

CIVIL SERVANT - EXCEEDING THE DUTIES OF SERVICE - ACTIVE OR NON ACTIVE SUBJECT OF THE CRIME OF BRIBERY

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Abstract: *An essential condition to be met for the retention of the crime of bribery is that the active subject has the necessary competence to perform the promised act in exchange for receiving undue benefits. Starting from a practical case, we will highlight the fact that in the situation of a control exercised by an inspector of the National Authority for Consumer Protection over a commercial space, it is necessary for the civil servant to have the necessary delegation to perform this activity. In the situation in which the civil servant acts outside the attributions of service, it will not be possible to retain the crime of bribery because there is no effective control carried out by the inspector of the National Authority for Consumer Protection. By exceeding the service attributions, the civil servant will not be an active subject of the crime of bribery but will be possible to establish administrative sanctions. In this situation, the civil servant will be responsible for influence peddling in the situation in which he promised that he will intervene next to a person who has the competence to fulfill the promised act. If the civil servant has promised to perform that act himself, but does not have the necessary competence to perform the act, the official will be liable for the crime of deception. We consider that the employed inspector of the National Authority for Consumer Protection who, although having as service attributions the finding of contraventions and the application of sanctions under the law, in the absence of an express delegation to carry out a control over a commercial space will not be active subject to the crime of taking bribery even in the event of receiving undue benefits.*

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OPINIONS ACCORDING TO WHICH A CIVIL SERVANT OUTSIDE HIS / HER DUTIES MAY BE AN ACTIVE SUBJECT OF THE CRIME OF BRIBERY

By Decision no.884/2019 of the Iasi Tribunal, it was ordered the acquittal of Mrs.X, commissar within the National Authority for Consumer Protection under the aspect of committing the crime of bribery. Through the indictment registered on the roll of the Iasi Tribunal, it was ordered to send Mrs.X to trial for committing the crime of bribery provided by art.7 lit.c of Law 78/2000 and of art.289 para.(1) Penal Code.

It was alleged by the prosecution that Ms. X, a commissar within the National Authority for Consumer Protection in connection with the non-fulfillment of the control attributions, claimed and received from the employee of a company a good in exchange for

the non-fulfillment of the service attributions. Mrs.X, together with Mr.Y, performed a thematic control at a company, and although they did not identify themselves or register in the single Control Register that exists at a unit that they control. However, a witness recognized them as commissars from the County Commissariat for consumer protection Iasi.

The prosecutor claimed that the civil servant did not ask what price a product had, intending to appropriate that product without paying it in view of the non-fulfillment of the service attributions. In the opinion of the prosecution, Mrs.X allegedly noticed that there were irregularities regarding the products found in the commercial space, and according to her duties, she could and should have found them and possibly applied a sanction. He retained the accusation that precisely because he did not do so, he would have appropriated his property.

It is claimed by the representative of the Public Ministry that Mrs.X is in the exercise of her duties because she had the competence to carry out a control at the company. The control action falls within the general competence of Mrs.X according to the job description prepared in accordance with the legislation regulating the activity in the field of consumer protection, respectively the Regulation on the organization and functioning of the central and subordinated structures of the National Authority for Consumer Protection. The act for which the fulfillment, non-fulfillment, delay is claimed, received, accepted or not rejected money or other improper benefits - as an essential condition for the existence of the crime - must be part of the scope of the official's duties, ie be an act relating to his duties or an act contrary to those duties. The act means any activity that must be performed by the civil servant in accordance with his duties, attributions, service competences.

In the opinion of the prosecution, it is an act regarding the official duties of the civil servant, the one that falls within the limits of his competence, the one that falls under his charge in accordance with the norms that regulate the respective service or is inherent to his nature. It is stated by the representative of the Public Ministry that according to the framework procedure regarding the supervision and control activity, the possibility is extended of the control by the control team with the approval of the Deputy Chief Commissar / Head of Office, on the products found to be non-compliant. thematic control actions, at distributors or at producers. Therefore, even in the situation where a thematic control is performed, there is the possibility to exceed the imposed limits, and this situation cannot be justified only in terms of the general competence of the control bodies.

At the same time, the prosecutor's reasoning was based on the fact that the claim action can be performed in any way: by words, gestures, in writing or by any other means of communication and that the claim can be not only express but also allusive but at the same time unequivocal, likely to be understood by the recipient. Thus, the prosecution concluded that Mrs.X committed the crime of bribery during the exercise of her duties.

OPINIONS ACCORDING TO WHICH A CIVIL SERVANT OUTSIDE HIS / HER DUTIES CANNOT BE AN ACTIVE SUBJECT OF THE CRIME OF BRIBERY

The court by Decision no.884/2019 of the Iasi Tribunal ordered the acquittal of Ms.X in relation to the fact that she did not have the competence to apply sanctions to the commercial unit. In order to pronounce this solution, the court motivated the fact that regarding the competence of Mrs.X to carry out a control at the company, the County

Commissariat for Consumer Protection communicated the fact that the control activities carried out at the institution in the month in which the control was performed were established by the subject matter ordered by the address of the National Authority for Consumer Protection which was submitted to the case file.

According to this address, the civil servant had the competence to carry out controls only at the commercial units such as kiosks located inside the educational units. Thus, it is beyond any doubt that Mrs.X did not have the competence to ascertain contraventions in stores such as the one where she is supposed to have carried out a control. It is necessary that the act for the performance of which, the non-fulfillment, the official claims, receives money or benefits to be part of the scope of his duties, ie to be an act regarding his duties. This requirement is of decisive importance for the existence of the offense of bribery, since it is an offense of duty, it can be retained in the charge of an official only in the event of breach of an obligation falling within his duties.

Consequently, considering that, on the one hand, it was not possible to prove the activity of Mrs.X for claiming the property, and on the other hand, that the civil servant did not have the competence to fulfill the act in connection with which non-fulfillment is claimed would have claimed the good, the elements of objective typicality of the crime of bribery are not met, so that the court ordered the acquittal. We appreciate the solution of the court as being legal and thorough in the conditions in which the civil servant is not during the exercise of his service attributions, so that the crime of bribery cannot be retained.

Mrs.X was charged with committing the crime of bribery, consisting in the fact that, on 15.03.2016, in connection with the non-fulfillment of the control attributions, she claimed and received from a company a good in exchange for not applying a contravention fine. According to art.100 para.(1) C.pr.pen. During the criminal investigation, the criminal investigation body collects and administers evidence both in favor and against the suspect or defendant, ex officio or upon request.

In relation to the constitutive elements of the crime of bribery, in the alternative variant of not fulfilling the service attributions, we appreciate that they are not fulfilled because the civil servant is not at that moment in the exercise of the service attributions. The condition regarding the objective side of the crime implies that the deed is related to the service attributions of the active subject. The service attributions and their exercise are a concrete and obligatory condition in order to be able to retain the crime under the aspect of the alternative variant of the non-fulfillment of an act.

Or, considering that at the moment of entering the commercial space, the civil servant is not in the exercise of his duties, not exercising any act in this regard, we appreciate that the deed charged to Mrs.X does not meet the constitutive content of the bribery offense. The proof of the fact that Mrs.X is not in the exercise of her duties in the commercial space is also confirmed by the General Commissariat for Consumer Protection. The institution confirms that the control theme considered only the public catering units (restaurants, fast food units, terraces, breweries, confectioneries etc.) and the kiosks inside the schools.

Considering the official point of view of the Regional Commissariat for Consumer Protection, it is obvious that at the date of the control, the civil servant did not have the attributions to carry out controls on products from other units than those mentioned in the topic, being excluded from this category. Therefore, we consider that since Mrs.X did not

have the task of carrying out the control in the commercial unit, she did not fulfill any act regarding the service attributions.

ARGUMENTS FOR WHICH THE HYPOTHESIS SUPPORTED BY THE PROSECUTOR IN THE INDICTMENT CANNOT BE ACCEPTED

Regarding the commission of the crime of bribery under the manner of the claim: The prosecution could not prove that Mrs.X had claimed the property in exchange for failure to perform her duties. Given that the demand for money or other benefits must be clear and unequivocal, it can be seen that this condition is not met in the case of unclear, equivocal and ambiguous expressions. Another interpretation would lead to an extensive and therefore abusive application of the text of the law (C. Rotaru, A-R Trandafir, V. Cioclei, 2018, p.225.)

The civil servant must be in the exercise of his duties. We appreciate the fact that one of the conditions that must be fulfilled within the constitutive content on the objective side of the material element is that the act whose fulfillment, non-fulfillment, urgency, delay is claimed or received benefits to be part of the service duties of the civil servant. . Specifically, to be an act regarding his duties or an act contrary to these duties (V. Dobrinoiu, I. Pascu, MA Hotca, I. Chis, M. Gorunescu, C. Paun, M. Dobrinoiu, N. Neagu, MC Sinescu, 2016 pp.517-520). Due to the lack of meeting this condition, the deed retained in the charge of Mrs.X cannot be included in the crime of bribery, as the objective typicality of the deed is missing.

Moreover, it has been appreciated in the specialized works that this requirement has a decisive importance for the existence of the crime of bribery, because, being a crime of corruption, it can be retained in the charge of an official only in case of violation. an obligation that falls within its competence. (Al. Boroi, 2014, pp.434-435). Regarding the need for the existence of an equivalent between the promised benefits in order to be able to retain the crime of bribery, we notice that in the description of the prosecutor this condition cannot be retained.

An additional argument to justify the lack of meeting of the constitutive elements of the crime of bribery is the derisory value of the good supposed to be handed over to the civil servant. The prosecution claimed that Mrs.X had received a good worth 21 lei in order not to apply a contravention sanction to the commercial space. The value of the good is derisory given that the amount of a fine applied for non-compliance with Government Ordinance no. 2/1992 on consumer protection is from 3,000 to 50,000 lei. According to the literature, it is essential that the money or benefits remitted represent a consideration for the activity required of the civil servant in connection with the fulfillment, non-fulfillment, delay of fulfillment or performance of an act contrary to official duties. It is not the essence of the crime of bribery to whom the money or benefits are actually remitted, but the civil servant must know their retributive nature and the purpose for which they were given or promised (Vasile Dobrinoiu, Norel Neagu, 2014, p. 485). Compared to the derisory value of the good supposed to be received by the civil servant, a correlation cannot be retained between the non-fulfillment of the service attributions and the benefit received.

We consider that the deed retained in the charge of Mrs.X, commissar within the National Authority for Consumer Protection does not meet the constitutive elements of the crime of bribery. In similar cases, the Romanian courts have concluded that to receive

something means to take over, to take possession of something. In this case, the initiative belongs to the bribe-taker, and the receipt is not conceivable without an act of remission performed by him.

To claim something means to ask for something, to make a claim. In this way of committing the crime, the initiative belongs to the perpetrator. It is not necessary for his claim to be satisfied. In the case brought before the court, the evidence administered does not converge either to the option of claiming or receiving by the defendant A the amount of 5000 euros in order to issue the urbanism certificate for the land in street x (amount submitted to Deputy Mayor B.) or to the option of claiming or receiving by the same defendant of a sum of money in order to issue an urbanism certificate for the land from street x (Decision of the High Court of Cassation and Justice no. 865/2018). The deed charged to Ms.X cannot be classified as receiving undue benefits, as the bribe-giver did not offer the good to the civil servant, nor as claiming because there was no request from Ms.X.

CONCLUSIONS

In order to be able to be retained the crime of bribery, it is necessary and obligatory to ascertain that the deed retained in charge of the active subject is circumscribed to its service attributions. These attributions must be expressly provided in the sphere of activity or competence of the active subject, which gives him the capacity to perform acts or activities regarding the finding or sanctioning of contraventions. We appreciate that in the absence of an express delegation in the sense of performing a control, the civil servant cannot be an active subject of the crime of bribery because he is not in the exercise of his duties, thus lacking the objective typicality of the crime.

The prosecution could not prove that the civil servant had expressly claimed undue benefits and even more so the fact that he was in the exercise of his duties. The presumption of innocence can be overturned only by certain evidence of guilt. If there is no such evidence, the doubt as to guilt cannot be removed, any doubt being interpreted in favor of the defendant. Thus, the crime of bribery cannot be retained in the charge of an official who did not have the attribution of fulfilling or not fulfilling the act for which sums of money or other undue benefits were received. We consider that this requirement is applicable to all corruption offenses, which cannot be retained in the charge of an official except in case of violation of an obligation that falls within his competence.

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