THE ACCOUNTING EXPERT REPORT AS A CONDITION OF REGULARITY OF THE INDICTMENT IN TAX EVASION CASES: LIMITS OF THE PRELIMINARY CHAMBER PROCEDURE AND CONSEQUENCES OF THE NORMATIVE ARCHITECTURE OF ART. 10 OF LAW NO. 241/2005

George-Gabriel BOGDAN[*]

Abstract

Decision HP no. 430/2025 of the High Court of Cassation and Justice (HCCJ) establishes with binding force that the failure to conduct a specialised accounting expert report in tax evasion cases renders the indictment irregular, attracting the remittal of the case to the prosecutor. The purpose of this article is to demonstrate that this solution represents the interpretation that best ensures the coherence of the normative architecture of Art. 10 of Law no. 241/2005 for the prevention and combating of tax evasion, as amended by Law no. 126/2024. The article pursues four objectives. First, it anchors the decision in the legislative history of Art. 10, reconstructed through HP no. 69/2023, demonstrating that the need for an objective standard for determining the damage is a recurring problem that has required repeated legislative and judicial intervention. Second, it delimits the tripartite of evidentiary instruments available in tax evasion cases — the ANAF tax inspection report, the technical assessment report, and the judicial expert report — showing that only the latter satisfies the requirement of Art. 10(2). Third, it proposes the systematic category of mandatory evidence with substantial effect, which the HCCJ implicitly created without naming it, and applies it to resolve two gaps left open by Decision HP no. 430/2025: the applicability of the expert requirement to the non-punishment grounds in Art. 10(3), and the constitutional implications of the absence of transitional provisions in Law no. 126/2024. Fourth, it develops a classification of pending cases into three categories and identifies the available remedies in the trial phase for cases that have already passed the preliminary chamber without an expert report.

Keywords: *preliminary chamber, irregular indictment, accounting expert report, tax evasion, temporal application.*

1. Introduction

On 15 December 2025, the Panel for the Resolution of Legal Issues in Criminal Matters of the High Court of Cassation and Justice pronounced Decision HP no. 430/2025[1], establishing that the failure to draw up a specialised expert report in tax evasion cases renders the indictment irregular and attracts the remittal of the case to the prosecutor. Binding from 26 February 2026, the decision put an end to a deeply fragmented practice in which more than half of the courts of appeal had adopted contrary positions. This article analyses the decision within the framework of four questions that the specialized literature has not yet addressed in a systematic manner.

(1) What matter does the paper cover? The paper covers the interpretive construction through which the HCCJ qualified the omission of the expert report as an irregularity of the indictment, the gaps left open by that construction, and the temporal application of the decision to cases pending at different procedural stages on the date of its publication. The qualification of the omission of the expert report as an irregularity of the indictment is not expressly provided by law — it is an interpretive construction of the HCCJ, deduced through the correlation of the evidentiary norm with Arts. 327 and 342 of the Code of Criminal Procedure (CPC). This article adopts, supports, and completes that construction.

(2) Why is the studied matter important? The decision affects a very large number of pending cases — all tax evasion prosecutions brought after 13 May 2024 without a specialised expert report, as well as all cases in which the defendant may invoke the more favourable law introduced by Law no. 126/2024. Beyond its immediate impact, the decision creates a new procedural category — mandatory evidence with substantial effect

[*] Assistant Professor, PhD Candidate, Faculty of Law, „Nicolae Titulescu” University of Bucharest, Judge - Prahova Tribunal – Criminal division (e-mail: george.bogdan@univnt.ro).

[1] Published in the Official Gazette of Romania, Part I, no. 149 of 26 February 2026.

— that may generate further case law in domains beyond tax evasion. Its correct understanding is essential for prosecutors, preliminary chamber judges, trial judges and defence counsel alike.

(3) How does the author intend to answer to this matter? The article employs a systemic coherence argument: it examines the alternative interpretive variants and shows that each produces consequences incompatible with the effective purpose of the law or with other imperative procedural norms. It further proposes the systematic category of mandatory evidence with substantial effect, defined by three cumulative conditions, as the instrument that best explains the HCCJ's decision and resolves its remaining gaps. A comparative perspective covering four systems — Italian, German, French, and British — contextualises the Romanian solution within the broader landscape of evidentiary standards in tax criminal law.

(4) What is the relation between the paper and the already existent specialized literature? Decision HP no. 430/2025 was pronounced in December 2025 and published in February 2026, leaving virtually no time for sustained academic analysis before the present article. The existing commentary is confined to practitioner notes and preliminary analyses. The article builds on the legislative history reconstructed by HP no. 69/2023 of the HCCJ,[2] the constitutional case law of the CCR — in particular Decisions no. 867/2021[3] and no. 146/2024[4] — and the author's own judicial practice,[5] which is used exclusively as practical illustration, not as primary argumentative authority. The article is structured as follows: after reconstructing the legislative history and comparative framework (Section 2), it analyses the structural constraints that make the expert report necessary in the investigation phase (Section 3), critically evaluates the HCCJ's arguments (Section 4), examines the admissibility of the referral (Section 5), identifies the gaps in the decision (Section 6), proposes solutions for the temporal application of the decision (Section 7), and concludes with de lege ferenda proposals (Section 8).

2. Legislative framework, paradigm shift, and comparative perspective

2.1. The legislative history of Art. 10 — a norm in continuous reform

Art. 10 of Law no. 241/2005 has undergone four substantial modifications in less than twenty years, each reflecting a change of vision regarding the relationship between the recovery of the tax damage and the mitigation of criminal liability. HP no. 69/2023 of the HCCJ has already reconstructed this trajectory,[6] furnishing a source of authority for the present analysis.

In its initial 2005 form, Art. 10(1) provided for reduction by half of the penalty limits if the accused covered the damage in full before the first hearing. The norm contained no provision on how to determine the damage — a gap that generated a subjective and variable standard, at the discretion of the investigating authorities.[7] Through Law no. 255/2013, the phrase "damage caused" was replaced by "the civil party's claims" — a modification with paradoxical consequences. The Constitutional Court declared this phrase unconstitutional through Decision no. 867/2021,[8] holding that it contravened the right to a fair trial and the principle of equality. Law no. 55/2021 returned to the criterion of the damage caused, but without resolving the problem of the evidentiary standard. This gap — the damage established by the prosecutor on the basis of the file documents, without procedural guarantees for the defendant — is precisely the one that Law no. 126/2024 sought to correct.[9]

As the HCCJ held in HP no. 69/2023, "the intertwining of criminal law with tax and procedural tax law in configuring the content of tax evasion offences, as well as the way in which the content of Art. 10 of Law no. 241/2005 has evolved over time, required repeated intervention by the Constitutional Court and the High Court

---

[2] Law no. 126/2024 on certain measures for strengthening the capacity to combat tax evasion, published in the Official Gazette of Romania, Part I, no. 437 of 13 May 2024.

[3] HP no. 430/2025, par. 68.

[4] HP no. 430/2025, par. 75.

[5] HP no. 430/2025, par. 76 and 93.

[6] HP no. 430/2025, par. 86.

[7] Criminal judgments no. 30 and no. 38 of 2026, pronounced by Prahova Tribunal, not final at the time of writing.

[8] CCR Decision no. 1.084 of 8 September 2009, published in the Official Gazette of Romania, Part I, no. 665 of 6 October 2009.

[9] CCR, Decision no. 1.084/2009: "The amount of the damage caused is that which results from the documents in the file, namely from the indictment or from the financial-accounting documents existing in the file. [...] The concrete determination of the damage caused falls, in the investigation phase, to the case prosecutor." The formula was confirmed in CCR Decision no. 867/2021, par. 31, and cited in HP no. 430/2025, par. 37.

of Cassation and Justice."[10] Each intervention signalled the same structural deficit: the absence of an objective standard for determining the damage.

2.2. The paradigm shift produced by Law no. 126/2024

Law no. 126/2024 responded to this structural deficit by introducing a unique objective evidentiary standard: the specialised expert report. Art. 10(2) now provides that "the damage shall be determined on the basis of a specialised expert report", with express reference to Arts. 172-180 CPC.[11] The Constitutional Court, in Decision no. 146/2024,[12] characterised Law no. 126/2024 as representing a transition from retributive theories of criminal law toward modern theories, according to which the main objective in economic crime cases is the recovery of illicitly obtained assets.[13]

The change is not merely formal. By introducing the expert report as the mandatory standard, the legislator transformed the determination of the damage from a matter of unilateral discretion of the investigating authorities into a technical operation subject to the procedural guarantees of Arts. 172-180 CPC. Non-compliance with this standard raises a problem of legality — and the manner in which the HCCJ qualifies this problem is the central subject of Section 4.

2.3. The dual dimension of Art. 10 and its normative implications

As the HCCJ held in HP no. 69/2023, in tax evasion cases "the determination of the damage constitutes an essential element for the legal classification of the criminalised act, while its coverage constitutes an essential element for establishing the conditions of legal liability."[14] This dual dimension — Art. 10 is simultaneously a norm of substantive law (the causes for reduction or elimination of the penalty) and a procedural norm (the conditions and method for determining the damage) — is the pivot of the entire argument in this article.

The new regulation introduces a complex architecture structured on two distinct paragraphs. Art. 10(2) regulates three hypotheses for reduction of the penalty: reduction by half if the damage is paid in full before the first hearing; application of a fine if the damage is up to EUR 1,000,000 and is covered before the first hearing; reduction by one third if the damage is paid before the final resolution. Art. 10(3) regulates three grounds of non-punishment, differentiated according to the procedural phase and the applicable percentage surcharge.

2.4. A comparative perspective: four systems, four solutions, one conclusion of systemic coherence

Comparative law is useful not to confirm the solution of HP no. 430/2025 — which is a national legislative policy choice — but to clarify the stakes of that choice through contrast with alternative solutions adopted by comparable legal systems.

In the Italian system, the criminal court itself determines the amount of tax evaded, "proceeding ex officio to the necessary verifications, possibly by recourse to presumptions of fact."[15] The Italian Court of Cassation has held that the criminal court cannot use the tax authority's presumptions and is not bound by the Agenzia delle Entrate's calculations.[16] Italy also knows a non-punishment ground through settlement of the tax debt (Art. 13 D.lgs. 74/2000[17]) — structurally analogous to Art. 10 of Law no. 241/2005 — but without imposing the judicial expert report as the mandatory standard in the investigation phase. The difference in solution reflects not a difference of principle but one of procedural architecture: in the Italian system, the active judge corrects the evidential deficiencies of the investigation, whereas in the Romanian system, the preliminary chamber functions as a filter preventing the transfer of those deficiencies to trial.

---

[10] CCR Decision no. 867 of 14 December 2021, published in the Official Gazette of Romania, Part I, no. 325 of 1 April 2022.

[11] CCR Decision no. 146 of 19 March 2024, published in the Official Gazette of Romania, Part I, no. 496 of 29 May 2024.

[12] HP no. 430/2025, par. 84; CCR Decision no. 146/2024.

[13] HP no. 69/2023, par. 79: "The intertwining of criminal law with tax and procedural tax law in configuring the content of tax evasion offences, as well as the way in which the content of Art. 10 of Law no. 241/2005 has evolved over time, required repeated intervention by the Constitutional Court and the High Court of Cassation and Justice."

[14] HP no. 430/2025, par. 88: "Such evidence may be administered during the criminal investigation or in the trial phase, but not within the preliminary chamber procedure, since it concerns the merits of the case."

[15] HP no. 430/2025, par. 94-95: the HCCJ deduces the irregularity of the indictment from the omission of the expert report through correlation with Arts. 327 and 342 CPC, building on the dual nature of the norm in Art. 10(2). The qualification as "implicit condition of validity" belongs to the HCCJ, not to the explicit text of the law.

[16] Art. 345(2) CPC corroborated with Art. 346(3)(a) CPC.

[17] Art. 346(3)(a) CPC.

The German system adopts a similar approach. The Bundesgerichtshof has held that the criminal court may estimate (Schätzung) the tax bases when the amount of evaded tax is uncertain, provided the estimation is exhaustively reasoned in the judgment,[18] and that the criminal court cannot automatically adopt the tax authority's (Finanzamt) calculations but must verify them independently, applying the in dubio pro reo principle.[19] There is no obligation of judicial expertise in the investigation phase under § 370 AO[20] — a model of the "active fiscal judge" that has no counterpart in the Romanian system post-CPC 2010.

The French system presents a relevant procedural particularity: the existence of tax fraud "cannot be inferred from mere evaluations made by the administration according to its own procedures, but must result from the findings of the judges extracted from elements subjected to contradictory judicial debate."[21] The expert report appears in the French system as a judicial instruction act, ordered by the investigating judge at the judge's discretion depending on the complexity of the case[22] — not systematically obligatory.[23]

The British Tax Tribunal confirms that the determination of the fiscal damage is a matter that, through its complexity, requires specialist expertise. The Tribunal has held that a fact witness's statements cannot contain inferences, conclusions or opinions on technical matters[24] and has accorded precedence to expert evidence over HMRC's administrative positions where complex valuation methodologies are involved.[25]

The comparative tableau shows systematic diversity: Italy and Germany place damage determination at the trial court (active); France at the investigating judge (discretionary); the United Kingdom at the trial court through expert evidence (as a rule of prudence, not a formal obligation); Romania at the investigating authorities (obligatory by law). No solution is universally superior; each is coherent with its own procedural architecture. The Romanian model distributes the risk of evidential insufficiency to the prosecutorial authorities — more favourable to the defendant, who will know the amount to pay before the legal deadline expires — but more costly for the prosecutorial system and more susceptible to case remittals.

3. Structural constraints: why the expert report in the Investigation Phase is the interpretation ensuring systemic coherence

The central argument of this article is one of systemic coherence: the alternative interpretive variants each produce consequences incompatible with the effective purpose of the law or with other imperative procedural norms.

3.1. Variant I — the expert report can be administered in the preliminary chamber

This variant is excluded by an express norm of criminal procedure. Art. 342 CPC defines the object of the preliminary chamber procedure as verification of "the legality of the referral to the court [...] of the

---

[18] Cass. pen., Sez. III, sent. n. 44170 del 3 novembre 2023 — the Court held that "*ai fini della configurabilità del reato di omessa dichiarazione di cui all'art. 5 d.lgs. 74/2000, non può farsi ricorso alle presunzioni tributarie, in quanto spetta al giudice penale la determinazione dell'ammontare dell'imposta evasa procedendo d'ufficio ai necessari accertamenti, eventualmente mediante il ricorso a presunzioni di fatto*".

[19] Cass. pen., Sez. III, sent. n. 43330 del 26 ottobre 2023 — reaffirming that "*spetta esclusivamente al giudice penale il compito di procedere all'accertamento e alla determinazione dell'ammontare dell'imposta evasa, attraverso una verifica che può venire a sovrapporsi o anche ad entrare in contraddizione con quella eventualmente effettuata dal giudice tributario, non essendo configurabile alcuna pregiudiziale tributaria*".

[20] Art. 13, comma 1, D.lgs. 10 marzo 2000, n. 74 (as amended by D.lgs. 158/2015 and D.lgs. 87/2024): "*I reati di cui agli articoli 10-bis, 10-ter e 10-quater, comma 1, non sono punibili se, prima della dichiarazione di apertura del dibattimento di primo grado, i debiti tributari, comprese sanzioni amministrative e interessi, sono stati estinti mediante integrale pagamento degli importi dovuti*".

[21] § 370 Abs. 1 Abgabenordnung (AO) of 16 March 1976 (BGBl. I p. 613), last amended by Art. 3 of the Act of 21 December 2019 (BGBl. I p. 2875).

[22] BGH, Beschluss vom 24. Mai 2007, Az. 5 StR 58/07 — the BGH held that tax assessments in criminal proceedings fall exclusively to the trial court, with an obligation of detailed reasoning. BGH, Beschluss vom 14. Dezember 2007, Az. 1 StR 293/07 — mere adoption of the tax authority's estimates is insufficient. See also Schwarz/Pahlke/Keß, Kommentar zur AO, § 370 Rz. 87 (Haufe Verlag): "*Das Gericht darf eine finanzbehördliche Steuerschätzung nicht ungeprüft übernehmen, sondern hat grundsätzlich eine eigene Schätzung vorzunehmen*".

[23] Schwarz/Pahlke/Keß, Kommentar zur AO, § 370 Rz. 87 and § 162 Rz. 211 (Haufe Verlag): "*Die im Besteuerungsverfahren geltenden steuerlichen Beweislast- und Vermutungsregeln finden im Strafverfahren keine Anwendung. [...] Insbesondere gilt der Grundsatz 'in dubio pro reo'*". BGH, Urteil vom 10. November 2009, Az. 1 StR 283/09 (Mindestschätzung principle).

[24] Cass. crim., 8 février 1988, n° 87-82777 — the first decision in which the Criminal Chamber held that the existence of tax fraud cannot be inferred from administrative evaluations. See also Cass. crim., 20 décembre 2017, n° 16-85029 — synthesis of the principle.

[25] Art. 156(1) Code de procédure pénale (CPP): "*Toute juridiction d'instruction ou de jugement, dans le cas où se pose une question d'ordre technique, peut, soit à la demande du ministère public, soit d'office, ou à la demande des parties, ordonner une expertise*". Available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006575748.

administration of evidence and of the acts performed by the investigating authorities." The preliminary chamber judge cannot order the administration of new evidence relating to the merits, and the accounting expert report on the amount of the damage is, by excellence, evidence on the merits. The HCCJ explicitly held that the expert report "may be administered during the criminal investigation or in the trial phase, but not within the preliminary chamber procedure, since it concerns the merits of the case."[26]

3.2. Variant II — the expert report can be administered in the trial phase, before the first hearing

A judicial expert report cannot be ordered before the first hearing, since the procedural measure requires the designation of the expert, communication of objectives, setting a deadline for the report, the possibility of appointing a party's expert, possible additions — a process that takes, in court practice, several months. Even assuming the expert report is ordered at the first hearing, the limit established by Art. 10 — until the first hearing — is already reached and exceeded. Beyond the practical impossibility, there is a purposive argument: as the HCCJ held in HP no. 69/2023, the cause for reduction of the penalty in Art. 10 aims to "facilitate the recovery by the state budget of the claims resulting from the commission of tax evasion acts."[27] This aim presupposes that the defendant can make an informed decision regarding payment, which is not possible if the exact amount becomes known only when the time limit has already expired.

3.3. Variant III — the expert report is optional, conditional on the defendant's manifestation

This variant — supported by the Prosecutor General's Office and some courts of appeal[28] — is excluded by three cumulative arguments. The first is textual: Art. 10(2) uses the imperative formulation "the damage shall be determined on the basis of a specialised expert report", without any condition regarding the defendant's manifestation of will. The HCCJ held that "the legislator did not make the performance of the expert report conditional on the prior manifestation of an intention to pay the damage by the suspect or defendant."[29] The second argument concerns the effective purpose of the law: if the expert report is optional, the norm in Art. 10(2) sentence I becomes practically inapplicable, since the defendant cannot make an informed decision on payment without knowing the exact amount. As the HCCJ held, "accepting the contrary thesis would empty the first sentence of Art. 10(2) of content."[30] The third argument concerns coherence with the objectives of Law no. 126/2024: leaving the determination of the damage to the discretion of the investigating authorities would perpetuate precisely the structural deficit the legislator sought to eliminate.[31]

3.4. Conclusion of the systemic argument

All alternative variants are incompatible with the effective purpose of the law or with imperative procedural norms. The qualification of the omission of the expert report as an irregularity of the indictment is the inevitable interpretive consequence — confirmed by the internal logic of HP no. 69/2023: once the repair of the damage is established by the criminal court, "this matter can no longer be reopened in another civil process."[32] But res judicata presupposes certainty — and certainty presupposes a damage determined by judicial expert report, not estimated by a technical assessment report with conditional conclusions.

---

[26] Cass. crim., 11 septembre 2019, n° 18-81.067 — the Court held that "*l'opportunité d'ordonner une mesure d'instruction relève de l'appréciation souveraine des juges du fond*", confirming that refusal of the expert report is valid if reasoned.

[27] CF Booth Ltd v. HMRC [2016] UKFTT 261 (TC), §14; Megantic Services Ltd v. HMRC [2013] UKFTT 492 (TC), §§15-20.

[28] Graham Chisnall and Others v. HMRC [2023] UKFTT 857 (TC), with reference to McArthur and Bloxham v. HMRC [2021] UKFTT 237 (TC), §15, and Netley v. HMRC [2017] UKFTT 442 (TC), §203.

[29] The express reference in Art. 10(2) of Law no. 241/2005 to Arts. 172-180 CPC — which regulate exclusively the judicial expert report — with the implicit exclusion of Art. 181 CPC on the technical assessment report, confirms that the legislator intended to impose a distinct instrument with full procedural guarantees.

[30] HP no. 430/2025, par. 33, reproducing the position of certain courts of appeal (Cluj, Oradea, Suceava, Timișoara): "the performance of the expert report in the investigation phase is optional and conditional on the manifestation of will of the suspect or defendant to pay the damage" — this is the thesis expressly rejected by the HCCJ.

[31] HCCJ, Panel for the Resolution of Legal Issues in Criminal Matters, Decision no. 430 of 15 December 2025, published in the Official Gazette of Romania, Part I, no. 149 of 26 February 2026, par. 79, 91-92.

[32] HP no. 430/2025, par. 87.

4. Critical analysis of the HCCJ's arguments in Decision HP no. 430/2025

4.1. The convincing arguments

The most solid argument in the decision's reasoning is that of the effective purpose of the law: if the expert report is not conducted in the investigation phase, the benefit of halving the penalty limits becomes illusory.[33] A structurally inapplicable norm is a norm devoid of normative content. Equally solid is the argument of the impossibility of administering the expert report in the preliminary chamber — a direct normative argument constructed on the legal definition of the object of the preliminary chamber, regarding which there is no room for appreciation. The teleological argument based on the purpose of Law no. 126/2024 as identified by the CCR in Decision 146/2024 and confirmed by HP no. 69/2023[34] is also well anchored.

4.2. Vulnerabilities in the reasoning

The first vulnerability concerns the leap from evidentiary norm to condition of procedural validity. Art. 10(2) is an evidentiary norm — not a norm on the validity of the indictment. The HCCJ makes this leap[35] through correlation with Arts. 327 and 342 CPC, without exhaustively explaining why the omission of a mandatory piece of evidence can be assimilated in all cases with an irregularity of the referral document. The vulnerability can be managed: the answer lies in the dual nature of the norm — Art. 10(2) is not a mere evidentiary norm, but one that conditions the exercise of a substantive right — and in the practical impossibility of subsequent remedy.

The second vulnerability concerns the relationship with "the impossibility of establishing the object and limits of the trial" from Arts. 345-346 CPC. The HCCJ extends the concept of irregularity beyond traditional formal deficiencies without articulating a general criterion for this extension. In the author's view, the most solid argument completing the reasoning is that of the effective right to defence: the omission of the expert report renders illusory a substantive right of the defendant, not merely a formal element of the indictment.

4.3. The distinction from ordinary evidential omission and the theory of mandatory evidence with substantial effect

Decision HP no. 430/2025 created, without naming it, a new procedural category: evidence mandated by law whose omission in the investigation phase generates the irregularity of the indictment. This article proposes its systematisation under the name "mandatory evidence with substantial effect."[36]

Mandatory evidence with substantial effect is defined by three cumulative conditions: (a) the existence of an express norm requiring the administration of the evidence in the investigation phase; (b) the evidence conditions the exercise of a substantive right of the defendant — not a purely formal procedural right, but one that directly affects the criminal consequences of the case; (c) the omission of the evidence is not remediable in subsequent phases of the criminal process without definitively depriving the defendant of the exercise of that right.

The expert report from Art. 10(2) satisfies all three conditions: (a) the express norm — "the damage shall be determined on the basis of a specialised expert report"; (b) substantive right — the defendant's right to benefit from the halving of penalty limits or the non-punishment ground by paying the damage; (c) subsequent irremediability — the expert report cannot be administered in the preliminary chamber, and ordering it in trial no longer allows the defendant to pay the damage before the first hearing.

The importance of this systematisation extends beyond tax evasion cases.[37] It furnishes a general criterion for answering the question that every practitioner will raise after HP no. 430/2025: what other mandatory pieces of evidence provided by law could generate, through their omission, the irregularity of the indictment? The

---

[33] CCR Decision no. 932 of 14 December 2006, published in the Official Gazette of Romania, Part I, no. 42 of 19 January 2007.

[34] HCCJ, Panel for the Resolution of Legal Issues in Criminal Matters, Decision no. 69 of 13 November 2023, par. 94, published in the Official Gazette of Romania, Part I.

[35] HCCJ, Panel for the Resolution of Legal Issues in Criminal Matters, Decision no. 430 of 15 December 2025, par. 31, 86-92, published in the Official Gazette of Romania, Part I, no. 149 of 26 February 2026.

[36] HP no. 69/2023, par. 79.

[37] HP no. 69/2023, par. 90: "The norms of the Code of Criminal Procedure [...] have a degree of generality that cannot cover the entire range of situations that may arise in connection with offences for which criminal law provides a sentencing regime with specific elements, in which the determination of the damage constitutes an essential element for the legal classification of the criminalised act, while its coverage constitutes an essential element for establishing the conditions of legal liability."

answer is precise: only those that simultaneously satisfy conditions (a), (b), and (c). The category is narrow but real, and HP no. 430/2025 provides its first paradigmatic case. The theory also responds to the doctrinal criticism that the HCCJ unjustifiably extends the concept of irregularity: the extension is not arbitrary but delimited by the three cumulative conditions, which function as limits against uncontrolled generalisations.[38]

5. Admissibility of the Referral — A Precedent with Implications of Principle

The Prosecutor General's Office sought rejection of the referral as inadmissible, arguing that the question formulated was not "necessary" for the solutions available in the preliminary chamber procedure. The HCCJ upheld admissibility by extending the concept of "concrete effect on the decision", namely that the preliminary ruling would have "a decisive influence on the final decision in the preliminary chamber phase." This extension creates a useful precedent for future referrals, but must be applied with caution: the mechanism for pronouncing a preliminary ruling is an instrument for unifying practice, not a means of resolving any legality problem. The extension is justified in the present case by the principled importance of the resolved issue and by the scale of the non-unitary practice identified.

6. Gaps in Decision HP No. 430/2025

6.1. The tripartite of evidentiary instruments

The first practical gap concerns the relationship between the judicial expert report required by Art. 10(2) and the other instruments for determining the damage that circulate in tax evasion cases. The decision does not explicitly delimit these instruments. The answer is negative for both alternatives, for different reasons.[39]

The ANAF tax inspection report (Arts. 94-105 of the Tax Procedure Code) is an administrative instrument through which the tax authority establishes the tax claim owed.[40] It may constitute a referral act for investigating authorities but cannot constitute evidence regarding the existence and extent of the unpaid tax obligation in the sense of the CPC,[41] was not ordered by a judicial authority, and does not benefit from the procedural guarantees of judicial expertise. More importantly, it expresses the position of a state body that is a civil party in the criminal case — which gives it a position structurally incompatible with the objectivity required by the standard of Art. 10(2).

The technical assessment report (Art. 181 CPC) is a piece of evidence, but with a different regime from that of the expert report: it is ordered by investigating authorities when there is urgency or risk of evidence disappearing, without the defendant's participation and without the procedural guarantees of judicial expertise. It may be challenged by requesting the performance of an expert report — which suggests the legislator treats it as evidentiary instrument inferior to, not equivalent with, the expert report.

The judicial expert report (Arts. 172-180 CPC) is the only instrument that satisfies the requirement of Art. 10(2). The express reference to Arts. 172-180 CPC, with the implicit exclusion of Art. 181 CPC, is a deliberate legislative choice, coherent with the objective of establishing an objective standard with complete procedural guarantees for determining the damage.[42]

---

[38] HP no. 69/2023, par. 92: "This intertwining between two branches of law and two types of liability (criminal and fiscal) requires systematic and teleological interpretation of the applicable norms, in a manner that does not contradict the purpose pursued by the legislator through the regulation of procedures for the prevention and combating of tax evasion."

[39] HP no. 69/2023, par. 55, with reference to HP no. 9 of 15 March 2017, published in the Official Gazette of Romania, Part I, no. 346 of 11 May 2017: the cause for reduction of the penalty in Art. 10 aims to "facilitate the recovery by the state budget of the claims resulting from the commission of tax evasion acts and, correlatively, the mitigation of the sanctioning regime for persons who contribute to their recovery."

[40] Prahova Tribunal — Criminal Section, Judgment no. 38 of 26 February 2026, case no. 3586/105/2025, and Judgment no. 30 of 16 February 2026, case no. 8538/105/2014, both non-final at the date of writing and unpublished. Both judgments are cited in this article exclusively as practical illustrations of the principles demonstrated on the basis of binding case law, not as independent argumentative authority. The author, as the judge who pronounced these judgments, transparently marks this capacity and the strictly illustrative — not probative — function of his own case law, in accordance with the practice of comparative law journals which admit references to the author's own case law provided the role thereof in the economy of the argument is clearly delimited.

[41] Judgment no. 38/2026, Prahova Tribunal (see fn. 41): "The report was drawn up with broad objectives [...]. Such a report may naturally serve as a guiding instrument for the investigation. The problem arises when the prosecution transforms it into the main foundation of the damage [...] without completing the gaps that the report itself acknowledges."

[42] Judgment no. 38/2026, Prahova Tribunal (see fn. 41): "The agreement is useful when the facts are clear, the evidence is sufficient, the damage is determined and the parties wish a rapid solution. The agreement becomes problematic when it is used as a solution to avoid clarifying essential technical issues."

Judicial practice illustrates these distinctions concretely. A court rejected a guilty plea agreement in which the assessment report constituted the main basis for the amount of the damage, on the ground of the estimative and conditional nature of its conclusions. The report used the formula "the estimated damage will be in a total amount of [...] insofar as the company has not declared fiscally and has not recorded its revenues in its accounts" — a formulation that does not affirm the existence of the damage as a certain fact but conditions it on further demonstrations.[43] The court identified four structural deficiencies: absence of VAT enforceability analysis; absence of verification of the right of deduction; absence of analysis of the applicable fiscal regime for the entire charged period; reconstruction of the damage exclusively from bank statements, without primary accounting documents.[44] The conclusion that the assessment report may serve as a guiding instrument for the investigation but cannot be transformed into the main foundation of the damage[45] is directly applicable to the problem in this article.

6.2. Art. 10(3) — a solution through the operative part of the decision

An apparent gap concerned the obligation of the expert report for the non-punishment grounds in Art. 10(3), given that the formulation in par. 72 of the decision — "in the rapporteur judge's opinion" — could suggest that the full panel did not adopt a firm position on this point in the reasoning. This apparent gap is, in reality, resolved on two convergent levels. At the level of positive law, the operative part of HP no. 430/2025 refers to "Art. 10 of Law no. 241/2005" in its entirety, without any distinction between paragraphs. At the dogmatic level, the theory of mandatory evidence with substantial effect permits a more rigorous demonstration: not an extension from one paragraph to another on the basis of similarity of rationale, but a deduction from the same general principle.[46]

The deductive reasoning is as follows. Major premise: the omission of the expert report generates the irregularity of the indictment when conditions (a), (b), and (c) are simultaneously satisfied. Minor premise: in the hypotheses of Art. 10(3), all three conditions are satisfied — (a) Art. 10(2) imposes the expert report through an express norm applicable to all tax evasion cases within the scope of Art. 10, regardless of the paragraph invoked by the defendant; (b) the absence of the expert report deprives the defendant of the possibility to calculate the applicable surcharge (25%, 50% or 100%) and to make an informed decision on payment; (c) the omission is not remediable subsequently, because the time limits in Art. 10(3) are even shorter or coincide with procedural phases in which the expert report cannot be administered. Conclusion: the omission of the expert report generates irregularity also for the hypotheses of Art. 10(3). This is a deduction from principle, not an extension by analogy — and the difference is not terminological but methodological.

6.3. The defendant's waiver of the expert report

The decision does not address the situation where the defendant expressly waives the expert report. There exist, within the expert report procedure, procedural guarantees established exclusively in the defendant's favour, with a disposable character — the right to propose a party's expert, the right to raise objections, the right to be notified of the ordering of the expert report. The expert report itself, however, cannot be set aside by the defendant's unilateral waiver,[47] for three distinct reasons. First: the text of Art. 10(2) does not subordinate the

[43] HCCJ, Administrative and Fiscal Section, Decision no. 1831 of 8 June 2016: the ANAF inspection report constitutes a preliminary act to the issuance of an administrative act of fiscal claim, pursuant to Art. 18 of Law no. 554/2004 on administrative litigation.

[44] CCR Decision no. 80 of 14 February 2024, par. 23, published in the Official Gazette of Romania, Part I, no. 266 of 27 March 2024. In the same sense: CCR Decision no. 72 of 29 January 2019, published in the Official Gazette of Romania, Part I, no. 332 of 2 May 2019.

[45] Prahova Tribunal, Criminal Section, Judgment no. 30 of 16 February 2026, case no. 8538/105/2014, non-final, cited for illustrative purposes — see fn. 41.

[46] Judgment no. 38/2026, Prahova Tribunal (see fn. 41): "The deficiency identified does not concern the level of evidence or the accuracy of the amount of damage, which could be clarified by administering an accounting expert report, but concerns the very determination of the material facts charged. The expert report presupposes the verification and evaluation of facts already determined in the referral document; it cannot substitute for the lack of determination of the facts."

[47] The logical chain of the connection with Directive 2012/13/EU: (i) Art. 10(2) conditions the reduction of the penalty on the payment of a damage determined by expert report; (ii) without the expert report, the defendant does not know the exact amount to pay in order to benefit from the cause for reduction; (iii) the financial consequence of the accusation — the amount to pay for mitigation of the penalty — forms part of the content of the accusation that the defendant must know in detail in order to exercise effectively the right to defence; (iv) Art. 6(3) of Directive 2012/13/EU, as interpreted in Case C-282/20, ZX v. Bulgaria, guarantees precisely this right. The connection is not direct but mediated through the right to effective defence — which makes it stronger in principled terms.

obligation to perform the expert report to any manifestation by the defendant.[48] Second: the damage is an objective element of the case, relevant not only to the defendant but also to the civil claim and to the public interest of recovering the tax claim. Third: to admit that the defendant can waive the expert report would be equivalent to allowing the defendant to unilaterally influence the conditions for the application of a criminal law norm — which contradicts the public order character of criminal law norms.

6.4. Expert report costs — an open legislative problem

The regime of costs for the expert report mandatorily ordered in the investigation phase, regardless of the defendant's manifestation of will, is not addressed by the decision and requires legislative clarification. The general rules from Arts. 272-276 CPC do not adequately cover the situation of the expert report whose mandatory character does not depend on any request by any party, and whose costs cannot reasonably be automatically charged to the defendant before the definitive resolution of the case.

7. Temporal Application of Decision HP No. 430/2025 and available remedies

Published in the Official Gazette on 26 February 2026, Decision HP no. 430/2025 is binding for courts from that date. But the interpreted norm has been in force since 13 May 2024. The classification of pending cases into three categories is therefore essential for the correct application of the decision.

7.1. Category A — Indictments issued before 13 May 2024

Category A covers all cases whose indictment was issued before the entry into force of Law no. 126/2024, regardless of the procedural stage on the date of publication of HP no. 430/2025. The norm interpreted by HP no. 430/2025 was not in force at the time the indictment was issued, so the standard of regularity remains the prior one: the damage established by the prosecutor on the basis of the file documents, without the obligation of the expert report as a legality requirement. CCR Decision no. 867 of 14 December 2021 remains the relevant benchmark.[49]

A1 — Indictment before 13 May 2024, with a definitive preliminary chamber decision before 26 February 2026

Res judicata operates both in relation to HP no. 430/2025 and in relation to Law no. 126/2024. The trial has begun under the dual protection of the prior evidentiary standard and the definitive preliminary chamber decision. The absence of the expert report cannot be invoked on any ground in the trial phase regarding the regularity of the referral. The problem of applying Art. 10 as amended through invocation of the lex mitior principle remains open and follows the regime analysed below.

A2 — Indictment before 13 May 2024, with the preliminary chamber procedure not finalised on 26 February 2026

This situation might appear assimilable to Category C, since the preliminary chamber procedure is ongoing at the date of publication of HP no. 430/2025. The assimilation is however erroneous: the standard of regularity of a procedural act is determined by reference to the norm in force at the time of the act. Law no. 126/2024 could not impose a retroactive obligation on an investigating authority that issued the indictment before its entry into force, and HP no. 430/2025 interprets a norm that did not exist at that time. The preliminary chamber judge will therefore find the referral regular in the absence of the expert report and order the commencement of trial, leaving the lex mitior question to be resolved in the trial phase.

In Category A cases where the defendant invokes lex mitior and requests the benefit of Art. 10(2) sentence I, a structural impossibility arises in the current normative framework. The accounting expert report takes in practice several months — sometimes a year or more — making it structurally impossible for the report to reach the file before the first hearing. The cause for halving the penalty from Art. 10(2) sentence I thus becomes

[48] Judgment no. 30/2026, Prahova Tribunal (see fn. 41), legal basis: Art. 371 CPC related to Art. 346(3)(a) CPC, interpreted in conformity with Art. 6(3) of Directive 2012/13/EU and Art. 47 of the Charter of Fundamental Rights of the European Union, as interpreted by CJEU C-282/20, ZX v. Bulgaria. Direct application — not mere conforming interpretation — represents an element of procedural novelty.

[49] Judgment no. 30/2026, Prahova Tribunal (see fn. 41): "To consider that the lack of individualisation can be remedied by an expert report would mean admitting that the court can adjudicate an undetermined accusation, subsequently establishing its exact contours through evidence, which is incompatible both with Art. 371 CPC and with the standard of detailed information enshrined in Art. 6(3) of Directive 2012/13/EU."

objectively and definitively inapplicable for any defendant in Category A, not because of the defendant's conduct, but exclusively because of the absence of transitional provisions in Law no. 126/2024. A constitutional exception could target Art. 10(2) of Law no. 241/2005 as amended by Law no. 126/2024, in relation to the absence of any transitional norm, through reference to Art. 15(2) and Art. 21(3) of the Constitution — a form of unconstitutionality by legislative omission, recognised in the CCR's case law.

Until a possible intervention by the CCR or the legislator, the practically reasonable solution is for the court to order the expert report immediately upon the defendant's manifestation of intent to pay, and to treat the hearing immediately following the submission of the report as the reference hearing for the application of Art. 10(2) sentence I, through a teleological and pro reo interpretation. This interpretation has no direct normative support, but it is the only one that preserves the effectiveness of the more favourable norm and prevents the absence of transitional provisions from functioning as a sanction attributable to the defendant rather than the legislator.

7.2. Category B — Indictments issued between 13 May 2024 and 26 February 2026, with a definitive preliminary chamber decision

For cases in which the preliminary chamber judge has already issued a definitive decision before the publication of HP no. 430/2025, res judicata retains its effect. The trial has commenced with the potential absence of the expert report validated by a definitive decision. The trial court cannot reopen the question of the regularity of the referral on the basis of HP no. 430/2025. However, if the accusation remains unclear and the damage undetermined, the trial court may invoke European Union law, independently of the res judicata of the preliminary chamber decision.

The problem of applying Art. 10 as amended arises in Category B cases in identical terms to those analysed for Category A. The trial court will be able — and, insofar as the defendant invokes lex mitior, will be required — to order the expert report during the trial. The expert report ordered in the trial phase will not remedy the irregularity of the indictment — which remains covered by res judicata — but will serve exclusively to determine the damage to the standard required by Law no. 126/2024. The structural impossibility analysed for Category A reproduces identically in Category B, with the same consequences for the effectiveness of Art. 10(2) sentence I and with the same argument in favour of a constitutional exception.[50]

The most serious situation — and with the greatest procedural costs — is that of Category B cases in which the absence of the expert report has generated an accusation whose damage remains unclear or undetermined. By "procedural damage" the author means the definitive deprivation of the defendant of the possibility of exercising a substantive right recognised by law, caused by an omission in the investigation phase that can no longer be remedied subsequently.[51] This connects, through Art. 6(3) of Directive 2012/13/EU as interpreted in Case C-282/20, ZX v. Bulgaria, to the right to receive detailed information about the accusation, independently of the preliminary chamber's res judicata.[52]

7.3. Category C — Indictments after 13 May 2024, with the preliminary chamber procedure not finalised on 26 February 2026

Category C covers two distinct situations, united by the same procedural effect: the preliminary chamber judge is obliged to find the irregularity of the referral document and to proceed pursuant to Arts. 345-346 CPC.

The first situation concerns indictments issued between 13 May 2024 and 26 February 2026 for which the preliminary chamber procedure was not definitively finalised at the date of publication of HP no. 430/2025. The interpreted norm was in force at the time the indictment was issued, and the binding ruling covers the ongoing procedure. From 26 February 2026, all preliminary chamber judges seized with such cases are obliged to find the irregularity and to remit the case to the prosecutor.

The second situation concerns indictments issued after 26 February 2026. These are subject to HP no. 430/2025 directly and uncontroversially. A prosecutor who issues an indictment without an expert report after

[50] HP no. 430/2025, operative part, corroborated with HP no. 69/2023, par. 91 and 94, and with HCCJ — RIL Panel Decision no. 17 of 5 October 2015: the damage in tax evasion cases consists of principal and accessory tax debts established pursuant to tax legislation, its determination requiring a specialist fiscal and accounting analysis that exceeds the ordinary evaluative competence of judicial bodies.

[51] HP no. 430/2025, par. 91.

[52] HP no. 430/2025, par. 79.

this date acts with full knowledge of the consequences, and the preliminary chamber judge has no margin of appreciation. An essential distinction that judicial practice explicitly formulates is that the specialised expert report verifies facts already determined, so it cannot substitute for the lack of concrete determination of the accusation. If the accusation is unclear and the damage undetermined, ordering the expert report in the trial phase does not solve the problem, and remittal to the prosecutor remains the only effective remedy.[53]

8. Conclusions

The analysis undertaken confirms and extends the thesis that Decision HP no. 430/2025 represents the interpretation ensuring the coherence of the normative architecture of Art. 10 of Law no. 241/2005. The article makes five original contributions beyond a mere commentary on the decision. First: anchoring the argument in the legislative history documented through HP no. 69/2023, demonstrating that the need for objectivity in damage determination is a recurring problem that has required repeated legislative and judicial intervention. Second: delimiting the tripartite of evidentiary instruments — ANAF inspection report, technical assessment report, judicial expert report — and demonstrating that only the judicial expert report satisfies the normative requirement of Art. 10(2). Third: systematising the theory of mandatory evidence with substantial effect, with the three cumulative conditions that delimit the category and furnish a general criterion applicable beyond tax evasion cases. Fourth: demonstrating by deduction — not by analogy — the obligation of the expert report for the hypotheses of Art. 10(3), resolving a gap that Decision HP no. 430/2025 left open. Fifth: identifying the concept of procedural damage as an analytical instrument for Category B cases and as the principled foundation for the connection with Directive 2012/13/EU, independently of the preliminary chamber's res judicata.

The expected impact of these research outcomes operates on three levels. At the level of judicial practice, the theory of mandatory evidence with substantial effect and the tripartite classification of cases provide preliminary chamber judges, trial judges, prosecutors and defence counsel with a precise and operationally complete toolkit for applying Decision HP no. 430/2025. At the level of constitutional litigation, the identification of the structural impossibility affecting Category A and Category B defendants — and the consequent argument for a constitutional exception on grounds of unconstitutionality by legislative omission — opens a path for CCR intervention that could restore the effectiveness of the lex mitior right for defendants already in the trial phase. At the level of legal doctrine, the systematic category of mandatory evidence with substantial effect has the potential to extend beyond tax evasion cases, generating a new doctrinal instrument for the qualification of evidential omissions in the preliminary chamber procedure.

Three directions for further research emerge from this analysis. First, empirical research on the actual application of HP no. 430/2025 in the months following its publication — particularly the rate of case remittals, the duration of expert reports ordered in the investigation phase, and the impact on the duration of criminal proceedings in tax evasion cases — is needed to assess the systemic costs identified theoretically in this article. Second, the connection between the concept of procedural damage and the right to information under Directive 2012/13/EU, applied directly in the trial phase independently of the preliminary chamber's res judicata, deserves a dedicated study exploring its potential application in other categories of criminal cases where a mandatory investigative act conditions a substantive right of the defendant. Third, the constitutional exception identified for the absence of transitional provisions in Law no. 126/2024 requires a detailed analysis of the CCR's case law on unconstitutionality by legislative omission, in order to assess the admissibility and chances of success of such a referral. The decision retains one significant legislative gap — the cost regime for the mandatory expert report — which requires legislative intervention and which the present article cannot resolve through doctrinal instruments alone.

References

- HCCJ, Panel for the Resolution of Legal Issues in Criminal Matters, Decision no. 430 of 15 December 2025, published in the Official Gazette of Romania, Part I, no. 149 of 26 February 2026;

[53] The term "mandatory evidence with substantial effect" is proposed by the author as an analytical instrument to delimit the category of evidential omissions that generate the irregularity of the indictment from ordinary evidential omissions, subject to review exclusively on grounds of merits. The category is not expressly regulated by the CPC, but is implicit in the interpretive construction of the HCCJ in HP no. 430/2025, which this article explicates and systematises.

- HCCJ, Panel for the Resolution of Legal Issues in Criminal Matters, Decision no. 69 of 13 November 2023, published in the Official Gazette of Romania, Part I;
- HCCJ, RIL Panel, Decision no. 17 of 5 October 2015;
- HCCJ, Administrative and Fiscal Section, Decision no. 1831 of 8 June 2016;
- CCR, Decision no. 867 of 14 December 2021, published in the Official Gazette of Romania, Part I, no. 325 of 1 April 2022;
- CCR, Decision no. 146 of 19 March 2024, published in the Official Gazette of Romania, Part I, no. 496 of 29 May 2024;
- CCR, Decision no. 80 of 14 February 2024, published in the Official Gazette of Romania, Part I, no. 266 of 27 March 2024;
- CCR, Decision no. 1.084 of 8 September 2009, published in the Official Gazette of Romania, Part I, no. 665 of 6 October 2009;
- Prahova Tribunal — Criminal Section, Judgment no. 38 of 26 February 2026, case no. 3586/105/2025 (non-final, cited for illustrative purposes);
- Prahova Tribunal — Criminal Section, Judgment no. 30 of 16 February 2026, case no. 8538/105/2014 (non-final, cited for illustrative purposes);
- Cass. pen., Sez. III, sent. n. 44170 del 3 novembre 2023;
- Cass. pen., Sez. III, sent. n. 43330 del 26 ottobre 2023;
- Art. 13, comma 1, D.lgs. 10 marzo 2000, n. 74 (as amended by D.lgs. 158/2015 and D.lgs. 87/2024);
- BGH, Beschluss vom 24. Mai 2007, Az. 5 StR 58/07;
- BGH, Beschluss vom 14. Dezember 2007, Az. 1 StR 293/07;
- BGH, Urteil vom 10. November 2009, Az. 1 StR 283/09;
- Schwarz/Pahlke/Keß, Kommentar zur AO, § 370 Rz. 87 und § 162 Rz. 211 (Haufe Verlag);
- Cass. crim., 8 février 1988, n° 87-82777;
- Cass. crim., 20 décembre 2017, n° 16-85029;
- Cass. crim., 11 septembre 2019, n° 18-81.067;
- CF Booth Ltd v. HMRC [2016] UKFTT 261 (TC);
- Megantic Services Ltd v. HMRC [2013] UKFTT 492 (TC);
- Graham Chisnall and Others v. HMRC [2023] UKFTT 857 (TC);
- CJEU, Case C-282/20, ZX v. Bulgaria;
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1 June 2012;
- Charter of Fundamental Rights of the European Union, Art. 47.