumstances of the case relating to this matter, constitutes, in our view, judicial evidence. As can be seen, the expert's report is primary, non-derivative evidence and is self-contained, having no preference over other evidence. Expert evidence is usually indirect evidence, since it does not establish the guilt of the person under investigation, but certain facts, which, together with the other circumstances of the case, as clarified by the prosecution or the courts, are important for resolving the question of the guilt of the person under investigation or on trial. However, there are cases where expert evidence also constitutes direct evidence. For example, where a document is examined to establish whether or not it is forged by the suspect or defendant.

At the same time, the court can be helped, like the prosecution, by the conclusions of experts in solving the problems it faces.

In our law, all evidence does not have a predetermined value established by law and is subject to the free judgment of the judicial authorities after evaluation of all the evidence in the case.

The accounting expert's conclusions/theories, also being evidence, must be assessed, like the others, in relation to the material in the file, even though the expert's conclusions/theories represent the opinion of a specialist on a matter in which the prosecution and the court do not have specialist knowledge.

The **conclusions** of the expert's report will therefore be considered in relation to the other data in the file and checked in such a way as to establish whether they are derived from the material in the file and are well-founded. Moreover, in judicial practice it has been decided that the expert's report must be compared with the other evidence, each in its own right and in its entirety. In this way, not only is the accuracy of the expert's conclusions checked, but other evidence is also clarified.

If we try to have an overview of the accounting expertise before the prosecution and court bodies, we can conclude that the prosecution and court bodies must attach particular importance to the proper conduct of the expertise, which, together with the other means of evidence, helps to catch criminals and punish them.

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