# TAKING OF EVIDENCE IN THE CRIMINAL INVESTIGATION PHASE

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**Abstract**

*Evidence taking is a complex work, it must be carried out in accordance with all due process guarantees and must not deviate from the principles governing the criminal trial. The way in which evidence is taken and assessed during the criminal investigation phase is an important aspect, the criminal investigation phase being the basis of the criminal trial. In the prosecution phase, evidence is sought and found, and depending on the standard of proof, the prosecution authorities make judgments on the prosecution, interpreting the evidence and applying procedural measures.*

*In this paper I intend to provide a detailed analysis of the process of assessing the standard of proof depending on each stage of the criminal prosecution phase, within this analysis I will conduct a theoretical and practical debate on how the prosecution bodies make assessments on the condition of evidence when taking certain procedural measures or changing the quality of the person against whom the accusation is made, and finally I will make proposals on the existing ambiguities in the criminal procedural legislation.*

**Keywords:** *evidence, appreciation, suspicion, standard, legality.*

## 1. Introduction

Taking of evidence is the most important aspect in a criminal investigation. Evidence is the basis on which the judiciary builds and develops a criminal charge. The entire criminal process is governed by the principle of finding the truth, and the path of finding the truth requires the collection of evidence as a matter of priority. The taking, assessment, interpretation and corroboration of evidence is also done in accordance with the principle of establishing the truth, a rule from which judicial bodies cannot deviate and which, when applied in accordance with the principle of legality and respect for the right to a fair trial, are designed to ensure justice. The necessary steps to implement the principle of finding the truth must be made gradually, the evidence must be taken within the legal limits, without deviation from the conditions of admissibility, the judicial bodies to carry out the process of interpretation, corroboration and then assessment taking into account the rigors of criminal procedure and due process guarantee. Every necessary step in the process of taking of evidence must be carried out objectively, under the circumstances of a fair trial and without deviating from the legal rules.

This paper aims to analyse the importance of evidence in applying the principle of finding the truth. The most important phase of the criminal proceedings, which is the collection of evidence, is the prosecution phase. According to art. 285 para. (1) CPP, the *„object of the criminal investigation is to collect the necessary evidence to prove the existence of criminal offenses, to identify the individuals who committed a criminal offense and to establish their criminal liability, in order to decide whether they should be prosecuted".* Therefore, the role of the criminal prosecution phase revolves around the collection of evidence, all this in order to outline the charges, after assessing and corroborating the evidence. The criminal prosecution is important in analysing the substance of the evidence, as this phase consists of several stages, each stage being circumscribed an important evidentiary standard so that, at the end of the prosecution phase, the prosecutor can correctly decide whether to arraign or not to arraign.

I consider it useful and necessary to have a debate on this procedural phase, especially since it is the one most closely linked to the taking of evidence, as it is the phase in which information is collected and sources are obtained that are intended to outline a picture of the evidence that is capable of providing a conclusion on the issues submitted to the judicial bodies for analysis. The importance of this phase of the criminal process, in addition to the fact that it provides the necessary levers to outline a criminal charge, being the stage in which the accusation is built, which later, also through the taking of evidence, may or may not be strengthened, it is also the most exposed to non-compliance with legal provisions, the violation of the rules on the taking of

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evidence. It is not by chance that the legislator felt the need to create and implement the preliminary chamber phase, prior to the trial, the preliminary chamber also having the role of a filter of the evidence obtained during the criminal investigation phase. The Preliminary Chamber Judge investigates the evidentiary material taken during the criminal prosecution, analysing the legality of taking of evidence, being the one who can finally validate the evidence from the point of view of lawfulness or, on the contrary, to find its unlawfulness, abusive and to exclude it.

## 2. Content

### 2.1. Stages of the prosecution phase and standard of proof

Criminal prosecution also knows three important stages: the stage of criminal prosecution *in rem*, only regarding the deed, the stage of criminal prosecution regarding a person (suspect and after the initiation of the criminal action – defendant) and the final stage of the criminal prosecution, respectively the establishment of a solution by the prosecutor.

The evidence shall be taken considering the stage of the criminal prosecution and obviously respecting the specific characteristics of this phase of the criminal trial. The most important feature of the criminal investigation phase, directly related to the evidence taking management activity, is the non-public character of the criminal investigation. Why? Because a non-public prosecution provides and gives the prosecution body a wide and important margin in the search for evidence and the identification of persons who have committed criminal offenses.

A criminal prosecution that would be public would jeopardize the investigation of the criminal investigation bodies, by making it difficult to gather evidence and by the risk that it could no longer be found, being deleted or destroyed.

However, taking of evidence at this stage must not deviate from the principles of criminal procedure - the principles of legality, finding the truth, the right to a fair trial. Concurrently, the existing principles of evidence, namely the principle of freedom of evidence and free appraisal of evidence, must also be applied in the prosecution phase.

According to the Criminal Procedure Code, taking of evidence shall take place after starting *the criminal proceedings in rem*. That it is necessary first to start the criminal investigation *in rem*, respectively the existence of a legal procedural framework results from the provisions of art. 306 para. (3) CPP according to which, *„after the start of the criminal investigation, the criminal investigation bodies shall collect and present evidence both in favour and against the suspect or defendant."* However, some evidence may also be presented prior to the commencement of the prosecution. Thus, exceptionally, art. 311 para. (9) CPP provides that the *„hearing of the injured person by the judicial body that has registered a complaint regarding the commission of a crime shall be carried out immediately, and if this is not possible, it shall be carried out after the submission of the complaint, without undue delay"* and according to para. (10) of the same article, *„the statement given by the injured person under the conditions of paragraph (9) constitutes evidence even if it was presented before the commencement of the criminal investigation"*. Also, before the start of the criminal investigation, evidence can also be obtained through a body or vehicle expertise, under the conditions provided by art. 165 and art. 167 CPP.

Regarding the taking of evidence after the establishment of the legal framework, respectively the initiation of the criminal investigation *in rem*, the Criminal Procedure Code provides the following rules to the criminal investigation bodies, as follows: art. 5 CPP regarding the principle of finding out the truth provides that *„(1) The judicial bodies have the obligation to ensure, on the basis of evidence, the finding of the truth regarding the facts and circumstances of the case, as well as regarding the person of the suspect or defendant (2) The criminal investigation bodies have the obligation to collect and present evidence both in favour of and to the detriment of the suspect or defendant. Rejection or non-assessment in bad faith of the evidence proposed in favour of the suspect or defendant shall be sanctioned in accordance with the provisions of this Code"*; art. 100 para. (1) CPP provides that *„During the criminal investigation, the criminal investigation body collects and presents evidence both in favour and against the suspect or defendant, ex officio or upon request"* and art. 306 para. (3) CPP provides that *„After the start of the criminal investigation, the criminal investigation bodies shall collect and present evidence both in favour and against the suspect or defendant"*.

With regard to the latter text, analysing it, we could say that the wording could be contradictory, because although the legislator by this rule positions the conduct of the prosecution authorities immediately after the beginning of the criminal prosecution *„after the start of the criminal investigation*" the text goes on referring to the suspect and the defendant. However, in order to reach the stage where we talk about evidence in favour or against the suspect or defendant, it is necessary to have an evidentiary standard that the criminal investigation bodies can corroborate and interpret so as to conclude that there is a reasonable suspicion that a certain person has committed the act – which has the effect of acquiring the quality of suspect by that person or to observe that the standard of evidence is more than a suspicion and that the evidence induces the fact that a certain person has committed the crime – which has the effect of obliging the initiation of the criminal action and assigning the quality of defendant.

At the stage of criminal prosecution *in rem*, there is not always enough evidence to allow an accusation to be made against a person, and the criminal prosecution is secret to the perpetrator, the perpetrator can only propose evidence in his favour after he becomes a suspect or defendant. We cannot discuss the taking of evidence in favour or against the perpetrator, even when it is known or indicated in the referral document. Until the perpetrator is assigned a certain quality, we cannot discuss the taking or non-taking of evidence in its favour or against it.

The transition of the criminal prosecution from the stage of investigation *in rem* to the stage of investigation *in personam*, is done taking into account the evidentiary standard. The Criminal Procedure Code establishes as a condition of acquiring the quality of suspect that the evidence results in „reasonable suspicion that a certain person has committed the deed". The Criminal Procedure Code does not define „reasonable suspicion", remaining the task of the criminal investigation bodies to assess according to the criminal investigation material whether there is a suspicion that a particular person has committed the act for which they were notified. Regarding the standard of proof required for a person to acquire the status of a suspect, the literature[1] has shown that the evidence should not prove beyond reasonable doubt the commission of the crime by that person, or be sufficient to justify prosecution, the existence of data, information showing that the crime may have been committed by the person against whom the further prosecution was ordered.

Regarding the two moments, namely the commencement of the criminal investigation *in rem* and the continuation of the criminal investigation in relation to a certain person, with the acquisition by him of the status of suspect, as well as the fact that it cannot be ordered by the same ordinance both the commencement of the criminal investigation in rem and the continuation of the criminal investigation in relation to a certain person, the specialized literature[2], by reference to the judicial practice, has shown that it is necessary to present evidence that provides relevant information for the continuation of the criminal investigation, both in terms of criminal activity and criminal participation. Even if certain data may provide a minimum of clues to the identity of the possible suspect, they may still not be sufficient to lead to a reasonable conclusion that that person would have committed the act that is the subject of the criminal investigation and then those data must be verified and strengthened by evidence presented after the start of the criminal investigation *in rem*.

CCR jurisprudence[3] has shown that as regards the time interval separating the moment of commencement of the criminal investigation *in rem* from the moment of commencement of the criminal investigation *in personam*, it is not strictly and expressly determined by the provisions of the Criminal Procedure Code. However, the criminal procedural provision states that the prosecutor orders that the criminal investigation should continue to be carried out against a person when the existing data and evidence in question show reasonable indications that he has committed the act for which the criminal investigation was initiated. Moreover, the Constitutional Court has stated that the prosecutor is obliged, when there are reasonable indications that a person has committed the act for which the criminal investigation was initiated, to order the continuation of the criminal investigation against that person, the Court establishing that this results from the use by the legislator of the verb in the imperative mode „disposes", and not „can dispose", so that it can be interpreted that there is a faculty of the prosecutor to postpone the moment of commencement of the criminal investigation *in personam* until the necessary evidence for the initiation of the criminal action and the direct disposition of this measure. At the same time, the fact that it is not possible to acquire the official status of a suspect as soon as the criminal

[1] A.V. Iugan, *Procedură penală. Partea generală*, C.H. Beck Publishing House, Bucharest, 2023, p. 83.
[2] *Idem*, p. 84.
[3] CCR dec. no. 236/2016, published in the Official Gazette of Romania no. 426/07.06.2016.

investigation bodies have been notified of the commission of a criminal offence by one or more persons represents, in the Court's view, a guarantee justified by the need to protect the rights of the persons against whom such a referral has been lodged, so that they are not subject to criminal charges without a minimum verification of the allegations showing both the existence of the offence and the non-existence of any case that prevents the exercise of criminal action, as well as the reasonable suspicion that they have committed an offence provided for by criminal law.

Regarding the moment when the criminal action can be initiated and the role of evidence in reaching this moment, the provisions of the Criminal Procedure Code are contradictory. While art. 309 para. (1) CPP provides that *„The criminal action is initiated by the prosecutor, by ordinance, during the criminal investigation, when he finds that there is evidence from which it results that a person has committed a crime and there are no cases of obstruction provided by art. 16 para. (1).”*, the provisions of art. 15 CPP stipulates that *„Criminal action is initiated and exercised when there is evidence that results in the reasonable assumption that a person has committed a crime and there are no cases that prevent its initiation or exercise”*. However, analysing these texts of law, we find, on the one hand, that although they regulate the same institution, they are contradictory, on the aspect of evidence and, on the other hand, that the provisions of art. 15 CPP are similar to the provisions of art. 305 para. (3) CPP, regarding the moment of acquiring the quality of suspect.

The explanations regarding these aspects concern the legislator's failure to adapt the general provisions of the Criminal Procedure Code after the provisions of art. 309 para. (1) of the special part of the Criminal Procedure Code were amended by the GEO no. 3/2014 to take implementing measures necessary for the application of Law no. 135/2010 on the Criminal Procedure Code and for the implementation of other regulatory documents. Subsequent regulations relating to the amendment of a text in the special part should take precedence over earlier regulations governing a text in the general part of the Code. Moreover, this difference in terminology should not create a problem if we refer strictly to the intention of the legislator who wanted to make the burden of proof more onerous for the prosecuting authority when initiating criminal proceedings. However, I consider it useful to harmonize the texts in this matter, in order to give coherence and clarity of the Criminal Procedure Code.

*What, in concrete terms, is the standard of proof required to bring criminal proceedings?*

Regarding the evidentiary standard, the doctrinal views are different. In a first opinion[4], for the purpose of initiating the action, a single standard must be considered, which must not be different from the one created for the prosecution and referral to the court with the resolution of the criminal action. Others also agreed with this opinion[5], considering that obviously the standard for moving must be higher than that required to continue the criminal prosecution, but significantly lower than that for ordering a solution of conviction, waiver or postponement of the application of the sentence, showing at the same time that the standard must correspond to that for the prosecution, in relation to the importance of moving the criminal action and to ensure the possibility of the prosecutor to exercise the criminal action before the court.

In another doctrinal opinion[6], it was shown that the evidence must create a reasonable suspicion that the defendant has committed the crime, as this concept is understood in the jurisprudence of the European Court of Human Rights, namely the existence of data, information that would convince an objective and impartial observer that the crime may have been committed by the defendant, in support of this opinion being made reference to another doctrinal interpretation[7] where it was shown that the circumstance that art. 309 para. (1) CPP refers to the existence of evidence, in the sense that a person has committed a crime, must not be interpreted as imposing the existence of a conviction of guilt of the nature necessary for prosecution, but as a simplified form of reference to the provisions of art. 15 CPP, in a different regulatory context. It has also been pointed out that in this regard it is also pleaded that, in order to take most preventive measures, it is necessary, on the one hand, to initiate the criminal action, as a prerequisite of form, and, on the other hand, the existence of reasonable suspicion, resulting from evidence, in the sense that the defendant has committed a crime. It was also pointed out that, if, when analysing the conditions required by law for initiating criminal proceedings, the provisions of art. 15 CPP were not given priority, the result would be the illogical situation in which the standards required for taking the preventive measure are lower than those required for initiating criminal proceedings,

[4] Gh. Mateuț, *Procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2019, p. 130.
[5] A.I. Negru, *Administrarea și aprecierea probelor în procesul penal*, Universul Juridic Publishing House, Bucharest, 2022, p. 432.
[6] A.V. Iugan, *op. cit.*, pp. 144-145.
[7] *Idem*, p. 145 (reference being made to M. Bulancea, A.M.Șinc, in M. Udroiu (coord.), *Code of Criminal Procedure*, p. 1732.

even though the latter is, by hypothesis, prior to the taking of the preventive measure. Finally, it was held that the evidence need not prove beyond reasonable doubt that the accused committed the offense, but must be stronger than in the case of the suspect.

Regarding the timing of the criminal action, I consider that from the point of view of the evidentiary standard, the evidence should be stronger than those envisaged by the criminal investigation bodies when ordering the continuation of the criminal investigation *in personam*, respectively at the time when a suspect is identified. I appreciate that the wording provided by art. 309 para. (1) *„when it finds that there is evidence to show that a person has committed the crime"* shows the intention of the legislator to have another level of evidence than the one envisaged at the time of assigning the status of suspect. The legislator no longer limits the standard of proof to a „reasonable suspicion" or a „reasonable assumption". I cannot agree with the opinion that the standard of proof should not be different from the one created for the prosecution and referral to the court for the settlement of the criminal action, as there are situations in which the moment of initiation of the criminal action may be more distant from the moment of drawing up the indictment and sending it to court, and during this period other evidence, perhaps more important and which proves and strengthens even more, the decision to send to court. In addition, according to art. 327 CPP, *„When he finds that the legal provisions guaranteeing the finding of the truth have been complied with, that the criminal investigation is complete and there is the necessary and legally presented evidence, the prosecutor: a) issues the indictment ordering the prosecution, if it results from the criminal investigation material that the deed exists, that it was committed by the defendant and that he is criminally liable"*. However, analysing this text, we find that in order to reach the final moment of the criminal investigation, namely for the prosecutor to assess the solution to be ordered in the case, namely for the prosecution, a full criminal investigation is needed to ensure the finding of the truth, and in practice, not always after the prosecution is initiated, the criminal prosecution becomes complete, even with the defendant in question, the criminal investigation bodies continue to give evidence, in order to ensure a full criminal prosecution and to strengthen the conviction that the solution is to be sent to trial.

The moment when the criminal action can be initiated and the positive condition stipulated by the provisions of art. 15 and art. 309 para. (1) CPP was the subject of analysis and in the judicial practice, the High Court of Cassation and Justice[8], in a case decision, noted regarding the evidence necessary to initiate the criminal action, on the one hand, that *"(...) by initiating the criminal action, the prosecutor formulates a criminal charge – in the autonomous sense enshrined by the provisions of art. 6 ECHR – against the suspect and thus decides to configure the appropriate procedural framework in order to bring him to criminal liability, giving rise to the criminal procedural report"* and, on the other hand, strictly at the request *of the evidence that „The evidence collected and presented in question by the criminal investigation bodies should be able to reveal for any objective and impartial observer, who assesses them, a reasonable (reasoned) assumption that a person has committed an offense – probable guilt in a criminal procedural sense – and that he can be held criminally liable for it. This requirement of substantial legality imposed by law on the indictment therefore reveals the existence of a genuine evidentiary standard regulated by the aforementioned legal provisions, distinct from the evidentiary standard beyond any reasonable doubt, inferior in level of exigency to the latter, applicable by the preliminary chamber jurisdiction vested to carry out the legality control of the indictment procedural act, in order to avoid arbitrariness in adopting a capital decision, which triggers the criminal liability procedural mechanism and creates one of the most important legal relationships in the criminal trial"*. Next, the High Court of Cassation and Justice pointed out, *with regard to the positive condition of the existence of evidence for the initiation of the criminal action, that „(...) the present case is of particular peculiarity, in the sense that, on the one hand, there is a final court decision finding that there is no evidence to show the reasonable suspicion of committing the offense of which the defendant was accused, and, on the other hand, that the Prosecutor's Office has not taken any probative action in relation to this finding that it has taken into account the dispensation of the jurisdiction competent to ensure the protection of fundamental rights in the criminal investigation phase, ignoring its mandatory nature"*. The court decision referred to by the High Court of Cassation and Justice, in this case, was a final conclusion of a Judge for Rights and Liberties by which it ruled on the taking of a preventive measure, respectively on the judicial control, rejecting this proposal motivated by the fact that the evidence adduced in the case does not support the accusations brought. Regarding this aspect, the panel of Preliminary Chamber Judges of the High Court of Cassation and Justice emphasized that *„This analysis carried out by the Judge for Rights and Liberties aimed at*

[8] HCCJ, Conclusion of 03.04.2024, available at *https://legislatiecomunitara.ro/EurolexPhp2014*, last consulted on 28.03.2025.

*assessing the condition of the evidence necessary to hold the existence of a factual basis for taking judicial control (there should be direct or indirect evidence from which the reasonable suspicion that a person has committed the crime arises). The concept of reasonable suspicion is thus analysed by the Judge for Rights and Liberties in relation to the meaning given by the jurisprudence of the European Court of Human Rights regarding the existence of data, information that would convince an objective and impartial observer that a person may have committed a crime"*. After an analysis of the considerations of the conclusion of the Judge for Rights and Liberties, the HCCJ concluded that *„(...) the conclusion of the Judge for Rights and Liberties and the considerations explaining the solution of this criminal jurisdiction were mandatory for the prosecutor regarding the assessment of the condition of evidence resulting in the reasonable assumption/suspicion of committing a crime"* and that this conclusion *„attests, by the coherence of its considerations, the lack of a reasonable appearance of probative basis necessary for the initiation of the criminal action and, consequently, the illegality of the procedural act issued by the prosecutor"*. Under these circumstances, the HCCJ considered that *„the condition of the evidence necessary for the initiation of the criminal action was implicitly invalidated by jurisdiction, such as to reveal the illegality of the initiation of the criminal action by which the prosecutor triggered the mechanism of criminal liability of the defendant"* and that *„(...) it was the prosecutor's duty, as ex officio, to supplement the evidence to remove, following an assessment, the doubts found by the Judge for Rights and Freedoms in connection with both the subjective side of the accusation and the objective typicality of the deed, doubts that affected the legality of the initiation of the criminal action by not fulfilling a mandatory condition provided by law".*

Another important aspect regarding the criminal investigation phase and the evidence presented in this procedural phase is the taking of preventive measures and the evidentiary standard necessary to be able to order a preventive measure. Obviously, preventive measures are restrictive measures of rights and freedoms and in order to take these measures, a comprehensive analysis of all the conditions imposed by law, including those relating to evidence, is necessary.

After analysing the conditions necessary for taking preventive measures, we noticed, in terms of the evidentiary standard, that the legislator is limited to indicating in art. 202 para. (1) CPP, in the matter of the general conditions for the application of *preventive measures that „Preventive measures may be ordered if there is evidence or reasonable indications that a person has committed a crime (...)"* and when analysing the special conditions in the matter of preventive arrest or house arrest, we note that the nuance *of the legislator is in the same sense, respectively „only if the evidence shows a reasonable suspicion that the defendant has committed a crime"*. The references that the legislator makes regarding the reasonable suspicion seem to conflict with another condition, namely that for preventive measures, except for detention, it is necessary to initiate the criminal action, respectively to acquire the status of defendant. From this point of view, there are inconsistencies, inconsistencies that give rise to important practical and doctrinal controversies. *De lege ferenda*, I consider it useful to harmonize the texts of the Criminal Procedure Code so that there are no ambiguities regarding the standard of proof when taking preventive measures. I consider such adaptation useful and urgent, in order to leave no room for interpretations in judicial practice on this issue.

Regarding the concept of „solid indications" existing in the provisions of art. 202 para. (1) CPP, I am of the opinion that it should be considered obsolete. This concept was used in CPP 1968, where art. $68^1$ it was provided that *„There are solid indications when the existing data in question show the reasonable assumption that the person against whom preliminary acts or acts of criminal prosecution are carried out has committed the deed"*. In the current regulation, the concept has been maintained but its definition has been abandoned. It is wrong to keep this concept. The doctrine in the matter[9] considers that the solid clues are reminiscent of the previous Criminal Procedure Code, being obsolete and anachronistic. An argument that would support the obsolescence of sound indications, highlighted by the literature, is provided by the corroborated interpretation of art. 203 and art. 305 para. (3) CPP. Art. 203 para. (1) CPP shows that the measure of detention can be taken both against the suspect and the defendant, while the rest of the preventive measures can be taken only against the defendant. Art. 305 para. (3) CPP regulating the continuation of the criminal investigation against the suspect requires as a positive condition the existence of evidence showing a reasonable suspicion that a person has committed the act for which the criminal investigation was initiated. However, analysing these legal provisions, the literature considered that if preventive measures can be taken only against the suspect or defendant, as the case may be, and in order to continue the criminal investigation against the suspect, the law imposes the positive condition

[9] A.I. Negru, *op. cit.*, p. 435.

of the existence of evidence showing a reasonable suspicion that a person has committed the act, it can be concluded that the solid indications are not sufficient for the judicial body to be able to order a preventive measure, regardless of what it may be.

I agree with this doctrinal opinion, as it is obvious that the legislator intends to take into account the evidence exclusively in the current Criminal Procedure Code. Maintaining solid indications in art. 202 para. (1) CPP is useless, the corroboration of the current texts of the code making them inapplicable.

Another concept attributed by the legislator to evidence when taking preventive measures is „reasonable suspicion". Before discussing the concept of „reasonable suspicion" and the practical interpretation of this concept, it is necessary to state from the outset that, in my opinion, as regards the evidentiary material necessary for the ordering of a preventive measure, especially for pre-trial arrest and house arrest, it cannot be inferior to the one who determines the quality of suspect. I consider that for the preventive measures that can be taken against the defendant, even if the legislator speaks of „reasonable suspicion", a higher standard of evidence is required than the one that generated the acquisition of the quality of suspect. In this situation, the evidence may not be less than that envisaged when the criminal action was initiated. The current form of the Criminal Procedure Code leaves to the judicial body the criteria for assessing evidence in this matter, being a case-by-case assessment, in relation to the object of the investigation and the concrete situation of the case.

Regarding reasonable suspicion, it is obvious that in the absence of a definition of what "reasonable suspicion" means, there are ambiguous interpretations in judicial practice.

In this regard, the Constitutional Court by Decision no. 10/2016 noted about[10] the concept of "reasonable suspicion" that it *„(...) must be analysed in close correlation with that of reasonable suspicion, as preventive measures, less detention, can be ordered only to the suspect or defendant. In this respect, according to art. 305 para. (3) CPP, the acquisition of the status of suspect is conditioned by the criminal procedural norms, by a certain level of evidence that of the existence of a reasonable suspicion that the person concerned has committed the deed that is the subject of the criminal investigation. Also, acquiring the quality of defendant is conditional, according to art. 309 para. (1) CPP, the existence of evidence showing that the offence for which the criminal action was initiated was committed by that person"*. Also in its recitals, the Court noted that *„Obviously, the reasonable suspicion formed on the basis of such evidence must not have the same force as that which causes the conviction. Unlike the evidence underlying a conviction, which must be incontrovertible and from which it must result, beyond any reasonable doubt, the conclusion that the defendant has committed the crime for which he is tried, the standard of probation necessary to acquire the above-mentioned procedural qualities and to order preventive measures is that of the ability to determine the formation of a suspicion or suspicion. The latter must, however, be reasonable. As the concept of reasonable does not benefit from a specific definition of criminal law or criminal procedure, the Court held that the legislator took into account the common, proper meaning of the term. Therefore, the meaning of the phrase reasonable suspicion means the existence of evidence on the basis of which, using a balanced, natural reasoning, devoid of exaggerations, the plausible conclusion that the suspect or defendant has committed a crime can be drawn"*. At the same time, the Constitutional Court underlined that *„both the addressees of the criminal procedural law and the bodies called upon to apply it may determine the meaning of the concept of reasonable suspicion, a phrase whose concrete content will be established, according to those retained by the European Court of Human Rights and the Constitutional Court, depending on the circumstances of each case"* referring in this regard to *„a strong belief of the judicial body that the suspect or defendant has committed the acts that are the subject of criminal prosecution or judicial investigation"*.

Interesting and noteworthy are the Court's considerations according to which *„the reasoning for taking pre-trial supervision measures must be made in such a way that it does not imply to the person concerned or to a third party that the judge is certain of the guilt of the person still on trial. The European Court of Human Rights considered that a distinction should be made between judgments reflecting the feeling of guilt of the accused person and those that merely describe a state of suspicion (...) Moreover, the European Court of Human Rights held that the preliminary assessment of the data in the file cannot signify an influence on the final decision, which is of interest that this final assessment be made at the time of taking the decision and be based on the elements of the file and the debates at the hearing"*.

[10] Published in the Official Gazette of Romania no. 284/30.05.2018.

In the practice of the courts, in a case decision[11], it was noted that *„The delivery of an acquittal solution by the court of first instance and appeal, based on the provisions of art. 16 para. (1) section c) CPP, does not ipso facto lead to the assessment that preventive measures (judicial control, preventive arrest and preventive house arrest) successively extended until 19.12.2017, constitute unlawful deprivation of liberty of the defendant"*. In support of this, it was stated that *„both in national law and in the settled case-law of the European Court of Human Rights it has been held that the standard of probation for taking a preventive measure is not identical to that for convicting an accused, so the facts giving rise to reasonable suspicion justifying the arrest of the person concerned should not be at the same level as those necessary to identify a conviction or substantiate a charge, which will be proved at the stage of the criminal prosecution against that person and even of the judicial investigation"*. The court also mentioned that *„In this regard, the European court also assessed the absence of indictment or prosecution of a person subject to preventive measures, noting that in these situations it cannot be assumed that a deprivation of liberty ordered in the light of legitimate suspicions of committing crimes would not be consistent with the purpose provided by art. 5 para. 1 lit. c) of the Convention (Case Murray v. the United Kingdom, Brogan et al. v. the United Kingdom)"*.

It is important to emphasize, in view of the specificity of the problem raised in this case, that the court wanted to mention that *„The taking of new evidence during the trial on the merits and on appeal or the modification or even the removal of evidence cannot substantiate the unlawful nature of the preventive measures that took into account the solid evidence and indications existing at the time of their taking and whose standard was lower than the evidence envisaged when the acquittal was pronounced. Moreover, some of the evidence that substantiated the accusations brought against the defendant but were assessed in the existence of the legitimate suspicion of committing the facts were removed by the Court of Appeal, following the decisions of the Constitutional Court (...)"*.

Finally, evidence is important in the analysis of preventive measures, as it is the task of the judicial bodies to interpret and assess on the basis of objective criteria if there are reasonable grounds to suspect that the person against whom the preventive measure is requested is the one who committed the act. Obviously, in addition to these reasons related to the assessment of evidence, preventive measures must be analysed from other perspectives, proportionality, necessity or public interest. In analysing the condition of the evidentiary standard, the criminal investigation material must contain facts and information capable of convincing an objective observer that the person concerned has committed the crime. As I have pointed out, there are no clearly defined criteria to help the judicial bodies to assess this evidentiary standard, but I believe that at the stage of criminal prosecution, the judge of rights and freedoms should assess the material of criminal prosecution, analysing it turn by turn, examining the evidence and checking it. The judge of rights and freedoms should not simply read the prosecutor's report, which may have a different interpretation of the standard of proof. I am of the opinion that an intervention of the legislator is required in this matter, on these aspects, given the interpretations of the courts and the contradictions encountered in the judicial practice, contradictions even between the court of first instance and the court of judicial control which most often appreciate this condition differently.

### 2.2. Taking and assessment of evidence by criminal investigation bodies

After having analysed the standard of proof according to each moment of the criminal prosecution phase and after having reviewed some aspects of the analysis of the condition of evidence when taking preventive measures, it is necessary to analyse in concrete terms how the prosecution bodies collect evidence during the criminal prosecution phase and how the evidence is assessed by the prosecution bodies.

According to art. 5 CPP: *„(1) The judicial bodies have the obligation to ensure, on the basis of evidence, the finding of the truth regarding the facts and circumstances of the case, as well as regarding the person of the suspect or defendant. (2) The criminal investigation bodies have the obligation to collect and present evidence both in favour of and to the detriment of the suspect or defendant. The rejection or non-consumption in bad faith of the evidence proposed in favour of the suspect or defendant shall be sanctioned in accordance with the provisions of this Code"*.

[11] HCCJ dec. no. 157/A/22.06.2020, available at *https://legislatiecomunitara.ro/EurolexPhp2014*, last consulted on 28.03.2025.

This article, which regulates the principle of finding the truth, a principle of criminal procedural law, around which the entire criminal process revolves, imposes on the judicial body a certain conduct that it is to adopt during the criminal trial, regardless of the procedural phase it is in.

This study will be limited to analysing from the perspective of the existing principles and rules in the field of evidence, the conduct of the criminal investigation bodies in the criminal investigation phase. This analysis is important given, on the one hand, the purpose of the criminal investigation phase and, on the other hand, the way in which this purpose is achieved in judicial practice.

When analysing this topic, we must start from two important aspects: 1) the guilt is established in a trial, in compliance with the procedural guarantees and 2) the burden of proof lies with the judicial bodies, which is why the interpretation of the evidence is made at each stage of the criminal trial, the conclusions of a judicial body not being mandatory and final for the next phase of the trial.

Then, we must not forget that in criminal proceedings, evidence is presented taking into account the principle of freedom of evidence, legality and loyalty of evidence. With regard to the matter of evidence, the Criminal Procedure Code regulates a number of conditions regarding the way in which the judicial bodies must act in order to collect and present evidence both in favour of the suspect or defendant and to his disadvantage, and the essence of the legality of the taking of evidence in criminal proceedings is the compliance of the activities carried out by the judicial bodies in the activity of gathering evidence with the rules governing the evidentiary procedure followed. The sanction of non-compliance with the legal provisions governing the way of obtaining the evidence is the exclusion of the evidence.

Also, an important aspect in the criminal investigation phase is the way in which the evidence is assessed by the judicial bodies and the effects of this assessment when adopting procedural measures or even when taking solutions.

Regarding the actual taking of evidence, an important aspect in the criminal investigation phase is the stage in which the criminal investigation is carried out in relation to a person, suspect or defendant, as the Criminal Procedure Code establishes, in art. 306 CPP, the obligation of the criminal investigation bodies to collect and present evidence both in favour and against the suspect or defendant. Moreover, the Criminal Procedure Code regulates among the rights of the suspect and the defendant the right to propose the taking of evidence by the judicial bodies and according to art. 100 para. (3) CPP, the request regarding the taking of evidence formulated during the criminal investigation is admitted or rejected, motivated, by the judicial bodies.

However, judicial practice has shown over time that the way evidence is presented in criminal cases does not always meet legal standards, being often contrary to the principles and rules of criminal procedure, the taking of evidence being often a way of violating the principle of the right to a fair trial, the criminal investigation bodies being sanctioned in the preliminary chamber stage by excluding evidence obtained illegally and by returning the case to the prosecutor's office.

In this regard, in judicial practice, we have noticed, for example, that the criminal investigation bodies, especially in the case of damage offenses, order from the stage of criminal prosecution *in rem*, the performance by the specialists within the prosecutor's offices of which they are part of, of finding reports in order to establish a possible damage in question. Through these finding reports, the criminal investigation bodies actually obtain an expertise to which the parties do not have the opportunity to formulate expertise objectives or possible objections. This finding report is not one to be carried out taking into account the provisions of art. 172 para. (9)-(12) CPP. Then, according to this finding report, the accusation is made and the damage is established to order the prosecution. Such an approach of the criminal investigation bodies contravenes the right to a fair trial, given that, at the stage of the criminal investigation, a true expertise is carried out under the title of a finding, obtaining assessments and explanations on facts without respecting the right of defence of the main procedural subjects or of the parties.

By means of this evidentiary procedure, the fixing of facts that can be the subject of evidence is carried out and there is a risk of their disappearance or change of factual situations, or it is necessary to urgently clarify some facts or circumstances of the case, without, however, pursuing a complex assessment of them in order to obtain a detailed scientific explanation. However, this approach of the criminal investigation bodies is illegal and unfair, given that, as we have shown, the ordinance of the criminal investigation bodies establishes the true objective specialists and hypotheses aimed at assessing and scientifically explaining a factual situation, exceeding the limits stipulated by the legislator for obtaining a finding and restricting the right of defence of the suspect or defendant. Moreover, the obtaining and use of such evidence, in order to take certain procedural

measures, such as precautionary measures or even preventive measures, seriously affects the guarantees of the right to a fair trial.

Another important aspect to consider is the situation in which the criminal investigation bodies, after the denunciation in question is formulated, use the whistleblower as a factual collaborator to obtain evidence against the defendant. Regarding this situation, the previous dec. no. 64/02.10.2023 where the HCCJ established that, *„in the procedure provided for by art. 148 para. (3) CPP, as well as by art. 150 para. (5) CPP, the referral to the Judge for Rights and Freedoms in order to issue the technical surveillance warrant is mandatory if the prosecutor deems it necessary that the investigator be able to use technical recording devices, even if there is a technical surveillance warrant of the same nature previously issued, these legal provisions establishing a special procedure, derogating from the provisions of art. 139 CPP".* I consider that this decision is also applicable to the collaborators, under the conditions provided by art. 148 para. (10) related to art. 148 para. (2) and (3) CPP. In judicial practice, we have identified situations in which the criminal investigation bodies have used such persons, as factual collaborators, who have themselves recorded conversations with the defendants, without there being a warrant from the Judge for Rights and Freedoms for the use by the collaborator of the technical recording devices.

Regarding the timing of the assessment of evidence, in the literature[12], it was noted that the assessment of evidence is the set of intellectual processes for the assessment of all evidence presented by the judicial bodies in order to find out the truth in a criminal case, in this framework, the criminal investigation bodies are obliged to clarify in all aspects the criminal case, based on evidence, in order to reconstruct the truth. This activity is governed, as I said, by the principle of free assessment of evidence, according to which the judicial bodies have the right to freely assess both the value of each piece of legally presented evidence regardless of the procedural phase in which they were presented and their credibility. The evidence does not have an a *priori* value established by the legislator, their importance resulting from their assessment by the judicial bodies following the analysis of all the legally and loyally presented evidence in question.

In the criminal investigation phase, the activity of assessing the evidence belongs to the criminal investigation bodies, the criminal investigation bodies and the prosecutor. Obviously, in this procedural phase, an assessment of the evidence may include a Judge for Rights and Freedoms when invested with a proposal to take a preventive measure involving deprivation of liberty, assesses the condition of the evidence, the reasonable suspicion that the person concerned has committed the crime and a restrictive measure of rights is required against him. Often the criminal investigation bodies proceed to an assessment of the evidence when it is necessary to continue the criminal investigation against a particular person, when the criminal action is initiated, when a preventive measure is requested and most importantly when a solution is ordered at the end of the criminal investigation phase. For example, ordering a solution to waive prosecution involves the analysis and assessment of evidence by the criminal investigation bodies, in order to establish that the case in question, in relation to the criteria established by art. 318 CPP, there is no public interest in pursuing the deed. Then, the assessment of the evidence is of the essence of establishing the case of classification, being provided in art. 16 para. (1) section c) CPP the impediment according to which there is no evidence that a person has committed the deed. However, in order to reach this conclusion, the criminal investigation bodies must assess the criminal investigation material.

An interesting topic, encountered in judicial practice and analysed in the literature, is the polygraph test. Although the polygraph test is not perceived as evidence but, at most, as having the value of a clue, however, in certain cases, the prosecution proceeds to such testing.

The expertise for the detection of simulated behaviour consists in the evaluation made, by using the technique, by a specialist/expert of the effects that stress produces on the nervous system revealed by changes in heart or respiratory rhythm, or blood pressure as well as sweating or pupil dilation.

In this analysis, the tested person is asked three categories of questions (control, relevant and irrelevant), and then the answer to them is compared.

In the literature[13], it has been appreciated, on the one hand, that the comparative law analysis reveals that the polygraph test is in principle rejected as evidence in most jurisdictions, just as the possibility of hearing under hypnosis or by using the "truth serum" procedures considered equally unfair in Romanian procedural law is not

[12] M. Udroiu, *Sinteze de Procedură penală. Partea generală*, vol. I, 5th ed., C.H. Beck Publishing House, Bucharest, 2024, p. 630.
[13] *Idem*, p. 646.

allowed, and on the other hand, that the establishment of the factual situation cannot be determined by using a technical means that cannot be considered infallible, given that the result of the polygraph test may be influenced by the unreliability of the technique used, by the deficiencies in the formulation of the questions or by the professional skills of the specialist/expert.

However, the literature considered that[14] the rejection of the probative value of the polygraph or special caution in assessing its result is justified when the lie detector is invoked by the prosecution as a proof *in peius*. In this regard, reference is made to the case where the suspect or defendant, who had a found position of rejection of the accusations, claiming his innocence, requested the polygraph test and its result confirms his previous claims, considering that the judicial bodies must reflect deeply on the evidentiary effects of this means. However, from the refusal to take the polygraph test no conclusions can be drawn as to the guilt of the accused, without prejudice to the right to silence and the privilege against self-incrimination enjoyed by him.

With regard to the polygraph text[15], judicial practice has established that „the result of the polygraph test can only constitute an indication, which must be corroborated with other certain evidence, even if not necessarily direct, capable of substantiating, beyond reasonable doubt, a solution of conviction". At the same time, it was considered that, „regarding the probative value of the simulated behaviour test result, as shown in the literature, from a psychological point of view, it is considered that the current polygraph records are relatively imperfect, the indicators used in the detection of dishonesty being dependent on the emotional manifestations, the form in which the simulation and the peripheral path of its highlighting are manifested". It was also considered that, „from a criminal procedural perspective, the testing of sincerity, using polygraph techniques, is not part of the means of evidence provided by law, nor does it fall among the ways of hearing the defendant. Much less can it be conclusive that a person refuses to submit to such a test, in the sense of characterizing it or its statements as insincere".

As far as I am concerned, I appreciate that the polygraph test is not evidence and the prosecution cannot use such a means to find clear grounds to support an accusation. I am of the opinion that this testing cannot provide the prosecution or any judicial body with honest information, given that it has often been considered that the persons examined can conceal their behaviour in order to obtain a result that is favourable to them. Yes, we could discuss a clue for the prosecution, but not a genuine source of investigation. The result of this test can be analysed but cannot be included in the category of evidence that can then be assessed by the judicial bodies or corroborated with other evidence.

Also, regarding the evidence management activity, an important aspect on which I wanted to dwell is the exclusion of illegally obtained evidence and the competence of the criminal investigation bodies to directly exclude this evidence, before the preliminary chamber phase. According to art. 102 CPP, the evidence obtained illegally cannot be used in the criminal trial and the nullity of the document by which the taking of evidence was ordered or authorized or by which it was presented determines the exclusion of the evidence, as well as the removal from the case file of the means of evidence corresponding to the excluded evidence. It has been shown in the literature that the criminal investigation bodies may exclude certain evidence when they find that it has been obtained unlawfully. In this regard, it was also shown that the exclusion of evidence obtained unlawfully during the criminal investigation may be requested by any of the main procedural subjects or by the parties throughout the criminal investigation and the prosecutor, *ex officio* or by means of the complaint formulated according to art. 336 CPP may order the exclusion of evidence.

Finally, the activity of evidence taking is the most important activity of the criminal investigation bodies, but the judicial practice shows us that the criminal investigation bodies deviate from complying with the conditions of evidence taking, obtaining either evidence that cannot be used in the criminal trial because they are flawed, or the standard of proof obtained is not likely to support a conviction solution. The most important moment of the criminal investigation phase is, of course, the assessment of the evidence obtained, at which time the criminal investigation bodies analyse the need to order certain solutions in question, but the assessment of the evidence must be made within clear, objective and circumstantial limits, so that the purpose of the criminal investigation is achieved.

[14] *Idem*, p. 648.

[15] CA Bucharest, 2nd crim. s., dec. no. 689/A/07.05.2015, *apud* M. Udroiu, *op. cit.*, pp. 648-649.

## 3. Conclusions

The taking of evidence in the criminal investigation phase involves extensive and important discussions. As we have shown in the judicial practice, there is a real challenge for the prosecution bodies and not only to analyse the standard of proof. Each stage of the criminal investigation has an exact reference to the criminal investigation material, each measure ordered by the criminal investigation bodies is made by reference to the evidence. What is important throughout this evidence collection process is the observance of the principles that dominate the matter and of course the procedural guarantees. What is important is that in the end the prosecution is based on evidence that has been obtained in strict compliance with the conditions of evidence taking. Each evidentiary procedure must provide clear, coherent, legal and truthful evidence. As I was saying, the entire criminal process revolves around evidence and the principle of finding the truth, and the criminal investigation phase represents in my opinion the basis in the matter of evidence, on the one hand, from the purpose of this phase and, on the other hand, from the possibility of the criminal investigation bodies to be in the midst of them, to be closer to the evidence through the levers offered by the Criminal Procedure Code.

Through this paper, I tried to provide a vision on this topic, analysing in detail the applicable rules of law, doctrinal and jurisprudential interpretations. This theme can be even broader, more developed, and can be topics that obviously give rise to curiosity or criticism. However, I chose to relate to a few aspects that caught my attention and curiosity in carrying out my professional activity.

I appreciate that some rules of the Criminal Procedure Code that are closely related to the chosen theme must be reformulated, we need a harmonization of the legal provisions to avoid non-unitary interpretations and practices. Perhaps an important emphasis of the legislator should be placed on the matter of preventive measures, on the role of evidence in the analysis of the disposition or not of a restrictive measure of rights. I am of the opinion that the Judge for Rights and Liberties, in the criminal investigation phase, when he has to analyse the need for taking a preventive measure, may reject such a proposal if the criminal investigation material would result in a suspicion of unlawful taking of evidence. This does not mean that verifying the legality in this way would go beyond its function and exercise a specific control of the Preliminary Chamber Judge, such an approach would guarantee the security of the legal relationship and the observance of the procedural guarantees, in the context of preventive measures being restrictive measures of rights and freedoms.

Finally, following the study, we found that the matter of evidence, although it gives rise to scientifically interested discussions, leaving room for multiple topics of debate, in practice, however, the taking of evidence is a real challenge, not only for the criminal investigation bodies but also for the main procedural subjects or for the parties who have the possibility to propose from this procedural phase evidence that will give them the chance to find out the truth and to prove whether the accusation is substantiated or not.

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