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Respect for the Right of the Defence in the Romanian Criminal Process from the Perspective of European Union Law and Internal Criminal Procedural Law

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ABSTRACT: Given that the right to a defence is guaranteed both in international documents and in European Union law, normative acts have been developed over the years concerning the European standard of protection of the right to defence, the time necessary for the preparation of the defence, the facilities necessary for the defence, the information of the accused on the right to defend himself or to be assisted by a chosen defence counsel at all stages of the criminal proceedings. In this respect, Romanian legislation has also adopted essential regulations in line with European provisions on the subject, starting with the fundamental law - the Romanian Constitution, other special laws and expressly the provisions of the Code of Criminal Procedure on the right to defence.

KEYWORDS: right of defence, Code of Criminal Procedure, fair trial, chosen counsel, compulsory legal assistance, public defender, right to consult the file, preparation of defence

1. Legal provisions referred to in international legal acts and European Union law on the respect of the right of defence

Considering it is essential that human rights be protected by the rule of law, the United Nations adopted the Universal Declaration of Human Rights on 10th December 1948, which states in Article 11 that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under international or national law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal act was committed.

After the establishment of the European Community and subsequently the European Union, the Charter of Fundamental Rights of the European Union was adopted [published in the Official Journal of the European Union No C 326/391 of 26.10.2012 (hereinafter referred to as "the Charter")], with express reference to the provisions of Articles 47 and 48; the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), referring to Art. 6; the International Covenant on Civil and Political Rights (hereinafter "ICCPR") enshrining the right to a fair trial and guaranteeing respect for the right of defence.

To begin with, we shall refer to Article 6 paragraph (3) of the ECHR, which states that any accused person has, above all, the right:

a. to be informed promptly, in a language he understands and in detail of the nature and cause of the charge against him;

b. to have adequate time and facilities for the preparation of his defence;

c. defend himself in person or through legal assistance of his own choosing and, if he does not have sufficient means to pay for legal assistance, a public defender should represent him free of charge in cases where the interests of justice so require;

d. to hear or call witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

e. to have the free assistance of an interpreter if he does not understand or speak the language used at the hearing.

Thus, the European Court of Human Rights states that the guarantees expressly set out in Article 6 paragraph (3) illustrate the concept of a fair trial in the sense of guaranteeing or contributing to guaranteeing the fairness of the criminal proceedings as a whole, and that in criminal matters accurate and complete information about the charges against an accused person, and therefore about the legal position which the court might take against him, is an essential condition of the fairness of the proceedings - Art. 6 paragraph 3 letter a) (see to this effect *Pelissier and Sassi v. France, paragraph 52; Sejdovic v. Italy, paragraph 90*). This information must actually be received by the accused, as a legal presumption of receipt is not sufficient, and this obligation to inform the accused is entirely incumbent on the prosecution and cannot be passively fulfilled by providing information without warning to the defence. The information must be adequate and full and, with regard to any change in the charge, he must have the necessary time and facilities to react to these changes and to organise his defence on the basis of any new information or allegations (*Mattoccia v. Italy, paragraph 60; Bäckström and Andersson v. Sweden*).

In situations where it is shown or there is reason to believe that the accused does not have sufficient knowledge of the language in which the information is communicated, the authorities must provide the accused with a translation (*Brozicek v. Italy, paragraph 41; Tabaï v. France*).

With regard to the provisions of Article 6 paragraph (3) letter (b) of the Convention - the ECHR looks at two elements of a genuine defence, relating to the question of facilities and that of time in that the activities relating to the defence of the accused must include "*everything necessary*" for the preparation of the trial (*Can v. Austria, paragraph 53; Gregačević v. Croatia, paragraph 51*) as well as the facilities and time granted to an accused to be assessed in the light of the circumstances of each case (*Iglin v. Ukraine, paragraph 65; Galstyan v. Armenia, paragraph 84*). The appropriate time limit must not be detrimental to the procedural rights of either party, but must take into account the nature of the trial, the complexity of the case and the stage of the proceedings (*Gregačević v. Croatia*).

With regard to the necessary facilitation, any accused must have access to the evidence in the case file throughout the proceedings in order to prepare a defence (Huseyn and Others v. Azerbaijan, paragraph 175), that the remand prisoner must have conditions of detention which allow him to read and write with a reasonable degree of concentration and for his lawyer to make observations, the facilities which the accused must have for consultation with his lawyer, and the fact that this right under Article 6 paragraph (3) letter (b) overlaps with the right to be assisted by a lawyer under Article 6 paragraph (3) letter (c) of the Convention (see, for example, *Lanz v. Austria, paras. 50-53; Öcalan v. Turkey (MC), para. 148; Trepashkin v. Russia (no. 2), paragraphs 159-168*).

With regard to the provisions of Article 6 paragraph (3) letter (c) governing particular aspects of the right to a fair trial guaranteed in paragraph 1 (*Correia de Matos v. Portugal (dec.); Foucher v. France, paragraph 30*) and three distinct rights of the accused are set out: the right to defend himself, to be assisted by a lawyer of his own choosing and to be assisted free of charge by a lawyer (*Pakelli v. Germany, paragraph*

31). As regards the right of self-defence, it allows the accused to defend himself, but it is not absolutely guaranteed because it is within the discretion of the Contracting State to appoint a lawyer to guarantee his right of defence (*Croissant v. Germany, paragraph 27; Lagerblom v. Sweden, paragraph 50*).

The fundamental elements of a fair trial are the right of any accused person to be effectively defended by a lawyer, and when they are detained or remanded in custody, they must have access to a lawyer from that moment. This right also derives from the fact that the accused may participate effectively in his criminal trial, but also includes the right to be assisted by a lawyer if necessary, and the mere presence of the lawyer cannot compensate for the absence of the accused (*Dayanan v. Turkey, para. 31, Lagerblom v. Sweden, paragraph 49, Zana v. Turkey (MC), paragraph 72*). If an accused who has been lawfully summoned does not appear for trial even without justification, he should not be deprived of the right to be defended by a lawyer (*Van Geyseghem v. Belgium (MC), paragraph 34, Krombach v. France, paragraph 89*), and in order for the right to legal assistance to be practical and effective and not merely theoretical, its exercise must not depend on the fulfilment of excessively formal conditions (see in this respect also *the Guide to Article 6 of the Convention - Right to a fair trial - criminal side - https://www.echr.coe.int/*).

The last right set out in Art. 6 paragraph (3) letter (c) concerning the right to legal aid must fulfil two conditions:

- To prove that he does not have sufficient financial means (some indications);
- Contracting States are only obliged to provide legal aid *"if the interests of justice so require" (Granger v United Kingdom, paragraph 46*).

With regard to the *"interests of justice"* the European Court in its practice has decided that the complexity of the case as well as the personal situation of the accused must be taken into account. This right to legal assistance must be *"concrete and effective"* in the sense that the accused has the right to discuss in private with the lawyer, the effective assistance of a lawyer to which the accused is entitled must not be prevented, and the obsessive limitation of the number and duration of visits by the defendant's lawyers must not be hindered, as these are further possible violations of the right to effective assistance (*Sakhnovskiy v. Russia (MC), paragraph 102, Öcalan v. Turkey (MC), paragraph 135*).

It should be pointed out that the case law of the European Court of Human Rights has led to the adoption of directives implementing the principle of mutual recognition of decisions in criminal matters and the right to information in criminal proceedings. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (published in the Official Journal of the European Union No L 142/1 of 01.06. 2012), which covers both suspects and accused persons in criminal proceedings and persons subject to a European Arrest Warrant and states in Article 3 that they must be informed promptly of the following procedural rights as they apply under national law, in order to ensure that those rights can be exercised effectively: *(a) the right to be assisted by a lawyer; (b) any right to free legal advice and the conditions for obtaining such advice; (c) the right to be informed of the charge in accordance with Article 6; (d) the right to interpretation and translation; (e) the right to remain silent*.

This information shall be in plain, accessible language and shall be provided orally or in writing. The Directive also indicates the right of access to case material of arrested persons or their lawyers, where a person is arrested and detained at any stage of the criminal proceedings, material in the possession of the competent authority which is essential to effectively challenge, in accordance with national law, the lawfulness of the arrest or detention.

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in proceedings relating to the European Arrest Warrant, as well as the right of a third person to be informed after deprivation of liberty and the right to communicate with third persons and consular authorities during deprivation of liberty (published in the Official Journal of the European Union No. L 294/1 of 6.11.2013) which lays down minimum rules on the rights of suspects and accused persons in criminal proceedings *to have access to a lawyer*, setting out in Article 3 these rights, namely:

(a) Before being questioned by the police or other law enforcement or judicial authority;

(b) In the course of an investigative or evidence-gathering exercise by law enforcement or other competent authorities in accordance with paragraph 3 letter (c);

(c) Without undue delay after deprivation of liberty;

(d) Where they have been summoned to appear before a court competent in criminal matters, in good time before they appear before that court.

This right of access to a lawyer consists in the fact that suspects or accused persons have the right to have their lawyer present and participate effectively when they are questioned, in accordance with procedures under national law, but provided that such procedures do not prejudice the effective exercise and the substance of the right concerned.

Similar rights also apply when a person is wanted in the executing Member State after arrest pursuant to a European Arrest Warrant.

Once the suspected or accused person has been informed of the rights of access to a lawyer (in writing or orally), he or she has the opportunity to waive them, which is voluntary and unequivocal and can be done in writing or orally.

Similar provisions on ensuring the right of defence can be found in Directive (EU) 2016/343 of the European Parliament and of the Council of 9th March 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings (published in the Official Journal of the European Union L 65/1 of 11 March 2016), in Article 8 on the right of suspects and accused persons to be present at their own trial, that they may be represented by a mandated lawyer, who shall be appointed either by the suspect or accused person or by the State.

In order to comply with Directive 2013/48/EU on suspects and accused persons in criminal proceedings, those who are arrested under a European Arrest Warrant and who: are deprived of their liberty; must be assisted by a lawyer in accordance with Union or national law; must or may be present at an investigative or evidence-gathering act, Directive (EU) 2016/1919 of the European Parliament and of the Council of 26th October 2016 on free legal assistance for suspects and defendants in criminal proceedings and for persons wanted for questioning in proceedings under the European Arrest Warrant (published in the Official Journal of the European Union L 297/1 of 4. 11.2016).

It should be noted that without prejudice to the right to a fair trial, the following situations *do not constitute deprivation of liberty* within the meaning of the Directive: the identification of the suspected or accused person; the determination of whether an investigation should be initiated; the verification of the possession of weapons or other similar security-related matters; the carrying out of investigative or evidence-gathering acts other than those explicitly mentioned in this Directive, such as body searches, physical examinations, blood tests, alcohol tests or similar tests, or the taking of photographs or fingerprints; the bringing of the suspected or accused person before a competent authority in accordance with the rules laid down in national law.

Free legal assistance means the funding by a Member State of legal advice by a lawyer and applies to suspects and accused persons who do not have sufficient resources to cover the costs of legal advice by a lawyer. Here the criterion of material status is taken into account, subject to certain relevant and objective factors such as income, family situation of the person concerned, costs of legal assistance, standard of living in the Member State, and sometimes the *criterion of merits* is also applied, taking into account the seriousness of the offence, the complexity of the case, the severity of the sanction in question, to see whether the interests of justice require that free legal assistance be granted. Such assistance shall be granted only for the purpose of criminal proceedings in which the person concerned is suspected or accused of having committed a criminal offence, similarly free legal assistance shall also apply from the moment of arrest under a European Arrest Warrant until they are surrendered or until the decision refusing surrender becomes final.

The European Union has also established procedural safeguards for children (persons under 18 years old) by adopting Directive (EU) 2016/800 of the European Parliament and of the Council of 11th May 2016 on procedural safeguards for children who are suspected or accused persons in criminal proceedings (published in the Official Journal of the European Union L 132/1 of 11.05.2016).

This Directive applies to children who are suspects or accused persons in criminal proceedings until it is finally established that the suspected or accused person has committed a criminal offence, including, where applicable, until a conviction has been handed down and any appeal has been determined. If during the proceedings the child was under the age of 18 and has subsequently reached that age, this Directive shall apply taking into account all the circumstances of the case, including the maturity and vulnerability of the person concerned. Member States may decide not to apply this Directive to the person concerned when he or she has reached the age of 21 and they must ensure in national law the effective legal assistance of the child to be assisted by a lawyer pursuant to Article 6 of the ECHR. This legal assistance must be provided without undue delay, inform children that they are suspects or accused persons and must be provided with the compulsory assistance of a lawyer from any of the following points in time: *before being questioned by the police or other law enforcement or judicial authority; when an investigative or evidence-gathering act is carried out by the investigating or other competent authorities; without undue delay after deprivation of liberty; if they have been summoned to appear before a court having jurisdiction in criminal matters, in good time before they appear before that court*. Private interviews of the child and communication with the child's lawyer, including prior to questioning by the police or other law enforcement authorities, must be ensured when they are present before a judge or court competent to rule on detention at any stage of the proceedings as well as during detention.

2. Domestic legal rules on criminal proceedings for the right of defence

In view of the universal validity of the right to defence, Romania has also adopted this right in its domestic law through various normative acts and here we refer to Article 24 of the Romanian Constitution where the *right to defence* is guaranteed and the parties during criminal proceedings have the right to be assisted by a lawyer, elected or appointed ex officio; Law no. 51/1995 on the organization and exercise of the legal profession (republished in the Official Gazette, Part I, no. 440 of 24 May 2018), with reference to the legal assistance and representation before the courts, prosecution bodies of the parties (accused, civil party, civilly liable party) and the main subjects of proceedings (injured party, suspect) in criminal proceedings by lawyers; Code of Criminal Procedure (Law no. 135/2010, published in the Official Gazette, Part I, No.

486 of 15 July 2010), where the fundamental principles of the right of defence are expressly provided for in Article 10, in the provisions setting out the rights and obligations of the parties regarding legal assistance and representation (Articles 88 - 96), in the taking of preventive measures provided for in Articles 202 - 244, as well as during the trial and during ordinary and extraordinary appeals.

We must expressly point out that all these provisions relating to the right to defence respect both the treaties ratified by Romania, the rights and freedoms interpreted and applied in accordance with the Universal Declaration of Human Rights, and the European Union's Community regulations which are binding, taking precedence over contrary provisions in domestic laws, in compliance with the provisions of the Accession Treaty.

From an examination of the provisions of Article 10 of the Code of Criminal Procedure, we note that the parties and the main accused have the right to defend themselves or to be assisted by lawyers, and that both they and their lawyers have the right to have the time and facilities necessary for the preparation of their defence, and that the judicial authorities are obliged to inform the suspect immediately and before he is heard of the offence for which criminal proceedings are being conducted and its legal classification. The same rights are enjoyed by the accused against whom criminal proceedings have been brought and the legal framework of the case, as he is a party to the criminal proceedings and both the suspect and the accused are advised that they have the right not to make any statement. This right of defence must be *fully and effectively* exercised by the parties and the principal subjects of the proceedings throughout the criminal proceedings, and must be exercised in *good faith* in accordance with the purpose for which it has been recognized by law.

The criminal procedure provisions in Articles 88 - 96 of the Code of Criminal Procedure provide for issues related to the lawyer who assists or represents the parties or the main litigants in the criminal proceedings, under the conditions of the law, being obliged to do so when he is chosen or appointed ex officio to provide legal assistance, and when the parties or the litigants have contrary interests, they cannot be assisted or represented by the same lawyer.

Both the suspect and the accused have the right to be assisted by one or more lawyers throughout the criminal proceedings (*during the criminal prosecution, the pre-trial proceedings and the trial - merits, ordinary or extraordinary appeals*), and the judicial bodies are obliged to inform them of this right. If a person is detained or arrested, he or she has the right to contact the lawyer, with the right to confidentiality of communications, subject to the necessary visual surveillance, security and security measures.

The legislator has also provided for situations in which legal assistance is mandatory - Article 90 of the Code of Criminal Procedure:

a) When the suspect or defendant is a minor, interned in a detention centre or in an educational centre, when he/she is detained or arrested, even in another case, when against him/her the security measure of medical internment has been ordered, even in another case, as well as in other cases provided by law;

b) If the judicial body considers that the suspect or accused person would be unable to defend himself or herself;

c) In the course of proceedings in the pre-trial chamber and in the course of the trial in cases where the law provides for life imprisonment or imprisonment for more than five years for the offence committed.

In Romanian judicial practice, the question has been raised whether the provisions of Art. 90 lit. c) of the Criminal Procedure Code on the mandatory legal assistance of the accused is only provided for natural persons or is also for legal persons. The High

Court of Cassation and Justice - *The Panel for Preliminary Ruling on Questions of Law* (the resolution of questions of law by the High Court of Cassation and Justice are binding for the courts from the date of publication of the decision in the Official Gazette of Romania, Part I - Art. 477 para. 3 of the Code of Criminal Procedure) by Decision no. 21/2016 ruled on the mandatory legal assurance in the case of a legal person, on the following grounds:

In the case law of the *European Court of Human Rights, the case of Fortum Oil and Gas Oy v. Finland was identified, in which it was held that Article 6 applies to legal persons to the same extent as it applies to natural persons and that a legal person may be considered as "accused of committing a criminal offence" in the autonomous sense that this expression has in the meaning of Art. 6 of the Convention, and the case of PayKar Yev Haghtanak Ltd v. Armenia, in which the European Court of Human Rights reiterated that, when remedies are regulated, Contracting States must ensure that legal and natural persons within their jurisdictions continue to enjoy the same guarantees of Art. 6 before courts of appeal as before courts of first instance.*

The legal text, Article 90 of the Code of Criminal Procedure, which regulates the mandatory assistance of the suspect or defendant, in the provisions of letter (c) does not distinguish between the accused as a natural person and the accused as a legal person, nor does it limit the application of these provisions to the accused as a natural person.

According to Article 82 of the Code of Criminal Procedure, the defendant is the person against whom criminal proceedings are brought and may be either a natural person or a legal person. Thus, where the text of the law does not distinguish, neither must the court distinguish (ubi lex non distinguit, nec nos distinguere debemus). Whenever the legislator has wished to distinguish between a natural person defendant and a legal person defendant, it has expressly referred to one of these concepts [e.g., Article 90 letter (a) of the Code of Criminal Procedure].

Interpreting grammatically the text of Art. 90 letter c) of the Code of Criminal Procedure, it follows that what was taken into account is the penalty prescribed by law for the offence committed, in the meaning set out in Article 187 of the Criminal Code, i.e. the penalty prescribed by the text of the law incriminating the offence committed in its completed form, without taking into account any possible causes for reduction or increase of the penalty, so that compulsory legal aid is required by law in view of the seriousness of the offence.

Any solution to the contrary would lead to unequal treatment of the different parties to the proceedings and to an unjustified distinction in interpretation which the procedural law does not allow.

Moreover, this is not the only legal provision in the case of legal persons, where the penalty provided for in the rules of criminal procedure is taken into account, in the sense of Article 187 of the Criminal Code, the same reasoning being found in the determination of the fine for legal persons (Article 137 of the Criminal Code) in the case of the application of the additional penalty of dissolution of the legal person (Article 139 paragraph (1) letter (b) of the Criminal Code), and in the matter of the limitation of criminal liability of legal persons (Article 154 of the Criminal Code).

It is true that the penalties that may be imposed on a legal person do not include the penalties referred to in Article 90 letter (c) of the Criminal Code, as these are specific to the treatment of penalties applicable to natural persons, but this fact is not such as to lead to interpretations such as the exclusion of compulsory legal aid for legal persons.

The criminal liability of a legal person has certain particularities, which may also be reflected in the specific sanctions that can be applied to it.

The main penalty is a fine, which the legislator has opted for because the legal person is identified with its assets, and a financial penalty, which is well proportioned, affects its financial interests, has the desired deterrent effect and ensures a public sense of fairness.

It follows, therefore, that in determining the need for compulsory legal aid to be provided to a legal person, in the context of Article 90 paragraph (1) letter (b) of the Criminal Code, it is necessary to take account of the fact that the defendant is a legal person. c) of the Code of Criminal Procedure, the penalty applicable to the legal person under Article 136 of the Criminal Code should not be taken into account, since the text of the law makes no reference to the subject of the proceedings concerned by the penalty of life imprisonment or imprisonment for more than 5 years, but only to the seriousness of the offence committed, reflected in the penalty provided for by law.

The Romanian Code of Criminal Procedure regulates in the provisions of Articles 489 - 503 the procedure for holding a legal person criminally liable, stating that in the case of offences committed by legal persons where the main penalty is the fine provided for in Article 136 of the Criminal Code, in carrying out the object of activity in the interest of or on behalf of the legal person, from which there are no derogations regarding the mandatory legal assistance of the accused legal person, and the provisions of the preliminary chamber and trial procedure apply accordingly, as to the natural person.

The phrase *'duly applied'* in Article 90 letter c) of the Code of Criminal Procedure cannot be interpreted to the detriment of the legal person, in the sense of excluding the accused legal person from compulsory legal assistance.

To interpret the *'proper application'* of the provisions of Article 90 letter (c) of the Code of Criminal Procedure as meaning that the legal aid applicant is not entitled to be excluded from the scope of the legal aid of the Code of Criminal Procedure to the effect that they relate to the penalties applicable to the legal person under Art. 136 paragraph (2) and (3) of the Criminal Code, and not to the penalties provided for in the incriminating rules, to which Article 187 of the Criminal Code refers, is to exclude the legal person from compulsory legal aid, by way of interpretation, without a legal basis.

Accordingly, Article 489 of the Code of Criminal Procedure establishes the corresponding application of Article 90 letter c) of the Code of Criminal Procedure to the accused legal person, in the sense of referring these provisions to Article 187 of the Criminal Code.

The provisions of Art. 91 of the Criminal Procedure Code and the cases when the suspect or defendant has not chosen a lawyer, and if legal assistance is mandatory, the judicial body must take measures for the appointment of a lawyer ex officio, when: *the chosen lawyer is unjustifiably absent, fails to provide a substitute or unjustifiably refuses to defend, although the exercise of all procedural rights has been ensured, the judicial body shall arrange for the appointment of a lawyer of its own motion to replace him, giving him a reasonable time and facilities for the preparation of an effective defence, and shall mention this in the minutes or, where appropriate, in the closing of the hearing. In the course of the trial, where legal assistance is compulsory, if the chosen lawyer is absent without justification at the trial date, fails to arrange for a substitute or refuses to conduct the defence, even though the exercise of all procedural rights has been assured, the court shall arrange for the appointment of a lawyer to replace him, giving him at least three days to prepare his defence. The appointed public defender is obliged to appear whenever requested by the judicial body, ensuring a concrete and effective defence in the case.*

The criminal procedure law provides for the rights of the suspect's and defendant's lawyer to attend any act of criminal prosecution with some exceptions, to

request to be informed of the date and time of the criminal prosecution or the hearing by the judge of rights and freedoms and to participate in the hearing of any person in the case, to formulate complaints, requests and briefs. Once the case has reached the stage of trial, the defendant's lawyer shall have the right to consult the case file, to assist the defendant, to exercise the defendant's procedural rights and to be given the time and facilities necessary for the preparation and conduct of an effective defence. An essential right is also the right to consult the file in the sense that this can be done both by the lawyer of the parties and of the parties to the proceedings. This is done objectively, in the sense that the lawyer may note down data or information from the file, obtain photocopies at the client's expense, and in some cases, during the criminal proceedings, the prosecutor may restrict consultation of the file for up to 10 days (if criminal proceedings have been initiated), giving reasons.

The lawyer of the injured party, the civil party or the civilly liable party has rights similar to those of the suspect and the accused during *the criminal proceedings*, in the sense of the right to be present at any act of the criminal proceedings, the right to consult the documents in the file and to make requests and submit pleadings.

Also, *during the trial*, the lawyer of the injured person, the civil party and the party civilly liable shall exercise the rights of the person, assisted except for those which he or she exercises in person, the right to consult the file, and there are also situations in which legal assistance is mandatory if the injured person or the civil party is a person who lacks capacity or has limited capacity. It is possible for the judicial body to decide whether, for certain reasons, the persons referred to above are unable to defend themselves and to appoint a lawyer of its own motion.

Throughout the criminal proceedings, the suspect, the accused, the other parties and the injured party may be represented by a lawyer, except in cases where their presence is mandatory or deemed necessary by the prosecutor during the criminal proceedings or by the judge or the court during the trial.

In order to respect the right of defence when taking preventive measures (Art. 202 paragraph 4 of the Code of Criminal Procedure - detention; judicial control; judicial control on bail; house arrest; preventive arrest), it is mandatory that the suspect or defendant be assisted by a lawyer, chosen or appointed ex officio. This participation of the defendant's lawyer is mandatory so that the judicial bodies are obliged to take measures in this respect, being in line with Directive 2013/48 EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and proceedings relating to the European Arrest Warrant. The legislator has provided in the provisions of Article 224[1] of the Code of Criminal Procedure for information on the special conditions of execution of detention and preventive arrest ordered against a minor who, together with the information of the prosecution, is also informed of the right to special conditions of execution. This information is made not only to the minor (the person under 18 years of age) but also to the parents, or, where appropriate, to the guardian, curator or person in whose care or supervision the minor is temporarily placed. If these listed persons could not be found, or if informing them would affect the best interests of the minor or the conduct of the criminal proceedings, the information shall be given to another adult who is designated by the minor and accepted as such by the judicial body. If the juvenile does not designate another adult or is not accepted by the judicial body, the information shall be made by another person chosen by the judicial body, taking into account the best interests of the juvenile. It should also be pointed out that even where medical security measures are provisionally applied, the suspect or defendant is heard by the court only in the presence of a lawyer chosen or appointed by the court. This obligation of the judicial body to ensure the defence also

exists in the case of the measure of compulsory medical treatment or provisional medical detention.

During the criminal prosecution phase, when a person is made aware of his status as a suspect, before his first hearing, when he is presented with the legal classification of the offence, he is informed of the provisions of Article 83 of the Code of Criminal Procedure, among which we can mention the right to have a lawyer of his choice, and if he does not appoint one in cases of compulsory assistance, the right to have a lawyer appointed by the court, the right to be informed of the offence for which he is being investigated and its legal classification. The same applies to respect for the right of defence and when criminal proceedings are initiated by the prosecutor under Article 309 of the Code of Criminal Procedure.

Ensuring the defence is also essential at the trial stage, so that the injured person, the defendant and the other parties can hire a lawyer and prepare their defence, including the provision of the necessary facilities for the preparation of an effective defence which must be in compliance with the reasonable time limit of the criminal proceedings. The provisions on the defence are similar not only in the first instance trial, both in the ordinary appeals (appeal and appeal) and in the extraordinary appeals (appeal for annulment, appeal in cassation, review and reopening of the criminal proceedings in the case of trial in default of the convicted person), since the provision of defence is made according to Article 356 of the Criminal Procedure Code throughout the trial, all the more so when legal assistance is mandatory.

3. Penalties for failure to respect the rights of the defence

For violation of the legal provisions regulating the conduct of the criminal proceedings (*any violation of the provisions regulating the criminal prosecution, the preliminary chamber procedure, the trial in first instance and in ordinary and extraordinary appeals as well as the execution of criminal judgments*), the legislator has established sanctions that may lead to the nullity of the act under the conditions expressly provided for by the provisions of the Code of Criminal Procedure - art. 280-282, i.e. *relative nullities* concerning the non-compliance with the legal requirement that has brought a damage to the rights of the parties or the subjects of the proceedings that can only be removed by the dissolution of the act. This may be invoked: until the close of the preliminary chamber proceedings if the infringement occurred during the criminal proceedings or in the course of those proceedings; until the first trial date with the procedure legally completed, if the infringement occurred during the criminal proceedings, when the court was seized of an agreement to plead guilty; until the next trial date with the procedure completed if the infringement occurred during the trial. This relative nullity shall be covered if the person concerned has not invoked it within the time limit prescribed by law or has expressly waived it. From the perspective of *absolute nullity* they cannot be removed in any way (e.g. assistance by a lawyer of the suspect or defendant according to the provisions of Article 90 letter (c) of the Code of Criminal Procedure - mandatory legal assistance); they can be invoked at any stage of the criminal proceedings - in the prosecution phase, in the preliminary chamber procedure or during the trial (first instance, appeal or extraordinary appeal); they can be invoked by any party, main procedural subject, by the prosecutor or ex officio by the court. According to Art. 281 of the Code of Criminal Procedure, absolute nullities are applied when the provisions concerning: a) the composition of the trial panel, b) the material competence and personal competence according to the quality of the person of the prosecution body and the courts, c) the publicity of the trial session; d) the participation of the prosecutor, when his participation is mandatory according to the law; e) *the presence of the suspect or the accused* when his participation is mandatory

according to the law; f) the assistance by the lawyer of the suspect or the accused as well as the other parties when the assistance is mandatory. This absolute nullity shall be established ex officio or upon request, and the violation of the provisions of Article 281 paragraph (1) letters a) - d) may be invoked at any stage of the criminal proceedings. The provisions of paragraph 1 letters e) to f) paragraph 4 must be invoked: a) before the end of the preliminary chamber proceedings if the violation occurred during the criminal proceedings or in the preliminary chamber proceedings; b) at any stage of the trial if the violation occurred during the trial; c) at any stage of the trial, regardless of the moment when the violation occurred, when the court has been seized with a plea agreement.

We consider, along with other authors (see in this regard Mateuț 2019, 1004) that the criminal procedural regulation establishes a discriminatory regime between the provisions set out in art. 281 paragraph 1 letter a) - d) and those provided for in paragraph 1 to letter e) - f) relating to the presence of the suspect or defendant when participation is mandatory, or the assistance by the lawyer of the suspect and the other parties when the assistance is mandatory under Article 90 of the Code of Criminal Procedure. For this reason, with reference to the provisions of Art. 281 para. 4 in which the way of regulation limits the term in which the absolute nullity of the procedural acts drawn up in the course of the criminal prosecution with violation of the right to defence, as well as in the preliminary chamber procedure, can be invoked, the Constitutional Court was referred to the Court because this was a minimization of this fundamental right, guaranteed and protected both by the Romanian Constitution and by the Convention for the Protection of Human Rights and Fundamental Freedoms. During the preliminary chamber procedure (which aims at verifying, after the committal for trial, the competence and legality of the referral to the court, as well as the legality of the administration of evidence and the performance of acts by the prosecution bodies), according to Article 344 paragraph (3) of the Code of Criminal Procedure, in the cases provided for in Article 90 of the same act, the preliminary chamber judge shall arrange for the appointment of a defence counsel ex officio and shall determine, depending on the complexity and peculiarities of the case, the time limit within which the defence counsel may submit written requests and exceptions regarding the legality of the court's referral, the legality of the administration of evidence and the performance of acts by the prosecution bodies. Failure to appoint a public defender is punishable by absolute nullity under Article 281 paragraph (1) letter f) of the same code. The Constitutional Court has ruled that *"nullity is an extreme procedural sanction, which intervenes only when other remedies are not possible"*. Thus, the significance of the protected public interest is circumscribed by the right to defence of the persons in the legal hypothesis described, for which the legislator has provided by mandatory rule, on the one hand, the provision of legal assistance ex officio and, on the other hand, the sanction of absolute nullity in the event of non-compliance.

From an analysis of the text of the law under criticism, namely Article 281 paragraph (4) letter (a) of the Code of Criminal Procedure, it follows that the violation of the right to legal assistance of the court of first instance during the preliminary chamber proceedings may be invoked only until the conclusion of the preliminary chamber proceedings. The author of the exception considered that, despite the particular importance given to this right - highlighted by the application of the maximum sanction, i.e., *absolute nullity*, in the event of its non-observance by the preliminary chamber judge, the text of the law limits the right to claim absolute nullity, even at the end of the phase of the criminal proceedings in which the accused did not enjoy this right. Thus, entitled to a lawyer of his own motion, the defendant will not have access to the defence and will not have the possibility to invoke nullity at a later stage, since the time limit for

the lapse of time has expired. In this respect, the right to a lawyer of the court of first instance at the stage of the preliminary proceedings is devoid of content, which affects both the fundamental principle of legality and the fundamental right to a defence provided by a lawyer of the court of first instance in the cases expressly provided for by law, all the more so since, in cases of absolute nullity, the procedural harm is presumed *iuris et de iure*, there being no requirement to prove its existence.

The Constitutional Court by Decision No. 88/2019 (published in the Official Gazette, Part I, No. 499 of 20.06.2019) admitted the exception of unconstitutionality of the provisions of Article 281 para. 4 letter a) of the Code of Criminal Procedure in relation to Art. 281 para. 1 letter f of the same normative act, with the following reasoning: *in the case of violation of a provision subject to the sanction of absolute nullity, there is always the procedural harm required by law, that the existence of such harm does not need to be proven, as well as its non-existence cannot be proven, the occurrence of harm being therefore under the power of a legal presumption juris et de jure. However, a sanction which always implies the existence of an injury which cannot be removed in any way can protect only those provisions which guarantee to the highest degree the establishment of the truth or which ensure the effective realization of the rights of the parties. In the case of absolute nullity, therefore, all the provisions subject to that sanction are provisions which, by the will of the law, guarantee the establishment of the truth or ensure the rights of the parties, without it being necessary to assess and argue whether the unlawfulness of the judgment under appeal falls within that ground for setting aside. Absolute nullity is characterized by the fact that the harm is based on absolute legal presumptions, the violation of the law having serious and direct consequences for the achievement of the purpose of the criminal proceedings. The Court finds that the exercise of the right to a defence, enshrined in the constitutional provisions of Article 24, must be effective, which means that in certain cases the presence of a lawyer is a necessary element in establishing the effectiveness of that right. This is because the 'assistance' of the defendant by the lawyer means not only the physical presence of the defendant in the cases provided for by law, but also the 'provision of legal assistance', i.e. the giving of advice to the defendant on what to do in the proceedings and the exercise of the defendant's procedural rights. However, the Court considers that, by regulating a case in which legal assistance is mandatory, the legislature has presumed that the right to a defence can be exercised effectively only in the presence of a lawyer. The Court finds that the legislature presumed that it was in the interests of justice to make legal aid compulsory in the cases expressly provided for by law, since infringement of the provisions relating to compulsory legal aid would result in infringement of the right to a fair trial. In that context, the Court observes that by legislating a time-limit within which absolute nullity may be pleaded in the event of non-attendance by a lawyer, even though the law provides that it is mandatory, a contradictory situation arises. Thus, the legislator establishes a time-limit which limits the possibility of invoking absolute nullity, even though it is absolutely presumed that the person present at the hearing requires the assistance of a lawyer in order to be able to make an effective defence, a defence which includes invoking nullity. However, even in the case law of the courts, it has been held that the right to an effective defence is central to the criminal trial, its importance being that all other rights would remain derisory without procedural guarantees, and the judicial authorities are obliged to ensure this right. Effective defence is a guarantee, a sure prerequisite for the objective and complete investigation of evidence, a sine qua non for the discovery of the truth, the defence of the legal rights and interests of the accused, creating the necessary conditions for the delivery of a legal and sound judgment. In those circumstances, the Court finds that, by introducing a time-limit within which the plea of absolute nullity*

may be raised in the event of non-attendance by a lawyer at the preliminary chamber stage, even though the law provided that that was mandatory, the legislature renders meaningless the very fundamental right to a defence, which is guaranteed by the assistance of a lawyer appointed by the court of its own motion in the cases expressly provided for by law. Thus, although the legislature imposes absolute nullity on the judicial body for failure to comply with that obligation, the applicable sanction appears to be ineffective if a time-limit is imposed (conclusion of the preliminary ruling procedure) within which the absolute nullity arising from the failure to comply with the provision concerning the obligation to be assisted by a lawyer at the preliminary ruling stage may be invoked.

Conclusions

From the above, it is clear that the legal provisions mentioned in the European Union law and the Romanian domestic legal provisions on the right of defence, give to the parties and defendants the right to defend themselves or to be assisted by a lawyer, the right to be given the time and facilities necessary to prepare their defence, to be informed immediately of the acts committed, the legal framework, and that this right is fully and effectively exercised by the parties and the main defendants throughout the criminal proceedings. We also consider it necessary to regulate the *legal assistance of witnesses* in criminal procedure legislation, as in other foreign legislation (France, the Anglo-Saxon system), because in many cases those who are called as witnesses to give declarations to *judicial bodies* (criminal investigation body, prosecutor, courts) want to be assisted by a lawyer. It should be noted that the Romanian Code of Criminal Procedure does not prohibit the witness to be assisted by a lawyer, in most cases both in the criminal investigation and in court the judicial bodies accept the witness to be heard in the presence of the chosen lawyer, but by legislating legal assistance to the witness, the provisions of Article 6 of the ECHR would be fully respected also for other procedural subjects of which the witness is part (Article 34 of the Code of Criminal Procedure).

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