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BRIEF CONSIDERATIONS REGARDING THE RESPECT FOR THE RIGHT OF DEFENCE OF THE ACCUSED PERSON DURING CRIMINAL PROSECUTION, IN THE LIGHT OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS. CASE STUDY.

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Abstract

By the entry into force of the current Code of Criminal Procedure on 01.02.2014, the national legislator aimed to create a clear, accessible and predictable judicial system for all participants involved in a criminal proceeding, but also to place this system on the pillars of new principles in order to precisely respect human rights and fundamental freedoms.

Its objectives have been specifically set out from the very preliminary theses of the adoption of the Code of Criminal Procedure, among which we mention that of *establishing an appropriate balance between the requirements for an effective criminal proceeding and respect for the fundamental human rights of all participants in a criminal trial.*

This was a pressing need, because Romania ratified the European Convention on Human Rights (hereinafter E.C.H.R.) on 20.06.1994, introducing the obligation to respect it by the national judicial bodies, an aspect subsequently transposed into the internal legislation by adopting Article 20 of the Constitution (amended in 2003), as well as by introducing Article 1 (2) of the current Code of Criminal Procedure.

Although the role of the European Court of Human Rights (hereinafter E.Ct.H.R.) is not defined by a court of judicial review of the decisions adopted by the national courts, not being able to modify or abolish them, it plays a subsidiary role to the national judicial systems which subsequently must verify the compatibility of internal legislation with the mandatory requirements of the European Court.

From the content of the File on Romania, drawn up by the Strasbourg Court Registry, published in January 2021, as well as of its Report for 2020, both published on the website of this institution, it results that between 1997 (the date of the first conviction against Romania) and December 2020, a number of 1578 judgments and decisions passed against our country, and this ranks it in the top four member countries, after Turkey (convicted in 3742 cases), Russia (convicted in 2884 cases) and Italy (convicted in 2424 cases). Statistics also show that, after Romania, there are Ukraine (convicted in 1499 cases), Poland (convicted in 1197 cases), France (convicted in 1048 cases), Bulgaria (convicted in 737 cases) and Moldova (convicted in 473 cases).

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At the end of 2020, our country was convicted in 82 cases by E.Ct.H.R., and an analysis of the violated fundamental rights shows that the most common is the right to a fair trial provided for in Article 6 of E.C.H.R. (in 82 cases) which includes the right of defence of the person accused of having committed a criminal offence in its content.

In accordance with Article 6 (2) and (3) from E.C.H.R.: “*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law... Everyone charged with a criminal offence has the following minimum rights: to be promptly informed of the nature and cause of the accusation against him in a language which he understands and in detail...; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require...*”

Keywords: legislator, rights, norms, prosecution

INTRODUCTION

The present work explains the concept of 'criminal charge' as governed by the internal legislation, but also in the case-law of the European court, since there is no perfect overlap between the two judicial systems on this issue, as the European framework is much more permissive, which actually creates difficulties of interpretation in the practice of national judicial bodies.

In the *Adolf v. Austria* case, E.Ct.H.R. established that the phrase '*charge in criminal matters*' has an '*autonomous*' meaning, independent of the classifications used by the national judicial systems of the Member States.

Failure to comply with the procedural norms on the rights of defence of a person accused of committing a criminal offence may lead to the exclusion of the evidence thus obtained as a result of the violation of the principle of loyalty to the administration of evidence, laid down by Article 101 from the Code of Criminal Procedure as well as to its absolute nullity, in relation to article 281 (1) (f) from the Code of Criminal Procedure.

From the analysis carried out during the work, it was found that the current criminal procedural provisions largely meet the requirements of the European court in terms of predictability and accessibility, bringing together in Article 83 by reference to Articles 89 - 92 from the Code of Criminal Procedure, the main procedural rights of the defendant, among which we mention: the right to information about the act with which he is charged, the right not to make a statement, the right to be assisted by a lawyer of his choice or by a duty lawyer, the right of access the file, the right to propose the administration of evidence, and the right to witness the performance of any act of criminal prosecution with a lawyer of his choice or a duty lawyer, with the exceptions expressly covered by law.

The present work aims to analyze the national standards that are taken into account by the criminal investigation bodies with the purpose of ordering the initiation of criminal prosecution regarding a criminal act (*in rem* phase), as well as ordering further criminal investigation of a person (*in personam* phase), in order to

establish the level of harmonisation with the requirements of the European court in the field. This analysis concludes with a case study that was based on national courts, in order to assess in concrete terms, whether the requirements of the case-law of E.Ct.H.R. are respected by those called upon to perform the act of justice on respect for the right of defence during criminal investigation of a person accused of committing a crime.

I. THE REQUIREMENTS OF ECtHR ON RESPECT OF THE RIGHT OF DEFENCE OF A PERSON ACCUSED OF COMMITTING AN OFFENCE, LAID DOWN IN ARTICLE 6 OF ECHR

The notion of criminal charge must be interpreted from the point of view of E.C.H.R., which decided that it represents “...*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence*” and depending on the existence or absence of “*significant repercussions on the suspect's situation*” in the *Deweer v. Belgium* case.

In accordance with the provisions of Article 6 of E.C.H.R., the concept of *accusation in criminal matters* has an *autonomous* meaning, and the *notification* of the person accused of committing a crime by the competent state authority must not comply with a certain form.

The conventional law does not require member states to regulate a list of antisocial acts that would fall within the notion of *criminal*, as E.Ct.H.R. is given the task of framing them in this sphere, according to certain criteria developed in its case-law, which is compatible with the object and purpose of E.C.H.R. (*Öztürk v. Germany* case).

The starting point for examining the applicability of the criminal side of Article 6 of E.C.H.R. results from the criteria laid down in the *Engel and Others v. the Netherlands* case, as follows:

A. Qualification in internal legislation

This first criterion is used as a starting point by the European court and it has a relative weight. If there are no problems of interpretation in the internal law of the Member States, the act under investigation is considered a criminal offence. Otherwise, E.Ct.H.R. will examine the reality of the procedure, and will be able to frame the offence in the notion of *criminal*.

B. Nature of the crime

In the *Jussila v. Finland* case, the European court decided that this criterion is the most important in making a decision, meaning that it can take into account the following factors:

- clarifying whether the legal rule in question is addressed exclusively to a specific group or is imposed on all by its nature (*Bendenoun v. France* case);
- clarifying whether the procedure is initiated by a public authority on the basis of legal powers of execution (*Benham v. the United Kingdom* case);
- clarifying whether the judicial norm has a repressive or deterrent function (*Öztürk v. Germany* case, cited above);
- clarifying whether a conviction to any type of punishment depends on finding of guilt (*Benham v. United Kingdom* case, cited above);

- the way in which comparable procedures are classified in other Member States of the Council of Europe (*Öztürk v. Germany* case, cited above).

C. The seriousness of the punishment which the person concerned risks receiving.

This criterion is analysed by the European court in the light of the maximum possible punishment provided for by the incidental law in question of the Member State complained of (*Campbell and Fell v. the United Kingdom* case).

It has also been decided that the last two criteria presented above *are alternatives and not necessarily cumulative* in the *Engel and Others v. the Netherlands* case.

In order to benefit from the protection of the fundamental right provided by Article 6 from E.C.H.R., it is sufficient for the offence by its nature to be regarded as *criminal* from the point of view of conventional law, or if it makes a person liable to a penalty which, by its nature and degree of seriousness, falls within *the criminal sphere* (*Lutz v. Germany* case).

For example, the fact that a crime is not punishable by imprisonment is irrelevant in *Nicoleta Gheorghe v. Romania* case, because *the relatively diminished character cannot free a crime from its intrinsic criminal character*.

A cumulative approach to the three criteria mentioned above may, however, be ordered in a situation where a separate analysis for each of them does not allow a clear conclusion to be reached on the existence of an accusation in criminal matters (*Bendenoun v. France* case, cited above).

Using the expressions *accusation in criminal matters* and *accused of a crime*, the three paragraphs of Article 6 of E.C.H.R. refer to identical situations, being applicable in terms of solving the criminal side of the case brought before the court.

As a result of the above-mentioned criteria, the incidence of Article 6 of E.C.H.R. may also be applied to cases related to the administrative or contravention field, such as those related to the road regime (*Lutz v. Germany* case), or those regulating the norms of social cohabitation (*Nicoleta Gheorghe v. Romania* case, cited above), including the procedures regarding tax increases or other tax penalties if the law on the application of the penalties is applicable to all taxpayers, and the increase is a considerable one (*Mieg de Boofzheim v. France* case).

The exigencies of Article 6 of E.C.H.R. also apply to cases in the criminal investigation phase, especially in terms of respecting the reasonable term or the right of defence, and in this case the European court examines them as a whole (*Imbrioscia v. Switzerland* case).

Thus, the provisions of Article 6 (1) apply from one end of the judicial proceedings to the other in order to establish the merits of an *accusation in criminal matters*, with the exception of proceedings aimed at reopening a criminal trial (*Fischer v. Austria* case). If the court has ordered the reopening of the criminal proceedings, the European court's requirements are again applicable as regards the merits of an accusation in criminal matters (*Löffler v. Austria* case).

In national criminal procedural law, the charge in criminal matters against a person who has committed a crime is made at the time when the continuation of the criminal investigation is ordered against him, also known as *in personam* stage.

The activity of the criminal investigation bodies to summon the suspect in order to inform the accused is equivalent to an official notification regarding the imputability of committing a criminal act.

We mention the fact that the purpose of the criminal trial, in accordance with the provisions of Article 8 of the Code of Criminal Procedure, is deduced from all the specific activities carried out by the criminal investigation bodies in full compliance with the right to a fair trial, respectively “... *the acts constituting criminal offences established in a timely and complete manner and no innocent person shall be held criminally liable, and any person who has committed a criminal offence shall be punished in accordance with the law*”.

In accordance with the provisions of Article 285 from the Code of Criminal Procedure, *the objective of the criminal prosecution* consists of “... *gathering the necessary evidence regarding the existence of the offences, to identify the perpetrators of the offence and to establish their liability, in order to determine whether or not it is appropriate to order the indictment*”.

It results that there cannot be a criminal trial, if we take into account the purpose and object of the criminal investigation activity established by the legislator, without carrying out this stage, which also has a non-public character (according to Article 285 (2) from the Code of Criminal Procedure.

The temporal limit of carrying out the criminal prosecution is characterized by an initial limitation that corresponds to the date of the beginning of the criminal investigation *in rem* and a final limit, materialized by the solutions on whether to proceed or not with the prosecution of a person ordered by the prosecutor.

Regarding the *content* and *scope* of the acts of criminal prosecution that can be carried out after the date of the beginning of the criminal investigation *in rem*, we mention that they are circumscribed to the procedural activity of administering the evidence, an essential aspect for the formulation of a criminal charge against a person.

The mere registration of a criminal complaint or a complaint that meets the substantive and form requirements laid down in Article 289 from the Code of Criminal Procedure does not necessarily automatically lead to a criminal charge against a person without the administration of a minimum of evidence, which is a particularly important stage regarding the person under investigation.

Accusing a person of committing a crime must be the consequence of the existence of certain evidence that has been obtained loyally in compliance with the legal provisions, but also in compliance with the requirements of the court of conventional law.

The case-law of E.C.H.R.,¹ regarding the person who should benefit from protection who has acquired the status of suspect, had held that he operates not from the moment when he is made aware of that status, but from the moment when

¹ www.echr.coe.int, *Brusco v. France* case, no. 1466/07 of 14.10.2010, accessed on 25.08.2019.

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the national judicial authorities “*had plausible reasons for suspecting him of having committed a criminal offence*”.

The provisions of Article 305 (3) from the Code of Criminal Procedure which regulates the conditions under which the initiation of criminal prosecution *in rem* is ordered, as well as the further conduct of criminal prosecution against a person, leave a large margin of appreciation regarding the volume of administration of evidence at the disposal of the criminal investigation bodies, but also the moment when they understand to formulate the criminal charge.

This aspect generates an unequal practice in this field, as it is enough to go through the content of the Report of the Judicial Inspection – Directorate of Inspection for Prosecutors no. 5488/IJ/1365/DIP/2018 from 05.04.2019 on “*Respectarea principiilor generale care guvernează activitatea Autorității Judecătorești în cauzele de competența Direcției Naționale Anticorupție privind magistrați, sau în legătură cu acestea, în perioada 2014-2018*”², in order to see the extent of this phenomenon.

In this respect, we exemplify the criminal file no. 304/P/2014 (which was not solved at the date of the control), assigned to the case prosecutor for settlement on the 08.12.2014, regarding alleged acts committed by several judges and prosecutors (National Anticorruption Directorate – ST Ploiești), in connection with the settlement of some civil cases whose handover was repeatedly requested between August and December 2017, as many were in progress before judicial courts. From the date of registration until the date of the control (about 4 years), criminal investigation activities were carried out in this case, respectively it was ordered to start the criminal prosecution on 10.12.2014 in terms of committing the offence laid down by Article 132 of Law no. 78/2000 reported to Article 297 from the Code of Criminal procedure; in the period 2014-2018, 37 additions to the initial denunciation were received in the file, and 2 witnesses were heard on 25.05.2018 and 31.05.2018. However, in this case, no criminal charge was made against any person, although evidence was administered, and the investigation period was considerable (over 4 years from the date of the complaint).

In another criminal case (criminal file no. 163/P/2014 of National Anticorruption Directorate - ST Suceava), regarding alleged acts committed by a prosecutor from PT Suceava, it was registered on 10.11.2014 and the criminal prosecution *in rem* in terms of committing the offense was started on 26.05.2016 as laid down by Article 132 of Law no. 78/2000, although the injured person was heard on 24.05.2015, **one year before the order was issued *in rem***.

The judicial inspectors also found (criminal case no. 33/P/2014 of National Anticorruption Directorate – ST Suceava) that the file in question was registered on 30.04.2014, as a result of the notification report from the same date (targeting a judge from the Suceava Court of Appeal), and the criminal investigation bodies

² English translation: *Compliance with the general principles governing the activity of the Judicial Authority in cases within the competence of the National Anticorruption Directorate on magistrates, or in relation to them, in the period 2014-2018*

did not carry out any investigation act between August 2014 and April 2016, and, as a result, **the file remained unworked**. On 13.04.2016, it was requested the issuance of technical supervision measures through the prosecutor's report until 11.06.2016, and it was ordered to close the case by order dated 28.03.2018, based on Article 16 (1) (a) of the Code of Criminal Procedure ("the act does not exist").

We consider that the aspects found by the judicial inspectors during the control carried out at the National Anticorruption Directorate for the period 2014-2018 can also be found at the other prosecutor's offices in the country, even if at a lower level.

In order to prevent the recurrence of such situations, it is imperative that the judicial bodies comply exactly with the European court's requirements regarding *the right of defence and granting of the time and facilities necessary to prepare the defence of the person accused of committing a crime*.

This fundamental right is provided for in Article 6 (3) (b) of E.C.H.R., which regulates the right of defence and granting of time and facilities necessary for the preparation of the defence.

Since the right of defence guaranteed by Article 6 (3) (b) of E.C.H.R. has a relative character, it cannot be invoked if the accused or his lawyer does not do all the diligence necessary for the exercise of it in accordance with the provisions of national law, if he declared during the proceedings that he would not take part in them, or if the defendant was acquitted or a solution was ordered against him (*Bricmont v. Belgium case*).

In its case-law (*Artico v. Italy case*, cited above), E.Ct.H.R. has held that the judicial bodies of the Member States are obliged to ensure and protect "... *not theoretical or illusory rights, but concrete and effective rights*" in a judicial procedure, referring to the importance of the right of defence as a basic component of the right to a fair trial, essential in a state of law.

The European Court ruled that this assessment was made in a concrete manner, depending on the circumstances of each case in relation to the complexity in fact and law of the criminal case, the importance of the activity for which the time is necessary for the preparation of the defence (proposing evidence or challenging its conclusiveness or usefulness, drawing relevant conclusions when taking preventive measures, etc.), or the decision of the accused to exercise his own defence, etc. (*Iglin v. Ukraine case*).

The defendant's exercise of the rights of defence assumes the possibility for him to benefit accordingly and without restrictions from all the procedural rights provided by the legal norms, in order to support the main favourable arguments before the criminal investigation bodies.

In the *Dayanan v. Turkey case*, E.Ct.H.R. decided that these facilities may consist in the right of the accused deprived of liberty to contact his lawyer orally and in writing, to know the evidentiary material in the criminal file, but also the obligation of the prosecutor to present all the means of evidence administered to the court during the criminal investigation, both in his favour and to his detriment.

The national criminal procedural provisions provide for legal regulations according to which the parties or the main procedural subjects involved in a criminal procedure must benefit from all the guarantees provided by law for the proper exercise of their rights and legitimate interests.

The right of defence can be exercised both personally (judicial authorities may restrict this right if they consider that the accused person cannot defend himself adequately and properly without the assistance of a lawyer)³ and by a lawyer.

The national criminal procedural provisions provide a series of specific rights for the suspect or defendant in order to guarantee a concrete and effective defence, these being expressly mentioned in the provisions of Article 83 and Article 108 from the Code of Criminal Procedure.

However, the rights of defence must be exercised in good faith, as this is part of the principle of procedural loyalty, otherwise the judicial bodies may sanction the situations in which it is abused (according to the provisions of Article 283 (4) (n) of the Code of Criminal Procedure).

In the practice of the criminal investigation bodies, the violation of the right to a concrete and effective defence is encountered in the situation in which the accused is a suspect and requests the consultation of the criminal investigation file in accordance with the provisions of Article 94 (4) from the Code of Criminal Procedure⁴, because it may be restricted by the prosecutor, although in the investigation phase of the act, also called *in rem* (Article 305 (1) from the Code of Criminal Procedure), most of the evidence on which the criminal charge is based is administered.

In this respect, we will present a case study in order to ascertain the degree of harmonisation of the national rules in the field with the requirements of the European court.

Case study

From the content of the Conclusion no. 337 final on 26.06.2019 of the Criminal Section of the High Court of Cassation and Justice (hereinafter HCCJ), a conclusion accessible on www.scj.ro website), it results that the defendant A. was sent to trial by indictment no. X from 18.01.2019 of the Prosecutor's Office attached to the High Court of Cassation and Justice - Section for the investigation of crimes in justice, and the case was registered before the Bucharest Court of Appeal (hereinafter CA Bucharest), Criminal Section I, for committing the crime of "abuse of office" provided for and punished by Article 297 (1) from the Criminal Code.

³ According to Article 90 (1) (b) from the Code of Criminal Procedure, mandatory legal assistance is provided "*if the judicial body considers that the suspect or the defendant could not make his own defence*".

⁴ According to Article 94 (4) from the Code of Criminal Procedure, "*during the criminal investigation, the prosecutor may restrict the consultation of the file on a reasoned basis, if this could prejudice the proper conduct of the criminal investigation. After the initiation of the criminal proceedings, the restriction may be ordered for a maximum of 10 days*".

The defendant complained in particular about the violation of the right of defence during the criminal investigation both during the criminal investigation, in front of the case prosecutor, as well as in the preliminary chamber procedure at the CA Bucharest, but also in the grounds of appeal before the preliminary chamber judge of HCCJ (as the superior court), because *“before he was assigned a procedural quality that would allow him to request and obtain participation in the performance of the acts of criminal prosecution, as well as subsequently, after acquiring the status of suspect in question and after hearing in this capacity, he was denied any request for evidence in defence by the case prosecutor, but also the re-hearing of the witnesses carried out before the criminal charge was made”*.

The preliminary chamber judge of the superior court, after analyzing the evidentiary material administered in the case, found that the hearing of witnesses D and E was carried out by the case prosecutor on 19.12.2018, and the injured persons B and C were heard on 18.12.2018, the activities being carried out in the absence of the defendant or the chosen defender.

The preliminary chamber judge also found that, by the prosecutor's order dated 14.12.2018, it was ordered to continue the criminal investigation against suspect A in terms of committing the crime of “abuse of office”, an act provided for by Article 297 (1) from the Criminal Code, and it was subsequently summoned to the headquarters of the prosecutor's office for 20.12.2018 in order to inform the accusation, as well as to his hearing as a suspect.

At that time, the suspect requested a deadline for the purpose of consulting the criminal file, as well as for his hearing and the request was approved by the case prosecutor for the date of 09.01.2019.

It results, therefore, that although the person under investigation was a suspect as of 14.12.2018, before being made aware of that capacity, the case prosecutor proceeded to hear the two injured persons, as well as witnesses D and E. The preliminary chamber judge also noted that there was no need for mandatory legal assistance in accordance with the provisions of Article 90 from the Code of Criminal Procedure in relation to the offence under investigation and the defendant (who was of age, who was being investigated in a state of liberty, etc.), as well as in the absence of an express request from the chosen defender to participate in the conclusion of any act of criminal prosecution.

Since the provisions of Article 281 (1) (f) sanction with absolute nullity the administration of evidence in the event that the suspect or defendant is not assisted by the lawyer when legal assistance is mandatory, the preliminary chamber judge of HCCJ found that the right of defence of defendant A was not violated.

The superior court thus concluded that it was *“...a circumstance which cannot be imputed to the judicial bodies which did not objectively know that the suspect had hired a defender”*, since there was no express request in the criminal file from the defendant's chosen defender to be present at the administration of this evidence at the time of the hearings held on 18th and 19th of December 2018.

On the other hand, the preliminary chamber judge of HCCJ found that the rejection of the request for re-hearing of the persons heard before being made

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aware of his status as a suspect in the present case by the case prosecutor “...*may be assimilated in certain circumstances to a violation of the right of defence, in which sense it may be considered that the procedure was not fair if the accused was not given an adequate and sufficient opportunity to challenge the statements of the witnesses and to obtain their interrogation at the time of formulating the provisions and, in any event, before the indictment is issued*”.

In such situations, the judicial bodies are obliged to concretely verify the importance of the evidence administered in the absence of the defendant's chosen defender, in relation to the existence of other evidence capable of supporting the establishment of the criminal charge.

If the evidence contested by the defendant constitutes the only evidence on which the accusation is based, or is the most important, the defendant must be approved to interrogate the witnesses of the prosecution until the indictment is drawn up, in order to avoid a judicial error in case of abolition of these provisions by the court.

Taking into account the above-mentioned, the preliminary chamber judge of HCCJ maintained the conclusion of the preliminary chamber judge of the Bucharest CA given in the council chamber on April 11, 2019, and found the legality of the court referral, the legality of performing the acts and the administration of evidence in the criminal investigation phase, ordering the commencement of the trial, stating that the defendant's right of defence did not suffer an infringement as regards the equity of the proceedings in the light of the requirements of the European court.

Although we appreciate the relevance of the argumentation of the courts called upon to rule on such a request in fact and in law, we must note that the further conduct of the criminal investigation against the suspect A. was ordered on 14.12.2018, and he was summoned for the notification of the criminal charge and for a possible hearing on 20.12.2018 (after 6 days), the period of time during which the criminal investigation body conducted the hearing of the injured person and of the prosecution's witnesses.

We consider that the suspect A should have been notified immediately after the criminal investigation body drew up the order for the further conduct of the criminal investigation, and to postpone the administration of the evidence after this date, except for the situation expressly governed by the provisions of Article 308 from the Code of Criminal Procedure concerning the early hearing of persons.

We mention that this is due to the fact that the provisions of Article 305 (3) in relation to Article 307 from the Code of Criminal Procedure are permissive in this respect, because they do not expressly oblige the criminal investigation bodies to immediately notify the person under investigation of the criminal charge, as provided by the requirements of the European court.

It is true that in its case-law, E.Ct.H.R. made it liable to the national judicial authorities of a Member State to notify the criminal charge of a person suspected of committing a criminal offence, no later than the time of the case trial, under adversarial conditions and in open court.

Even if it can be considered that the right of defence is not violated in such situations from the point of view of the conventional right, there are situations in the judicial practice in which the witness no longer fully supports the statement given before the criminal investigation body, situation in which, correctly, the prosecutor of the session is referring to him in terms of committing the crime of "perjury" provided by Article 273 from the Criminal Code.

The criminal investigation bodies invested with the settlement of the new criminal case note that he returns and supports again the first statement given during the criminal investigation, and not the one given before the court, on the occasion of the hearing as a suspect of the person who previously had the quality of witness, after they notify the case of non-punishment provided by Article 273 (3) from the Criminal Code.

In such situations, the witnesses invoke various reasons to justify the return to the previously given statement (respectively, the state of fatigue when they were heard in court, the passage of a long period of time between the two statements, the fact that they did not correctly understand the questions asked by the judge or by the parties' lawyers, etc.).

In these conditions, the criminal investigation bodies order the solution of closing the criminal case against the respective witness in terms of committing the offence provided for by Article 273 from the Criminal Code pursuant to Article 16 (1) (h) from the Code of Criminal Procedure.

The solution ordered as well as the suspect's statement are immediately sent to the initial criminal case pending before the first court, in order to be taken into account when resolving it.

If we analyze the cases of non-punishment provided for in Article 273 (3) from the Criminal Code, it results that the witness will not be criminally liable for committing this crime, if he withdraws his statement "... before the detention, arrest, or initiation of criminal proceedings, or before an order has been issued or another solution has been given as a result of perjury in other cases".

Basically, the person heard as a witness in a criminal case in which the prosecutor settled the case and ordered the indictment of a defendant is criminally liable for committing the crime of *perjury*, if he no longer supports the statement given during the criminal investigation during the judicial investigation, during the judicial investigation, during his re-hearing as a witness, or makes statements that no longer correspond to those initially declared, as laid down by Article 273 from the Criminal Code, which may influence the path to find out the truth.

CONCLUSIONS

In conclusion, we consider that the following aspects are necessary in order to comply exactly with the requirements of the European court regarding the observance of the right of defence of the person accused of committing a crime, as well as for the purpose of a fair settlement of a criminal case:

- re-hearing of witnesses who were heard after the date of ordering the continuation of the criminal investigation against the suspect, if requested;

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- modification of *de lege ferenda* of the provisions of Article 273 (3) from the Criminal Code, in the sense of extending the cases of non-punishment and in the situation in which the witness withdraws the statement given during the criminal investigation, until no later than the date of settlement of the case at first instance.

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- Conclusion no. 337 final on 26.06.2019 of the Criminal Section of the High Court of Cassation and Justice, accessible on the www.scj.ro website;
- All decisions of E.Ct.H.R., E.Ct.H.R. and the statistical data indicated in the paper are accessible on the www.echr.coe.int website.

⁵ English translation: *Compliance with the general principles governing the activity of the Judicial Authority in cases within the competence of the National Anticorruption Directorate on magistrates, or in relation to them, in the period 2014-2018*)