COMMENTS ON THE OFFENSE SET FORTH UNDER ART. 13IN THE LAW NO. 78/2000

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Abstract

The law conditions the application of its provisions only to the arbitrary conduct of the head of a political party, union, employers' association or some non-profit corporate bodies. Considering the contradictory judgments pronounced so far in case law, we believe that some comments on the capacity of the passive subject against the active subject of an offense are required. In fact, we consider that the dispositions of this article should be conditioned only following some influence exercised on the members of one's own political party, union, employers' association or non-profit corporate bodies.

Keywords: *head of political party, members of political party, exercising influence, using authority, offenses assimilated to corruption offenses, law no. 78/2000.*

1. Introduction

Fighting against corruption involves a *sine qua non* premise, namely understanding the concept of „corruption". For these purposes, an outline of the meanings of the notion of „corruption" was required. The first substantial amendments to the legal status of corruption deeds were made in the Law no. 78/2000, as subsequently amended by the Law no. 161/2003.

Through this law, the legislator aimed at fighting against any types of corruption, among which the offenses assimilated to corruption offenses.

The provisions under art. 13 in the Law no. 78/2000 (as subsequently amended and supplemented) incriminated the deed committed by a person holding a management position in a political party, union, employers' association or a non-profit corporate body, exercising their influence or authority for obtaining, for themselves or for others, money, assets or other undue benefits.

2. Content

The legal object[1] referred to in the dispositions under art. 13 in the Law no. 78/2000 consists of „*the social relationships related to the honesty and fairness of the persons leading political parties, unions or other institutions playing an important role in the political and social life and in the creation and operation of the rule of law and market economy. Such persons' conduct should be materially subordinated to the idea of serving the public interest and only secondly their own interest*".

In light of the form the material element may take, the law mentions two alternative versions arising exactly from the management position held by the active subject. The influence or authority exercised by the active subject of the offense refers to the employ or use of their capacity for changing a decision or judgment, based on the position held. Such use may refer either to the influence or to the authority the active subject has, or to both of them, these completing each other.

Influence, in the meaning relevant to this case, is the ability/capacity of a person holding a management position in a political party to determine or to convince someone to change their attitude, belief, judgment or decision, in virtue of the position held.

Authority means the prestige, consideration, importance, as generally accepted, of the person holding the position specific to the active subject of the offense.

Both influence and authority arise from the very position held and not from the individual/personal characteristics of the person holding a management position in a political party, being inherent to them.

The socially dangerous consequence consists of the risk posed to the social relationships, that the special legal – main and secondary – object of the offense and, *ipso facto*, the object that safeguards the penal law, namely the creation of some danger to the reputation of the entity managed by the active subject (a political party, employers' association, etc.). Once created, such danger determines the appearance of the cause-effect relationship that should exist between the immediate consequence and the material element, strengthening thus the objective element of the offense. The actual achievement of benefits is not a condition for the existence of the offense.

In support of our claim, we recall the case law[2] of the High Court of Cassation and Justice, according to which „*the offense imputed to the defendant is the danger it poses, which means that its existence does not involve that the benefit aimed at be actually obtained*".

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[1] C. Voicu (coord.), Dreptul penal al afacerilor (Penal Business Law), 4th edition, C.H. Beck Publishing House, Bucharest, 2008, page 456.
[2] The Hight Court of Cassation and Justice, Penal Sentence no. 76 of 30.01.2012.

Such facts may be noted, among others, within the relationships existing within a political party (in the first case) or within a non-profit corporate body (in the second case). Therefore, we consider that both the person exercising their influence or authority, and the victim of such pressure should be members of the same political party. Otherwise, the influence or authority exercised would not arise from the position held by the doer in the political party, but could arise from any other circumstances, a case the legislator did not envisage.

Such manner of construing the legal disposition is apparent also in the case law of the National Anticorruption Directorate: „*one shall order the rescission of the case as regards the offense set forth under art. 13 in the Law no. 78/2000, corroborated with art. 35 par. 1 in the Penal Code (2 material documents), as retained in charge of the defendant G. M. S., given that the evidence taken showed that the persons meeting the defendant's requests held in the political party positions that were higher than the position held by the first, therefore the defendant could not have imposed a decision on them; thus, S. N. E. acted deliberately and fully aware, for the purpose of fulfilling its own interest, whereas F. D. attested, by signing the neighborhood minutes, an actual situation*".

The facts mentioned above show that the offense is related to a limited range of social relationships, namely those governing the activity of a political party/employers' association/union or a non-profit corporate body. Therefore, the legislator aimed, through the incriminating rule under art. 13 in the Law no. 78/2000, to sanction the deed committed by a person that, upon fulfilling their management position held in the entities aforementioned, uses their authority or influence for obtaining, for themselves or for others, undue benefits. Or such influence or authority should be exercised, in the hypothesis related to a political party, only over the members of the political party in which the active subject holds the management position. Otherwise, exercising the influence or authority has no relevance whatsoever, given that these may be exercised only over some persons that are subordinated to the active subject of the offense. It is absurd to suppose that the head of a political party may exercise any influence or authority over some persons that are not members of such political body. This is the reason why the legislator incriminated such deed, in order to limit the discretionary actions of party leaders in their relationships with the members of their own political party. As such, we consider that the offense set forth under art. 13 in the Law no. 78/2000 has a limited scope of applicability, regarding only the relationships deployed within a political party by its leader and not outside such context.

Further, such opinion was stated also by specialist authors[3]: „*when we speak about influence, we consider those relationships between the doer and the injured person and the manner in which the doer's position might harm in the future the activity of the injured person. When we speak about authority, we should consider the somewhat subordinated status of the injured person against the doer, inclusively the doer's moral authority over that person. (...)*

If the doer's deed is not based only on the influence or authority arising from the position held, but also on other kinds of relationships, such offense may not be considered (for example, a party leader approaches a good friend for acquiring some funds for supporting the party election campaign).

We take as an essential requirement for considering such offense that the doer's deed causes the panic of the person approached, making the latter surrender to the doer's insistence".

In support of such claims, we should recall also another judgment[4] against the defendant M.D.I. who, as the head of a county party organization, was tried for committing the offense set forth under art. 13 in the Law 78/2000. „*The evidence showed that, under a sole resolution, criminal in character, the head of P. N. L. G. branch, M.D.I., ordered the local party branch to buy books and magazines in value of RON 43 million from his own company, SC A. SA, ordered the managers of public institutions to buy school materials that were distributed in the name of P. N. L., and exercised his influence as a political leader in order to determine some central decision makers to appoint managers of public institutions, as agreed upon under the protocol signed on 6th March 2005.*

The prosecution documents showed that, in the period aforementioned, the defendant M.D.I., as the head of P. N. L. G. branch, exercised his influence and authority for obtaining undue benefits consisting of amounts of money requested from several persons, who were members of P. N. L., or who held management positions in several public institutions or trading companies, with full state capital; such amounts of money were requested outside the legal framework, for supporting the election campaign for the European Parliament, scheduled to start on 13th April 2007.

As regards the persons holding management positions in several public institutions or trading companies, the Court considered that the influence exercised was based on the relationship between the political party and the person influenced. Therefore[5], „*for the purposes mentioned above, the appointment of the chief commissary of the Financial Guard of G. is also relevant. I.T. was appointed managing chief commissary of the Financial Guard, G. Section, on 1st November 2005, and on 1st January 2006, he was appointed permanent holder of this position. He mentioned in the statement made on 22nd March 2007 as follows: „Upon the emergence of these problems, Mr. C.A.D. came to me with a party membership application and asked me insistently to complete it, given that I was not a member of P. N. L. and I paid nevertheless the membership fee as*

[3] C. Voicu (coord.), Dreptul penal al afacerilor, (Penal Business Law), 4th edition, C.H. Beck Publishing House, Bucharest, 2008, page 456.
[4] The High Court of Cassation and Justice, Judge Panel 5, Judgment no. 363 of 10.11.2011.
[5] The High Court of Cassation and Justice, Judge Panel 5, Judgment no. 363 of 10.11.2011.

a party supporter, and he told me that it would be better to become a member. I completed the application, but I did not fill in the date, so that a previous date could be put down. As a P. N. L. G. supporter, I was recommended, given that I held a position that, according to the political allocation of positions, should have belonged to P. N. L., to pay RON 100 monthly, as a party membership fee or as a donation to the party. I should mention that such fee was also paid by Mr. P.G.A., the manager of the General Directorate of Public Finances, by Mr. P.D., a deputy manager of the General Directorate of Public Finances, and by Mr. P.G.B., a deputy manager of the General Directorate of Public Finances. These amounts of money were requested from us by the president D.I.M. on the occasion of certain events, such as Easter and Christmas; each of us contributed as we were able, with products specific to such holidays (such as cake, sweets, juice, etc) for orphanages and rest homes for the elderly. On the occasion of such holidays, press conferences were conducted that we did not attend but where such products were provided. The audio recording broadcast on the TV channels and in the local press regarding the P. N. L. meeting on 5th March 2007, at which D.I.M. asked some amounts of money from various institution managers, was genuine".

On the contrary, a court judgment[6] pronounced by the High Court of Cassation and Justice, the Penal Section, considered that „*the law listed with limitation the active subjects (a person holding a management position in a political party, union or in a non-profit corporate body), described clearly the incriminated conduct (exercising influence or authority for obtaining, for themselves or for others, money or other undue benefits). The fact the law does not mention that influence or authority should be exercised only in one's own organization (political party, union or non-profit corporate body) leads to the conclusion that the legislator considered this conduct as illicit, notwithstanding the place or persons it is employed against. If the law does not differentiate these hypotheses, it results that the person construing the law is not entitled to make such a distinction and, therefore, that one should not limit the scope of application of the law, as requested by the defense*.

Further, the Court finds that there can be no confusion, based on the incriminating rule, between supporting the initiatives of the members of an election circumscription by the person representing them and the deed of exercising influence or authority, given that the law incriminates only the conduct that aims at obtaining, for themselves or for the others, money or other undue benefits. (...)

Exercising one's influence or authority is illicit conduct, notwithstanding the persons over which this is exercised (over one person or several persons, over an individual or over a corporate body), considering the purpose (obtaining undue benefits) and whether the conduct was caused also by other circumstances, such as the relationships between the person exercising the influence and the person benefiting from it (relatives, friends or persons with whom there are no such relationships)".

In our opinion, the deed of a person that is the head of a political party, consisting of receiving financial support from a person that is not a member of such political party and has no direct or indirect political connection with the first is not set forth in the penal law. Even more so when the relevant support was not requested by the person holding that position, but was offered willingly by other persons outside the party and then remitted to the poor in several locations, on certain holidays; therefore, we consider that this is not the sponsorship of a political party by a person without political affiliation; a charitable act may not be considered a penal deed.

We consider that this interpretation may be supported also by another judgment[7] in the case law. On 16.01.2009, the defendant A. N. was indicted for committing the offense set forth under art. 13 in the Law no. 78/2000 corroborated with art. 41, par. (2) Penal Code, *„namely that he repeatedly and with the same criminal determination exercised his influence and authority arising from his position as president of P.S.D., and obtained, with the help of the defendants J.I.P. (a state general inspector in the State Inspectorate for Constructions), P.B., P.M.I. and V.M.C. (representatives of some trading companies), as well as of other persons, undue benefits, consisting of bearing the cost of some election propaganda materials within the presidential election campaign during November – December 2004, amounting to ROL 34,223,906,475 (ROL 33,841,734,455 from SC E.G. SRL and ROL 382,172,020 from SC V.T.C. SA Bacău)".*

In light of the influence or authority exercised over the defendant J.I.P., the High Court of Cassation and Justice retained the following[8]:

„Evidently, the closest relationship was that of the defendant J., involved recently in the construction of the house of the defendant N. in the 1st district (starting from 1999), as a director of SC C.N.P. SA. Bacău.

In this context, on 22nd January 2001 the defendant was appointed deputy state general inspector in the State Inspectorate for Constructions, an institution subordinated to the Ministry of Public Works within the Government led by the defendant N., as a Prime-Minister.

Subsequently, as of 1st April 2001, the defendant was appointed a state general inspector within I..C., a position she held until after the elections in the fall of 2004, despite the legal changes made during that period, which affected the status of that institution, being confirmed in that position directly by the defendant N., under the decision no. 149 of 15th July 2004.

[6] The High Court of Cassation and Justice, Penal Sentence no.1039 of 22.11.2013, pronounced as final by the Judge Panel 5, page 32.
[7] The High Court of Cassation and Justice, Penal Section, Penal Sentence no. 76 of 30.01.2012.
[8] The High Court of Cassation and Justice, Penal Section, Penal Sentence no. 76 of 30.01.2012.

The relationships between the defendant J. and the defendant N. and his family became tighter after she was appointed a state general inspector, as evidenced by her trips to China together with N.D., the wife of the defendant N, during 2002 and 2003, for buying some goods for the houses owned by the family N. in 1st district. The manner in which such goods were bought, as well as the involvement of the defendant J. in this business are the subject matter of another corruption case on the docket of I.C.C.J, in which both N.A. and J.I.P. are defendants.

All these facts are sufficient for considering the defendant J. influenced by the defendant N".

Thus, the Supreme Court considered that the offense set forth under art. 13 in the Law no. 78/2000 may be committed also through exercising some influence, based on a relationship between friends. However, even in the case previously mentioned, the relationship between friends, namely between the defendants N. and J., was strengthened through the position acquired by J. Therefore, even if the defendant J. was not a member of the political party, she held a position which, according to political allocation, belonged to the party, or was under the authority of the defendant N., as a head of the governing party.

Moreover, we consider that a correct application of the incriminating rule under discussion involves approaching it by construing the legal dispositions.

Thus, the very content of the rule results implicitly in a clear description of the scope of the persons – secondary passive subject versus active subject, and the penal rule should be construed in its spirit and not automatically, as the doctrine also shows[9]: "*the enforcement body (the judge or administrative body) should comply with, by its activity, the law, in its letter and also its spirit*."

We consider that it is absurd to suppose that a person managing a political party/union/employers' association/non-profit corporate body is able to exercise their influence or authority over some persons outside such organizations.

As such, in order to be able to establish the application of the incriminating rule to an actual situation, we should establish clearly the meaning considered by the legislator when developing the rule, in order to find out whether the defendant's activity is penal or not.

The only way to identify the legislator's intention is to construe the legal rule in a manner suitable for the accurate enforcement of the penal law.

Thus[10], „*the need for interpretation is based on the fact that, during the process of law enforcement, the enforcing body (the judge, administrative body, etc.) should clarify precisely the rule content, should establish its applicability to a certain actual situation (a case ruled by it)*".

If an official interpretation, which could remove any possibility of arbitrariness upon establishing the match between the penal rule and the actual situation subject to indictment, is missing, we are in the hypothesis required for the legal interpretation, involving the responsible efforts of the court of law to check whether the aim of the penal law regarding the alleged criminal activity in charge of the defendant was fulfilled or not.

For these purposes, one is obliged to analyze this rules by using the most common interpretation methods, so that to establish the penal nature of the deed beyond any doubt.

Thus[11], in light of the grammatical method, the Court has the obligation to understand the meaning of the legal rule, by considering its terms, phrases and their syntax within the rule. „*The grammatical method aims at establishing the disposition contained in the legal rule, by means of the grammatical (syntactic and morphologic) analysis of the content of the legal rule*".

By using the grammatical method, we notice that the legislator listed comprehensively the persons that may act in capacity of active subject of the offense, but did not consider necessary to describe the persons that may become a passive subject of such offense. However, the syntax of the terms used by the legislator shows clearly that these are within the scope of the entities at the top of which the active subject of the offense is placed, a position which grants them, further, the authority or influence they exercise.

Specialist doctrine[12] stated the same: „*The passive subject is the political party, the union, the employers' association or the corporate body within which the active subject holds a position*".

Moreover, the use of the logic method results in the same kind of interpretation of the incriminating rule. In the hypothesis the legislator intended to extend the scope of passive subjects, the phrase „*or other persons*" would have been inserted in the incriminating rule. Thus, to make the argument more effective *per a contrario* seems to be mandatory, the inexistence of such phrase supporting the interpretation that the persons that may act in capacity of passive subjects are limited to the political party, union or the non-profit corporate body within which the active subject exercises their authority or influence.

Last but not least[13], we should use also the systematic method for interpretation, which „*regards the manner of establishing the meaning of the legal rule, by considering it in the context of the law it is a part of or by comparing it with other laws*".

Or, the Law no. 78/2000 was developed in order to regulate the efficient removal of corruption deeds *lato*

[9] Teoria generală a dreptului (General Law Theory), Nicolae Popa, All Beck Publishing House, 2002, page 247.
[10] Teoria generală a dreptului (General Law Theory), Nicolae Popa, All Beck Publishing House, 2002, page 236.
[11] Teoria generală a dreptului (General Law Theory), Nicolae Popa, All Beck Publishing House, 2002, page 243.
[12] Legea nr. 78/2000 pentru prevenirea, descoperirea și sancționarea faptelor de corupție (The Law no. 78/2000 on the prevention, detection and sanctioning of corruption deeds), Vasile Dobrinoiu, Mihai-Adrian Hotca, and others, Wolters Kluwer Publishing House, 2009, page 204.
[13] Teoria generală a dreptului (General Law Theory), Nicolae Popa, All Beck Publishing House, 2002, page 244.

sensu, committed, usually, by persons in a capacity or in a position in which they are able to decide as regards the interested/influenced/subordinated person, a fact that allows them to condition/ to constrain/ to influence the said person. Thus, we consider, according to the fundamental principles of the material penal law, unanimously used in the specialist doctrine, that the interpretation and enforcement of the penal rule should be strict, while the extension of the meaning of the rule, for purposes of a comprehensive interpretation, is a risky operation, liable to change the legislator's intentions and to result in an overlap between the legislative function and the court function.

As some authors in this field[14] said: „*However, an extended interpretation should be made carefully, given that, rather often than not, the possibility of extending the meaning of a notion used by the legislator in the case of a new situation is debatable, and such uncertainty is difficult to reconcile with the legality principle. (...) A last issue to discuss regards the situation in which all the interpretation approaches presented failed to offer the result expected, namely the ambiguity of the law content is maintained, being thus liable of divergent interpretations. The Canadian doctrine and case law claim that, in such a situation, one should use the interpretation that is more advantageous to the defendant, given that doubt would benefit the latter*".

The principle *in dubio pro reo* became legal upon the coming into force of the New Code of Penal Procedure, art. 396 par. 2 reading as follows: „*the Court should pronounce the conviction, if it finds, beyond any reasonable doubt, that the deed exists, is an offense and it was committed by the defendant*".

The rule *in dubio pro reo* complements the presumption of innocence, an institutional principle reflecting the manner in which the principle of finding the truth, as regulated by the dispositions under art. 5 in the CPP, is found in the evidence taken. According to such rule, the Court, if not being able to be convinced based on certainty, should rule the defendant's innocence and clear the charges against them.

Therefore, the Court should not and may not construe a law widely, against the defendant's interest, if the doubt the latter would benefit from regards precisely the existence and capacity of the passive subject.

Thus, as the doctrine also established, the method of wide interpretation should be used only if none of the other interpretation methods described previously is able to lead to a correct legal reasoning.

In light of the subjective aspect, this shall include, besides the culpable form of direct intention, also the purpose of obtaining undue benefits, in form of cash, goods or other benefits.

As regards the description of the manner of committing the deed, the High Court of Cassation and Justice considered[15] that „*it is irrelevant, in light of incrimination, as set forth under art. 13 in the Law no. 78/2000, whether the defendant was aware or not of the actual manner in which the undue benefits were to be obtained, being unimportant whether the defendant knew or not the details of the criminal activity carried out by the other defendants*". Therefore, in order for the dispositions under art. 13 in the Law no. 78/2000 to be applicable, the existence of the purpose to obtain undue benefits is sufficient.

3. Conclusion

Given the facts described so far, we consider that, as regards the offense set forth under art. 13, the legislator intended to sanction the conduct of a person that takes advantage of their position in order to go beyond the limits of the law, by exploiting their moral superiority against other persons, perceived by the latter also in light of the position held by the active subject. Therefore, the possibility of the active subject to exercise their influence or authority exists only if considered within some relationship framework, in which the passive subject is integrated, and, thus, may be exposed to the doer's illicit conduct. If the passive subject is not a member of the entity managed in whatever way by the active subject, we cannot speak about the existence of any criminal act subject to the incriminating rule.

References:

- C. Voicu, A. Boroi and others, Dreptul penal al afacerilor, (Penal Business Law), 4th edition, C.H. Beck Publishing House, Bucharest, 2008;
- F. Streteanu, Tratat de drept penal (Penal Law Treaty), Partea generală (General Section), Volume I, C.H. Beck Publishing House, Bucharest, 2008;
- N. Popa, Teoria generală a dreptului (General Law Theory), Nicolae Popa, All Beck Publishing House, 2002;
- V. Dobrinoiu, M.-A. Hotca, and others, Legea nr. 78/2000 pentru prevenirea, descoperirea și sancționarea faptelor de corupție (The Law no. 78/2000 on the prevention, detection and sanctioning of corruption deeds), Wolters Kluwer Publishing House, 2009, page 204;
- www.scj.ro;
- www.idrept.ro.

[14] Tratat de drept penal (Penal Law Treaty), Partea generală (General Section), Volume I, Florin Streteanu, C.H. Beck Publishing House, Bucharest, 2008, pages 64-65.

[15] The High Court of Cassation and Justice, Penal Sentence no. 76 of 30.01.2012.