Entrapment in Case of Corruption Offenses – Breach of the Right to a Fair Trial

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Abstract:

The adoption of the Romanian New Code of Criminal Procedure has entailed endless debates in the doctrine, generated by the imperfect structure of the new procedural law.

Many provisions of the new law, that have the value of fundamental principles, gradually lose their consistency, as they are infirmed by rules contrary precisely to those that consecrated them. On the one hand, it is worthwhile that the New Code provided for a much clearer principle of loyalty in obtaining evidence, expressly setting out the interdiction to induce a person to commit an offense with the purpose to obtain evidence. On the other hand, though, the same Code settled less conventional methods of criminal investigation, such as the possibility of state agents (undercover investigators) to participate to authorized activities that would otherwise be illegal, precisely in order to collect evidence, which includes, among others, the commission of an act similar to the actus reus of a corruption offense.

The present study aims at a sober analysis of the new procedural dispositions, from the perspective of the perpetual conflict between the state's public interest to fight against corruption, and the private interest of the person against whom the criminal investigation is conducted.

Keywords: *the principle of loyalty in obtaining evidence; entrapment; authorized participation to otherwise illegal activities; breach of the right to a fair trial; the new Code of Criminal Procedure.*

In law, there is a rather gloomy, yet true saying that any legislative work is fatally imperfect.

The statement is illustrative for the manner in which the Romanian New Code of Criminal Procedure[1] was conceived, as a structure of weak balance, due to the frequent lack of correlation between its procedural norms, as well as to the massive import of institutions from foreign judicial systems, that has generated serious mismatches with internal judicial practice.

In the Explanatory Note preceding the draft law on the Romanian New Code of Criminal Procedure[2] (hereinafter 'the New Code'), the authors referred to some innovating principles of criminal procedure, which "alongside with the classical ones" are destined to "bind judicial organs to create a criminal justice that is independent and impartial, able to inspire the public opinion with respect and confidence in the acts of justice".

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[1] The New Code has been in force starting the 1st of February 2014.

[2] The Explanatory Note preceding the draft of Act no. 135/2010 referring to the New Code of Criminal Procedure is available at www.just.ro.

Among said principles, in the field of evidence, one principle stands out, namely the loyalty in obtaining evidence, set out in article 101 of the New Code. The reason behind this principle was, by the words of the same authors, that in the new law, the rules of obtaining evidence were elaborated so as to determine "an increase in the professionalism of judicial authorities when it comes to obtaining evidence and, as well, to guarantee the effective respective of the right of parties to a fair trial".

In this context, as compared to former procedural dispositions [ex-art. 68 para. (2) in the Code of Criminal Procedure of 1968], the present provisions have much better settled *the interdiction to induce a person to commit offenses* in order to obtain evidence in a criminal trial [the current art. 101 para. (3) in the Code of Criminal Procedure]. Art. 101 para. (3) underlines that judicial authorities or other persons acting for the former shall refrain from inducing a person to commit or continue to commit a criminal act, in order to obtain evidence.

With a view to correctly understanding what entrapment means, in the absence of national case-law on this topic, it is necessary to turn first of all to the common law systems where this issue was largely debated in the practice of courts, especially in that of the U.S. Supreme Court. Secondly, the case-law of the European Court of Human Rights (hereinafter the 'ECHR') will be taken into account, since the European Court dealt firmly with the limits of using state officers (undercover agents) to incite persons to commit offences so as to obtain evidence for the accusation.

In the common law system, one of the most famous corruption cases, where the issue of entrapment was examined, is *United States v. Kelly* (1983).[3] At this stage, it is good to mention that the U.S. courts based their interpretations on entrapment on two procedural approaches or tests, the first being the subjective test, the second- the objective test.

The subjective test (used in the majority of cases, as the official standard of the U.S. Supreme Court) requires the meeting of two main conditions in determining whether entrapment took place: first, it looks at the defendant's state of mind; entrapment can be claimed if the defendant had no predisposition to commit the crime. Second, it implies a chain of causation between the offence and the conduct of the undercover agent.

The objective test looks instead at the government's conduct; entrapment occurs when the actions of government officers would usually have caused a normally law-abiding person to commit a crime. Although at first it emerged only in the dissenting opinions of American judges, the objective test soon became widespread, focusing rather on the conduct of state agents, than on the predisposition of the defendant to commit crimes. The courts would rule entrapment whenever the state agents exceeded a reasonable limit in performing their activities.[4]

In the pre-cited case of *Kelly*, upon motivating senator Kelly's conviction to 13 months of imprisonment for corruption, the federal court applied the subjective test in order to determine whether entrapment occurred, stating that the accused was merely offered an opportunity to commit the offence, without being provided with the means to

[3] Available at la http://www.leagle.com/decision/19841439748F2d691_11303. In this case, the FBI used as a special method of investigation – the video surveillance during the operation that later became known as "the Abscam operation (Arab scam). The operation initially targeted trafficking in stolen property and corruption of prestigious businessmen, but was later converted to a public corruption investigation.

[4] V. Pușcașu, *Agenți sub acoperire. Provocarea ilegală a infracțiunii. Considerații (I)*, Caiete de Drept Penal nr. 2/2010, C.H. Beck Publishers, Bucharest, pp. 45-46.

do it, and the conduct of state agents aimed only at testing unwary criminals and not at testing unwary innocents[5].

The U.S. Supreme Court failed to apply the "reasonable suspicion" standard (A/N consecrated by the ECHR case-law) on the person against whom the undercover activity was carried out, an aspect which was harshly criticized by the doctrine[6].

For this reason, the suggestion was that a requirement expressly stipulated by the dispositions on entrapment should be that the persons targeted by judicial authorities may be persons engaged in criminal activities or reasonably suspected of being engaged in such activities; thus, the test of the predisposition to commit crimes would be replaced with the reasonable suspicion test.

The conditions of entrapment were also analyzed in the ECHR case-law on many occasions, including in cases against the Romanian state, such as *Alic v. Romania* (judgment of November 9th, 2010), *Bulfinsky v. Romania* (judgment of June 1st, 2010), and, more recently, *Sandu v. the Republic of Moldova* (judgment of February 11th, 2014)[7].

In the pre-cited judgment of *Sandu*[8], the European Court held by a majority of votes that the applicant's right to a fair trial was infringed, due to the fact that there was entrapment in the sense of inducing a person to accept bribe by a private individual, who was not an authorized undercover agent: "As no police officer was directly involved, the present case does not concern undercover police work, but rather the acts of a private individual, acting under police supervision" (paragraph 32 of the judgment). In order to verify whether the applicant was incited to commit the crime, the Court had to determine whether he could be reasonably considered as having been engaged in the relevant criminal activity prior to the police involvement. In other words, the Court was supposed to check "whether the applicant would have committed the crime in the absence of the alleged incitement" (paragraph 33 of the judgment). The Court also noted that there were no objective suspicions that the applicant had been involved in any criminal activity prior to the relevant events. Nor was there any evidence that he was predisposed to commit offences. According to the Court, "the Government's argument that the police could not initiate a criminal investigation against the applicant, before they obtained evidence that he had actually committed a crime", only confirmed the conclusion of the lack of evidence (paragraph 37).

The Court considered that the domestic courts failed to properly assess whether C.'s actions (A/N. the inciting agent), acting on behalf of the police, had the effect of inciting the applicant to commit the offence of which he was subsequently convicted or whether there had been any clues that the offence would have been committed without such intervention.

Although in the case the domestic courts had reason to suspect that there was an entrapment, they did not analyze the relevant factual and legal elements which would

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[5] See the similar case *Sherman v. United States* 356 U.S. 369 (1958), available at https://supreme.justia.com/cases/federal/us/356/369/. The U.S. Supreme Court (Justice Warren) used a dictum that would become famous in all cases of entrapment, namely: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal".

[6] P. Chevigny, *A Rejoinder*, Nation, Feb. 23, 1980, pp. 201-202.

[7] A. Crişu, *Câteva consideraţii privind regulile generale în materia probelor, mijloacelor de probă şi procedeelor probatorii din noul Cod de procedură penală (I),* Analele Universităţii din Bucureşti, Supliment 2014, C.H. Beck Publishers, Bucharest, 2014, p. 298.

[8] Available in Romanian at http://hudoc.echr.coe.int/sites/.

have helped them to distinguish entrapment from a legitimate form of investigative activity In view of the above, and of the use of evidence obtained through C.'s active involvement under police supervision to convict the applicant, his trial was deprived of the fairness required by Article 6 of the Convention. Therefore, the Court concluded that there existed a violation of Article 6 paragraph (1) of the Convention (paragraph 38).

Returning to the Romanian Code of Criminal Procedure, it provides in art. 101 para. (3) the possible incitement of a person to commit an offence by judicial agents or other persons acting for the former, during the development of activities allowed by law in the course of a criminal investigation. More precisely, the legislator of the New Code refers to the dispositions of art. 138 para. (11), completed by the dispositions of art. 150 that allow authorized participation of criminal investigation officers, namely undercover investigators or collaborators, to certain otherwise illegal activities.

Somehow in contradiction with the noble purpose of the above-mentioned principle, that of ensuring effectiveness of the right to a fair trial by the interdiction of entrapment, the New Code has for the first time provided for the *authorized participation to certain activities* (as a special method of criminal investigation) which implies, according to the new provisions [art. 138, para. (11)], the commission of an *actus reus* similar to that of a corruption offense, the conclusion of transactions, operations or any other agreements with respect to a good or to a person who is suspected of having been missing, is the victim of human trafficking or has been kidnapped, the performance of drug dealing, as well as other services carried out with the authorization of competent judicial authorities, *in order to obtain evidence.*

Pursuant to art. 150 para. (1) of the New Code, authorized participation to certain activities can be ordered by the prosecutor who conducts or supervises the criminal investigation on a maximum period of 60 days, on condition that the following requirements are met:

a) there is reasonable suspicion as to the preparation or commission of an offense of drug dealing, weapons trafficking, human trafficking, acts of terrorism, money laundering, counterfeiting of currency or other valuable goods, blackmail, kidnapping, tax evasion, corruption and similar offenses, offenses against the EU's financial interests, or other offenses punishable under the law by imprisonment of 7 years or more, whether there is reasonable suspicion that a person is engaged in criminal activities that are related with the above-mentioned acts;

b) the measure is necessary and proportional with the limitation of fundamental rights and freedoms, given the particulars of the case, the importance of information or evidence to be obtained or the gravity of the offense;

c) evidence could not be obtained by using other means or their obtainment would imply serious difficulties that would obstruct the investigation or endanger the safety of persons or valuable goods.

From a procedural standpoint, the text addresses strictly the fulfillment of requirements needed for the authorization of certain activities, otherwise illegal, whereas the establishment of entrapment is a material law issue that will be determined on the merits of each case.

Due to the apparently antagonistic content of the two texts quoted above, namely art. 101 para. (3), and, respectively, art. 138 para. (11) in the New Code, which, on the one hand prohibit entrapment used to obtain evidence, on the other hand, allow infiltration of undercover investigators up to the point where they can commit activities that are similar to the *actus reus* of a corruption offense, an essential distinction must be

made, based on which there will be established the limits within which the judicial police can conduct a legal investigation, the exceeding of said limits qualifying as entrapment, expressly prohibited by procedural law.

Thus, one needs to distinguish between the passive attitude of investigating agents, who, while participating to the activities enumerated by art. 150, must restrict themselves to the role of careful observers, involved in an ongoing activity, with an aim to collect evidence, and their pro-active attitude of inciting a person to commit an offense, with the same aim to obtain evidence. Entrapment must imply a conclusive intervention, in the absence of which the offense would not have been committed.

Correlatively, one needs to make a distinction between *undercover investigators*[9] who, pursuant to art. 148 para. (4) of the New Code, represent law enforcement officers who belong to the judicial police and adopt a passive attitude of collecting data and information that they later submit to the prosecutor, and, respectively, *inciting agents*, who have been defined only by the doctrine. Thus, an inciting agent represents an infiltrated agent of the state or any other person acting under the coordination or supervision of a competent judicial authority, and who, in the course of his activity, goes beyond the limits imposed by the law, thus acting not only in order to reveal the criminal acts of a person, but to incite that person to commit offenses so as to obtain evidence for the accusation.[10]

The different attitudes adopted by investigating agents are essential and have been highlighted by the ECHR on the occasion of the well-known case of *Teixeira de Castro v. Portugal* (June 9th, 1998), being reaffirmed in all similar cases that followed. Although the subject-matter of the case was the investigation of drug dealing, the legal reasoning of the Court has remained valid for all cases of serious offenses (including corruption offenses) in which entrapment is debated.

Thus, in paragraph 36 of the above-mentioned judgment, the Court clearly stated that "The public interest cannot justify the use of evidence obtained as a result of police incitement". By this dictum, the ECHR actually introduces the rule of using undercover agents only in exceptional cases, in well-determined conditions, so as to ensure the safeguard of the defendant's procedural rights. The Court in Strasbourg explicitly mentioned that a justifiable goal, such as such as the suppression of serious crime, cannot account for abusive measures. In paragraph 39 of the cited decision, the Court deemed that "the two police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial. Consequently, there has been a violation of article 6 para. (1)".

Therefore, it is completely unfair to use state mechanisms in order to trigger the criminal liability of a person whose act was generated precisely by the state agents.

In those situations where entrapment was proved, there emerged a serious problem which has not yet been solved by the New Code, namely that of the sanction applicable to evidence obtained as a result of entrapment.

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[9] The collaborator of the undercover investigator is part of the larger category of undercover agents. For further details, see V. Pușcașu, *Agenți sub acoperire. Provocarea ilegală a infracțiunii. Considerații (I)*, Caiete de Drept Penal nr. 2/2010, C.H. Beck Publishers, Bucharest, p. 32.

[10] O. Predescu, M. Udroiu, *Jurisprudența Curții Europene a Drepturilor Omului cu privire la agenții provocatori,* Dreptul no. 1/2009, p. 243.

Certainly, the first solution at hand would be the exclusion of evidence, by correlating the provisions of art. 101 para. (3) – interdiction of entrapment – with those of art. 102 para. (2) in the New Code, according to which illegally obtained evidence (A/N including by the incitement of a person to commit crimes) shall not be used in a criminal trial.

The doctrine[11] has made innovative proposals in this sense, sustaining that solutions such as the exclusion of evidence as unlawful or the approach to entrapment as a mitigating circumstance are not enough to counterbalance the unfairness of judging and convicting a person under these conditions. The preferable solution would be not to prosecute an incited person or, in any case, not to convict him.

In all circumstances, if the evidence consists in the testimony of an undercover investigator, and where the court is not convinced beyond a reasonable doubt that entrapment took place, the judge should be cautious in ruling conviction, a logic sustained by art. 103 para. (3) in the New Code, according to which conviction cannot be based, in a determinant proportion, on the testimony of the investigator, the collaborator or the protected witnesses.

Difficulties of practical applicability are to be found also in art. 150 (pre-cited) of the New Code, related to the authorized participation to certain activities, therefore it needs to be further examined.

Thus, the second condition required [art. 150 para. (1) b)], in order for the prosecutor to authorize participation of undercover investigators to certain activities, otherwise illegal, is that the measure be proportional with the limitation of fundamental rights and freedoms, given the particulars of the case, the importance of *information* or evidence to be obtained or the gravity of the offense. From the manner in which this condition has been settled, it results that the prosecutor could authorize participation to certain activities (a measure of subsidiary, exceptional character) even when simple information must be obtained, not necessarily evidence. If judicial authorities need to resort to such unconventional proceedings that must be used by exception, given the obvious inequality of arms between the state agents (undercover investigator/ collaborator) and a person reasonably suspected of preparing or committing a serious offense, the pretext of this special method of criminal investigation is not justified. In this context, the principle of proportionality between such measure and the restriction of fundamental rights becomes diluted and devoid of content. Since there is no proportionality between the fundamental rights of a person and the authorization of undercover investigators whose limits are pushed up to the commission of *an actus reus* of a corruption offense, with the sole aim to collect information. In my opinion, information can be easily obtained by using other evidentiary proceedings, and not by resorting to such tricky operation to which the New Code itself confers a peculiar, subsidiary character, of temporary validity.

Similarly, interpretation dilemmas still arise in art. 150 para. (7), according to which judicial authorities can use or place at the disposal of the person who performs the authorized activities, *any writings or objects* destined to support such activities.

In case of a corruption offense, the sensitive issue is to know whether the undercover agent can use *money* in order to collect evidence about the preparation or commission of a corruption act. In other words, can money be assimilated, legally

[11] V. Pușcașu, *Agenți sub acoperire. Provocarea ilegală a infracțiunii. Considerații (I)*, Caiete de Drept Penal nr. 2/2010, C.H. Beck Publishers, Bucharest, p. 77.

speaking, to writings or objects necessary for the agent to carry out the activities for which he was authorized?

I believe that the significance of the term should remain autonomous, namely that of "monetary inscriptions" as defined by Act no. 384/2004 on the denomination of national currency[12], therefore money can be qualified neither as writings, nor as objects. The doctrine[13] came up with a definition of 'writing' as being the unilateral or conventional document that issues from one or more natural persons or legal entities of public (including judicial authorities) or private law or that belongs to such persons/entities.

In fact, a distinction between these notions can be drawn by that, although there is no strict definition either in the New Penal Code[14] or in the New Code of Criminal Procedure, their legal meaning can be inferred. Thus, pursuant to art. 197 para. (1) of the New Code, objects that contain or are impregnated by a trace of the act committed, as well as any other objects that may lead to the discovery of truth, represent material evidence; and according to art. 198 para. (1) of the code, writings can be used as evidence if their content may express facts or circumstances that can contribute to the discovery of truth.

In my opinion, if the undercover investigator places at the disposal of the person suspected of preparing or committing a corruption offense – a sum of money – the investigator exceeds his limits of a passive observer, infiltrated in the operation with an aim to collect evidence. Therefore, this shall count as entrapment, expressly forbidden by art. 101 para. (3) of the New Code.

The special method of investigation that consists in authorizing participation to certain activities to undercover agents is an absolute novelty for Romanian procedural legislation in criminal matters. Perhaps more than any other methods of supervision and investigation (also set out in our former Code of Criminal Procedure) this one raises many questions, because the limits of the authorization within which undercover investigators or collaborators may operate seem very generous, since the New Code grants state agents the occasion to commit an act close to the *actus reus* of a corruption offense; this implies a very broad range of ways in which the act can be committed, that will theoretically ensure the success of the operation conducted by the undercover agent, and will leave little chance of defense to the suspected person.

From this perspective, due to the risk of confusion generated by the New Code, in judicial practice the task of the courts will be precisely to determine as accurately as possible the limits up to which the authorized participation to certain activities may extend, and the point wherefrom entrapment occurs.

Analyzing the above-cited case-law solutions reached by international courts (the U.S. Supreme Court and the ECHR) in cases of corruption where entrapment took place, there emerge essential aspects that lead to the same conclusion and that need to be taken as models.

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[12] Published in the Official Journal no. 664 of July 23rd 2004.

[13] M. Udroiu, *Procedură penală. Partea generală. Noul Cod de procedură penală. Sinteze şi grile*, C.H. Beck Publishers, Bucharest, 2014, p. 277.

[14] The New Penal Code defines only 'official writings' as being any type of writings that issue from a legal entity referred to by article 176 (A/N public authorities, public institutions or other legal entities that administer or exploit goods that are property of the public domain) or from the person referred to by article 175 para. (2) (A/N the public officer) or that belong to such persons/entities.

There shall exist entrapment, so the legal limits within which a state agent could act in order to collect evidence were surpassed, if *four essential conditions* are fulfilled, namely: 1. there is no reasonable suspicion that a person prepares the commission of a corruption offense or already participates to it; 2. the activity of police agents or their collaborators has not been authorized under the law; 3. the state agents did not play the role of passive observers, but instead offered the suspect more than a mere opportunity to commit an offense; 4. there can be established a chain of causation between the conduct of the state agent and the offense committed.

While the increase in corruption offenses undoubtedly requires that appropriate measures be taken, the right to a fair trial of the accused that could guarantee his fundamental rights holds such a prominent place, that it cannot be sacrificed for the sake of expedience.

In such conditions, judicial authorities should award utmost value to that principle consecrated by art. 101 para. (3) in the New Code – interdiction of incitement to commit offenses in order to obtain evidence – since it is the unique procedural guarantee which ensures the respect of fundamental rights, by protecting defendants from trial abuses against them.

In the contrary case, the much-praised right of the accused to a fair trial shall unmistakably be breached.