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Influence Peddling, a Controversial Crime Applicable to an Obsolete Criminal Policy

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ABSTRACT: I have deliberately used the archaism "obsolete" to highlight the very expired, outdated and outmoded character of the notion of the crime of influence peddling. Since the crime of influence peddling belongs to the category of corruption crimes, our approach should not be misinterpreted, i.e., in the sense of potentializing this phenomenon that we consider cancerous for a democratic society, but in the sense of updating and progressing Romanian criminal policy relative to this crime. The establishment of a "legislative footprint", defined as "a comprehensive public register of the influence of lobbyists on a normative act", would be an effective way to reduce the risk of inappropriate influence and, at the same time, to increase the transparency of the adaptation process of policies within the EU, as revealed in a document issued by Transparency International (Berg and Freund 2015, 4). The present scientific-legal approach is likely to adapt, through a new proposed meaning, the notion of influence peddling crime to the objective reality of current criminal policies and respect for the fundamental freedoms of citizens according to the rules of the European Union and to overcome the obscurity of the elements constitutive of this crime.

KEYWORDS: crime, influence peddling, concept/definition, criminal policy, social reality

1. Introductory considerations

It is well known that in Western countries with a solid and perennial democracy, influence peddling takes the legal form of lobbying, the latter being the activity of a group or individual who tries to get the legislative or executive branch to adopt a position or take a decision that serves the legitimate interests of that group.

Criminal law, as a science and as a branch of law, differs from state to state, depending on the specifics of each state's criminal legislation and criminal policy. Currently, with all the diversity of European Criminal Law, there is also a Community Criminal Law based on treaties and international conventions, which is based on the cooperation of European states on the basis of the European Convention for Human Rights (Pradel and Corstens 1999, 16). We are talking about the rules of Community Criminal Law adopted by the member states of the European Union, which have created specific bodies in their institutional plan. In relation to these changes, the definitions were diverse and had corresponding limits and modifications.

2. Diachronic view relative to the crime of influence peddling

The incrimination of influence peddling in Romanian legislation has a long tradition. Thus, the Romanian Criminal Code from 1865 regulated in chapter II entitled "Crimes and misdemeanors committed by civil servants", section IV – "On bribery of civil servants", in art. 146, that: "any individual who, in his name, or in the name of any civil servants, administrative or judicial official, with or without his knowledge, directly or indirectly, will demand, take, or will cause him to be promised gifts or other illegitimate benefits, to intervene, to do or not to do any of the acts related to the attributions of that official, he will be punished with imprisonment from six months to two years and with a fine double the value of the things taken or promised, without this fine being less than 200 lei. The things received, or their value, will be used for the benefit of hospices or charity houses of the locality where the act was committed. And if the mediator will be a civil servant, he will lose the right to hold positions and will not be able to receive a

pension". In the *Criminal Code of 1936* (also called the Criminal Code of Carol II), in art. 252 was ordered relative to the offense of influence peddling under art. 252 that – "the one who, taking advantage of the real or supposed influence that he would have with a civil servant, receives directly or indirectly or causes him or another to be promised any gift, benefit or remuneration, for his intervention on next to that official, to do or not to do any act that falls within his duties, commits the crime of influence peddling and is punished with correctional prison from 6 months to 2 years, a fine from 2,000 to 10,000 lei and a correctional ban from one at 3 years. If the guilty person receives directly or indirectly, or causes to be given or promised, to him or to another, any gift, benefit or remuneration, under the pretext of having to buy the favor of a civil servant, the punishment is correctional prison from one to 3 years, a fine from 2,000 to 10,000 lei and the correctional ban from one to 3 years. The things received or their value are taken for the benefit of the fines fund."

The Criminal Code from 1936 reveals in art. 252 the notion of influence peddling offense as follows: "the one who, taking advantage of the influence or the real or supposed influence he would have with a public official, receives directly or indirectly or causes him or another to be promised any gift, benefit or remuneration, for his intervention in the presence of that civil servant, to do or not to do any act that falls within his attributions, commits the crime of influence peddling and is punished with correctional prison from one to three years, a fine from 5,000 to 10,000 lei and correctional ban from 1 to 3 years. However, if he receives directly or indirectly, or causes any gift, benefit or remuneration to be given or promised to him or another, under the pretext of having to buy the favor of a public official, the penalty is correctional prison from 2 to 5 years, a fine from 5,000 -15,000 lei and correctional ban from 2 to 5 years. The one who, relying on an alleged assignment from an official person, asks an authority to do or not do an act within its attribution, will be punished with correctional prison from 2 to 5 years and a fine from 5,000-10,000 lei. The objects received or their value are taken for the benefit of the State."

The Criminal Code from 1969, in art. 257, defined influence peddling as: "receiving or claiming money or other benefits or accepting promises, gifts, directly or indirectly, for oneself or for another, committed by a person who has influence or lets it be believed that has influence on an official in order to determine him to do or not to do an act that falls within his duties, is punished with imprisonment from 2 to 10 years."

3. Analyzing the constitutive content of the offense of influence peddling and proposing a new form

In the current Criminal Code (2014), the criminalization text of influence peddling, respectively art. 291 para. (1), is the following: *"Soliciting, 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 who alleges that they have influence over a public servant and who promises they will persuade the latter perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties, shall be punishable by no less than 2 and no more than 7 years of imprisonment."*

As indicated in Decision no. 489/2016 of the Constitutional Court of Romania, published in Official Gazette no. 661 of August 29, 2016, "the promise can be explicit or implicit, when it results from factual circumstances, and the crime exists regardless of whether the promised intervention took place or not and regardless of whether the performance of a legal or illegal act was pursued. At the same time, the Court notes that only the act of preparation that comes close enough to damaging the protected social value is to be criminally punished, from this perspective the new law is the more favorable criminal law and also the new Criminal Code regulates the crime more clearly and predictably of influence peddling".

Analyzing the objective side of the crime of influence peddling, it follows that the material element includes three alternative normative modalities, respectively: claiming, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, each of which is doubled by the promise of intervention by the civil servant.

The author of the crime, relying on a real or presumed influence on the civil servants, promises that he will cause him to perform, not to perform, to expedite or delay the performance of an act that falls within his official duties or to perform an act contrary to these duties. From this it follows that the act for which the intervention of determination is promised must fall within the duties of the civil servant.

Inevitably, it is about joint actions, since the legislator uses the conjunction "and", using the phrase "and which promises (…)". So, a first finding is that the actions of claiming, receiving or accepting the promise have no criminal relevance - from the perspective of this crime - in the absence of the promise of intervention. Also, only the promise, without any of the three alternative actions, does not fulfill the material element of this crime and the promise to determine the public official must be subsequent to or concurrent with the claim, receipt or acceptance of the promise of money or other benefits.

We consider it absolutely inadvertent from a legal point of view for a person to be held criminally liable if he causes a civil servant **to perform an act that falls within the latter's powers.** We predict that the Criminal Law should not regulate labor relations, but order attitudes and behaviors that come into conflict with social relations considered normal/natural. It is not in the nature of a correct criminal policy for a person to be held criminally liable if he causes a civil servant to perform an act that falls within his duties, an act that he is obliged to perform anyway. If we analyze the hypothesis in which an employee of a public institution, accepts the promise of being promoted by his director because, having influence on his colleagues, he will cause them to finish the work they are tasked with and which he would have finished anyway, but possibly in a longer time. In the example provided, the person who accepted the promise to be promoted if he will induce his colleagues to perform acts that fall within their scope of activity and which they would have performed anyway, commits the crime of influence peddling under the current regulation.

We concede that the syntagma in the content of the crime according to which the civil servant will be determined "to perform an act that falls within his official duties" cannot be accepted because the performance of official duties represents the normality/naturalness of the activity of a civil servant and the criminal law must sanction only the phrases: "not to fulfill, to expedite or delay the fulfillment of an act that is part of his official duties or to perform an act contrary to these duties", because only the last phrases represent deviations from the normal performance of the professional activity.

Consequently, *de lege ferenda*, we propose to remove from the typology of the crime of influence peddling, the phrase (...) ***to perform*** (...) *an act that falls within his official duties* because it does not correspond to the character of the criminal law to ensure the legal framework corresponding to a normal development of society, in the context of respect for human rights and the other values that constitute the scale of social values protected by legal norms, putting in the foreground in the hierarchy of values protected by the criminal law, the supreme value - the human person.

Next, the legislator, relative to the crime of influence peddling, uses the notion of "promise to determine" with the meaning of action complying with the material element, so the attitude of the perpetrator must be described as a firm commitment, unequivocal, express, with a precise objective of determining a certain conduct of the civil servant, which excludes the meaning of implicit conduct, deduced from the circumstances in which a person acted. Consequently, the meaning of the term "promise" in the text of the incriminating law is that of "word, speech" - expressed by live speech - and not "silence", which only exceptionally and exclusively in civil matters is assimilated to the manifestation of externalized will (consent).

It is very important to mention the fact that the idea of the implied promise exceeds the typicality of influence peddling and, consequently, even less could those situations be accepted in which the judicial bodies presume the existence of the promise, but not from the existence of a known fact (proved as such), but from the assumption of the existence of the latter, that is, presumption to presumption, which leads to fiction.

The European Court of Human Rights shows that de facto presumptions are admissible only to the extent that they are reasonable, presuppose things that are difficult or impossible to prove and can be overturned by the person concerned (Case of Salabiaku v. France, Decision of October 7, 1988). However, the ECHR rules that de facto or de iure presumptions are not incompatible with the presumption of innocence under the condition of being reasonable and proportionate to the intended purpose (The Falk v. Netherlands case, Decision of 19 October 2004), and they must fall within reasonable limits, which take into account the seriousness of the presumed situation and keep a limit so that the right of defense can be exercised (Phillips v. Great Britain, Decision of July 5, 2001).

In accordance with art. 291 para. (2) Criminal Code, *"money, valuables or any other goods received are subject to confiscation, and when they are no longer found, confiscation is ordered by equivalent"*. Consequently, according to the doctrine (Bodoroncea 2014, 644), the money, values or other goods that were only claimed or whose promise was accepted will not be subject to confiscation, just as the sums of money made available for the realization of the flagrant will not be confiscated either, these being returned to the criminal investigation body. If a conviction is ordered for committing the offense of influence peddling, the institution of extended confiscation can also be applied to the extent that the conditions provided for in art. 112 of the Criminal Code are fulfilled cumulatively.

4. Delimitation of lobbying to influence peddling

Regarding the regulation of lobbying activities, at the European level, both the European Union and the Council of Europe have preferred non-binding legal instruments ("soft-law" approach), generally based on a system of self-regulation and the adoption of ethical codes, in contrast to the North American paradigm, which opted for binding legal instruments ("hard law" approach), based on rigorous and detailed rules, which may attract sanctions in case of their violation (Tănăsescu coord. 2015, 6 and 37).

According to a document issued by Transparency International, an effective way to reduce the risk of undue influence and at the same time increase the transparency of the policy adaptation process within the E.U. consists in the establishment of a "legislative footprint", defined as "a comprehensive public register of lobbyists' influence on a normative act" (Berg and Freund 2015, 4).

In Romania, the distinction between influence peddling and lobbying is emphasized in the National Anti-Corruption Strategy for the period 2016-2020, approved by G.D. no. 583/2016, which is based on art. 5 of the United Nations Convention against Corruption, regarding policies and practices to prevent corruption. Thus, in order to achieve Specific Objective 3.3 regarding increasing integrity, reducing vulnerabilities and corruption risks in the activity of members of Parliament, it is foreseen to introduce rules on how members of Parliament interact with people who carry out lobbying activities and other third parties who try to influence the legislative process, according to the GRECO Recommendation, Round IV, paragraph 42, which will be taken into account without affecting the criminal normative framework and without it generating a decriminalization of influence peddling (point 4) ("Doctoral and Postdoctoral studies Horizon 2020: promoting the national interest through excellence, competitiveness and responsibility in Romanian fundamental and applied scientific research", contract identification number POSDRU/159/1.5/S/140106. The project is co-

financed from the European Social Fund through the Sectoral Operational Program Human Resources Development 2007-2013).

Relative the regulation of lobbying activities in Romania, a draft law (PL-x no. 739/2011) was registered in 2011 and is still in the legislative process. According to the statement of related reasons, the purpose of the draft law is to define the specifics and limits of lobbying activities, the parties involved in such activities, the conditions for acquiring the quality of lobbyist, obligations regarding the registration and declaration of lobbying activities, as well as the relationship between lobbying issues with public authorities. At the same time, it is appreciated that the regulation of lobbying activities is imperatively necessary in Romania, among other reasons, and to draw a clear distinction between the legitimate mechanism for influencing legislative decisions (lobby) and illegitimate mechanisms, which are likely to create conflicts of interest and influence peddling.

Conclusions

We consider that the criminal policy of any state must be in relation to the existing objective social realities and look at the measures and means that must be adapted and applied in order to prevent and combat the criminal phenomenon for a given period. Between the general policy of the state and its criminal policy there must be a full concordance for the means of preventing and fighting crime to be fully effective. For this purpose, we considered that our intervention, through the proposed *de lege ferenda*, supports a current criminal policy and is consistent with European criminal policies.

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