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Some Aspects Specific to the Investigation of Corruption Acts

Nicoleta-Elena Hegheș

"Dimitrie Cantemir" Christian University of Bucharest, Romania, nicoleta.heghes@ucdc.ro

ABSTRACT: Corruption can be considered the oldest form of crime that has accompanied the development of human society so far, and probably a long time from here on. The topicality of the approached topic has its roots in the urgent need to combat this dangerous reality by adopting a fair and stable legislation, without the existence of loopholes to encourage criminal perseverance. In this article we will emphasize the need for legal regulation of the facts and acts of corruption both internally and internationally, as well as the presentation of the methods or tactics that can prevent or, as the case may be, combat these antisocial facts if the function of prevention of the law did not produce the expected effects, such as the search, the hearing of the suspects, the accused and the witnesses, the flagrant or the spot investigation. With its sanction, corruption has also become a legal phenomenon, crossing purely social borders and becoming a source of criminal consequences. Thus, corruption becomes a legal fact, regulated by rules that attract the most serious form of liability in case of their violation.

KEYWORDS: crime scene investigation, corruption, flagrant, hearing, investigation, search

Domestic and international normative framework of corruption

In the context of globalization over the last decade and the tendency to standardize criminal law at European level, at least under the context of incrimination of the same crime, corruption offenses have been the subject of an analysis that was the basis of an European anti-corruption strategy, a strategy that has materialized, on the one hand, through treaties and conventions, and, on the other hand, through the creation of strong anti-corruption institutions (Teodorescu 2016, 13).

The desire to suppress this harmful phenomenon has materialized worldwide since 1958 when the European Committee for Criminal Matters was set up within the Council of Europe, whose main tasks are to supervise and coordinate the Council's activities in the field of preventing and combating corruption.

A structure with significant repercussions in the fight against corruption is represented by the Group of States against Corruption - GRECO, which is responsible for identifying weaknesses in the anti-corruption political systems of the Member States and facilitating the exchange of the most effective practices by providing a platform (Moise and Stancu 2017, 197).

In 1994, the concept of corruption was analyzed by the Multidisciplinary Group on Corruption, set up by the Committee of Ministers of the Council of Europe, which provided the following definition: "corruption includes occult commissions and all other measures involving persons invested with public or private functions, who have breached their obligations arising from their status as a public servant, private employee, independent agent or such relationship, in order to obtain illicit benefits, regardless of what nature, for themselves or others" (Stancu 2015, 724).

Under the aegis of Council of Europe was adopted in Strasbourg on January 27, 1999 the Criminal Law Convention on Corruption, which entered into force on July 1, 2002, ratified by Romania by Law no 27 of January 16, 2002, published in Official Gazette no 65 of January 30, 2002. This convention also includes other relevant provisions in many sectors, such as: the use of special investigative techniques to facilitate the collection of evidence, identification, blocking, seizure and confiscation of property from corruption offenses, mutual legal assistance, extradition, etc. Also, the Member States of the Council of Europe and the European Community adopted in Strasbourg on November 4, 1999 the Civil Convention on Corruption, which defines in art. 2 "corruption", by which "is meant to solicit, offer, give or accept, directly or indirectly, an unlawful commission or other undue advantage or the promise of such undue advantage that affects the

normal exercise of a function or behavior required of the beneficiary of the wrongful commission or of the undue advantage or of the promise of such undue advantage". This act was ratified by our country by Law no 147 of April 1, 2002, published in Official Gazette no 260 of April 18, 2002, with the purpose of implementing its provisions regarding the measures and means necessary to be created in support of the persons injured by antisocial acts in this sphere.

One of the most recent international initiatives was the development of laws in The Southeastern European Legal Development Initiative - S.E.L.D.I. with the aim of monitoring corruption on a regional scale. Besides Romania, many other countries are monitored, such as: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia etc. The main activity of this program is to carry out analyses designed to emphasize the public significance of the problem of corruption and its degree of penetration in the political, economic, social and administrative structures (Stancu and Ciobanu 2018, 260).

At the international level, in 2003 the General Assembly of the United Nations adopted the United Nations Convention against Corruption which addresses issues similar to those dealt with in the main Convention of the Council of Europe.

The Criminal Code of Romania of 1968 (adopted by Law no 15/1968, published in the Official Bulletin of the Socialist Republic of Romania, Part I, no 79-79 bis of June 21, 1968, entered into force, January 1, 1969 and republished in The Official Gazette of Romania, Part I, no 65 of April 16, 1997, currently repealed) regulated in Title VI of the Special Part the offenses that affect certain activities of public interest or other activities regulated by law, the most numerous texts of the Romanian Criminal Code being found in this title, which presents a wide area of criminality, united by the same generic legal object: "the bundle of social relations whose existence is ensured by defending social values such as: the good functioning of state organizations, as well as of the public ones, the legal interests of the people, the execution of justice, the safety of the traffic on the railways ".

Taking into account the evolution of the criminal phenomenon in the sphere of the exercise of public functions, as well as the international acts in this matter to which our state has acceded, the Law no 78/2000 for the prevention, discovery and sanctioning of corruption facts, published in the Official Gazette no 219 of May 18, 2000, with the subsequent modifications and completions, normative act that in art. 2 circumscribe the purpose of this special regulation, as follows: "The persons provided in art. 1 are obliged to fulfill the duties incumbent upon them in the exercise of the functions, duties or assignments entrusted, with strict observance of the laws and norms of professional conduct, and to ensure the protection and realization of the legitimate rights and interests of the citizens, without using the functions, the duties or assignments received, for acquiring for them or for other persons money, goods or other undue benefits". Before this law was amended, it was stipulated in art. 5 a classification of the crimes that represent the object of regulation of the law in question, framing them into four categories: corruption offenses - those provided in art. 254-257 of the Criminal Code, at art. 61 and 82 of the law, as well as the offenses provided for in special laws, as specific modalities of these offenses; crimes assimilated to corruption offenses - those provided in art. 10-13 of the law; offenses in direct connection with corruption offenses - those provided in art. 17 of the law; offenses against the financial interests of the European Communities - those provided in art. 181 - 185 of the law (Glodeanu 2009, 5-9).

After amending these provisions by art. 79 point 1 of Law no 187/2012, which entered into force on February 1, 2014, corruption offenses are provided for in art. 289-292 of the Romanian Criminal Code, including when committed by the persons provided for in art. 308 of the Romanian Criminal Code. In par. (2) it is provided that offenses are assimilated to the corruption offenses the offenses provided in art. 10-13, and in par. (3) it is specified that the provisions of this law are also applicable to offenses against the financial interests of the European Union provided for in art. 181-185, sanctions that ensure the protection of the funds and resources of the European Union.

The Criminal Code adopted by Law no 286/2009, published in Official Gazette no 510 of July 24, 2009, which entered into force, according to the provisions of art. 246 of Law no 187/2012, on February 1, 2014, regulates in Title V of the Special part "Offenses of corruption and

service", this being structured in two chapters: Chapter I – "Offenses of corruption" (articles 289-294) and Chapter II – "Offenses of service" (articles 295-309).

In contrast to the Criminal Code of 1968, which regulated, in Chapter I of Title VI of the Special Part, together, the offenses of service and those of corruption under the name of "offenses of service or in relation to the service", this normative approach being criticized since the publication of the Romanian Criminal Code, considering that "in a perfect classification the chapter should have included only the offenses of service, but the demands of a perfect classification could not be respected, because the close connection they have with the duties of the service required that the offenses related to the service be included in this chapter". In this sense, it was appreciated that the offenses of service "can have no immediate active subjects than officials or other employees", whereas in the case of crimes related to the service, "direct active subjects can be any person".

Specific problems to the investigation of corruption acts

The term of corruption originates from the Latin "Coruptio" which defines the activity of the official who sells his position, deceiving the trust with which the society has invested by assigning the position (Cristiean 2017, 151).

The corruption of the judiciary mainly affects the evolution of the rule of law (justice represents in a liberal democracy a power in the state) and, in the alternative, the prestige and activity of the magistrates who carry out their activity in compliance with the laws and professional deontology (David 2014).

In case of corruption offenses, offenses similar to those of corruption or offenses in direct connection with corruption offenses (hereinafter - corruption offenses as a whole) it is necessary to follow and observe certain predetermined rules, as the illicit acts of corruption have their own investigation methodology (Aionițoaie 1977, 71).

In the light of art. 288 of the Romanian Criminal Procedure Code (Law no 135/2010 on the Criminal Procedure Code published in the Official Gazette, Part I no 486 of July 15, 2010, as amended and supplemented), the competent criminal investigation bodies, Prosecutors' Offices attached to the Tribunals and the National Anti-Corruption Directorate, must be notified by the following means: complaint, denunciation, the documents concluded by other bodies established by law or these state institutions are notified *ex officio.*

Also, for the discovery and investigation of corruption offenses, Law no 78/2000 and G.E.O. 43/2002 regarding the National Anticorruption Department, published in Official Gazette no 244 of April 11, 2002, as amended and supplemented, establishes the obligation of the following persons to notify the criminal prosecution body:

- persons with control powers with regard to any data or indications resulting from an illegal operation or act. They have the duty, during the control activity, to take the necessary measures for the preservation and assurance of the means of evidence that can contribute to the elucidation of the case;
- persons who carry out, control or provide specialized assistance, insofar as they participate in the adoption of decisions or have the ability to influence them. This category includes those who take part in operations involving the circulation of capital, bank, foreign exchange or credit transactions, investment transactions, exchanges, insurance, domestic and international commercial transactions regarding amounts of money or goods on which there was the suspicion that they would come from committing corruption offenses;
- the services and bodies specialized in collecting and processing information that have the task of bringing to the attention of the criminal prosecution bodies including those data related to the perpetration of corruption acts (Petre and Trif 2016, 54).

Article 291 of the Romanian Criminal Procedure Code establishes the obligation of the following persons to inform the specialized bodies of criminal prosecution of any act of corruption: those with management function within an authority of public administration or within other public

authorities, public institutions or to other legal persons of public law, as well as any person with control powers, who, in the exercise of their duties, became aware of the commission of an offense for which the criminal action is initiated ex officio, are obliged to immediately notify the prosecution body criminal and to take measures so that the traces of the crime, the criminal bodies and any other means of proof do not disappear; any person exercising a service of public interest for which he has been invested by the public authorities or who is subject to their control or supervision regarding the performance of the respective service of public interest, who in the exercise of his duties has become aware of having committed an offense for which the criminal action is set in motion ex officio, is obliged to immediately notify the criminal prosecution body.

The judicial authorities that have become aware of the perpetration of a corruption act must clarify many issues, among which we specify (Stancu 2015, 755):

- *the quality of the perpetrator* - in relation to the criminal activity carried out by the active subject, its perpetrator may be a person who exercises a public function or control duties, who participates, as a service attribution, in making decisions or who can influence them, a person who has a leadership position in a party, union, employer organization, foundation, etc.;
- *the illicit activity* - carried out by the perpetrator, alone or in criminal participation, the mode of operation, the means of committing the deed, links with various institutions;
- *purpose of the antisocial activity* - this question implies establishing the existence of the purpose with which the perpetrator acted, more precisely if the perpetrator did the illegal activity with intent because the presence of a special purpose contributes to a correct legal classification of the deed; money, assets, values or other patrimonial benefits.

The forensic investigation of the acts of corruption demands the use of *special measures* on the background of the existence of solid indications for committing corruption offenses, in order to gather evidence to establish the criminal responsibility of the perpetrator.

Article 138 (1) of the Romanian Criminal Procedure Code lists in full the activities which constitute special methods of surveillance and investigation, thus:

a) Interception of communications or any type of remote communication;
b) Access to an information system;
c) Video, audio or photography surveillance;
d) Tracking or tracing by technical means;
e) Obtaining data on a person's financial transactions;
f) The detention, handing over or search of postal items;
g) Use of undercover investigators and collaborators;
h) Authorized participation in certain activities;
i) Supervised delivery;
j) The acquisition of data generated or processed by providers of public electronic communications networks or providers of publicly available electronic communications services.

The National Anti-corruption Directorate is allowed to possess and use appropriate means to obtain, verify, process and store information on corruption acts regulated in Law no 78/2000. By way of example, the National Anti-corruption Directorate may order the supervision of bank accounts and accounts treated as such; the putting under operational supervision of the perpetrators and/or the interception of their communications; access to the information systems used by the participants in the crime. In order to clarify technical invoice problems (financial, banking, accounting and so on) within the National Anti-corruption Directorate, specialists with long experience and professional training are active in multiple fields, such as economic, financial, customs, IT or other fields related to corruption (Stancu and Ciobanu 2018, 264).

The criminal prosecution activities traditionally carried out following the commission of corruption offenses are: searches of all kinds, removal of objects and documents, hearing of suspects, defendants and witnesses, findings and expertise, flagrant, on-the-spot investigation, reconstitution, preservation of computer data.

Search is a procedural act consisting of searching for, discovering and removal of objects, documents containing or bearing traces of the crime or of the crime bodies and which may result in the gathering of evidence concerning the commission of the investigated criminal offense or the apprehending of the suspect or defendant (Stancu and Ciobanu 2018, 264).

The complex role of search, much more important than that of the removal of objects and documents, also stems from the fact that, in the interests of justice, the prosecution bodies can carry out this procedural act in compliance with legal provisions even if, apparently, other rights or values protected by criminal law are violated, such as inviolability of residence and person or secrecy of correspondence.

The headquarters of the matter on search is shaped by Articles 156-168[1] of the Romanian Criminal Procedure Code and the criminal proceedings for the removal of objects and documents are limited by article 169-171 of the same code.

The search may be domiciliary, corporeal, IT or on a vehicle, but for the treatment of the subject addressed in this paper, it is of particular interest that the domicile and IT search are fulfilled with respect for the dignity and avoiding a forced, disproportionate interference in the private life of each individual.

The importance of carrying out the search and the removal of objects or documents emerges from its purpose in the sense that, in many criminal cases, this procedural activity obtains a decisive note in solving the cases because it contributes to obtaining absolutely necessary evidence for proving the offender's guilt or even identifying the author.

Hearing of suspects, defendants and witnesses. The process of hearing the suspect or the defendant is addressed in articles 107-110 of the Romanian Code of Criminal Procedure, which contain provisions regarding the questions about the person being heard, the communication of rights and obligations, the way of listening and the recording of statements. In order to establish the objective truth likely to be camouflaged by the perpetrator, the judicial bodies also proceed to take the statements of the injured person if the victim chooses to acquire this quality by constituting under the legal provisions. As the entity that has suffered directly from the repercussions of the antisocial acts committed, it is presumed that the injured person will provide the most complete and accurate information on the subject of the criminal investigation, but most of the times a strong affective disorder puts a mark over it that prevents it from offering solid guarantees of truthfulness. Therefore, often even the honest, good-faith injured person unconsciously presents a distorted factual situation, inaccurate, imprecise information (Ciopraga and Iacobuță, 258).

The definition of the witness is provided by article 114 of the Romanian Code of Criminal Procedure as "any person who is aware of facts or circumstances of fact that constitute evidence in the criminal case". By perceiving all the criminal activities from a tertiary position (the witness does not commit or commit a criminal act on him), the formation of a witness statement, including that which is perceived as corruption, goes through a psychological process structured in four stages: the reception of information, their logical processing, storing and reproducing information. Hearing a witness who has information about a corruption act can prove extremely useful, as based on the statements provided by it the truth can be discovered and the case finalized, of course if the witness is in good faith.

Flagrant. The specialized literature thinks in the sense that the most reliable and conclusive way to prove the corruption facts lies in finding the flagrant crime. The corruption offenses found in the Romanian Criminal Code, namely taking bribes, giving bribes, trafficking influence and buying influence, are consumed spontaneously, instantly, which makes it difficult to find them through the legal process of the flagrant. The evidence obtained from the application of the specific operations of the flagrant is useful for identifying both giving bribery and taking bribery, influence trafficking and buying influence, both sets of offenses claiming similar investigative tactics. The flagrant surprise does not aim primarily for finding corruption offenses, but to establish with certainty the receipt of

money and other patrimonial benefits, moment located after the consumption of corruption offenses (Moise and Stancu 2017, 206).

The team for detecting the flagrant crime is made up of specialized police officers and criminals who work in the field of recording and interception of communications, being coordinated by a prosecutor. To the extent that the information comes from special services, staff will be added to the team within these bodies. Each member of the team will receive precise assignments, depending on the material competence of each one, and in exceptional cases some members should not know the attributions of the others (Stancu and Ciobanu 2018, 269).

The on-the-spot investigation constitutes the essential forensic tactic with which the criminal investigation begins in the context of committing corruption offenses and those assimilated to them and which gives rise to new directions, orientations in the investigative activity to lead the judicial bodies to find the unique reality.

The Romanian Code of Criminal Procedure defines this activity in Article 192 which states that "the on-the-spot investigation is ordered by the criminal prosecution body, and during the trial by the court, when the direct finding is necessary in order to determine or clarify some circumstances of fact that are important for establishing the truth, as well as whenever there are suspicions regarding the death of a person". Therefore, this probation procedure can only be ordered after the commencement of criminal prosecution in the case of corruption. The role of this forensic tactic lies in the fact that it gives the investigative bodies the possibility to perceive directly the factual circumstances in which the perpetrator acted, the objects used by the perpetrator in committing the crime and the traces left at the scene. Typical traces of corruption are most often: money, currency, tangible assets, bank cards, receipts, accounting and registration documents; the personal accounts of the depositor, the invoices of the services provided, the checks (note) of payment, the transport tickets, the labels of the goods, their photographs, etc. Also, the typical traces can be represented by traces of hands on money, on objects received as bribes, of footwear, of cars, of special chemicals on the body and on the clothes of the corrupt person, traces formed under the action of contact with the object of the bribe (Gheorghiță 2016, 43). Among the ideal traces of the crime, the information received from the service colleagues of the corrupting, corrupt or intermediary person, from the members of their families, as well as from random witnesses, are important. This complex of indispensable activities contributes to the successful joining of the efforts of the criminal investigation bodies and to the approach to the purpose for which all the procedural acts are performed, namely the bringing to criminal liability of the person guilty of committing the crime.

Conclusions

The international structures, identifying the significant danger represented by corruption, both at the level of each Member State of the European Union and at the cross-border level, the intensity and the more frequent manifestations that go beyond the internal borders, have reacted accordingly, through the specific tools and the ways that they have. In connection with the forensic investigation of the phenomenon of corruption, viewed both individually and internationally, numerous criteria can be addressed that can give an overview on its proportion and major repercussions, as well as various solutions for identifying, investigating and the legal classification of each case, which expresses an intrinsic specificity.

The rapid evolution of the criminal phenomenon, in general, and organized crime in particular, has led contemporary society to realize that the traditional investigative means used by the judicial bodies were outdated and almost impractical. Therefore, other complex modalities have been adopted with the role of giving the state authorities a high level of control and new possibilities to suppress organized crime, even though, not infrequently, the use of such methods has aroused numerous controversies regarding compliance of human rights and fundamental freedoms.

The provisions of the old Romanian Criminal Procedure Code in this matter violated the foreseeability and accessibility requirements long recommended by the European Court of Human Rights through its jurisprudence as the special methods of supervision and research were disseminated in various normative acts, of different natures, so there was no legislative and systematic approach. The optics of the legislator have changed with the entry into force of the current Romanian Criminal Procedure Code, being inserted within the same chapter most of the special means to which the criminal investigation bodies can appeal in the efficient conduct of their investigation, being taken from the special laws.

References

Aioniţoaie, C. 1977. *Course of Forensics*., vol. III, Criminalistic methodology, Part II, Bucharest: School of officers of the Ministry of Interior.

Ciopraga, A. and Iacobuţă, I. 2001. *Forensics*. Iaşi: Junimea Publishing House.

Civil Convention on Corruption, Strasbourg, November 4, 1999, ratified by Romania by Law no 147 of April 1, 2002, published in Official Gazette no 260 of April 18, 2002.

Criminal Convention on Corruption, Strasbourg, January 27, 1999, ratified by Romania by Law no 27 of January 16, 2002, published in Official Gazette no 65 of January 30, 2002. Accessed December 20, 2019. https://www.cna.md/public/files/legislatie/conventia_penala_privind_coruptia_.pdf.

Cristiean, V. 2017. *Criminal law. Special Part II. Offenses against the execution of justice. Corruption and service offenses. False offenses*. Bucharest: The Legal Universe Publishing House.

David, B. 2014. *The problem of the scourge of corruption in the judicial system*. NEDES 2014. Bucharest: Pro Universitaria, Publishing House.

Gheorghiţă, M. 2016. "The forensic model of corruption offenses". In *Journal of Criminology, Criminology and Penology,* no 3: 43.

Glodeanu, R. 2009. *Taking and bribing*. Bucharest: Hamangiu, Publishing House.

Law no 135/2010 regarding the Criminal Procedure Code published in the Official Gazette, Part I no 486 of July 15, 2010, as amended and supplemented.

Law no 286/2009 regarding the Criminal Code, published in the Official Gazette, Part I no 510 of July 24, 2009, as subsequently amended and supplemented.

Law no 78 of 2000 for the prevention, discovery and sanctioning of corruption facts published in the Official Gazette no 219 of May 18, 2000, as subsequently amended and supplemented.

Moise, A.-C. and Stancu, E. 2017. *Forensics. Methodological elements of crime investigation*. Bucharest: The Legal Universe Publishing House.

O.U.G. no 43/2002 regarding the National Anticorruption Department, published in Official Gazette no 244 of April 11, 2002, as subsequently amended and supplemented.

Petre, A. and Trif, V. 2016. *Detecting corruption offenses*. Bucharest: C.H. Beck, Publishing House.

Stancu, E. 2015. *Treaty of Forensics*. Ed. a VI-a. Bucharest: The Legal Universe Publishing House.

Stancu, E. and Ciobanu, P. 2018. *Forensics. Criminalistic methodology*. Bucharest: The Legal Universe Publishing House.

Teodorescu, M.G. 2016. *Fighting corruption offenses at national and European level*. Bucharest: Pro Universitaria Publishing House.