THE BRIBERY OFFENCE - BRIEF CONSIDERATIONS OF ECONOMIC CRIME IN LOCAL PUBLIC INSTITUTIONS

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ABSTRACT: *Corruption is a risk to democracy, to the essence of law and justice. Corruption, at the local level, compromises citizens' credibility in the administrative act. In the local public administration, the idea of developing and implementing "good practice" guides has become topical, as they are necessary precisely to be able to stop the phenomenon of corruption, which certainly does not honor the image of public institutions and their employees, in front of the citizens.*

KEY WORDS: *corruption, crime of bribery, public institutions, law.*

JEL CLASSIFICATIONS: *K14, K38.*

1. INTRODUCTION

This article requires attention and study as the crime of bribery among officials in local and central public institutions is a well-known topic that is able to capture the attention of the general public.

The question is, what are the causes of this form of corruption?

The answers in this regard could be many: lack of proper professional training of officials working within the institution; the generous attractions offered in the performance or non-fulfillment of service duties such as sums of money, various advantages, goods of all kinds; modest salary. The bribery offence is regulated by the Penal Code, in Title V Crimes of corruption and service, Chapter I Crimes of corruption, at art. 289, al. 1-3 (Law no. 286/2009). In the specialized literature (Streteanu & Nițu, 2014, p. 510), the general idea was outlined that this "consummation of the crime takes place at the moment when all its constituent elements are gathered".

We will not present an in-depth analysis of this crime, but we will make a brief reference to this notion in general. Thus, the crime of bribery briefly presents three

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essential variants, the typical one, assimilated and aggravating. The exact determination of each individual is important in determining the decision of the court, respectively the punishment applied depending on the gravity with which the perpetrator exercises it.

The standard variant [provided in art. 289 para. (1) Criminal Code] consists in "the act of the civil servant who, directly or indirectly, for himself or for another, claims or receives money or other benefits that are not due to him or accepts the promise of such benefits, in connection with the fulfillment, non-fulfillment, the urgency or delay of the fulfillment of an act that enters into his duties or in connection with the fulfillment of an act contrary to these duties". The assimilated variant [provided in art. 289 para. (2) Criminal Code] consists in the deed provided in par. (1), committed by one of the persons provided in art. 175 para. (2), if it is committed in connection with the non-fulfillment, the delay of the fulfillment of an act regarding its legal duties or in connection with the performance of an act contrary to these duties. From the corroboration of the provisions of art. 308 of the Criminal Code with art. 289, it results that bribery also has an attenuated variant of incrimination by committing the deed by the persons who exercise, permanently or temporarily, with or without a remuneration, a task of any nature in the service of a natural person from those provided in art. 175 para. (2) Criminal Code or within any legal entity (corruption in the private sector).

The aggravated variant (provided in art. 7 of Law no. 78/2000) consists in committing the deed by a person exercising a function of public dignity; is a judge or prosecutor, a criminal investigation body or has the power to establish or sanction contraventions, or by persons who, on the basis of an arbitration agreement, are called upon to rule on a dispute which is given to them for settlement by to the parties to this agreement, regardless of whether the arbitration procedure is conducted under Romanian law or under another law (Doseanu, 2015, pp. 55-56).

The criminal law requires the official to have a correct, honest, dignified, sharp attitude towards the bribery offer, imposing on him a firm, unequivocal, clear position to reject it. The expectation of the official against the bribe offer made by the promise of money or other benefits is not only an unworthy act but also one of corruption that must be prevented and punished, it being put by the criminal law on the same level as acceptance. Non-rejection means the passive, omissive attitude of the official who does not fulfill his obligation established in his task and does not step aside, does not refuse the promise of the corruptor (Caian, 2007, pp. 133-134).

2. CORRUPTION, A REAL FACT IN THE LOCAL PUBLIC ADMINISTRATION

In order to understand the phenomenon of corruption, do we have to consider what the term really means? Does this fact come from the author's desire to motivate the fulfillment or non-fulfillment of his professional activity?

Corruption is a threat to democracy, the rule of law, social equity and justice, erodes the principles of an efficient administration, undermines the market economy and jeopardizes the stability of state institutions. One of the ideas circulated as a solution to prevent and limit the effects of corruption is that local authorities and their associations promote integrity and honesty by adopting codes of conduct, based on the European

model, in order to serve as a guide in the exercise of attributions and establishing an ethical climate. To date, there is no such code of conduct for local authorities in our country. One of the requirements in the fight against corruption is the transparency that derives from the constitutional right to information. In art. 31 of the Romanian Constitution states that "the right of the person to have access to any information of public interest may not be restricted." In this sense, "public authorities, according to their competences, are obliged to ensure the correct information of citizens on public affairs and on matters of personal interest".

The law on local public administration specifies the obligation to inform the inhabitants of the administrative-territorial unit, respectively the agenda of the meeting of the local council through the media or through any other means of publicity. In communes or cities where citizens belonging to a national minority have a share of more than 20% of the population, the agenda shall be made public and in the mother tongue of citizens belonging to that minority (https://www.fdsc.ro/documente/26.pdf.).

Serious social phenomenon, corruption erodes the principles of an efficient administration and the credibility of the citizens in the state institutions. In order to prevent and combat corruption, a necessary first step is the adoption of specific, efficient and clear legislation, capable of eliminating illegality and arbitrariness in the functioning of public institutions and authorities and in their relationship with citizens. However, the mere adoption of legal provisions aimed at limiting and discouraging acts of corruption in public administration is not enough. Conducting research to address the phenomenon of corruption from multiple perspectives is a necessity to substantiate the development and implementation of effective anti-corruption policies. It is crucial at this point to overcome the limitations of previous policies, built naively on a 'top-down', eminently administrative and penalizing perspective, focused exclusively on imposing appropriate rules and behavior. Finding ways to involve all those targeted by acts and practices of corruption, all institutions having a role in developing, evaluating and implementing anti-corruption policies and strategies becomes a necessity in this context (http://www.agenda21.org.ro/download/Studiu%20perceptia%20cetatenilor%20asupra%20coruptiei%20din%20institutiile%20publice.pdf).

Some of the most publicized acts of corruption seem to be those in the field of local government and administration, where bribery and abuse have been and continue to be the main ways to maximize benefits and satisfy the personal interests of government officials. public, including mayors, deputy mayors, councilors, etc. Numerous media signals and complaints from citizens highlight, probably more adequately than official statistics, the involvement of officials and local government officials in acts of corruption, which lead to the redistribution of resources in the interests of private groups, including the so-called "local barons". Causing great damage to the reform process. The media in general, and the press in particular, play a key role in exposing acts of abuse and corruption committed by public officials, with the role of following what is hidden behind closed doors and highlighting how decisions are made that affect the whole of society. By investigating and reporting various cases of abuse and fraud, the media provides information about the beneficiaries, causes, consequences, control strategies and eradication of corruption, outlining a more or less accurate picture of the state and size of this phenomenon in Romania. Undoubtedly, some of the incidents

reported in the press are unfounded and are, rather, mere assumptions of journalists. They are, however, promoted, either out of political interests or to induce a certain "sensationalism" capable of capturing the public's attention. However, in the absence of official data on the extent and types of corruption in local government, media reports, even vague and fragmented, remain indispensable elements for a study that aims to assess the frequency and intensity of corruption at this level. , in different parts of the country (https://www.revistadesociologie.ro/pdf-uri/nr.5-6-2005/art6-%20Sorin%20M.%20Radulescu.pdf).

3. DEVELOPMENT OF GUIDELINES FOR THE PREVENTION OF BRIBERY - MEASURES TAKEN BY LOCAL PUBLIC ADMINISTRATIONS

Local public authorities have recently tried to show interest in finding different ways to prevent corruption in public institutions. In the town halls of the country, the issue of elaboration and implementation of "good practice" guidelines has become more and more topical, precisely in order to stop the phenomenon of corruption, which certainly does not honor the image of the institution and its employees, in front of the public. Thus, at the level of Calafat City Hall, a well-structured project was developed to prevent corruption and raise the efficiency and effectiveness of employees.

The project "Implementation of measures to prevent corruption in the Municipality of Calafat", financing contract no. 223 / 10.08.2018 aims to contribute to better prevention of corruption, by improving the structures and processes of local public administration, increasing efficiency and organizational effectiveness and increasing the degree of responsibility of workers in the administration of Calafat City Hall. In this sense, beyond the surveys on the perception of corruption, its causes and effects, the project carried out by Calafat City Hall brings to the attention of those interested in local public administration this Guide, built on the experiences, problems and solutions identified in public administrations. The guide is addressed mainly to the staff of the local public administration, ie to all officials or dignitaries, elected or appointed, from the institutions with which the citizens come in contact, at local level, regardless of whether the institutions are part of the decentralized or decentralized administration. Why a good practice guide?

Starting from the needs of elaboration and implementation of procedures and guidelines for conduct regarding the phenomenon of corruption, ethics and efficiency in carrying out the administrative act and to make transparent the processes and activities of the local public administration, at the level of Calafat Municipality, in the implementation of measures to prevent corruption in the municipality of Calafat was decided to make a guide of good practices, which aims to ensure the proper functioning of the institution, increase the quality of public service, but especially increase the trust of the beneficiary of public services in institution. Developing and adopting clear internal standards and procedures to prevent corruption is not enough to meet the objectives of the National Strategy.

Anticorruption 2016-2020, but must be accompanied by appropriate attitudes and behaviors in the process of putting them into practice, in the daily activity. Thus, the

emphasis is on ideals, goals and desirable values, examples of fairness, personal example, commitment to public service and public interest, individual responsibility. In this regard, the implementation of this guide has been considered a practical solution for the institution, both in terms of staff and its management, as it proposes recommendations for good practice aimed at strengthening the ethical and integrity environment and preventing of corruption.

How can corruption be prevented? How can officials and citizens contribute to the fight against corruption? For a public official to be considered integrity, he must not only have a reputation for being spotless, but must also actively protect the integrity of the public institution by taking action against those who have committed acts of corruption. The legislation on corruption, as well as the code of ethics of civil servants, clearly outlines the behavior of a civil servant, so that he does not reach the position of being the perpetrator of a corruption offense. The law makes it very clear that an official must not claim any benefit in return for the performance of his duties or any sum of money or property in addition to the fees and costs established by law, where applicable. At the same time, the official has no right to receive money or other benefits in the performance of his duties or to accept the promise of such benefits. At the same time, no official has the right to receive or accept the promise of sums of money or goods in order to perform an act that falls within his duties, to delay the performance of an act or to perform an act to the contrary. Very often citizens are willing to offer sums of money to have certain requests resolved, to be served first or not to have various sanctions applied to them. In this case, any official must firmly refuse the offer made and explain to the person who made it that this is illegal.

Not shall the official receive anything in return for the performance of his duties, even if he has applied the law correctly. As a matter of habit, a number of citizens offer various attentions, gifts or services to officials in order to maintain a good relationship with them. Their acceptance by the official may put him in an unpleasant situation when he will have to apply a sanction or refuse to offer a service to that citizen. The referral must be seen in two ways: both as a legislative obligation in a democratic society, but also as a civic duty of all citizens. We consider that the modalities that a person has at his disposal based on the law and, at the same time, the obligation to report the facts of corruption are important (https://municipiulcalafat.ro/wp-content/uploads/2019/08/GHID-2-var-3.pdf).

Another such guide elaborated in detail was prepared by the Sebeș City Hall, a project called "Guide of good practices for preventing corruption in public administration." The proposed methods seem to be current and immediately applicable.

Measures that can be taken in response to the causes of corruption among staff are: increasing the level of professional and civic education of staff and assuming the obligations of conduct and professional ethics; the introduction of a system of selection, recruitment and promotion for dignitaries, civil servants and contract employees, in which professional and / or managerial criteria predominate, depending on the need, not the ability to memorize normative acts; increasing the degree of anti-corruption education for the public institution, through training modules for civil servants and contract staff; informing staff on how to report corruption and the institutions involved in preventing and combating corruption; training courses, with online interactive testing,

for the people in charge of the public institution; adapting staff to job or job requirements; creating a strong organizational culture to discourage corruption; notifying the hierarchical heads or the criminal investigation bodies regarding the offenses of colleagues, including regarding their criminal activities; categorical rejection of temptations offered in exchange for defective performance or non-fulfillment of duties (amounts of money, goods, services, benefits, etc.); categorical rejection of requests for the settlement of requests from "colleagues" from different institutions, which are sometimes at the limit of legality; creating a positive image from the first contact with the citizen through: positive attitude, availability, kindness, using a formula of politeness at the beginning of a discussion / conversation, clarity of the message etc .; adapting the answer for each social category with which they interact and depending on the context (public services are offered to all equally: young, old, poor, rich, etc.), without complicated phrases, too legal terms, etc.; providing complete, clear, accurate, easy-to-understand and timely information; improving public services according to the recommendations / proposals made by its direct beneficiary (citizen or business environment); developing projects in partnership with non-governmental organizations involved in the fight against corruption; computerization of procedures and interconnection of databases of all public institutions, so that the citizen is relieved of the burden of collecting signatures and stamps, can be informed directly from the web pages of the institutions and can even submit petitions in electronic format; effective information for citizens, so that they are not put in a position to resort to other channels of entry into the institution; streamlining / revising / simplifying the internal route of documents and information, during petition processing, to eliminate unnecessary syncopes and delays; establishing the exact settlement deadlines and introducing emergency fees, in order to eliminate any incorrect pressures; identification of vulnerable areas of public service and corruption risks, simultaneously with the implementation of a corruption risk management system; interoperability / interconnection of information systems of public institutions (common databases, but with differentiated access), so that the citizen does not have to bring the same document to several institutions to solve the request; the establishment of a register of complaints and an evaluation system (questionnaires for measuring customer satisfaction / feedback) of the public service in order to improve it (https://anticoruptiesebes.ro/).

4. JUDICIAL PRACTICES - A RELEVANT DECISION OF THE CEDO

In practice, the analysis of evidence material must be done with the most exigency, both during the criminal investigation and before the court. Such an act being an accusation of corruption must be based on solid evidence or indications regarding the fulfillment, non-fulfillment, acceleration or delay of the fulfillment of an act by a public official or state officials. In principle, the constant denial of the commission of the act, in the conditions where there is no blatant and no witness statements that do not incriminate the alleged perpetrators, the interceptions and messages invoked by the prosecution are not sufficient to prove the existence of such acts of which they are accused. The administration of justice requires a judge to base a judgment on certain

elements that are capable of leading beyond any doubt or reasonable doubt to the establishment of guilt, an objective reality regarding any charge.

The Bucharest Court considered that the verbal expression of refusal, without returning the amount of money placed on the desk by an undercover investigator, in the conditions where it is not proven that the money actually came into the defendant's possession, does not represent sufficient evidence for to retain the commission of the crime of bribery, so that the defendant must be acquitted (Sentence no. 828/2022 of July 20, 2022, pronounced by the Criminal Section of the Bucharest Court). Finally, until the adoption of a final conviction, the defendant has the status of an innocent person, and a final conviction must be based on clear evidence of guilt, any doubt being against the defendant, the court being obliged to pronounce a solution of acquittal The "in dubio pro reo" rule according to which any doubt despite the defendant is applied uniformly and represents a principle of law (https://www.luminitamazilu.ro/post/luare-de-mita).

A relevant decision regarding the correct administration of evidence is the Decision of November 8, 2016 in the case of Gutău v. Romania, published in the Official Gazette no. 755 of September 21, 2017 (https://legislatie.just.ro/Public/DetaliiDocumentAfis/193315). The plaintiff, Mircea Gutău, notified the European Court of Human Rights on July 13, 2010, pursuant to art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). At the time of the facts, the plaintiff was the mayor of Râmnicu - Vâlcea.

The legal and factual situation being the following: Through the 2006 indictment, the prosecutor's office sued the plaintiff for bribery. By the same indictment, the vice mayor of the city was sent to court for complicity in taking bribes. The plaintiff was accused of asking, between April and July 2006, a certain amount of money from a businessman from Râmnicu Vâlcea, in exchange for an urban planning certificate that met the criteria he wanted. The vice-mayor was accused of having received, following a prior agreement concluded with the plaintiff, two parts of the amount requested by the businessman.

By the Decision of June 2007, the Alba Court pronounced the acquittal of the applicant and the deputy mayor under the charge of bribery. To order this solution, the court held as follows: the businessman had made several attempts to obtain a town planning certificate for the construction of a building on a plot of land located on a certain street, and each time received certificates that did not meet his requirements ; although he had stated that he intended to eventually build the building on another plot of land, located on another street, he had not made a request to the authorities to that effect until after the mayor and deputy mayor had been sent to court;in these circumstances, the applicant could not be accused of soliciting or receiving money in connection with the performance of his duties and therefore had not breached national anti-bribery legislation.

The court also noted that the businessman had turned up at the applicant's office after handing the second part of the amount of money to the deputy mayor at the restaurant and that when he had tried to talk to the applicant about the amount thus handed, he had uttered the word "no". According to the court, beyond the gestures that accompanied the word, visible on one of the video recordings, the negation expressed by the applicant had to be understood as an opposition of the latter to any handing of

money. By the decision of December 2007, the Alba Iulia Court of Appeal annulled the June 2007 judgment of the tribunal, finding that it had not fulfilled its obligation to subject the parties to debate the legal reclassification of the facts of which the deputy mayor was accused of taking bribes. The High Court admitted the appeal filed by the prosecutor's office, overturned the judgments handed down in the first instance and on appeal and, ruling on the merits, sentenced the applicant and the deputy mayor to three years and six months in prison each, for taking bribes and complicity in bribery, respectively. The High Court found that the lower courts had committed a "serious error of fact" by placing undue reliance on certain pieces of evidence and by truncatedly interpreting or ignoring other pieces of evidence. The court based its decision on: the statements given by the businessman and five witnesses heard during the investigation and during the examination of the case in the first instance; documents sent by local authorities; several audio and video recordings of the businessman's meetings with the applicant and the deputy mayor; and interceptions of the telephone conversations the businessman had with them.

The applicant denounces a violation of his right to a fair trial in the criminal proceedings against him: he accuses the High Court of convicting him without direct administration of the evidence on the basis of which he had been acquitted by the lower courts. The applicant submits that in order to convict him of bribery and set aside the judgments of the lower courts, the High Court re-examined the merits of the charges in fact and in law. He considers that the supreme court proceeded for this purpose with an examination of all the evidence administered, including the witness statements, which, in his opinion, are decisive evidence in the case. The applicant complains to the High Court that he was convicted of bribery on the basis of the statements of witnesses whom it had never heard, stating that he had been acquitted of this charge by the lower courts. Referring to the previously mentioned Găitănaru jurisprudence, he considers that his conviction violated art. 6 § 1 of the Convention. Finally, he criticizes the High Court for the conclusion he reached regarding the existence of a "serious factual error" in the previous judgments and for not having limited himself to the analysis of a simple question of law.

The Court recalls that the admissibility of evidence is a matter primarily related to the rules of domestic law that, in principle, it is the national courts that are responsible for evaluating the evidence administered by them (García Ruiz v. Spain [MC], no. 30,544/ 96, point 28, ECHR 1999-I) and that its task is, according to the Convention, to examine whether the procedure, considered as a whole, including the way of presenting evidence, was fair (see, among many others, Teixeira de Castro v. Portugal, 9 June 1998, § 34, Reports of Judgments and Decisions 1998-IV). In addition, the Court points out that when an appellate court is called upon to decide a case on the facts and law and to examine, as a whole, the question of guilt or innocence, it cannot, for reasons of procedural fairness, decide on these matters without directly hearing statements given in person either by the accused who maintains that he did not commit the act of which he is accused (see, among other examples, Ekbatani v. Sweden, 26 May 1988, § 32, Series A, no. 134; Constantinescu v. Romania, No. 28,871/95, § 55, ECHR 2000-VIII; Dondarini v. San Marino, No. 50,545/99, § 27, 6 July 2004; and Igual Coll v. Spain, No. 37,496 /04, point 27, March 10, 2009), or by witnesses who gave statements during the

procedure (Găitănaru, previously mentioned, point 35 and Hogea v. Romania, no. 31,912/04, point 54, October 29, 2013) .

In this regard, the Court emphasizes that it has already established, in similar cases, that, in the Romanian judicial system, the competences of the courts referred to with appeal were not limited only to matters of law. Thus, the Court found that the proceedings before the appellate court were a full proceeding that followed the same rules as a substantive proceeding and that the appellate court could either confirm the acquittal handed down by the lower court or declare the person in question guilty, after a complete assessment of the issue of guilt or innocence, administering, as appropriate, new means of evidence (Dănilă v. Romania, no. 53,897/00, point 38, March 8, 2007, Găitănaru, previously cited, point 30 and Văduva v. Romania, no. 27.781/06, point 43, February 25, 2014). In the Court's view, in the present case, the High Court had indeed offered a new interpretation of the evidence, establishing that the applicant had committed the acts charged, which resulted in the application of a criminal conviction.
The Court notes that, in previous cases, it concluded that, based on the provisions of the Code of Criminal Procedure, if the appeals court retained a case for retrial, it had to rule, as the case may be, on the evidence to be administered during the procedure. Therefore, it follows that the administration of evidence after the annulment of a decision was regulated by a specific legislative framework (Găitănaru, previously cited, point 33). In this regard, the Court recalls that it previously criticized the Romanian authorities for the lack of evidence before the appeals court (Flueraș v. Romania, no. 17,520/04, points 56-62, April 9, 2013, and Moinescu v. Romania, no. 16,903 /12, points 36-41, September 15, 2015).

However, in this case, the Court notes that the Alba Tribunal and the Alba Iulia Court of Appeal considered that the documents in the file, including the statements of several witnesses, justified the acquittal of the plaintiff. It shows that the High Court did not have any new information to replace his acquittal with a criminal conviction for bribery and that the supreme court relied exclusively on the documents on file, implicitly on the written statements obtained during the investigation stage and on the minutes drawn up by the court, which contained witness statements. The Court further notes that the High Court decisively based its conviction of the applicant for bribery, inter alia, on the statements of witnesses, filed before the lower courts, and this without proceeding to hear the witnesses in question. Relying, in particular, on the statements of the same witnesses, the High Court went further than the lower courts. Undoubtedly, the appellate court had the competence to assess the various information obtained, as well as the relevance of those that the applicant wanted to present. It is no less true, however, that the applicant was found guilty on the basis of testimony which the first courts that dealt with the case had considered insufficient to convict him. Under these conditions, the omission of hearing witnesses by the supreme court before declaring the applicant guilty considerably limited the right to defense (Destrehem v. France, no. 56,651/00, point 45, 18 May 2004; Dan v. Republic of Moldova, No. 8,999/07, §§ 31-35, 5 July 2011, and Lazu v. Republic of Moldova, No. 46,182/08, §§ 36-44, 5 July 2016; see also, mutatis mutandis, Marcos Barrios v. Spain, No. 17,122/07, §§ 40-41, 21 September 2010, and Lacadena Calero v. Spain, No. 23,002/07, § 49, 22 November 2011).

The Court considers that the said conviction of the applicant for bribery, pronounced without hearing the previously mentioned witnesses, and although the two lower courts considered that the constituent elements of this crime were not met, is contrary to the requirements of a fair trial within the meaning of art. 6 § 1 of the Convention.

5. CONCLUSIONS

The acts of corruption, the most known by the public, seem to be those in the sphere of local public administration. The role of public institutions is to get involved in finding the best solutions to corruption in their own administrations. It is hoped that the quality of the public service will be streamlined, and public authorities have used guidelines to prevent corruption. Failure to find appropriate measures to combat this widespread phenomenon will certainly reduce the credibility of citizens in these institutions. Adopting strong, special and clear legislation in preventing and combating corruption would be paramount. Equally essential is the involvement of officials in various specialized courses on the fight against corruption and in improving the services provided.

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