



## Requirements Regarding Ex Officio Notification in the Context of Criminal Investigations Conducted by the Prosecutor

Sandra GRĂDINARU<sup>1</sup>

**Abstract:** The legislator has stipulated that, for certain offenses, criminal investigations must be conducted by the prosecutor. The rationale for this regulation is to ensure the proper conduct of the criminal process, considering the complexity of investigating specific offenses. This regulation must be adhered to both at the time of vesting the judicial authority with the resolution of such cases and subsequently during the performance of criminal investigation acts. The study begins with a theoretical analysis of the way the criminal investigation authority is notified, specifically through the drafting of an ex officio notification report, followed by an empirical investigation based on practical cases found in national jurisprudence, and concludes with the author's own inductive research. The researched topic is of interest to both practitioners and theorists of criminal procedure law.

**Keywords:** ex officio notification report; prosecutor's exclusive competence; incompetent authority; delegation order

### 1. Theoretical Aspects Regarding Ex Officio Notification of Criminal Investigation Authorities

According to Article 292 of the Code of Criminal Procedure, when the criminal investigation authority becomes aware of an offense through means other than a criminal complaint, denunciation, or notifications made by persons in leadership positions or others, it shall draft an ex officio notification report.

The purpose of this report is to document the intent of the criminal investigation authority and to describe the facts or offenses of which it has become aware. The existence of this ex officio notification, embodied in the report, constitutes a *sine qua non* condition for initiating a criminal investigation. If the criminal investigation

<sup>1</sup> Associate Professor, PhD, Alexandru Ioan Cuza University of Iași, Romania, Address: Bulevardul Carol I 11, Iași 700506, Romania, Corresponding author: sandra.gradinaru@yahoo.com



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authority is not lawfully notified and the investigation is not lawfully initiated, the court cannot be lawfully seized either.

According to legal doctrine, the formal requirements for an ex officio notification to produce legal effects mandate that it always be recorded in a report by the criminal investigation authority (Micu, Slavoiu & Zarafiu, 2022, p. 451).

The legislator provides that the first act drafted in preparation for a criminal investigation is the notification document, which, in the case of an ex officio notification report, also serves as the procedural act of the criminal investigation authority. Through this act, the authority, having established that it is lawfully vested regarding the commission of an offense, orders the initiation of activities to hold the offender criminally liable.

Following notification, the criminal investigation authority shall order the commencement of the criminal investigation with respect to the committed act or an act in preparation, provided the notification document meets the legal requirements, even if the perpetrator is identified or known (Article 305(1) of the Code of Criminal Procedure).

Thus, it is evident that the legislator establishes an inseparable link between the notification act of the criminal investigation authorities and the order to commence the criminal investigation, making it impossible to initiate an investigation without a prior lawfully drafted notification document.

It is noted that both Article 292 and Article 305(1) of the Code of Criminal Procedure use the term “criminal investigation authority”.

According to Article 55(1) of the Code of Criminal Procedure, criminal investigation authorities include: a) the prosecutor; b) judicial police investigation bodies; and c) special criminal investigation bodies.

Legal doctrine has established that, in fulfilling their duties regarding the supervision of criminal investigations, pursuant to Article 56(1) of the Code of Criminal Procedure, the prosecutor directly leads and supervises the criminal investigation activities of the judicial police and other special investigation bodies, ensuring that investigative acts are carried out in compliance with legal provisions (Boroi & Negruț, 2022, p. 175).

Paragraph 3 of this article stipulates that criminal investigations shall be conducted mandatorily by the prosecutor in the following cases: a) for offenses where the jurisdiction for trial at first instance lies with the High Court of Cassation and Justice or the Court of Appeal; b) for offenses provided under Articles 188–191 of the Criminal Code; c) for offenses committed with exceeding intent resulting in a person’s death; d) in other cases provided by law.

Legal scholarship indicates that judicial criminal authorities exercising their functions through authorized individuals are assigned based on legal competence criteria concerning specific offenses or acts within a particular phase of the criminal process. This delineation and allocation of judicial authority functions define the concept of criminal competence (Mateuț, 2007, p. 397).

It is noted that cases where the criminal investigation is exclusively the responsibility of the prosecutor constitute exceptions to the general rule, which allows investigations to be conducted by both the prosecutor and criminal investigation bodies.

We consider that, regarding the use of the term "criminal investigation authority" in Articles 292 and 305(1), the legislator intended the general rule rather than the exceptional case of investigations exclusive to the prosecutor.

Moreover, legal doctrine and national jurisprudence unanimously agree that, in cases where the investigation is exclusive to the prosecutor, the order to commence the criminal investigation must be issued by the prosecutor.

We argue that, in such exceptional cases, the *ex officio* notification report must also be drafted by the competent authority, namely the prosecutor.

## **2. Opinions in National Jurisprudence Stating that the Material Competence of the Criminal Investigation Authority Drafting the Ex Officio Notification Report is Irrelevant**

Although it would seem illogical for an authority to lawfully notify itself regarding an offense for which it cannot conduct the investigation, the analyzed case law reveals opinions supporting such a possibility.

According to the Cluj Court of Appeal, the claim of incompetence of the criminal investigation authority in drafting the *ex officio* notification report – as the fact that officers from the Service for Combating Organized Crime (SCCO) were not competent to investigate European fraud offenses, which fall under the exclusive jurisdiction of the National Anticorruption Directorate (DNA) – is unfounded.

*Ex officio* notification regarding the existence of an offense is an obligation of the criminal investigation authority, regardless of whether the notified facts fall within its investigative competence. Furthermore, Article 294 of the Code of Criminal Procedure, concerning the examination of notifications, regulates the obligation of the criminal investigation authority to verify its competence after receiving a notification and to proceed according to Article 58 of the Code of Criminal Procedure. In the present case, this was done, as the case was referred to the DNA Cluj Branch immediately after the *ex officio* notification was drafted.

Thus, the SCCO criminal investigation authorities did not conduct investigative acts regarding offenses outside their structure's competence. After registering the ex officio notification, they referred to the case, thereby complying with material competence provisions, as alleged. The claim that SCCO officers conducted investigative activities for European fund fraud offenses prior to drafting the ex officio notification report was also unsupported, leading to the dismissal of the nullity exception as unfounded (Cluj Court of Appeal, Preliminary Chamber Judge's Ruling No. 128 of October 15, 2019).

Similarly, the Cluj Tribunal held that, regarding the defense's claim that the ex officio notification was made by an incompetent authority, it must be emphasized that, under general legal provisions supplemented by specific provisions in Law No. 508/2004, and referencing Article 2(1) of Law No. 364/2004 on judicial police and Law No. 218/2002 on the organization and functioning of the Romanian Police, every judicial police officer has a general obligation to ascertain the commission of offenses, with the implicit consequence of ex officio notification regarding offenses they become aware of in or outside the exercise of their duties. This is further supported by Article 3(1) of Law No. 364/2004, which states that police officers not part of the judicial police have the right and obligation to perform any act to ascertain the commission of offenses, in accordance with the law. Thus, even a local police officer who learns of an offense, regardless of the means, is obligated to first notify ex officio and then verify their competence and act accordingly.

In this regard, Article 294(1) of the Code of Criminal Procedure provides that, after notification, the criminal investigation authority verifies its competence and proceeds accordingly. Therefore, ex officio notification regarding the commission of an offense can be made even by an authority incompetent to conduct the investigation for that offense.

On the other hand, Article 14(2) of Law No. 508/2004, invoked by the defense, applies to situations where the criminal investigation has already begun, and the criminal investigation body determines that the investigated offenses fall under another authority's competence.

Thus, it is considered that the notification was made lawfully, and the ex officio notification report drafted on July 13, 2019, meets the legal requirements, rendering the exception unfounded and subject to dismissal. Consequently, there is no need to analyze the legality of subsequent procedural acts (Cluj Tribunal, Preliminary Chamber Judge's Ruling No. 107 of December 23, 2019).

It is noted that both the Cluj Tribunal and the Cluj Court of Appeal confuse the judicial police officer's obligation to notify the competent authority of the commission of offenses with their ability to draft an ex officio notification report that

serves as the basis for issuing a subsequent order to commence the criminal investigation *in rem*.

If a judicial police officer becomes aware of an offense, they will assess whether they are competent to conduct the investigation. If not, the officer shall forward the information regarding the offense to the competent authority without drafting an *ex officio* notification report, as legal provisions do not reference such an obligation for the judicial authority.

### **3. Issues of Illegality Regarding the Ex Officio Notification Report Drafted by Criminal Investigation Bodies in Cases Where the Investigation is Exclusive to the Prosecutor**

This paper assumes the scenario where an *ex officio* notification report is drafted by judicial police officers for an offense where the law mandates that the criminal investigation be conducted exclusively by the prosecutor.

For illustrative purposes, we will analyze the case of an *ex officio* notification report drafted by criminal investigation bodies for bribery offenses, as provided under Article 7(c) of Law No. 78/2000 in conjunction with Article 289(1) of the Criminal Code, and giving bribes.

According to Article 22 of Law No. 78/2000, for offenses provided under this law, criminal investigation must be conducted mandatorily by the prosecutor.

We consider that, in such a case, judicial police officers who obtain data and information regarding corruption offenses committed by customs officials, pursuant to Article 22 of Law No. 78/2000, are obligated to forward this information to the competent authority to conduct the investigation, namely a prosecutor from the National Anticorruption Directorate (DNA). Only the latter has the legal authority to draft the *ex officio* notification report.

If such a report were drafted by judicial police officers, we consider that the provisions of Article 292 of the Code of Criminal Procedure, which explicitly state that *ex officio* notification must be made by the criminal investigation authority – clearly referring to the competent authority – would be violated.

This conclusion is further supported by Articles 294(1) and (2) of the Code of Criminal Procedure, which provide that the verification of the criminal investigation authority's competence is conducted only in cases where it has been notified through a complaint or denunciation, i.e., external notifications typically submitted by individuals without legal expertise:

“(1) Upon receiving the notification, the criminal investigation authority verifies its competence and, in the case provided under Article 58(3), forwards the case to the prosecutor along with a proposal to refer the notification to the competent authority.

(2) If the complaint or denunciation does not meet the legal formal requirements or the description of the act is incomplete or unclear, it is returned administratively to the petitioner with an indication of the missing elements.”

The legislator refers to the concept of “receiving” the notification, which applies only to complaints or denunciations, not to ex officio notifications, as an authority cannot “receive” a document it has already drafted.

It is thus presumed that, prior to drafting the ex officio notification report, the criminal investigation authority has already assessed its own competence.

Ex officio notification (an internal notification method) is distinctly different from external notification through complaints or denunciations.

Unlike external notification, ex officio notification incorporates both the notification act and the vesting of the criminal investigation authority, eliminating the need to verify substantive, formal, or competence conditions, as the judicial authority would otherwise be reviewing the legality of its own act.

Thus, regarding the drafting of an ex officio notification report for the offense of bribery under Article 7(c) of Law No. 78/2000 in conjunction with Article 289(1) of the Criminal Code, the competence to draft this act lies solely with the authority competent to conduct the investigation, namely a prosecutor from the National Anticorruption Directorate.

Further clarifications are necessary regarding the sanction applicable to a notification act drafted under such conditions.

According to Article 281(1)(b1) of the Code of Criminal Procedure, “The following always result in nullity:

b1) violation of provisions regarding the material competence and competence based on the person’s status of the criminal investigation authority.”

In the case of an ex officio notification report drafted by an incompetent criminal investigation body, the applicable sanction is the absolute nullity of the act.

We consider that the competent prosecutor conducting the investigation may declare the nullity of the ex officio notification report drafted by judicial police officers and draft a new one.

Moreover, Article 280(2) of the Code of Criminal Procedure provides that acts performed after a nullified act are also null if there is a direct connection between them and the nullified act.

Thus, the importance of drafting the notification act of the criminal investigation authorities in compliance with legal requirements is evident. If the preliminary chamber judge declares the nullity of the ex officio notification report, pursuant to Article 280(2) of the Code of Criminal Procedure, all subsequent investigative acts will also be deemed null.

#### **4. Delegation of Most Criminal Investigation Acts When the Investigation is Exclusive to the Prosecutor**

According to legal doctrine, delegation refers to the procedural activity through which a criminal investigation authority or court entrusts the performance of a procedural act concerning certain evidence, which it cannot perform directly, to a hierarchically subordinate or territorial competent authority (Udroiu, 2018, p. 576).

As previously noted, criminal investigations are generally conducted by criminal investigation bodies under the supervision and direction of the case prosecutor.

However, for more serious or sensitive offenses that raise complex issues, the legislator has stipulated the exclusive competence of the prosecutor to conduct the investigation.

In this regard, pursuant to Article 56(3) of the Code of Criminal Procedure, "Criminal investigations shall be conducted mandatorily by the prosecutor for offenses under the jurisdiction of the Directorate for Investigating Organized Crime and Terrorism or the National Anticorruption Directorate."

Thus, this obligation to conduct the investigation by the prosecutor for offenses listed in Article 56(3) of the Code of Criminal Procedure constitutes an exception, distinct from the mandatory leadership and supervision of criminal investigations regulated under Article 56(1) and (6) of the Code of Criminal Procedure.

This obligation is also reflected in Article 11(4) of Government Emergency Ordinance No. 78/2016, which states that "Specialized prosecutors from the Directorate for Investigating Organized Crime and Terrorism shall mandatorily conduct investigations for offenses listed in paragraph (1)."

Legal scholarship (I. Neagu, M. Damaschin, *Treatise on Criminal Procedure. Special Part*, 2nd Edition, Universul Juridic Publishing, Bucharest, 2018, p. 41) confirms this view, emphasizing that, in cases exclusively under the prosecutor's competence, given the imperative nature of the law, much of the investigation activities must be personally conducted by the prosecutor.

Criminal investigation bodies may perform certain investigative acts only if delegated by the prosecutor through an order or if obligated under Article 60 of the

Code of Criminal Procedure to perform urgent investigative acts that cannot be delayed, with such acts immediately forwarded to the competent prosecutor.

In cases where the investigation is exclusively under the prosecutor's competence, the prosecutor may, in exceptional circumstances, delegate criminal investigation bodies to perform certain investigative acts, pursuant to Article 324(3) of the Code of Criminal Procedure.

Moreover, according to the general provisions on delegation under Article 201, "The criminal investigation authority or court may order, under the conditions set out in Article 200(1) and (2), the performance of a procedural act through delegation." Article 200(1) provides that "When a criminal investigation authority or court cannot hear a witness, conduct an on-site investigation, seize objects, or perform any other procedural act, it may request another criminal investigation authority or court with the ability to perform them."

Thus, the delegation procedure is an exception, used when the criminal investigation authority (prosecutor or criminal investigation body) or court is unable to perform a procedural act.

However, it is necessary to examine cases where the delegation institution has been transformed into a rule, with the entire criminal investigation conducted by judicial police investigation bodies, in violation of the prosecutor's exclusive mandatory competence and circumventing imperative legal provisions. We consider that if many investigative acts were performed by criminal investigation bodies, despite the investigation being exclusive to the case prosecutor, the delegation orders would be null, as they would severely infringe the prosecutor's mandatory competence under Article 56(3) of the Code of Criminal Procedure.

This provision would be rendered meaningless, with the delegation used to circumvent the prosecutor's obligation to conduct the investigation. The prosecutor's conduct of the investigation is regarded by the Code of Criminal Procedure as an additional guarantee of legality and thoroughness in cases deemed highly complex, either due to their nature or the status of the person involved. Conducting the investigation under the conditions would eliminate this guarantee of legality, with the prosecutor unlawfully assuming a supervisory role incompatible with the cases provided under Article 56(3) of the Code of Criminal Procedure. We consider that such a situation would constitute a violation of the prosecutor's mandatory competence, with the delegation orders (viewed as a whole) issued in violation of Article 56(3) of the Code of Criminal Procedure.

Given the interdependence of investigative acts performed under delegation orders, we believe that, in such a case, all investigative acts conducted under the delegations should also be annulled.



## **5. Conclusions**

We consider that the provisions regarding the mandatory conduct of criminal investigations by the prosecutor cannot be circumvented through the delegation institution. Furthermore, only the judicial authority competent to conduct the investigation may ex officio notify itself regarding the commission of an offense. Clearly, any other person may bring information regarding the commission of such an offense to the attention of the competent authority, but not every person can notify ex officio in this regard. We do not share the view that the legality of evidence is assessed based on the prosecutor's competence rather than that of the criminal investigation body that collected it (Decision No. 21 of July 7, 2020, of the High Court of Cassation and Justice, published in the Official Gazette No. 118 of February 4, 2021 – notification dismissed as inadmissible). Such an approach would allow the circumvention of the provisions of Article 56(3) of the Code of Criminal Procedure, enabling the prosecutor to delegate all investigative activities, despite the legislator's intent on the prosecutor's personal involvement in certain offenses.

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