



## Research Article

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### Preliminary investigation and invalidity of investigative actions

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#### Abstract

Time limits for preliminary investigation and its duration is part of the right to a regular legal process, provided for by Article 42 of the Constitution of the Republic of Albania.<sup>1</sup> This is because the preliminary investigation is the first stage of the criminal proceedings and is part of the trial as a whole. Under these conditions, the preliminary investigation also has deadlines within which it must be completed, in order to complete the investigation and judgment within a reasonable time.

The deadline of the preliminary investigation begins from the date that the name of the person whom the criminal offence is attributed to has been written in the register of notification of criminal offence and ends at the moment the investigations are completed with the relevant acts, the end of the investigations, etc. The duration of the preliminary investigations are different, depending on the prosecution, so in the general jurisdiction prosecution, the preliminary investigation period is 3 months and in the special jurisdiction prosecution it is 6 months. Extension of the preliminary investigation can be done periodically every 3 months, with a maximum term of 2 years, by the prosecutor of the concrete case. In addition to this 2-year period, the deadline can be extended by one more year by the General Prosecutor for the prosecutors of the general jurisdiction and by the Head of the Special Prosecution against Organized Crime and Corruption, for the prosecutors of this prosecution.

The goal of the legislator who has set deadlines for the preliminary investigation is not only the completion of the investigation within a reasonable period, but also the legality, validity of all acts and the usefulness of all the evidence obtained during this period of the preliminary investigation. In this way, the legislator has disciplined the preliminary investigation and its validity. Thus, in order for the investigation to be valid, all evidence and procedural acts must be done within this validity period.

But what happens if the investigative actions are carried out after the preliminary investigation period? What about the procedural acts that the prosecutor compiles at the end and beyond the deadline of the preliminary investigation, will they be valid and usable? These and other will be part of the analysis of this article.

<sup>1</sup> Paragraph 2 of Article 41 of the Constitution of the Republic of Albania provides that: "Everyone, for the protection of his constitutional and legal rights, freedoms and interests, or in the case of accusations brought against him, has the right to a trial fair and public within a reasonable time by an independent and impartial tribunal established by law."

**Keywords:** Deadlines of preliminary investigation, deadline extension, validity of acts, unusability of evidence.

## 1. Introduction

The right to a regular legal process, as a fundamental right of the individual, is also provided for in the Constitution of the Republic of Albania. In this article it is stated that: *“Everyone, for the protection of his constitutional and legal rights, freedoms, and interests, or in the case of an accusation raised against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law.”*<sup>2</sup>

At first, the provision creates the idea that the deadlines for the preliminary investigation are not an element of the regular legal process, since the provision refers to the trial within a reasonable time. In fact, this interpretation would not only be wrong, but also contrary to the purpose of this provision, since the preliminary investigation is part of the trial as a whole, it is the first and most important stage of it, since without a preliminary investigation there is no trial. It is precisely at this stage that the evidences are collected, with the aim of identifying the criminal fact, its provability and further also in relation to individual criminal responsibility (Gera, 2024).

Precisely because during this phase, the prosecutor collects evidence, compiles acts, for these to be valid and used in the proving process, they must be completed within the validity period and duration of the preliminary investigation. For this reason, the legislator has been careful to have a precise legal regulation regarding the deadlines of the preliminary investigation. This legal regulation has reasonable deadlines to carry out investigative actions and the legal regulation has responded to the need of practice and there were not many problems during its implementation. Even the reforms to these provisions have not been sensitive. The problems in practice have been with investigative actions and procedural acts which were carried out beyond the deadline of the preliminary investigation. Therefore, I will specifically focus on these elements, the investigation and its deadline, the reform, the usability of the evidence and the invalidity of the acts.

## 2. The time limit of the preliminary investigation

The preliminary investigation itself, since it is directed against a person suspected of committing a criminal offense, may also lead to the restriction of the fundamental rights and freedoms of the person to whom this preliminary investigation is directed. In these conditions, this subject is very vulnerable, therefore, from this point of view, the preliminary investigation must be completed within a reasonable time, in order to identify the criminal fact and examine it.

For this purpose, the legislator has set relatively short deadlines to complete the preliminary investigation and to give a solution at the end of it with the various requests made by the prosecutor at the end of the preliminary investigation, such as the request for the dismissal of the charge or of the case, or taking the case to trial by filing the corresponding charge.

The time limit of the preliminary investigation varies depending on which prosecutor

<sup>2</sup> See for more Article 42 of the Constitution of the Republic of Albania.

is conducting the preliminary investigation.<sup>3</sup> Specifically, if the investigation is being carried out by the prosecutor's office with general jurisdiction, the period of the preliminary investigation is 3 months and this deadline begins to be calculated from the date on which the name of the person to whom the criminal offense is attributed is entered in the register of notification of criminal offences, while the investigations which are under the jurisdiction of the Prosecution Against Organized Crime and Corruption have a 6-month investigation period. The legislator has established longer deadlines for the preliminary investigation, for criminal offenses according to Article 75/a of the Code of Criminal Procedure.<sup>4</sup> These different deadlines are related to the necessity to carry out complex investigative actions in the case of investigations by the special prosecutor's office, since this prosecutor's office investigates criminal offenses with several co-defendants, such as the criminal offenses of human trafficking, drug trafficking, terrorist acts, commpeppitted by a structured criminal group, criminal organization, armed gang, etc. These criminal offenses are complex to investigate and require not only more investigative actions, but also international cooperation in the criminal field, and of course these investigative actions within the framework of international cooperation take more time (Miha, 2024).

The legislator has tried to establish short disciplinary deadlines for the preliminary investigation, so that the prosecutors as a rule complete the preliminary investigation within the deadlines set by the Code of Criminal Procedure, respectively 3 months for the prosecution with general jurisdiction and 6 months for the special jurisdiction. But prosecutors do not always complete the preliminary investigation within these deadlines, therefore they have to extend the preliminary investigation period.

### **3. Extension of preliminary investigation**

The deadlines established in the Code of Criminal Procedure are disciplinary deadlines, which discipline the prosecutor's office to complete the investigation and investigative actions, but prosecutors do not always manage to complete these investigative actions on time. If the code had not provided for the extension of the investigation deadlines, then the investigation would be truncated, incomplete, non-exhaustive and this could bring problems with the process of proving the accusation, which would remain unproven and the prosecutor should have asked for a dismissal of the case, since any doubt about the charge goes in favor of the defendant.<sup>5</sup> This decision-mak-

<sup>3</sup> Article 323 of the Code of Criminal Procedure provides that: " *Term of preliminary investigations - 1. Within the end of the legal term of investigations, the prosecutor decides according to paragraph 6, of Article 327, of this Code. 2. The deadline for the completion of investigations is three months from the date on which the name of the person to whom the criminal offense is attributed is entered in the criminal offense notification register; and six months for the criminal offenses provided by the letters "a" and "b", of Article 75/a, of this Code.*"

<sup>4</sup> Article 75/a of the Code of Criminal Procedure provides that: " *a) the crimes provided for by Articles 244, 244/a, 245, 245/1, 257, 258, 259, 259/a, 260, 312, 319, 319/a, 319/b, 319/c, 319/ç, 319/d, 319/dh, 319/e, b) any crime committed by structured criminal group, criminal organization, terrorist organization and armed gang pursuant to the provisions of this Code. c) criminal charges against the President of the Republic, Speaker of Parliament, Prime Minister, member of the Council of Ministers, judge of the Constitutional Court and the High Court, General Prosecutor, High Justice Inspector, Mayor, member of the parliament, deputy minister, member of the High Judicial Council and High Prosecutorial Council, and directors of independent and central institutions defined in the Constitution or in law. ç) criminal charges against above former officials, when the offence was committed on duty.*"

<sup>5</sup> For more, see Article 4 of the Code of Criminal Procedure, which provides that: " *Presumption of innocence - 1. The defendant is presumed innocent until his guilt is proven by a final court decision.*" Any doubt about the

ing would not only be a deviation from the constitutional function of the prosecutor's office, the exercise of criminal prosecution and representation of the accusation, the prevention of the commission of a criminal offense, but it would harm the provision of effective justice. Therefore, the legislator has provided for the extension of the preliminary investigation.<sup>6</sup>

There are two different arrangements in the provision. In the first extension of the term by the legislator, no special criteria were provided to justify the extension, thus only a justification of the prosecutor on the need for the investigations to continue for another term, a maximum of 3 months or 6 months for the Special Prosecutor's Office (Miha, 2023). Meanwhile, in the other, second and following extensions, it is foreseen that the preliminary investigation is extended by a reasoned decision by the prosecutor periodically every 3 months by the prosecutors of the general jurisdiction up to the 2-year term. This extension is made by the prosecutor because he does not complete investigative actions within the legal period, as these investigations are complex or the other condition required by the provision is the objective impossibility to complete them within the extended period (Peppo, 2023). Meanwhile, the prosecutors of the special jurisdiction have the first extension of 6 months and then periodically every 3 months, for the same legal reasons related to complex investigations, i.e. the necessity to complete the investigative actions and not to close the objective within the legal term.

So, both the general and special prosecutor's offices can extend the preliminary investigation up to 2 years. Meanwhile, beyond the 2-year term, for cases of accusations of organized crime and crimes that are judged by a jury, the investigation period can be extended, with the approval of the General Prosecutor or the Head of the Special Prosecution for up to 1 year for each extension of no more than three months, without prejudice to the terms of extension of detention. The same legal regulation is also for the prosecutors of the general jurisdiction, where beyond the 2-year term, in exceptional cases, the term of the investigation can be extended only with the approval of the General Prosecutor for up to 1 year, for each extension no more than three months, without prejudice to the duration of detention.

We see that the legislator has extended the time limit of the preliminary investigation to a maximum of 3 years. Of course, it seems that this extension is contrary to the goal of completing the preliminary investigation as soon as possible, but practice has dictated this legal regulation, extending the deadline of the preliminary investigation in order for the investigation to be complete.

However, despite the first extension that seems to have formal reasons, leaving these

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*charge is evaluated in favor of the defendant."*

<sup>6</sup> Article 324 of the Code of Criminal Procedure provides that: "Extension of the term - 1. The prosecutor can extend the term of investigations for up to three months. In the case of the Special Prosecutor's Office, this term is up to six months. 2. Further extensions, each for a time not exceeding three months, may be made by the prosecutor in cases of complex investigations or objective impossibility to complete them within the extended period. In addition to the 2-year term, for cases of accusations of organized crime and for crimes that are judged by a jury, the investigation term can be extended only with the approval of the General Prosecutor or the Head of the Special Prosecution for up to 1 year, for each extension no more than three months, without prejudice to the terms of the duration of detention. Beyond the 2-year period, in exceptional cases, the period of investigation can be extended only with the approval of the General Prosecutor up to 1 year, for each extension no more than three months, without prejudice to the terms of the duration of detention."

at the discretion of the prosecutor, and other extensions that require a legal cause, the complexity and the impossibility of completing the investigation, these decisions are decisions that can be controlled by the court. The court checks the fulfillment of the legal conditions: «*complex investigations*» and «*objective impossibility*» case by case. Based on the jurisprudence of the European Court of Human Rights, the complexity of the case includes the nature of the charges, the volume of documentation to be examined, the need to carry out several expert reports, the need to carry out investigative actions in foreign countries or to cooperate with these states, the need to submit claims related to the provision of evidence, the difficulties related to the protection of witnesses or the relocation of the place of investigation due to the political climate, the high number of defendants and witnesses for to be asked, the high number of charges that are attributed and also the nature of the criminal facts.<sup>7</sup> While «*objective impossibility*» is a situation, which must be determined by evaluating the diligence shown by the prosecutor in the initiated proceedings and avoiding what is called «*dead time*» in the investigative activity.

#### **4. Completion of preliminary investigation and unusability of investigative actions**

Referring to the legal regulations of the preliminary investigation, I conclude that the legislator has taken care that the investigations are extended by reasoned decision of the prosecutor, with the aim of their validity and convincing the subjects about the legality of these decisions. The prosecutor is obliged to respect the legal deadline of the investigation, and if it is objectively impossible to complete it on time, dispose of the extension of the deadlines with a reasoned decision. Any contrary action constitutes a violation of the right to due process. This fact has been underlined by the Constitutional Court itself, which has stated that «*by continuing the investigations for a period of about 6 months without having a decision to extend the deadline by the prosecutor, the defendant's rights guaranteed by the Constitution and the law have been violated*».<sup>8</sup> Here, the legislator departs from the strict position of the 3-month or 6-month deadline, allowing the extension, with the aim that the investigation is complete. The legislature is strict when it comes to investigative actions carried out within the validity period of the investigation or outside. For all investigative actions carried out within this period of investigation, they are valid and usable in the process of proving by the prosecutor. Meanwhile, it is quite the opposite if the investigative actions were carried out outside the deadline of the preliminary investigations, because they cannot be used.<sup>9</sup> Therefore, under these conditions, the extension of the preliminary investigation period should be done not until the end of the investigation period or its extension, so that we do not have investigative actions carried out beyond the legal duration. This element is also mentioned by the Supreme Court which reasoned that: «*The court, in addition to assessing the concrete circumstances related to the needs of the investigation, which in law are related to i) complex investigations or ii) the objective impossibility to complete them within the deadline, also verifies the formal aspect that has to do with the time*

<sup>7</sup> Foti and others v. Italy dt. 10/12/1982.

<sup>8</sup> Decision no. 20, dated 10.07.2005 of the Constitutional Court of the Republic of Albania.

<sup>9</sup> Paragraphs 3 and 4 of Article 324 of the Code of Criminal Procedure, which provide that: «3. *The decision to extend the investigation period is given with reasons and is notified to the defendant and the victim; 4. Evidence received after the deadline cannot be used.*».

aspect of making the decision for extension, which must be obtained within the investigative period provided for the criminal offense<sup>10</sup>.

The investigative actions that can be carried out beyond the preliminary investigation period are different. They may be evidence or means of searching evidences, but they may not be investigative actions, but procedural acts with which the prosecutor closes the preliminary investigation. In practice, we have seen different implementations of this provision, i.e. Article 323/4 of the Penal Code. Therefore, in the following, we will focus on the previous regulation of Article 323/4 and its implementation in practice.

#### *4.1 Court practice regarding the unusability of investigative actions carried out after the end of the term of preliminary investigations (Article 324.4 of the CPC), without changing*

The provision of Article 324/4 of the Code of Criminal Procedure, as we mentioned above, has been among the most misapplied provisions in practice. The Criminal College of the Supreme Court, with decision no. 67, dated 4.2.2004, has interpreted that: *“with the content of point 4 of article 324 of the Code of Criminal Procedure, all those actions that consist in the collection of evidence by the proceeding (investigative) body should be understood and that investigative actions conducted (accumulated evidence) after the end of the investigation period, or after the end of the extended investigation period cannot be used by the court. But, this does not mean that, during the judicial examination, the court cannot take them mainly, in accordance with the law, as new evidence.”* *“... Therefore, both the first-instance court and the appellate court should not consider the procedural acts carried out after the end of the investigation period as invalid, but useless.”*

In another decision, the one with no. 00-2011-579 (101), dated 13.7.2011, the Criminal College of the Supreme Court has interpreted that: *“In the sense of Article 128/1 (b) all acts issued beyond the date of the preliminary investigation deadline will be considered as “absolutely invalid” due to non-compliance with the mandatory provisions of the criminal procedural law related to “the prosecutor’s right to exercise criminal prosecution and his participation in the proceedings”.*

Meanwhile, in decision no. 237, dated 15.3.2006, the Criminal Panel of the Supreme Court has interpreted that: *“Even the other reasoning of these courts that all the procedural acts carried out after the resumption of the investigation on 23.09.2002 are unusable because the extension of the deadline was not made, is wrong”.*

Further, in decision no. act 1623, dated 15.12.2008, of the Court of the Judicial District of Tirana, it is sanctioned that: *“... it turns out that the deadline for conducting investigative actions and compiling procedural acts by the prosecution was 06.11.2008, after this date the prosecutor cannot to carry out any investigative action, or to compile other procedural acts, it results that the procedural acts undertaken after the completion of the preliminary investigation deadlines, such as the summons dated 24.11.2008, as well as the act of notification of the charge dated 27.11. 2008, were compiled after the deadlines for preliminary investigations had ended, under these conditions it is clear that the two procedural acts are invalid.”*

Based on the above decisions, the Criminal College of the Supreme Court with decision no. 5 dated 10.04.2009, reasoned that *“... as long as the two procedural acts that were mentioned above (the summons dated 24.11.2008, to be familiar with the charge and the act of*

<sup>10</sup> Decision no. 332, dated 12.12.2012 of the Criminal College of the Supreme Court and Decision no. 262 dt. 10.10.2012 of this Court.

*notification of the charge itself, dated 27.11.2008), both of these acts were declared invalid, the persons have not received the status of a defendant and under these conditions the court has no subject to judge and the trial must be terminated."*

So, referring to judicial practice, we have these theories, unusable acts, invalid acts and unusable evidence, so we do not have a unified practice. In fact, it seems that the provision is clear, since in relation to investigative actions, those investigative actions aimed at "gathering evidence" should be understood, such as the evidence itself and the means of searching for evidence, and not the acts compiled by the prosecutor that ensure the progress and closing the criminal proceedings. But not the procedural acts, such as the act for the conclusion of the investigations, the act of notification of the charge and the request for sending the case to court, when these were made outside the deadline of the preliminary investigation. Because if these acts were to become invalid, the prosecutor's office would not exercise its constitutional function, that of prosecuting and further representing the accusation in court.

In these cases, the prosecution would assume the risk that with the evidence that is usable, close the preliminary investigation by filling the relevant acts, the conclusion of the investigations, the act of notification of the charge and the request for trial, regardless of whether the investigation was complete and proved criminal offense with the standard beyond any reasonable doubt based on the evidence. One of the alternatives that the prosecutor had, would be to retrieve these evidences from the court with the rules of ordinary trial and this would without question be a solution in order to provide effective justice and the constitutional functions of the prosecutor's office. This wrong practice of the courts was seen to be corrected by the reform of the Code of Criminal Procedure with the law no. 35 of the year 2017.

## **5. Legal reform in Article 324/4 and the practice of the Supreme Court**

The institution of preliminary investigation deadlines underwent changes and improvements, a must due to contradictory judicial practice. Thus, Article 324/4 was changed as follows: "*Evidence received after the deadline cannot be used*". Through this change, the provision has a clearer arrangement, which means that only the evidence is unusable and not the procedural acts.

In a recent decision, the Criminal College of the Supreme Court, with decision no. 00-2023-1242 (226) dated 25.07.2023, interpreted Article 324/4 of the Code of Criminal Procedure before the changes of 2017, which provided that: "*Investigative actions carried out after the deadline cannot be used*". Specifically, this College has interpreted as follows:

First of all, the provision in question refers to investigative actions and not criminal proceedings. Thus, the procedural sanction resulting from the expiration of the term is that of unusability. The panel notes that this sanction is provided in a general way in article 151/4 of the Procedure Penal Code, therefore, taking into account the fact that with the procedural sanction of unusability the legislator has provided for it in relation to the field of evidence, it comes to the conclusion that with the term "investigative actions" provided by Article 324/4 of the Code of Criminal Procedure, should be understood all those actions that are or may constitute the object of evidence, according to the definitions contained in the Code of Criminal Procedure regarding the means of evidence and means of searching for evidence, that is, not with all the mul-

titute of other acts that are carried out during the phase of preliminary investigations in a given criminal proceeding.

Based on Article 149 of the Code of Criminal Procedure, evidence is information on the facts and circumstances related to the criminal offence, which are obtained from sources provided for by the criminal procedural law, as well as in compliance with the rules defined by it and serve to prove whether the criminal offence was committed or not, its ensuing consequences, the guilt or innocence of the defendant the level of his/her accountability.

Under these conditions, the College notes that for the purpose of determining the prosecutor's initiative to send the case to trial, the act of notification of the charge or the decision to send the case to trial cannot be considered in the sense of Article 324/4 of the Criminal Procedure Code as investigative actions and, as such, eventually be subject to the procedural sanction of inapplicability provided by the provision.

The panel assesses that in the case under review, the courts of first instance have confused the concept of the sanction of "unusability" with that of "invalidity". Unusability is a procedural sanction that, as a rule, acts on the content of the evidence, striking those acts that have evidential value and that can be raised mainly at any level and stage of the judicial proceedings. The unusability of a piece of evidence means its legal exclusion from the file (file) and from the validity of the court's decision-making. While the sanction of absolute nullity is provided, as a rule, for all procedural actions, as derived from all procedural acts that logically and causally depend on the act charged with absolute nullity.

This interpretation was very welcome before the 2017 changes to Article 324/4 of the Code of Criminal Procedure, but as of today the provision has undergone improvements and is correct, clearly defining that only evidences obtained in excess of the preliminary investigation period are unusable.

## 6. Conclusions and recommendations

Completion of the preliminary investigation, within the deadlines set by the Criminal Procedure Code, is part of the right to a regular legal process, completion of the trial within reasonable deadlines. Under these conditions, the legislator has set deadlines within which the investigation must be completed. With the changes that the code underwent in August 2017, there were also some improvements to the provisions regarding the preliminary investigation deadline. Thus, the time limit of the preliminary investigation is 3 months from the moment the name of the person under investigation is registered in the registers of criminal proceedings, for the prosecution of general jurisdiction, and 6 months for the prosecution with special jurisdiction. The first extension of 3 months or 6 months does not require any legal cause, while further extensions require legal causes, such as the complexity of the case and the objective impossibility to complete it. The maximum term that the respective power of attorney can extend in both jurisdictions is 2 years.

From practice, it has been noticed that there are criminal proceedings registered without an author and that have been going on for years without investigative actions and without any proper decision-making by the prosecutor. This is an abnormal behavior of the prosecutors who should close the criminal proceedings whether



they are with or without perpetrators.

The Code of Criminal Procedure, in article 324/4 before the changes of 2017, provided for the unusability of investigative actions taken outside the preliminary investigation period. The interpretation made by the courts has included not only misinterpretation, but also contradiction. In one case, the court concluded that the investigative actions carried out in excess of the preliminary investigation are unusable, in another case it said that the acts are invalid and in another moment it said that the acts of completion of the preliminary investigation are invalid and in this way ended the criminal proceedings, without a proper decision of the prosecutor. While the correct decision is the one recently made by the Criminal College of the Supreme Court, in 2023, interpreting who the investigative actions are. Investigative actions are the evidence and evidence search tools and not the procedural acts that regulate the progress and conclusion of the preliminary investigation. Meanwhile, problems arise with the investigation deadlines, which are short. It would be good, if the time were longer and there was no periodic need for the prosecution to extend the term of the preliminary investigation. This deadline is determined depending on the complexity of the evidence. As well as for some criminal offences, the decision to extend the preliminary investigation deadline should not be announced, thus respecting investigative secrecy.

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