DISTINCTION BETWEEN THE OFFENCE OF TRADING IN INFLUENCE AND THE OFFENCE OF DECEPTION/FRAUD

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Abstract

On the occasion of the research for the elaboration of this scientific paper, I plan to treat the constituent elements of the criminal offences of deception and trading in influence succinctly, in order to neatly lay off their defining characteristics.

Based on the above, I believe that the analysis of the two offences separately is highlighted for a better understanding, but also by the way of comparing their material elements.

Due to the similarities between the offence of deception and the offence of trading in influence in the "let it be believed" way, the literature has the obligation to provide the necessary clarifications in order to eliminate any existing doubt.

Keywords*: offence of trading in influence, fraud, distinction, offence of deception, similarities, differences.*

1. The offence of deception

1.1. Assessment of the constituent elements

The offense of deception is provided for in the Criminal Code, the Special Part in Title II (offenses against property), Chapter III (offenses against property by disregarding trust), being dedicated in Article 244.

It presents a standard variant, which incriminates as a crime "misleading a person by presenting as true a false deed, or as false a true deed, in order to obtain for himself/herself or for another an unjust patrimonial benefit and if damage is caused, is punishable by imprisonment from six months to three years"[1].

In the second paragraph of Article 244, the Romanian legislator states an aggravated variant of the offence of deception, enacting "deception committed by using false names or capacities or other fraudulent means is punishable by imprisonment from one to five years." If the fraudulent means constitute in itself an offense, the rules on concurrent offences shall apply"[2].

The criminal action in the case of the offence of deception is initiated *ex officio*, regardless of the criminal modality or the aggravated variants, as the Criminal Code does not make a distinction between the standard variant and the other more serious forms of the offence.

The norm of incrimination expressly provides that reconciliation removes criminal liability [Art. 244 (3)], the provisions regarding this institution provided in the provisions of Art. 215 of the previous criminal code being maintained.

By O.U.G. no. 18/2016, a new aggravated variant of the offence of deception was introduced for the hypothesis in which the commission of the crime results in particularly serious consequences (Art. 256[1] Criminal Code), the latter consisting in a material damage exceeding Ron 2,000,000 (Art. 183 Criminal Code).

Also, Article 248 of the Criminal Code expressly states that the attempt to commit the offense provided for in Article 244 of the Criminal Code is punishable, regardless of the form of the attempt (perfect, imperfect, relatively inappropriate), this being both possible and incriminated.

The special legal object of the offence of deception consists in the protection of social relations regarding the patrimony by disregarding trust.

The generic legal object consists in the protection of the social relations regarding the patrimony.

In the case of deception, the material object of the crime is any tangible movable property having an economic value[3] or immovable property.

1.1.1. The subjects of the offence

The active subject of the offence of deception can be any natural or legal person with criminal capacity, the criminal participation being possible in all its forms.

The passive subject of the crime can be any natural or legal person against whom the material elements of the offence of deception have been carried out.

As well stated in the specialised legal literature/ legal scholarship[4], in the event that there is no identity between the injured person and the misled person, the person misled in the legal relationship of conflict will appear as a secondary passive subject.

1.1.2. The objective side/point of view

The material element consists in misleading a person, both by an action and by omission, by presenting a false deed as true, or a true deed as false,

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[1] Art. 244 para. (1) Criminal Code, in *Criminal Code, Code of Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2020.

[2] Art. 244 para. (2) Criminal Code, in *Criminal Code, Code of Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2020.

[3] M. Udroiu, *Sinteze de drept penal, Partea specială*, C.H. Beck Publishing House, Bucharest, 2020, page 427.

[4] Ibidem.

capable of distorting objective reality and creating for the passive subject an erroneous perspective on it.

It was also rightly held in the specialised legal literature[5] that error must be invincible in the sense that distorted, erroneous or false representations of reality, which produce effects on the victim"s decision-making process[6] must not be such as to produce only a doubt in the psyche of the passive subject, but must be apt by reference both to the deceitful ways used by the perpetrator, as well as to the intellectual factor of the passive subject of the crime, to overcome any doubt of the latter.

If the actions or inactions of the perpetrator do not lead to the elimination of any doubt, and the passive subject, knowingly, diminishes his/her patrimony by enriching that of the perpetrator, I consider that we are not in the hypothesis in which criminal liability could be engaged for committing the offence of deception, but the civil offense if the conditions for making such a claim are met.

The immediate consequence of the offence of deception consists in diminishing the patrimony of the passive subject of the crime (main / secondary passive subject - as we have showed above) and the correlative enrichment of the perpetrator"s patrimony.

In other words, a damage is committed to the property of the passive subject person, a damage (*damnum emergens*) which is an essential condition of the offence of deception, which must exist at the time of the crime, while not the unrealized benefit (*lucrum cesans*), which is taken into account in the analysis of the civil action[7].

Causation is the cause-effect relationship between the material element and the immediate consequence, a relationship that must be proven.

1.1.3. The subjective side/point of view

The offence of deception can be committed only with direct intent qualified by purpose, the form of guilt not being expressly specified in the incrimination rule, this being deduced from the wording used by the legislator in the constitutive content of the crime.

In my opinion, the only form of guilt accepted by the conditions enacted in Article 244 of the Criminal Code is direct intent, because it is qualified by purpose, a purpose that cannot be called into question in the case of an indirect intent incidence by which the perpetrator predicts the result of his deed, ***although it does not seek to obtain it***, accepts the possibility of its outcome.

Therefore, the purpose provided in Article 244, as well as the intellectual factor of the perpetrator in achieving the criminal resolution are likely to limit the subjective side only under the conditions of direct intention, under the conditions of Art. 16 Criminal Code.

In other words, the perpetrator seeks to obtain an unfair patrimonial benefit for himself/herself or for another, by using fraudulent methods, the determining motive for committing the crime being irrelevant.

1.2. The aggravated variant

The aggravated variant of the offence of deception consists in the use of false names or capacities or other fraudulent means - Art. 244 (2) Criminal Code.

The fraudulent means are mentioned in the aggravated version, because they represent much stronger deceitful ways on the psyche of the injured person/party.

By the decision of the Constitutional Court no. 49/2019, the Court considered the phrase "***or of other fraudulent means***" from the content of the aggravated variant of the offence of deception satisfies the standard of clarity and predictability. The same held that "in the standard version of the crime, the concrete means and ways in which the active subject makes the passive subject believe the untruths presented, i.e. the former misleads or maintains the latter in error or produces the illusion of truth, can be very different, as for example: craftiness, slyness, schemes, ploys, ruses, mystifications, dissimulation, seductions, deceptions, tricks, intrigues, etc. Therefore, these means or ways of misleading the passive subject can only be in the form of simple lies, because if they are fraudulent, i.e. supported or strengthened by other means, such as names, capacities, documents, staging of deeds, etc., so that the lie is more convincing, the deed shall be included in the aggravated version.

The latter variant of the offence of deception differs from the standard variant only by the means by which the offence of deception was committed, the misleading of the passive subject, and which are likely to ensure the success of this action more easily.

The fact that in the text of Art. 244 (2) of the Criminal Code for the designation of such fraudulent means, the expression "fraudulent means" is used, giving as an example "false names or capacities", does not mean they are exhaustive.

The criticized legal provisions are clear and unequivocal, as the recipient of the criminal norm of incrimination has the possibility to foresee the consequences deriving from its non-observance, meaning that he can adapt his/her conduct accordingly. In this regard, the Constitutional Court has ruled in its jurisprudence (i.e., Decision no. 1 of 11 January 2012, published in the Official Gazette of Romania, Part I, no. 53 of 23 January 2012) that, in principle, any regulatory act must meet certain quality conditions, including predictability, which means that it must be sufficiently precise and clear to be applicable; thus, the sufficiently precise wording of the regulatory act allows the interested persons - who may, if necessary, seek the advice of a specialist - to foresee to a reasonable extent, in the circumstances of the case, the

[5] G. Fiandaca, E. Musco, Diritto penale. Parte speciale, I delitti contro il patrimonio, vol. II, Zanichelli Editore, 2015, page 186.
[6] M. Udroiu, Sinteze de drept penal, Partea specială, op. cit., page 429.
[7] Idem, page 436.

consequences that may result from a given act. Of course, it can be difficult to draft laws of total precision and a certain flexibility may even prove desirable, flexibility which must not affect the predictability of the law (see, in this regard, the Constitutional Court Decision No. 903 of 6 July 2010, published in the Official Gazette of Romania, Part I, No. 584 of 17 August 2010, and Decision of the Constitutional Court No. 743 of 2 June 2011, published in the Official Gazette of Romania, Part I, No. 579 of 16 August 2011). (...) Therefore, the argument that the addressees of the criticized legal provisions cannot adapt their conduct according to their content, because they are sufficiently clear and predictable cannot be accepted, in the way that the Court finds that the wording of the law is not likely to generate difficulties of interpretation, the term "fraudulent" not being susceptible to different interpretations. Moreover, it is often used in criminal law, without difficulties of interpretation, the legislator seeking to punish more severely the commission of an act of deception by means which themselves involve acts of bad faith, in violation of the law. (...) At the same time, by Decision no. 676 of November 6, 2018, published in the Official Gazette of Romania, Part I, no. 1,115 of December 28, 2018, paragraph 23, and following, and Decision no. 50 of February 14, 2002, published in the Official Gazette of Romania, Part I, no. 144 of February 25, 2002, the Constitutional Court ruled that an aggravated variant of the offence of deception is committed when the deception is committed through the use of false names or capacities or by other fraudulent means. The note in the second sentence of the paragraph, according to which, if the fraudulent means constitutes by itself a crime, the rules regarding the concurrent offences are applied, it does not contradict the provisions of Art. 4 item 1 of the Protocol no. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, provisions prohibiting the prosecution or punishment of a person who has previously been convicted or acquitted, by a final judgment, of the same acts. The fact that it is retained in all cases a qualified deception, including when the use of the fraudulent means constitutes in itself an offense, does not mean the double sanctioning of the offense. The fraudulent means used by the perpetrator can be a variety of illegal acts. Their mere existence, regardless of their number or gravity, gives the offence of deception a qualified character, being necessary, according to the will of the legislator, a harsher sanctioning of this category of offenders. The fact that the fraudulent means is in itself a crime cannot change the aggravating nature of the incrimination. To put on the same level the swindler who uses fraudulent means which are not crimes with the one who uses such means, but which in themselves constitute crimes, means to grant impunity to the latter for such crimes, which is inadmissible. The existence of plurality of offenses in this situation does not mean a plurality of sanctions established contrary to the provisions of Art. 4 paragraph 1 of Protocol no. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but the application of a principal punishment established in accordance with the rules on concurrent offences.[8]

By the phrase "false names" from the content of article 244 (2) Criminal Code, we mean the use of real or unreal names which do not belong to the perpetrator, for the purpose enacted in Art. 244 (1) Criminal Code.

By the phrase "false capacities", we mean the use of any capacities the perpetrator understands to use to reach the desired criminal resolution, a way that can attract criminal liability for other crimes as well (i.e. unlawful impersonation of a person or an authority), in the event that the capacity used implies the exercise of state authority and is accompanied or followed by the performance of an act related to it.

1.3. The punishability of attempt

Article 248 of the Criminal Code expressly establishes that the attempted offense provided for in Article 244 of the Criminal Code is punishable, regardless of the form of the attempt (perfect, imperfect, relatively inappropriate), which is both possible and incriminated.

However, the legislator does not distinguish between the standard variant and the aggravated form, which is why the attempt is possible for both forms.

1.4. Judicial practice

However, regarding the offence of deception - in the sense that the defendant A. obtained as a result of these fraudulent steps and manoeuvres a court decision inconsistent with the factual and legal reality, respectively the Civil Decision no. 1210 of September 26, 2011 of Suceava Tribunal, civil section, it cannot be legally established that a court was deceived.

The appellate court refers to the constant judicial practice in the matter, which shows that the legal object regulated by law for deception cannot be violated by such a concrete activity, as the judges cannot be harmed by committing the respective act (by way of example, Decision No. 449 / A / 2015 ruled by the High Court of Cassation and Justice or, the criminal sentence No. 51 of February 24, 2009 of the Bucharest Court of Appeal).

Therefore, the false presentation of certain factual or legal aspects before a judicial authority falls outside the scope of these relations protected by the criminalisation of deception, and may be protected in the strict framework of crimes against the administration of justice, which has not been called into question. The use of forged documents in court is an activity subsumed to the offence of forgery or using a false instrument/ forgery of administrative documents and trafficking therein and not to the offence of deception.

[8] Decision of the Romanian Constitutional Court no. 49/2019.

Consequently, the act is not provided by the criminal law, as it cannot be committed with respect to the members of the court panel, whose property was not affected by committing this act of alleged deception *(High Court of Cassation and Justice, criminal section, decision no. 407/23.11.2017, www.scj.ro)*.

The controversial fact in question is the real or fictitious nature of the legal aid contracts concluded, as well as the evidence proving the payment of fees, the defendants claiming, contrary to the accusation, that they certify real operations, stating that the purpose was to determine the civil party to respect the rights of the defendant A. in the future over the real estate in question, which constitutes in their opinion an abuse of right/ abusus juris, and not the offence of deception.

Prior to any analysis of the fictitious or simulated nature of the mentioned documents, the High Court of Cassation and Justice finds that the facts, as described in practice, do not realize the typicality of the offence of deception, a crime against property, the specificity of which is that, by deceitful manoeuvres of the perpetrator or by resorting to other fraudulent elements, the victim of the misleading act engages in prejudicial conduct.

The essence of this crime is that the perpetrator deceives, disregards the trust given in relations with the patrimonial content, or, the deed underlying the accusations brought against the defendants consists in the fact that they used, by filing in enforcement files, contracts of legal assistance and receipts which do not certify real operations, the civil party being enforced even for amounts that represent allegedly fictitious legal fees.

The false presentation of certain factual or legal aspects before a judicial authority falls outside the scope of these relations protected by the incrimination of deception (Art. 244, Title II), but is protected in other crimes such as forgery (Title VI), against the administration of justice (Title IV) etc. Thus, the "misleading" of an authority brings into question other types of disregarded social relations and other incidental incriminations, those that protect the authority, such as false statements, false testimony, false identity, presentation to the customs authority of forged documents etc.

The use of forged documents in an enforcement case which is subject of a levy of execution/enforcement could constitute an act provided by the criminal law subsumed to the offence of forgery and / or using a false instrument, and not to the offence of deception. The conclusion results from the fact that the legal object of the offence of deception is the protection of patrimonial social relations based on trust, while the legal object of the offence of forgery is different and refers to the protection of social relations in relation to the value of public trust granted to certain categories of documents. In the same sense, in the practice of the supreme court, it was ruled that the lawyer"s act to submit to the court, in a trial, forged receipts that unrealistically certify the collection of sums of money as a fee, in order to get the opposing party ordered by the court to pay legal expenses, does not meet the constitutive elements of the attempt at the offence of deception, prov. by Art. 32 Criminal Code in ref. to Art. 244 (1) and 2 of the Criminal Code, but only the constituent elements of the criminal offence of forgery of documents under private signature, since the offence of deception constitutes a crime against property by disregarding trust in relations with patrimonial content, and misleading an authority is not included in the sphere of the relations protected by the criminalisation of deception (decision no. 449/A of December 8, 2015, published on the website www.scj.ro).

Moreover, in the case of the offence of deception, the property constituting the unjust material benefit leaves the possession or detention of the passive subject and falls within the scope of the perpetrator as a result of misleading the former, who is thus forced to take a damaging property order. Or, in this case, the damage does not appear as a direct effect of the deception, it does not come from an act of will of the bailiff/enforcement officer or the civil party - debtor in the enforcement procedure, but from the abusive manner in which the defendants exercised their rights in this phase of the civil lawsuit.

Thus, the defendant A. submitted in the execution files receipts attesting the allegedly uncollected fees for the execution to bear on their payment as execution expenses. Or, according to the provisions of Art. 6 of Law 188/2000 "Bailiffs cannot refuse to perform an act given in their competence except in the cases and under the conditions provided by law.", provisions which corroborated with those prov. by Art. 56 of the same regulatory act, according to which the refusal to fulfil the attributions provided in Art. 7 (b) –(i) shall be motivated, if the parties insist in their request for fulfilment thereof, it results that the enforcement of an enforcement order, attribution prov. for in Art. 7 (a) cannot be the object of a refusal.

In accordance with Art. 622 (3) Code of Civil Procedure, the enforcement takes place until the realisation of the right recognised by the enforcement order, as well as of the enforcement expenses, the lawyer"s fee in the enforcement phase, being one of the expenses expressly listed by Art. 669 (3) Code of Civil Procedure. Also, Art. 669 (4) Code of Civil Procedure states that:

"The sums due to be paid shall be determined by the bailiff, in conclusion, on the basis of the evidence filed by the interested party, in accordance with the law. Such amounts may be censored by the enforcement court, by way of the enforcement appeal filed by the interested party and taking into account the evidence administered by the same ... ".

As such, the act, as described in the document instituting the proceedings, which is the object of the trial as defined by Art. 371 Code of Criminal procedure, is not provided by the criminal law. The conduct of the defendant A. could be subsumed to the

offence of forgery of documents under private signature, but the analysis of the factual and legal elements regarding the imposition of criminal liability for this exceeds the object of the trial, in the context in which the accusation was formulated explicitly only in terms of misleading through the use of fraudulent means, without a separate accusation in terms of forgery of documents under private signature, used to produce a legal consequence. Or, art. 244 (2) final thesis Criminal Code expressly mentions:

"If the fraudulent means is in itself a criminal offense, the rules on concurrent offences shall apply", the offence of forgery being an autonomous offence for which the prosecutor did not exercise the criminal action in this case, so that any other analysis regarding the real or fictitious character of those recorded in the documents submitted in the enforcement procedure exceeds the object of the trial and would necessarily imply a complete, substantive change of the factual situation, which would violate the right to defence, a component of the right to a fair trial. The principle of separation of judicial functions prohibits the court from determining the possible criminal act committed in a manner that modifies the object of the trial by a change of the legal classification in question from the offence of deception to the offence of forgery of documents under private signature *(High Court of Cassation and Justice, criminal section, decision no. 156/2018, www.scj.ro).*

2. The offence of trading in influence

2.1. Assessment of the constituent elements

The offence of trading in influence is found in Title V (offenses of corruption and crimes committed while in office), Chapter I (offenses of corruption), which is regulated by Article 291 of the Criminal Code.

The legal object of trading in influence offence consists in the protection of social relations related to the development of service relations in good faith.

In other words, the offence of trading in influence is a guarantee offered by the legislator to subjects of law, a guarantee likely to protect social relations of office, in the sense that no one is above the law, we are all equal before it and no person can abuse for his/her own interest to the detriment of the general interest.

These guarantees are offered even by the Fundamental Law of the state, being consolidated by rendering punishable as criminal offences some objective situations capable of violating the constitutional principles.

Therefore, the duties of service must be exercised in good faith, for the purpose and the limits for which they were created, without prejudice to the social values protected by criminal law.

We are in the presence of a crime that lacks a material object, an aspect resulting from the analysis of the provisions of Art. 291 Criminal Code.

I consider that the offence of trading in influence is *not* an indirect form of discrediting the officials or the persons provided in Art. 308 of the Criminal Code, as specified in the specialised legal literature[9], but a substantial remedy and a guarantee offered by the legislator, for the purpose of the good development of labour relations, under the conditions of Art. 308 Criminal Code.

2.1.1. The subjects of the offence

The active subject of the offence of trading in influence can be any natural or legal person who has criminal capacity, who can have, has or is believed to have influence over an assimilated or private public official.

Criminal participation is possible in all its forms: co-authorship, complicity, or instigation.

As is well stated in the literature[10], it is possible for a person to be an accomplice to both the offence of trading in influence and the offence of buying influence, if he/she supports the acts of the influence trader/ peddler and the acts of the influence buyer.

The main passive subject of the offence of trading in influence is represented by the public authority, public institution, the institution or the public / private benefit corporation in which the public official operates and exercises his/her duties, the secondary passive subject being the one on which it is claimed the influence will be trafficked.

2.1.2. The objective side

The material element of the offence of trading in influence consists only in an action which cannot be committed by omission, and the material element can be achieved by claiming, receiving or accepting the promise of money, goods or other benefits, directly or indirectly, for oneself or for another, claiming to have influence, or suggesting that he/she has influence over a public official, promising to cause the latter to perform, not to perform, to hasten or delay the performance of an act falling within his/her service, or perform an act contrary to such duties.

These modalities listed above (claim, receipt or acceptance) represent the only execution possibilities of the material element of trading in influence.

In the event that the offence is committed in other ways than those mentioned above, the conditions provided in legal texts are not met, the deed not being typical, it will not constitute a crime.

Similar to the offence of bribery, the term payments or other benefits has the classic meaning corresponding to the crimes of corruption (both bribery, and trading in / buying influence).

[9] S. Bogdan, D.A. Șerban, Drept penal, partea specială, infracțiuni contra patrimoniului, contra autorității, de corupție, de serviciu, de fals și contra ordinii și liniștii publice, Universul Juridic Publishing House, Cluj-Napoca, mai 2020, page 302.

[10] M. Udroiu, Sinteze de drept penal, Partea specială, op. cit., page 719.

An intriguing problem arises in the specialized legal literature[11] in the sense that some authors consider a doubt in the hypothesis of obtaining benefits of a sexual nature.

In my opinion, the Romanian legislator in Article 291 of the Criminal Code by the phrase "other benefits", does not limit in any way the possibility of the perpetrators to obtain any type of benefits, including in the previously mentioned situation.

I am of the opinion that the intention of the legislator is to include (by the phrase "payments or other benefits") any type of "reward" of the influence trader by the buyer, and no limits are established to exclude sexual benefits, this being one among the particular ways of realising the material element.

In this regard, the judicial practice agrees with this approach, the courts noted that we are discussing trading in influence in the event that the defendant, a university professor, claimed sexual favours to traffic his influence in relation to a colleague, in order to facilitate the passing of exam[12].

The Constitutional Court by Decision no. 650/2018 (Official Gazette no. 97 of February 7, 2019) considered that "By conditioning the material element of the crime by the material benefits claimed / received / accepted, an impermissible restriction of the conditions for criminalising trading in influence is found, as long as the intangible - non-patrimonial benefits are excluded. It leads to the evasion from the sphere of incrimination of an act of corruption, which is contrary to Art. 1 (3) of the Constitution".

It does not present a relevant aspect if the goods are actually handed over, the criminal liability not being conditioned in this sense by the incrimination norm.

In the event the influence peddler who is a public official and has powers in connection with the act for which the fulfilment, non-fulfilment, urgency, delay trades the influence, concurrence of bribery and trading in influence shall be retained[13].

Also, in the event the influence trader, in order to reach the desired result, offers payments or other undue benefits to the public official for the fulfilment, non-fulfilment, urgency, delay of the duties, or for the fulfilment of an contrary act, concurrence of bribery and trading in influence shall be retained.

The immediate consequence of the offence of trading in influence is represented by the state of danger generated by the perpetrators (the influence buyer and peddler), a state of danger that may endanger the good development of the service relations in which operates the one over whom the influence is trafficked.

The causal link results *ex re*, from the materiality of the deed, this being an offense of abstract danger.

2.1.3. The subjective side

The offence of trading in influence can be committed only with purpose qualified direct intent, the form of guilt not being explicitly specified in the criminalisation rule, but being deduced from the constitutive content of the crime.

In my opinion, the only form of guilt, as I have shown in the case of the offence of deception, accepted by the conditions enacted in Article 291 of the Criminal Code, is direct intention, because it is qualified by purpose, a purpose that cannot be called into question in the case of the incidence of an indirect intention by which the perpetrator foresees the result of his deed, ***although he does not pursue it,*** accepts the possibility of its occurence.

Therefore, the purpose provided for in Article 291, as well as the intellectual factor of the perpetrator in carrying out the criminal resolution are likely to limit the subjective side only to the conditions of direct intent.

In other words, the perpetrator seeks the trading of influence over a public official so that the latter fulfils, does not fulfil, speeds up or delays the performance of an act part of his/her duties or performs an act contrary to such duties.

2.2. The aggravated variant

In the event the offence is committed by a person exercising a function of public dignity, a judge, prosecutor, criminal investigation body or has responsibilities for finding or sanctioning contraventions, or based on an arbitration agreement are called to rule with regard to a dispute that is given to them for settlement by the parties to this agreement, regardless of whether the arbitration procedure is carried out under Romanian law or under another law (Art. 293 Criminal Code, Art. 7 of Law no. 78/2000).

For the aggravated variant, the punishment is imprisonment from two years and eight months to nine years and four months.

2.3. The mitigated variant

The Criminal Code establishes a mitigated variant of the offence of trading in influence, incriminating the typical act that is committed in connection with private officials, i.e. persons who exercise, permanently or temporarily, with or without remuneration, a task of any kind in the service of a natural person, as provided in Art. 175 (2) Criminal Code (natural person exercising a service of public interest for which he/she

[11] S. Bogdan, D.A. Șerban, Drept penal, partea specială, infracțiuni contra patrimoniului, contra autorității, de corupție, de serviciu, de fals și contra ordinii și liniștii publice, op. cit., page 303.

[12] The word "benefit" is defined as a moral or material gain. Judicial practice has also ruled in this regard, considering that, for example, sexual favours (non-pecuniary benefits) can be considered undue benefits, the scope of undue benefits that can be obtained by the perpetrator is very wide, including not only material benefits, of patrimonial nature, such as money, goods, or material advantages, but also the so-called moral advantages, so that sexual favours may also be included in the scope of the notion of other undue benefits. (C.A. Timișoara, dec. no. 550/2016; Trib. Mehedinți, Sent. Pen. 117/2016; CAB, Dec. Pen. 925/2017; ICCJ, Dec. Pen. 118/A/2019).

[13] M. Udroiu, Sinteze de drept penal, Partea specială, op. cit., page 718.

has been invested by public authorities or who is subject to their control or supervision regarding the performance of such public service) or within any legal person[14].

For the mitigated option, the punishment is imprisonment from one year and four months to four years and eight months.

2.4. The punishability of attempt

In the situation of the offence of trading in influence, the attempt is not incriminated, this being assimilated by law to the consumed act (the crime involving anticipated consumption).

2.5. Judicial practice

The existence of the offence of trading in influence does not imply a real influence of the defendant over an official in order to determine the latter to do or not to do an act that falls within his/her duties, but it is necessary that the influence the perpetrator has or lets be believed that has, regards an determined official or indicated generically by the nature of the influence to be exercised, who has attributions in fulfilling the act for which the perpetrator received or claimed payment or other benefits. Consequently, there must be a causal link between the receipt of such benefits and the promise to exercise influence, whether claimed or actual. If the receipt of goods is made prior to the request for intervention, unrelated to the requested intervention, the conduct of the accused, no matter how immoral it may be, does not fall within the objective side of the offence of trading in influence .

The offence of trading in influence is consumed by committing any of the typical actions provided alternatively in the rule of incrimination (receiving or claiming payments or other benefits or accepting promises, gifts, committed by a person who has influence or suggests that has influence over an official, in order to determine the latter to do or not to do an act that falls within his/her duties.

Although it is irrelevant whether the claim for benefit has been satisfied, nor whether the acceptance of the promise of benefits has been followed by their provision, for the existence of the criminal offense it is necessary to prove from the objective point of view:

1. the act which the defendant was to determine by his/her influence;

2. the receipt or acceptance of benefits in connection with the exercise of influence;

3. the connection between the exercise of the claimed or real influence and the claim / receipt / acceptance of the benefits

From the subjective point of view, it is necessary to prove the facts which lead to the conclusion that the accused person sought to receive benefits by having or suggesting that he/she has influence over an official so that the latter would exercise his/her duties in a certain way.

If the receipt or acceptance of benefits takes place prior to the request for the exercise of influence, the evidence must indicate the anticipation of the invocation of influence, in a certain case, by the defendant. The guilt of the defendant is proved in relation to his own conduct. The guilt of the defendant cannot be inferred exclusively from the reason for which the injured party gave the respective benefits, unless there is an act of conduct of the defendant confirming that the injured party was entitled to believe that the defendant would exercise his/her influence. The receipt of the benefits the injured party gives for a possible future, general, indeterminate protection (if necessary), does not fall within the objective side of the offence of trading in influence .

In conclusion, although it is not relevant whether or not the intervention took place, or whether it is real or not, or when it was carried out in relation to the time when one of the actions constituting the material element of the crime was committed, for the existence of the objective side of trading in influence. it is necessary for the evidence to indicate the influence that the defendant had or allowed to be believed to have on an official and what is the act that falls within the duties of an official that the defendant was to determine to do or not to do, and from the subjective point of view, the facts which lead to the conclusion that the accused person sought to receive benefits by having or suggesting that he/she has influence over an official in order for the latter to exercise his/her duties in a certain way. Invoking influence, directly or indirectly, must be decisive for receiving the benefits *(High Court of Cassation and Justice, criminal section, decision no. 676/2013, www.scj.ro)*.

From the perspective of the legality of the judgment, the appellate court finds that, compared to the factual situation retained by the courts, based on the evidence, the deed of the defendant who, during June 2010, claimed from the witness-complainant S.I.A. the amount of Eur 50,000, representing a percentage of the value of some works, to ensure the latter, through the influence he has on some officials in the administrative apparatus, would win tenders worth Eur 5 million, and from the witness-whistleblower M.P. the amount of Eur 100,000, before signing a contract, assuring the whistleblower of winning the tender for the award of works worth RON 50 million, as he would have known influential people from the Ministry of Agriculture, where he claimed to work; on November 30, 2010, he claimed from the witness- whistleblower C.P. the amount of Eur 50,000, for the intervention before a court-appointed administrator in order for the whistleblower to win a tender having as object real estate located within the municipality of Bucharest; on December 7, 2010, he claimed from the said K.L. 3% of the value of a work of about USD 100 million, as

[14] M. Udroiu, Sinteze de drept penal, Partea specială, op. cit., page 738.

advisory fee (representing, in fact, part of the price of trading in influence) and the amount of Eur 100,000 cash, claiming to have influence over officials at the Ministry of Foreign Affairs, respectively a person who works in this ministry in the Libyan area, in order to determine the award of the works to the company of the Turkish citizen, meets the constituent elements of the offences of trading in influence *(High Court of Cassation and Justice, criminal section, decision no. 1004/2014, www.scj.ro)*.

3. Distinction between the offence of trading in influence and the offence of deception. Conclusions

Starting from the legal object of the two crimes, we can observe that the offence of trading in influence has as LO the social relations regarding the good development of service relations, and the offence of deception the protection of the social relations regarding the property.

Since their regulation, the legislator has been considering the separation of offences, even if they involve similar issues in some cases, in crimes against property (deception/fraud/swindling) and crimes of corruption and crimes committed while in office (trading in influence).

Apparently, there is similarity between the two offences, which consists in misleading a person in the normative version of the material element of the offence of trading in influence by the phrase „ ... or suggests that he/she has influence over a public official" given that the other normative variant of the offence of trading in influence assumes that the perpetrator has influence, especially when the buyer of influence has a criminal initiative.

In the event that he/she "lets to be believed", the perpetrator is the one who proposes to the buyer of influence to exercise his/her influence over a public official for the purpose provided in Article 291 of the Criminal Code.

Therefore, the influence peddler may be in two situations:

1. the situation in which the perpetrator *has* influence over the public official, influence capable of producing legal consequences;

2. the situation in which the author *has no* influence over the public official, but "let other believe that he/she has influence".

However, if the buyer of influence agrees to give, promise, offer money, goods or other benefits for the purpose of trading in influence, there is no question of retaining the offence of deception "by misleading", as the buyer buys the influence from the influence trader and diminishes his/her patrimony consciously and voluntarily, his consent not being vitiated, the purpose pursued by the two being different, and the consequences produced being of a criminal nature both for the buyer and for the peddler.

Even if the influence trader does not have influence over the public official, but "lets it be believed so", the buyer of influence has a criminal attitude unlike the person injured by the offence of deception.

From the above, it results that the person against whom the offence of deception is committed is innocent, being a person injured by the commission against him/her of an act provided for by the criminal law.

In the case of the offence of trading in influence, both the perpetrator and the one buying influence, has a criminal character, the purpose of the two being the purchase-trading in influence.

In concreto, the influence buyer appeals to a person – the influence trader - who has, may have or lets it be believed to have influence over a public official in order to distort the latter"s employment relationships.

Thus, both attitudes, of the buyer and of the peddler, are criminal.

In comparison to the offence of deception, the one on whom the material element of the crime is committed is an innocent person, the perpetrator distorting reality by deceitful methods, in order to obtain an unfair patrimonial benefit for himself or for another.

The essence of the offence of deception is for the perpetrator to exercise acts of misleading on the injured person, and for the passive subject to be induced an invincible error in relation to which he/she fulfils the essential features of an injured person by committing an act against him, provided for by criminal law.

If an attempt is made to mislead the buyer of influence in the regulatory version of "letting it be believed that he/she has influence", and the buyer is not convinced of the possibility of the influence trader, refusing the offer of trading in influence, apparently committing the offence of deception may be called into question, but only in an attempted form.

An important criterion is found even in the provisions of Article 291, second thesis Criminal Code "and who promises to determine him/her", a criterion which, if fulfilled, one no longer speak of an attempt at the offence of deception, but of a consumed offence of trading in influence.

The rule of 291 of the Criminal Code penalises the behaviour of a person who, in order to unjustly acquire money, goods or other benefits, commits acts of corruption so that, whenever it is found that a possible misleading of the potential buyer of influence who does not agrees to buy the influence, since the action is placed in relation to the duties of some public officials, is always retained the offence of trading in influence, this being considered a priority ("special") rule over the rule regulated in Article 244 Criminal Code which incriminates acts of misleading unrelated to the duties of public officials.

Therefore, whenever it is a question of misleading a potential buyer of influence by promising the

intervention of the peddler on a public official, the offence of trading in influence will be unequivocally held, and not that of deception.

As we have shown in the analysis of the constituent elements of crimes, they are fundamentally different, in the sense that the legislator understood to place them in different spheres of protection, with distinct purposes, as well as attitudes of participants and criminal resolutions.

In the event the influence peddler misleads the buyer through the normative method "lets it be believed", but the peddler does not promise to intervene before the public official, and the benefits are not remitted to him, we are only in the presence of an attempted form of deception.

In conclusion, the two crimes have similar aspects, but the constituent contents differ and delimit the material elements in a natural and simple way, these delimitations being likely to differentiate in a direct way the offence of trading in influence from the offence of deception.

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