Olimpiu Aurelian Sabău-Pop[1]: The theoretical and practical implications of Criminal Convention regarding the corruption concluded in Strasbourg 1999 upon Romanian legislation

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Abstract

Considering Resolution (58)7 regarding the authorisation of creating of an enlarged partial Agreement, which establishes the Group of States against corruption - GRECO, the *Penal Convention regarding Corruption* was also issued in January 27, 1999 at Strasbourg (STEN 173), convention which had a decisive impact upon changing the vision of the Romanian legislator regarding aspects concerning the notion of 'corruption', both of incriminatory as well as of procedural order.

1. Introduction

The member states of the European Council and other states[1], considering that the aim of the European Council is to build a tighter unity among its members, being convinced by the necessity of promoting in a priority way of a legal common policy with the purpose of protecting the society from the corruption phenomenon, which constitutes a threat to the supremacy of law, democracy, human rights by undermining the principle of a proper administration, equity, encroaching of the economic development, are agreeing for the establishment of an adequate legislation and proper procedural measures concretized in The Criminal Convention regarding the Corruption, concluded in Strasbourg in January 27, 1999.

Out of the recent development of some measures at international level against corruption, we mention the measures taken by the United Nations Organization, the World Bank, the International Monetary Fund, the World Trade Organization, the American States Organization. Some of the results are: *The Action Program Against Corruption*, adopted by the European Council Ministers Committee in November 1996; we also mention the Resolution 1 adopted by the European Ministers of Justice within the XXI Conference (Prague 1997) which resorts to urgent application of the previously presented program and recommends the issuing of a criminal convention regarding the corruption; we also wish to mention the *second Summit which took place at Strasbourg in October 10-11, 1997* and the *Resolution from November 6, 1997*, which refers to the 24 fundamental principles concern the fight against the corruption phenomenon authorizing the Ministers Committee to finish within the proper time the papers issuing the international legal instruments. Considering Resolution (58)7 regarding the authorization of creating of an enlarged partial Agreement, which establishes the Group of States against corruption (GRECO)[2], the *Penal convention regarding corruption* was also issued in January 27, 1999 at Strasbourg (STEN 173). The latter convention, as we are about to see as it follows, had a decisive impact upon changing the vision of the Romanian legislator regarding aspects concerning the notion of 'corruption', both of incriminatory as well as of procedural order.

2. The link between the Convention provisions and the 5th Article from Corpus Juris (2000)

Between these two, there is a series of similarities regarding their content. It can be observed that the deal of corruption offence is made on the both sides of the subject, that is the active and passive corruption, a conception taken from the French doctrine and criminal legislation.

We can find this opinion, to a certain extent, also in the Romanian[3] doctrine. Both two forms of corruption contain, also in the Convention and Corpus Juris, same elements of the *actus reus*.

Corpus Juris refers only to the member states of the European Union and the common institutions, while the Convention refers to every state-party[4]. But among the member states of the European Union, those who have ratified the Convention, we consider that the qualified subjects of these legal international norms are overlapping due to lato-sensu interpretation which is received by the notion of civil servant in the European law. The only statute foreseen by the Convention, upon it could fall the suspicion that it's not incorporated by the expression "civil servant" from the European law, is the "agent or judge of an international Court" one.
To find an answer on this problem we must start from the interpretation of the 5th Article from E.C.H.R. concern the activity of "justice". The justice is represented by every organ with competence in solving litigations, and by consequence implicitly defines the term "agent or judge". In supporting this conclusion we'll refer to a series of decisions of the European Court: Van Marle/Holland, Van Leuven and Meyere/Belgium, H/Belgium.
Thus, by the time of entry into force of Corpus Juris for the member states of the European Union, the two mentioned international norms will overlap perfectly upon the provisions of corruption offences.

3. The compatibility between the provisions of the Convention and the Romanian law

Neither the Criminal Code nor the special domestic law have offered a definition to the concept of corruption and this fact led to a tendency of extrapolation, situation ended by the article 5 of Law 78/2000[5], modified by Law 161/2003[6]. It considers that crimes are: the ones stipulated by article 254-257 from the Criminal Code[7] (Accepting Bribe, Offering Bribe, Accepting Undeserved Goods, Traffic of Influence); the crimes stipulated by the articles 6^1 (influential buyer), article 8; crimes assimilated to those of corruption stipulated by the articles 10, 11, 12, 13 of Law 78/2000; crimes directly[8] linked with corruption(articles 17-18 of Law 78/2000), assimilated [9]to those of corruption (articles 10-16 of Law 78/2000) and those against the financial interests of the European Union[10]
The Article 2 has corespondent in the article 255 of Criminal Code, with the note of the formulation "any un-owed advantage" that corresponds in the Criminal Code with "money or other benefits". The notion of money or other benefits, in the way formulated by the Romanian legislator, can be explained due of the insufficiently formulation in the criminal field only on the basis of Romanian Civil Code provisions, and implies an interaction between the patrimony of the briber (or a tertiary) and the bribed, more exactly at least the possibility of increasing the patrimony of the civil servant co-related with the decreasing patrimony of the briber, according to the element of the objective side from the article 255, which is made by the doer.
To demonstrate the meaning of "other benefits" understood by the legislator, we'll refer to the provisions regarding the special confiscation that require a patrimony feature to this notion[11].
In this way, the promise made by a civil servant but without a patrimonial feature(for example, passing the exam for somebody) can not framed at the article 255 of the Criminal Code, but eventually at the article 257 of the Criminal Code if are fulfilled the conditions of the latter offence. Also, the donations[12] without economic value are not associated with the bribe offence.
The drafter of Convention preferred the formulation "un-owned advantage" that regards the valuable and non-valuable element. As a result, we have two choices: first, in a wider way, the interpretation of bribe could be extended, making abstraction of the "money" and this notion is associated with the notion "other benefits"; secondly, the national drafters cold take the formulation from the Convention. The former is considering better.
The article 3 from the Convention corresponds, regarding the objective side, the offence of bribing also to the national public agent, the provisions of article 1(a-d) of the Law 78/2000.
The objective side of the offence(stated by the article 3 of Convention) contains only actions, and the correspondent provision from the domestic law contains in addition an inaction, that is "non-rejecting

the promise". As a consequence, it can be observed that it is imposed an active behavior to the Romanian civil servant, that is to refuse of the briber.
Due to in-advertences that persist between the Convention ratified by Romania and the provisions of the article 254, as well as between the Convention and the Draft of the Criminal Code(article 303) we are suggesting to straighten them.
Another interesting aspect is that in the paragraph 3 of the article 303 of the project, are included also the categories of subjects from the article 8 from the Law 78/2000. Qualified subjects are to be seen also in the provisions of articles 5,6,7,8,9,10,11 from the Convention. From this statement we conclude that the purpose of legislator is to include the provisions from the special laws (that is Law 78/2000 and 16/2003, implicitly those from the Convention) in the Chapter I of the Title VI "offences and corruption offences".
The Article 4 of the Convention refers to the *actus reus* of the offences stated by the articles 2 and 3, committed by a member of the Parliament. This quality of the active subject, therefore also this offence is to be re-find in to a smaller extent in the Law 78/2000, more concrete in the article 1(f) - "the persons that hold a leading role in a party or in a political entity".
A member of parliament in his law making activity acts in his official capacity, representing a collective organ, thus, taking into consideration the require of the criminal responsibility to have an individual[13] character, it considers that he can't commit the offence stated by the Article 4 of the Convention; rather is being possible to engage another form of responsibility in the practice, that is the political responsibility. This approach is based upon the legality of the activity of lobby and existence of interest groups. However, making abstraction of the professional activity of the members of Parliament[14], they can be either subject of an active corruption, in generally, either is under the provisions of article 13 of the Law 78/2000.
The article 5 is recovered due of the quality imposed to the perpetrator in the article 8^1 (e) and article 8^2 of the Law 78/2000.
The active special subject(article 6 of the Convention), whom is member of public assemblies, falling under provisions of the article 8^1 (f).
The Article 7 and 8 from the Convention refers to the corruption from private sector and it was criminalized by the article 254, 255 from the Criminal Code, as a result of the Law 140/1996, regulation which bring together the legal texts regarding to the notion of "civil servant" and "other employees", stating that the notion of civil servant include also the "public officer" one, as it is regulated by the article 147 of the Criminal Code, and also "any employee that exercises a duty in the interest of a legal[15]entity"; moreover, the Law 78/2000, in the article 1(b, e) refers to this aspect, too.
The Article 9 of the Convention regarding international civil servant is finding its applicability in the provisions of article 8^1 (a, c) of Law 78/2000.
The next article refers also to the quality of the subject, the member of international parliamentary assemblies one, regulated by the article 8^1 (b).
The Article 12 criminalized the conduct of the trafficker and the buyer of influence[16] and are founded in the article 247 from the Criminal Code and article 6^1 from the Law 78/2000, introduced by the Law 161/2003.
Before the intervention of this domestic law(no 78/2000) the person that was buying the real influence or the alleged one of the traffic author couldn't have the active quality of a subject, so he was not criminal responsible[17]. Our criminal code, inspired by other legislation, didn't punish the act of influence buyer(as it is stated in the case of giving bribe offence), which is charged distinctly by the

offence of giving bribe, even if in reality, the offence of buying influence have obviously a social danger.

By the formulation of the article 6^1 the rising question is what is the meaning of a person "with influence, or at least making to believe of having influence". To explain this formulation of the legislator, identical to the formulation of the article 257 of the Penal Code, we start from the answer given by the doctrine in the case of this offence. Thus, in a first form, the trafficker has in a concrete way the influence, or he is enjoying in a real way the trust and the respect of that public officer, we are having in the view an objective criteria. This will eventually can lead to the influence presumption of the prospective trafficker, a fact that in our conception is unacceptable. Going even further with this suggestion we could say than that every person that enjoys the respect, or is having an important function can be connected by the influence buyers.

The second form (he's letting to believe)[18] is realizing when is created the wrong belief that trafficker can influence a civil servant.

In both forms it is essential that the trafficker is adopting an active attitude and not a passive one, either by an action, or inaction; in the support of the mentions above we refer to the criminal Convention regarding the corruption, from Strasbourg, which in the article 12 imposes the prospective trafficker to "say" or to "confirm" he's able to exercise such an influence. If we wouldn't make such of reference to the behavior adopted by the trafficker, than we would analyses the existing condition of the offence ("has...influence") through the angle of subjective of the buyer, and the measure in which he had represented the capacity of influencing the trafficker and if it can be proved, he is perpetrator of the offence stated by the Article 6 of the Law 78/2000. And if we would analyses instead in a objective way this condition, the things would complicate even more by considering the effects of the error in which the buyer would be.

Regarding *ferenda law,* we're suggesting the reconsideration of this regulation in consonance with the Law 27/16 January 2002 regarding the ratification of the convention with the one from Convention.

The article 13 imposes the states who have ratified the Convention to incriminate the acts of money laundry[19] caused through performance of corruption offences. In the article 17 of the Law 78/2000, which is represented by offences directly linked with the corruption, at letter *e* are stated acts of money laundry[20] from the Law 656/2002.

In the article 18 of the Convention is established the responsibility of the legal entity for the offences of briber, influence trafficking and money laundry derived from corruption offences.

To stimulate this form of responsibility the physical person must represent, lead and control the activity of such legal entity. "The premise situation"[21] is fulfilled if the person has by the time of committing the offence one of the three qualities.

The responsibility of the legal entity is engaged no matter of his form of participation that the leader/representative is acquiring in committing the offence(author, accomplice, instigator).

This is applicable also when due to shortage of surveillance or control, another person being under the authority of such person concern by align. 1 is committing such an offence. It can be observed the possibility of accumulating the responsibility of the legal entity with the physical person.

In order to pronounce upon the form of responsibility of the legal entity, it must be analyzed the Article 19(2) regarding the penalties and measures to be taken against this person. The formulation proposed by this article contains an extreme large interpretation, making reference only to "efficient sanctions", whether if they have a criminal, civil or administrative feature. However, taking into account the feature of the Convention, the criminal law one, and the fact that the physical person has committed an offence in the name of the juridical person, we can pass in the way of giving criminal responsibility[22] to the legal entity..

This interpretation can be proved through the references of similar dispositions from the Corpus Juris project. Thus, the article 13 establishes the criminal responsibility of the juridical person for the

offences of articles 1-8 from Corpus Juris, when the offence was committed in the interest of the entity by any other person that acts in behalf of his name and interest.
On the same line, neither the dispositions of article 5 and 6 of E.C.H.R. are not excluding the possibility of penal sanction to the juridical person.
This change of vision of the European legislator is reflected also in the domestic law, thus the draft of Criminal Code is setting up the criminal responsibility of the juridical person for the offence of giving bribe and influence trafficking.

4. Conclusions

The purpose to confer to juridical person a criminal responsibility would be represented by a much strong and consistent punishment, realizing in this way one of the purposes of criminal trials, the general prevention translated by the general and abstract fear of the society toward a criminal result.
The article 20 imposes to the parties of the Convention the establishment of a specialized authority in the fight against the corruption. Through the Ordinance no. 43/2002 it is established the National Anti-corruption Authority which receives, depending on the nature of the offences stipulated by the Law 78/2000 and the prejudice caused by the perpetrator[23] to the state, the exclusive competence to accused the perpetrators of these offences.
The article 22 stipulates the taking of measures in order to protect the witness and the cooperator in front of the corruption offences. The Law 682/2002[24] in the article 2(3)(h), foresees the possibility of taking special measures of the witnesses and their inclusion in the program of witness protection when an offence of corruption is under investigation.

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