

UNDERCOVER PARTNER

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Abstract

The undercover partner takes part in the process of providing the investigating bodies with information. This institution carries out activities similar to undercover investigator. These both represent a proactive investigating instrument used by criminal authorities to obtain better results concerning the fight against criminality. Under the cover another identity, they carefully search for crimes or favorable circumstances for commitment of others new.

Keywords: *partner, investigator, investigation, prosecutor, judge.*

1. Introduction

The institution of undercover partners was introduced in the new Criminal Procedure Code by Law no 281/2003, with the purpose to fight against criminality

Previously, several acts have been adopted with provisions on using undercover investigators (for certain cases, we use “undercover policeman”), such as Law no 143/2000 on fight against drugs trafficking and illegal drug use, which by its art. 21 stipulates that: “Prosecutor can authorize the use of undercover investigators to discover facts, to identify authors and o obtain evidence in cases where there are well grounded reasons to consider that a crime related to drugs trafficking or illegal drugs use has been committed.”

Law no 218/2002 on organizing and functioning of Romanian Police sets in its art. 33 that “in order to prevent and fight corruption, trans-border criminality, human trafficking, terrorism, drug trafficking, money laundry, IT crimes and organized crime, on the demand of the Romanian General Police Inspectorate, having the approval of the Prosecutor’s Office of the Court of Appeal, the Romanian Police can make use of undercover informers in order to obtain information for a trial. The Prosecutor’s authorization shall be issued by a Decree, for a maximum 60 day time which can be extended, provided there are well grounded reasons; each time, the extension cannot overpass 60 days. All these authorizations shall be confidential and not be made public”.

Law no 39/2003 on prevention and fight against organized crime stipulates in its art 17, that “in case there are well grounded reasons that a crime has been committed by one or several members of an organized group, that cannot be proved or whose authors cannot be identified by other means, undercover policemen can be used to gather information and identify facts and authors”. These policemen are employees of the Ministry of Home Affairs.

According to art 22 of Law n 678/2001 on fight against traffic with human beings, undercover investigator can be use to gather information necessary for the beginning of the criminal prosecution.

2. Undercover partner

According to art 138 paragraph 10 of the Criminal Procedure Code, undercover investigators are persons using false identity in order to obtain information and data about a committed crime. The provisions on undercover investigators provided both by the Criminal Procedure Code and by special laws, allow us to have different approaches of this institution.

According to art 141 paragraph 1, letter a of Criminal Procedure Code, undercover investigators are used when “there is reasoned suspicion about the preparation and about a committed crime against national security provided by the Criminal code and other special laws, such as crimes involving drug trafficking, arms trafficking, human being trafficking, terrorism or assimilated to them, such as financing terrorism, money laundry, counterfeiting money or other values, electronic payment instruments, blackmail, deprivation of liberty, tax evasion, in case of crimes of corruption, crimes assimilated to those of corruption, crimes against financial interest of European Union, crimes that are committed by means of IT or electronic communication devices or in case of other crimes provided by laws with punishment by prison of 7 years or more or if there is a reasoned suspicion about a person being involved in criminal activities related to the above mentioned crimes”.

Using false identity, pursuant to law, undercover investigator can gather information on the crime, on the persons suspected of committing or having committed a crime. Their actions cannot be considered as constraints or encouragement to committing or continuing to commit crimes.

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Undercover investigators are special policemen assigned to do this with clear purpose of gathering information.

We considered necessary to make mention all these legal acts which regulate the institution of undercover investigator as the undercover partner we analyze in this work does the same actions as the undercover investigator. The law doesn't define the partner but we can adopt the definition of the collaborator of justice, as in the Recommendation no 9/2005 of the Committee of Ministers of the member states of EU on protection of witnesses and collaborators of justice¹.

Thus, a collaborator of justice is the person who faces criminal charges or has been convicted of taking part in a criminal association or other criminal organization of any kind or in offences of organized crime, but who agree to cooperate with but who agree to cooperate with criminal justice authorities, particularly by testifying about a criminal association or organization, or about any offence related to it or other serious crimes.

The undercover partner is the person assigned to obtain information just like the undercover investigator with the purpose of gathering information about crimes and their authors.

As the specialized literature doesn't offer a definition for undercover partner, many times it was described as an undercover investigator but to use it this "to cover also the activity carried out by a person who is not employee of the police, is illegal"².

Others³ think that undercover partner is the person who "within the limits of permission given by the Prosecutor carries out certain actions to discover crimes, to identify authors and to obtain useful data to establish the existence of a crime and start the process of holding authors criminally liable".

Law no 143/2000⁴ on prevention and fight of illegal drugs trafficking and use, with its article 22, stipulates the employment of partners, meaning specially trained policemen acting as undercover investigators, and their collaborators who can obtain drugs, essential chemical substances, pursuant the previous authorization of Prosecutor, in order to discover criminal activities and identify criminals.

Thus, a collaborator of the undercover investigator can be a police informer or a person investigated in another case, who decided to cooperate with judicial bodies in order to discover crimes and identify their authors.

A more extended definition would say that any person, no matter if he is member of not of a police

or informative structure, who helps during the actions of discovery, research, investigation and bring to justice those who committed the crime. Thus, collaborators can be both informers and persons accused for having committed crimes, but also persons who testify about crimes which are not related with them in any way.

Provisions of art 148 paragraph 5 of Law no 143/2000 state that undercover investigators obtain information, based on the Prosecutor's authorization who is the beneficiary of this information. The prosecutor surveillance and carries out the criminal prosecution.

For this, undercover investigators draw up minutes.

The fact that the undercover partner is allowed to get drugs, chemical substances and precursors, is possible due to the Prosecutor's permission, which is also mentioned in a minutes, the only document considered evidence.

The partner can be heard but only as witness with protected identity, as specified by law at art 125-130 of Criminal Procedure Code.

The importance of the activity done by the undercover investigator and partner led to the necessity of United Nations Convention against Transnational Organized Crime: each state shall take appropriate measures in order to encourage persons who participate or who have participated in organized criminal groups to supply information useful to competent authorities for investigative and evidentiary purposes on such matters as: identity, nature, composition, structure, location or activity of these groups; links including international links, with other organized criminal groups; offences that organized criminal groups have committed or may commit; to provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime⁵.

Each state shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in investigation or prosecution of an offence or organized crime.

These persons shall be granted protection against possible threats or acts of violence or intimidation. These references concerning the partner institution

Are provided by art 15 and art 16 of Law no 143/2000 on persons who have committed an illegal substances offence and who decided to cooperate

¹ Recommendation no 9/2005 of the Committee of Ministers on witness protection and collaborators of justice, adopted at the 924th meeting of the Ministers Deputies, published in Romanian on <https://wcd.coe.int/ViewDoc.jsp?id=1597817&Site=COE>.

² Pușcașu V., Undercover agents, *illegal challenge of the offence. Opinions (I)*. "Criminal Law Notebooks" no 2/2010, p. 32.

³ Dascălu I. et al, *Drugs Criminal Organization*, Publishing House Sitech, Craiova, 2008, p. 337.

⁴ Law no 143/2000 on fight against drug trafficking and illegal use, published in the Romania Official Gazette" Part I, n 362 of 3rd of August 2000.

⁵ Pașca Ioana-Celina, *Aspects on the use of undercover collaborators in Romanian criminal judgment. Their institution in the new criminal law*, Faculty of Law and Administrative Sciences, University of West of Timișoara.

with judicial authorities to identify and punish others who committed offences involving drugs trafficking. These collaborators, who committed one of the offences provided by art 2 – 10 of this law, who have cooperated and informed about other offenders, are to have their punishment mitigated by half.

On the other hand, the law stipulates also a case where the punishment is no longer enforced for the person who, before the beginning of the prosecution informs the authorities about his participation in a group or in an agreement to commit one of the offences provided by art 2-10, allowing identifying and bringing to justice of other participants⁶.

Such benefits are also mentioned by law no 39/2003 on prevention and fight the organized crime⁷.

Art 9 paragraph 2 of this law states half of the legal punishment for the person who committed one of the crimes provided by art 7 paragraph 1 or 3 of the same law and who, during criminal prosecution or judgment, informs and facilitates the identification and the bringing to justice of one or several members of a criminal group.

This category of collaborators is not regulated by Criminal Procedure Code or by any other law; that's why we think that any person can become a collaborator. This does the same things as the undercover investigator, without being a police officer or agent and therefore we can ask about the difference between them.

We also remark that the lawmaker didn't state anything about the conditions or limits of the partnership or its duration

Compared to the informer who is a person who is not involved in the criminal activity and who informs about facts he accidentally found out, the collaborator is a well known in these criminal groups and often collaborates with judicial authorities.

According to provisions of art 148 paragraph 5 of the Criminal Procedure Code, only investigators can carry out investigating actions. Thus, thinking that collaborator enjoys the same authorization as the investigators is an extended interpretation of the law.

Assignment of an investigator and the choice of a collaborator imply necessary measures of recruiting, selection and training.

Both of them must be familiar with the world of criminality, its modus operandi, its slang; they must be members of the action zone, have the same origin or, at least, the same education like other criminals; they must have self esteem, be able to assess correctly reality and have good memory and patience.

Many expressed their opinions⁸ about the fact that the papers the collaborators draw up are absolutely null for the criminal investigation process, according to art 102 paragraph 2 of the Criminal Procedure Code related to art 280 Criminal Procedure Code.

Therefore, the only possibility to contribute to unveil the facts and identify the author is the hearing a witness according to art 114 of the Criminal Procedure Code.

Jurisprudence often encounters situations where a person commits offences and draw up several reports in order to obtain several reductions of the punishments.

The High Court of Cassation and Justice motivated a rejection of the appeal made by a defendant, pursuant to art 19 of Law no 682/2002 and art 16 of Law no 143/2000, stating that: "the person who committed one of the crimes provided by art 2-10 of Law no 143/2000, and who during the criminal prosecuting informs and helps to identify and bring to justice other offenders related to drug crimes, enjoying the mitigation by half of the punishment limits according to art 16 of Law no 143/2000, cannot be granted a new mitigation by half of the punishment as the provisions have the same content"⁹.

As using collaborators is a common practice, sometimes their activity exceeds their competences and become similar to the provocateur.

There are opinions¹⁰ according to which "in order to enter under the incidence of art 101 Criminal Procedure Code, the provocative activity of a crime must have clear form of instigation to initiate in a person's mind the idea to commit an offence; it cannot be represented by requests, deception, innuendos, false promises, threats, blackmail, harassment or repeated demand based on mutual sympathy."

The High Court of Cassation and Justice decided that¹¹ "there is no violation of art 101 paragraph 3 of Criminal Procedure Code, as it is not a instigation to commit offences, given the fact that the defendant involvement in drug trafficking was known both by the collaborator and the defendant. In other words, the defendant already had a tendency to commit such offences (taking into account that at that time he was already brought to justice for similar actions); the fact that the defendant committed the offence after he had been contacted by co defendant, who had talked with collaborator on buying a drug quantity, doesn't confer the later a provocateur feature as it is provided by art 101 of Criminal

⁶ Art. 15 of Law no 143/2000 on fight against drug trafficking and illegal use.

⁷ Law no 39/2003 on prevention and fight against organized criminality, published in the Official Gazette. Part I no 50 of 29th of January 2003.

⁸ Heghelegiu L., *Undercover investigators*, Magazine of Criminal Law no2/2005, p. 119.

⁹ High Court of Cassation and Justice, Criminal Section, *Decision no 545/2004*, published in Magazine of Criminal Law no 2/2005, p.155.

¹⁰ Florian C., *Undercover investigators*, Magazine of Criminal Law no 2/2007, p. 133.

¹¹ High Court of Cassation and Justice, Criminal Section, *Decision no 3547/4th of November 2008*.

Procedure Code and sanctioned by the European Court of Human right in its jurisprudence”.

That is the reason for which there should be no confusion between the activities of determining, of inciting, if there is no clear evidence of intention, and those of creating some opportunities or some favorable conditions to carry out an illegal action, conceived and continued on his own.

Sometimes, it the collaborator who incites, determines or pushes, even by material cooperation, to commit a crime so that afterwards he should benefit from a reduction of the punishment, as set by law.

That is why we strongly think some clear regulations to be adopted to state the circumstances where we have instigation and to forbid these practices as the content of art 101 paragraph 3 of Criminal Procedure Code stipulates the elimination of the illegal evidence.

The only documents that regulate the institution of the collaborator are the special laws. The competences of the undercover collaborator were considered similar to those of the undercover investigator.

The tasks of the undercover partner have been set by the extensive interpretation of the definition of the definition of the undercover investigator.

Thus, the Criminal Procedure Code decided to make use of undercover investigators and therefore of collaborators only when “the measure is necessary and proportionate with limitation of fundamental rights and freedoms, given the characteristics of the cause, the importance of information and of evidence¹²”.

Collaborator can be heard as witness as it is set by art 125-130 of Criminal Procedure Code, defining a new category of witness, the threatened one who receives additional protection, according to art 126-129 of Criminal Procedure Code.

3. Conclusions

Using the undercover investigator and partner helps to obtain information concerning crimes. The undercover investigator has to report to the

Prosecutor in charge with the case periodical reports on his activity. Such reports are confidential and they are drawn up by investigators based on the data obtained, together with all the details of the activities carried out by them, all focused on serious offences, committed or which are being prepared to be committed, and on their authors.

The partner obtains data and information, sometimes even pieces of evidence, that he gives to the undercover investigator. This one writes the minutes about the actions undertaken by him and by the partner.

Both of them can be heard as witnesses during a trial, according to art 125 of the Criminal Procedure Code, without being asked about their person.

Authorities want to keep their identity confidential, in order to offer protection to them and their families and at the same time to continue their activity inside criminal groups and protect the methods.

When there is a risk concerning the hearing of these persons during the trial, the prosecutor can inform the judge for rights and freedoms on anticipated hearing according art 308 and 352 of the Criminal Procedure Code. If, afterwards, during the trial, this is no longer possible, and if they have already testified before the prosecuting bodies or the judge for rights and freedoms, pursuant to art 308 of the Criminal Procedure Code, the Court shall decide that the statement be read and taken into account while judging the case.

In our opinion, the Romanian law doesn't offer a satisfying explanation on the fact that these undercover investigators or partners, or collaborator in justice can commit offences in order to gain respect and confidence of the members of the criminal groups.

We consider that the crimes committed inside the criminal groups must be thought absolutely necessary and less serious than those for which they obtained permission from the prosecutor and totally proportionate to the envisaged purpose.

Therefore, we think that our legal system should consider offering clear rules concerning this issue.

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¹² Art.148 par.1, letter. b of Criminal Procedure Code.

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