RAIS RESEARCH ASSOCIATION for INTERDISCIPLINARY STUDIES
August 2021

DOI: 10.5281/zenodo.5507035

The Legal Benefits Provided by the Romanian Criminal Legislation in Favor of the Collaborators

Nadia Zlate

National Anticorruption Directorate, Romania
zlate_nadia@yahoo.com

ABSTRACT: In the Romanian criminal process, a collaborator can be any person who does not act as an operative agent within the judicial police and who helps the criminal investigation authorities to obtain data and information in criminal cases for the identification and criminal prosecution of perpetrators, as well as for taking all legal procedural measures in the criminal case (for example, for identifying goods subject to special confiscation). Thus, the collaborators may have the quality of parties or main procedural subjects (defendant, civil party, civilly responsible party, injured person, and suspect) or of other procedural subjects according to the provisions of art. 34 of the Romanian Code of Criminal Procedure, such as the witness. The use of the collaborators, in addition to other special methods of surveillance and investigation provided by the Code of Criminal Procedure, is often essential in the investigation of drug trafficking offenses or other illicit activities carried out by organized criminal groups, given the secrecy of their activity and the difficulty of infiltrating foreigners into the criminal environment. The legal benefits that can be given to collaborators to persuade them to cooperate with criminal investigation authorities in order to gather the data and information necessary to find out the truth in criminal cases and prevent the commission of crimes are the application of a case of impunity or reduction of punishment and financial rewards. However, special attention must be paid to employees' motivations to assess their credibility, both by the criminal investigation authorities and by the court.

KEYWORDS: special investigation methods, use of undercover investigators and collaborators, motivation of collaborators, legal benefits

Introduction

Traditionally, criminal investigations were reactive when they looked at crimes of corruption, organized crime, economic crime and other serious crimes, which presuppose that they were already consumed, and investigative bodies administered evidence that was subsequently corroborated to establish the situation fact.

It was noted in the Deployment of Special Investigative Means (written as part of the Project on the Recovery of Crime Proceeds in Serbia, available at www.coe.int - Council of Europe, 1-2) that such investigations have proved effective when, for example, there are reliable witnesses capable of providing strong evidence or when accused persons have been willing to cooperate with the authorities and report and provide evidence against participants in such offenses or when there is a detailed written record of financial transactions.

Given the increasingly sophisticated nature of serious organized crime, corruption and economic crime, there is a reduced likelihood that there will be a foreign witness to the criminal activity to assist in its commission or that participants in crime will assist the prosecuting authorities to find out the truth. It is also most likely that the documentary evidence will not be sufficient to prove the criminal activity.

For these reasons, as the capacity of the judiciary to gather and process information increases, proactive investigations are conducted in increasingly diverse jurisdictions to combat serious crime.

Proactive investigations enable investigating bodies to detect and stop suspects while committing crimes.

Collaborators. Definition

The Romanian legislator did not provide a generic definition of special investigative means, but listed and defined each one in Title IV, Chapter IV of the Code of Criminal Procedure, entitled "Special methods of surveillance or investigation", in article 138.

A generic definition of special investigative means was provided in the paper "Deployment of Special Investigative Means" (Idem, 12), which showed that special investigative techniques are those techniques used to gather evidence and/or information in such a way as not to alert people who are being investigated.

According to art. 138 of the Romanian Code of Criminal Procedure, special means of surveillance or investigation are the following: interception of communications or any type of remote communication, access to a computer system, video, audio or photography surveillance, location or tracking by technical means, obtaining data on a person's financial transactions, withholding, handing over or searching postal items, use of undercover investigators and collaborators, authorized participation in certain activities, supervised delivery and obtaining traffic and location data processed by providers of public electronic communications networks or providers of electronic communications services intended for the public.

It was pointed out in the doctrine that the emergence of the legal framework governing the activity of undercover investigators was unanimously determined by the needs of the fight against atypical forms of crime, which operate in an organized and "hermetic" way, so that the documentation of the criminal activity by normal methods becomes particularly difficult, if not impossible (Trif 2016, 88).

The use of undercover investigators and collaborators, as a special mean of investigation, is regulated in articles 148 and 149 of the Romanian Code of Criminal Procedure, which provide the legal conditions for using this technique, its duration, and the limits within which undercover investigators and collaborators can carry out activities.

The measure is ordered by the prosecutor, *ex officio* or at the request of the investigation body, by ordinance, which must include an indication of the activities that the undercover investigator is authorized to carry out, the period for which the measure was authorized, and the identity assigned to the undercover investigator.

The prosecutor will authorize the use of undercover investigators and collaborators if all the conditions provided by law are met, including those related to the proportionality and subsidiarity of the measure so that there is no unjustified interference in the privacy of the subject. Also, the prosecutor's decision will be subject to the judge's analysis when assessing the legality of the administration of evidence in the criminal investigation phase, which also involves a filter from the latter.

Undercover investigators are operative workers within the judicial police (for example within the Special Operations Directorate or the General Anticorruption Directorate), while in case of investigation of crimes against national security and terrorist offenses there can also be used as undercover investigators operative workers within the bodies that carry out, according to the law, intelligence activities in order to ensure national security. Thus, in the case of the investigation of crimes against national security and terrorist offenses (art. 394-410 of the Romanian Code of Criminal Procedure and art. 32-38 of Law 535/2004 on preventing and combating terrorism), there can be used as undercover investigators also operative agents within the state bodies that carry out according to the law, intelligence activities for national security (officers of the Romanian Intelligence Service, the Foreign Intelligence Service, the Intelligence and Internal Protection Directorate of the Ministry of Internal Affairs, the General Intelligence Directorate within the Ministry of National Defense, Protection and Guard Service)."

Unlike the undercover investigator, the "collaborator" does not have a definition in the Romanian procedural legislation, this being done in a doctrinal and jurisprudential way. The collaborator was defined in the doctrine as "that person who is not part of the judicial bodies and who acts under their coordination to obtain data and information" (Șuian 2016, 15-16).

The Constitutional Court mentioned in Decision no. 323/2017 (regarding the rejection of the exception of unconstitutionality of the provisions of art. 148 par. 2 c of the Romanian Code of Criminal Procedure, published in the Official Journal no. 640 of August 4, 2017, Part I) the categories of persons who may have the quality of collaborators in the criminal process showing that "a collaborator is not a member of the judicial police and can be any person in the circle of suspects or who has interacted with the criminal area and can provide evidence in proving crimes. Thus, since in many cases the infiltration of an undercover or real-identity investigator is impossible due to the concrete conditions regarding the secrecy of the criminal structure or the relationships within the groups, judicial bodies may recruit a member of the criminal network or a person who may infiltrate into it thanks to the trust it enjoys among its members" (par. 22).

Some authors have shown that collaborators are usually "criminals who have been identified by the criminal investigation authorities and are determined to offer their support through various methods. The possibility that a person who has not committed illegal acts incriminated by the criminal law to become a collaborator is not excluded, but the reality teaches us that a person who is not interested in any way (financially, benefition from a case of impunity or a cause of reduction of the sentence) will not endanger his life to help the criminal investigation bodies, and can be, in the best case, an anonymous informant or a whistleblower" (Șuian 2016, 17).

The same author pointed out that "the advantage of using a collaborator is that he is often infiltrated in the targeted criminal group and does not have to prove his loyalty to the group to obtain data and information. As such, the collaborator will not be assigned another identity in most cases, but will assume his or her own identity and continue his or her activities within the group for the period for which he or she continues to be used as a collaborator. However, the provisions of art. 148 par. 10 Romanian Code of Criminal Procedure do not rule out the possibility that a collaborator may be assigned a new identity (Șuian, 2016, 17-18).

Collaborators' motivation

It was emphasized in the doctrine that "the issue of motivating collaborators and even informants is particularly important for finding out the truth, both from the perspective of criminal prosecution authorities and the lawyer of the suspect or defendant, due to the possibility that evidence, data or information obtained by using of collaborators and informants to be vitiated by the very factors that determine them to help the criminal investigation bodies".

The legislator has not created a procedural mechanism to effectively verify the motivation behind the acceptance of a collaborator or informant to help prosecutors, currently, the only way to find out this motivation is through hearing the collaborator.

The same author expressed reservations about the effectiveness of this solution in relation to the court's ability to censor any question that could lead to disclosure of the person's identity, so that the accused's lawyer will not be able to invoke the collaborator's motivation to give false statements. The reasons behind the help provided by collaborators and informants are important to know by the court, in order to avoid solutions that are far from the truth and are determined by the false statements of a collaborator interested in obtaining a benefit as a result of helping the prosecution authorities.

From the prosecutor's perspective, it was shown that it is necessary for the collaborator's motivation to weigh heavily in assessing their credibility, and he must know at all times what determined that person to help the investigators, in order to keep the person on the same side and to avoid, in particular, obtaining information on the investigation by the persons against whom the investigative measure was ordered (situation of a collaborator - double agent). It should not be forgotten that a collaborator and an informant have access to information known only by the investigators, and these can be essential for the proper conduct of a case. An example that can be imagined is the authorization of several collaborators, one of which is a so-called double agent, infiltrated within the investigation bodies to discover the identity of other collaborators or informants.

Regarding the role of the lawyer in hearing a collaborator during the criminal trial, it was considered that the development of an effective defense strategy requires finding out the reasons that determined the collaborator to cooperate with the investigators so the defense is able to verify the loyalty of obtaining evidence derived from the investigative measure. When the entire criminal investigation was carried out with the help of a collaborator (complaint made by him, providing several statements, environmental recording of conversations in his home, wearing the operative technique at meetings with other people etc.), even though he has that quality of a participant at the process as a whistleblower, the defense strategy will be decisively affected by the way in which the motivation of this collaborator will be found out.

Consequently, it was proposed that during the criminal investigation, before the issuance of the order authorizing the use of collaborators, a collaboration agreement be concluded between the prosecutor and the future collaborator in which to highlight the benefits offered to the collaborator in exchange for his services for the good serving of justice.

With regard to the latter proposal, we note that it is part of the recommendations issued by European Union specialists to which we referred earlier, but special attention must be paid to the fact that, by revealing the motivation of the collaborator, his identity could be indirectly found by the accused person.

Therefore, we are of the opinion that the court will have to assess on a case-by-case basis whether it will allow the participants in the process to be aware of the collaborator's motivation, and will take into account all aspects related to the fairness of the procedure, the reliability of the evidence obtained as a result of the use of collaborators, including in terms of their motivation.

In the case of Cornelis v. The Netherlands (Judgment of 25 May 2004, available at www.echr.coe.int - European Court of Human Rights), the European Court of Human Rights has stated that the use of witness statements in exchange for immunity or other benefits is an important tool in the fight against serious crime. However, the way in which this instrument may compromise the fairness of the proceedings against the defendant raise delicate issues, given that, by their very nature, such statements are subject to manipulation and can only be made in order to obtain the benefits offered in return or for personal revenge. The sometimes-ambiguous nature of such statements and the risk that a person may be accused and tried on the basis of unverified statements that are not necessarily disinterested should therefore not be underestimated. However, the use of such statements is not in itself sufficient to make the procedure unfair, depending on the particularities of each case.

The United Nations Convention against Transnational Organized Crime (Adopted by the General Assembly of the United Nations (UN) on November 15, 2000, ratified by Romania by Law 565/2002 and published in the Official Journal. no. 813 of 08.11.2002, Part I) provides in art. 26 that each State Party shall take appropriate measures to encourage persons participating in or having participated in organized criminal groups. Each State Party shall rule for the possibility, in accordance with the fundamental principles of its domestic law, of granting immunity from prosecution to a person who cooperates substantially in the investigation or prosecution of an offense under the Convention.

Collaborators' motivations to help judicial authorities in conducting investigations are varied, including money, fear, revenge, threats from perpetrators, special treatment during detention, ego, and threats of deportation, remorse or duty, civic sense, immunity from prosecution or reduction of punishment.

The legal benefits that can be granted to collaborators

a) **Benefiting from of a cause of impunity or a cause of reduction of the punishment.**
The causes of impunity or reduction of the punishment can be established only by law, by the Romanian Criminal Code or by the special criminal legislation.

The Romanian Criminal Code regulates in the case of corruption offenses two situations in which the person who committed an act of corruption will not be punished if he makes a complaint about his own act of corruption, before the criminal investigation authority to have been notified regarding its commission, respectively in the case of the offenses of bribery and purchase of influence, the causes of impunity being established by the provisions of art. 290 par. 3 of the Criminal Code and art. 292 par. 2 of the Criminal Code.

In the case of the crime of initiating or setting up an organized criminal group incriminated in art. 367 of the Romanian Criminal Code, the law provides a cause of impunity and a cause of reduction of punishment. The cause of impunity from art. 367 par. 4 of the Romanian Code of Criminal Procedure presupposes that a member of the group denounces its existence to the criminal investigation authorities before it has been discovered and before the commission of the crimes falling within the scope of the group has begun.

Another cause of reduction of the punishment is provided by art. 411 of the Romanian Criminal Code in case of committing a crime against national security, whereby the person who committed such an act will benefit from the reduction of the special limits of punishment by half if, during the criminal investigation, will facilitate finding the truth and prosecuting the perpetrator or of the participants in that act.

Also, in the case of corruption offenses, a cause of reduction of the punishment limits may be incident, included in the provisions of art. 19 of the Government Emergency Ordinance no. 43/2002 regarding the National Anticorruption Directorate (published in the Official Journal. no. 244 of April 11, 2002, Part I). This cause of reduction of the punishment limits will be incident if a person has committed an act that falls within the competence of the National Anticorruption Directorate, and during the criminal investigation, denounces and facilitates the identification and prosecution of other persons who committed such crimes.

It was noted in the doctrine that from the way in which the cause of reduction of the punishment is regulated, it is observed that the prosecutor will have a wide appreciation regarding the determinant character of facilitating the criminal prosecution of other persons. If this cause of reduction of the punishment is applied, the benefit will consist in reducing by half the limits of the punishment provided by law for the committed deed and which falls within the competence of the National Anticorruption Directorate.

Also Law no. 508/2004 regarding the establishment, organization and functioning within the Public Ministry of the Directorate for the Investigation of Organized Crime and Terrorism Crimes (published in the Official Journal no. 1089 of November 23, 2004, Part I) provides in art. 18 a cause of reduction of the punishment, in the sense that if the person who committed a crime assigned in the competence of the Directorate for the Investigation of Organized Crime and Terrorism for investigation, and during the criminal investigation denounces and facilitates the identification and prosecution of other participants when committing the crime, he benefits from the reduction by half of the limits of the punishment provided by law.

Unlike the cause of reduction of the punishment regulated by art. 19 of Government Emergency Ordinance no. 43/2002, the applicability is restricted only to the crime of which the person is accused, as a result of the use of the term participants.

In the case of crimes incriminated by Law no. 143/2000 on preventing and combating illicit drug trafficking and consumption, republished (published in the Official Journal no. 163 of March 6, 2014, Part I), will be applicable a cause of impunity or a cause of reduction of punishment.

According to art. 14 of the law mentioned above, in case of committing the offenses provided by art. 2-9 of Law no. 143/2000, the offender will not be held criminally liable if, before the criminal investigation is initiated, he denounces his participation in the commission of crimes, thus contributing to the identification and prosecution of the perpetrator or the other participants. The cause of impunity involves the denunciation of one's own deed and does not imply that the perpetrator contributes in addition to the criminal prosecution of the other persons who participated in the commission of the crime.

The condition for applying this cause of impunity is the absence of a criminal complaint regarding the criminal offence of the future collaborator. In the situation where there is already a notification regarding his deed, it will be possible to apply a cause of reduction of the punishment which, according to art. 15 of Law 143/2000 will entail a reduction by half of the punishment limits provided by law for drug-related offenses, provided that the person in question denounces and facilitates the prosecution of other persons who have committed crimes (including other drug-related offenses.)

Furthermore, the Law no. 682/2002 on the protection of witnesses, republished (published in the Official Journal no. 288 of April 18, 2014, Part I), has provided in art. 19 a legal cause of reduction of the punishment applicable to witnesses within the meaning of the provisions of the special law (According to art. 2 of Law 682/2002, the witness is the person who is in one of the following situations: 1. has the quality of a witness, according to the Code of Criminal Procedure, and through his statements provides information and data of a decisive nature in finding out the truth about serious crimes or which contribute to preventing the occurrence or recovery of special damages that could be caused by committing such crimes; 2. without having a procedural quality in question, through information and data of a decisive nature contributes to finding out the truth in cases of serious crimes or to preventing the occurrence of special damages that could be caused by committing such crimes or recovering them; this category also includes the person who has the quality of defendant in another case; 3. is in the course of the execution of a custodial sentence and, through the decisive information and data he provides, contributes to finding out the truth in cases of serious crimes or to preventing the occurrence or recovery of special damages that could be caused by committing such crimes).

Thus, according to art. 2 of the law, it will not be necessary for the person to have the quality of witness during the criminal process, but only that of witness within the meaning of the special law, the legal provisions applicable to collaborators and informants. It is necessary for the witness to report and facilitate the prosecution of other persons who have committed serious crimes. Regarding the phase of the criminal trial in which the witness can act for the benefit of the cause of reduction of the sentence, the text of the law shows that the denunciation and facilitation of prosecution may occur before the prosecution, during the criminal investigation or during the trial. The procedural phases refer to the investigation and judgment of the deeds of the witness and not of the persons against whom a complaint is made. The legal cause of reduction of the punishment has a broader character than those shown above, being applicable to persons who have committed a serious crime. Although the law stipulates the condition that the crime committed must be a serious one, the Constitutional Court ruled in Decision no. 67 of 25 February 2015 (regarding the admission of the exception of unconstitutionality of the provisions of art. 19 of Law no. 682/2002 on the protection of

witnesses, published in the Official Journal. no. 185 of March 18, 2015, Part I) that this provision is unconstitutional, being discriminatory, as it would not allow the application of the cause of reduction of the sentence if the witness did not commit a serious crime within the meaning of Law 682/2002 (according to art. 2 of Law 682/2002, the serious crime is the crime that falls into one of the following categories: genocide and crimes against humanity and war crimes, crimes against national security, terrorism, murder, crimes related to drug trafficking, human trafficking, money laundering, counterfeiting of coins or other valuables, offenses related to non-compliance with the regime of weapons, ammunition, explosives, nuclear or other radioactive materials, corruption offenses, as well as any other offense for which the law provides for special imprisonment maximum at least ten years).

b) **Money as motivation of collaborators**

In the Romanian criminal legislation, there is only one case in which funds are allocated from the state budget to be used to pay collaborators and informants, but it is limited to cases investigated by the Directorate for the Investigation of Organized Crime and Terrorism.

According to art. 1 par. 6 of Law no. 508/2004 on the establishment, organization and functioning within the Public Ministry of the Directorate for the Investigation of Organized Crime and Terrorism (published in the Official Journal. no. 1089 of November 23, 2004, Part I): "An annual deposit of 1,000,000 lei is established for actions regarding the organization and finding of flagrant crimes or occasioned by the use of undercover investigators, informants or their collaborators, at the disposal of the chief prosecutor of the Directorate for Investigation of Organized Crime and Terrorism, and its mode of management and use will be established by order of the Chief Prosecutor of this Directorate.

Expenditure on the use of undercover investigators by informants and collaborators means, in particular, expenditure incurred by the Public Ministry to give them credibility with members of the groups they infiltrate or to provide logistical support in conducting research measures (e.g. renting a building to serve as a home for the employee). A concrete example is the participation in certain activities through which an employee purchases a quantity of drugs from a person, using money received from the liaison officer in order to carry out this transaction." In addition to these uses, the text of the law allows the payment from these funds of collaborators and informants as remuneration for services provided in support of criminal prosecution bodies, given that few people would be willing to put themselves in danger without being assured that they will receive a substantial remuneration.

It was emphasized in the doctrine that the real problem is not the payment of sums of money but the conditioning of receiving sums of money by obtaining results, such as confiscation of quantities of drugs, criminal prosecution of certain persons, discovery of new crimes, etc. Given that the criminal investigation bodies would recognize the collaborators' motivation as a patrimonial one and would specify it, this circumstance would contribute to establishing the probative value of his statement. For example, if the sums of money offered were significant and conditioned by obtaining results, the honesty of collaborator's statements is questioned because the collaborator has a patrimonial interest in sanctioning a defendant, especially if the sums of money are not paid until the case is resolved. Informants and collaborators, if they are paid according to the results they obtain and if these results are quantified in the number of people arrested or sent to trial, can become the subordinates of the criminal investigation bodies very easily. They become "habitual collaborators" and will be financially interested in helping to solve as many cases as possible (Șuian 2016, 18).

Conclusions

The institution of using of the collaborator, as a special mean of criminal investigation, has shown that it is particularly useful in proving certain crimes, such as corruption, in which the

subjects involved have a high degree of intelligence and commit crimes in such way to avoid the risk of them being discovered.

Also, the use of the collaborator, in addition to other special means of surveillance and investigation provided by the Romanian Code of Criminal Procedure, is often essential in the investigation of drug trafficking offenses or other illicit activities carried out by organized criminal groups, given the clandestine activity and the difficulty of infiltrating foreigners into the criminal environment.

The collaborator may be subject to serious risks when performing undercover operations, which may endanger his life, the physical or mental integrity of himself or other close people, the workplace, etc. Therefore, the process of recruiting private individuals to help investigators in obtaining data and information in criminal investigations can be particularly difficult.

We consider particularly appropriate the legal benefits that can be applied to collaborators in order to persuade them to cooperate with the investigators and thus to gather the data and information necessary to find out the truth in criminal cases and to prevent the commission of criminal offenses. However, special attention must be paid to the motivations of collaborators in order to assess their credibility, both by the criminal investigation authorities and by the court.

We appreciate that it is necessary to regulate the way of recruiting collaborators in the criminal process in order to follow a clearer procedure by the criminal investigation authorities when they decide to approach a private person to cooperate with them.

At the very least, there is a need to develop guidelines in the above-mentioned sense for greater transparency and ethics in the recruitment procedure, guidelines that also provide for the need to prepare documentation on the terms and conditions of collaboration, including on the benefits that can be granted the collaborator. However, this documentation should only be accessible to the courts if the identity of the collaborator is hidden.

De lege ferenda, we consider that it is necessary to remove the legal limitations on cases of impunity and cases of reduction of penalties to acts whose participants have been reported and facilitated their prosecution, as it reduces the chances of serious crimes being discovered and of which potential collaborators are aware and can help the investigators to prove them.

We also appreciate that it is necessary for the Romanian legislator to provide other benefits that can be granted to collaborators for a more effective encouragement to cooperate with criminal prosecution bodies, such as more permissive conditions for suspension under supervision or to postpone the application of punishment.

References

Cornelis v. The Netherlands, Judgment of 25 May 2004, European Court of Human Rights, available at www.echr.coe.int.

Council of Europe. 2013. *Deployment of Special Investigative Means*, Belgrade, March 2013. https://rm.coe.int/deployment-of-special-investigative-means-eng/16807828fa.

Decision no. 323/2017 regarding the rejection of the exception of unconstitutionality of the provisions of art. 148 par. 2 c of the Romanian Code of Criminal Procedure, published in the Official Journal no. 640 of August 4, 2017, Part I.

Decision no. 67 of 25 February 2015 regarding the admission of the exception of unconstitutionality of the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses, published in the Official Journal no. 185 of March 18, 2015, Part I.

Government Emergency Ordinance no. 43/2002 regarding the National Anticorruption Directorate published in the Official Journal. no. 244 of April 11, 2002, Part I.

International law and Domestic law.

Jurisprudence of the European Court of Human Rights.

Jurisprudence of the Romanian Constitutional Court.

Law 535/2004 on preventing and combating terrorism, http://www.onpcsb.ro/pdf/Law%20535-2004.pdf

Law no. 143/2000 on preventing and combating illicit drug trafficking and consumption, republished.

Law no. 508/2004 on the establishment, organization and functioning within the Public Ministry of the Directorate for the Investigation of Organized Crime and Terrorism published in the Official Journal, no. 1089 of November 23, 2004.

Law no. 682/2002 on the protection of witnesses published in Official Journal no. 964 of December 28, 2002, and republished in the Official Journal no. 288 of 18 April 2014.

Petre, Adrian and Trif, Valentin. 2016. *Constatarea infractiunilor de coruptie.* Bucharest: C.H. Beck Publishing House.

Romanian Code of Criminal Procedure.

Romanian Criminal Code.

Șuian, Mihai. 2016. "Unele aspecte privind folosirea investigatorilor sub acoperire și a colaboratorilor" in *Revista penalmente relevant* available at www.revista.penalmente.ro. UN General Assembly, United Nations Convention against Transnational Organized Crime, resolution adopted on 8 January 2001, A/RES/55/25.