

Liability of Investigators and Collaborators for Acts Committed in the Performance of their Duties in Criminal Investigations

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ABSTRACT: The special investigative means of using undercover investigators and collaborators has proven to be particularly useful in proving certain crimes, such as corruption offences, where the subjects involved have a high degree of intelligence and commit the crimes in a rather cautious manner so as to avoid the risk of detection. If the conduct of the undercover investigator's or collaborator's activity involves participation in certain activities within the meaning of Article 150 of the Romanian Code of Criminal Procedure, the prosecutor shall order by the same order by which he orders the use of the undercover investigator or collaborator or by a separate order the participation in these activities. It may happen that the undercover investigator or collaborator, in the course of the activities carried out, is in a situation where he is forced by circumstances to commit an act provided for by criminal law other than those for which he has been authorised by the prosecutor, otherwise there is a risk that the entire operation will be exposed. In these situations, the Romanian Code of Criminal Procedure does not provide for the possibility of committing such offences without the risk of criminal liability of the undercover investigator or collaborator, if there is none of the justifying or non-imputability grounds regulated in the Criminal Code, such as legitimate defence or state of necessity. There is a unanimous opinion in the Romanian literature that undercover investigators and collaborators must be held criminally liable as instigators of crimes committed by the persons under investigation and who were provoked to commit the acts in order to obtain evidence against them. In carrying out their duties, undercover investigators and collaborators may cause certain pecuniary or non-pecuniary damage to persons, whether they are connected to the criminal environment or are third parties. For example, an undercover investigator who is infiltrated into an organised criminal group must behave in a similar way to persons in that group in order to gain credibility with them and commit certain criminal offences, such as car theft. Or he accidentally causes certain damage to third parties at the criminal investigation in the course of his work. In such cases, the obligation to repair the damage caused to the injured party under the rules of tort law arises.

KEYWORDS: undercover investigators and collaborators, criminal liability of undercover investigator and collaborator, entrapment, tort liability of undercover investigator and collaborator

1. Introduction

In Europe, the use of undercover investigators and collaborators is considered a special investigative means, suited to the contemporary need to adapt investigative methods to the reality of crime, which is becoming more and more advanced in terms of complexity and the means used. The institution of using undercover investigators and collaborators has proved to be particularly useful in proving certain offences, such as corruption offences, where the subjects involved have a high degree of intelligence and commit the offences in a rather cautious manner, so as to avoid the risk of detection.

Also, the use of the collaborator, in addition to other special surveillance and special investigation methods, is often essential in the investigation of drug trafficking offences or other illicit activities carried out by organised criminal groups, given the clandestine nature of their activities and the difficulty of infiltration of outsiders into the criminal environment.

The objectives of using an undercover investigator or collaborator are to obtain data and information about criminal activity, to obtain evidence to be used in the criminal process. In practical terms, the undercover investigator or collaborator may carry out activities to establish whether the crime of which a person or an organised criminal group is suspected has been committed, is in progress or in the preparatory stages, identify members of the criminal

group, identify accomplices, identify witnesses, identify places where the proceeds of crime are hidden, identify places where the victims of crime are located, identify suitable times for carrying out searches or arrests, etc.

The European Court of Human Rights, in its extensive case law on the subject, has laid down some general principles for this particular method of investigation so that the right to a fair trial is respected and the authorities' interference in a person's private life is within the limits laid down in Article 8(2). 2 of the European Convention on Human Rights and Fundamental Freedoms, i.e., to be provided for by criminal law, to be necessary in a democratic society and to be proportionate.

1. Types of activities that may be carried out by the undercover investigator or collaborator

The prosecutor's order authorising the use of undercover investigators or collaborators must contain an indication of the activities the undercover investigator or collaborator is authorised to carry out.

If the performance of the undercover investigator's or collaborator's activity involves participation in certain activities within the meaning of Article 150 of the Romanian Code of Criminal Procedure (i.e. acts provided for by criminal law, such as remitting a bribe to a person suspected of committing the offence of bribery, drug trafficking in a case in which an organised criminal group is being investigated for the commission of such offences), the prosecutor must order in the same order ordering the use of the undercover investigator or collaborator or in a separate order the participation in these activities.

Where the use of the undercover investigator or collaborator also involves technical surveillance activities (e.g. audio/video recording in an environmental environment, taking photographs in private premises, placing GPS tracking systems on vehicles, accessing a computer system, copying data from an accessed computer system, etc.), a technical surveillance warrant must be obtained in advance of these activities from the judge of rights and freedoms of the court that would have jurisdiction to hear the case in the first instance or from the court in whose jurisdiction the prosecutor who made the request is based.

The same shall apply if the undercover investigator or collaborator participates in a supervised delivery under Article 151 of the Romanian Code of Criminal Procedure.

In general, there are three types of operations that can be carried out by undercover investigators and collaborators:

- The first category of undercover operations consists of cases that systematically involve intelligence gathering: an undercover agent tries to gather information about a suspect's involvement, for example, in a serious violent crime. For example, an undercover agent tries to find out, by befriending the suspect, whether the suspicion that he has been involved in a crime is well-founded.

- The second category of operations usually focuses on the trading of drugs, weapons or other such illegal goods or services.

The undercover agent buys such goods from a suspect in order to obtain direct evidence that the suspect is indeed involved in these crimes.

For example, law enforcement has information that such goods are offered for sale on the Internet. In order to prove the crime and who offered such goods for sale, an undercover investigator may be used to try to buy the goods in question.

- In the third category of operations, undercover transactions are part of a wider activity, not targeting individual suspects, but criminal groups carrying out criminal activity on a larger scale, such as trafficking in drugs or human beings.

In addition to gathering direct evidence, the purpose of these operations is to gain insight into the composition of the criminal group, their modus operandi and the use of the money resulting from criminal activity.

Undercover investigators may not “play” the role of the buyer, but only carry out infiltration activities into the organised criminal group and become involved in its activity for systematic intelligence gathering.

It has been pointed out in the doctrine that “infiltration constitutes the action of the police officer to maintain, under a false identity, lasting relations with one or more persons in relation to whom there are solid grounds for believing that they are committing offences within a criminal organisation” (Franchimont, Jacobs and Masset 2006, 331).

The judicial bodies may use or make available to the undercover investigator any documents or objects necessary for the conduct of the authorised activity. The activity of the person who provides or uses the documents or objects does not constitute a criminal offence (Article 148(7) of the Romanian Code of Criminal Procedure). Thus, if the undercover investigator or collaborator also carries out technical surveillance activities, the equipment he or she uses must have the exact date and time set to accurately reflect the time placement of the recorded activities.

The different types of operations that undercover investigators or collaborators carry out vary greatly in terms of their duration, intensity and the type of contact between them and the subject. Some undercover operations last only one day and consist of no more than brief business contact with a suspect. However, an undercover operation can last more than a year and may include many meetings between the undercover agent and the suspect/s. Between different types of operations, the nature of the contacts also varies.

Some contacts may be purely business contacts, such as in investigations involving drug or arms trafficking, where the undercover investigator or collaborator may claim to intend to buy the trafficked goods. In cases where an undercover agent befriends a suspect to obtain information about his or her involvement in a serious crime (e.g. a murder), he or she must sometimes establish a fairly intense personal and emotional bond with the suspect.

If the undercover agent tries to infiltrate a group of suspects dealing in illegal goods, his task is most often to obtain a clear picture of the composition of the criminal group and its activity (such as the source of supply of the illegal goods, the way in which they are transported, the means of transport used, the transactions concluded or to be concluded concerning the illegal goods), but first he must obtain a position within the group in which he is perceived as trustworthy.

When the special research method is combined with other methods, such as technical surveillance, the undercover investigator or collaborator can record the activities carried out and also place audio/video recording equipment in the environment (e.g. in homes, offices, etc.), key-log on computers, laptops, GPS tracking devices on various objects (means of transport, parcels, etc.), take photographs, access computer systems, etc.

Undercover investigators and undercover collaborators in cases investigated by the controlled delivery method may be allowed to contact members of the criminal group, coordinate and monitor the work of other officials (customs staff, courier services, etc.), and to carry out surveillance of the activities of the criminal group. There are also controlled delivery operations where undercover agents of one State will be authorised to engage in activities to gather intelligence, procure drugs or transport them to another State, accompany or monitor controlled deliveries, etc.

The course of undercover operations can be highly unpredictable given the lack of predictability in the behaviour of suspects.

It may happen that the undercover investigator or collaborator, in the course of the activities carried out, is in a situation where circumstances force him to commit an act provided for by criminal law other than those for which he has been authorised by the prosecutor, otherwise there is a risk that the entire operation will be exposed.

In these situations, the Romanian Code of Criminal Procedure does not provide for the possibility of committing such offences without the risk of criminal liability of the undercover

investigator or the collaborator, if there are none of the justifying or non-imputability grounds regulated in the Criminal Code, such as legitimate defence or state of necessity.

As a matter of law, the legislator must provide that, in the context of undercover operations, in situations where the undercover investigator or collaborator has had to commit an offence other than that for which he has been authorised by the prosecutor's order, he may not be held criminally liable if the offence was committed in order to avoid disclosing the criminal investigation being carried out or jeopardising his safety, if there is a proportionality ratio between the criminal offence committed and the purpose pursued. In this respect, the undercover investigator or collaborator should take into account the importance of the evidentiary process carried out, the seriousness of the criminal activity under investigation, and the seriousness of the act he or she would have to commit without having the practical possibility of giving prior notice to the prosecuting authorities.

2. Entrapment

The work carried out by undercover investigators and collaborators under the coordination of the prosecutor, as an evidentiary procedure, is subject to the same fundamental principles of the criminal process. Therefore, they must refrain from any acts that may violate the rules of criminal procedure, use tricks or strategies aimed at obtaining evidence in bad faith or have the effect of provoking the commission of a crime. In essence, undercover investigators and collaborators must also respect the principles of legality and loyalty in the administration of evidence. A discussion frequently encountered in practice and reported in the doctrine is that of provocation to commit crimes by state agents, and a distinction is made between “provocation to commit a crime” and “provocation to evidence of the criminal activity”.

Provocation has essentially been defined in the doctrine as “unfair action carried out for the purpose of obtaining evidence, consisting in knowingly inducing a person to commit a crime (the agent provocateur is, in practice, from the point of view of substantive law, in the position of the instigator who induces a person to take a criminal resolution) or to continue committing a crime. (...) The rationale of the prohibition of provocation to commit a crime is that the State, through its agents, cannot exceed its law enforcement powers by instigating a person to commit a crime that he or she would not otherwise have committed, and then triggering the criminal prosecution mechanisms against that person in order to bring him or her to account; limits are thus placed on the exercise of prosecutorial activities as part of a pro-active investigation, in order to protect citizens against provocation from state agents and to protect the integrity of the criminal justice system, which would otherwise be compromised if the courts had to take account of evidence resulting from these manifestly unacceptable practices by state law enforcement officials. At the same time, it ensures the credibility of the criminal justice system and guarantees the principle of establishing the truth” (Udroiu 2020, 438-439).

The work of undercover investigators and collaborators must be carried out in such a way that it does not lead to the provocation of the commission of a crime, where it is unlawful to induce a person to commit or continue to commit a crime in order to obtain evidence. It has been pointed out that the rationale for this prohibition is that the State cannot through its agents, including a collaborator, exceed its law enforcement obligation by instigating a person to commit an offence which he would not otherwise have committed (Şuian 2016, 14).

The view in the Romanian literature that undercover investigators and collaborators must be held criminally liable as instigators of crimes committed by persons under investigation who were provoked into committing the acts in order to obtain evidence against them is also widespread in European doctrine.

We consider that the existence of provocation does not automatically entail the criminal liability of the undercover investigator and the collaborator when they did nothing more than comply with the instructions of the judicial bodies conducting the investigation and carried

out their tasks to the letter, and the activities carried out were not manifestly illegal so that they were aware that they were in the realm of entrapment.

In order for them to be held criminally liable as instigators of the offences under investigation, it is necessary to prove that they were aware that they played an active role in inducing the suspects to commit the criminal acts in that, without their intervention, the persons under investigation would not have committed such acts.

Otherwise, they must have the benefit of the justification of fulfilling an obligation imposed by the competent authority, in the form prescribed by law, unless it is manifestly unlawful as provided for in Article 21(2) of the Romanian Criminal Code.

3. Civil liability of the undercover investigator and collaborator

In the course of their work, undercover investigators and collaborators may cause some financial or non-financial damage to individuals, whether they are connected to the criminal environment or third parties. For example, an undercover investigator who is infiltrated into an organised criminal group must behave in a similar way to persons in that group in order to gain credibility with them and commit certain criminal acts, such as stealing cars. Or he accidentally causes certain damage to third parties of the criminal investigation in the course of his work.

In such cases, the obligation to repair the damage caused to the injured party arises under the rules of tort law. According to Article 349 of the Romanian Civil Code, every person has the obligation to respect the rules of conduct established by law or local custom and not to prejudice in any way the rights and legitimate interests of others.

The person who, acting with discernment, violates the above and causes damage to another person, is under an obligation to make full reparation, that is to say, both for the damage actually suffered - *damnum emergens* - and for the gain not realised - *lucrum cessans*.

It is therefore necessary to prove the cumulative existence of the four conditions for civil liability in tort: the tort, the damage, the causal link and the guilt of the tortfeasor.

Tort has been defined in the doctrine as “the action or inaction of a person contrary to law or morality which results in the infringement or violation of the subjective rights or legitimate interests of another person” (Pop, Popa and Vidu 2020, 355).

Liability for such unlawful acts may lie with the undercover investigator or collaborator for his own act, but it may also lie with other persons, namely those who have a relationship of subordination with the undercover agent. Thus, while the institution in which the undercover investigator operates (as principal for the agent) will be liable in tort for the wrongful acts committed by the undercover investigator, the Public Prosecutor's Office, which in fact acted as principal in relation to the undercover collaborator, may be liable in tort for the damage caused by the latter.

Article 20 of Law 39/2003 on preventing and combating organised crime stipulates that if, in carrying out authorised activities, the undercover police officer causes material damage to natural or legal persons who have no connection with the organised criminal group and the criminal activities carried out by it, compensation shall be paid from the funds specifically allocated for undercover operations.

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