THE BORDER BETWEEN BRIBERY AND SPONSORSHIP OF A MEDIC-PUBLIC SERVANT, IN THE EXERCISE OF HIS DUTIES

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Abstract

Present paper aims to analyze the situation of a medic, civil servant in the exercise of his duties, who is compelled to ask the patient to pay the provided medical services from his own funds. The economic and social context of Romania over the last ten years, along with Romania's entry into the economic crisis, has led to drastic austerity measures. A major area that has been affected was the medical field in which patients were faced with two situations. On the one hand, in order to benefit from medical services, reimbursed by the Romanian state, they had to be included on waiting lists, and on the other hand, they had the possibility to sign a sponsorship contract with the medical unit and to pay out of their own funds the medical services they were receiving. Thus, as many people have opted for the sponsorship contract, this situation has come to the attention of anticorruption prosecutors who have considered that signing of a sponsorship contract is a disguised form of bribery of the medic. In the context of the fight against corruption, prosecutors investigated whether the constitutive elements of the bribery offense were met in these conditions. The present study follows the arguments used by lawyers to prove that signing a sponsorship contract between a patient and the medical unit not only cannot have criminal connotations but the most important that the criminal responsibility of the physician involved cannot be attributed.

Keywords: *bribery, medic, public servant, sponsorship, contract, external finances.*

JEL Classification: K14

1. Factual situation

Since 2010, there have been major deficiencies in the financing of the Romanian medical system and the waiting lists at the hospitals in Romania, treating cardiac diseases requiring the financing of a coronary stent or a pacemaker, exceeded 6 months, well beyond the reasonable period of postponement of a patient with severe cardiovascular disease.

Under-financing of hospitals for cardiovascular diseases, lack of sanitary materials, specific devices and intermittent supply of medicines, resulted in delayed medical procedures and the registration of an approximately triple number of deaths in 2010 compared to previous years.

Considering that certain procedures often constitute a medical emergency without alternative treatment, it was repeatedly requested support from the Ministry of Health with the consent of the Board of Directors of the hospital. The solutions proposed by the Ministry were: inclusion of patients on waiting lists, redirection of patients to other medical centers or full payment of medical services to patients hospitalized over the number of cases assigned to the hospital.

Board meetings to discuss solutions on limiting the number of cases contracted with the County Health Insurance House (CHIH) offered the option of limiting the activity to the allocated funds and payment of medical services for patients who would have addressed the hospital after completing these insufficient funds.

Since none of these variants could be a viable solution to the problem of underfunding, the Legal Department of the Public Health Administration and the Legal Department of the Cardiovascular Disease Hospital have proposed to the Board of Directors to issue a decision through which to allow supplementing hospitals revenue from donations and sponsorships[3].

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2. Legal framework

The legislation in force provides both the right of hospitals to supplement their income from donations, sponsorships and other forms of liberalities as well as the right of the doctor to receive additional payments or donations from patients.

Thus, the general framework, regulated by the Public Finance Act no. 500 of July 11, 2002[4] stipulates in art. 63 that "public institutions can use to conduct their work, material goods and funds received from legal and natural persons in the form of donations and sponsorships, in accordance with the legal provisions".

Although our donations legal framework represented by the Civil Code, does not limit in any way the ability of subjects' right to be donors, as regards the sponsorship, positive law tried a conceptual boundary on the ability of certain entities to be beneficiaries of sponsorship.

Law no. 32/1994[5] defines sponsorship in art. 1 as the legal act by which two persons agree to the transfer of ownership of material goods or financial means for the support of non-profit activities carried out by one of the parties, named the beneficiary of the sponsorship.

Regarding the legal subjects eligible for sponsorship, the Romanian legislator listed as an example in the art. 4 par. 1 lit. a) a range of areas in which legal entities can receive sponsorship.

Therefore, can benefit from sponsorship any non-profit legal entity who is carrying out or is about to pursue an activity in the fields of: culture, art, education, scientific - fundamental and applied research, religion, philanthropic, sport, protection of human rights, health care, social and social services, environmental, social and community protection, representation of professional associations, as well as maintenance, restoration, preservation and valorization of historical monuments".

Since these provisions were likely to lead to the restriction of certain categories of legal persons of public interest, on 02.08.1994 the Ministry of Health issued Guidelines[6] for the application of Law no. 32/1994 and in chapter II expressly provided that can benefit from sponsoring: schools, hospitals, retirement homes, orphanages, associations, foundations, etc., if they have legal personality.

Thus, if, prior to 2003, the right of hospitals to receive sponsorship was expressly regulated only through tertiary legislation, through the adoption of the Hospital Law no. 270/2003[7], the legislator intervened by organic law and stated in art. 36 par. 4 that "public hospitals can achieve additional own revenues, among others, from donations and sponsorships".

Along with the health reform, achieved through Law no. 95 of April 14, 2006[8], considering the socio-economic context, the Parliament has provided a detailed legal framework on healthcare systems possibility to benefit from donations, sponsorships and other forms of liberalities.

At a macro level, the legislator of Law 95/2006 in art. 58 has ruled on the financing of national health programs. Thus, we observe that the legislator tried to safeguard the medical field by stipulating that it could be financed:

- From the budget of the Ministry of Health, from the state budget and from own revenues, for the national public health programs;
- From the budget of the Single National Health Insurance Fund, for the national curative health programs;
- From other sources, including donations and sponsorships, according to the law.

If regarding the budget of the Ministry of Health and the state budget there were regulations regarding the sources of financing, regarding the single national health insurance fund stipulated by art. 58 par. 1 lit. b, being a new fund introduced as a result of the health reform, the legislator

[4] Published in the Official Gazette, Part I no. 597 of 13.08.2002, entry into force: 01.01.2003.
[5] Published in the Official Gazette, Part I no. 129 of 25.05.1994, entry into force: 01.06.1994.
[6] Published in the Official Gazette, Part I no. 210 of 11.08.1994, entry into force: 11.08.1994.
[7] Published in the Official Gazette, Part I no. 438 of 20.06.2003, entry into force: 01.03.2004, revoked by Law no. 95/2006 at 28.05.2006.
[8] Republished in the Official Gazette, Part I no. 652 of 28.08.2015, entry into force: 28.08.2015.

stipulated in the art. 265 par. 1[9] the fact that the fund is made up of: contributions of natural and legal persons, funds from the Ministry of Health's own revenues, subsidies from the state budget, interest, donations, sponsorships, revenues obtained from the exploitation of the patrimony of the National Health Insurance House, the county insurance houses, and other income, under the law.

As far as the financing of hospitals is concerned, the Romanian legislator considered it appropriate to rule through art. 188 par. 1 of the Law no. 95/2006 that public hospitals are fully financed from their own revenues and operate on the principle of financial autonomy. It also shows that the hospital's own incomes come from the sums received for medical services, other contract-based benefits, as well as from other sources, according to the law.

Motivated by the fact that the phrase "from other sources, according to the law" in the above cited text is relatively generic, the art. 193 par. 7 of the same law expressly states that "public hospitals can achieve additional income from: donations and sponsorships".

Correlative to the right of public hospitals to supplement their income with liberalities from various natural or legal persons Patient Rights Act no. 46 of 21 January 2003 in the contents of art. 34 par. 2 provides the right of patients to give to the employees or to the hospital where they received medical care, additional payments or donations with compliance of the law.

Under these circumstances, we note that sponsorship contracts between patients as sponsors and cardiovascular disease hospitals as beneficiary are not only provided by the entire public finance and hospitals legislation, but the natural conclusion in this case is that such legal relationships of private law cannot have criminal connotations.

3. Legal qualification of the National Anticorruption Division

During an investigation by the National Anti-Corruption Division, the case prosecutor found that an announcement addressed to patients was published in the cardiovascular disease hospital, from which resulted, among other things, that "non-medical emergency patients will be scheduled on waiting lists; those patients who do not accept the waiting lists may access paid medical services; the sponsorship of the hospital represents a legally regulated resource that is able to diminish the financing deficit".

After the issue of Ex officio referral report, the investigation revealed that there was a second hospital announcement addressed to the doctors, which implies that physicians who make appointments for continued admission are required to inform properly the patients about issues related to waiting lists or the alternative to sign a sponsorship contract.

As a result of the investigations carried out, the NAD prosecutors have noted that a Custody Agreement between SC M.D. SRL and the Cardiovascular Disease Hospital was signed allegedly to avoid the application of the legislation on public procurement. The custody contract in fact concerned the purchase of the medical supplies from the mentioned company. The funds used for this acquisition came exclusively from funds received by the hospital as sponsorship from patients[10].

In this context, a number of evidence has been administered, among which:

- a doctor's report on the serious condition of a patient requiring the necessary measures to mount a permanent cardio stimulator as the patient is not in a material capacity to purchase the device;

- the clinical observation sheet of the B.V. (signed and stamped), hospitalized between December 28, 2010 and January 17, 2011, with coronary heart disease, as well as the annexes thereto, which show that it was operated on 28.12.2010 by the physician I.N., being subjected to cardiac surgery. Also a certificate was attached, from which it appears that B.V. had a monthly income of 125 lei, documents showing the medication that were administered and whose medical procedures were submitted, a centralized partial situation from which resulted data on the amounts received as sponsorship, the name of the patient and the doctor;

[9] Art. 256 in the previous form, prior to republishing.

[10] Official Prosecution act issued by the National Anticorruption Division at 25.10.2011, unpublished.

- the observation sheet of the R.V.M. (signed and stamped), hospitalized between 28.02-03.03.2011, with chronic heart disease, as well as the annexes thereto. There have also been attached: a certificate of disability classification of this pacient, a receipt showing that the hospital has received from this patient a certain amount of money as a sponsorship, a payment reimbursement related to the medical treatments given to the patient, the total amount being 3.481,13 lei;

- copy of the receipts which showed that the hospital has collected from several people (probably ill) certain amounts of money - between 100-2.066 lei - as sponsorship (in the receipts it is mentioned „sponsorship contract no. ....");

- the clinical observation sheet of E.I. (signed and stamped), corroborated with the receipt showing that the hospital received from this patient on April 11, 2011 the amount of 2,600 lei as sponsorship;

- addresses from March to May 2011 of a chief medical officer to the hospital manager regarding some patients, as well as the copies of the receipts stating that from these patients the hospital received the amount of 2,600 lei as sponsorship.

Subsequently, the NAD considered that during the period 01.01.2007-07.03.2012, at different time intervals, but under the same criminal resolution, T.G., N.I. and D.R., as doctors in the hospital for cardiovascular disease have conditioned the medical care of patients after receiving sums of money totaling 8.526.301,56 lei. In order to hide the real nature of the amounts of money received as bribery under the conditions described above, N.V., in conjunction with the persons involved, drafted a number of 2,979 contracts in which it falsely stated that the money in question were donated or given as sponsorship by patients[11].

4. Arguments of defense

The main argument used by the defense revealed that the constitutive elements of the bribery offense are not met due to the fact that the doctors did not get any benefits given that medical interventions could not be pursued because there were no resources necessary for carrying out the medical-surgical procedures and there was no equipment.

As a matter of fact, the patients were informed that they could be enrolled on the waiting list in order not to pay for the cost of the equipment needed for surgery, but due to the medical emergency or the long and uncertain waiting period, this solution could not be agreed.

This aspect is backed up by GM's statement according to which "at the time of hospitalization a hospital representative (I do not remember his name) told me that I had the possibility to sponsor the hospital with a sum of money, the amount of which could be determined by me. I agreed to sponsor the hospital, providing me with a contract model and a statement that I did not agree with my inclusion on a waiting list".

All the witnesses heard by the criminal investigation bodies revealed that the donations and sponsorships amounts were paid to the hospital cashier, where they received a receipt for the full amount.

Relevant to this extent is VD's statement that "besides the amount of 1000 lei I gave to the hospital, for which a contract was signed and I received a receipt, I did not give nor have been claimed any sum money by the medical staff, during or after hospitalization for surgery, neither to carry out the actual surgery nor before".

Moreover, the budget approved by the board of directors, which highlighted donations and sponsorships from patients, was endorsed by a financial audit of the Ministry of Health in 2010 and 2011, as well as an audit by the Ministry of Finance, context in which they did not find any irregularities.

The analysis of the hospital's economic and financial situation revealed that the budget received for national health programs from the Ministry of Health was reduced compared to previous years by 50%, as the number of patients was constantly increasing. Funding for hospital

[11] Resolution to start criminal prosecution issued by the National Anticorruption Division at 05.04.2012, unpublished.

services covered only personnel and equipment related expenses, and the sums contracted with the CHIH covered only staff, services and goods, but without medicines and sanitary materials.

Under such circumstances, the Board of Directors of the hospital was summoned and found that for the payment of sanitary and other expenses were used the donations and sponsorships, the sums attracted from liberties being highlighted in the hospital budget under the chapter "Other incomes".

Moreover, the money coming from these donation and sponsorship contracts was used exclusively for the purpose of purchasing the medical devices and medication needed for hospitalized patients who signed sponsorship contracts as sponsors.

Including the health status of each patient reveals that these contracts were signed with people who had severe diagnostics and presenting high risk of medical-surgical emergency.

Practically, the goal of these sponsorship contracts was to meet patients' needs, given the crisis faced by the medical system and maintaining the quality of medical services in public health facilities.

However, in order to meet the constitutive elements of the bribery offense, the claim made by such means must have an exact, precise meaning, undoubtedly and unequivocally suggest the demand for money or undue advantage, which must be understood as such by the one to whom it is addressed.

Thus, in the present case, in order for the bribery to exist, the patient had to understand not only that a claim was made, claim to give the doctor money or other benefits, but also that the claim is unlawful.

The literature[12] has shown that we can speak of unlawful benefits not only when the act is free, but also in the situation where are claimed, received, accepted or not refused money or other benefits exceeding what is legally owed for the act performed or the service provided.

We believe that we cannot talk about unlawful benefits in the conditions in which the money were used not in personal interest, but for the purchase of the apparatus and instrumentation necessary for the hospital activity. As a result, in the absence of these cash contributions, the medical act could not have been actually performed and these contributions did not exceed what is legally owed for the provided medical service.

The necessary supplies, namely medicines and sanitary materials, were ordered from suppliers on behalf of the hospital, which then reimbursed these orders. By signing these conventions, the hospital interposed between the patient and the distributors of sanitary materials and medicines, guaranteeing both the quality of the purchased drugs (accredited medical devices, with the appropriate shelf life and warranty) and a reasonable price, given that the hospital knew the prices of distributors and prevented the application of excessive prices.

At the same time, this funding method provided a viable solution to patients who did not want to be included on the waiting lists.

Particularly relevant is the fact that the accounts of the hospital show that the amounts coming from the sponsorship contracts were fully justified and highlighted in the accounting, being allocated according to the destination for which they were collected, respectively included in the Income and Expenditure Bundle, verified and approved by the Ministry of Health.

Another defense argument concerned the very essence of the legal relationships of private law, namely the freedom of contracts. Thus, it was argued that the signing of donation and sponsorship contracts represented the free will of the parties, a matter arising both from the content of the sponsorship contracts and from the "Declaration" that was part of the contract. According to this document, patients were aware that if they do not wish to sign such a convention, they could opt to be included in the hospitals waiting list.

Also relevant is the fact that there was a contractual clause that sponsors had the "right to claim a refund".

[12] Gabriel Caian, *Conținutul constitutiv al infracțiunii de luare de mită* in „Revista de stiinte juridice" no.2/2007, p. 137, available online at http://drept.ucv.ro/RSJ/images/articole/2007/RSJ2/016Caian.pdf

Moreover, during the administration of evidences in the criminal investigation, the patients heard as witnesses unanimously declared that the money for the sponsorship contracts was granted on a voluntary basis without suffering any constraint or condition related to the medical act or any other duties of the doctors involved.

Thus, it is indisputable that to all patients who have signed sponsorship contracts it was clearly and correctly explained all the possible treatment options and the consequences of each variant, all procedures being carried out only with their informed consent.

5. Doctrinal and jurisprudential elements

Steven van de Walle, a professor at Erasmus University in Rotterdam, who studied the phenomenon of the medical system in Romania, says that unofficial payments cannot be reduced to corruption, as citizens consider these payments as logical[13].

This assertion could be correlated to the existence of a justifiable cause for the suspect of bribery offense motivated by the patient's will to gratify the doctor, right guaranteed to patients as we have already shown in art. 34 par. 2 of the Law no. 46/2003.

According to art. 21 par. 1, sentence I of the Criminal Code, the act provided by the criminal law consisting in the exercise of a right recognized by law shall be considered as justified, conditions in which attraction of criminal liability is not possible.

In this context, having regard to this controversy, the Bucharest Military Court of Appeal asked the High Court of Cassation and Justice, the Panel for unraveling points of law in criminal matters, to rule on the following question of law: *"to determine whether the act of the doctor, who is considered a civil servant, to receive additional payments or donations from the patients under Art. 34 par. 2 of the Law no. 46/2003 regarding the rights of the patient, constitutes or not the exercise of a right recognized by law, resulting in the incidence of the provisions of art. 21 par. (1) Thesis I from Criminal Code"*.

As the reporting judge did not identify relevant case law on the question of criminal law brought to the court, the views of criminal law specialists were sought.

The majority opinion[14] expressed in the matter proceeded on the assumption that the doctor, a civil servant employed by the hospital is indirectly concerned by the provisions of art. 34 par. (2) of the Law no. 46/2003 patient rights.

As we have seen, in the present case, the normative text must be corroborated with the relevant provisions of the Law no. 95/2006 which stipulates the right of hospitals to earn revenues not only from public sources but also from liberties from individuals, namely donations and sponsorships.

However, according to the expressed opinion[15] we note that "it does not emerge explicitly from the cited texts that the doctor can receive donations or sponsorships, in other words, there is no expressly provided right which could be invoked as the basis of the justifying cause in discussion. But if the patient can benefit from the justifiable cause, it implies implicitly that the employee of the hospital in which he was cared for, the doctor has the same regime. It would be absurd to consider that the patient is entitled to provide an additional payment or a donation, but the doctor or other employee of the care unit is not entitled to receive them. The prohibition of the doctor would invalidate the explicitly stipulated right of the patient. Thus, if we admit the patient's right, we are obliged to admit that the doctor has a correlative right".

In other words, if the patient's right to provide additional payments after the medical act is the basis for the retention of the justifiable cause in relation to the bribe giving, the correlative right

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[13] *The Economist: Corupţia, problemă endemică în sistemele medicale din Europa de Est, inclusiv România* available online at http://www.mediafax.ro/externe/the-economist-coruptia-problema-endemica-in-sistemele-medicale-din-europa-de-est-inclusiv-romania-14057532

[14] Valerian Cioclei, legal opinion sent by the Department of Criminal Law, Faculty of Law, University of Bucharest to the Panel for unraveling points of law in criminal matters of SCJ on April 22, 2015.

[15] Ibidem.

of the doctor, to receive additional payments after the medical act, must represent a ground for the justifiable cause in relation to the bribery offense.

The same opinion was also expressed by the specialists of the Institute of Legal Research "Acad. Andrei Rădulescu"[16], who stated that "the exercise of the patient's right to provide additional payments or donations to the employees or to the unit where he was cared for - only after the provision of medical care - as provided for in art. 34 par. (2) of the Patient Rights Act no. 46/2003, draws the incidence of the justifying cause provided by art. 21 par. (1), sentence I of the Criminal Code, which will operate both with regard to the patient in relation to the offense of bribe giving, as well as with regard to the doctor (the employee of the medical unit), in relation to the bribery offense".

In the relevant doctrine of criminal law[17] it was stated that "the rationale for the regulation of this justifiable case is that an act cannot be unlawful as a consequence of its provision in the criminal law, and, on the other hand, the same act should be considered lawful by other rules. It would not be conceivable that the law should provide the possibility of exercising a right, while at the same time removing this possibility as a result of banning it under criminal punishment".

However, by Decision no. 19[18], issued in Case no. 1151/1/2015, the Supreme Court's Panel for unraveling points of law in criminal matters admitted the Military Court of Appeal's request and stated that *"the deed of the doctor, civil servant in accordance with the provisions of Article 175 paragraph 1 b) of the Criminal Code, to receive additional payments or donations from patients within the meaning of Article 34 paragraph 2 of Law No 46/2003 on patient's rights does not constitute exercise of a right recognized by a law enacting the provisions of Article 21, paragraph 1, sentence 1a, of the Criminal Code"*.

Even under these circumstances, we believe that if a patient grants to the hospital or to the doctor various amounts of money as sponsorship or donation, independent of the Supreme Court's statutes, we consider that are still not in the hypothesis of committing bribery.

Without criticizing Supreme Court's decision, we can see that the text of art. 289 of the Criminal Code sanctions the bribery as claiming or receiving unlawful money or other benefits. The High Court of Cassation and Justice held that, in the basic hypothesis of the present study, the justifiable cause cannot be accepted, but there is no criminal procedural impediment, to the criminal investigation bodies or the criminal courts, to retain that the constitutive elements of the bribery offense are not met motivated by the fact that the amounts offered are lawful.

6. Conclusions

In conclusion, we can state that bribery offense crime does not exist when a sponsorship contract is signed between the patient as a sponsor and the public hospitals as beneficiaries.

Criminal investigation bodies from the present study, although they have ordered the initiation of criminal prosecution for bribery, have found that the alleged offense does not exist.

The contract related to the minimum amount required to purchase primary medical device. However, the overall cost of the procedures was much higher, with strict reference to the materials used and the medication, the difference being paid by the hospital, through funding from the County Health Insurance House or National Health Programs. Thus, the value of donation or sponsorship contracts varied with the procedure to be followed and other relevant factors.

Also relevant is the fact that doctors had no job responsibilities for signing donation and sponsorship contracts, which were initially signed by the accounting chief and the legal advisor.

As we have highlighted, the bribery offense cannot exist as the money were voluntarily offered by patients without any pressure or constraint of any kind on the part of doctors.

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[16] „Acad. Andrei Rădulescu", Institute of Legal Research opinion sent to the Panel for unraveling points of law in criminal matters of SCJ in case file no. 1151/1/2015/HP/P.

[17] C-tin. Mitrache, C. Mitrache, *Drept penal român. Partea generală*. Ed. Universul juridic, Bucharest, 2014, p. 186.

[18] Issued by the SCJ on 04.06.2015, published in the Official Gazette, Part I no. 590 of 05.08.2015.

Incidentally, the inexistence of the crime is justified by the fact that money not only did not reached the doctors patrimony, but were used entirely and exclusively in the interest of the patient sponsor.

Moreover, these amounts were collected in compliance with the public finance legislation, they were highlighted in the budget of the hospital and were subject to the audit of the Ministry of Health, occasion in which no irregularities were identified.

The expressed opinion and the solution of the criminal investigation bodies of the National Anticorruption Division in the analyzed case does not contradict the decision of the High Court of Cassation and Justice, since in the case submitted to the supreme court refers to physicians as natural persons while in this situation, although the prosecution had been initiated for alleged bribery offense committed by doctors in a dissimulated form, in fact it was found that the direct beneficiary of the money offered as sponsorship was none other than the patient.

Basically we can sustain that the bribery offense does not exist given that the patients, who have signed sponsorship contracts, financed their own health care without hospital or physicians to receive any material benefit directly or indirectly.

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