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Use of Undercover Investigators and Collaborators in Investigating Corruption Offenses

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ABSTRACT: Corruption is a threat to the stability and security of societies, undermining democratic institutions and values, ethical values and justice, and compromising sustainable development and the rule of law. Art. 19 of the United Nations Convention against Corruption, adopted in New York on 31 October 2003, recommends that States parties consider the adoption of legislative and other have been committed intentionally, the act of a public official abusing his functions or position, for example to perform or refrain from performing, in the exercise of his functions, an act in violation of the law, in order to obtain an improper benefit for himself or for another person or entity. The emergence of the legal framework governing the activity of undercover investigators was unanimously determined by the need to fight atypical forms of crime, which carry out their activity in an organized and "hermetic" way, so that the activity of proving criminal acts by normal methods becomes especially difficult, if not impossible. The objectives of using the undercover investigator or the collaborator are to obtain data and information about the criminal activity, to obtain evidence that will be used in the criminal process. In practice, the undercover investigator or collaborator may carry out activities to establish whether the crime of which a person or an organized criminal group is suspected has been committed, is in progress or in the preparatory phase, identification of members of the group of offenders, identification some accomplices, the identification of witnesses, the identification of the places where the goods from the crimes are hidden, the identification of the places where the victims of the crimes are, the specification of propitious moments for carrying out searches or arrests, etc.

KEYWORDS: corruption, special investigative methods, the use of undercover investigators and collaborators, the provocation

Introduction

Etymologically, "corruption" comes from the Latin "corruption" which means to break, to destroy by antithesis with "integrity", which translates into totality, fullness.

The latter can be seen as "a moral principle with multiple personal virtues (honesty, courage, sincerity), but also social because it involves more than the coherence of commitments and action, respectively compassion and awareness of society as self-integration."

Corruption could therefore be translated as the destroyer of totality, fullness, honor (Iordache and Banciu 2020, 11). Corruption, in a broad sense, as well as criminal corruption, in particular, is related to the abuse of power and the incorrectness in making a decision at the public level. In essence, corruption is the misuse of public power in order to obtain, for oneself or for another, an undue gain, involving:

- Abuse of power in the exercise of official duties;
- Disorganization;
- Fraud (deception and prejudice of another person or entity);
- The use of illicit funds in the financing of political parties and electoral campaigns;
- Favoritism;
- Establishing an arbitrary mechanism for exercising power in the field of privatization or public procurement;
- Conflict of interest (by engaging in transactions or acquiring a position or a commercial interest that is not compatible with the official role and duties) (Ciuncan 2017, 28).

Other definitions of the phenomenon of corruption have been formulated by various international bodies:

The Council of the Organization for Economic Cooperation and Development (OECD), 1998, defines corruption as "bribery involving direct or indirect supply or undue use, pecuniary or other advantage to one or a foreign official, for breach of duty, to favor or obstruct the conduct of a business".

The Criminal Convention of the Council of Europe on corruption, signed by Romania in 1999 (ratified by Romania by Law 27/2002, published in the Official Journal no. 65 of January 30, 2002), defines it by the two ways of committing it, active and passive.

Active corruption consists in "proposing, offering or giving, directly or indirectly, any undue advantage to one of his public agents, for himself or for someone else, for him to perform or refrain from performing an act in the exercise of its functions." (art. 2)

Passive corruption consists in "the act of one of its public agents to claim or receive, directly or indirectly, any undue advantage for himself or for anyone else, or to accept an offer or promise of an advantage in order to perform or obtain refrains from performing an act in the exercise of its functions." (art. 3)

The preamble to the above-mentioned convention states that corruption is "a threat to the principles of the rule of law, democracy and human rights, undermines the principles of good administration, equity and social justice, distorts competition, impedes economic development and jeopardizes the stability of democratic institutions and foundations, morality of society".

Transparency International defines corruption as "abuse of power for personal gain", while the United Nations Convention against Corruption adopted in New York on 31 October 2003 (ratified by Romania by Law 365 of September 15, 2004, published in the Official Journal no. 903 of October 5, 2004), the most important universal instrument in the field under review, does not provide a definition for corruption. This convention is based on the assumption that the concept is constantly changing and that, by its nature, it includes multiple approaches. The Convention takes a descriptive approach that covers various forms of corruption that currently exist, while providing a framework for forms of corruption that may arise in the future. States Parties to the Convention will criminalize the following offenses: bribery, influence peddling, abuse of office, illicit enrichment (including in the private sector), money laundering, concealment, and obstruction of justice.

It has been pointed out in the literature that among the main factors that determine the occurrence of corruption can be listed: political and administrative/financial instability, instability and lack of predictability of legislation, inefficiency of financial control actions, inadequate pay of corrupt subjects, insufficient endowment of the police apparatus in many states of the world, superficial and one-dimensional treatment of corruption - in terms of political interests, group, as electoral goods, etc. (Iordache 13).

Regarding the types of corruption, several classifications are possible, which are not out of criticism precisely due to the complex nature of the corruption phenomenon:

Major and minor corruption

There are three criteria to differentiate major corruption from minor corruption:

a) The hierarchical position occupied by the perpetrator

Major corruption is the so-called political or high-level corruption, which is found at the level of the governing bodies of the state 112, ie those that make up policies, strategies, laws. Political corruption covers a wide range of practices, from illegal financing of political parties and election campaigns, to buying votes or trafficking in influence of politicians or those elected to public office. These people can use their official position to improve their own well-being (for example, a normative act is issued for the 24-hour tax exemption of imports of certain goods by certain companies with which politicians are in contact or manipulate privatization processes, modifying normative acts by removing or illegally adding texts), or to improve their status or their own power (buying a seat in elections, buying votes).

Minor corruption is bureaucratic or administrative corruption, which occurs at the level of public administration, obliged to apply public policies and laws created by politicians. It meets every day, where the citizen has direct contact with officials, including those in justice area. This type of corruption most often occurs through bribery. The sum amounts vary, but they are usually small. It is specific to countries in transition.

b) The value of the object of the act of corruption

Major corruption can occur, for example, in the field of public procurement, as opposed to the small corruption encountered at customs, payment of taxes, obtaining authorizations, permits.

c) The degree of impact of the act of corruption

The impact of the act of corruption can be extended, such as the illegal hiring of a lighting company that can harm all taxpayers in a city, or individually, such as bribing a counter official who only affects the bribe-taker and those who requests the issuance of a similar license.

Systemic and sporadic corruption

Systemic (endemic) corruption is corruption that is an integral and essential part of the economic, social and political system. Practically, most institutions and activities are used and dominated by corrupt individuals and groups of corrupt individuals and there is no alternative for citizens than to accept and get involved in these acts of corruption. Compared to a single institution, systemic corruption occurs when its entire organization, culture, or leadership allows for corrupt practices, closes its eyes to these acts, and even encourages such inappropriate behavior.

Sporadic (occasional) corruption occurs irregularly, occasionally, and affects not the mechanism, but the individual, affecting only the morale of those involved. In these cases, one cannot speak of a network, not even at the territorial level.

Functional and dysfunctional corruption

Functional corruption aims to facilitate the legal fulfilment of certain acts, it is committed to "anoint" the mechanism of bureaucracy. The amounts circulated are small, being rather a matter related to culture, the society itself sometimes legitimizing such conduct (Russia, South Korea, Turkey). Dysfunctional corruption is corruption that has the effect of making activities more difficult. The benefits offered/received in this case have a high value.

Corruption in the public sector and in the private sector

Corruption in the public sector is what includes:

- administrative corruption: concerns the activity of local and central public administration, customs authorities, health and social assistance, culture and education, institutions in the field of defense, public order and national security;
- corruption in the judiciary: concerns the judicial authorities, prosecutor's offices and courts;
- economic corruption: it is found especially in the financial-banking field, in agriculture, forestry and in some branches of industry, metallurgy-steel, as well as in oil processing and trading;
- political corruption: it is mainly related to parliamentary activity and political parties: the negative effects of parliamentary immunity, the influence of legislative initiatives, the financing of political parties and electoral campaigns.

Corruption in the private sector involves commercial activities carried out by national companies or multinational companies. It affects fair competition and the rules of the market economy, decreases the quality of products and services, decreases economic investment. Corruption acts often involve civil servants (private-public bribery), bribes to grant tax facilities or certain contracts to companies, from small acquisitions to arms production contracts and concessions for the exploitation of natural resources.

Active corruption and passive corruption

Active corruption consists in proposing or offering benefits to the decision maker (bribery, buying influence). Passive corruption consists in accepting these benefits (taking bribes, receiving undue benefits, trafficking in influence) (Danileț 2009, 54-58). The author also mentioned a classification of corruption: Black, grey and white corruption. Black corruption refers to behaviors repudiated by both public and elite. Grey corruption concerns the condemnation of corruption desired only by the elites of society. White corruption concerns antisocial acts or behaviors whose sanction is not desired by any social category, corruption being found tolerable. This includes lobbying, but also small "attentions" (for example, flowers) given to the teacher, doctor, etc.

The commission of corruption offenses has a certain specificity, in the sense that they are generally committed in the absence of witnesses and involves a small number of people, so it is necessary to resort to certain specific methods of discovery and investigation.

Incrimination of corruption in Romanian criminal law

According to the Romanian Criminal Code, receiving bribery (art. 289), giving bribery (art. 290), influence peddling (art. 291) and buying influence (art. 292) are crimes of corruption.

The crime of bribery consists in the act of the public servant (see art. 175 of the Romanian Criminal Code regarding the sphere of persons considered public servants) who, directly or indirectly, for himself or for another, claims or receives money or other benefits that are not due to him or accepts the promise of such benefits, in connection with the fulfilment, non-fulfilment, urgency or delay in the performance of an act falling within its duties or in connection with the performance of an act contrary to such duties (passive corruption).

The deed mentioned above, committed by one of the persons provided in art. 175 par. 2 (see art. 175 par. 2 of the Romanian Criminal Code regarding the sphere of "assimilated officials", for example, there are assimilated civil servants' notaries public, bailiffs, judicial experts, insolvency practitioners) of the Romanian Criminal Code constitutes an offense only when it is committed in connection with the non-fulfilment, delay of the fulfilment of an act regarding its legal duties or in connection with the performance of an act contrary to these duties.

The crime of bribery consists in the promise, offering or giving of money or other benefits, under the conditions shown in art. 289 of the Romanian Criminal Code (active corruption).

Trafficking in influence consists in claiming, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or is believed to have influence over a civil servant and who promises that it will cause him to perform, not to perform, to hasten or delay the performance of an act which enters into his duties or to perform an act contrary to these duties.

The purchase of influence consists in the promise, offering or giving of money or other benefits, for oneself or for another, directly or indirectly, to a person who has influence or lets one believe that he has influence over a civil servant, to determine him to perform, not to fulfil, to hasten or delay the fulfilment of an act that enters into his duties or to perform an act contrary to these duties. The above acts also constitute offenses if committed by private officials, the penalties applicable to them being reduced by one third compared to those applicable to public servants.

Law no. 78 of May 8, 2000 for the prevention, detection and sanctioning of acts of corruption, published in the Official Journal 219 of May 18, 2000, establishes measures for the prevention, detection and sanctioning of acts of corruption. According to this law, which criminalizes the corruption offenses regulated by art. 289-292 of the Criminal Code committed by the persons provided in art. 1 of that law, are considered as crimes assimilated to those of corruption the facts provided in art. 10-132.

Competence to investigate corruption offenses

By Government Emergency Ordinance no. 43/2002 regarding the National Anticorruption Directorate, published in the Official Journal no. 244 of April 11, 2002, Part I, the National Anticorruption Directorate was established, a structure with legal personality within the Prosecutor's Office attached to the High Court of Cassation and Justice, based in Bucharest and exercising its powers throughout Romania through specialized prosecutors in investigating corruption offences.

According to art. 13 of the Government Emergency Ordinance no. 43/2002, are within the competence of the National Anticorruption Directorate the offenses provided in Law no. 78/2000, with subsequent amendments and completions, committed in one of the following conditions: a) if, regardless of the quality of the persons who committed them, they caused a material damage greater than the RON equivalent of 200,000 euros or if the value of the amount or of the good that is the object of the corruption crime is higher than the equivalent in lei of 10,000 euros b) if, regardless of the value of the material damage or the value of the amount or the good that is the object of the corruption crime, they are committed by: deputies; senators; Romanian members of the European Parliament; the member appointed by Romania in the European Commission; members of the Government, Secretaries of State or Undersecretaries of State and their associates; advisers to ministers; the judges of the High Court of Cassation and Justice and of the Constitutional Court; the other judges and prosecutors; members of the Superior Council of Magistracy; the president of the Legislative Council and his deputy; The People's Advocate and his deputies; presidential advisers and state advisers within the Presidential Administration; the state advisers of the prime minister; members and external public auditors of the Romanian Court of Accounts and of the county chambers of accounts; the governor, first vice-governor and vice-governors of the National Bank of Romania; the president and vice-president of the Competition Council; officers, admirals, generals and marshals; police officers; the presidents and vice-presidents of the county councils; the general mayor and deputy mayors of Bucharest; mayors and deputy mayors of the sectors of Bucharest; mayors and deputy mayors of municipalities; county councillors; prefects and subprefects; the heads of central and local public authorities and institutions and the persons with control functions within them, with the exception of the heads of public authorities and institutions at the level of cities and communes and the persons with control functions within them; lawyers; Financial Guard commissars; customs staff; persons holding management positions, from the director including, within the autonomous utilities of national interest, national companies and corporations, banks and commercial companies in which the state is the majority shareholder, public institutions with attributions in the privatization process and of the central financial-banking units; the persons provided in art. 293 and 294 of the Criminal Code.

The criminal investigation in the cases regarding the above-mentioned crimes committed by the active military is carried out by military prosecutors from the National Anticorruption Directorate, regardless of the military rank of the investigated persons.

If the National Anticorruption Directorate is not competent to prosecute for the corruption facts under investigation, the investigations shall be carried out by the Prosecutor’s Offices attached to the Courts, as common law investigative bodies, or by the higher prosecutor's offices if personal competence requires it.

In this regard, for example, if corruption offenses are committed by Members of Parliament, the Prosecutor's Office attached to the High Court of Cassation and Justice will have the competence to investigate them and to prosecute.

The power to prosecute in the case of corruption offenses belongs to the prosecutor, who may delegate judicial police workers to perform various procedural acts, such as hearing witnesses, conducting a home search, transcribing recorded conversations etc.

Special methods of surveillance or investigation in the case of corruption offenses

The legislator provided in the current Romanian Code of Criminal Procedure in addition to the classic evidentiary procedures, special methods of surveillance or investigation (art. 138), respectively: interception of communications or any type of remote communication, access to a computer system, video surveillance, audio or photography, localizing or tracking by technical means, obtaining data on a person's financial transactions, seizing, handing over or searching postal items, using undercover investigators and collaborators, authorized participation in certain activities, supervised delivery and obtaining data generated or processed by providers of public electronic communications networks or providers of electronic communications services intended for the public, other than the content of communications, retained by them under the special law on the retention of data generated or processed by providers of electronic communications networks public electronic communications networks and providers of electronic communications services intended for the public.

All these special methods of surveillance or investigation are applicable in the case of the investigation of corruption offenses, given that the legislator has classified this type of crime as one of the most serious. In the case of the latter offenses, the use of special methods of surveillance and investigation, which involve investigative activities that are not known to persons under criminal investigation, is very useful given that they are often educated, trained, the so-called "white collars", which will try to protect themselves in the most sophisticated ways from the risk of discovery by the judicial authorities. To this end, they will commit crimes of corruption sometimes through intermediaries, using coded language, will try to give a legal appearance to illicit financial transactions, will have incriminating discussions only with people they trust, after putting aside possible recording devices (tablets, telephones, etc.).

The use of undercover investigators and collaborators, as a special method of investigation, is regulated in Articles 148-150 of the 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 criminal 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.

It has been pointed out in the doctrine (Petre and Trif 2016, 88) that "the emergence of the legal framework regulating the activity of undercover investigators was unanimously determined by the need to fight atypical forms of crime, organized and "hermetic", so that the activity of proving criminal acts by normal methods becomes particularly difficult, if not impossible."

The objectives of using the undercover investigator or the collaborator are to obtain data and information about the criminal activity, to obtain evidence that will be used in the criminal process. In practice, the undercover investigator or collaborator may carry out activities to establish whether the crime of which a person or an organized criminal group is suspected has been committed, is in progress or in the preparatory phase, identification of members of the group of offenders, identification of some accomplices, the identification of witnesses, the identification of the places where the goods from the crimes are hidden, the identification of the places where the victims of the crimes are, the specification of propitious moments for carrying out searches or arrests, etc.

The second condition that must be met is that the measure is proportionate to the restriction of fundamental rights and freedoms. This condition is provided by art. 148 par. 1 lit. b) of the Code of Criminal Procedure and must be analyzed by the prosecutor in the light of the criteria provided by the text of the law: the particularities of the case, the importance of the information or evidence to be obtained or the seriousness of the crime. It is thus necessary for the prosecutor to analyse in each case whether there is sufficient justification for ordering this special method of investigation, even in the conditions of investigating a crime of those limited by law.

The prosecutor will have to consider whether in a given case the information that an undercover investigator or collaborator is needed due to the particularities of the case, such as the difficulty of documenting the criminal activity, due to the importance of the information or evidence they could obtain (their probative value or the concrete possibility of the judicial bodies to capitalize the respective information for obtaining evidence) or taking into account the concrete gravity of the crime, situation in which any legal evidentiary procedure performed is justified.

Activities that may be performed by the undercover investigator or collaborator

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

The first category of covert operations consists of cases that systematically involve the collection of information, 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 offenses, and in the third category of transactions, undercover transactions are part of a wider activity, which does not concern individual suspects, but criminal groups engaged in a larger-scale criminal activity, such as drug or human trafficking, the formation of an organized criminal group.

In addition to collecting direct evidence, the purpose of these operations is to obtain a perspective on the composition of the criminal group, how they operate, on the use of money resulting from criminal activity.

Undercover investigators may not "play" the role of buyer, but only carry out infiltration activities in the organized criminal group and get involved in its activity for the systematic collection of information.

The doctrine stated that, "infiltration is the action of the police officer to maintain, under a false identity, lasting relationships with one or more persons in connection with whom there are solid reasons to believe that they are committing crimes within a criminal organization." (Franchimont and Masset 2006, 331).

The different types of operations that undercover investigators or collaborators vary greatly in terms of their duration, intensity and the kind of contact between them and the subject.

Some covert operations last only one day and consist of no more than a brief business contact with a suspect. Some contacts may only be business-related, such as in bribery investigations, in which the undercover investigator or co-worker may claim to remit the bribe in order for the official to perform his duties incorrectly (for example, remittance to the police officer so as not to be penalized for traffic offences).

In cases where an undercover agent befriends a suspect in order to obtain information about his involvement in a serious crime, he must sometimes establish a rather intense personal and emotional connection with the suspect. If the undercover agent tries to infiltrate a group of suspects who trade 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 goods), how they are transported, the means of transport used, the transactions completed or to be completed concerning the illegal goods), but must first obtain a position within the group in which to be perceived as trustworthy.

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

Undercover investigators infiltrated in illegal activities investigated by the supervised 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.), to buy drugs with

collaborators from drug traffickers, to transport drugs as carriers (drivers) to identify the final recipients of drugs, etc. There are also supervised delivery operations in which undercover agents of a state will be allowed to engage in activities for the collection of information (such as the commission of corruption offenses by public servants who know and tolerate criminal activities in exchange for receiving benefits), procuring drugs or transporting them to another state, accompanying or monitoring the supervised delivery, etc. (Transnational supervised deliveries in the context of drug trafficking investigation, Manual, 174).

The course of covert operations can be very unpredictable given the lack of predictability of the behavior of suspects. It may happen that the undercover investigator or collaborator, in the course of his activities, is in a situation where he is forced by circumstances to commit other act incriminated by criminal law than those for which he was authorized by the prosecutor, otherwise there is a risk that the whole operation will be uncovered and / or the safety of the undercover agent will be jeopardized (for example, by the suspect finding out his real identity). In these situations, the Code of Criminal Procedure does not provide for the possibility of committing such offenses without the risk of incurring criminal liability of the undercover investigator or collaborator, if there are none of the justifying or imputability cases regulated in the Criminal Code.

De lege ferenda, it is required that the legislator provide that, in undercover operations, in situations where the undercover investigator or collaborator was forced to commit a crime other than that for which he was authorized by the prosecutor's order, he should not or be held criminally liable if the act was committed in order not to expose the criminal investigation carried out or not to endanger its safety, if there is a relationship of proportionality between the criminal act committed and the purpose pursued. In this regard, the undercover investigator or collaborator should take into account the importance of the evidentiary procedure carried out, the seriousness of the investigated criminal activity, but also the seriousness of the act they should commit without having the practical possibility to notify the prosecution bodies in advance.

In all cases, it is necessary for the undercover investigator or collaborator to be sufficiently well trained, to be provided with all the data necessary to ensure that the operation is not exposed and that its safety is not jeopardized. Depending on the complexity of the operation, a practical planning of the activities carried out at the beginning and, if necessary, during the operation will be necessary so as not to violate the principles of criminal proceedings, including the loyalty of the administration of evidence.

The judicial bodies may use or make available to the undercover investigator any documents or objects necessary for the performance of the authorized activity. The activity of the person who makes available or uses the documents or objects does not constitute a crime (like giving bribery or buying influence). Thus, if the undercover investigator or collaborator also carries out technical suprveillance activities, the equipment he uses must have the exact date and time set to rigorously reflect the time placement of the recorded activities.

In the event of the perpetrator being caught red-handed, the judicial authorities must ensure that the undercover investigator or collaborator is protected from possible acts of revenge by the perpetrators. The undercover investigator collects and makes available to the prosecutor who conducts or supervises the criminal investigation all the data and information obtained on the basis of the issued order, drawing up a report on all the activities carried out.

Undercover investigators may be heard as witnesses in criminal proceedings under the same conditions as threatened witnesses, respectively without revealing their identity and without being present in the courtroom. Although art. 148 par. 10 of the Romanian Code of Criminal Procedure stipulates that the collaborator, like the undercover investigator, should write a report on all activities carried out, in practice he is only heard by the judicial bodies, without being necessary to write any report by the collaborator.

According to art. 103 par. 3 of the Romanian Code of Criminal Procedure, the decision of the court cannot be based, to a decisive extent, on the testimony of the undercover investigator or on the statements of the protected witnesses. 5. Use of undercover investigators and collaborators in compliance with the principle of loyalty of evidence administration

The activity carried out by undercover investigators and collaborators under the coordination of the prosecutor, as a probative procedure, is subject to the same fundamental principles of the criminal process.

They must therefore refrain from any act which is likely to infringe criminal procedural rules, to use tricks or strategies in order to obtain, in bad faith, evidence or which have the effect of provoking the commission of an offense. In essence, both undercover investigators and collaborators must respect the principles of legality and loyalty of evidence.

A discussion frequently had in practice and reported in the doctrine is that of the provocation to commit crimes by state agents, making the distinction between "provocation to commit a crime" and "provocation to prove criminal activity." (See Volonciu, Uzlău coord. 2014, 282; Udroiu, coord. 2017, 413-414).

The work of undercover investigators and collaborators must be carried out in such a way as not to lead to the commission of criminal offenses, while it is illegal to determine a person to commit or continue to commit a crime in order to obtain evidence. It was pointed out that the reason for this prohibition is that the state cannot, through its agents, including a collaborator, exceed its obligation to apply the law by instigating a person to commit a crime that he would not otherwise have committed. (Șuian 2016, 14).

The provocation to commit a crime is distinct from the provocation to the proof of a previously committed crime, the latter not being, in itself, likely to lead to the violation of the principle of loyalty, because it only proves the commission of a crime and not the determination to commit or continue its.

The literature has also expressed the opinion that sometimes the provocation to the proof can fall under the influence of unfair strategies. It was pointed out that "the existence of a hypothesis of disloyalty may be retained if, in the evidentiary procedure of the technical surveillance, the witness, acting under the coordination of the criminal investigation body, obviously determines his interlocutor to report certain facts that he has not wanted to expose them or he didn't remember them, in which case there was no loyal provoking to the proof; the action of the witness thus exceeds the scope of a passive investigation in the matter of obtaining evidence, being able to be assimilated to the case of disloyalty provided by art. 101 par. 2 of the Code of Criminal Procedure, if it is held that it has the nature of a maneuver that influenced the ability of the interlocutor to report consciously and voluntarily the facts that are the subject of evidence." (Udroiu 2020, 435).

The provocation was essentially defined in the doctrine (Udroiu 2020, 438-439) as representing the unfair action performed for the purpose of obtaining evidence, consisting in knowingly determining a person to commit a crime (the provocateur was practically, from the point of view of substantive law, in the position of the instigator who determines a person to take a criminal resolution) or to continue committing a crime. (…) The reason for not prohibiting the commission of an offense is that the State, through its agents, may not exceed its powers to enforce the law by instigating a person to commit an offense which he would not otherwise have committed, in order to then initiate against this person the mechanisms of the criminal process, in order to be held accountable; This creates limits on the pursuit of criminal prosecution in a proactive investigation, in order to protect citizens from provocations posed by state agents, as well as to protect the integrity of the criminal justice system, which would otherwise be compromised if the courts would take into account the evidence resulting from these obviously unacceptable practices of law enforcement officials. At the same time, the credibility of the criminal justice system is ensured and the principle of finding out the truth is guaranteed.

It has emerged from the case law of the European Court of Human Rights that in order to verify the existence of the challenge, the courts have to do two tests:

- the substantive test in which it is ascertained whether the authorities have engaged in essentially passive conduct in the commission or continuation of the commission of the offense by the accused. This test relates to the reasons that were the basis for initiating the investigation, namely whether there was at least a reasonable, objective suspicion that the accused was involved

in criminal activities or had a predisposition to do so, the conduct of prosecutors during the investigation for to check whether they influenced the accused person to commit the crime or offered him a "regular opportunity" to commit the crime, the criminal resolution belonging to him. The substantial test will also take into account the legislative standard, and it is necessary to have clear and predictable legislation on the authorization of investigative measures, including for the purpose of their supervision.

- the procedural test of provocation, represents the second stage of verifying the observance of the principle of loyalty, the way in which the national courts analyzed the defenses of the accused by which the existence of the provocation was invoked is examined.

If the substantive test shows that the prosecuting authorities behaved purely passively and did not provoke the accused person to commit the crime, the European Court of Human Rights will no longer carry out the procedural test as it has already been concluded that there was no provocation by the public agents to commit the offence.

In the judgment of February 14, 2017 in the case Pătrașcu against Romania (application no. 7600/09), the European Court of Human Rights ruled that art. 6 paragraph 1 of the Convention was violated. In fact, in February 2007, a police officer approached the applicant in a nightclub to check on information that the latter was dealing with drug trafficking. The undercover police officer later wrote a report describing that the applicant had told him that he could buy him drugs and that they would be heard on the phone. After the start of the criminal investigation and the authorization of some surveillance measures, the applicant called the police officer to ask him if he was interested in buying ecstasy. The police officer in turn called the applicant several times during April and May 2007 to agree on the details of the transaction. On July 19, 2007, the two met, on which occasion a flagrant was committed. The applicant was sentenced to prison for drug trafficking. The European Court of Human Rights has reiterated that the provocation of committing a crime occurs when state agents do not engage in passive behavior, but incite a person who would not otherwise have committed it to commit a crime. He also points out that the admission by the courts of evidence obtained as a result of provocation by the police can lead to an unfair trial. In this sense, the reasons that were the basis of the decision to initiate the special measure, the behavior of the state agents, as well as the way of examining the case in court are important.

As regards the manner in which the national courts examined the case, the Court observed that, in that case, since the applicant had alleged that he had been challenged to commit the offense, the national courts were required to take the necessary steps to find out the truth. The burden of proving that the challenge did not take place is on the prosecuting authorities. Consequently, the courts should have examined, by assessing the information in the case file and, if necessary, by examining the material relevant to the operation, the reasons for the authorities' suspicion that the applicant might be involved in drug trafficking. The Court noted in this regard that the national courts failed to verify the statement included in the initial report of 1 March 2007 that the police were in possession of information regarding the applicant's involvement in drug trafficking. This would have helped to clarify the reasons why the operation was initiated, in particular whether the authorities acted on the basis of information received from a person and therefore joined a continuing offense or the information was collected directly by the to the police, the latter leading to the risk of extending their role to that of provocateurs. The undercover policeman was heard in court, but the statement did not clarify this issue.

Conclusions

The institution of the undercover investigator and the collaborator, as a special method of criminal investigation, has shown that it is particularly useful in proving certain crimes, such as corruption offenses, in which the subjects involved have a high degree of intelligence and commit crimes within a fairly cautious manner so as to avoid the risk of them being discovered. Under these

conditions, in order to prove the crime, it is often necessary to "provoke" certain discussions regarding the criminal agreements between the investigated subject and the undercover investigator or collaborator, in which the former has a certain degree of trust to conduct those discussions.

In addition, the use of the undercover investigator and the collaborator, in addition to other special methods of surveillance and investigation provided for in the Code of Criminal Procedure, are often essential in the investigation of drug trafficking offenses or other illicit activities carried out by organized criminal groups, and also corruption offences related to these crimes, given the secrecy of their activity and the difficulty of infiltrating foreigners into the criminal environment.

In order for the undercover investigator or collaborator to carry out the activities for which he has been authorized in an appropriate manner, both to ensure an increased chance of obtaining legal and fair evidence in the criminal case and to ensure his safety, it is necessary to benefit all legal and practical facilities in this regard, from the protection of his safety or that of others close to him in case of need, to adequate professional training before the operations carried out, as well as adequate equipment with the technical equipment or other objects necessary to carry out the activity.

The prosecutor supervising or conducting the criminal investigation must ensure that, in relation to all the data of the criminal case, the activities of the undercover investigator or collaborator, as outlined in the ordinance ordering the use of this special method of investigation, do not violate fundamental principles of the criminal trial and, at the same time, the principle of the loyalty of the administration of evidence. To this end, their activity should be monitored throughout its operation in order to stop in time any slippage that may lead to the risk of losing important evidence.

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