



## Special Investigative Opportunity

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**Abstract:** The special investigative opportunity is a special procedural action that can be exercised during the investigation phase of the concrete criminal case, and through it contributes to the efficient processing of that case. This criminal procedural action consists in taking witness testimony or finding and opinion of the expert, for situations when it is expected that they will not be present in the main trial and it will be handled in terms of determining the meaning and criteria to be met for its implementation, procedure and authority that could set and enforce it, actions that guarantee criminal procedural efficiency and human rights during its implementation and the importance of this procedural action within the criminal procedure. The topic of this article focuses on Kosovo. During the preparation of this article, I applied the legal, historical, comparative and descriptive method.

**Keywords:** Witness; expert; judge; prosecutor; investigation

### 1. Introduction

Special investigative opportunity represents a criminal procedural action of particular importance. This criminal procedural action that can be taken during the investigation phase serves to render a fair and legitimate decision by the court, and is in function of guaranteeing criminal procedural efficiency and human rights, especially the defendant in criminal proceedings. This criminal procedural action consists in obtaining witness testimony or opinion and ascertainment of the expert. The application of special investigative opportunity in Kosovo allows the pre-trial judge upon the request of the state prosecutor, the victim, the victim's advocate, the defendant or his defense counsel. For the implementation of this procedural action it

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is required to meet the relevant legal criteria (relevance of the criminal offense, the existence of circumstances that would make it impossible to obtain the testimony of a witness or the opinion of the expert's findings at a trial) and a special procedure should be implemented in the manner as prescribed by law. Special investigative opportunity, the criminal procedure authority (pre-trial judge) usually allows and applies it in cases where the witness or expert of the case has serious health problems (they suffer from incurable illnesses) or they are too old or when other existing circumstances put at risk the possibility of their presence at the main trial (whether they are foreign nationals or reside in a third country etc.) etc. In such situations, through the implementation of a special investigative opportunity, it is assured to obtain testimony of that key witness or the expertise of an expert that is assessed as special in the relevant field. Such evidence is considered to be fully acceptable evidence for judicial decision-making, as long as it is taken in full compliance with the rules governing the obtaining of evidence.

## **2. The Notion of the Special Investigative Opportunity**

Special investigative opportunity represents criminal procedural action of particular importance. This procedural action, which may be exercised during the investigation phase, is in the function of achieving a more efficient prosecution of the criminal case and guaranteeing a lawful and fair trial of the person suspected of committing the criminal offense. As such, it consists in obtaining a witness testimony, including when he is a victim of a criminal offense and a statement is taken from him in this capacity or opinion and expert's finding where there is a significant risk that such evidence will not be made available during the main trial. I consider that during the implementation of the special investigative opportunity, the respect of the fundamental rights of the person being questioned is required (Human Rights, 2003, pp. 223- 248). This investigative action applies to a specific person who is considered as a defendant, but there are no legal obstacles to apply it to another person when it involves situations extending investigations to him, even when regarding the first person we are dealing with judged issues (Petrić, 1986, p. 323).

Although the application of the special investigative opportunity is recognized by the procedural criminal laws of many countries (Criminal Procedure Code of the Republic of Albania, Articles 316 – 322, Law on Criminal Procedure of Bosnia and Herzegovina, Article 223 etc.), including Kosovo, in the current format in Kosovo it

is presented in the framework of the Code of Criminal Procedure of the Republic of Kosovo of 2012 (Criminal Procedure Code, Article 149).

The special investigative opportunity, on the basis of the reasoned request of the competent entity, is authorized by the pre-trial judge. He grants it and guides the implementation of this action in cases where the witness or expert of the case, including the victim, has serious health problems (they suffer from incurable diseases) or they are too old or when other circumstances endanger the possibility of their presence at the main trial (are foreign nationals or live in a third country and are not in accordance with giving testimony remotely etc.) etc. “In such situations, through the implementation of a special investigative opportunity, it is achieved to provide the evidence of that key witness or expert’s expertise that is assessed separately in the relevant field (The deployment of special investigative means,, 2013, p. 8).” Such evidence is fully admissible evidence at the main trial (in which as a rule any evidence that serves the judicial decision is to be examined and verified), because obtaining of witness testimony or opinion and ascertainment of the expert by the pre-trial judge is done in accordance with the provisions governing the obtainment of such evidence and that during the implementation of this investigative action the defendant could have confronted with the witness or expert in front of at least one judge of the panel (Sahoti, Murati & Elshani, 2014, p. 405), but also because such a testimony is considered as evidence by the Criminal Procedure Code of Kosovo (Article 149).

Finally, it should be considered that through such a solution the Kosovo lawmaker has given realistic opportunities for the courts to overcome practical difficulties in such problematic situations and to provide fair and lawful solutions to concrete criminal cases.

### **3. Criteria for Applying Special Investigative Opportunities**

The words “special investigative opportunity” clearly indicate that in this case we are dealing with a specific criminal procedural action, which in a measure goes beyond the basic rules that legitimately addresses the issue of evidence collection and administration, but who is not the one who challenges them.<sup>1</sup> Taking this into account, the Kosovar lawyer with paragraphs 1 and 2 of Article 149 of the Code of

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<sup>1</sup> This is due to the fact that the evidence obtained during the implementation of the special investigative opportunity is fully admissible in the main trial, in so far as it is conducted in accordance with the provisions governing the obtaining of evidence at the main trial.

Criminal Procedure has clearly defined the criteria on the basis of which the court may grant the implementation of this criminal procedural action.

In accordance with these two legal provisions that the special investigative opportunity may be able to apply, the following conditions must be met:

1. Existence of this opportunity as a sole opportunity for obtaining significant evidence. This condition is considered to be fulfilled when there is no second possibility to obtain the testimony of the witness or the opinion and the expert's finding, respectively the victim's statement at the main trial. In cases where they lack the second chance to obtain important evidence may be of different nature. They may refer to serious health conditions or to the old age of the witness or expert, the possibility of them leaving the country (eg, being foreign nationals), imposing prohibitions on them, etc. Thus, this condition is not considered to be fulfilled if it is a witness who should be questioned for any important fact in the main trial, which works in a neighboring country but returns every weekend to his home. In any case, the application of a special investigative opportunity is required to be granted only when it comes to obtaining relevant evidence. This would mean that this investigative action cannot be applied to gather any evidence (Salih, 1981, pg. 203).<sup>1</sup> Meanwhile, the meaning of the relevant evidence is only that evidence that prove the existence or non-existence of any relevant fact regarding the criminal case that is the subject of criminal proceedings.

2. Significant risk exists that important evidence cannot be obtained during the main trial. This condition is considered completed when the assessments done derive to the conclusion that there is a real risk that the examining of a witness or findings and opinions of an expert at the main trial in order to give clarification on any relevant facts related to the criminal case would be impossible. Existence of such a risk may refer to the case when, for example, we are dealing with the need to obtain the statement from a single witness or important witness, or to obtain the opinion and ascertainment of an extremely irreplaceable expert regarding the case under investigation, who may be in very bad health (when their death is expected at any moment) when they are at a very old age or when they are expected to go for a while or forever to live in another country and who have not expressed readiness to give their statement remotely.

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<sup>1</sup> During the trial process (including the application of a special investigative opportunity), all the numerous problems that arise in relation to the evidence due to the collision of existing interests need to be considered.

3. Existence of a grounded suspicion of committing a serious criminal offense. - “In order to apply the special investigative opportunity it is required to conduct an investigation into a criminal offense for which a punishment of five or more years of imprisonment or for a special criminal offense, is foreseen, such as: endangering the constitutional order, taking hostages or other offenses set out in Article 90, paragraph 1, subparagraph 1.2. of the Code of Criminal Procedure (Hajdari, 2016, p. 398).” Hence, in order to authorize to obtain an important evidence for which there is a real danger that it cannot be obtained at the main trial, which refers to the taking of the testimony of the witness or the opinion and the ascertainment of the expert through the implementation of the special investigative opportunity, in each case should be related to the criminal offenses for which the legal possibility has been granted, and in no other case for other criminal offenses. This would mean that the special investigative opportunity, despite the fulfillment of the two pre-conditions, cannot be authorized for offenses punishable by less than five years of imprisonment and which are not included in sub-paragraph 1.2. of Article 90 of the Code of Criminal Procedure.

Finally, it is worth mentioning the fact that for the authorization of special investigative opportunity these three conditions should be cumulatively met. Establishing the fact of their fulfillment is an issue that falls under the responsibility of the pre-trial judge.

#### **4. Procedure for Application of Special Investigative Opportunity**

For the implementation of a special investigative opportunity, a special procedure should be applied as a rule. This procedure involves actions for the exercise of which the legislator has given concrete authorizations to the relevant criminal procedural entities (Krapac, 2005, p. 145; Grubać, 2006, p. 374).

Consequently, the procedure for the implementation of the special investigative opportunity is put into motion through a specific request that the state prosecutor, victim, victim’s advocate, defendant or his defense counsel addresses it to the pre-trial judge of the concrete basic court. Such requests should clearly specify the witness or expert from whom is required to take the statement (testimony or opinion and ascertainment), which constitutes significant evidence of a criminal case, and it is required to be in full accordance with the criteria on the basis of which the special investigative opportunity may be applied (Hjadari, 2013, p. 34). The lawmaker has authorized the pre-trial judge authority to approve the application for the

implementation of this procedural action when it finds that the legal conditions have been met. On the contrary, he has the authority to refuse such a request. In this case, to the applicant for the application of special investigative opportunity, the legislator has accorded the opportunity to submit a separate appeal. Such an appeal shall be submitted to the Panel for Special Investigative Opportunity, part of which is the pre-trial judge and two judges appointed by him. The Panel is also likely to reject the appeal filed as ungrounded or to approve it, and to decide on the application of special investigative opportunity. In each case the panel's decision is final.

When the pre-trial judge approves the request for the implementation of the special investigative opportunity, he or she schedules a hearing session for taking the testimony of the witness or the opinion and ascertainment of the expert. The hearing must be attended by two other members of the panel, and the participation of the state prosecutor, the defendant and his counsel is mandatory, whereas the victim and victim advocate shall be notified of such a session, but that it can be held even without their presence. The pre-trial judge is obliged to ensure, in the application of the special investigative opportunity, the application of all rules governing the taking of evidence at the main trial as well as the efficiency and completeness of the proceedings and to protect the rights of the defendant. A statement taken from a witness or expert in front of the Panel for the Implementation of a Special Investigative Opportunity must be recorded on audio or video tape. This recording is attached to the case files. Likewise, such a statement can also be obtained through the technology that enables video-conferencing, with the understanding that the witness is not in Kosovo, taking into account the witness protection measures.

### **5. Authority for the Implementation of Special Investigative Opportunity**

In line with the legal solutions of the Criminal Procedure Code of the Republic of Kosovo, the issue of authority for the implementation of special investigative opportunity refers to the level of pre-trial judge and the panel for the implementation of special investigative opportunity. In fact, under paragraph 2 of Article 149 of this Code, it is a pre-trial judge he who has the authority whether to approve or not the request submitted by the authorized bodies for the implementation of the special investigative opportunity. While, the panel's authority initially comes into play to decide on the appeal which may be exercised in cases where the pre-trial judge rejects the request for the implementation of this investigative action, then it is precisely in front of this authority the special investigative opportunity is

implemented, respectively in front of whom the statement of the witness or the opinion and the ascertainment of the expert is taken.

It is worth mentioning the fact that the role of the pre-trial judge with legal solutions addressing the implementation of the special investigative opportunity has been raised at the level of the panel leader for the implementation of such an investigative action (Sahiti & Murati, 2013, pp. 315–316). He has the responsibility to determine the date of the hearing session for taking the statement of the witness or the opinion and ascertainment of the expert, respectively the statement of the victim to make the invitations to the respective subjects of the procedure and to secure their presence, to ensure the efficiency and completeness of the proceedings as well as to protect the rights of the defendant to ensure compliance with all legal provisions governing the issue of obtaining evidence at the main trial to ensure the registration of the given statement audio or video, and that this recording be attached to case files and when there are real possibilities to enable the recording of the statement received through the technology that enables video conferencing, whether the witness is not in Kosovo and is ready to give testimony, but always respecting the witness protection measures established by law.

Finally, it should be emphasized that the authority of the panel for the implementation of special investigative opportunity extends beyond the scope of the special investigative opportunity. Thus, the Kosovo legislator by paragraph 4 of Article 149 of the Criminal Procedure Code has determined that in case the indictment is filed in criminal proceedings at least one of the two judges who served on the panel for the application of special investigative opportunity should be designated as Presiding Judge or a member of the Trial Panel.<sup>1</sup>

## **6. Guarantee Actions of the Procedural Efficiency and Rights of the Defendant in the Case of Application of the Special Investigative Opportunity**

One of the key obligations associated with the implementation of a special investigative opportunity is the one that refers to guaranteeing the efficiency of the procedure and guaranteeing the rights of the defendant. This duty, which results to be two-dimensional, was granted by the law to the pre - trial judge. His undertaking

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<sup>1</sup> In these positions, because of the position it has during the investigation phase, including the one under the special investigative opportunity, the pre-trial judge cannot have it.

to comply with such legal obligations is authorized to undertake all actions that the Kosovo lawmaker has provided him with through the specific provisions contained in the Code of Criminal Procedure. What are some of these responsibilities, seeing this in these two dimensions of aspects, will be discussed in the following by addressing this topic.

Consequently, in order to ensure the efficiency of the procedure, the pre-trial judge, among other things, must undertake the following actions: to examine and decide as soon as possible on the submitted request for the application of the special investigative opportunity, in case of approval of such a request, immediately establish the panel for the implementation of this investigative action, set the date of holding the hearing, send the summons and secure the presence of all the subjects they need or may attend the hearing, the date the hearing is held, before its commencement, “must notify the attendees of the rights and duties assigned to them by the applicable law, to ensure full compliance with all legal provisions with which regulates the taking of the statement at the main trial (Hajdari, 2014, pp. 240 – 241)” and to record audio or video tapes of the received statement and place it in the case file, respectively to ensure the taking of the evidence through the technology that enables video conferencing, when the special investigative opportunity applies remotely “when a witness or expert is located in a third country” (Islami, Hoxha, Panda, 2003, p. 425).

However, in order to ensure the rights of the defendant, the pre-trial judge is required to notify him of his rights pertaining to the application of the special investigative opportunity, which in fact are the rights which he or she enjoys in case of examination at the main trial. “These rights relate to the possibility for him to question the witness or specific expert and to ask for necessary clarifications, including the right to rebuttal, etc. (Hajdari, 2013, p. 105).” In fact, in exercising these rights the defendant must be enabled to consult with his defense counsel (Damaška, 1962, p. 51), whenever he needs it during the duration of the investigation (Sahiti, 1999, p. 222), including the application of special investigative opportunity. Of course, one of the guaranteed defendants’ rights that may come to effect in the execution of a hearing for the application of special investigative opportunity is also the use of his language, and to request a translation of the given statement into the language that he understands, but also the statements of the state prosecutor and other participants, insofar as they relate to the testimony given by the witness or expert.

It is worth mentioning that the fact that the undertaking of these and other actions guaranteeing the efficiency and completeness of the criminal proceedings and the



rights of the defendant, besides serving the consistent application of the principle of legality, undoubtedly serves the purpose of fair decision-making regarding the proceeding and conclusion of the concrete criminal case.

## **7. The Importance of Applying Special Investigative Opportunity**

The application of special investigative opportunity, as well as any other criminal procedural action, where more or less, manifests its influence in the further course of the criminal proceedings. This is in full compliance with the very nature of this criminal procedural action. Consequently, the effects of this procedural action are issues that essentially relate to the nature of the case, its complexity, the entirety of the evidence available, the manner of administering the statement of the witness, the expert or the victim etc. Looking at this aspect, the application of special investigative opportunity reflects the criminal-political (Latifi, Elezi & Hysi, 2012, pp. 257 – 258, Milutinović, 1984, pp. 321 – 322), criminological (Halili, 2005, p. 244) and criminal procedure importance. Therefore, looking at the principal terms, it can be freely said that the importance of the implementation of this criminal procedure action, among other things, consists of:

1. Obtaining the important (relevant) evidence. - The application of special investigative opportunity is related to the need to ensure obtaining significant evidence. In the case of application of the criminal procedural action is required to obtain the testimony of the witness or opinion and findings of the appropriate expert that constitutes relevant evidence, such whereby considered to clarify one or more of the relevant facts in relation to the case that is in the investigative process. “Such evidence is taken in order for the same to be used at the main trial to enforce the court’s conviction in the decision-making that it will render to the specific case (Pavišić, Vučković, Velić & Radolović, 1998, pp. 187 – 188).”
2. Legitimate decision-making in the proceedings of the case. - Although the taking of witness testimony or opinion and finding of an expert through the application of the special investigative opportunity essentially refers to the assertion of the statement from these subjects to be consumed as evidence during the main trial, it may in fact also have an evident impact on the decision-making that the state prosecutor will adjust in the process of concluding the investigation. I consider this as a real possibility for the fact that the state prosecutor being an indispensable participant in the hearing when taking the statement of a witness or expert, regardless of the role that he may exercise at such a hearing, comes in a situation where he also

learn about concrete facts that he can use in his orientation about the direction that will give in order to conclude the investigation.

3. Objective decision-making upon the case. - As noted above, the application of a special investigative opportunity, concretized through the testimony of a witness or the opinion and finding of an expert is done in order to obtain a statement from a procedural subject, which constitutes an important evidence for the main trial. "This legal definition, as well as theoretical and practical, makes it freely observable that the application of special investigative opportunity is envisaged with the ultimate purpose of serving the objective decision-making of the criminal case. In the present case, the emphasis is on a court decision that gives concrete solutions to the relevant court case (Markis, 2006, p. 70)." It is evaluated as such because the evidence obtained through the implementation of this criminal procedural action, in addition to answering any relevant controversial facts, may ultimately prove to be evidence of the court's conviction of whether or not such a fact stands for which other evidence is pointing out to. Viewed in this regard, the value of such a statement in a court decision can manifest its strength in a broader sense.

4. Efficiency and entirety of the procedure. This aspect of the importance of applying a special investigative opportunity is in fact the backbone of addressing this criminal procedural action. This would mean that the Kosovo lawmaker, through obtaining the testimony of a witness, expert or victim through the application of a special investigative opportunity, aims to shorten the probationary process in the main trial, which, on the contrary, is not expected to happen, but also to ensure the entirety of the proceedings in the sense of proving the relevant facts of the criminal case that is the subject of the trial.

5. Protection of human rights in criminal proceedings. - The Kosovar lawmaker, when referring to the special investigative opportunity, emphasizes the obligation of the pre-trial judge to ensure respect for the rights of the defendant. This solution is logical as the defendant is the one on whom the charges of committing the offense are burdened. Nevertheless, I consider that in the conscience of the pre-trial judge, during the implementation of the special investigative opportunity to always have to remain committed to ensure the respect of the rights of other procedural participants, especially the victims of crime. Viewed in this regard, I consider being the duty of the trial judge that during the implementation of this particular criminal procedural action to inform the defendant and the victim about their rights that belong to them and enable their practical implementation (eg, giving the opportunity to ask questions, request clarifications, rebuttals, have interpreters, etc.). That this

constitutes a legal obligation underlined by the last sentence of paragraph 6 of Article 149 of the Code of Criminal Procedure where it is expressly stated that “The obtaining evidence by a pre-trial judge shall be conducted in accordance with the provisions governing the taking of evidence at the main trial (CCP, Article 149, paragraph 1.6).”

## **8. Conclusion**

The modest results achieved during the preparation of this article have led me to the following conclusions:

Special investigative opportunity represents criminal procedural action of particular importance. This procedural action, which can be exercised during the investigation phase, is in the function of achieving a more efficient proceeding of the criminal case and guaranteeing a fair and just trial. As such, it consists in obtaining witness testimony or opinion and expert's finding when there is a significant risk that such evidence may not be available during the main trial.

In order to be able to apply the special investigative opportunity, the following criteria are required: a) the existence of this opportunity as a sole possibility for obtaining significant evidence; b) the existence of significant risk that important evidence cannot be obtained during the main trial; and c) the existence of a grounded suspicion for the commission of a serious criminal offense, namely a criminal offense for which a punishment of five or more years of imprisonment or special criminal offense, such as: endangering the constitutional order, taking hostages or other offense set forth in Article 90, paragraph 1, subparagraph 1.2. of the Code of Criminal Procedure. For the authorization of a special investigative possibility, these three conditions should be cumulatively met.

The procedure for the implementation of a special investigative opportunity is put into motion through a specific request that the state prosecutor, victim, victim advocate, defendant or his defense counsel addresses to the pre-trial judge of the respective basic court. Such a request should clearly specify the witness or expert from whom it is required to make a statement (evidence or opinion and ascertainment), which constitutes significant evidence for the criminal case, and it is required to be in full compliance with the criteria on the basis of which the special investigative opportunity may be applied. The lawmaker has authorized the pre-trial judge authority to approve the application for the implementation of this procedural action when it finds that the legal conditions have been met.

The issue of authority for the implementation of special investigative opportunity refers to the level of pre-trial judge and the panel for the implementation of special investigative opportunity. In fact, according to paragraph 2 of Article 149 of this Code, the pre-trial judge is the one who has been granted the authority to decide whether or not to approve the request submitted by the authorized entities for the implementation of the special investigative opportunity. Meanwhile, panel authority initially comes into consideration to decide on the appeal that may be exercised in cases when the pre-trial judge rejects the request for the implementation of this procedural action, and then it is precisely this authority before which the special investigative opportunity applies, namely before which the statement of the witness is taken or the opinion and the ascertainment of the expert, respectively the statement of the victim.

One of the key obligations associated with the implementation of a special investigative opportunity is the one that refers to guaranteeing the efficiency of the procedure and guaranteeing the rights of the defendant. This task, which results to be two-dimensional, has been granted to the pre-trial judge by law. In attempting to fulfill such statutory obligations, he is authorized to undertake all actions that the Kosovo legislator has provided through the specific provisions contained in the Code of Criminal Procedure.

Viewed in principle, it can be said freely that the importance of applying a particular investigative opportunity, inter alia, is: a) providing important - relevant evidence, b) legitimate decision-making in the proceedings of the case, c) objective decision-making of the case; d) the efficiency and completeness of the procedure; and e) the protection of human rights in criminal proceedings .

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