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A BRIEF COMMENTARY OF INITIAL AND SECOND HEARING UNDER PROVISIONS OF CRIMINAL PROCEDURE CODE

ABSTRACT

This paper comments provisions which regulate initial and second hearing according to the Criminal Procedure Code (Code no.04/L-123)¹, which entered into force on 1 January, 2013.

Commenting on these provisions is important for the fact that very often it is possible to avoid a fair trial, namely, the possibility of conclusion of a phase of the proceedings is increased (pronouncing of sentence) during this phase, or even the possibility of rejection of the indictment that also concludes concrete issue. These provisions enable the parties in the proceedings (state prosecutor, the defendant and the victim) to be active and that the court still gives the ability to have its pro-active role in controlling the indictment.

Commenting of legal provisions is done for every article starting from initial revision, to continue with the plea and the plea agreement, rejecting evidence and demand for laying the indictment.

Also, legal provisions are commented quite extensively, specifying the conditions and cases of rejection of the indictment, the second hearing, reviews to determine the validity of the proposals to complete the submission of materials by the defense.

The paper also contains conclusion and literature which was used for realization of this paper.

Key words: KPP, initial hearing, second hearing, admission of guilt, rejection of evidence

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¹ Hereinafter we will refer with terminology Code or CPC.

1. Initial hearing²

1. During the initial hearing, the state prosecutor, the defendant or defendants and lawyers should be present.

It is important to emphasize that during the initial hearing it is envisaged to have present the state prosecutor, defendants and lawyers, which is natural and meets minimal standards for initial hearing.

Presence of the state prosecutor³ is inevitable and is conditioned by the fact that without his presence the initial revision can not be developed, since, besides the fact that he is a party in the proceeding⁴ he also has competences to present the indictment during all phases of criminal proceeding before the courts.

Also, during the initial hearing it is necessary to have the presence of the defendant, and that any person can win the quality of the defendant in criminal proceedings, who possesses the ability to act, ie the person who has certain age and who is accountable⁵ as the Code⁶ does not allow development of an initial hearing or court review in the absence of the defendant "in absentia". Non judgment in the absence of the defendant even though it is not written explicitly⁷, but based on the concept that the Code is built, it ruled out the possibility of trial in absentia, based on the active role it has given to the defendant in the proceeding⁸. However it should be noted that the trial in absentia is an old concept and now with some minor exceptions has been abandoned by the majority of European criminal law and moreover it is in contradiction with the principles of KEDLNJ⁹ which is directly¹⁰ applicable in our legislation.

However, the presence of the defence is not necessary unless the cases of compulsory defence¹¹ or defence cases with public expenses, when the

² Article 245, KPPK

³ Competences of state prosecutor are defined in article 7 of the law of State Prosecutor and article 49 of CPC

⁴ Article 19 par. 1.15 of CPC

⁵ Hajdari, Azem, *Criminal procedure* – Commentary, Prishtina, 2010, page 155

⁶ Hajdari, Azem, *Criminal procedure* – Commentary, Prishtina, 2010, page 155

⁷ Code of Criminal Procedure of Bosnia and Herzegovina prohibits specific provision trial in absence..

⁸ Article 232, CPCK

⁹ Article 6 point 1 and 3 point, KEDNj

¹⁰ Article 22, Constitution of Republic of Kosovo

¹¹ Article 57, CPCK

defence is compulsory¹² and is provided based on request of the accused under certain conditions. The Code has not envisaged the way how the presence of the sides that take part in the initial hearing would be provided, however it should be understood that provisions of the call for judicial review should be implemented.

An important issue that must be analyzed is the fact that the initial evaluation has not envisaged the presence of the injured. This is interesting especially considering the fact that the role of the injured is significantly strengthened by this Code, the injured person has the role of the party¹³, moreover, in case this provision is to be analyzed in systemic terms, it is contradictory to Article 248 paragraph 2 of the Code which states that "in assessing the plea of the defendant, judge of court or the presiding judge may seek the opinion of the state prosecutor, defense counsel and the injured¹⁴" and this necessarily presents a logical question how can the opinion of the injured be taken without being present.

Therefore, in order to overcome this situation, it is necessary that the aggrieved person is necessarily invited at the initial hearing, specifically due to the fact that accused person pleads guilty, the injured party should be given the opportunity to make statement about the type and amount of property-legal request.

While the second possibility would be to complete the initial hearing and appoint another session for determination of any fact relevant to the sentence¹⁵. And in this session the damaged party would have possibility to present his proposal for a property claim, since the property claim would present relevant fact for the punishment, to determine the type and length of punishment.

However, in case pronouncement of the sentence is done in this phase, than the damaged person should necessarily be present since his opportunity to present judicial property claims during the criminal proceeding ends here, unless the damaged person has filed statement of damage.¹⁶

¹² Article 58, CPCK

¹³ Article 19 par.1.15 and article 62 par.1 item.1.3, CPCK

¹⁴ Article 248, par.2, CPCK

¹⁵ Article 248, par.4, CPCK.

¹⁶ Article 218, CPCK.

2. During the initial hearing, the single court judge or the presiding judge gives copy of indictment to the defendant or defendants, in case they have not accepted these copies of indictment before.

This paragraph is of technical character and it is not preferable to happen this way due to the reasons that: it would be necessary that the indictment is filed before the initial session due to the fact that acceptance of indictment presents an important precondition for the defendant to declare his guilt or innocence. So, it would be unrealistic to expect from the defendant to declare about his guilt immediately after he accepted the indictment, as it is envisaged at the initial hearing, therefore it would be very important that together with the initial hearing to enclose the indictment as it is envisaged in the judicial review, not later than eight (8) days¹⁷ that would create adequate preconditions of the initial hearing.

3. During initial hearing, the single court judge or the presiding judge decides about all proposals in order to continue or implement measures for security of presence of the defendant.

This presents an interesting fact and is in line with the principal that security measures of presence of the defender are necessary to be treated in all phases of the procedure, since the basis and conditions of the measures may change after filing the indictment. The rationale for revision of these measures is important for two reasons:

- first of all it is important due to the fact that at the initial hearing the sides are present and they can present their views for these measures and
- secondly, by completing the investigation phase, the phase of filing the indictment starts and this can change basis and conditions for continuation or implementation of measures for insurance of presence of the defendant.

Certainly, it is important to emphasize the fact that the Code has not envisaged segregation of security measures of the presence of defendant before and after presentation of the indictment, respectively in case a measure is determined before filing the indictment it remains in power even after its filing until this measure expires. In one word the concept has been abandoned that every determined or continued measure during investigation procedure, to be reviewed obligatory after filing the

¹⁷ Article 287 par.3, CPCK.

indictment and where it is decided to continue or withdraw the measure (as it was done with former KPPK), but now the Code has determined that as for the measures for continuation or implementation of security of the presence of defendant to decide at the first hearing, in accordance with the proposal of the sides in proceeding, but it is important the fact that the obligation to question the arrested persons- detained persons, derives from the known principle Habeas Corpus, according to which the arrested – detained person must be heard by the judge and this is an overall known rule by legislation of the states and is implemented by the International Criminal Court.¹⁸

But it should be clear that with regards to measures to ensure the presence of the defendant it can be decided even before the initial hearing, in two cases: in the first case when such measure expires after filing the indictment and prior to the initial hearing and the second case is when the charges¹⁹ filed by the state prosecutor, the proposal for ordering detention is presented (where the defendant is at liberty) or it is proposed that a defendant who is in custody should be released from detention and in such cases the initial hearing should not be waited to decide for such a measure.

4. During the initial hearing the single judge or the presiding judge of the panel ensures that the state prosecutor has fulfilled obligations relating to the disclosure of evidence from article 244 of the Code.

This presents a duty to the court to ensure that the state prosecutor has fulfilled obligations for disclosure of evidence from article 244 not later than the filing of an indictment that could be submitted even before, respectively during investigation.

Even the provision of article 244 is not clear and while its subject describes “materials that are given to the defendant by filing an indictment”,²⁰ and the provision refers to the defender of the accused person (exclude paragraph 2 of this article) however this may cause uncertainty to whom should the investigation materials be submitted, to the defendant or the defender but it should be read in a way that it is obligatory for the investigation materials to be submitted to the defender and this means the obligation is fulfilled.

¹⁸ Islami Halim, Hoxha Artan & Panda Ilir, *Criminal Procedure*, Tirana, 2012, pg. 352.

¹⁹ Article 241, par.2, CPCK.

²⁰ Article 244, par.1, CPCK.

Also, uncertainty that may cause confusion are also the expressions used while its title uses the expression “materials that are given to the defendant” which means that they should be given to the defendant, while in the description of provision “No later than filing the indictment, the state prosecutor provides to the defender or the main defender the below materials or their copy, that are in possession or in its protection, in case these materials are not given to the defender during investigation”,²¹ thereof these materials are provided to the defender, which means that the materials are put in his disposal and at this point the obligation of the state prosecutor ends up here, and defense can take them if deemed necessary.

A logical question arises from this, such as what would happen in case the defendant is not given evidence, while the defender has not been provided evidence according to article 244 of CCP. This situation is not regulated by any relevant provision, but than of course the court should oblige the state prosecutor to submit them within the timeframe specified by the court (court deadline) and this deadline should be reasonable, considering the complexity of the case and the amount of materials to be submitted and it would be reasonable to interrupt the session in order to continue the review after their provision, highlighting that this has not been envisaged by special provisions but provisions of court review should be applied accordingly.

5. During the initial hearing, the single judge or the presiding judge of the panel schedules the second hearing no earlier than (30) days after the initial hearing and no later than forty (40) days after the initial hearing. On the contrary, the single judge or the presiding judge of the panel may require only the presentation of proposals until the scheduled date, which can not be later than thirty (30) days from the initial hearing.

There are two possibilities in this provision, the first in cases when the initial hearing does not come to confession, than the second hearing is scheduled within the specified time. The second option is to require presentation of proposals which means that proposals should be provided by both sides the prosecutor and the defender or the defendant no later than 30 days from the initial hearing and this avoids the second hearing. So, strict timeframes are set between these reviews, aiming at having a more efficient procedure.

²¹ Article 244, par.1, CPCK.

It should be clarified that these options exclude each other and despite of the fact there are two options in disposal, it is difficult to determine which option would be better and more efficient, but according to the court practice until now, it is noted that majority of courts applied the first option, respectively have determined and hold the second hearing to decide regarding objections and proposed requests.²²

Nevertheless, I consider that the timeframe no earlier than 30 days for scheduling the second hearing is too long and in case this timeframe was shorter, it would serve in the function of the efficiency of the procedure.

6. The single court judge or the presiding judge of the panel informs the defendant and the defender that before the second hearing, they should:
 - 6.1. present their objections for evidence mentioned in the indictment;
 - 6.2. present requests for rejection of indictment in case it is legally prohibited; and
 - 6.3. present requests for rejection of indictment due to non description of the criminal act in accordance with the law.

This is important for the fact that after the second hearing these objections and requests should be in disposal of the state prosecutor, in order to respond to these claims either in written form when there is no second hearing, or these claims are answered orally during the second hearing. But it should be clear that the objection may be claimed for evidence in the indictment and later to present evidence by the defender or the defendant that are reviewed during the second hearing.

7. No witness or expert is examined and no evidence are presented during the initial hearing, unless the witness is required to make decision on continuation or implementation of measures to ensure presence of the defendant under paragraph 3. of this article.

As stated above, during the initial hearing no evidence are presented, respectively no witnesses or experts are heard, but exclusively this may be done in case it is needed for continuation or implementation of the presence of the defendant and this presents the possibility that through this hearing to continue, respectively reject security measures of the presence of defendant, although it is not specified, I think it would be justifiable only for the most serious security presence, respectively through detention

²² Sahiti, Ejup & Murati, Rexhep, *The Law on Criminal Procedure*, Prishtina, 2013, pg. 346.

measure respectively implementation of this measure according to article 194-203 of this Code.

2. Acceptance of guilt²³

1. At the beginning of the initial hearing, a single judge or the presiding judge of the panel shall instruct the defendant about his right to avoid being declared about his case or to answer any questions and if he declares about the case, that he is not obliged to incriminate himself or a relative, or to confess guilt; to defend himself or through legal assistance of the attorney of his choice; to oppose the indictment and admissibility of evidence presented in the indictment.

It is inexplicable for what reason this provision does not envisage why the defendant is not initially taken his personal data,²⁴ since it is very important during the initial hearing, for two reasons:

- firstly, because personal data are important and are not only technical or ceremonial issue, or only to verify his identity, but are fundamental issues since through these data the court creates an overview related to the personality and character of the defendant, his economic and social state, education degree, which are important information for decision on the case;
- while, the other importance of full security defendant's personal data is in cases when the defender may accept the guilt during this hearing and the personal data are important for individualization of the sentence, respectively for determination of the type and length of sentence.

In the case of guidance for the rights given to the defender, it is important that the judge makes sure the defendant understands them, since these guidances should be given in a simple way, without exaggerated terms of judicial nature and in general they should match the level of the accused person regarding the education level, the age and other characteristics. Importance of these guidelines is also for the fact that through these guidelines the defendant is being informed that he takes active part in the initial hearing and is not there only formally.

It is very important to emphasize specifically that the defendant is guided in relation with the right to have defender, but in case it deals with

²³ Article 246, CPCK

²⁴ Article 321, par.1, CPCK.

criminal act where obligatory protection is envisaged, the court when notes that the defendant has no defender before the initial hearing, is obliged to provide the defender and provide necessary materials since it present a precondition for a successful session.

2. The single judge or the presiding judge of the panel than evaluates whether the right of defendant to counsel is respected and if the state prosecutor has fulfilled obligations relating to the disclosure of evidence from article 244 of this Code.

This provision has defined two obligations of the single court judge or the presiding judge, and the first obligation is to apprise the defendant's right to counsel, and in cases when the defendant has no defense or while for various reasons he remained without defense, the court appoints defense to the defendant, in cases where defense is required²⁵. In cases where defense is not required, the defense is appointed by public expense at the request of the defendant²⁶, and it is important that if the court is aware that the defendant has no defense, it would be preferable that counsel is appointed in advance, ie before the initial hearing, and moreover the investigation materials should be provided to the defense. It is similar when obligations under Article 244 of the CPC are not fulfilled.

Both situations need caution, otherwise if these preconditions are not fulfilled that there is possibility to interrupt the initial hearing and continue the initial hearing after the preconditions are met, in accordance with the provision.

3.Than the state prosecutor reads the indictment to the defendant.

Reading the indictment presents an important moment of the initial hearing due to the fact that it is the moment when the people present (the public and other persons) for the first time undersand the claims of the state prosecutor. Reading of the indictment in fact presents the start of the initial hearing since the above mentioned part is referred to the guidelines of the parties.

4. After the single judge or the presiding judge of the panel is convinced that the defendant understands the indictment, he ofers to the defendant the possibility to plead guilty or not guilty. If the defendant did not

²⁵ Article 57, CPCK.

²⁶ Article 58, CPCK.

understand the indictment, the single judge or the presiding judge of the panel calls the state prosecutor to explain the indictment to the defendant so that he may understand without difficulty. If the defendant does not want to make any statement regarding his guilt, it is considered that he is not guilty.

It is important to treat the momentum when the defendant shall declare on his guilt but prior to that, it is important that he has right understanding on the indictment made upon him. This usually presents different difficulties. First, the indictment may be incomprehensible for the defendant and he may have difficulties understanding it because it uses legal terminology, so an opportunity should be provided to the state prosecutor who has an active role during the initial hearing,²⁷ to explain to the defendant the content of indictment. This should be implemented in a way that the explanation fits the age of defendant, the education, overall knowledge of the defendant, specifically the focus should be at explaining legal institutions, such as negligence, intent, mistake of law, the violation factual, performing together, abetting, aiding, etc.

It should also be clarified in a fair, clear and simple way the elements of the offense as often there are created more uncertainties for the defendant. But the importance of this should be related to the fact that often the defendant may declare formally that he understands the indictment, but it happens often to be an incorrect statement for different reasons: either due to the fact that if they don't understand the indictment, they would feel themselves badly, and sometimes it is combined with the fact that this statement appears before the declaration of guilt and that could affect the fact that the plea would be punished more leniently, therefore I consider that the legislator rightly asks the judge single judge or the presiding judge to be careful when explaining the charges and often he should ask the state prosecutor to do a simple explanation without excessive legal terms until he is convinced that the defendant understands and he is clear what he is accused for.

Misunderstanding the indictment fully results in the fact that the misunderstanding presents reasons that protection might be wrong, however, it should be clear that non clarification of the indictment,

²⁷ Çollaku Hashim: *The Role of State Prosecutor in the Criminal Procedure*, Prishtina, 2013, pg. 134.

respectively its misunderstanding presents basis for essential violation of provisions of criminal procedure.²⁸

While in case the defendant is not pleading guilty, the procedure continues as if the defendant has plead not guilty.

3. Agreements on accepting the guilt during the initial hearing²⁹

1. If the agreement on accepting the guilt, from article 233 of this Code appears together with the indictment, the single judge or the presiding judge of the panel considers the agreement on accepting the guilt and accepts it, rejects it or determines special hearing in accordance with procedures from article 248 and article 233 of this Code.

This paragraph deals with agreement on accepting the guilt which is possible to appear together with the indictment and the court in this case considers the agreement on accepting the guilt and has three possibilities: to accept, to reject the agreement or to appoint special hearing with regards to the agreement on guilt. It should be emphasized that the institute of agreement for accepting the guilt is a relatively new institute in our legislation, and its application started in 2004 and managed to develop rapidly and has great impact in increasing efficiency and selection of a great number of criminal issues, and that this institute originates from USA, but now it is being implemented in many countries in the region, respectively this institute is known in CPC of Bosnia and Herzegovina, CPC Of Croatia and CPC of Serbia.³⁰ It should be emphasized that the Procedural Code of Albania doesn't envisage such an institute but in its provisions it has determined a similar institute called "summary procedure", which has some similarities with the institute of agreement for accepting the guilt, since the initiative derives from the defendant and in case the court accepts the summary procedure reduces the fine or imprisonment by one third.³¹

2. If the defendant pleads not guilty, the court can not punish the defendant, unless the defendant changes his declaration and accepts the guilt, or if the court proclaims the defendant guilty after the court hearing, regardless of the agreement on acceptance of guilt.

²⁸ Article 384 par.2, CPMK.

²⁹ Article 247, CPMK.

³⁰ Çollaku, Hashim, *The role of State Prosecutor in the Criminal Procedure*, Prishtina, 2013, pg. 134.

³¹ Islami Halim & Hoxha Artan & Panda Ilir, *Criminal Procedure*, Tirana, 2012, pg. 547.

There is possibility that even after reaching an agreement on the guilt, the defendant may declare not guilty at the initial hearing and after this the court can not punish the defendant, but there is possibility that the defendant can admit guilt even later, but logically after the court hearing can proclaim the defendant guilty.

3. Reviews from this chapter may be held under secret measures after the request of state prosecutor from Chapter XIII of this Code.

Admission of guilt is regulated by Chapter XIII of this Code, since it presents something specific for all phases when the agreement of guilt is regulated, while it is characteristic that the reviews may be held under secret measures until the agreement is reached.

4. Agreement on admission of guilt from article 233 of this Code or acceptance of guilt from article 248 of this Code may be reviewed by the court any time before the end of the trial.

Agreement for acceptance of guilt between the parties as well as admission of guilt may be reviewed any time before the end of the trial.

Although this provision is included at the initial hearing, nevertheless it has much wider character and includes the phase from the initial hearing until before the judicial review, that in fact the provision does not limit the possibility for the defendant to admit guilt until before the end of the judicial review, but it is up to the court to review this admission. In the judicial practice, often cases of accepting the guilt appear in the cases of changing the indictment, while the change is done when the state prosecutor during the review finds that the reviewed evidence show that actual situation presented in the indictment is changed,³² but it should be emphasized that the change of indictment often results with change of the legal qualification of the criminal act, therefore it is necessary that after this change the defendant to declare about the guilt once more.

4. Admission of guilt during the initial hearing, article 248

1. When the defendant admits guilt for all the items of indictment according to article 246 or 247 of this Code, the single judge or the presiding judge of the panel determines that:

³² Sahiti, Ejup & Murati, Rexhep, *The Law on Criminal Procedure*, Prishtina, 2013, pg. 367.

- 1.1. defendant understands the nature and consequences of the guilt;
- 1.2. admission is done deliberately by the defendant after sufficient consultations with the defender, in case the defendant has a defender;
- 1.3. admission of guilt relates to facts of the case that is consisted in the indictment, in the presented materials by the state prosecutor for fulfilment of the indictment accepted by the defendant and any other evidence, such as testimony of witnesses presented by the prosecutor or the defendant; and
- 1.4. indictment contains no clear legal violation or factual mistakes.

The most important phase after the initial hearing is the moment after admission of guilt by the defendant and this is important for several reasons, first of all due to the fact that the conditions envisaged should be fulfilled in cumulative way and only in this case the admission of guilt can be accepted and not in cases when the admission is partial, with dilemmas or unclear.

Evaluation of admitting the guilt is quite complex and multidimensional and not easy at all to determine whether criteria are met or not, since some criteria are measurable but some are of objective nature and it is more difficult to be determined.

The most interesting is the fact that admission of guilt should be done in a way that the defendant should understand the nature and consequence of admission of guilt and this is very complex, due to the fact that the defendant should understand the indictment that stands on it, than because by admission of the guilt we would have avoidance from the regular judicial process, respectively the process would be much shorter than usually, because he is deprived of providing evidence or rejection of evidence presented by the state prosecutor and that after this he will immediately be pronounced his punishment for his action, he would be obliged to fulfill property- judicial request of the damaged party (in case there are damaged parties and there are proposals of authorised persons for property-judicial request), that the property gained as result of criminal act may be confiscated (if there proposal for confiscation), while as consequence of admission of guilt presents the fact that the judgment can not be attacked due to the wrong or non final verification of the actual state respectively loses one base for appeal of judgment.

Admission of guilt should be done voluntarily, fully and with no dilemma, further more the defendant should be aware for this admission and the admission should not be done by force, threat, obligation, ignorance, than

if it a known fact that the defendant suffers from a temporary or permanent mental disease and preferably on most cases the defender should be part of it and must appreciate the fact that there was enough time for consultations, so all these elements are very important, otherwise acceptance of guilt would be incomplete.

Another important fact is that admission of guilt should be supported by concrete evidence although in fact formally in this phase no evidence are reviewed, however the single judge or the presiding judge of the panel, is obliged to review and evaluate quantity and quality of evidence in the subject acts and it necessarily obliges the court to make it clear if there is criminal responsibility of the defendant, than whether there are elements of criminal act described in the accusation and many other elements, that must be considered due to the fact that evidence must be valued for the fact if the evidence are accepted since, as it is known the judgement can not be based on unaccepted evidence,³³ and mus consider evidence for determination of guilt,³⁴ respectively lack of evidence for a decision on guilt.

2. During evaluation of admission of the guilt by the defendant, the single court judge or the presiding judge of the panel may ask for opinion of the state prosecutor, the defender and the damaged person.

It is important, though not obligatory to request the opinon, since the parties from their view will present arguments, which sometimes might be contradictory. Undoubtedly it would be preferable to ask for opinion of the parties since the court would have a clear picture of the evend, than it is left to the court's evaluation, to be connected to evidence it has in disposal.

Getting the opinion is of importance for the fact the court may receive important informaion to decide about acceptance or nonacceptance of guilt or no, which in this contect and based on the other fact, no final word is foreseen, than the parties to the proceeding may present their views for this as well and enable the court to have a more clear picture about the circumstances of committing criminal act, personality of defendant and many other important circumstances to individualise the sentence, respectively to determine the type and the level of sentence,

³³ Article 257, par.3, KPPK.

³⁴ Article 262, KPPK.

respectively concrete sentence which is provided by the court to the author of criminal act.³⁵

3. When the single judge or the presiding judge is not convinced that the facts from section 1 of this article, he brings decision by which he refuses admission of guilt and proceeds with the initial hearing, as the admissions of guilt was not done.

But despite these hits of evidence under paragraph 1, however, the court has no other option at this stage other than the fact that if it finds that the facts set out in Article 248 paragraph 1 of the CPC are not proven or finds any deficiency of evidence, to reject admission of guilt in order to pave the way for the second hearing or judicial hearing. Although not mentioned specifically, it is clear that the decision is recorded in the minutes of the initial review.

4. When the single judge or the presiding judge of the panel is convinced that the facts from section 1 of this article are verified, he brings decision by which he accepts admission of guilt by the defendant and continues with pronouncing the sentence, scheduling session for verification of relevant facts for the sentence or suspends sentence until completion of cooperation within the defendant and state prosecutor.

Same as in the previous paragraph, in this case the decision on admission of guilt is found in the minutes of initial hearing, also no specific provision is envisaged for the content of minutes of initial hearing, while minutes should be compiled in written form and record the course of the main core.³⁶

No doubt that the part which mostly caused debate by entering into force of this Code is the moment when the single judge or the presiding judge of the panel accepts admission of guilt and then we might have three different situations.

The first is that it can be proceeded with pronouncement of sentence and it presents a reduction of judicial procedure but here are presented dilemmas especially when handled by department for serious crimes and this has caused confusion that after admission of guilt, the presiding judge of the panel shall pronounce sentence or the judge panel to be completed. However, provisions that regulate court competences should

³⁵ Muçi, Shefqet, *Criminal Law, Overall part*, Tirana, 2007, pg. 265.

³⁶ Hajdari, Azem, *Criminal procedure – Commentary*, Prishtina, 2010, pg. 597.

be analysed in details, specifically “In criminal procedure within the Department of Serious Crimes of the Basic Court, the decision is brought by three (3) professional judge, one of which chairs the judge panel”³⁷ and if analysed carefully it is understood that the decision is brought exclusively only by the judge panel, which means that this is supposed to happen in every phase of the proceeding, respectively even after the initial hearing, since the provision does not specify in which phase it may happen. Therefore, it allows possibility to happen in any phase, but in every case when the decision is brought based on this sentence, it should be taken after the judicial panel is completed, notwithstanding the initial hearing. This conclusion is made by analysing systematically the provision which belongs to decisions before the judicial hearing, because “After the indictment by the state prosecutor in the Basic Court, single judge or the presiding judge of the panel holds initial hearing and the second hearing, decides on requests to exclude evidence and makes a decision on the request for assignment of detention or other measures to ensure the presence of the defendant”,³⁸ that provides competences to the presiding judge for decision making for all these situations except for bringing the judgement.

However, I consider that it would be natural and normal that pronouncement of the sentence is provided by the judicial panel, based on the fact that hypothetically we would come to a situation that the head of presiding judge pronounces the most serious sentence envisaged by the Criminal Code of Republic of Kosovo, respectively the sentence of life imprisonment.

However, we acknowledge the fact that by applying these provisions, there were lot of uncertainties and confusion among the courts regarding sentencing in the department of serious crimes of basic courts and in some of them the sentencing was provided by the presiding judge of the panel, while in some others by supplementing the judge panel only for sentencing, because this provision was interpreted differently in since the beginning and caused confusion in the judicial practice.³⁹

But this dilemma is overcome by the opinion of the Supreme Court of Kosovo⁴⁰ which has determined that the penalty should be imposed by the presiding judge as it comes to the specific situation during the initial hearing.

³⁷ Article 25, par.3, CPCK .

³⁸ Article 26, par.1, CPCK.

³⁹ Sahiti, Ejup & Murati, Rexhep, *Law on Criminal Procedure, Prishtina*, 2013, pg 342.

⁴⁰ Legal Opinion of Supreme Court of Kosovo, GJA. no. 207/13 of the date 19.03.2013.

Another situation, respectively the second situation appears in cases when after admission of guilt exists another relevant fact which would be more interesting and necessary for sentencing and in these cases although not decisively defined it would be necessary to close the initial hearing and schedule another session only for verification of the fact in question. It is not clear what would be the term of appointment and retention of this session, but obviously it depends on the circumstances to be established, and especially which facts it comes to the doubt that this is a discretion of the presiding judge. Also relevant facts may be of different nature, such as insurance of data from the evidence of convicted persons, any significant personal circumstances or family issues of defendant, if it were necessary to verify the fact whether or not the victim respectively the damaged person has been compensated, such could be confirmation of the fact when the defendant has limited mental capacity. But in all cases, that might be of different nature should exclusively be linked to verification of a fact or circumstances regarding sentencing of the type of punishment and it sometimes brings to postponing of the initial hearing and than scheduling a special session exclusively for sentencing..

While the third situation appears in cases of cooperation between the defendant and state prosecutor and this may cause suspension of sentence until this cooperation is completed, which might appear in situations when the agreement of admission of guilt is being negotiated and in cases when we deal with cooperating witness. While in cases of suspension, the court schedules judicial term, aiming at not prolonging too much and certainly these terms should be determined in relation with the complexity of the case, but in case this cooperation is prolonged, than the court would be able to pronounce the sentence since the decision on admission of guilt is done already.

With regards to this provision it is necessary to analyse two more situations that appear quite often in practice, after raising the accusation, which is important due to the accusation principal *nemo iudex sine actore*⁴¹:

- the first situation when the accusation is raised towards the defendant for various criminal acts and in these situations logically we also have declaration of the defendant for each action separately and in some items of the accusation admission of guilt is

⁴¹ Sahiti, Ejup, *The Law on Criminal Procedure*, Prishtina, 1986, pg 173.

done according to criteria of article 248 par.1 of this Code, while for some the criteria may not be met.

In these situations it should precisely be determined for what actions the guilt has been admitted and for what actions the guilt is rejected, for what actions the criteria are met and for what actions the criteria are not met. Nevertheless, it is important in these cases to continue with second hearing or judicial hearing only for accusations when the guilt is not admitted or the criteria has not been met, while for cases when the guilt is not met, the sentence is pronounced at the end of judicial hearing.

- the second situation exists in cases when the accusation is raised towards some defendants and in these cases exists the possibility that one or some defendants declare not guilty. In these cases the procedure should be separated⁴² and the defendants who admit the guilt continue with sentencing while the other defendants shall continue with the second hearing or eventually with the judicial hearing.

Separation of procedure is justified specifically in these situations:

- the first situation when we deal with complicated cases, which would take much time and the defendant who admit the guilt would be obliged to be present during the judicial procedure although his presence is not necessary,
- the second situation is in cases when defendants are in custody and it would be completely unnecessary to be kept in custody.

Another strong argument in favor of separation procedure is the provision envisaged in the judicial hearing “ Single judge or presiding judge of the panel postpones sentencing for defendants who admit the guilt at the beginning of judicial hearing until the end of judicial hearing”,⁴³ which in fact enables the defendant to admit the guilt, not to be present during the flow of judicial hearing until imposition of sentencing.

However the court must be careful in assessing the admission of guilt due to the fact that sometimes the defendants may have secret agreement among themselves for admission of guilt for different reasons and based

⁴² Article 36, par.1 of the CCP allows possibility of specifying criminal procedure, for important reasons or for reasons of efficiency until the ending of court hearing, that enables the specification to be done during the initial hearing.

⁴³ Article 326, par.5, CPCK.

on this reason we can not say it might be a uniform solution separation of procedure but separation of procedure should be done on a case by case basis.

Obviously the judicial practice in such cases is not uniform because there are times when the procedure is separated but there are also cases when the procedure is not separated, however, I consider that the opportunity would be to separate the proceedings for the reasons set out above.

5. A defendant who pleads not guilty during the initial hearing may change his statement and plead guilty at any time. For any defendant who wants to plead guilty in this paragraph, the single judge or the presiding judge of the panel applies appropriate hearing from this article.

Even after completion of the initial hearing the possibility of pleading guilty is not exhausted or there is a possibility that the defendant pleads guilty at any time after the initial hearing, although it is not specified in what form will be able to make this statement, however it can be done through a written appeal, therefore it can determine the development of an initial examination that can actually take place conditionally rather than an initial hearing.

5. Rejection of evidence⁴⁴

1. Before the second hearing, the defendant may file objections to certain evidence in the indictment, based on these reasons:

1.1. the evidence are not taken lawfully by the police, state prosecutor or other state body;

1.2. evidence are in contrary with regulations from Chapter XVI of this Code; or

1.3. there is articulated base that the court values the evidence as deeply unsupportable

It should be noted that among the initial hearing and the second hearing there is a middle phase in which a series of very important procedural actions are conducted by the parties in the proceedings, which initiatives arise from the defendant through an objection to the evidence presented by the state prosecutor in the indictment and this is the stage when the

⁴⁴ Article249, CPMK

defendant through this institute of claims opposition presents his evidence regarding the proposed evidence by the state prosecutor.

Undoubtedly, opposing of evidence is important due to the fact that there is a possibility that in this stage of the proceedings the court should record and also declare inadmissible certain evidence and this would be a decontamination of the case from the inadmissible evidence, since the court decision can not rely in such evidence.⁴⁵ Objections can be submitted only on certain evidence and in cases when they are received in illegal ways by bodies that conduct investigations and it is important that these bodies should be prudent in their actions and that exceeding the authority can lead to the fact that the evidence are received in illegal way. Regarding the evidence that are in opposition with Chapter XVI of the Code, in essence presents differently the institute of unaccepted evidence, further more this chapter describes which evidence are unaccepted.

As far as the third basis is concerned, where the request for opposition of evidence can be presented when there is articulated basis, in order for the court to value the evidence as deeply unsupportable.⁴⁶

2. State prosecutor is given possibility to respond to opposition orally and in written.

It is common that the claims of the defendant be given an opportunity to state prosecutor to respond to these claims. This can be accomplished in two ways; orally that is common during the second hearing, and the second way is a written response which may occur between the initial hearing and the second hearing. It is natural that the court in cases when the defendant files a written objection to the submission of the other party or send it to the state prosecutor, responsible and deadlines are shown in the provision of Article 251 paragraph 3 of this Code.

Another issue that needs to be addressed is what would happen if no answers are presented by the state prosecutor within the term of 7 days, then the court after expiry of this deadline must decide without the response of the state prosecutor to not remain hostage to the answers and to not postpone the issue. But primarily because of the many reasons it would be more preferable that the state prosecutor's response was mandatory because the concept as it is currently constructed rate this presents an opportunity and not an obligation of the state prosecutor.

⁴⁵ Sahiti, Ejup & Murati, Rexhep, Law on Criminal Procedure, Prishtinë, 2013, pg. 249.

⁴⁶ Article 19 par.1.29, CPCK.

3. For all evidence for which the objection has been filed, the single judge or the presiding judge of the panel brings the written decision justified for issuance or exclusion of evidence.

This provision determines that for all evidence it should be decided to allow or exclude the evidence. This actually represents an interruption of procedure until a decision is taken for allowance or exclusion of evidence. Therefore, there is possibility to allow or exclude some evidence or to allow or exclude all evidence.

4. Inadmissible evidence are separated from the case and are closed. Such evidence are kept separated from court documents and other evidence. Inadmissible evidence can not be reviewed or used in criminal procedure, unless in the case of complaint against the decision on admission.

This paragraph describes actions undertaken when found that there are inadmissible evidence in the case. This is a common standard that evidence are separated from other documents, to be closed and are not allowed to be used until a decision is taken about them. So, this presents a common standard based on the fact that the evidence proclaimed as inadmissible are considered as they don't exist, although there is no definition regarding the inadmissible evidence. These evidence are taken against legal provisions, this is considered invalid or inadmissible evidence.⁴⁷

5. All evidence against which no objection is filed, are admissible in the judicial hearing, unless the court based on the official duty determines that the admissibility of certain evidence would prejudice the defendants rights guaranteed by the Constitution of the Republic of Kosovo.

The above provision comes into consideration in the cases when the parties do not dispute the evidence, in that case the authority is given to the court to exclude the evidence in cases when admission of determined evidence affects defendant's rights guaranteed by the Constitution of Republic of Kosovo. This represents a very broad concept and rightly entrusted the legitimacy of the court as authority that is likely to exclude the evidence as inadmissible in evidence can not support decision of guilt or not guilty.

⁴⁷ Çollaku, Hashim, *The role of State Prosecution in Criminal Procedure*, Prishtina, 2013, pg. 92.

6. Either party may appeal against the decision from paragraph 3 of this article. The complaint must be made within five (5) days of receipt of the written decision.

Complaints may be submitted by each party and the complaint is submitted to the court of appeal.

6. Request to dismiss the accusation⁴⁸

1. Before the second hearing, the defendant may file a request to dismiss the accusation, based on these reasons:

- 1.1. the offence charged is not a criminal offence;
- 1.2. there are circumstances which exclude criminal responsibility;
- 1.3. the timeframe of criminal act has passed, criminal act is involved in forgiveness or there are other circumstances that inhibit prosecution; or
- 1.4. no sufficient evidences to support a well based doubt that the defendant committed criminal act for which he is accused on indictment.

The second option of the defendant before the second hearing is to file request for dismissal of accusation and this request may be filed for the grounds set and these situations are identical with bases for exemption from accusation.

2. The state prosecutor should be provided possibility to respond to the request orally or in written form.

Same as in the above article, the state prosecutor is given possibility to respond orally during the second hearing or in written before the second hearing.

3. The single judge or president of presiding judge makes a written decision by which he refuses the request or rejects the accusation.

After the response by the state prosecutor or even without response within the determined timeframe according to article 251 par.3 of this Code, the court has two possibilities to refuse the request for rejection of accusation

⁴⁸ Article 250, CPCK

in case he evaluates that there are bases from paragraph 1 of this Code. It is important to emphasize that in this case the court decision (upon refusal of request for rejection of accusation), presents a filter of court control of the accusation and based on theory aspect after completion of procedures about accusation control, the accusation becomes final.⁴⁹

4. Each party may file request against the accusation from paragraph 3 of this article the Complaint must be filed five (5) days from the day of written decision.

The complaint can be filed by each party and the complaint is submitted to the appeal court, according to the defined term.

7. Responses⁵⁰

1. The state prosecutor is given possibility to respond on the objection from article 249 or in the request from article 250 of this Code.

It is natural that upon objection and request of defender or defendant the state prosecutor is enabled to submit responses so that the court could consider arguments of the parties during decision making.

2. Response from paragraph 1. of this article may be done orally during second hearing or in written.

Responses may be submitted in written through the complaint so that the court could consider it during decision making, while there is also possibility that arguments that are submitted orally during the second hearing, respectively in the report of the second hearing. I consider that certainly it is more preferable to have written communication since the state prosecutor would have more time in disposal.

3. The single judge or presiding judge of the panel provides available time of one (1) week to the state prosecutor, to submit written response from article 249 or request from article 250 of this Code.

⁴⁹ Sahiti, Ejup & Murati, Rexhep, *Law on Criminal Procedure, Prishtinë*, 2013, pg. 347.

⁵⁰ Article 251, CPCK.

Legislator rightly ruled legal term for the state prosecutor's response but still the court after the expiry of the deadline immediately is created possibility to decide on the application or objection.

4. Instead of response to request from article 250, the state prosecutor can submit changed indictment from article 252 of this Code.

In this paragraph there is possibility that the state prosecutor instead of response to the claims of the defendant to have opportunity of repairing the accusation respectively change it, which presents innovation compared to previous Code and it also creates much confusion and dilemma. Basic issue which needs treatment is the fact what is understood by the changed accusation and whether this change in the accusation means substantial change or only in the aspect of technical mistakes. Is it possible that this change includes subjective and objective aspects, whether it can be changed not only in the aspect of technical mistakes but also substantial, specifically referring to article 252 par.3 of CPCK, which is envisaged as separate basis of objections and requests exclusively for this change of accusation.

8. Amended indictment⁵¹

1. In case the submitted request from the

If the request submitted by the defendant for rejection of accusation from article 250 of this Code may be regulated by changing the accusation, the state prosecutor presents changed accusation in accordance with article 250 of this Code may be regulated by changing the accusation, the state prosecutor submits changed accusation in accordance with article 241 of this Code within one (1) week from the second hearing.

Responding to the claims of the defendant for rejection of indictment the state prosecutor has possibility to amend the indictment and the amended indictment should be presented within a week of the second hearing. So, the change can be made after the second hearing, also this difference is not clear in what consists, in content or just changes of the aspect of technical mistakes. But referred to in paragraph 3, it is clear that it is about substantial character changes.

⁵¹ Article 252, CPCK.

2. If the amended indictment is filed against a defendant or multiple defendants, the single judge court or the presiding judge determines the initial hearing under Article 245 of the Code as the indictment was new.

This provision is extremely unclear and it is not clear whether the defendant is about the same as in the initial submission of the indictment or may be submitted against the other defendants. It may also be either one but it is possible that the amended indictment be submitted to other defendants due to the fact that this indictment was treated as new indictment. It is important to note that through the amended indictment we have a recycling or a return to the stage of filing of the indictment.

3. The defendant may submit new objections from article 249 or the request from article 250 of this Code, but only for the amended parts of accusation.

Objections and requests may be submitted only for the amended parts of accusation not for the parts that have no possibility of their submission.

4. The defendant may submit previous objections again, from article 249 or requests from article 250 of this Code. In case the defendant doesn't submit objections or previous requests again, the single judge or the presiding judge of the panel decides that those objections or requests are not relevant for the amended accusation and does not review them further.

So, as it was described above, now we have an opportunity to re-submission of applications and objections submitted before, but then a single judge or presiding judge of the panel decides on complaints and objections, respectively decides that they are not relevant to the amended indictment and no further reviews therefore estimates that the initial objections are eliminated with the amended indictment.

5. State prosecutor may amend the indictment once, unless provided with new data that necessitate the amendment of the indictment.

There is only one possibility of amending the indictment except in cases when the data are provided which make it necessary to amend the accusation, so that this provision is quite complex since it allows that amendment of accusation is done several times in cases when new data are provided which make the amendment of accusation necessary as provided by the legislator, which is quite unclear and this confusion is

even bigger based on the fact how would the data be provided, when bsince by filing the accusation ceases any activity of the state prosecutor, respectively the investigation phase is completed for that criminal act.

9. Rejection of accusation⁵²

1. For every request for rejection of accusation from article 250 of this Code, the single judge or presiding judge of the panel makes decision for rejection of accusation and cease of criminal procedure when he evaluates that:

- 1.1. the act by which he is accused doesn't present criminal act;
- 1.2. there are circumstances which exclude criminal responsibility;
- 1.3. the timeframe of offense has passed, the offense is involved in amnesty or forgiveness, or there are other circumstance that obstruct prosecution; or
- 1.4. there are no sufficient evidence to support a well based doubt that the defendant has committed criminal act for which he is accused in the accusation.

This provision regulates rejection of accusation which is connected to article 250 and is certainly important the fact that rejection of accusation and cease of procedure may be done according to request of the parties. So, according to this provision it is determined that the accusation and cease of criminal procedure is done only after the request of parties that excludes the possibility of the court to act according to official duty. Here we certainly should clarify and distinguish the situation when the court rejects the appeal, after it is returned to the submitter for correction and amending, as consequence of inaction.⁵³ Certainly, distinction among these situations is substantial due to the fact that rejection of appeal the procedure is not terminated and is not considered as judging issue "ne bis in idem", while provision of this paragraph rejects the accusation and terminates the procedure, and in these cases when the decision becomes final, the procedure towards the defendant can not continue for that criminal act. So, it is related to the subjective and objective identity of the accusation.⁵⁴

⁵² Article253, CPCK.

⁵³ Article442of CPK, as submission defines the accusation as well

⁵⁴ Article4, CCPK

With regards to bases for rejection, these are determined explicitly and are similar with bases determined at the acquittal judgement.

2. Upon making decision from this article, the single judge or presiding judge of the panel is not obliged by legal qualification of the criminal act, as set by state prosecutor in the accusation.

The Court is not bound to the legal qualification under the state prosecutor claims, however it is related to description of the facts related to the indictment.

3. In response to the request from Article 250, the state prosecutor can reject an indictment if the application of Article 250 of this Code is based.

This paragraph provides opportunity to the state prosecutor in the case of the response to allegations of the defendant to reject the accusation in cases where it considers that the request is based.

This provision is quite interesting for two reasons, first it seems illogical for the state prosecutor to reject the accusation which was previously raised by him and secondly how would cast an indictment which is already submitted to the court.

10. Second hearing and scheduling judicial hearing⁵⁵

1. The state prosecutor, the defendant and defenders participate at the second hearing, unless the single judge or presiding judge of the panel requested only submission of proposals until the date of second hearing.

Second hearing presents another very important phase in the procedure where the court develops very important activity and is not limited to one session. But more sessions can be scheduled, however it should emphasize the fact that the second hearing also likely not to be held at all, such as when the indictment is rejected and the case is closed at this stage, or the proposal for rejection of accusation is refused and in this case the judicial hearing is held. But peculiarity is the fact that it is not possible to conclude the procedure during the second hearing.

It is important to note that even at second hearing there are set deadlines relating to the initial hearing. The state prosecutor, the defendant or the

⁵⁵ Article 254,CCPK.

defendants and the defense participate in this hearing, and only submission of proposals until the date of second review is required. So if the proposals are submitted then the second hearing is not held at all.

2. During the second hearing, the single judge or presiding judge of the panel makes sure that the defender has fulfilled all the obligation relating to disclosure of evidence from article 256 of this Code.

While the initial review examined the state prosecutor's obligations to the defendant and his defender, now at the second hearing the court is focused on obligation of disclosure of evidence by the defense, which is interesting to note here that there is no mention of defendant and that this could be interpreted by the fact that this obligation is attributable to defense as a professional and not the defendant, or that occurs after the legislator apparently did not foresee the situation where the defendant will defend himself without defense.

3. During the second hearing, the single court or the presiding judge of panel reviews objections from article 249 or requests from article 250 of this Code. He may ask from the state prosecutor to respond orally during the hearing or in written, in accordance with articles 249-253 of this Code.

If requests or objections have not been reviewed previously, they are reviewed at the second hearing and requests from the state prosecutor to respond to these claims. If there exists readiness to economize the procedure it can be done orally at the report, but can not be submitted in oral form, therefore the opportunity is provided to submit them in written through appeals.

4. During the second review, the single judge or the presiding judge of the panel schedules hearing sessions in accordance with article 225 of this Code, if such sessions are needed.

This paragraph precedes Article 255 of this Code and has been left the possibility that a single judge or the presiding judge of the panel have the opportunity to review the validity of the proposals to schedule and maintain more sessions. This should be understood as special sessions and during the second hearing. It is clear that these should not be intended as a continuation of the second hearing but special sessions and moreover there is no limit on how much can be the number of these sessions. However these are left to the discretion of the single judge or presiding

judge of the panel and, if necessary, but these should be related to the complexity of the subject matter.

5. During the second hearing, the trial judge or the presiding judge appoints judicial hearing unless he has not taken a decision on the objections made by Article 249 or the requirements of section 250 of this Code.

In this paragraph it is enabled that during the second hearing to schedule judicial hearing and in practical terms it is especially important to more complex subjects nature and in this case the flow of the trial can be planned. But there is no possibility that judicial hearing be set until deciding on requests and complaints submitted, respectively it is procedural obstacle, further more more decisions should be final.

6. If the single judge or presiding judge of the panel still has not decided on objections from article 249 or requests from article 250 of this Code, he makes written decision justified for all unresolved proposals after the second hearing. He schedules the judicial hearing by written order, which is issued at the same time with the decision or written decisions for abovementioned proposals.

After holding the second hearing, it should be decided for all proposals and at the same time decide regarding proposals and schedules judicial hearing which presents a good possibility for the present parties not to be invited one more time through regular calls, creates difficulties of different natures.

7. No witness or expert is examined and no evidences are submitted during the second hearing.

Until the initial examination and specifically permitted except in the case of deciding regarding the continuation or implementation of measures to ensure the presence of the defendant to hear witnesses, the second hearing does not foresee such a possibility. However, this presents an interesting situation that deserves a brief treatment at least for two reasons, such as:

- First the court is always obliged at all stages to review these measures to ensure presence of the defendant especially the most serious detention measure and it would be reasonable for these measures to decide at any stage that means even this stage;

- secondly given the fact that participants in the second hearing are the state prosecutor, the defendant and his defender, it would be expected to present demands for continuation or implementation of measures and from this reason it would be useful to hear arguments of the parties.

However, it is unclear why the legislator did not allow the hearing of parties and presentation of evidence as provided in the initial hearing, and only in regard to ensuring the presence of the defendant in particular to review the most serious measure or detention.

11. Reviews for determining the validity of proposals⁵⁶

1. In case the single judge or the presiding judge estimates that it is necessary to hold a hearing for verification of objections of the defendant from article 249 or requests from article 250 of this Code, he determines and implements this hearing as soon as possible to be able and not later than three (3) weeks from the day of the second hearing.

It is interesting to consider the paragraph in question, for several reasons: first, it is clear that it is necessary to hold several hearings, because it is described that these hearings are dealing with determination of validity of proposals. These hearings are held only if it is not decided for these proposals during the second hearing, otherwise there wouldn't be needed to hold a hearing for this during the second hearing. However, it seems that the legislator had in mind the situation when after the second hearing and despite the fact that the court has in disposal requests and objections but even the responses related to that, however there might exist objections that decide about them, therefore for this reason envisaged the anticipated review, and has envisaged time limitations until when this hearing can be implemented, from the second hearing.

2. The single judge or the presiding judge of the panel, issues a written decision, justified as soon as possible after the hearing to hold according to this article and not later than three (3) weeks from the day of holding the hearing from this article.

⁵⁶ Article 255

The maximum timeframe of issuance of the decision determined is 3 weeks from the day of holding the hearing, but more essential is the fact that the decision should be in the written form and justified.

12. Presentation of the defense material⁵⁷

1. During the second hearing, the defence presents to the state prosecutor:

1.1. notice of intent to present an alibi, stating the place or places where the defendant claims to have been at the time of the offense and the names of witnesses and any other evidence that supports the alibi;

1.2. notice of intention to present grounds for excluding criminal responsibility, specifying the names of witnesses and any other evidence that supports such ground; and

1.3. the announcement of the names of witnesses whom the defense intends to call to testify.

As emphasized earlier, during the second hearing the court makes sure to fulfill the obligation of protecting the defendant towards the state prosecutor in line with items 1.1, 1.2 and 1.3 set out explicitly.

It is important that the defender presents these notifications due to the fact that the state prosecutor needs to prepare for presentation of issues at the court hearing, further more appearance of witnesses in this phase is of importance because if not presented at this phase, it needs to be justified why these materials are not presented at this phase.

2. At any time before the judicial hearing, the defender may amend in written the information given according to paragraph 1 of this article to the state prosecutor.

This paragraph allows information to be amended until before the judicial hearing, but the information however need to be presented before the judicial hearing.

3. If the defender doesn't perform the obligation from paragraph 1 and 2 of this article, while the court doesn't find justifiable reasons for this

⁵⁷Article 256, CPCPK

thing, the court may pronounce fine up to twohundred fifty (250) EUR towards the defender and informs the Bar Association for this.

This paragraph allows that in case of non-fulfillment of obligation to discipline the defender by pronouncing a fine and submitting a notification to the Bar Association, and rightly the legislator has envisaged these measures as professional and a person who can be a cause of necessary, which damage efficiency of the procedure.

13. Conclusion

At the conclusion of this paper it is important to note that initial hearing, actions between the initial and the second hearing and the second hearing represent one of the most important stages of the criminal proceedings, which begins with the filing of the indictment by the state prosecutor and can be completed after the initial hearing in the case of rejecting of the indictment or can end the sentencing judgment in the case of the guilty plea or the successful negotiation of the plea agreement.

Initial hearing presents an important phase of criminal proceeding, where the recording of evidence is provided, unaccepted evidences are defected and eliminated, but there are also provisions of technical nature, such as submission of accusation, which I consider is excessive and unnecessary, since the accusation should previously be submitted together with the invitation, in order to prepare for the initial hearing.

Ensures that the right of the defendant to have a defender is respected and and that the state prosecutor has fulfilled the obligation to discover evidences and all these present a guarantee and preparation for the main phase, respectively for the judicial hearing.

During the initial hearing it is decided about security measures of the presence of defendant, which is important since the parties may submit their views on the continuation or implementation of these measures directly during the hearing and therefore exceptionally hearing of witnesses and experts is allowed.

During the initial hearing, the parties have possiblity to present their objections on certain evidences, which is a judicial filtering of controlling the actions of bodies that have developed investigative procedure and in

case of recording such evidences, the court can avoid that evidence from the case, declaring them as inadmissible evidence.

Also, during the initial hearing it is possible to complete a criminal act through rejection of accusation which can be done exclusively by request of the parties in the procedure, respectively between the accused person and the state prosecutor, but it is not foreseen to provide rejection according to the official duty, and by this I estimate that a possibility should exist that the court could act *ex officio*, to have possibility to reject the accusation without request of parties, in order not to proceed with other phases in the procedure.

Of same importance is the fact that parties in the procedure in this phase have very active role, either through the requirement for objection of the accusation or objection of proves and in the basis of requirement as one party, then there is possibility of responsibility in written form before second hearing, or orally during the second hearing, which notes that these timeframes are long (one week for response), therefore I consider that these timeframes could be shorter, three or five days for purpose of efficiency of the procedure. While a good solution is the fact that a possibility has been envisaged for court decision without response from the other party, after the timeframe for response, also the fact that there exists the possibility of the state prosecutor to change his accusation within the timeframe of one week is new, which according to my opinion is unnecessary and unreasonable.

A single judge or the presiding judge of the panel chairs the initial hearing, by guiding the defendant about his rights and in case of admission of guilt or plead not guilty, or reaching an agreement for admission of guilt if legal conditions are met, they are competent to pronounce sentence although this provision has been applied in practice. However, at the department of serious crimes it causes lots of debates and dilemmas, whether sentencing can be done by the presiding judge of the panel, therefore I estimate that in the cases that are being reviewed by the department of serious crimes it would be an opportunity that after admission of guilt to amend the judicial body with two more judges for pronouncement of sentencing.

Second hearing is peculiar because during this hearing it is not possible to end up the criminal procedure and may not be held at all, if for the parties in the procedure is decided through decisions of the single court or presiding judge of the panel, after the initial hearing.

During the second hearing the court ensures that the defender has fulfilled all obligation of presenting evidences, since the same provision is requested by the state prosecutor before the initial hearing and this is aiming to review evidences among parties in the procedure.

The special thing of this phase is the fact that besides the initial hearing and the second hearing, it has been envisaged that special hearings may be organized in order to determine validity of proposals of the parties and in this situation we deal with review of proposals according to the adversarial principle in presence of parties, where it is noted that maximum of taking decisions are too long (not more than three weeks), and it would be better for this term to be shorter, respectively maximum one week, in order to continue with the main phase, respectively judicial hearing.

I am fully aware that short commentary of these provisions may be deficient and with possible defects, but I welcome suggestions and comments from readers of this paper.

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