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COMPARATIVE LAW

PRESENTATION OF ROMANIAN NATIONAL SYSTEMS OF INVESTIGATION, PROSECUTION AND EVIDENCE (PART I)

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ABSTRACT

This study is the first part of a presentation of Romanian national legal system, with regard to investigation, prosecution and evidence in Romanian criminal procedural law.

The study also contains comparative law elements with reference to the French legal system and is structured in several chapters regarding general aspects of the procedure, phases of the criminal procedure, as concerns the meaning of investigation and prosecution in the Romanian and French legal system and t*he meaning of bringing to trial in both legal systems,* sources of criminal procedural law, bodies carrying out investigation and prosecution, with regard to investigation ***bodies of the criminal police, the prosecutor, specialised investigative bodies and certain bodies outside judicial structures. Other chapters of the study refer to threshold for initiating investigation and prosecution, the legality and opportunity principle, the status of the suspect/defendant, specialised procedure for financial criminal investigations.***

***The chapters of the study regarding investigation measures refer to formal designation as a suspect, questioning the suspect pre-trial, i*nterrogation of witnesses in the investigation stage (including complainants/injured party), arresting the suspect and detention for questioning, pre-trial custodial detention and house arrest, interception of postal communications (letters), electronic surveillance, monitoring of bank transactions, with reference to obtaining data on a person's financial transactions and o**btaining data regarding the financial status of a person. Other themes include tracking and tracing of objects and persons, d**ata mining and profiling, access to relevant premises ('crime scene'), search and seizure, on-line search of computers, freezing, production orders (in particular for banks, service providers, public authorities and administrators of other data collections), invoking the assistance of experts to examine clues, infiltration, controlled deliveries.

The study also analyses prosecution measures, with regard to opening of investigation and prosecution, unilateral disposal of the case (including remedy against it), multilateral disposal of the case (including negotiated justice, diversion and remedy against it),

reopening of the case closed on different grounds, committing to trial and presenting the case in court. The study ends by focusing on evidence, with regard to the status of illegally or improperly obtained evidence, admissibility of written reports and status of evidence obtained in other member states.

The second part of the presentation of Romanian national legal system will refer to the rights of the suspect/defendant during investigation and prosecution.

Key words: Romanian national legal system, prosecution, Romanian criminal procedural law, comparative law, investigation measures, ***the legality and opportunity principle, the status of the suspect/defendant, negotiated justice,*** evidence.

A. GENERAL ASPECTS OF THE PROCEDURE

1. Phases of the Criminal Procedure

(a) The meaning of Investigation and Prosecution in the Romanian Legal System

The Romanian criminal trial is composed of certain phases, within which different categories of judicial bodies fulfil various procedural functions. When all the phases are completed, a solution can be given and the case is closed. In the typical structure of the Romanian criminal process, there are four phases: the criminal prosecution, the preliminary chamber, the trial and the execution of decisions. The identification of the offender, his or her capture and the production of evidence in order to be brought to trial, requires the completion of a pre-trial procedural phase,[1] which is regulated by CCP, Articles 285-341 and is known as the criminal prosecution phase. The Romanian CCP refers to the investigation when it stipulates the bodies which carry out the criminal prosecution: the investigation bodies and the prosecutor.

The first phase of the criminal trial, namely the criminal prosecution phase (CCP, Special Part, Title I), during which the criminal investigation takes place, aims at collecting evidence and bringing the defendant to trial. The CCP contains many provisions regarding the criminal investigation. This is carried out by the criminal investigation bodies of the judicial police (CCP, Article 57 para 1), by the special criminal investigation bodies (CCP, Article 57 para 2) and by the prosecutor (CCP, Article 56). According to Article 56 para 1 CCP, the prosecutor coordinates and controls directly criminal investigation activities performed by the judicial police and by special criminal investigation bodies set by law.[2] Also, the prosecutor makes sure that criminal investigation acts are performed in compliance with the legal stipulations.

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[1] N Volonciu et alii, *Codul de procedură penală comentat,* 3rd edn (Bucharest, Hamangiu Publishing House, 2017) 818.

[2] A Lazar et alii, cap. 16, Romania, in K. Ligeti (editor), *Toward a Prosecutor for the European Union,* Volume 1, A Comparative Analysis, Series Modern Studies in European Law (Oxford, Hart Publishing House, 2013) 586.

According to CCP, Article 285 para 1, the object of the criminal investigation is to collect the necessary evidence to prove the existence of criminal offences, to identify the individuals who committed a criminal offence and to establish their criminal liability, in order to decide whether they ought to be brought to trial.

Throughout the criminal trial, the perpetrator may become subject to legal rights and obligations, as a suspect or, as the case may be, as a defendant. Thus, CCP stipulates that *the suspect* is the person in respect of whom, from the data and evidence existing in a case, there is a reasonable suspicion that they committed an offence stipulated by the criminal law (CCP, Article 77), and *the defendant* is the person against whom criminal action is initiated (CCP, Article 82). Therefore, the capacity of *defendant* arises only when the criminal action is initiated. 'Collection of evidence' is understood as comprising both the collecting of evidence and the operation of examining and evaluating it in order to find out whether the offender should be brought to trial.[3] Even if CCP, Article 285 does not contain express stipulations in this regard, the object of the criminal prosecution also includes the identification of the victim of the offence, as a necessary activity in the criminal trial.[4]

As opposed to the previous CCP (the 1968 CCP), the current CCP introduces a new second phase of the criminal process, namely the preliminary chamber.[5] According to CCP, Article 342, the object of the preliminary chamber procedure is examination, after return of the indictment, of the court's jurisdiction and of lawfulness of the referral to the court, as well as examination of the lawfulness of evidence-gathering and performance of the criminal investigation acts.

The second phase justifies its importance by the fact that the judge verifies the procedural activity carried out by the criminal investigation bodies or by the prosecutor, before the case trial.[6] If the preliminary chamber judge finds it necessary to invalidate a piece of evidence due to an essential violation of the procedural rights of one party, he/she will eliminate it as proof of evidence. If the judge excludes all evidence, he/she returns the file to the prosecutor so that the criminal investigation may be performed again.

The third phase of the criminal process is the trial, as regulated by CCP, Articles 349-477[1]. This phase allows for a continuation in the process of solving the criminal case, under conditions of publicity and with the observance of the defendant's right to actively present their case and the right to a defence, so that the final court decision would be based on the truth regarding the offence and that

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[3] V Dongoroz, *Tratat de procedură penală,* vol 3 (Bucharest, All Beck Publishing House, 2003) 140.

[4] M Udroiu, *Procedură penală. Partea specială,* 5th edn (Bucharest, CH Beck Publishing House, 2018) 1.

[5] Romania's new CCP was adopted through the Law 135/2010, published in the Official Journal of Romania No 486, 15 July 2010, which came into effect on 1 February 2014.

[6] Volonciu et alii (n 1) 1002.

the guilt of the offender, if proved, would be correctly established and synthesised in the sanction applied against him/her.[7] Another essential element of the trial phase is the independence and the impartiality of the judges. Thus, judges are under an obligation to be impartial and to decide objectively, free from any influence. It is imperative that the impartiality of judges be absolute, because public confidence and respect for the legal system are the guarantees of its effectiveness.8 The trial phase begins from the moment when the preliminary chamber phase is finished and ends with the final solution of the criminal case.[9] Having as its object the final solution of the criminal case, the trial is considered, with good reason, the central phase and the most important of the criminal process.[10]

The last phase is the execution of the court decision, CCP, Articles 550-601[1], the scope of which is to watch over the actual realisation of the decision reached during the third phase.

As opposed to the previous CCP (the 1968 CCP), the current Romanian CCP (the 2010 CCP) explicitly regulates the principle of separating the judicial functions, by stipulating in Article 3 para 1 that there are four judicial functions which are exercised during the criminal proceedings: the criminal investigative function, the function of issuing orders concerning the fundamental rights and liberties of a person at the stage of the criminal investigation, the function of examining the lawfulness of the decision to prosecute or drop charges and the trial function.

The specialised literature considers that there is a fifth judicial function, which corresponds with the execution phase and is exerted by the enforcement court or, as the case may be, by the judge delegate in charge of enforcement.[11]

By comparison with the Romanian legal system, the French criminal procedure distinguishes two phases: the pre-trial phase, which is ordinarily carried out by the police, under the supervision of the public prosecutor service and more exceptionally by a judge, and the trial phase. The pre-trial phase encompasses the investigation stage, conducted by the police under the supervision of the public prosecutor service, and the instruction or judicial investigation stage, which involves the intervention of a magistrate of a specialised nature: the investigating judge.[12]

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[7] Lazar et alii (n 2) 587.

[8] See O Predescu, M Udroiu, *Protectia europeana a drepturilor omului si procesul penal roman* (Bucharest, CH Beck Publishing House, 2008) 572-593.

[9] Udroiu (n 4) 235.

[10] Lazar et alii (n 2) 587.

[11] See M Udroiu, *Procedură penală. Partea generală,* 5th edn (Bucharest, CH Beck Publishing House, 2018) 6.

[12] See J Tricot, cap. 6, France, in K. Ligeti (editor), *Toward a Prosecutor for the European Union,* Volume 1, A Comparative Analysis, Series Modern Studies in European Law (Oxford, Hart Publishing House, 2013) 225.

(b) The Meaning of Bringing to Trial in the Romanian Legal System

The prosecutor is obliged to proceed to examining the criminal investigation actions and rule concerning them, within no longer than 15 days of receiving the case file referred to them by the criminal investigation body (CCP, Article 322). Cases are resolved in accordance with CCP, Article 327, as follows. First, the prosecutor must establish that the legal provisions which safeguard the finding of truth were observed, that the criminal prosecution is completed and that the necessary evidence exists and was legally produced. The prosecutor may then proceed, as follows: a) if, from the criminal prosecution material, it is concluded that the offence exists, that it was perpetrated by the defendant and that the latter has criminal liability, the prosecutor issues the indictment act, through which he orders the sending to court; the indictment must be limited to the offence and the person who is criminally investigated and must include, besides the specifications stipulated in CCP, Article 286 para 2 (date, place of issue, name and surname, quality of the issuing authority etc.), the information concerning the offender, the offence of which he is accused, the judicial setting, the evidence upon which the accusation is founded, the preventive measure taken and its duration as well as the arraignment decision; b) the prosecutor issues an ordinance through which he closes the case or drops the charges.

As opposed to the previous CCP (the 1968 CCP), the current CCP does not stipulate the obligation of the criminal investigation body or of the prosecutor to present the case file to the defendant, as the latter's right to defence is ensured by the regulations which stipulate the suspect's right or the defendant's right or their lawyer's right to assist to most of the criminal prosecution acts and their right to consult the file throughout all the criminal trial, under the conditions stipulated by the law.[13]

In the French legal system, the instruction stage aims at bringing the case to judgment. It differs according to the type of offence under investigation: it is compulsory in the case of a felony *(crime)*, optional for a misdemeanour *(délit)* and exceptional for a petty offence *(contravention)*. Where optional, the decision to open an *instruction* is based on the complexity of the case.[14]

2. Sources of Criminal Procedural Law

Romania's laws (constitutional, organic and ordinary) are themselves the main source of criminal procedural law, the 2010 CCP and its future amendments being the source of most regulations. Other sources of regulations are: international treaties, government ordinances (in areas which are not the object of organic laws; GOs are subject to Parliament's approval) and, in exceptional cases, emergency

[13] Volonciu et alii (n 1) 921.

[14] See Tricot (n 12) 227.

ordinances, which come into effect only following their deposition in Parliament, and as long as they are not rejected by the latter.

Criminal procedural rules in the Romanian legal system require a statutory base. The criminal procedural law is first of all connected to the constitutional law, because at the base of every branch of law there are juridical constitutional norms. The Romanian Constitution lays down numerous rules for various fields, which directly concern the criminal procedural law. A few examples can be given in this respect. Article 126 para 3 of the Romanian Constitution mentions that The High Court of Cassation and Justice ensures the unitary interpretation and enforcement of the law by the other courts of law, according to its competence.

Criminal procedural rules in the Romanian legal system also have a case law base, including the case law of the ECtHR and of the ECJ. The ECHR and its 11 additional protocols were ratified by Romania on 20 June 1994, since when Romania has recognised the jurisdiction and case law of the ECtHR as binding on Romanian courts in the matter resolved. In the event of the ECtHR finding that a Romanian court has violated a right stipulated in the ECHR, the decision of that court is subject to revision.

According to Article 20 of the Romanian Constitution, the constitutional regulations concerning the rights and freedoms of the citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania adhered. If there are inconsistencies regarding the fundamental human rights between the pacts and the treaties to which Romania adhered and the domestic laws, the international regulations will have priority, except for the case where the Romanian Constitution or the domestic laws contain provisions which are more favourable[15].

As to the French legal system, the main source of criminal procedural law is the CCP. The French CCP consists of a preliminary title and six chapters. Since the introduction in 2000 of the preliminary article, setting out guiding principles, the preliminary part of the Code has gained in importance.16

3. Bodies Carrying out Investigation and Prosecution

Criminal prosecution is carried out by the criminal investigation bodies and by the prosecutor, according to CCP, Article 55. The criminal investigation bodies are: a) the criminal investigation bodies of the judicial police, b) the special criminal investigation bodies. The criminal investigation bodies of the criminal police consist of agents from the Ministry of Administration and Interior, designated under conditions stipulated by the special law, with the assent of the general

[15] Lazar et alii (n 2) 588, 589.

[16] See Tricot (n 12) 224.

prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice or of the designated prosecutor.

(a) Investigation Bodies of the Criminal Police

The investigation bodies of the criminal police have a special role among the criminal investigation bodies, because they have very wide competences, being able to carry out investigations for every offence not mandatorily assigned to other investigation bodies' competence. The Ministry of Administration and Interior organises and carries out, through specialised structures, according to their competence, activities in order to prevent and fight terrorism, organised crime, crimes against the financial interests of the EU, as well as other criminal phenomena and antisocial actions. For this reason, the investigation bodies of the criminal police are considered by the specialised literature to have general material competence.[17] In urgent cases, they can carry out investigation acts which cannot be delayed, even if they concern a case which is not within their competence. Their work is immediately reported to the prosecutor who supervises their activity, or to the competent prosecutor. He can visit the crime scene, he can make drawings and take photographs. The data collected in this manner will be corroborated with other information obtained personally.[18]

(b) The Prosecutor

The role of the prosecutor is essential, as he supervises the criminal prosecution, conducts and controls directly the criminal prosecution activity performed by the criminal police and by other special investigative bodies. The prosecutor can carry out any act of criminal prosecution in the files he supervises.

According to CCP, Article 56 para 3, the criminal prosecution is performed mandatorily by the prosecutor in the following cases: crimes for which the High Court of Cassation and Justice or the Court of Appeal is the court of first instance, bribery (CC, Articles 289-294), crimes against the financial interests of the EU stipulated by Law 78/2000 etc. In special cases, where the prosecutor does not have the possibility to carry out the criminal investigation personally, a delegation can intervene through rogatory letter, according to CCP, Articles 200, 201.[19] The prosecutors within hierarchically superior prosecutor's offices can, in order to perform the criminal investigation, take over cases under the competence of a lower prosecutor's office, on command of the hierarchically superior leader.

By comparison, in the French legal system, the main actor of investigation is the judicial police, who acts under the supervision of the investigating judge, once a judicial investigation has been opened (the investigating judge carries out both

[17] Volonciu et alii (n 1) 170.

[18] Decision no 740/1998, High Court of Cassation and Justice, Criminal Section, 508-10; Decision no 851/1980, High Court of Cassation and Justice.

[19] Decision no 1665/1992, High Court of Cassation and Justice, Criminal Section, C 6, 452.

investigative and judicial functions, once an instruction is opened), and the competent authority responsible for prosecution is the public prosecutor. [20]

In the Romanian legal system, there is no investigating judge, as opposed to the French legal system, which gives the investigating judge investigating powers (generally delegated to the police through letters rogatory), as well as jurisdictional powers, except for pre-trial detention, which falls under the exclusive competence of the liberty and custody judge.[21]

(c) Specialised Investigative Bodies

The CCP expressly stipulates that the criminal prosecution be carried out by a special investigative body in some cases, given the nature of the offence as well as that of the offender (CCP, Article 57 para 2).

The criminal investigation may be carried out in such cases by the following special investigative bodies: officers designated by military unit commanders in cases regarding offences perpetrated within the unit by subordinate military; the commanders of the military unit, the officers designated by the garrison commanders etc.[22].

(d) Certain Bodies Outside Judicial Structures

According to CCP, Article 61, besides the judicial bodies, there can be other non-judicial bodies which can participate in the process of discovering and establishing crimes. The role of these bodies is to ascertain the existence of crimes committed in their field of activity. Such bodies are: a) the bodies of state inspections, of other state bodies, as well as of public authorities, public institutions or of other public-law legal entities; b) the control and leading bodies of the public administration; c) the public order and national security bodies, for offences identified during the exercise of responsibilities set by law.

Whenever there is a reasonable suspicion related to the commission of an offence, the above-mentioned bodies are under an obligation to prepare minutes on the identified circumstances. The minutes concluded represent an act seizing the criminal investigation bodies and may not be subject to administrative litigation challenge.

The above-mentioned bodies draft documents which ascertain the crime, are under the obligation to take measures to preserve the location where offences were committed and to collect or preserve material evidence. In the case of *flagrante delicto*, the same bodies have the right to conduct body and vehicle searches, to apprehend the offender and bring them forthwith before the criminal investigation bodies.

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[20] See Tricot (n 12) 227, 228.

[21] See Tricot (n 12) 227.

[22] The legal provisions were similar under the previous CCP (the 1968 CCP), see Lazar et alii (n 2) 590.

They do not have the competence of drawing up the indictment (which is an exclusive prerogative of the prosecutor) and they also cannot defend it before the court—the prosecutor defends the indictment before the court. The documents issued by the same bodies are sent to the prosecutor. Specialised agencies do not carry out the criminal prosecution (CCP, Article 61).

4. Threshold for Initiating Investigation and Prosecution

When the referral meets the conditions required by law, the initiation of the criminal prosecution is ordered by the criminal prosecution body in regard to the committed act or to the commission of which is being prepared, even if the author is indicated or known (CCP, Article 305 para 1). The criminal prosecution bodies can only take action after being formally notified about the perpetration of an offence. The external notification is done through complaint or denunciation. The criminal prosecution body can be informed *ex officio* and drafts an official record.

When the existing evidence in the case constitute probable cause to believe that a certain individual has committed the offence that warranted the start of the criminal investigation and none of the cases preventing criminal action as under Article 16 para 1 CCP apply, the criminal prosecution bodies shall order that the criminal investigation continue in relation to that individual, and the latter shall acquire the capacity of suspect. The decision taken by the criminal investigation body is submitted for confirmation of the prosecutor within 3 days (Article 305 para 3 CCP).

From the moment of initiation of the criminal prosecution, the perpetrator, in the juridical rapport of the substantive criminal law, is termed the suspect in the juridical rapport of the criminal procedural law, until such point as the criminal action is initiated against him, whereafter he is termed the defendant.

The criminal action is initiated by the prosecutor, through an ordinance, during the criminal investigation, when they find that evidence exists to attest that an individual has committed an offence and none of the cases under Article 16 para 1 apply (CCP, Article 309).

As opposed to the Romanian legal system, which institutes the obligation of the criminal prosecution body to initiate criminal prosecution when the referral meets the conditions required by law (CCP, Article 305 para 1), the French criminal procedure is based on the principle of discretionary prosecution, which means that before initiating the prosecution, the prosecutor must assess not only the legal basis of the case, but also the appropriateness of prosecution, given, as the case may be, the general or individual instructions issued by the Ministry of Justice.23

Nevertheless, in the Romanian criminal procedure, although the criminal prosecution body is under an obligation to initiate criminal prosecution when the

[23] See Tricot (n 12) 229.

referral meets the conditions required by law, the prosecutor can afterwards waive the exercise of the criminal action if, considering the concrete elements of the case, there is no public interest in performing its object, as mentioned below.

5. The Legality and Opportunity Principle

The principles *nullum crimen sine lege* and *nulla poena sine lege*, which signify the legality of incriminations and the legality of punishments in the criminal law have as correspondent in the procedure the principle *nulla justitia sine lege*, namely that there is no justice outside the law. Consecrated as a basic rule of the criminal proceedings in CCP, Article 2, it is shown that the criminal process is carried out according to the law. The provisions of the CCP allow the prosecutor to ponder the opportunity of a criminal investigation in a low importance case, in order that the investigative resources may be channelled towards more important files.[24] Thus, the CCP expressly makes reference to the opportunity principle in Article 7 para 2, which stipulates that 'in the cases and conditions specifically stipulated by law, the prosecutor can waive the exercise of the criminal action if, considering the concrete elements of the case, there is no public interest in performing its object'.

Furthermore, Article 318 CCP provides that in the situation of offences for which the law requires the penalty of a fine or a penalty of imprisonment of no more than 7 years, the prosecutor can drop charges when it is found that there is no public interest in prosecuting. Article 318 para 2 CCP provides the criteria taken into consideration by the prosecutor when assessing whether there is or not such a public interest, e.g. the contents of the offence and the concrete circumstances of its commission, the modus operandi and the instruments used, the goal of the offence, the consequences that occurred or could have occurred, etc. The text is also applied in the situation of an unknown perpetrator (the text allows for the investigation to be terminated and the application, from the part of the prosecutor, after consulting with the suspect or defendant, of a sanction stipulated by CCP, Article 318 para 6. These sanctions are: removing the consequences of the criminal offence or making redress or agreeing with the civil party on an avenue of redress; making a public apology to the victim; performing community service for a time span of no less than 30 and no more than 60 days, except for the case where their health precludes them to provide such community service; enlisting in a counselling program.

In case of non-compliance in ill-faith of the obligations within the deadline stipulated by the prosecutor, they shall rescind their order. The burden of proof for compliance with the obligations or submitting the reasons for failure to comply with the obligations shall fall on the suspect or defendant. A new waiver of prosecution in this same case is no longer possible.

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[24] Lazar et alii (n 2) 591.

The prosecutor's order to waive the exercise of the criminal action is verified by the preliminary chamber judge, who determines the lawfulness and legitimacy of the order (CCP, Article 318 para 12-16).

6. The Status of the Suspect/Defendant

In the Romanian criminal process, the parties are: the defendant, the civil party and the party with civil liability. The parties are litigants who file judicial action or against whom judicial action is filed (CCP, Article 32).

In the course of the criminal process, the active subject[25] of the crime receives different procedural qualities, which have distinct significations, with resonances in the structure of the content of the juridical criminal procedural relationship. In other words, the procedural qualities received by the perpetrator during the criminal process entail obligations and rights which the person held criminally responsible has to bear or execute during the procedural activity.

The suspect is the main passive subject of the juridical procedural relationship and this quality is received through the ordinance or, exceptionally, the oral statement of the prosecutor (in the case of crimes committed by the audience, in the course of a court hearing, under the conditions stipulated at CCP, Article 360), when the existing evidence in the case constitute probable cause to believe that a certain individual has committed the offence that warranted the start of the criminal investigation and none of the cases preventing criminal action as under Article 16 para 1 CCP apply (CCP, Articles 33 and 305 para 3). Thus, the criminal investigation body orders that the criminal investigation continue in relation to that individual, and the latter shall acquire the capacity of suspect and become subject to procedural rights and obligations.[26]

The suspect is the person against whom the criminal prosecution is carried out, as long as the criminal action has not been initiated against him/her. Unless the law stipulates otherwise, the suspect has the rights stipulated by the law for the defendant (CCP, Article 78). The quality of defendant appears once the criminal action has been initiated. The person against whom the criminal action has been initiated (when the criminal investigation and the criminal prosecution confirm the guilt) is part of the criminal process and is called the defendant (CCP, Article 82). The criminal action represents the legal means by which the goal of the criminal process is realised. Its object is to hold criminally responsible those natural and legal persons who have committed crimes.

[25] The term 'active subject' generally means perpetrator, but it also encompasses the notions of 'author', 'instigator' and 'accomplice' in the sense of the criminal law.

[26] The current Romanian CCP (the 2010 CCP) consecrates the term 'suspect', while under the former CCP (the 1968 CCP), the term was absent from the CCP, being used only by the legal literature.

The criminal prosecution bodies decide the moment of initiation of the criminal action, respectively when there is enough evidence of guilt brought into the case. The procedural acts through which a person is conferred this status, are the ordinance of initiating criminal action and, exceptionally, the oral statement of the prosecutor (in the case of crimes committed by the audience, in the course of a court hearing, under the conditions stipulated at CCP, Article 360).

The defendant is thus considered a party in the process, having certain obligations which the suspect does not have. For example, the only preventive measure which may be ordered against the suspect is taking in custody, whereas the judicial bodies can take any preventive measure against the defendant, including judicial control, judicial control on bail, house arrest or pre-trial arrest. The defendant, against whom the house arrest or pre-trial arrest is ordered, must be heard. The quality of defendant will change to that of convict when the criminal decision becomes final. The defendant also has rights, e.g.: the right to a defence, the right to consult the case file, under the law, the right to have the last word before court, the right to appeal the decisions rendered against him. To comply with the obligations he/she has, as well as to exercise his/her rights, the defendant must effectively participate in the criminal process (CCP, Article 364 para 1).

While the term 'suspect' appears in the Romanian CCP, in the French legal system, it is absent from the CCP, being consecrated only in the legal literature. Thus, according to the French legal doctrine, the suspect is the person who is suspected of the commission of the offence without being yet prosecuted.[27]

7. Specialised Procedure for Financial Criminal Investigations

There is no specialised procedure for criminal financial investigations in the Romanian legal system. By contrast, the French legal system consecrates a new Title XIII in the French CCP dedicated to the specialised procedure in the field, which has as purpose to provide for specific rules on competence and to create specialised jurisdictions. Furthermore, the French CCP distinguishes between cases of great complexity and cases of even greater complexity (due to the large number of perpetrators, accomplices or victims or of the geographical jurisdcition over which they were committed).[28]

Nevertheless, in the Romanian legal system, there are specialised institutions which carry out periodical financial controls at those institutions which have financial attributions; when these institutions become aware that certain acts must be investigated by the criminal investigation bodies, they inform the prosecutor's office or the judicial police. The Audit Court exercises a control function over the formation, administration and use of the financial reserves of the state and of the

[27] See Tricot (n 12) 231.

[28] See Tricot (n 12) 230, 231.

public sector, delivering to Parliament and to the territorial-administrative units reports regarding their use and administration, in accordance with the principles of legality, regularity, economy, efficiency and effectiveness (Article 21 of Law 94/92 for the Organisation and the functioning of the Audit Court). Under the subordination of the National Agency for Tax Administration (Government Decision no 109/2009) there operates the Financial Investigation Office[29].

The object of the National Office for Preventing and Combating Money Laundering is the prevention and combating of money laundering, for which purpose it receives and analyses the information and informs the Prosecutor's Office attached to the High Court of Cassation and Justice, or the Directorate for Investigating Organised Criminality and Terrorism (Law no 656/2002).

Also, the Antifraud Fighting Department (DLAF) aims at the protection of the financial interests of the EU in Romania. The Department has control competences for the Community funds, being national leader in the fight against fraud. DLAF is the contact institution of OLAF and ensures, supports or coordinates, as the case may be, the fulfilment of Romania's duties regarding the protection of the financial interests of the EU. According to Article 325 of the Treaty, it has the competence to control the allocation and use of Community funds, as well as of the different co-financing funds. DLAF carries out operative on-site checks following the information received from OLAF, from the authorities with competences in the management of the community financial assistance, or *ex officio.* In exerting these investigative attributions, DLAF - which has unconditional access to the premises of units, as well as vehicles or any other spaces used for economical purposes - can take statements from the perpetrator or the witnesses who have been present at the committing of crimes, can draw up official records about the real circumstances of the perpetration of crimes, and can seize *corpus delicti.*

CCP, Article 300 para 2 stipulates the legal obligation of the criminal prosecution body to inform the prosecutor of the activities they are undertaking or intend to undertake. After drawing up the indictment, through which the defendant is sent to trial, the prosecutor is no longer informed about the case.

According to the draft law on certain measures for the application by Romania of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation with regard to the establishment of the European Public Prosecutor's Office (EPPO),[30] the Minister of Justice designates three candidates on behalf of Romania to be appointed by the Council of the European Union as European Prosecutor.

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[29] Lazar et alii (n 2) 593.

[30] The above-mentioned draft law was published on the official website of the Ministry of Justice and can be found at http://www.just.ro/proiectul-de-lege-privind-unele-masuri-pentru-aplicarea-de-catre-romania-a-regulamentului-ue-20171939-al-consiliului-din-12-octombrie-2017-de-punere-in-aplicare-a-unei-forme-de-cooperare-consolidat (accessed on 11.12.2018).

Prosecutors or judges of at least 15 years of service as prosecutors or judges who have relevant experience in the Romanian legal system, prosecution or trial of financial crimes and international judicial cooperation in criminal matters may participate in the interview in order to become a European prosecutor.

Also, the TFEU provides that the material scope of competence of the EPPO is limited to criminal offences affecting the financial interests of the Union in accordance with the above-mentioned Regulation. The tasks of the EPPO should thus be to investigate, prosecute and bring to judgment the perpetrators of offences against the Union's financial interests under Directive (EU) 2017/1371 of the European Parliament and of the Council and offences which are inextricably linked to them. However, it should be noted that the initial and legislative discussions on the draft regulation also focused on the possible extension of EPPO's competence to high gravity transnational crimes.[31]

Transnational crime has been defined in the legal literature as the one involving multiple jurisdictions, without being an offence under international law.32 Nevertheless, any extension of the above-mentioned competence to include serious crimes having a cross-border dimension requires a unanimous decision of the European Council.

In the matter of substantive criminal law devoted to this area, one can notice a propensity of European Union law towards harmonization (in the form of the adoption of common minimum rules). Harmonization has been the first idea that the Union has approached in the field of criminal proceedings in the Member States for the purpose of defining common procedural rules applicable to the fight against offences concerning financial interests.

Furthermore, as a crowning achievement to approximate legislation in this area, the European Prosecutor's Office would take over the institutional role of organising a coherent and unique system of prosecution and sending to trial. This idea was one of the most profound and interesting approaches of the Union regarding an articulated and thorough legal battle system for the financial interests of the Union - it is the famous project „*Corpus Juris*", which was coordinated by prof. univ. dr. John A.E. Vervaele, from Utrecht University and by prof. univ. dr. Mireille Delmas-Marty, from Panthéon-Sorbonne University.[33]

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[31] See JAE Vervaele, S Gless, Editorial "*Law Should Guvern: Aspiring General Principles for Transnational Criminal Justice*" (Utrecht Law Review, vol. 9, nr. 4) 1-10.

[32] See Vervaele et alii (n 31) 1-10.

[33] „*La mise en oeuvre du Corpus Juris dans les Etats Membres*", vol. I-IV, Prof. M. Delmas-Marty et Prof. J.A.E. Vervaele (eds), Intersentia, Antwerp-Groningen-Oxford, 2000.

„*Corpus juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*", sous la direction de Mireille Delmas-Marty, Economica,Paris, 1997.

„*Către un spațiu judiciar european. CORPUS JURIS – dispoziții penale privind protecția intereselor financiare ale Uniunii Europene*", a study carried out at the request of the European Parliament with the assistance of the Associations of European Lawyers and under the auspices of the European Commission's Directorate-General for Financial Control, Bucharest, Efemerida Publishing House, 2000.

Regarding this approach, one must also mention the scientific research efforts carried out within the framework of the European project "*Criminal Investigation and Prosecution of Criminal Offences Affecting the Financial Interests of the European Union*", coordinated by the University of Luxembourg during 2010-2012, to which the Romanian Association for Community Law Research has brought its contribution.[34].

B. GENERAL ASPECTS OF THE PROCEDURE

1. Formal Designation as a Suspect

When the existing evidence in the case constitute probable cause to believe that a certain individual has committed the offence that warranted the start of the criminal investigation and none of the cases preventing criminal action as under Article 16 para 1 CCP apply, the criminal prosecution bodies shall order that the criminal investigation continue in relation to that individual, and the latter shall acquire the capacity of suspect (CCP, Article 305 para 3). The decision taken by the criminal investigation body is submitted for confirmation of the prosecutor within 3 days. Thus, a person becomes a suspect only after the beginning of the criminal prosecution.

Furthermore, as a special condition, Article 109 of the Romanian Constitution stipulates that only the Deputies Chamber, the Senate and the President of Romania have the right to request the criminal prosecution of government ministers for acts committed during the exercise of their functions. If criminal prosecution has been requested, the President of Romania can order their suspension from office. The bringing before court of a member of the government leads to his suspension from office.

In the special criminal laws, both legal persons and natural persons are obliged to give information requested by the specialised authorities. Similarly, the provisions of Law 87/1994 on combating tax fraud and of the CCP which stipulates the obligation of persons holding leading positions, to immediately inform the prosecutor or the criminal investigation body of the perpetration of a crime. Under CC, Article 267, violation of this obligation can become an offence (omission to notify the judicial bodies - the act of a public servant who, becoming aware of the commission of an offence criminalized by law in connection with the service where they work, omits to immediately notify the criminal investigation body, is punishable by no less than 3 months and no more than 3 years of imprisonment or by a fine). If the act is committed with recklessness, the penalty consists of no less than 3 months and no more than 1 year of imprisonment or a fine.

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34 ┐ See A Lazăr, „*Procurorul European – retrospectiva cercetării ştiinţifice premergătoare propunerii Comisiei Europene*", „*Pro Lege*" Magazine, nr. 4/2016, 21-33.

In the Romanian CC, both a natural person and a legal person can be a defendant. CC, Article 136 stipulates main and complementary punishments applicable to legal persons. The main punishment is a fine calculated according to CC, Article 137. Thus, the amount of the fine is determined based on the fine-days system. The amount corresponding to the fine-days, varying between Lei 100 and 5000, shall be multiplied by the number of days subject to the fine (between 30 and 600 days). The court shall decide on the number of days subject to the fine considering the general criteria for the customization of penalty. The amount of the fine-days is determined by taking into account the turnover (in case of for-profit legal entities), and the value of assets (in case of the other legal entities), as well as other obligations of the legal entity. CC, Article 137 para 4 stipulates the special limits of the days subject to the fine range between 60 and 510 days.

The complementary punishments are dissolution, suspension of the activity of the legal person or suspension of one of the activities of the legal person, related to which the crime has been perpetrated. Other such punishments are closure of operation locations of a legal entity, ban on taking part in public procurement tenders, placement under judicial supervision for a period between one and three years and posting or publication of the conviction sentence (CC, Articles 139-145). The financial investigations are carried out by the criminal investigation bodies or by the prosecutor. There are special laws which regulate the initiation procedure. For example, one of the procedures consists of informing the Office for Prevention and Combating of Money Laundering by the institutions and bodies stipulated in Article 8 of the Law on money laundering. The office will then inform the National Anticorruption Directorate and the Directorate for Investigation of Organised Crime and Terrorism. In the case of financial crimes under the competence of the National Anticorruption Directorate, the provisions of the criminal procedure are applied[35].

In the case of crimes *in flagrante delicto,* there are some special procedural rules which were instituted due to the necessity of simplifying the forms of performing the criminal process and for promptly holding the perpetrator criminally responsible (CCP, Articles 293, 298). Although there are some derogatory norms from the normal procedure of the criminal process, the basic principles which guide the criminal process are observed in the same manner. Sometimes the perpetrator is caught 'red-handed', or immediately after the perpetration. The offender can at times be pursued by the injured person, by an eye-witness or by public outcry and also by CCTV and other public cameras. Also, the perpetrator may be caught close to the crime scene with weapons, tools or any other objects which suggest that he/she was a participant in the crime. Based on the emergency character of this special procedure, the criminal investigation bodies can take some

[35] Lazar et alii (n 2) 594.

urgent measures in cases concerning crimes which are given to the exclusive competence of the prosecutor. In this regard, Article 60 CCP refers to urgent situations and stipulates that the prosecutor or the criminal investigation body, as applicable, is under an obligation to perform criminal investigation acts that cannot be delayed, even if these concern a case that does not fall under their jurisdiction. Work prepared in such cases shall be sent forthwith to the prosecutor who has jurisdiction. Other bodies stipulated in CCP, Articles 61 and 62 are competent to establish a crime *in flagrante delicto* as well, eg: the state inspection agencies, the captains of ship or aircraft etc, who are required to immediately turn over to the prosecutor or to the criminal prosecution body, the perpetrator, the works carried out and the evidence collected, in order to observe the terms of this procedure.

In the case of crimes *in flagrante delicto,* the public order and national security bodies shall write a report and describe all the elements they found and activities undertaken and shall submit the report to the criminal investigation body without delay. Complaints and requests filed in writing, material evidence, as well as objects and documents seized on finding commission of the offence shall be turned over to the criminal investigation body (CCP, Article 293 para 3, 4). The procedure in case of an offence "in the act" sets an obligation for the criminal investigation body to officially find the commission of an offence even in the absence of a preliminary complaint. After finding the commission of a crime *in flagrante delicto,* the criminal investigation body shall call upon the victim to ask whether they wish to file a preliminary complaint and if the answer is in the affirmative it shall begin the criminal investigation. If the answer is negative, the criminal investigation body shall submit its documentation to the prosecutor, accompanied by a proposal to close the case.

2. Questioning the Suspect Pre-Trial

The statements of the suspect or of the defendant are included amongst the means of evidence in the criminal proceedings, (CCP, Article 97) due to the fact that they know best the circumstances in which the crime was committed. Nevertheless, the statements of the suspect or of the defendant represent a right and not a duty *(nemo tenetur edere contra se).* In the first stage of the criminal process, the suspect is heard at the beginning of the criminal prosecution (CCP, Articles 107, 109), as well as when any preventive measure is taken (taking in custody, judicial control, judicial control on bail, house arrest, pre-trial arrest, CCP, Articles 209, 212, 214, 216, 219, 220, 225).

In the case of the suspect or the defendant, the questioning procedure follows a set of procedural or tactical rules. Before being questioned, the suspect or the defendant is asked about his personal data, after which he/she is informed about the act which constitutes the object of the case, about the legal considerations, the

right to have a defence lawyer as well as the right to remain silent, as anything he/she says may be used against him/her.

The procedure is similar in the French legal system, which stipulates that during a judicial investigation, hearing of the suspect by the investigating judge encompasses the right to be assisted by a defence lawyer and to be informed of this right at the beginning of the first hearing.[36]

Nevertheless, Article 109 para 2 of the Romanian Constitution provides for a limitation to this measure, stipulating that only the Deputies Chamber, the Senate and the President of Romania have the right to request the criminal prosecution of the members of government for acts committed during the exercise of their functions. Therefore, even if the suspect or the defendant admits the offence (self-incrimination), they cannot be questioned by the criminal prosecution bodies for this act without the authority of the above-mentioned institutions (Article 109 para 2 of the Constitution).

The statement is recorded in written form and is signed by the suspect, defendant, the criminal prosecution body, the defence lawyer of the suspect/defendant, if he/she was present and the interpreter, if one is appointed. Furthermore, during the criminal investigation, the hearing of a suspect or defendant is recorded with audio or audio-video devices. When such recording is not possible, this fact is mentioned in the statement of the suspect or defendant, indicating the actual reason why such recording was not possible (CCP, Article 110 para 5).

The questioning of the suspect is also subject to audio-visual recording in the French criminal procedure, except for offences relating to organised crime and terrorism.[37]

In the Romanian CCP, there is no stipulation of the obligation to cooperate with the criminal prosecution bodies, but such cooperation has some significance, because sincerity and the facilitation of finding or arresting the participants in a crime can represent an element that leads to a reduction in the punishment. The questioning is done by the criminal investigation bodies and by the prosecutor, in the criminal prosecution phase. In the case of *flagrante delicto* crimes, the notified criminal investigation body issues a protocol in which the facts of the crime are recorded (CCP, Articles 293 and 298).

Assistance by a defence lawyer is mandatory at each stage of the criminal prosecution, as well as during the questioning, only when the suspect or the defendant is a minor, committed to a rehabilitation centre or a medical and educational facility (as an educative measure), when he or she is detained or arrested, even in another case, when the security measure of being committed to a medical facility was taken against them, even in another case, as well as in other

[36] See Tricot (n 12) 233.

[37] See Tricot (n 12) 233.

situations established by law or when the judicial body deems that the suspect or the defendant could not defend themselves.[38]

In the judicial review, the preliminary chamber judge, if the file is returned for supplementing the criminal prosecution, can order a new hearing of the suspect or of the defendant.

3. Interrogation of Witnesses in the Investigation Stage (Including Complainants/Injured Party)

The statements of witnesses are an essential contribution to finding the truth in a criminal case, a fact which has led some authors to consider testimony evidence as a natural, inevitable proof.

When defining the witness, the law (CCP, Article 114 para 1) stipulates that it is the person who has knowledge of facts or factual circumstances representing evidence in a criminal case. Any natural person can be summoned as a witness in the criminal process, irrespective of his or her physical condition (blind, deaf, dumb; for instance, a blind person can be heard about a circumstance he/she has heard, and a deaf about a circumstance he/she has seen),[39] or a psychological condition (a psychologically ill person can be heard), and the judicial bodies have the latitude to appreciate which of these persons are qualified to deliver information, necessary for the solution of the criminal cases.

Nevertheless, there are restrictions stipulated in CCP. Thus, persons who are in a situation of nature to reasonably question their capacity to testify may be heard only when judicial bodies establish that the person is able to consciously present facts and factual circumstances according to reality. In order to decide on a person's capacity to testify, judicial bodies order, upon request or *ex officio*, any necessary examination, through means set by the law (CCP, Article 115 para 2, 3).

Another restriction can be found in CCP, Article 115 para 1, which stipulates that any person may be summoned and heard as witness, except for the parties and the main trial subjects. This restriction is justified by the fact that they are persons interested in the case and they cannot combine the status of witness with that of a party/main trial subject, as nobody can speak as a witness in his/her own case *(nemo testis idoneus in re sua)*. The parties to criminal proceedings are: the defendant, the civil party and the party with civil liability (CCP, Article 32) and the main trial subjects are the suspect and the injured person (CCP, Article 33).

The injured person can, however, be heard as a witness if he/she is not a civil party in the case or is not participating in the process as an injured party, as long as for the respective crime the criminal action is initiated *ex officio* (CCP, Article 81 para 2).

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[38] Lazar et alii (n 2) 596.

[39] Volonciu et alii (n 1) 327.

As opposed to the Romanian CCP, the French CCP has specific provisions concerning the questioning of the injured party only when he/she has the status of civil party within the framework of a judicial investigation. Thus, he/she is entitled with the same rights as the suspect and is not required to swear under oath.40

The Romanian CCP, Article 118 also provides for the right of witnesses to avoid self-incrimination. Thus, a witness statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case may not be used against them. At the moment when they record the statement, judicial bodies are under an obligation to mention their previous capacity.

As a particularity, in the French legal system, an intermediate status has been created, between a simple witness and a suspect placed under judicial examination. Thus, a person against whom there is serious and consistent evidence of participation in the crime may not be heard as an ordinary witness, but must be heard instead as an assisted witness. An assisted witness may not swear under oath and enjoys the right to be assisted by a lawyer, who is informed prior to the hearing and has access to the case file.41

Furthermore, there is another restriction in the Romanian criminal procedure regarding professionals who are obliged to observe the professional confidences (lawyers, doctors, notaries public etc). In this respect, Article 116 para 3, 4 CCP stipulates that those facts or circumstances the lawful secrecy or confidentiality of which can be raised before judicial bodies cannot be the subject matter of a witness statement, except when the relevant authority or the entitled person expresses their consent for this purpose or when there is another legal reason for removing the obligation to keep secrecy or confidentiality. The disclosure of a state secret or of a professional secret represents a crime (CC, Articles 227, 303, 304,407).

The capacity as witness prevails on the capacity as expert or defence lawyer, mediator or representative of either party or as main subject in respect of facts and factual circumstances known to a person before they acquired this capacity. Those persons, who are not obligated to appear as witnesses, make declarations if they agree to this. In this respect, CCP, Article 117 stipulates that the persons who are entitled to refuse to testify are a suspect's or defendant's spouse, ancestors and descendants in direct line, as well as their siblings and the persons who were a suspect's or defendant's spouse. If they agree however, they can give evidence as witnesses.

CC, Article 273 stipulates the offence of perjury, which is defined as the act of a witness who is heard in criminal, civil or other proceedings in which witnesses are heard and gives false statements, or does not tell everything they know

40 See Tricot (n 12) 234.

41 See Tricot (n 12) 234.

regarding the essential acts or circumstances in relation to which they are heard. The punishment for this offence is no less than 6 months and no more than 3 years of imprisonment or a fine. The punishment is more drastic if the offence is committed by a witness whose identity is protected or who is included in the witness protection program, an investigator working undercover, a person who prepares an expert report or an interpreter or in relation to an offence for which the law provides life imprisonment or a term of imprisonment of 10 years or more. In these cases, the punishment is no less than 1 and no more than 5 years of imprisonment. Nevertheless, the witness is not be punishable if they withdraw their testimony, in criminal cases, before the defendant's detention or arrest, or before the initiation of the criminal action or in other cases before a decision or another solution is given, following the false testimony given.

The witness has three obligations: to appear at the established place, on the day and at the hour mentioned in the summons, to communicate in writing, within 5 days, any change of the address where the summons is served and to declare everything he or she knows related to the aspects of the case. If these three obligations are not properly observed, the witness can be sanctioned with a fine between 500 and 5,000 Lei.

As opposed to the Romanian criminal procedure, which institutes the obligation of the witness to declare everything they know related to the case, irrelevant of the judicial body which interrogates them, in the French legal system, there is a distinction, depending on the judicial body doing the interrogation. Thus, witnesses summoned by the police are obliged to appear, but they are not obliged to testify, whereas witnesses summoned by the investigating judge are obliged to appear and bound to testify on oath and make a statement. Where refusing to comply with their obligation, they are liable to a fine for petty offences of the fifth class.42

In the Romanian criminal procedure, the interrogation of the witness is done by the criminal investigation bodies or by the prosecutor. As in the case of questioning of the suspect, the defendant or the other parties, this interrogation procedure is preceded by an identification phase (CCP, Article 119). If he/she has a hostile relationship with the parties, the witness may still be heard, but for the evaluation of proofs this aspect will be taken into account.

Before being heard, the witness will swear an oath to tell the truth and not to hide anything of what he/she knows, holding his/her hand on the cross or on the Bible. A witness without religion will swear a very similar oath. If there are more witnesses, each one will be heard separately (CCP, Article 122 para 1). During the criminal prosecution, if there are more witnesses, each one will be heard without the others being present.

42 See Tricot (n 12) 233.

First, the witness is allowed to declare everything he/she knows related to the case. The provisions concerning the recording of the statement of the suspect or the defendant also apply in the procedure of witness interrogation (CCP, Articles 110 and 123 para 1), with one exception. Whereas the hearing of a suspect or defendant shall be recorded with audio or audio-video devices, except for when it is not possible, the hearing of a witness shall only be recorded with such devices during the criminal investigation if the criminal investigation bodies deem this necessary or if the witness requests this specifically and such recording is possible (CCP, Article 123 para 2).

CCP also stipulates rules regarding the interrogation as witnesses of certain protected persons. Therefore, whenever there is a reasonable suspicion that the life, physical integrity, freedom, assets or professional activity of a witness or of a member of their family could be jeopardized as a result of the data provided by them to judicial bodies or of their statements, the judicial bodies of competent jurisdiction grant them the status of threatened witness and order one or more of the protection measures set by Articles 126 or 127, as applicable. The judicial body competent to order these measures is the prosecutor in the phase of criminal prosecution, *ex officio* or upon request by the witness, one of the parties or a main trial subject and in the trial phase, the court, *ex officio* or on the motivated request of the prosecutor, the witness, one of the parties or a main trial subject.

As mentioned previously, the protection measures which can be ordered during the criminal investigation and during the trial are stipulated in Articles 126 and 127 CCP. Thus, during the criminal investigation, once the status of threatened witness is granted, the prosecutor orders the application of one or more of the following measures: surveillance and guard of the witness' residence or providing of a temporary dwelling space; accompanying and ensuring protection to the witness or to their family members during travels; protection of identity data, by issuing them a pseudonym under which the witness shall sign their statement; hearing of a witness without them being physically present, through audio-video transmission devices, with their voice and image distorted, when the other measures are not sufficient, so that the witness cannot be recognised. The prosecutor supervising the criminal prosecution gives the approval to the criminal investigation body for this modality of hearing the witness. Statements of protected witnesses are recorded using audio and video technical devices and are fully transcribed in a written format. The protection measures which can be ordered during the trial are similar to the above-mentioned ones and also include closed court sessions during the hearing of witnesses.

The absence of the defence lawyer does not hinder criminal prosecution, if there is proof that the lawyer was informed of the date and the hour of the hearing (e.g. of a witness) in case he/she requested to be informed. The notification is performed through phone or other means of communication, and an official report is drafted to this effect[43].

[43] Lazar et alii (n 2) 597.

4. **Arresting the Suspect and Detention for Questioning**

The suspect or the defendant can be brought in by bench warrant even before having been summoned, if such step is required in the interest of settling the case. During the criminal investigation, the bench warrant is issued by the criminal prosecution body, while during the trial it is issued by the court. In case enforcement of the bench warrant requires entering a domicile or place of business without securing previous consent, during the criminal investigation the bench warrant can be issued, based on affidavit by the prosecutor, by the judge for rights and liberties of the court. The judicial body shall hear without delay the person brought in by bench warrant or, as the case may be, shall immediately perform the act that made that person's presence necessary. Persons brought in by bench warrant shall remain at the disposal of the judicial body only for the duration required by their hearing or by the procedural act that made their presence necessary, but no longer than 8 hours, except for the case where an order has been issued for their being placed in custody or under pre-trial arrest (CCP, Article 265 para 11, 12).

A bench warrant is enforced by the criminal investigation bodies of the judicial police and by the public order bodies. In case the person indicated in the warrant refuses to comply or tries to escape, they will be brought in by force before the criminal prosecution bodies or before the court (CCP, Article 266 para 1).

Arresting the suspect and detention for questioning are measures which can also be taken in the French legal system, by the prosecutor or, as the case may be, by the investigating judge or by the judicial police, with or without prior authorisation of the prosecutor, in certain cases stipulated by the law.[44]

5. **Pre-Trial Custodial Detention and House Arrest**

Pre-trial custodial detention and house arrest45 fall within the category of preventive measures, which are process measures of criminal procedural law, having a coercive character, through which the suspect or the defendant is prevented from certain actions with possible negative repercussions on the criminal proceedings. The preventive measures are: taking in custody, judicial control, judicial control on bail, house arrest and pre-trial custodial detention (pre-trial arrest) (CCP, Article 202). Due to its duration and content, the measure of pre-trial custodial detention of the defendant is the most severe of the custodial preventive measures. Whereas taking in custody is a preventive measure which

[44] See Tricot (n 12) 234-237.

[45] House arrest is a new preventive measure introduced by the current CCP (the 2010 CCP), as opposed to the former CCP (the 1968 CCP), which did not provide for this preventive measure.

can be taken against the suspect and the defendant, all the other preventive measures can only be taken against the defendant, but not the suspect (CCP, Article 203).

The conditions required cumulatively in order to take the measure of pre-trial custodial detention or house arrest (CCP, Articles 218 para 1, 223 para 1), are: 1) the existence of evidence which generate a reasonable suspicion that the defendant committed an offence; 2) the existence of one of the cases stipulated in CCP, Article 223, namely: a) the defendant has run away or went into hiding in order to avoid the criminal investigation or trial, or has made preparations of any nature whatsoever for such acts; b) a defendant tries to influence another participant in the commission of the offence, or a witness or an expert, or to destroy, alter or hide or to steal physical evidence or to determine a different person to adopt such behaviour; c) a defendant exerts pressures on the victim or tries to reach a fraudulent agreement with them; d) there is reasonable suspicion that, after the initiation of the criminal action against them, the defendant committed a new offence with intent or is preparing to commit a new offence.

Pre-trial arrest of the defendant and house arrest can also be ordered if the evidence generate reasonable suspicion that they committed an offence with intent against life, an offence having caused bodily harm or death of a person, an offence against national security as under the Criminal Code and other special laws, an offence of drug trafficking, weapons trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of currency or other securities, blackmail, rape, deprivation of freedom, tax evasion, assault of an official, judicial assault, corruption, an offence committed through electronic communication means or another offence for which the law requires a penalty of no less than 5 years of imprisonment and, based on an assessment of the seriousness of facts, of the manner and circumstances under which it was committed, or the entourage and the environment from where the defendant comes, of their criminal history and other circumstances regarding their person, it is decided that their deprivation of freedom is necessary in order to eliminate a threat to public order.

If these conditions are met, the prosecutor can issue *ex officio* or after being notified by the criminal investigation body, a motivated proposal for taking preventive measures against the defendant, when he considers that his detention is necessary in the interest of the criminal prosecution; prior to this, the defendant ought to be questioned in the presence of a defence lawyer. The proposal of pre-trial custodial detention or house arrest is resolved by a single judge for rights and liberties, irrespective of the nature of the crime. The defendant is brought before the judge and will be assisted by a defence lawyer. The participation of the prosecutor is mandatory. If the above-mentioned conditions are fulfilled, the judge for rights and liberties orders the pre-trial custodial detention or the house arrest of the defendant for a period not exceeding 30 days. The decision can be appealed,

within 48 hours from the moment of its issue for persons who were present, or from the moment of communication in the case of persons who were absent.

The pre-trial arrest of a defendant and the house arrest may be extended during the criminal investigation if the grounds having caused the initial arrest further require the detention of the defendant or there are new grounds justifying the extension of such measures. The extension of a defendant's pre-trial arrest or house arrest term may be ordered for a maximum period of 30 days. The judge for rights and liberties may also award, during the criminal investigation, further extension. The total duration of the defendant's pre-trial arrest or house arrest during the criminal investigation cannot exceed a reasonable term, and can be no longer than 180 days (CCP, Articles 222, 236). The duration of the house arrest measure is taken into consideration when calculating the total and maximum duration of the pre-trial arrest measure during the criminal investigation (CCP, Article 222 para 10).

House arrest is ordered if the above-mentioned requirements are met and if such measure is necessary and sufficient for the attainment of one of the purposes set by CCP, Article 202 para 1 (to ensure a proper conducting of criminal proceedings, to prevent the defendant from avoiding the criminal investigation or trial or to prevent the commission of another offence). The fulfilment of the house arrest terms is assessed by considering the threat level posed by the offence, the purpose of such measure, the health condition, age, family status and other circumstances related to the person against whom such measure is taken. House arrest measure may not be ordered against a defendant in whose respect there is a reasonable suspicion that he committed an offence against a family member or a defendant who previously received a final conviction for an escape offence (CCP, Article 218 para 3).

According to CCP, Article 221, the house arrest measure consists of an obligation imposed on a defendant, for a determined time period, not to leave the building where they live, without permission from the judicial bodies having ordered such measure or with which the case is pending, and to observe certain restrictions imposed by those. During house arrest, a defendant has the following obligations: to appear before criminal investigation bodies, the judge for rights and liberties, the preliminary chamber judge or the court whenever they are called; not to communicate with the victim or with members of their family, with other participants in the commission of the offence, with witnesses or experts, as well as with other persons established by the judicial bodies. Also, the judicial body may order that, during house arrest, a defendant permanently wear an electronic surveillance system.

In order to execute the arrest warrant, the police can enter the domicile or the residence of a person without their consent, as well as the premises of a legal person, without the consent of its representative. The defence lawyer is informed

about the place and the moment of the execution of this measure. It is requested that the lawyer be present at the execution of the measure (when the defence is mandatory ie when the defendant is arrested).[46]

In the French criminal procedure, pre-trial custodial detention was originally in the hands of the investigating judge and afterwards withdrawn from this judge to the benefit of the liberty and custody judge. Although the investigating judge may never order pre-trial detention, they may order the release, which is why they are considered a liberty judge. The maximum length of custiodial detention varies according to the nature of the offence.47

6. Interception of Postal Communications (Letters)

The secrecy of correspondence is not an absolute right, and is susceptible to certain restraints, justified by the necessity of the criminal instruction. Such legal provisions are necessary in a democratic society, in order to safeguard national security, defend public order and prevent crime.[48]

The seizure, surrender and search of postal deliveries can be ordered under conditions stipulated by CCP. Thus, the judge for rights and liberties may, at the prosecutor's request during the criminal investigation, order the seizure, surrender and search of postal deliveries, in respect of letters, postal dispatches or items sent or received by a perpetrator, suspect, defendant or by any person suspected to receive or send, by any means, such goods from/to a perpetrator, suspect or defendant, or goods intended to it, if three conditions are met. These are: a) there is a reasonable suspicion related to the preparation or commission of an offence; b) such step is necessary and proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or of evidence to be obtained or the offence seriousness; c) evidence could not be obtained in other way, or obtaining it would imply extreme difficulties that would harm the investigation or there is a threat against the safety of persons or of high value goods (CCP, Article 147 para 1).

The seizure, surrender and search of mail or of postal deliveries sent or received based on the relation between the counsel and the suspect, defendant or any other person defended by them are prohibited, except for situations where there is data that the counsel perpetrates or prepares the commission of any of the offences for which the judge can order electronic surveillance, listed under Article 139 para 2 CCP. This measure is decided according to the procedure stipulated by CCP, Article 140, regarding electronic surveillance and its duration can be

46 Lazar et alii (n 2) 599.

47 See Tricot (n 12) 237, 238.

48 Decision no 410/2008, Constitutional Court (Jurisprudența.com).

extended under the same conditions as electronic surveillance; the total duration of a measure related to the same person and the same act may not exceed, in the same case, 6 months (CCP, Article 147 para 9).

In emergency situations, when the obtaining of a warrant for the withholding, surrender and search of postal deliveries under the terms of Article 140 CCP would result in a substantial delay of the investigations, in the loss, alteration or destruction of evidence or would endanger the safety of the victim or of other persons, and the legal requirements are met, the prosecutor may order, for a term of maximum 48 hours, the seizure, surrender and search of postal deliveries to which the law makes reference. The prosecutor is under an obligation to notify the judge for rights and liberties in order for him to confirm the measure.

Following performance of the authorized activities, the prosecutor must inform each subject of a warrant on the measure taken against them, in writing, within maximum 10 days. After the moment of such information, the person whose mail, postal deliveries or items were seized and searched has the right to learn of the activities performed. Nevertheless, the prosecutor may postpone such information or the presentation of media on which electronic surveillance activities are stored or the minutes transcribing them, in a justified way, if this could result in disruption or jeopardizing of the proper conducting of the criminal investigation in the case, or jeopardizing of the safety of the victim, witnesses or members of their families, or difficulties in the electronic surveillance of other persons involved in the case. The postponement may be ordered until completion of the criminal investigation or until the case closure, at the latest.

In the French legal system, the measure of intercepting postal communications (letters) is governed by the French rules on search and seizure, where specific provisions apply concerning documents covered by professional secrecy, and especially those in possession of a defence lawyer.[49]

7. Electronic surveillance

Article 138 para 1 CCP stipulates surveillance or investigation special methods, as follows : a) wiretapping of communications or of any type of remote communication; b) accessing a computer system; c) video, audio or photo surveillance; d) tracking or tracing with the use of technical devices; e) obtaining data regarding the financial transactions of individuals; f) withholding, delivery or search of mail deliveries; g) use of undercover investigators and informants; h) authorized participation in specific activities; i) controlled delivery; j) obtaining traffic and location data processed by providers of public electronic communication networks or by providers of electronic communication services intended for the public.

[49] See Tricot (n 12) 238.

According to CCP, Article 138 para 13, technical surveillance means the use of one of the methods provided for in Article 138 para 1 lett. a) to d).

Electronic surveillance is ordered by the judge for rights and liberties when the following requirements are cumulatively met: a) there is a reasonable suspicion in relation to the preparation or commission of one of the offences listed under para 2; b) such measure is proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offence; c) evidence could not be obtained in any other way or its obtaining implies special difficulties that would harm the investigation, or there is a threat for the safety of persons or of valuable goods (CCP, Article 139 para 1).

Electronic surveillance may be ordered in case of offences against national security stipulated by the Criminal Code and by special laws, as well as in case of drug trafficking, weapons trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of currency or securities, counterfeiting electronic payment instruments, offences committed by means of computer systems or electronic communication devices, offences against property, blackmail, rape, deprivation of freedom, tax evasion, corruption offences and offences assimilated to corruption, offences against the European Union's financial interests, or in case of other offences in respect of which the law sets forth a penalty of no less than 5 years of imprisonment (CCP, Article 139 para 2).

The recordings done by the parties or by other persons represent evidence when they concern their own conversations or communications with third parties. Any other recordings may constitute evidence unless prohibited by law. The relationship between a counsel and a person assisted or represented by them may be subject to electronic surveillance only when there is information that the counsel perpetrates or prepares the commission of any of the above-mentioned offences.

Noteworthy is the fact that the Constitutional Court allowed the objection of unconstitutionality raised against Article 142 para 1 CCP and found that the phrase 'or other specialized bodies of the state' in the above-mentioned legal provision is unconstitutional.[50] Before this decision, CCP, Article 142 para 1 stipulated that the prosecutor enforces an electronic surveillance measure or may order that this be enforced by criminal investigation bodies or by specialized employees of the law enforcement bodies or of other specialized bodies of the state.

Thus, the Constitutional Court found that, given the intrusive nature of the electronic surveillance measure, it is mandatory for it to be carried out in a clear, precise and predictable legal framework, both for the person subject to that measure and for the tracing authorities and for the courts. The Court observed that the choice of the legislator is not justified with regard to the inclusion in Article 142

[50] Decision no 51/2016, Constitutional Court (Jurisprudența.com).

para 1 CCP of the phrase 'other specialized bodies of the state', given that it is not specified in the CCP or in other special laws. Therefore, the Court found that the provisions criticized breach the constitutional provisions contained in Article 1 para 3 of the Constitution on the rule of law in its component of guaranteeing citizens' rights and in Article 1 para 5 of the Constitution, which enshrines the principle of legality.

In order to set the provisions of CCP, Article 142 para 1 in accordance with the Constitutional Court's decision, Emergency Ordinance no 6/2016 was adopted and published. Following this step, based on the legal provisions of Emergency Ordinance no 6/2016, for the relationship with publicly provided electronic communications providers, the National Interception Centre for Communications within the Romanian Intelligence Service was designated with the role of obtaining, processing and storing information in the field of national security. At the request of the criminal investigative bodies, the Centre has the role to ensure their direct and independent access to the technical systems, for the purpose of performing the technical supervision provided in CCP, Article 138 para 1 lett. a).

According to Article IV of the Emergency Ordinance no 6/2016, which amended Article 8 of Law no 14/1992 on the organisation and functioning of the Romanian Intelligence Service, the specific conditions for access to the technical systems of the judicial bodies are established through cooperation protocols concluded by the Romanian Intelligence Service with the Public Ministry, the Ministry of Internal Affairs, as well as with other institutions in which operate special criminal investigation bodies.

Therefore, based on the above-mentioned legal provisions, the Public Ministry concluded in 2016 the cooperation protocol with the Romanian Intelligence Service and gained access to the technical system of the National Interception Centre for Communications within the Romanian Intelligence Service.[51] Also, based on the Constitutional Court's decision and the Emergency Ordinance no 6/2016, technical services have been set up within the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate and the Directorate for Investigating Organised Crime and Terrorism.

Electronic surveillance may be ordered during the criminal investigation, for a term of maximum 30 days, upon request by the prosecutor, the judge for rights and liberties of the court having the competence of jurisdiction to examine the case in first instance or of the court corresponding to its level under whose territorial jurisdiction the premises of the prosecutors' office to which the prosecutor who filed the application belongs are located. An electronic surveillance warrant may

[51] The existence of this protocol has generated a very strong public debate; individuals held criminally responsible, especially for corruption offences, invoked alleged violations of fundamental rights. In the context of these debates, it was proposed *de lege ferenda* that a national interception authority should be established under the control of the Parliament.

be extended, for well-grounded reasons, under the same conditions, each extension not exceeding 30 days. The total duration of an electronic surveillance measure, related to the same person and the same act, may not exceed, in the same case, 6 months, except for the measure of video, audio or photo surveillance in private spaces, which may not exceed 120 days (CCP, Article 144).

The prosecutor may authorize, for a time period of maximum 48 hours, electronic surveillance measures when there is an emergency situation, and the obtaining of an electronic surveillance warrant under the fore-mentioned terms would lead to a substantial delay of investigations, to the loss, alteration or destruction of evidence, or would jeopardize the safety of the victim, of witnesses or of their family members and the requirements set by Article 139 para 1 and 2 are met. Within a maximum of 24 hours following expiry of a measure, the prosecutor is under an obligation to notify the judge for rights and liberties of the court and, at the same time, shall forward a report presenting a summary of the electronic surveillance activities performed and the case file. If the judge decides that the legal requirements are met, they shall confirm the measure ordered by the prosecutor within 24 hours, through a court resolution, returned in chambers, without summoning the parties.

Wiretapped and recorded phone conversations, communications or discussions concerning an act subject to investigation or which contribute to the identification or localization of persons are transcribed by the prosecutor or the criminal investigation bodies in a report. The judge must approve the measure, and he/she also controls its execution. There are no restrictions (e.g. professional privileges) in taking this measure.

Following termination of an electronic surveillance measure, the prosecutor must inform each subject of the warrant for electronic surveillance enforced against them, in writing, within maximum 10 days (CCP, Article 145 para 1). Following such information, a person subject to surveillance has the right to learn, upon request, of the content of the minutes recording the electronic surveillance activities performed. Also, the prosecutor must ensure, upon request, the listening to discussions, communications or conversations, or the watching of images resulted from each electronic surveillance activity. The term for filing a request in this sense is of 20 days as of the date of communication of the written information set under para 1. The prosecutor may postpone such information or the presentation of media on which electronic surveillance activities are stored or the minutes transcribing them, in a justified way, if this could result in: a) disruption or jeopardizing of the proper conducting of the criminal investigation in the case; b) jeopardizing of the safety of the victim, witnesses or members of their families; c) difficulties in the electronic surveillance of other persons involved in the case. The postponement may be ordered until completion of the criminal investigation or until the case closure, at the latest.

In the French criminal procedure, interception of the contents of telecommunications (content data) is ordered by the investigating judge, in case of felonies or misdemeanours punishable by at least two years' imprisonment. Pollice officers are also allowed to resort to an interception within the framework of a flagrant offence investigation or a preliminary police inquiry when they carry out investigations on organised crime offences. The authorisation is made by the liberty and custody judge, at the request of the prosecutor.[52]

8. Monitoring of Bank Transactions

a) Obtaining data on a person's financial transactions

The obtaining of data regarding the financial transactions performed by a person may be ordered by the judge for rights and liberties with regard to the financial transactions of the perpetrator, suspect, defendant or any person suspected of performing such transactions with the perpetrator, suspect or defendant, if: a) there is a reasonable suspicion in relation to the preparation or commission of one of an offence; b) such measure is proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offence; c) evidence could not be obtained in any other way or its obtaining implies special difficulties that would harm the investigation, or there is a threat for the safety of persons or of valuable goods (CCP, Article 146[1] para 1).

This measure may be ordered for a term of maximum 30 days by the judge for rights and liberties and may be extended, for well-grounded reasons, under the same conditions, each extension not exceeding 30 days. The total duration of the above-mentioned measure, related to the same case and the same person, may not exceed 6 months (CCP, Article 146[1] para 4).

The prosecutor may authorize, for a time period of maximum 48 hours, the obtaining of data regarding the financial transactions, when there is an emergency situation, and the obtaining of the data warrant under the fore-mentioned terms would lead to a substantial delay of investigations, to the loss, alteration or destruction of evidence, or would jeopardize the safety of the victim, of witnesses or of their family members and the legal requirements are met. In this case, the same legal provisions apply, as in the case of electronic surveillance.

b) Obtaining data regarding the financial status of a person

The prosecutor may request a credit institution or any other institution holding data regarding the financial status of a person, to communicate data

[52] See Tricot (n 12) 239.

referring to the existence and content of accounts of a person, if there is probable cause in respect of the commission of an offence and there are grounds to believe that the requested data represent evidence. This measure is ordered *ex officio* or upon request by criminal investigation bodies, through an ordinance. The respective institution is under an obligation to provide the requested data forthwith (CCP, Article 153).

In the French system, the CCP does not foresee the monitoring of banking transactions. However, it is in practice covered by the general power of requisition provided for in the French CCP, which stipulates that judicial police officers may request information on bank accounts, on banking transactions and the monitoring of banking transactions. Furthermore, the public prosecutor, the investigating judge or the trial court may require the parties, any public administrations, financial institutions or persons holding funds for the defendant, to communicate relevant information of financial or fiscal nature, without confidentiality being raised as an objection.[53]

9. Tracking and Tracing of Objects and Persons

A wanted notice is requested and granted to identify, search for, locate and apprehend an individual in order to bring them before the judicial bodies or to enforce certain court orders. A wanted notice is requested and ordered in the following situations (CCP, Article 521):

a) it was not possible to enforce a pre-trial arrest warrant, a warrant to enforce a custodial penalty, a custodial educational measure, a medical internment measure or the expulsion measure, because the person against whom one of those measures was ordered could not be found; for this case the wanted notice is requested by the police body which found the impossibility of enforcing the above-mentioned measures;

b) the person escaped from legal arrest or detention or ran away from an educational centre, custodial centre or medical facility where they were medically interned; in this case, the wanted notice is requested by the management of the place of detention, educational centre or medical facility;

c) to find a person who is wanted internationally and information exists that they are in Romania; in this case, the right to request the wanted notice rests with the judicial body that has jurisdiction under special law.

A person is placed on wanted status by order of the General Police Inspectorate of Romania. During the search procedure, a number of activities can be performed in order to identify, search, locate and apprehend the wanted persons, under the conditions stipulated by the law (CCP, Article 523): a) electronic surveillance; b) intercepting, seizing and searching mail and items; b[1]) obtaining

[53] See Tricot (n 12) 241.

traffic and localisation data processed by providers of public electronic communications networks or providers of electronic communication services intended for the public; c) search warrants; d) seizing items or documents. The activities stipulated under a)-c) can only be performed on the basis of a warrant issued by the judge for rights and liberties (CCP, Article 523 para 2), whereas the activities stipulated under d) can only be performed with the authorisation of the prosecutor who supervises the activity of the police which searches for the wanted person (CCP, Article 523 para 3).

Asset freezing is a procedural measure which aims at avoiding concealment, destruction, disposal or dissipation of the assets that may be subject to special or extended confiscation or that may serve to secure the penalty by fine enforcement or to pay court fees or to compensate damages caused by the committed offence (CCP, Article 249 para 1).

In the French legal system, tracking and tracing of objects and persons are not regulated as such by the CCP. Nevertheless, to some extent, provisions on acoustic and visual surveillance and controlled deliveries may serve the same purposes.54

10. Data Mining and Profiling

The Ministry of Administration and Home Affairs has a data base, which is exploited by the department for technology of information within this ministry. At the level of the Romanian police, there is an application called CAMAS, which stores the informational data of all police structures, regarding all types of crimes, including organised crime, corruption and protection of the financial interests of the European Communities. Within this application there is a sub/module called EGI (which keeps the evidence of all criminal groups). This data base is managed by the Central Unit for Information Analysis of the Police (UCAI)[55].

The prosecutor and the court have the right of direct access to the electronic data bases held by the agencies of the state administration. The agencies of public administration which have electronic data bases are obligated to collaborate with the prosecutor or with the court in order to ensure their direct access to the information of the electronic data bases (CCP, Article 267). To ensure the application of these legal provisions, The Ministry of Justice and the Public Ministry arranged collaboration protocols with the public authorities and institutions which have electronic data bases.

The services and agencies specialised in collecting, processing and archiving information are obligated to immediately provide the competent Prosecutor's Office with all the data and information, unprocessed, held with respect to a

54 See Tricot (n 12) 241.

55 Lazar et alii (n 2) 602, 603.

certain crime, necessary to the evaluation of the necessity of initiating criminal prosecution (Art 66 of Law no 304/2004).

Pursuant to CCP, Article 152, criminal investigation bodies, based on a prior authorization from the judge for rights and liberties, may request traffic and localisation data processed by providers of public electronic communications networks or providers of electronic communication services intended for the public, when the following requirements are cumulatively met: a) there is a reasonable suspicion in relation to the preparation or commission of one of the offences listed under Article 139 para 2 CCP or of an offence of unfair competition, escape, forgery in documents, offences concerning non-compliance with the regime of weapons, ammunition, nuclear material and explosives etc.; b) there are reasonable grounds to believe that the data requested constitute evidence; c) evidence could not be obtained in other way, or obtaining it would imply extreme difficulties that would harm the investigation or there is a threat against the safety of persons or of high value goods; d) such measure is proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offence (CCP, Article 152 para 1). The judge for rights and liberties rules within 48 hours on requests transmitted by criminal investigation bodies regarding the transmission of data, through a reasoned court resolution, in chambers.

Also, according to Law no. 506/2004, amended by Law no 235/2015, the storage of information or access to information stored in the terminal equipment of a subscriber or user is permitted only if the following conditions are met cumulatively: a) the subscriber or user concerned has given his/her consent; b) the subscriber or user concerned was provided, prior to expressing the consent, in accordance with the legal provisions, clear and complete information that: (i) be displayed in an easily understandable language and be easily accessible to the subscriber or user; (ii) include insights into the purpose of processing the information stored by the subscriber or user or the information to which he or she has access (Article 4, Law no 506/2004).

Furthermore, according to Article 5, Law no. 506/2004, traffic data relating to subscribers and users, processed and stored by the provider of a public electronic communications network or by the provider of a publicly available electronic communications service, must be deleted or transformed into anonymous data, when they are not necessary any more for the transmission of a communication, but not later than 3 years from the date of the communication, except in the cases provided for in paras 2, 3 and 5.

Para 2 stipulates that the processing of traffic data for the purpose of billing subscribers or establishing payment obligations for interconnection is allowed only up to a period of 3 years from the due date of the corresponding payment

obligation. Processing of traffic data made for the purpose of setting contractual obligations regarding subscribers of prepaid communications services is allowed until a period of 3 years from the date of the communication has been completed.

According to para 3, the provider of a publicly available electronic communications service may process the data provided in para 1 for the purpose of commercializing its services or providing value added services only to the extent and for the duration necessary for the commercialization or provision of such services and only with the prior consent of the subscriber or user to whom the data relate. The subscriber or, as the case may be, the user may at any time withdraw his or her consent to the processing of traffic data.

Finally, para 5 stipulates that processing of traffic data under paras 1-4 may only be performed by persons acting under the authority of providers of public electronic communications networks or publicly available electronic communications services, such as billing or traffic management, customer relations, fraud detection, marketing electronic communications services or the supply of value adding services, and is allowed only to the extent necessary for the performance of those tasks.

The prosecutors and the officers of the judicial police have access, according to their authorization, to classified information. The surveillance performed by the prosecutor also consists of the authorised activities of data collection carried out by undercover agents who have to report the gathered information connected to the preparation and the perpetration of crimes. The surveillance conducted by the prosecutor consists of both the preliminary activity of data collection with a view to initiating criminal prosecution and the activity of criminal prosecution itself.

In the French criminal procedure, the CCP has a section entitled 'Police databases', which gathers several police databases of information on persons who have been wanted, prosecuted or convicted. There are three types of police database: criminal records databases, serial analysis databases and the official record of the person sought, which records data on persons object of a warrant, an order or a note of a magistrate seeking their search or arrest. The French CCP also authorises the use of software developing forensic analysis, allowing police officers to crosscheck data on *modus operandi.*[56]

11. Access to Relevant Premises ('Crime Scene')

This measure can be applied for any type/gravity of offences when a direct fact-finding is necessary in order to establish or clarify factual circumstances of importance for establishing the truth, as well as whenever there are suspicions on a person's death (CCP, Article 192). Crime scene investigation is ordered by the

[56] See Tricot (n 12) 242.

criminal investigation body or by the prosecutor and, during the trial, by the court. The criminal prosecution body or the court may prohibit the persons who are at the crime scene or come to that location from communicating among them or with other persons. An official report is drawn up following the onsite investigation.

In the French criminal procedure, access to relevant premises is regulated in the case of a crime that is flagrant, or of a death, the cause of which is unknown or suspicious. In these situations, any police officer informed of such crimes must immediately inform the prosecutor, visit the scene of the crime without delay and record any appropriate findings; responsibility is transferred from the police officer to the public prosecutor, once the latter arrives at the scene. In the context of an instruction, the investigating judge may travel with his clerk anywhere in the country in order to take any investigative steps, after informing the public prosecutor.57

12. Search and Seizure

According to CCP, Article 171, which stipulates the forced seizure of objects and documents, if a requested object or document is not surrendered voluntarily, the criminal prosecution body or the court orders their forced seizure. During the trial, an order regarding the forced seizure of objects and documents is communicated to the prosecutor, who takes steps to implement such measure, through criminal investigation bodies.

Furthermore, a home search or a search of goods found in a residence may be ordered if there is a reasonable suspicion that a person committed an offence or that such person is holding objects or documents that are connected to an offence and it is assumed that the search could lead to the discovery and collection of evidence related to such offence, to the preservation of traces left by the committed offence or to the capturing of the suspect or defendant. This measure can be applied for any type/ gravity of offences, when it is necessary to take away the objects or documents that may serve as means of evidence in the criminal trial. For seizure, no legal restrictions are stipulated. The home search may be performed between 6 am and 8 pm, and at other times only in case of *flagrante delicto,* or when the search is to be performed in a place open to the public at that time. A search which began between 6 am and 8 pm may continue during the night (CCP, Articles 157, 159).

CCP, Article 164 stipulates special provisions regarding searches conducted at a public authority, public institution or at other public-law legal entities. These provisions are as follows: a) the judicial bodies identify themselves and hand a copy of the search warrant to the representative of such authority, institution or

57 See Tricot (n 12) 243.

public-law legal entity; b) the search is conducted in the presence of the representative of such authority, institution or public-law legal entity or of other persons having full legal capacity; c) a copy of the search report is left with the representative of such authority, institution or public-law legal entity (CCP, Article 164).

Searches are conducted by a prosecutor or by criminal investigation bodies, accompanied, as applicable, by operational workers (CCP, Article 159 para 2). Home search may be ordered during the criminal investigation, upon request by the prosecutor, by the judge for rights and liberties. During the trial, search is ordered by the court vested to rule in the case, *ex officio* or upon request by the prosecutor. Applications requesting approval of a home search are ruled on within 24 hours, in chambers, without summoning the parties. The prosecutor's attendance is mandatory (CCP, Article 158).

The home search is performed in the presence of the person whose place is searched and, when the person is absent, in the presence of a representative, of a family member or, in their absence, of any other person having full capacity of exercise who knows the person whose domicile is subject to search and, if the case arises, in the presence of the custodian (CCP, Article 159 para 5). In the case of search conducted at the premises of a legal entity, the search is performed in the presence of its legal representative or, in the absence of such representative, in the presence of any other person having full capacity of exercise who is on the premises or is an employee of that legal entity. This measure may not be carried out clandestinely.

In the event that in the space where search is to be conducted there is no person, the search is performed in the presence of an assistant witness. Also, when a person whose domicile is searched is held in custody or arrested, they must be brought to assist to the search. If they cannot be brought, the seizure of objects and documents and the home search must take place in the presence of a representative or an assistant witness (CCP, Article 159 para 11).

In the case of searches which are extended to the neighbouring dwellings, under the terms of Article 158 para 3 CCP, persons found in such spaces must be informed of the search extension. In this respect, Article 158 para 3 CCP stipulates that in the event that, during a search, it is found that sought evidence or data were transferred or that searched persons were hidden in neighbouring places, the search warrant is also valid, under the law, for such places. A search continuation under these circumstances must be approved by the prosecutor, who afterwards shall submit an application to the judge for rights and liberties, requesting approval of the home search.

If the presence of a defence lawyer is requested, the search initiation is postponed until their arrival, but no longer than two hours of the moment when

this right was communicated, and steps for the preservation of the venue to be subject to search are taken. In exceptional situations, requiring the conducting of a search on an emergency basis, or when the defence lawyer cannot be contacted, a search can be started even prior to the expiry of the two-hour term. The defence lawyer is informed about the place and time of the execution of this measure when the search is about to begin, and not before this moment, in order to keep the surprise element. The defence lawyer has the right to complain, under CCP, Article 336, to the prosecutor who supervises the activity. Furthermore, a person subject to search is also allowed to be assisted or represented by a trustworthy person.

Exceptionally, a search may be started without handing a copy of the search warrant, without a prior request to hand over the person or objects, and without prior information regarding the possibility to request the presence of a defence lawyer, or of a trustworthy person, in the following cases: a) when it is obvious that preparations are made in order to cover traces or to destroy evidence or elements that are of importance to the case; b) if there is a suspicion that in the space where search is to be conducted, there is a person whose life or bodily integrity is threatened; c) if there is a suspicion that the wanted person may avoid the procedure (CCP, Article 159 para 14).

Body search implies the examination of the exterior of a person's body, oral cavity, nose, ears, hair, clothing and of objects a person has with them or under their control at the moment of search. If there is a reasonable suspicion that, by conducting a body search, traces of an offence, physical evidence or other objects having importance for finding the truth in the case can be discovered, judicial bodies or any other authority having responsibilities in ensuring public order and safety proceed to conducting it (CCP, Article 165). A body search can only be performed by a person of the same sex as the individual subjected to the body search and in accordance with the principle of human dignity.

A doctor's presence is mandatory when the inside of a person's body is examined. In this respect, CCP, article 190 stipulates that in the absence of a written consent by the person to be examined, of their legal representative or of an approval by the legal guardian, the request for physical examination must be approved by the judge for rights and liberties or, in case of an emergency, by the criminal prosecution body, through an ordinance which must later be validated by the judge. The physical internal examination of a person's body or the drawing of biological samples must be performed by a doctor, a medical assistant or a person with specialised medical training, according to the principles of human dignity and private life.

Following a home search, as well as a body search, an official report is drawn up mentioning the performance of the search. A copy of the official report is left with the person on whom the search has been performed or from whom the objects or writings have been removed, with the representative, a family member

or, in their absence, to any other person having full capacity of exercise who knows the person whose domicile is subject to search and, if the case arises, with the custodian (CCP, Articles 161 para 4, 166 para 6).

In the French legal system, both the suspect and the witness may be subject to body search, within a police or a judicial investigation. Such measures require consent, but the refusal of the suspect constitutes an offence, punishable by a fine. The search of premises may be carried out by police officers or by the investigating judge, with the express consent of the person upon whose premises the operation is to take place or, in cases stipulated by the law, without the person's consent. As to the measure of seizure, the French CCP stipulates that any objects which may assist in revealing the truth or whose disclosure might harm the investigation may be seized.[58]

13. On-line Search of Computers

The Romanian criminal law makes a difference between computer search (ie search of terminals or work stations belonging to the perpetrator) and online search of computers.

A computer system search or a computer data storage medium search designates the procedure for the investigation, discovery, identification and collection of evidence stored in a computer system or in a computer data storage medium, performed by means of adequate technical devices and procedures, of nature to ensure the integrity of the information contained by these. During the criminal investigation, the judge for rights and liberties may order the conducting of a computer search, upon request by the prosecutor, when the investigation of a computer system or of a computer data storage medium is necessary for the discovery and collection of evidence.

The prosecutor submits an application requesting the approval of a computer search, together with the case file to the judge for rights and liberties. Such application is ruled on in chambers, without summoning the parties. The prosecutor's attendance is mandatory. The judge approves the computer search, through a court resolution, when the request is well-grounded and issues a search warrant forthwith.

In the event that, on the occasion of a search of a computer system or of a computer data storage medium, it is found that the sought computer data is stored in a different computer system or a computer data storage medium, and is accessible from the initial system or medium, the prosecutor immediately orders the preservation and copying of the identified computer data and requests the issuance of a warrant on an emergency basis.

[58] See Tricot (n 12) 245.

A computer system or computer data storage medium search is conducted in the presence of a suspect or a defendant. An official report is drawn up mentioning the performance of the computer search. During the trial, computer search is ordered by the court, *ex officio* or upon request by the prosecutor, by the parties or the victim (CCP, Article 168).

The measure of immediate preservation of computer data can be ordered if there is a reasonable suspicion in relation to the preparation or commission of an offence, for the purpose of collecting evidence or of identifying a perpetrator, suspect or defendant. Thus, the prosecutor supervising or conducting the criminal investigation may order immediate preservation of computer data, including of data referring to information traffic, that were stored by means of a computer system and that is in the possession or under the control of a provider of public electronic communication networks or of a provider of electronic communication services intended for the public, in the event that there is a danger that such data may be lost or altered.

Such preservation is ordered by the prosecutor, *ex officio* or upon request by criminal investigation bodies, for a term of maximum 60 days and may be extended by the prosecutor, only once, for well-grounded reasons, for a term of maximum 30 days.

The prosecutor's ordinance is transmitted forthwith to any provider of public electronic communication networks or provider of electronic communication services intended for the public holding the data or having control on such data, and the latter are under an obligation to preserve it immediately, under confidentiality terms.

Within the above-mentioned terms, the prosecutor, based on a prior authorization from the judge for rights and liberties, may request a provider of public electronic communication networks or a provider of electronic communication services intended for the public to transmit the data preserved under the law or may order cancellation of such measure.

The judge for rights and liberties rules on requests transmitted by criminal investigation bodies regarding the transmission of data within 48 hours, through a reasoned court resolution, in chambers. These provisions also apply to computer data, including data relating to information traffic, stored by means of a computer system which is in the possession or control of other persons.

Before completion of the criminal investigation, the prosecutor is under an obligation to inform in writing the persons against whom the criminal investigation is conducted and whose data were preserved (CCP, Article 154).

In the French criminal procedure, on-line search of computers may be authorised by an investigating judge, in the case of remote computer data capture, and the procedure is carried out by police officers under the authority and the supervision of the investigating judge. The remote computer data capture may be

authorised for a maximum period of four months, renewable once. The French CCP also allows police officers, during the course of a search, to access any data relevant to the on-going inquiry, stored in a computer system, in cases of flagrant offence investigation, preliminary police inquiry or judicial investigation.[59]

14. Freezing

Freezing is ordered mainly for offences which caused financial losses or for offences that require the confiscation of goods acquired or created as a result of the offence. In this respect, CCP, Article 249 stipulates that the prosecutor, during the criminal investigation, the preliminary chamber judge or the court, *ex officio* or upon request by the prosecutor, during preliminary chamber procedure or throughout the trial, may order asset freezing, by a prosecutor's ordinance or, as the case may be, by a reasoned court resolution, in order to avoid concealment, destruction, disposal or dissipation of the assets that may be subject to special or extended confiscation or that may serve to secure the penalty by fine enforcement or to pay court fees or to compensate damages caused by the committed offence.

The measure, ordered by the prosecutor, can be maintained throughout the criminal trial until a final decision is pronounced, when the court has to decide on the sequestration, according to CCP, Article 397 paras 2 and 4. According to CCP, Articles 252 and 254, there are two types of sequestration: freezing of movables and immovable goods with the obligation to identify and evaluate them; or freezing of bank accounts, registering the amounts at the disposal of the criminal investigation body on behalf of the suspect/defendant. The prosecutor is assisted in this work by the judicial police officers who enforce the sequester ordinance.

Freezing ordered under legal terms is mandatory if the injured person lacks legal capacity or has a limited legal capacity. As a special rule, movable and immovable goods belonging to a public authority or institution or to other public-law legal persons as well as property exempted by law cannot be placed under sequester. In the case of corruption offences, crimes assimilated to corruption offences, offences directly connected to corruption and fraud offences affecting the financial interests of the EU, however, the measure is mandatory (CCP, Article 249).

The body that enforces the sequestration draws up an official report of sequester and registration of the mortgage on all acts performed, including a detailed description of the sequestered assets and the specification of their value. The presence of a defence lawyer is not mandatory; nevertheless, he/she must be informed.[60]

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[59] See Tricot (n 12) 245, 246.

[60] Lazar et alii (n 2) 605, 606.

In French criminal procedural law, freezing arises in connection with the financing of terrorism and the cooperation between EU Member States. The French CCP adapted the criminal procedure to the EU requirements.[61]

15. Production Orders (in Particular for Banks, Service Providers, Public Authorities and Administrators of other Data Collections)

According to CCP, Article 169, the criminal prosecution body or the court are under an obligation to seize objects and documents that may serve as evidence in criminal proceedings. Therefore, this measure can be ordered for any offence stipulated in the CC or in other special criminal laws. This kind of criminal investigation act is often requested by the judicial police officers, who perform their duties under the direct supervision of the prosecutor. The handing in of objects and documents is performed according to CCP, Article 170.

Furthermore, CCP, Article 306 para 6 stipulates that banking and professional secrecy, except for the lawyer's professional secrecy, cannot serve as a basis to deny a prosecutor's requests once the criminal investigation has started.

In the event that there is a reasonable suspicion in relation to the preparation or commission of an offence and there are reasons to believe that an object or document can serve as evidence in a case, the criminal investigation bodies or the court may order the natural person or legal entity holding them to provide and surrender them, subject to receiving proof of surrender (CCP, Article 170 para 1). Also, under the same terms, the criminal prosecution bodies or the court may order: a) any natural person or legal entity on the territory of Romania to communicate specific computer data in their possession or under their control that is stored in a computer system or on a computer data storage medium; b) any provider of public electronic communication networks or provider of electronic communication services intended for the public to communicate specific data referring to subscribers, users and to the provided services that is in its possession or under its control, other than the content of communications and then those specified by Article 138 para 1 lett. j).[62]

If a requested object or document is not surrendered voluntarily, either the criminal prosecution body, through an ordinance, or the court, through a court resolution, order their forced seizure. During the trial, an order regarding the forced seizure of objects and documents is communicated to the prosecutor, who takes steps to implement such measure, through criminal investigation bodies. Against such measure, or against the manner in which such measure is

[61] See Tricot (n 12) 246.

[62] Article 138 para 1 lett. j) stipulates the measure of obtaining traffic and location data processed by providers of public electronic communication networks or by providers of electronic communication services intended for the public.

implemented, a complaint may be filed by any interested person, to the judge of rights and liberties (CCP, Article 171).

In the French legal system, production orders refer to the power of *réquisition* in French criminal procedural law. Thus, police officers are vested with a general power to request the production of documents or information, whereas special agents in charge of tax, customs or consumer law are vested with similar powers. In both cases, the refusal to execute the request constitutes a criminal offence.[63]

16. Invoking the Assistance of Experts to Examine Clues

When for the ascertaining, clarification or assessment of facts or circumstances that have importance for finding the truth in a case, the opinion of an expert is also required, the criminal prosecution body or the court, during the trial, may order an expert to report on the matter, according to CCP, Article 172.

The criminal law does not stipulate the categories of offence for which an expert is mandatory, with a few exceptions provided by CCP, Articles 184 para 1, 185 paras 1 and 2, 187 and 188.

Thus, CCP, Article 184 para 1 stipulates that in case of offences committed by juveniles aged between 14 and 16, in case of killing or injury of a new-born infant or of a fetus by the mother, as well as when the criminal prosecution body or the court have doubts about the judgment of a suspect or defendant at the moment of commission of the offence subject to indictment, these judicial bodies order a forensic psychiatric expert examination.

Also, according to CCP, Article 185 para 1, forensic autopsy is ordered by the criminal prosecution body or by the court, in case of violent death or when there is a suspicion of violent death, or when the cause of death is not known, or when there is a reasonable suspicion that a death was caused directly or indirectly by an offence or in relation to the commission of an offence. If the body of a victim was buried, exhumation is ordered for the examination of the corpse by autopsy.

Furthermore, CCP Article 185 para 2 stipulates that the prosecutor shall order immediately the conducting of a forensic autopsy if death occurred during a time frame while a person was in the custody of the police, of the National Administration of Penitentiaries, during involuntary medical admission or in case of any death raising suspicions of non-observance of human rights, to the application of torture or of inhumane treatments

Also, according to CCP, Article 187, the forensic autopsy of a fetus is ordered in order to establish its intra-uterus age, its extra-uterus survival capacity, the type and cause of death, and in order to establish filiation, when the case. The forensic autopsy of a new-born infant is ordered in order to establish whether the infant

[63] See Tricot (n 12) 246.

was born alive, their viability, the term of extra-uterus survival, the type and medical cause of death, the date of death, whether medical care was provided to them after birth, and in order to establish filiation, when the case.

Finally, CCP, Article 188 stipulates that in the event that there is a suspicion related to poisoning, the conducting of a toxicological expert examination is ordered.

The main types of expertise required in courts of law are medico-legal expertise, technical expertise, forensic expertise and financial accounting expertise.

The expertise is performed, according to CCP, Articles 172 and 173, by officially authorised experts who are registered with the central office for technical judicial expertise in the Ministry of Justice. The expertise can also be performed by the Institute of Forensic Medicine, the National Criminology Institute and by the laboratory of forensic expertise of the National Inspectorate of the Romanian Police.

The prosecutor, the judicial police or the court, during the trial, decide the administration of this means of evidence. When there is a danger that certain evidence might disappear or some facts or circumstances related to the case might change, or when the urgent clarification of facts or circumstances of the case is necessary, the criminal investigation body may use the knowledge of a specialist, ordering a technical-scientific ascertainment, according to CCP, Article 172 paras 9 and 10.

The above-mentioned judicial bodies inform the parties about the objectives of the expertise and about the fact that they have the right to ask that an expert proposed by each of them be appointed, who will take part in the expertise in order to protect their interests, according to CCP, Article 173 para 4 and Article 177 paras 1 and 2.[64]

Also, the parties have the right to make observations regarding the objectives of the expertise and may request their modification and completion. The legal remedies for such situation are provided by CCP, Articles 180 and 181. Thus, CCP, Article 180 stipulates that when the criminal prosecution body or the court finds, upon request or *ex officio*, that an expert report is incomplete and such flaws cannot be remedied by hearing the expert, these judicial bodies order the conducting of an additional expert examination by the same expert. When the appointment of the same expert is not possible, they order the conducting of another expert examination by another expert.

Furthermore, CCP, Article 181 stipulates that the criminal prosecution body or the court orders the conducting of a new expert examination when the conclusions of an expert report are ambiguous or contradictory or when there are

[64] There was a similar regulation under the former CCP (the 1968 CCP), see Lazar et alii (n 2) 606, 607.

contradictions between the content and the conclusions of an expert report and such flaws cannot be remedied by hearing the expert.

In the French criminal procedure, in a strict sense, during the pre-trial phase, resort to expert opinion is restricted to the investigating authorities (investigating judge and second-tier investigating jurisdiction). Hoewever, the public prosecutor or the police officer may call on any qualified person if any technical or scientific reports or examinations need to be carried out. During a judicial investigation, an expert opinion may be ordered by the investigating judge or the second-tier investigating jurisdiction.65

17. Infiltration

If there is a reasonable suspicion related to the preparation or commission of a serious offence, if such measure is necessary and proportional to the restriction of fundamental rights and freedoms, considering the particularities of the offence, the importance of information or of evidence to be obtained, or the seriousness of the offence and if the evidence or the offender's, the suspect's or defendant's localisation or identity could not be obtained in other way or obtaining it would imply extreme difficulties that would harm the investigation, or there is a threat to the safety of persons or of high value goods, investigators with an identity different from the real one may be used in order to gather information (CCP, Article 148).

The prosecutor supervising or conducting the criminal investigation may authorize the use of undercover investigators in cases of offences against national security, drug trafficking, weapons trafficking, trafficking in human beings, acts of terrorism or acts assimilated to those, terrorism financing, money laundering, counterfeiting of currency or other securities, counterfeiting of electronic payment instruments, blackmail, deprivation of freedom, tax evasion, corruption offences, offences assimilated to corruption offences and other serious offences (CCP, Article 148 para 1).

As a restriction, the authorisation for using the undercover investigators is given for an initial period of 60 days and may be extended up to one year only for well-grounded reasons (CCP, Article 148 para 9). Therefore, the total duration of such measure, in the same case and in respect of the same person, may not exceed one year, except for offences against life, national security, drug trafficking, failure to comply with the arms, munitions, nuclear materials and explosives regime, trafficking and exploitation of vulnerable persons, acts of terrorism, money laundering, as well as for offences against the European Union's financial interests.

65 See Tricot (n 12) 247.

The undercover investigators are judicial police officers, specially designated by the Ministry of Interior, acting as undercover investigators. The investigators may perform investigations only with the authorisation of the prosecutor who performs or supervises the criminal investigation (CCP, Article 148 para 1). The use of undercover investigators can be requested by the judicial police or can be ordered, *ex officio,* by the prosecutor. All the data and information is included in an official report drawn up by the undercover investigator, which may constitute evidence in the criminal case.

According to CCP, Article 148 para 10, in exceptional situations, provided that the above-mentioned requirements are met, and the use of undercover investigators is not sufficient for obtaining data or information or such obtaining is not possible, the prosecutor supervising or conducting the criminal investigation may authorize the use of an informant, to whom an identity different from their real one can be attributed.

In the French legal system, infiltration is a measure with a restricted scope of application, limited to organised crime, drug trafficking and few offences related to the endagering of minors (prostitution) and the trafficking of human beings. The decision to authorise an infiltration may only be taken by a magistrate, who is either the prosecutor in case of a police investigation or the investigating judge in case of a judicial investigation, the latter being obliged to solicit the prior opinion of the former.66

18. Controlled Deliveries

A controlled delivery may be requested by the specialised structures for combating organised crime within the Ministry of Interior, Border Police, Customs or may be ordered *ex officio* by prosecutors. Also, in case of joint actions with other states, the supervised deliveries can be requested by rogatory letter issued by the judges or prosecutors from the Members States of the EU or from other states.67

The supervised delivery may be authorized, through an ordinance, by the prosecutor supervising or conducting the criminal investigation, upon request by institutions or bodies of competent jurisdiction, with or without the total or partial substitution of the goods subject to delivery.

A controlled delivery may be authorized only in the following situations: a) if persons involved in illegal transport of drugs, weapons, stolen items, explosive or nuclear materials, radioactive materials, money amounts and other proceeds resulting from illegal activities or of items used for the purpose of perpetrating offences could not be discovered or arrested in other ways or if this implies extreme difficulties that would harm the investigation or would be a threat against

66 See Tricot (n 12) 248.

67 Lazar et alii (n 2) 608.

the safety of persons or of high value goods; b) if the discovery or proving of offences committed in relation to the delivery of illegal or suspicious transports is impossible or extremely difficult in another way.

A controlled delivery is performed by law enforcement bodies or by another competent authority. A prosecutor establishes, coordinates and controls the performance of a controlled delivery. Performance of a controlled delivery does not represent an offence. Upon completion of a controlled delivery on the territory of Romania, the competent bodies are under an obligation to prepare a report regarding the performed activities, which is forwarded to the prosecutor (CCP, Article 151).

The duty to cooperate with the investigative authorities is stipulated by CCP, Article 170, which mentions that 'in the event that there is a reasonable suspicion in relation to the preparation or commission of an offence and there are reasons to believe that an object or document can serve as evidence in a case, the criminal investigation bodies or the court may order the natural person or legal entity holding them to provide and surrender them, subject to receiving proof of surrender'.

Any person who holds a managerial position with an authority of the public administration or with other public authorities, public institutions or other public legal entities, as well as any person who holds an oversight authority, who, in the exercise of their responsibilities, have acquired knowledge of the commission of a criminal offence that warrants *ex officio* criminal investigation, is under an obligation to immediately file a referral with the criminal investigation body and take steps to preserve the crime scene, *the corpus delicti* and any other forms of evidence.

Furthermore, any person who performs a public-interest service for which they have been mandated by public authorities or who is subject to oversight or supervision by these authorities concerning the performance of the public-interest service, and who in the exercise of their responsibilities acquired knowledge of the commission of a criminal offence that warrants *ex officio* criminal investigation, is under an obligation to immediately inform the criminal investigation body.

The suspect/defendant or any other interested person can file a complaint against the performance of the measure before the hierarchically superior prosecutor, who has to solve the complaint within the 20 days, according to CCP, Article 339, and communicate the solution immediately. The special measures (interception, undercover investigators, supervised delivery) cannot be notified to the suspect or the defence lawyer.

According to CCP, Article 339, the prosecutor's ordinance ordering the use of undercover investigators and supervised delivery can be challenged by the suspect or by the defendant at the hierarchically superior prosecutor, if their legitimate interests have been harmed. They can find out about the measure after its execution, by requesting consultation of the case file.

In the French criminal procedure, controlled delivery is included within the framework of special procedures applicable to organised crime and is defined as the surveillance of the transport of objects, goods or products arising from the commission of any of the offences falling within the scope of organised crime or used to commit them.68

C. PROSECUTION MEASURES

1. Opening of Investigation and Prosecution

CCP, Articles 288-292 provide for the rules regarding the initiation of criminal investigation, which consist of the information of the criminal investigation body by complaint or denunciation, or *ex officio.* Any individual or legal person must inform the prosecutor or the competent criminal investigation body when they discover a crime. There is also the possibility that the criminal investigation body is informed *ex officio*[69].

The prosecutor conducts and checks the criminal investigation performed by the Police or other bodies, and makes sure that the criminal investigation acts are performed in compliance with the legal provisions (CCP, Articles 299-300). The orders given by the prosecutor are compulsory for the criminal investigation body (CCP, Article 303). The prosecutor is the only one who decides how to complete the criminal investigation, having exclusive powers in this phase of the criminal investigation.

Any person may file a complaint against the criminal investigation acts and measures enforced by the prosecutor if they harmed his/her legitimate interests. The complaint is settled by the hierarchically superior prosecutor (CCP, Article 339). If the complaint is justified, the criminal investigation case is reopened and the measure taken by the prosecutor's act is invalidated. The reopening of the criminal prosecution is subject to the confirmation of the preliminary chamber judge, within no more than 3 days, under penalty of nullification (CCP, Article 335 para 4).

The French criminal procedure regarding opening of investigation and prosecution is similar, as opening of investigation is mostly in the hands of the police, who is obliged to inform the public prosecutor, as police officers act under his/her authority. Also, the public prosecutor may decide whether to prosecute or not either on legal grounds or on discretionary grounds, in accordance with the opportunity principle.[70]

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[68] See Tricot (n 12) 249.

[69] There was a similar regulation under the former CCP (the 1968 CCP), see Lazar et alii (n 2) 609.

[70] See Tricot (n 12) 250.

2. Unilateral Disposal of the Case (Including Remedy Against it)

After examining the referral, when the prosecutor finds that all the necessary evidence has been collected, they decide, by ordinance, either to close the case, when they do not wish to exercise criminal action or, as the case may be, discontinue criminal action that has started, because of applicability of one of the cases stipulated in Article 16 para 1 CCP, or to drop charges (CCP, Article 318), when there is no public interest in prosecuting the suspect or the defendant (CCP, Article 314 para 1).

According to CCP, Article 305, when the referral meets the conditions required by law, the criminal prosecution body orders the criminal investigation to start, by ordinance, in relation to the offence which has been committed or the commission of which is being prepared, even if the author is indicated or known. When the existing evidence in the case constitute probable cause to believe that a certain individual has committed the offence that warranted the start of the criminal investigation and none of the cases preventing criminal action as under Article 16 para 1 applies, the criminal prosecution body orders that the criminal investigation continue in relation to that individual, and the latter shall acquire the capacity of suspect. The measure ordered by the criminal investigation body is submitted within 3 days to the confirmation of the prosecutor supervising the criminal investigation.

The cases preventing initiation and exercise of criminal action are stipulated in CCP, Article 16 para 1, as follows: a) the act does not exist; b) the act is not stipulated in the criminal law or was not committed with the guilt required by law; c) there is no evidence that a person committed the offence; d) there is a justifying or non-imputability cause; e) a prior complaint, the authorisation or seizure of the body of competent jurisdiction, or any other condition stipulated by the law, necessary to the initiation of the criminal action is missing; f) amnesty or statute of limitations, or death of a natural-person suspect or defendant occurred or de-registration of a legal-entity suspect or defendant was ordered; g) a prior complaint was withdrawn, for offences in relation to which its withdrawal removes criminal liability, reconciliation took place or a mediation agreement was concluded under the law; h) there is a non-penalty clause set by the law; i) double jeopardy (res judicata); j) a transfer of proceedings with a different country took place under the law. In the situations set under para 1 lett. e), j), criminal action may be initiated subsequently, under the terms set by the law.

The criminal investigation may be terminated by the prosecutor's decision to close a case or to drop charges. According to CCP, Article 315 para 1, a case shall be ordered closed when: a) the criminal investigation cannot start, because the referral's crucial requirements of content and form are not met; b) one of the cases under Article 16 para 1 applies.

Also, based on CCP, Article 318, in the situation of offences for which the law requires the penalty of a fine or a penalty of imprisonment of no more than 7 years, the prosecutor can drop charges when, considering the contents of the offence, the modus operandi and the instruments used, the goal of the offence and the concrete circumstances of its commission, the consequences that occurred or could have occurred, they find that a public interest is not served in prosecuting. When the offender is identified, weighing the public interest aspect also involves the person of the suspect or defendant, their conduct previous to the offence and the efforts they made in removing or minimizing the consequences of the offence.

After consulting with the suspect or defendant, the prosecutor can order that they comply with one or several of the following obligations: a) remove the consequences of the criminal offence or make redress, or agree with the civil party on an avenue of redress; b) make a public apology to the victim; c) perform community service for a time span of no less than 30 and no more than 60 days, except for the case where their health precludes them to provide such community service; d) enlist in a counselling program. In case of non-compliance in ill-faith of the obligations within the deadline, the prosecutor rescinds his/her order. A new waiver of prosecution in this same case is no longer possible. The ordinance ordering the waiver of the criminal prosecution is verified by the hierarchically superior prosecutor and is forwarded to the preliminary chamber judge for confirmation, within 10 days from the date on which it was issued (CCP, Article 318 paras 10-12).

The prosecutor either closes the case or drops the charges by issuing a motivated ordinance, which is communicated to the person who made the demand, to the suspect or defendant and to any other interested person. Against the prosecutor's decision to terminate the criminal investigation, by closing the case or dropping charges, the victim or any other person whose legitimate interests have been harmed may file a complaint. The complaint is settled by the hierarchically superior prosecutor, within 20 days, and the solution is communicated immediately to the person who filed the complaint. If the above-mentioned persons are not satisfied by the solution of the complaint filed, they can address to the preliminary chamber judge from the court of first instance, the acts and the measures enforced by the prosecutor being subject to judicial control (CCP, Articles 339-341).

Also, according to CCP, Article 396 para 3 and CC, Article 80, a court can waive enforcement of a penalty if the following conditions are met: a) the committed offence has a low degree of seriousness, given the nature and extent of its consequences, means used, manner and circumstances of commission, reason and goal intended; b) considering the person of the defendant, their conduct before committing the offence, their efforts to remove or minimize the consequences of their offence, and their likelihood of rehabilitation, the court feels that enforcing a

penalty would be untimely because of its consequences on the defendant. Nevertheless, enforcement of a penalty cannot be waived if: a) the defendant has a previous conviction, except for the cases stipulated in Article 42 lett. a) (acts that are no longer stipulated in criminal law) and lett. b) (violations that have been pardoned) or for which rehabilitation has taken place or the deadline for rehabilitation has arrived; b) the same defendant has already had a case of penalty waiver granted to them in the 2 years previous to the commission of the offence for which they are on trial; c) the defendant has evaded criminal investigation or trial or tried to obstruct discovery of the truth or identification and prosecution of themselves or participants in the offence; d) the penalty for that offence is more than 5 years of imprisonment. When ruling to waive a penalty, the court issues the defendant with a warning.

In the French legal system, the public prosecutor decides if it is appropriate to initiate prosecution, or to implement alternative proceedings to a prosecution, or to close the case without taking any further action. A victim informed of the decision may lodge an appeal to the general prosecutor or initiate a prosecution by a complaint with civil party petition, which seises the investigating judge, or by directly summoning the defendant to the hearing. Where seised, the investigating judge is compelled to investigate and if he/she comes to the conclusion that the evidence against the person under judicial examination is insufficient, he/she issues an order ruling that there is no cause to prosecute.[71]

3. Multilateral Disposal of the Case (Including Negotiated Justice, Diversion and Remedy Against it)

The current Romanian CCP also provides a diversionary measure for the criminal trial that allows the prosecutor to negotiate justice with the defendant. Thus, the current CCP stipulates a new discretionary investigation system through the opportunity principle, which operates together with the mandatory investigation system. This innovative solution ensures the solving of cases within a predictable and optimal period of time.

In this regard, CCP, Article 478 stipulates that during the criminal investigation, after the criminal action is set in motion, the defendant and the prosecutor can conclude an agreement as a result of the defendant pleading guilty. The effects of the guilty plea are subject to approval by the hierarchically superior prosecutor. The guilty plea can be initiated by both the prosecutor and the defendant. The limits of the guilty plea are set by prior written agreement from the hierarchically superior prosecutor. The object of the guilty plea is admission to have committed the offence and accepting the charges on which criminal action has been set in motion, and regards the type and amount of punishment, as well as

[71] See Tricot (n 12) 250, 251.

how the punishment shall be served and the type of educational measure or, as the case may be, waiving punishment or postponing punishment.[72]

CCP, Article 480 stipulates the conditions for concluding a guilty plea; thus, a guilty plea can only be concluded concerning the offences for which the law requires a penalty of a fine or no more than 15 years of imprisonment. A guilty plea can be concluded when the gathered evidence provides sufficient information that the offence for which the criminal action has been set in motion exists and that the defendant is the author of that offence. The defendant benefits from the reduction by one third of the penalty limits provided for by the law in the case of imprisonment and by a one-fourth reduction in the penalty limits provided for by law in the event of the fine.

For minor offenders, these aspects will be taken into account when choosing the educational measure; in the case of educational measures depriving of liberty, the limits of the periods for which such measures are provided, shall be reduced by one third (CCP, Article 480 para 4).

The court, considering the agreement, pronounces one of the following solutions: a) admits the agreement on the recognition of guilt and pronounces the solution on which the agreement has been reached, if all legal conditions are met; b) rejects the agreement on the recognition of guilt and sends the prosecutor's file for further prosecution, if the legal conditions are not met or if it considers that the solution reached between the prosecutor and the defendant is unlawful or unjustifiably gentle in relation to the gravity of the offence or the danger of the offender.

In the French criminal procedure, there are three forms of negotiation between the parties which may end or modify the ordinary course of proceedings. The first category is based on the philosophy of the third way, which is a compromise between dropping a case and initiating prosecution and is referred to as conditional drop, the second is the conditional suspension, a procedure applicable to misdemeanours and connected petty offences with low penalty and the third is the procedure of appearance on prior admission of guilt, where the person admits the matters of which he/she is accused.73

4. Reopening of the Case Closed on Different Grounds

CCP, Article 335 stipulates the situations in which the reopening of the criminal investigation is possible. Thus, if the prosecutor who is hierarchically superior to the one having closed a case finds afterwards that the circumstances that warranted closing the case did not exist, they nullify the order to close the case

[72] The guilty plea could not be concluded under the former CCP (the 1968 CCP); it was introduced by Romania's new CCP (the 2010 CCP).

[73] See Tricot (n 12) 251, 252.

and have the criminal investigation reopened. Also, when new facts or circumstances have emerged that show that the circumstance that warranted closing a case has disappeared, the prosecutor rescinds the ordinance and issues a new order to resume the criminal investigation. When the prosecutor finds that the suspect or the defendant has failed, in ill-faith, to comply with their obligations, they rescind the ordinance and order the reopening of the criminal prosecution.

Reopening of the criminal investigation is subject to confirmation by the preliminary chamber judge, within no more than 3 days, under penalty of nullification (CCP, Article 335 para 4). The judge rules on the lawfulness and legitimacy of the order to resume the criminal investigation.

When a case has been closed, reopening of the criminal investigation can also take place when the preliminary chamber judge sustains the complaint against the prosecutor's order and sends the case back to the prosecutor for a supplement to the criminal investigation. The preliminary chamber judge's orders are mandatory for the criminal prosecution body. Thus, the reopening of the criminal investigation is also possible if the victim or any other person who has a legitimate interest files a complaint against the prosecutor's ordinance deciding the closing of the case, according to CCP, Articles 339-341.

Reopening of the criminal prosecution can be ordered by the hierarchically superior prosecutor, who is competent to settle the complaint against the prosecutor's acts. In case the complaint for the reopening of the case is rejected by the hierarchically superior prosecutor, the victim or any other person whose legitimate interests were harmed can address, within 20 days, the competent judge to solve the case in first instance.

In the French criminal system, the reopening of the case depends on the grounds on which the case was closed and on the judicial body which closed the case, either the public prosecutor or the investigating judge. However, it is for the public prosecutor alone to decide whether there is a case for the reopening of the investigation on new charges.74

5. Committing to Trial and Presenting the Case in Court

When the prosecutor finds that the legal requirements have been met, that guarantee discovery of the truth, that the criminal investigation is complete and the necessary evidence is in place and has been legally produced, the prosecutor either returns an indictment whereby the case shall be prosecuted, if the criminal investigation shows the offence exists, was committed by the defendant and that the defendant has criminal liability, or returns an order to close the case or drop charges, as under the law (CCP, Article 327).

74 See Tricot (n 12) 252.

The prosecutor, as the representative of the Public Ministry, is the only one who can initiate the criminal action. After the prosecutor sends the criminal case to court, by indictment, he is obliged to take part in the court sessions, where he can file motions, raise objections and make final arguments, according to CCP, Article 363 para 3. The prosecutor has an active role in the judicial investigation, in order to establish the truth and to ensure compliance with the legal provisions. The prosecutor is free to present the conclusions he considers justified, under the law, taking into account the evidence produced. Nevertheless, reasons must be submitted for the motions and the arguments of the prosecutor. When considering that there is a cause preventing exercise of criminal action, the prosecutor argues, as the case may be, for acquittal or the end of criminal proceedings (CCP, Article 363 para 4).

The participation of the prosecutor during the trial and in the appeal trial is mandatory according to CCP, Articles 363 para 1 and 420 para 3. The prosecutor is obliged to take an active part in the criminal trial, being the only person powered by law to represent the prosecution and to support the indictment, acting as a representative of the public interest, and protecting the order of law and the rights and liberties of the citizens (CCP, Article 363). There are no specialised bodies that can replace the judicial attributions of the prosecutors before the court of law.[75]

In the French criminal procedure, in a judicial investigation, the investigating judge may either issue a closing order ruling that there is no cause to prosecute, referring the case to the competent court, or, in the case of a felony (crime), an indictment before the assize court. In any other case, the public prosecutor is responsible, concurrently with the victim (who may summon directly the offender before the trial jurisdiction), of committing the case to trial. Once the trial jurisdiction is seised, the public prosecutor has the exclusive and mandatory competence to request that the law be enforced by the trial court.76

D. EVIDENCE

1. Status of Illegally or Improperly Obtained Evidence

The Romanian CCP stipulates express sanctions for illegally or improperly obtained evidence in Article 102. Thus, according to CCP, Article 102, illegally obtained evidence may not be used in the criminal trial and is, therefore, excluded from the case file. As for 'illegally obtained', the specialised literature and the judicial practice refer to the mandatory legal provisions which stipulate the way this evidence is produced. Also, according to CCP, Article 101, it is prohibited to use violence, threats or other coercion means, as well as promises or inducements for the purpose of obtaining evidence.

[75] Lazar et alii (n 2) 611.

[76] See Tricot (n 12) 252, 253.

Also, hearing methods or techniques affecting the capacity of persons to remember and tell conscientiously and voluntarily facts representing the object of the taking of evidence may not be used. Such prohibition applies even if a person subject to such hearing gives their consent in relation to the use of such hearing methods and techniques.

Furthermore, criminal judicial bodies or other persons acting on their behalf are prohibited from entrapping a person into committing or continuing commission of a criminal act for the purpose of obtaining evidence (CCP, Article 101 para 3).

The theory of the fruit of the poisonous tree has its counterpart in Romanian criminal procedure legislation. CCP stipulates at Article 102, entitled 'dismissal of illegally obtained evidence', the fact that this evidence may not be used within the criminal trial (CCP, Article 102 para 2). Derived evidence is excluded if it was procured directly from illegally obtained evidence and could not have been found in any other way (para 4).

Also, according to CCP, Article 102 para 3, the nullity of a document ordering or authorizing the production of evidence or based on which such evidence was produced triggers exclusion of that evidence. Noteworthy is the fact that in the field of probation, a governing principle is that of the free assessment of evidence.

After being notified with an objection of the unconstitutionality against the provisions of Article 102 para 3 CCP, the Romanian Constitutional Court allowed the objection and found that the above-mentioned legal provisions are constitutional in so far as the term 'exclusion of evidence' also means the removal of the evidence in the case file.[77] The specialised literature was of the opinion that the Romanian Constitutional Court consecrated a double dimension of the notion of excluding illegally or improperly obtained evidence, on the one hand, the material exclusion of evidence, and, on the other hand, the judicial exclusion of evidence.[78]

In the French legal system, admissibility of evidence is poorly regulated by the CCP, most of the rules on evidence being based on case law, either national or European. The French CCP addresses the issue of illegally or improperly obtained evidence through nullities. Evidence tainted by nullity must be withdrawn from the case file.79

2. Admissibility of Written Reports

Writings can serve as evidence, provided that their content shows facts or circumstances which could contribute to finding the truth. Consequently, the

[77] Decision no 22/2018, Constitutional Court (Jurisprudența.com).

[78] See Udroiu (n 11) 972.

[79] See Tricot (n 12) 253.

Romanian legislation acknowledges written reports in due form of law as evidence. According to CCP, Article 198 para 2, a report including personal findings of the criminal prosecution body or of the court represents evidence. Minutes prepared by the fact-finding bodies specified by CCP, Article 61 para 1 (bodies of state inspections, of other state bodies, as well as of public authorities, public institutions or of other public-law legal entities, etc.) constitute documents notifying the criminal prosecution bodies and do not have the value of specialized findings in criminal proceedings.

Written reports are means by which an authorised person ascertains directly (ex *propriis sensibus)* facts and circumstances which can serve in finding out the truth in a criminal case. They are drafted in due form of law.

The following categories can pass a report regarding a crime or the circumstances of its occurrence: criminal investigation agencies and prosecutors (CCP, Articles 198, 161, 195, 289 para 6); the court and its president (CCP, Articles 198, 360); determination agencies as stipulated at CCP, Articles 61, 62; the staff of other state agencies with attributions in the field of homeland security, as well as undercover agents (CCP, Article 148 para 5). [80]

In the French criminal procedure, official records and reports establishing the existence of felonies and misdemeanours only have the value of simple information, provided that they are formally regular, their drafter acted in the performance of their duties and reported what they personally saw, heard or found on a subject matter within their jurisdiction. However, in many cases, proof of the contrary may only be brought in writing or through witnesses.81

3. Status of Evidence Obtained in Other Member States

Departing from the principle of territoriality in what concerns the criminal procedure rules, a procedural act performed in a Member State according to the law of that country, is valid before the Romanian authorities.

Law no 302/2004 on international judicial cooperation in the criminal field has brought the regulation at the level convened through the international conventions to which Romania adhered. The request for undertaking criminal procedures addressed to the Romanian judicial authorities is solved, in the case of a criminal investigation, by the prosecutor's office attached to the court of appeal in the constituency of which the investigated person resides or has been identified. In the case of a trial, the request is solved by the criminal department of the same court of appeal. The court rules and its decision is laid down in an appealable writ within

[80] There was a similar regulation under the previous CCP (the 1968 CCP), see Lazar et alii (n 2) 612.

[81] See Tricot (n 12) 254, 255.

five days after the ruling, which can decide the admission of the transfer and the continuation of the trial according to the Romanian criminal procedure.

Foreign decisions recognised in Romania on the basis of a request for recognition before the court of appeal in the range of which the convicted person resides or has been identified, produce the same effects as the decisions rendered by the Romanian courts. Procedural acts requested through international rogatory letter and performed according to the applicable law of the Member State are also valid before the Romanian authorities.[82]

As to the French criminal procedure, the status of evidence obtained in foreign legal systems, including other Member States of the EU, varies depending on whether evidence was collected within the framework of international cooperation, upon request of a French judicial authority, or otherwise.[83]

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[82] Lazar et alii (n 2) 612, 613.

[83] See Tricot (n 12) 255.

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