

Brief Considerations on the Delimitation between the Crime of Influence Trafficking and the Crime of Deception

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Abstract:

The need for delimitation between the crime of influence trafficking and that of deception has resulted from the possibility of confusion between the two acts, confusion generated, mainly to mislead the victim. Both in the case of influence trafficking-realised by speculating the alleged influence of the public functionary and in the case of deception-by presenting false facts as true, the victim is presented with a distorted reality, and the purpose of the offender is to obtain for himself or for another, a unjustly patrimonial benefit. However, a careful analysis of both regulations clearly reveals the elements that make the exact delimitation between the two offenses. This analysis should consider the social value protected in each of the two offenses and also pursue the other constituents (result, form of guilt, consumption etc.).

Keywords: influence trafficking, deception, error inducing, benefits, public servant, work duties.

1. Introductory notions regarding the regulation in influence trafficking offenses and deception as in the 2009 Penal Code

Sanctioning corruption has always been a concern for legislators, corruption being a phenomenon that alters the members of a community's confidence in the integrity of public servants and the effective exercise of institutions where they carry out their work duties. After 1990, many changes were made to corruption offenses, both increasing the penalties provided by law in their desire of an effective eradication of corruption, and supplementing them with new incriminations of similar offenses or in connection with them provided by Law no. 78/2000.

Although by the material element, influence trafficking is not related to the activity of civil servants, committing this offense discredits the authority of the institution in which the public servant operates, creating a state of suspicion, mistrust about its fairness and honesty¹. Indirectly, the offense violates the effective exercise of service, creating suspicion that civil servants are incorruptible, sufficiently serious danger that could determine the legislator to incriminate these facts as corruption offenses.

The offense of influence trafficking is stipulated and incriminated by the provisions of art. 291, Penal Code, and consists of demanding, receiving or accepting the promise of money or other benefits, directly or indirectly, for himself or for another committed by a person who has influence or who suggest possessing influence over a public servant and promises that it will determine him to accomplish, not to accomplish, to expedite or

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¹ Dobrinoiu, V., Neagu, N., *Drept penal. Partea specială. Teorie și practică judiciară. Conform noului Cod penal*, Universul Juridic Publishing House, București, 2012, p. 463.

delay the performance of an act falling within the duties of his office or to perform an act contrary to these duties.

Regulation of influence trafficking offense in Title V "Crimes of corruption and service" Chapter I "corruption offenses" means, in terms of the object of criminal protection, the legislator wanted to protect the effective exercise of the service, conditioned by the confidence and prestige which the civil servants in the line of duty benefit of. The offense poses an actual or alleged sale of influence that the perpetrator claims he has on a public servant.

On the other hand, the offense of deception covered by Article 244 Penal Code consists of misleading a person by presenting false facts as true, or true facts as false, for the purpose of obtaining for himself or for another, unjustly patrimonial benefits though causing prejudice.

Placing the offense of deception in Title II "Crimes against property" in section III "Crimes against property by disregarding trust" means that the legislator intended to protect the patrimony which can be efficiently achieved if the patrimonial relations are governed by trust and good faith of those who are involved in these patrimonial relations.

The need for delimitation between the influence trafficking crime and that of deception resulted from the possibility of confusion between the two offenses, the confusion generated, mainly by misleading the victim. Both in the case of influence trafficking-realised by speculating the alleged influence of the public functionary and in the case of deception-by presenting false facts as true, the victim is presented with a distorted reality. On the other hand, another factor that may make it difficult to distinguish between the two offenses is the purpose of the perpetrator represented by obtaining for himself or for another, an unjust patrimony – for deception, or demanding, receiving or accepting the promise of money or other benefits, directly or indirectly, for himself or for another – for influence trafficking. Both offenses may involve obtaining an unjustified patrimony by the offender.

However, a careful analysis of the two regulations clearly shows the elements that make exact delimitation between the two offenses. This analysis should consider the social value protected in each of the two offenses and also pursue the other constituents (result, form of guilt, consumption etc.).

2. Elements of delimitation between the offenses of influence trafficking and deception

The premise situation of the offense of influence trafficking consists in the pre-existence of a service owned and operated within an agency, institution that has the power to examine and perform acts of the kind that this buyer of influence is interested in.² Within this service, the public servant must fulfill the duties of public officials, real or fake influence that the perpetrator prevails. Unlike, the offense of deception does not require the existence of a premise situation and is not circumscribe around the exercise by the public servants of their duties.

If the offense of influence trafficking we can not speak of the existence of a material object, because the action of the perpetrator is not directed against a good. Money or

² Diaconescu, H., *Infrațiunile de corupție și cele asimilate sau în legătură cu acestea*, All Beck Publishing House, București, 2004, p. 110.

benefits regarding which the offender claims, receives or accepts a promise of, does not represent the material object, but the benefit sought by the seller in exchange for the benefit of his influence.

Instead, the offense of deception has as material object a movable or immovable good or a document that has economic value and that is obtained by the offender as a result of his action of misleading the victim.³

An essential requirement of the material element of the offense of influence trafficking consists in the prevalence of real or alleged influence on the civil servant, influence which is determinant to convince the victim that the civil servant will meet or not an act falling within the duties of his work. This is, in fact, the essence of the offense of influence trafficking consisting in trafficking actual or perceived influence that the offender has or suggests of having over the appropriate official.

The offense of influence trafficking exists both when the perpetrator has a real influence on an official, and when the perpetrator creates the delusion that he has influence over an official, although in reality there is no such influence. Therefore, the act of claiming and receiving a sum of money, committed by a person who suggests that he has influence over an official, to induce him to do or not to do an act falling within his work duties, even if the perpetrator does not actually have such an influence, he meets the constitutive elements of the offense of influence trafficking and not those of the offense of deception.⁴

In the case where the influence of which the active subject prevails is real, the existence of the offense of deception is excluded, since the essence of this act is to mislead the victim by altering the truth. We can not speak of altering the truth while the perpetrator uses real influence on the public servants, therefore, the classification as influence trafficking is possible without getting in the domain of deception.

The prevalence of a presumed influence on the civil servant, what the perpetrator does is to present a false statement as true, misleading the victim. Misleading the victim is required to convince it that the offender will determine a certain behavior of the public servants.

Prevalence of a non-existent influence, over an official, although it constitutes of presenting false facts as true – action that makes the material element of the offense of deception – through the legislator's will, constitutes a separate offense, if the other conditions provided by the text of the law are met, influence trafficking exists, unlike deception, regardless whether or not it has caused material damage or not. This element brings it very close to influence trafficking offenses and makes it difficult to set their delimitation.

Also in the offense of deception, the victim is being induced in error by the offender who presents false facts as true or true facts as false. The perpetrator may use different means to achieve misleading the victim, and inducing a false representation of reality may be in the prevalence of the offender to influence a public servant. In such a situation a possible delimitation must consider the social value endangered by the actions of the perpetrator.

³ Dongoroz, V., Fodor, I., Kahane, S., Iliescu, N., Oancea, I., Bulai, C., Stănoiu, R., Roșca, V., *Explicații teoretice ale Codului penal român*, vol. III, partea specială, Academiei Publishing House, București, 1971, p. 319.

⁴ High Court of Cassation and Justice, secția penală, dec. nr. 3420/25 june 2007, available at www.scj.ro.

In the case of the offense of influence trafficking, the effective exercise of the service, the confidence and prestige that civil servants have in their duty attributes is being protected. Therefore, it is necessary that the act fulfilled or omitted by the official on which the perpetrator claims to have influence, comes into his work duties; otherwise, the act is incriminated as a crime of deception.

Therefore, for the existence of the offense of influence trafficking it is necessary that civil servants have the functional attributes to perform the solicited act. The public servant's competency can only be seen and accepted in the exercise of his duties, so that, in theory,⁵ it was concluded that the requirement for the existence of the crime of influence trafficking are two attributes which are determined, and interdependent.

Thus, receiving money, promising to influence police officers to obtain not sending the offendant to trial meets the requirement that the act must relate to the duties of the civil service on which the perpetrator claims to have influence, as the police, although not having attributions to hear the case, may act in conducting research so as to determine a specific solution adopted by the prosecutor.⁶

Another essential element that helps clearly delimitate between the two offenses regards the good faith of the one giving money to the offender from action of misrepresentation. If the offense of deception it is necessary to remark the good faith of the person on whom the misleading is exercised, which is why the crime of deception is incriminated as an economic offense which rejects confidence. In the offense of influence trafficking, the influence buyer has bad-faith pursuing his own interest in an illegal way.⁷

In judicial practice the question of delimitation of the offense of deception from the offense of influence trafficking which also involves obtaining a material benefit from the action of the offender pretending to have influence over an official, which is similar to the action of deceit characterizing deception. A criterion that has emerged in order to distinguish the two offenses is the good or bad faith of the person who gives the money or goods. Thus, in the offense of deception, the person who gives money or goods is in good faith, while in the offense of influence trafficking the person who gives money or goods is in bad faith and seeks that the author determines an official to do or not to do an act falling within the duties of his work.⁸

On the other hand, for the offense of influence trafficking to affect the confidence and prestige that civil servants benefit of in their duty it is necessary that when the perpetrator prevailing influence on a public official, he must indicate, identify or give sufficient evidence for identifying the civil servant who promises to intervene.

Therefore, the offense of the culprit who said that through the intervention of friends she will determine a certain teacher to promote more students, from which she received numerous sums of money, does not constitute the offense of influence trafficking but that of deception, because the culprit did not state that she would influence the teacher herself, but claimed that she will achieve this through other

⁵ Diaconescu, H., *Infrațiunile de corupție și cele asimilate sau în legătură cu acestea*, All Beck Publishing House, București, 2004, p. 116.

⁶ High Court of Cassation and Justice, completul de 9 judecători, dec. nr. 15/2001, *Revista de Drept Penal* nr. 3/2002, p. 117.

⁷ Mădulărescu, E., *Traficul de influență. Studiu de doctrină și jurisprudență*, Hamangiu Publishing House, București, 2006, p. 96.

⁸ High Court of Cassation and Justice, secția penală, dec. nr. 5438/ 7 december 2001, available at www.scj.ro.

people, whom she did not individualize.⁹ It is not necessary that the offender should indicate the names and the official's specific tasks; is sufficient to indicate the position and authority. Therefore, the constitutive elements of the crime of influence trafficking are met when the culprit promises that by her relations she will obtain leases of public housing apartments, deceiving that is a clerk in the Autonomous Urbis and showing them a list of several apartments and houses state property and using first names of officials who worked in the town hall.¹⁰

Another aspect that determines the existence of the crime of influence trafficking is the moment the action that constitutes the material is to be committed. Thus, influence trafficking presumes that any actions which may constitute the material element to be committed before the official located under the influence performed the act to the duties of his office requested, or at latest during the performance or while performing the act. If the action of receiving or claiming money, other benefits or accepting their promises were made after the performance of the official act it not an offense of influence trafficking, but that of deception¹¹.

Another essential element that distinguishes influence trafficking offenses and deception offenses is the result that occurs for each of them. Deception, is a crime against property and is characterized by obtaining interests by the perpetrator; Moreover, the production of damage is stipulated as a constituent in the criminalizing text of the offense. In contrast, influence trafficking is conditioned by obtaining money or profits for the perpetrator. Obviously, if the act is accomplished by receiving money or profits, it takes place when handing their possession and reaching the perpetrator. But in the other two ways of realizing the material element of the offense (that of it claiming or accepting the promise of money or other benefits), the offense does not require the perpetrator to receive money or consideration. It is consumed, considering the social value protected, when demanding or accepting the promise.

Therefore, if in the case of deception, the immediate consequence is that of damage, in the case of influence trafficking the immediate consequence is the state of danger for the effective exercise of an institution in which's service the civil servant operates. If influence trafficking the state of danger occurs regardless of whether or not the damage is caused, if the perpetrator had received the money or not.

As regarding the form of guilt characterized by the subjective position of the perpetrator for the two offenses there are differences in this aspect as well . Although both crimes are committed with direct intent, characterized by the purpose of the perpetrator, this purpose is the essential difference between the two offenses. The offense of deception is dominated by the purpose of obtaining for himself or for another of an unfair patrimony, whereas for influence trafficking the purpose is to determine the public official to violate official duties by performing, failure in performing, speeding or delaying of an act falling within the duties of his office or performing any act contrary to these duties. Even the purpose of the perpetrator in the two cases analyzed gives clear indications about the social value protected by the legislator by incriminating these

⁹ Court of Appeal București, dec. nr. 36/A/1996, *Revista de Drept Penal* nr. 4/1996, p. 149.

¹⁰ Court of Appeal Timișoara, secția penală, dec. 180/12 february 1998, in Mădulărescu, E., *Traficul de influență. Studiu de doctrină și jurisprudență*, Hamangiu Publishing House, București, 2006, p. 98.

¹¹ Diaconescu, H., *Infrațiunile de corupție și cele asimilate sau în legătură cu acestea*, All Beck Publishing House, București, 2004, p. 118.

facts, value that the perpetrator is aware he will harm and sets out to obtain either one of the purposes mentioned.

Therefore, influence trafficking committed by the prevalence of false influences on the civil servant of the offender contains in its structure the elements of the offense of deception, this is why it can not be retained in competition with this crime. It has been retained that the influence trafficking situation can constitute a way of offence for deception which becomes a crime of purpose. When the perpetrator that claims to intervene with the official demands a greater amount of money than required for payment of influence, saying that the difference is required to provide a reward for the official, but in reality, the alleged gift giving is a delusion to obtain an unfair profit. In this case the delusion from which the offense took place becomes autonomous and is itself an offense of deception and will be accepted in competition with influence trafficking that served as a means for achieving fraudulent deception.¹²

3. Conclusions

So even if the perpetrator relies on an alleged influence on civil servant, there are difficulties in delimiting the offense of influence trafficking offense of that of deception, though the doctrine and practice have shown many elements that facilitate correct classification of the facts from a legal point. Correct identification of the affected social value by the action of deception is the main element from which the other criteria that help delimitation derive. Establishing the civil servant's jurisdiction and the authority that operates as a criterion for differentiation occurs and it becomes necessary only as far as it concludes that the action of deceit throw doubt on the fairness and honesty of the civil servant. Even the goal that the perpetrator pursues in each of the two cases shows that he is aware of the social value that will be affected by the action. A correct and complete analysis and understanding of all the constituent elements of each offense in part outlines the criteria that helps the correct delimitation.

¹² V. Dobrinou, *Traficarea funcției și a influenței în dreptul penal*, Științifică & Enciclopedică Publishing House, București, 1983, p. 229.