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PRECOP-RF

Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices

Technical Paper:

Analysis of International Practice of Criminalisation/Decriminalisation of the Provocation of Bribes as Investigative Action

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Conflict of Interest and the use of Official Power for Private Gains

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Abbreviations

BEPA	Bureau of European Policy Advisers
CHIS	Covert Human Intelligence Source
CoE	Council of Europe
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
MP	Member of the Parliament
MEP	Member of the European Parliament
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OLAF	European Anti-Fraud Office
POGO	Project on Government Oversight
RIPA	Regulation of Investigatory Powers Act
UN	United Nations
UNCAC	United Nations Convention against Corruption

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1 EXECUTIVE SUMMARY

This technical paper has been prepared within the framework of the Joint EU/CoE project on the "Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices" – PRECOP RF. The paper is divided into two parts; the **first part** provides an analysis of the international standards and practice for the criminalisation/decriminalisation of the provocation of bribes as an investigation technique.

In addition to the criminalisation of corruption and other offences, the Criminal Convention on corruption of the Council of Europe lays down the obligation for its parties to adopt legislative or other measures, including those permitting the **use of special investigative techniques** with a view to enable them to gather evidence related to the criminal offences established therein.

Within this context, at the European level, the ECtHR has defined **entrapment, as opposed to a legitimate undercover investigation**, as it occurs: "(…) where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (…)".

Against this background, the ECtHR defined strict limits that must be observed when it comes to the use of special investigative methods in particular under-covered techniques. Indeed, in that respect, the ECtHR undertakes a three-phase check:

- **during the authorising phase**, are the authorities in possession of "concrete and objective evidence showing that initial steps have been taken to commit the acts constituting the offence for which the applicant is subsequently prosecuted";
- **during the implementing phase**, are the authorities able to establish if "the criminal act was already under way at the time when the source began collaboration with the police"; in other words, what is the degree of influence exercised by the under-cover agents and to what extent do they instigate the offence which would not have been committed without their intervention? In doing so, the ECtHR carries out what has been called the substantive test of incitement;
- authorities have to demonstrate that "any arguable plea of incitement places the courts under an obligation to examine it in a manner compatible with the right to a fair hearing"; the ECtHR will check whether or not, **within this supervising phase,** the procedure is "adversial, thorough, comprehensive and conclusive on the issue of entrapment, with the burden of proof on the prosecution to demonstrate that there was no incitement".

The **second part** of the paper will be dedicated to the **issue of the use of official power for private gains in the context of unresolved conflicts of interests**.

The academic literature underlines the particular difficulty in regulating and in managing conflict of interest as a result of the high number of potential conflicts. It is often described how conflicts of interest can arise at any time and may range from avoiding personal disadvantages to personal profit seeking. They can have financial or non-financial reasons and include many social and professional activities and interests. Modern conflicts of interest systems are no longer based purely on law, compliance and penalising wrongdoing. In fact, they are oriented towards preventing conflict of interest from happening and encouraging proper behaviour through guidance and orientation

measures, such as training and the introduction of codes of conduct. Consequently, all countries – to different degrees– offer a wide range of instruments in the fight against unethical behaviour and the emergence of conflicts of interest.

2 INTRODUCTION

In *Considérations sur les causes de la Grandeur des Romains et de leur décadence*[1], Montesquieu (1734), explained how corruption of the public virtues and the destruction of the constitutional order are at the heart of the decline of Rome[2]. Corruption had always been present in the history of humanity but it is only at the beginning of the 90s that anti-corruption regulatory activities increased considerably, at national, European and International levels. A preeminent role for the actions developed in this area can be attributed to OECD together with the Council of Europe and the European Union.

At the level of the Council of Europe, it was in particular in October 1997, at the 2nd Summit of Heads of State and Government of the Council of Europe, that Member States of the Council of Europe decided to adopt common principles to prevent and combat corruption and organised crime. It was therefore long time after Montesquieu, that corruption which was considered as a threat to democratic values, rule of law, human rights as well as social and economic progress had been criminalised.

As follow-up to the Summit, the Council of Europe adopted in January 1999 its Criminal Law Convention on Corruption, an international legal instrument setting up the basis for a common criminal policy enabling an increased international cooperation in criminal matters.

This Convention sets out the obligation for the Member States of the Council of Europe to criminalise, on the basis of a set of common elements, a large range of corruption offences, including active and passive corruption of: national, foreign and international public officials; of members of national, international and supranational parliaments or assemblies; of judges and staff of domestic, international or supranational courts; private corruption; trading in influence involving national and foreign public officials; laundering of corruption proceeds as well as corruption in auditing. By criminalising a large number of corrupt practices and dealing with new offences such as active and passive bribery in the private sector and trading in influence, this Convention is an ambitious and innovative one.

In addition to the criminalisation of these offences, the Convention lays down the obligation for its parties to adopt legislative or other measures, including those permitting the use of special investigative techniques with a view to enable them to gather evidence related to the criminal offences established therein[3]. It is in this context that in the first part of this paper, an analysis of the international practice of provocation of bribes as investigative action will be provided by making also reference to the ECtHR jurisprudence on this topic.

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[1] *Decadence of the Romans.*

[2] Marco Arnone, Leonardo S. Borlini (2014), *Corruption – Economic Analysis and International Law*, USA, Edward Elgar Publishing Limited, p. 314.

[3] "*Article 23 – Measures to facilitate the gathering of evidence and the confiscation of proceeds*

1. *Each Party shall adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, in accordance with national law, to enable it to facilitate the gathering of evidence related to criminal offences established in accordance with Article 2 to 14 of this Convention and to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds, liable to measures set out in accordance with paragraph 3 of Article 19 of this Convention.*
2. *Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in paragraph 1 of this article.*
3. *Bank secrecy shall not be an obstacle to measures provided for in paragraphs 1 and 2 of this article.*"

The second part of the paper will be dedicated to the issue of the use of official power for private gains in the context of unresolved conflicts of interests. In this respect, the paper will make reference to the Recommendation of the Committee of Ministers of Council of Europe on the Codes of Conduct for Public Officials (Rec(2000)10E)[4], the OECD 2003 Guidelines for Managing Conflict of Interest in the Public Service[5] which reflects a consensus by OECD members as good practice. An overview of the applicable ECtHR case law in this area will be equally provided.

3 THE CRIMINALISATION/DECRIMINALISATION OF THE PROVOCATION OF BRIBES AS INVESTIGATIVE ACTION

The defence of provocation is one of man's earliest recorded pleas. The Bible tells us that Eve, when accused of eating the forbidden fruit, protested: "*The serpent beguiled me, and I did eat*"[6]. In the United States, no state or federal court recognized provocation as a valid defence prior to 1870[7]. But it is definitively the case of *Woo Wai v. United States* in 1915 which marked the beginning of the modern doctrine of provocation with its emphasis on, and limitation of, the notion of "origin of intent"[8].

Excepting in the United States, from a historical point of view, the defense of provocation appears to be rather unusual and mostly unknown by European courts, for instance, in United Kingdom, the Royal Commission on Police Powers (1928) defined an "agent provocateur" as: "a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such an offence". Nevertheless, beyond this statement, there is no clear definition of entrapment in English law but the key factor appears to be acts or words amounting to enticement to commit an offence followed by the passing of information to the police. In particular, the fact that a defendant would not have committed an offence were it not for the activity of an undercover police officer or an informer acting on police instructions does not provide a defence under English law[9].

At the European level, the ECtHR has defined **entrapment**[10], as opposed to a legitimate undercover investigation, as it occurs: "(…) where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (…)"[11].

The provocation of bribes as an investigative action could have implications at two different levels:

1. **at the incrimination level**, where it will be examined whether it is necessary to establish in every case that there had been prior agreement between the corrupt parties;
2. **at the procedural level**, where an assessment of the extent to which the provocation of bribes invalidates the investigation will be made.

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[4] Council of Europe (2000), *Rec(2000)10E 11 May 2000 on Codes of Conduct for Public Officials*; available at www.coe.int

[5] OECD (2005), *Managing Conflict of Interest in the Public Sector – A toolkit*, OECD.

[6] Paul W. WILLIAMS (1959), *The defense of entrapment and related problems in criminal prosecution*, USA, Fordham Law Review, vol. 28, issue 3, p. 399, available at http://ir.lawnet.fordham.edu/ (accessed July 2015);

[7] Rebecca ROIPHE (2003), *The serpent beguiled me: a history of the entrapment defence*, USA, Seton Hall Law Review, vol. 33.257, p. 271, available at http://scholarship.shu.edu/ (accessed July 2015);

[8] Paul Marcus (1986), *The development of Entrapment Law*, USA, College of William & Mary Law School, The Wayne Law Review, p. 13, available at http://scholarship.law.wm.edu/ (accessed July 2015);

[9] See ECtHR, case of *SHANNON v. United Kingdom* (n° 67537/01), 6 April 2004;

[10] The ECtHR case-law uses interchangeably entrapment, police incitement and *agents provocateurs*.

[11] ECtHR, case of *RAMANAUSKAS v. Lithuania* (n° 74420/01), 05.02.2008, para. 55.

3.1 At the incrimination level

According to §36 of the explanatory report on the Criminal Law Convention on Corruption, the material components of the offence of active bribery are ***promising, offering*** or ***giving*** an undue advantage, directly or indirectly for the official himself or for a third party. The three actions of the briber are slightly different. "**Promising**" may for example, cover situations where the briber commits himself to give an undue advantage later (in most cases only once the public official has performed the act requested by the briber) or where there is an agreement between the briber and the bribee that the briber will give the undue advantage later. "**Offering**" may cover situations where the briber shows his readiness to give the undue advantage at any moment. Finally, "**giving**" may cover situations where the briber transfers the undue advantage. The undue advantage need not necessarily be given to the public official himself: it can be given also to a third party, such as a relative, an organisation to which the official belongs, the political party of which he is a member. When the offer, promise or gift is addressed to a third party, the public official must at least have knowledge thereof at some point. Irrespective of whether the recipient or the beneficiary of the undue advantage is the public official himself or a third party, the transaction may be performed through intermediaries.

Complementary to that, when it comes to passive bribery, §§41-42 of the same explanatory report underline the fact that "**Requesting**" may for example refer to a unilateral act whereby the public official lets another person know, explicitly or implicitly, that he will have to "pay" to have some official act done or abstained from. It is immaterial whether the request was actually acted upon, the request itself being the core of the offence. Likewise, it does not matter whether the public official requested the undue advantage for himself or for anyone else. On the other side, "**Receiving**" may for example mean the actual taking the benefit, whether by the public official himself or by someone else (spouse, colleague, organisation, political party, etc.) for himself or for someone else. The latter case supposes at least some kind of acceptance by the public official. Again, intermediaries can be involved: the fact that an intermediary is involved, which would extend the scope of passive bribery to include indirect action by the official, necessarily entails identifying the criminal nature of the official's conduct, irrespective of the good or bad faith of the intermediary involved.

At this stage, it is extremely important to underline the fact that **offering and giving** a bribe do not require an *agreement* between the briber and the official. The OECD Glossary of international standards in criminal law on corruption[12] emphasises indeed that **offering** and **giving** do not require that the public official accepts the offer or gift, or even that he or she is aware of or has concretely received the offer or gift (e.g. the offer or gift is intercepted, for instance by the law enforcement authorities, before it is delivered to the public official). In the same sense, **requesting** and **receiving** do not need also an agreement between the corrupt parties. Moreover, the person solicited need not being aware of or have received the solicitations (e.g. the solicitation is intercepted by the law enforcements authorities before it is delivered)[13]. When looking at the Istanbul Action Plan countries[14], **receiving** and **accepting** bribes are criminalised by all of them. By contrast, many countries have not established **requesting** as an autonomous offence. Some of them seem relying on the offences of extortion and provocation to cover this situation. But this approach could appear being rather problematic since **requesting** a bribe does not systematically constitute provocation or extortion.

3.2 At the procedural level

Behind almost every corruption offence lays a pact of silence between the person who pays the bribe and the person who receives it. In normal circumstances none of them will have any interest in

[12] OECD Glossaries (2008), *Corruption – A glossary of international standards in criminal law*, OECD publications, pp.26-27.

[13] OECD Glossaries, *op. cit.*

[14] The Istanbul Anti-corruption Action Plan is a sub-regional peer review programme of OECD for Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Ukraine, launched in 2003, in the framework of the Anti-Corruption Network for Eastern Europe and Central Asia (ACN).

disclosing the existence or the modalities of the corrupt agreement concluded between them[15].

Therefore, the Council of Europe's Criminal Law Convention on Corruption provides in Article 23 that each party is to adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, to enable it to facilitate the gathering of evidence in this sphere. The explanatory report on the Convention further specifies that "special investigative techniques" may include the use of undercover agents, wiretapping, interception of telecommunications and access to computer systems. Article 35 states that the Convention does not affect the rights and undertakings deriving from international multilateral conventions concerning special matters.

In addition to that, it is necessary to mention also the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[16] which provides, in Article 4, that each party should consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracking of proceeds and the gathering of evidence related thereto. The use of special investigative techniques, such as controlled deliveries in the context of illicit trafficking in narcotic drugs, is also provided for in Article 73 of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders, signed in Schengen on 19 June 1990.

With regard to allegations of entrapment/provocation/incitement committed by under-cover agents, there are more particularly two cases that deserve special attention. Indeed, in these cases, the applicants complained of the use of evidence resulting from police incitement in the proceedings against them, in breach of the right to a fair trial. These cases are the following one:

- the case of *Ramanauskas v. Lithuania* of the EctHR[17]; the applicant formerly worked as a prosecutor in the Kaišiadorys region (Lithuania); he submitted that in late 1998 and early 1999 he had been approached by AZ, a person previously unknown to him, through VS, a private acquaintance; AZ had asked him to secure the acquittal of a third person and had offered him a bribe of 3,000 USD in return; the applicant had initially refused but had later agreed after AZ had reiterated the offer a number of times;
- the case of *Veselov and others v. Russia* of the ECtHR[18]; the applicants were each targeted in undercover operations conducted by the police in the form of a test purchase of drugs under sections 7 and 8 of the Operational-Search Activities Act of 12 August 1995 (no. 144-FZ). These operations led to their criminal conviction for drug dealing.

Within the particular context of the case of *Veselov and others v. Russia*, the ECtHR conducted an extensive comparative study of the legislation of twenty-two member States of the Council of Europe (Austria, Belgium, Bulgaria, Czech Republic, Croatia, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Lithuania, "the former Yugoslav Republic of Macedonia", Poland, Portugal, Romania, Slovenia, Spain, Turkey and the United Kingdom) concerning the use of undercover agents in test purchases and similar covert operations[19].

The comparative study carried out by the ECtHR showed that in all of these countries it is possible for the police to carry out undercover operations, in particular in drug-trafficking cases, according to the procedure set out in the relevant laws and regulations. Only in Ireland is there no formal legislative or regulatory basis for the use of undercover police. A number of countries provide also for the involvement of private individuals and authorise resort to undercover agents only when the collection of evidence by other means is too complicated or impossible.

[15] Para. 114 of the explanatory report on the Criminal Law Convention on corruption.

[16] ETS no. 141, 8 November 1990.

[17] ECtHR, case of *RAMANAUSKAS v. Lithuania* (n° 74420/01), 05 February 2008.

[18] ECtHR, case of *VESELOV and others v. Russia* (n° 23200/10, 24009/07 and 556/10), 2 January 2013.

[19] *Ibid*., para. 50-63.

Research of the ECtHR reveals that in most of the countries covered there is exclusive or shared responsibility of the judicial bodies in the authorisation procedure, although in some the decision lies with the public prosecutor, the administrative authorities or high-level police officials. A judicial authorisation is required in Bulgaria (court), Croatia (investigating judge), Estonia (investigating judge), Greece (indictments chamber), Liechtenstein, Poland (regional court with prior agreement of the Prosecutor General), Slovenia (investigating judge), and Turkey (judge). In Austria and Belgium the authority to sanction undercover operations lies exclusively with the public prosecutor.

A number of countries provide for the involvement of the prosecutor or the court, or both, depending, for example, on the type of operation or, more commonly, the stage of the proceedings. In the Czech Republic, "fictitious transfers", which include test purchases, require authorisation by the public prosecutor, whereas the use of an undercover agent (in connection with particularly serious offences) can be authorised only by a High Court judge. Under German law, the use of undercover agents must be authorised by the public prosecutor, and additionally by a court if the operation targets a particular person or involves entry into private premises. In Romania also the authorisation is given by the public prosecutor, but video and audio recording during the operation requires prior authorisation by a judge.

According to the ECtHR research, in France, the authorisation is delivered by the public prosecutor at the preliminary inquiry stage and by the investigating judge [*juge d'instruction*] during the pre-trial investigation. Lithuanian law, in a similar vein, requires the authorisation of a pre-trial judge during a pre-trial investigation, while at an earlier stage the authorisation of the prosecutor suffices. In "the former Yugoslav Republic of Macedonia" special investigative measures in the pre-investigation phase can be ordered either by the public prosecutor or by an investigating judge, but once an investigation has been opened the authorisation can be given only by the latter.

In Portugal, covert operations within the framework of the inquiry are subject to the prior authorisation of the competent member of the Public Prosecution, with mandatory communication to the investigating judge, and are deemed to be ratified if no order refusing permission is issued within 72 hours. If the operation is carried out in the framework of crime prevention, it falls within the competence of the investigation judge to give the required authorisation at the proposal of the prosecution authorities. Spanish law also provides for notification of the investigating judge when authorisation for an undercover operation has been given by the public prosecutor. Such authorisation can also be issued directly by the judge.

In Italy, there is no requirement for formal authorisation from the prosecutor or a court, but the appropriate authority must give prior notification of the start of the operation to the competent prosecutor. In drug cases, before undertaking an undercover operation, the Central Directorate for Drug Services or its regional or provincial offices need to inform the prosecutor in charge of the investigations, but they do not need their formal approval. In a few countries, there is no involvement of a court or a prosecutor in the authorisation procedure. In Finland, the decision on undercover activities is taken by the Head of the National Bureau of Investigation or the Head of the Security Police, at the request of a regular police department. The decision-making bodies are separate from the services which carry out the operation.

In the United Kingdom undercover operations are subject to administrative rather than judicial authorisation. In the House of Lords decision in R v. Loosely (2001) Lord Mackay underlined that although the technique in the United Kingdom for authorising and supervising such practice was very different from the judicial supervision in continental countries, the purpose was the same, namely to remove the risk of extortion, corruption or abuse of power by policemen operating without proper supervision.

According to the ECtHR analysis, the public authorities entitled to authorise the use or conduct of a Covert Human Intelligence Source (CHIS) are laid out in law[20]. Each public authority has its own separate authorising officer. Authorising officers should not be responsible for authorising their own activities, that is, those in which they themselves are to act as the CHIS or as the handler of the CHIS. Furthermore, authorising officers should, where possible, be independent of the investigation. However, it is recognised that this is not always possible, especially in the case of small organisations, or where it is necessary to act urgently or for security reasons. Where an authorising officer authorises his own activity the central record of authorisations should highlight this and the attention of a Commissioner or Inspector should be drawn to it during his next inspection. In Ireland similarly there is no judicial authorisation procedure. The police or other enforcement agencies both take and carry out all operational decisions concerning undercover operations.

Against this background, the ECtHR defined strict limits that must be observed when it comes to the use of special investigative methods in particular under-covered techniques. Indeed, in that respect, the ECtHR undertakes a three-phase check[21]:

- during the **authorising phase**, are the authorities in possession of "concrete and objective evidence showing that initial steps have been taken to commit the acts constituting the offence for which the applicant is subsequently prosecuted*"*;
  In that respect, the ECtHR required that any preliminary information concerning the pre-existing criminal intent must be verifiable; the authorities must be able to demonstrate at any stage that they had good reasons for mounting the covert operation;
- during the **implementing phase,** are the authorities able to establish if "the criminal act was already under way at the time when the source began collaboration with the police"; in other words, what is the degree of influence exercised by the under-cover agents and to what extent do they instigate the offence which would not have been committed without their intervention? In doing so, the ECtHR carries out what has been called the **substantive test of incitement**[22];
  In that regard, in deciding whether the **investigation was "essentially passive"**, the ECtHR will examine the reasons underlying the covert operation and the conduct of the authorities carrying it out; the Court will rely on whether there were objective suspicions that the offender had been involved in criminal activity or was predisposed to commit a criminal offence[23]; in addition to the aforementioned, the following may, depending on the circumstances of a particular case, also be considered indicative of pre-existing criminal activity or intent: the offender's demonstrated familiarity with criminal activities;
  Closely linked to the criterion of objective suspicions is also the question of the point at which the authorities launched the undercover operation, i.e. whether the **undercover agents merely "joined" the criminal acts** or instigated them[24]; this criterion has been used in a number of cases where the police only became involved after being approached by a private individual – crucially, not a police collaborator or informant – with information indicating that the applicant had already initiated a criminal act;
  Another very important dimension to be underlined is the fact that the ECtHR does not exclude as such the possibility to prosecute an offender on the basis of **information handed to law-enforcement agents by a third party**; in the case *Shannon v. United Kingdom*[25], the applicant was "set up" by a journalist, a private individual, who was not an agent of the State:

[20] See for example: *Regulation of Investigatory Powers Act* 2000 (RIPA-United Kingdom) which is an Act of the UK Parliament regulating the powers of public bodies to carry out surveillance and investigation, and covering the interception of communications available at www.legislation.gov.uk/ (accessed July 2015); and also the *Lithuanian Law on the special investigations service of 2 May 2000*, No.VIII-16 available at www3.lrs.lt/ (accessed July 2015);

[21] See ECtHR, case of *VESELOV and others v. Russia* (n° 23200/10, 24009/07 and 556/10), 2 October 2012, para. 88-94.

[22] ECtHR (2014), *Guide on Article 6 – Right to a fair trial*, Council of Europe, p. 126.

[23] ECtHR, case of *BANIKOVA v. Russia* (n° 18757/06), 4 November 2010, para. 38;

[24] ECtHR, case of *SEQUEIRA v. Portugal* (n° 73557/01), 6 May 2003;

[25] ECtHR, case of *SHANNON v. United Kingdom* (n° 67537/01), 6 April 2004;

he was not acting for the police on their instructions or otherwise under their control; the police had no prior knowledge of the journalist' operation, being presented with the audio and video recordings after the event.

- authorities have to demonstrate that "any arguable plea of incitement places the courts under an obligation to examine it in a manner compatible with the right to a fair hearing"; the ECtHR will check whether or not, within this **supervising phase**, the procedure is "adversial, thorough, comprehensive and conclusive on the issue of entrapment, with the burden of proof on the prosecution to demonstrate that there was no incitement".

After having carried out such an analysis, ECtHR ruled that:

- in the case *Ramanauskas v. Lithuania*, while being mindful of the importance and the difficulties of the task of investigating offences, ECtHR considered that the actions of under-cover agents had the effect of inciting the applicant to commit the offence of which he was convicted and that there is no indication that the offence would have been committed without their intervention; in view of such intervention and its use in the impugned criminal proceedings, the applicant's trial was deprived of the fairness required by Article 6 of the Convention[26];
- similarly, in the case *Veselov and others v. Russia*, ECtHR found that it was precisely the deficient procedure for authorising the test purchase that exposed the applicants to arbitrary action by the police and undermined the fairness of the criminal proceedings against them; the domestic courts, for their part, failed to adequately examine the applicants' plea of entrapment, and in particular to review the reasons for the test purchase and the conduct of the police and their informants *vis-à-vis* the applicants[27]; as a consequence, the criminal proceedings against all three applicants were incompatible with the notion of a fair trial.

In conclusion, the ECtHR recognised not only the need but also the legality of the use of special investigative methods, as **undercover techniques**, specifically with the context of the fight against organised crime and **corruption**[28]. Nevertheless, taking into consideration the risk of police incitement involved by such techniques, they must be kept **within clear limits**.

[26] See. para 73. of the ECtHR case *RAMANAUSKAS v. Lithuania*.

[27] See para 127 of ECtHR case *VESELOV and others v. Russia.*

[28] See para 49 of ECtHR case *RAMANAUSKAS v. Lithuania*.

4 THE PROSECUTION OF THE USE OF OFFICIAL POWER FOR PRIVATE GAINS IN THE CONTEXT OF UNRESOLVED CONFLICT OF INTEREST

4.1 Definitions

The **World Bank** settled on a straightforward definition of corruption as **the abuse of public office for private gain**. More precisely, it considers that public office is abused for private gain when an official accepts, solicits, or extorts a bribe. The public office is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. According to this definition, public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues. As one could see, this is very much a definition for policy purposes rather than a definition in criminal law.

Article 13.1 of the Recommendation n° R(2000)10 of the Committee of Ministers of the **Council of Europe** on codes of conduct for public officials provides that "the **conflict of interest** arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties". In addition, Article 13.2 specifies that "the public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto".

The **conflict of interest** could be considered as an indicator, a precursor of corruption and has been defined by the **OECD** as a "conflict between the public duty and private interests of a public official, in which the public official has private capacity interests which could improperly influence the performance of their official duties and responsibilities"[29]. In this context a conflict of interest is not necessarily corruption or fraud. However, it constitutes an **abuse of public office for private gain** and may hold a potential for unfair behaviour[30].

In the academic literature, it is often described how conflicts of interest can arise at any time and may range from avoiding personal disadvantages to personal profit seeking. They can have financial or non-financial reasons and include many social and professional activities and interests. For example, a minister, judge, legislator etc. may be a Member of a board, or have personal contacts with lobby groups, NGOs or simply friends. Any of these relationships could be the source of conflicts of interests that could conflict with the public interest of the holders of public office. Therefore, most policies make a difference between:

- **pecuniary** interests which imply an actual or potential financial gain; and
- **non-pecuniary** interests which arise from personal or family relationships or other activity.

In addition to that, the OECD Guidelines[31] make a difference between:

- **actual conflict of interest** that occurs when there is a direct conflict between an official's current duties and responsibilities and his/her private interests; and
- **apparent conflict of interest** where it appears that an official's private interests could influence improperly the performance of his/her duties; and

[29] OECD (2005), *Managing Conflict of Interest in the Public Sector – A toolkit*, OECD, p. 13.

[30] The **United Nations** Convention against corruption of 2004 does not contain as such any legal definition of the conflict of interest but contains, in its chapter 2 "Preventive measures", a provision which states that "each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest." (Art. 7.4);

[31] OECD (2003), *Managing Conflict of Interest in the Public Service – OECD Guidelines and Country Reports*, p.53-58.

- **potential conflict of interest** where a public official has private interests which are such that a conflict of interest would arise if the official was to become involved in the relevant official responsibilities in the future.

These two concepts have to be properly differentiated with another one which is trading in influence. Being included in Article 12 of the Criminal Law Convention on Corruption, it criminalises a corrupt trilateral relationship where a person having real or supposed influence on official, trades this influence in exchange for an undue advantage from someone seeking this influence. The difference, therefore, between this offence and bribery is that the influence peddler is not required to "act or refrain from acting" as would a public official. The recipient of the undue advantage assists the person providing the undue advantage by exerting or proposing to exert an improper influence over the third person who may perform (or abstain from performing) the requested act. "Improper" influence must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion[32].

S. Rose-Ackerman summarised the concept of conflict of interest as "a broad umbrella term that incorporates all sorts of tensions between official and private roles. Corruption and fraud are a subset of this concept where the benefits to the official are financial. The payoffs may induce the official to violate the terms of his/her official position in return for private gain, or they may be extortion paid to induce the official to do what he/she ought to being doing anyway. Fraud is an offense that need not involve a third party. The official steals from the public coffers"[33]. In addition to that, it must finally be emphasised the fact that concepts of conflicts of interest and corruption have changed over the years to include more types of official and private conduct. What was legal a generation ago is considered corrupt today[34].

4.2 Some examples of abuse of power and/or conflict of interest in the medias/case-law

To illustrate how difficult it may be sometimes to draw a clear line between these two categories, the reader will find hereafter a list of some examples coming for various sources:

- On 7 September 2008, the United Kingdom weekly newspaper The Sunday Times published in its printed version and on its website an article entitled "*Revealed: how Eurocrat leaked trade secrets over lavish dinners*"; the article described three dinners which the EU senior official attended between March and September 2008 in restaurants in Brussels (Belgium) with reporters from The Sunday Times who had introduced themselves to him as the correspondents of a Chinese exporter with an interest in certain anti-dumping procedures conducted by the Commission; still according to the article, the EU senior official provided the persons in question, in the course of those dinners and in telephone conversations, with information relating to proceedings pending before the Commission which he was not authorised to disclose; it was also proposed to the EU official that, in exchange for the information, he should collaborate in the activities of the alleged Chinese exporter for an annual remuneration of 600,000 EUR, but, according to the article, the EU official envisaged doing so only after he had retired; last, in response to the proposal which had been made to him during the second dinner to pay him a sum of 100,000 EUR, the EU official was alleged to have stated that such a sum could be placed in a frozen account to which he would have access once he had retired, but none the less said that that payment should be made only in the light of the results obtained by the alleged Chinese exporter on the basis of the information received[35];

[32] Council of Europe/GRECO, *Explanatory report on the criminal law convention on corruption*, para. 65.

[33] S. Rose-Ackerman (2014), *Corruption and conflicts of interest – A comparative Law Approach*, UK, Edward Elgar Publishing Limited, p. 6-7.

[34] Alan Rosenthal (2006), The Effects of Legislative Ethics Law: An Institutional Perspective, *in* Saint-Martin/Thompson, *Public Ethics and Governance: Standards and Practices in Comparative Perspective*, Vol. 14, p. 163.

[35] Judgment of the Civil Service Tribunal (First Chamber) of 30 November 2009, *Fritz Harald Wenig v Commission of the European Communities Public service* – Officials, Case F-80/08 is available at http://curia.europa.eu/

- Keir Starmer, the director of public prosecutions, announced that the United Kingdom Crown Prosecution Service was charging, on 5 February 2010, three Labour MPs and a Tory peer with false accounting in relation to their parliamentary expenses; the announcement came a day after the publication of a report showing that around half of MPs have been asked to repay a total of more than £1m to the Commons authorities because some of their previous claims were deemed improper; the UK police launched an investigation into several MPs following the revelations about parliamentary expenses published by the Daily Telegraph last year; the Telegraph obtained a computer disc with full details of claims submitted by MPs, including information that the Commons authorities wanted to keep secret, and the publication of the Telegraph's findings unleashed a wave of anger about the way the system has been abused[36];
- In March 2011, one Member of the European Parliament caught up in a "cash-for-laws" in which pretended lobbyists had requested two amendments to draft legislation on consumer protection; according to the UK's Sunday Times newspaper, the undercover team made it clear to the Member of the European Parliament that he would be paid for his services;[37] [38]
- One of three MEPs who were willing to accept payment to amend legislation in the European parliament on behalf of a fake lobbying company set up by Sunday Times reporters has been convicted of attempting to change laws in the European parliament on behalf of a business offering to pay him €100,000 a year; this MEP, an Austrian former minister who used his role as an MEP to work secretly as a lobbyist, was exposed during an undercover investigation by The Sunday Times (United Kingdom) three years ago; on 13 March 2014, he was jailed for 3 years after being found guilty of corruption by a court in Vienna; it was the second time he had been convicted of the same offence; an earlier verdict had been overturned on appeal;[39]
- In 2013, a former executive of Citigroup was nominated as US treasury secretary. The nomination was seen by many organisations as a conflict of interest; in fact, research conducted by the Project

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[36] The Guardian (5 February 2010), *Three Labour MPs and one Tory peer face expenses abuse charges*, available at www.theguardian.com/ (accessed July 2015).

[37] Laurence Peter (2011), *Fourth Euro MP named in lobbying scandal*, BBC News, available at www.bbc.com/ (accessed July 2015).

[38] The *Rules of Procedure of the European Parliament* (EP) precisely determines the **way the MEP can lose his or her immunity**: after a competent authority of a Member State asks the EP President to waive the immunity of the MEP, this request is announced in plenary; MEPs have right to defend their immunities; the EP Committee of Legal affairs recommends the adoption or rejection of the request for the waiver of immunity or for the defence of immunity and privileges; the committee may ask the requesting authority clarify or to explain its demand; the committee presents the report where it may decide whether the requesting MS authority is competent and the request acceptable; the committee must not judge the MEP concerned, neither the opinions nor acts attributed to him or her that have been used by the authority to justify the request; the members discuss the reasons for and against each proposal on the next plenary session; after the debate, an individual vote is taken; the President immediately communicates Parliament's decision to the Member concerned and to the competent authority of the Member State concerned; besides this procedure, it is interesting to underline the fact that a waiver of immunity is not a "guilty" verdict, it merely enables national judicial authorities to proceed; in addition to that, even if found guilty, entitlement to sit as an MEP is a separate issue from that of immunity, with different Member States having different criteria for disqualifying members from holding an electoral mandate; as MEPs are elected under national electoral law, if an MEP is found guilty of a criminal offence, it is for the member state's authorities to inform the Parliament if the individual is disqualified from office, available at www.europarl.europa.eu (accessed July 2015); with regard to the **MEP immunity towards European Anti-Fraud Office (OLAF) investigative actions**, the European Union Court of Justice ruled that the possibility cannot be ruled out *a priori* that OLAF, in the course of an investigation, might take action prejudicial to the immunity enjoyed by every Member of the Parliament; if that were to occur, any Member of the Parliament faced with such an act could, if he considered it damaging to him/her, avail himself/herself of the judicial protection and the legal remedies provided for by the Treaty (see: European Union Court of Justice, *Rothley and others v. Parliament* (C-167/02), 30 March 2004, para. 29, available at: http://curia.europa.eu/ (accessed July 2015); and also European Union Court of First Instance, *Rothley and others v. Parliament* (T-17/00), 26.02.2002, para. 73, available at: http://curia.europa.eu/ (accessed July 2015);

[39] Bojan Pancevski (16 March 2014) *Jail for corrupt MEP caught by Sunday Times*, Sunday Times, available at www.thesundaytimes.co.uk/ (accessed July 2015).

on Government Oversight (POGO) shows that financial groups consider it very beneficial to have former employees occupying public jobs; in the case of Citigroup, the financial institution offered a financial reward to the executive for taking a position in the government; other large corporations also have compensation policies to executives moving to key public positions (POGO 2013)[40]; this is an illustration of the so-called *revolving door* phenomenon[41], or also called in French: *pantouflage*;

- In the United States of America, on August 2014, Texas Governor Rick Perry was charged with abuse of official capacity, a first-degree felony, and coercion of a public official, a third-degree felony for his veto of funding for a state ethics watchdog that has investigated prominent Texas Republicans; the longest-serving governor in the United States' history, Perry became the target of an ethics investigation in 2013 after he vetoed $7.5 million in funding for the state public integrity unit run from the Travis County district attorney's office; Perry's veto was widely viewed as intended to force the resignation of Travis County District Attorney Rosemary Lehmberg, a Democrat, after she had pleaded guilty to drunken driving[42].

4.3 Regulations on conflict of interest

The academic literature underlines the particular difficulty in regulating and in managing conflict of interest as a result of the high number of potential conflicts. On 2007, a study carried out for the Commission's Bureau of European Policy Advisers (BEPA)[43] classifies the different national regimes into three categories – "strict", "moderate" and "soft" – distinguishing between those countries and institutions:

- which regulate, prohibit and restrict a number of issues, require a detailed number of reporting obligations and have independent control and monitoring mechanisms in place (a **restrictive approach**);
- which regulate, prohibit and restrict a number of issues but leave room for some exceptions and have less strict control mechanisms in place (**moderate approach**); and those
- which are mostly based on voluntary approaches and rely on different forms of self-regulation and self-enforcement (**soft approach**).

According to the same study, the trend in most countries is clearly to strive for a higher degree of transparency with regard to the private lives of holders of public office. For example, new requirements include an obligation to register additional jobs, private income or shares, or an obligation to provide information about the jobs/activities of his/her partner, which may be in conflict with his/her public position. There are also rules which refer to the acceptance of gifts and invitations in order to prevent unwanted external influence on decision-making. This may include a dinner offered by a private firm or accepting a gift which can involve a holiday to an attractive place offered by an applicant in a public procurement procedure. Moreover, another observation is that the higher the position the stricter the policy, regulations and codes and the more transparency is required. In all Member States Members of Government are required to avoid or withdraw from activities,

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[40] Transparency International (2015), *Cooling-off periods: regulating the revolving door*, available at www.transparency.org/ (accessed July 2015), p. 2.

[41] OECD defines it as: "the movement of people into and out of key policymaking posts in the executive and legislative branches and regulatory agencies. This can carry the risk that it increases the likelihood that those making policies are overly sympathetic to the needs particularly of business—either because they come from that world or they plan to move to the private sector after working in government"; see OECD, 2009, *Revolving Doors, Accountability and Transparency - Emerging Regulatory Concerns and Policy Solutions in the Financial Crisis*, OECD, p. 8.

[42] Jon Herskovitz (6 November 2014), *Texas' Perry slams abuse of power charge at court hearing*, Reuters, available at www.reuters.com/ (accessed July 2015).

[43] T. Moilanen/G. Pikker/A. Salminen (2007), *Regulating Conflicts of Interest for Holders of Public Office in the European Union A Comparative Study of the Rules and Standards of Professional Ethics for the Holders of Public Office in the EU-27 and EU Institutions*, A study carried out for the European Commission Bureau of European Policy Advisers (BEPA) available at http://ec.europa.eu/ (accessed July 2015), p. 132.

memberships, financial interests or situations that would place them in real, potential or apparent conflict of interest.

It concluded that modern conflicts of interest systems are no longer based purely on law, compliance and penalising wrongdoing. In fact, they are oriented towards preventing conflict of interest from happening and encouraging proper behaviour through guidance and orientation measures, such as training and the introduction of codes of conduct. Consequently, all countries – to different degrees– offer a wide range of instruments in the fight against unethical behaviour and the emergence of conflicts of interest.

4.4 European Court of Human Rights case-law

The BEPA study underscored the fact that sanctions in relation to public office holder's misbehaviour are rare and – mostly – relatively "soft" compared to civil servants. It also noted that growing discrepancies between more rules and standards and weak enforcement practices are likely to create more criticism and public suspicion[44]. This study also emphasised the fact that especially in the field of conflicts of interests, requirements for more transparency and declaration of information etc. are supposed to discipline institutions and office holders making information about their potential conflicts of interest public. Like this, transparency especially is positively related with ethical behaviour because public exposure is presumed to act as a stimulus: the more the public knows about holders of public office, the better they behave. Transparency and openness requirements are also popular since they are widely supposed to make institutions and their office holders both more trustworthy and more trusted. In addition, more reporting requirements about conflicts of interest should contribute positively to public trust. Thus, many experts in the field propose that holders of public office should be required to disclose more personal information.

In that respect, the ECtHR considered that the freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. **The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.** Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of **such protection have to be weighed in relation to the interests of open discussion of political issue**s[45].

Nevertheless, it is important to underline here that according to ECtHR case-law, Article 10 of the Convention does not cover the right to **seek** information. It only covers the **right to receive information** from general sources of information or a right of **access** to general sources of information. Indeed, the ECtHR observed that the right to freedom to **receive** information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not confer on the individual a **right of access** to a register containing information on his personal position, nor does it embody an obligation on the government to impart such information to the individual[46].

Another interesting dimension is related to the possible consequences of allegations of infringements to rules and standards on conflict of interest. In the first case mentioned in point 4.2, the so-called The Sunday Times case, the EU Commission suspended the EU senior official for an indefinite period and ordered that the sum of 1,000 EUR be withheld from his monthly salary for a maximum period of six

[44] *Ibid.* p. 8.
[45] ECtHR, case of *Lingens v. Austria* (n° 9815/82), 08 July 1986, para. 42.
[46] ECtHR, case of *Leander v Sweden* (n° 9248/81) (1987), 26 March1987, para. 74.

months. The EU senior official lodged a complaint within the meaning of Article 90(2) of the EU Staff Regulations, seeking annulment of the contested decision. Within this context, according to Article 6.1 of the ECHR, in the determination of his civil rights and obligations or of any criminal charge against him, the Civil Service Tribunal considered that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

However, the Civil Service Tribunal ruled that it must be borne in mind that proceedings involving suspension and the withholding of remuneration are not judicial but administrative in nature, such that the Commission cannot be characterised as a court within the meaning of Article 6 of the ECHR. Accordingly, compliance with the obligations which that Article imposes on a 'tribunal' cannot be required of the Commission when it suspends an official and orders that sums be withheld from his remuneration[47].

5 CONCLUSION

Special investigative techniques, such as provocation of bribes, can prove necessary tools for gathering the evidence required for an effective fight against corruption. Member States, in line with the Council of Europe Convention against Corruption, have generally regulated in their national laws the use of such techniques. However, what is apparent from the national practices and the relevant case law in this area is that the boundaries between a legitimate and unlawful use of such techniques are thin and specific attention must be given to ensuring that the appropriate safeguards are in place for guaranteeing a fair process.

In this respect, the first part of the paper was dedicated to describing the national practice of several Member States of the Council of Europe regarding the use of undercover operations and the means employed for guaranteeing in practice a legitimate use of the special investigative techniques. A comparative study carried out by the ECtHR in twenty two Member States of the Council of Europe, showed that in all these countries undercover operations are possible and are, in the vast majority of cases, regulated under national law, with, often, an involvement of the judicial authorities or public prosecutor in the authorisation phase of the process. In some cases however, the authorisation process required for guaranteeing a non-arbitrary procedure is undertaken by an administrative authority. The research also revealed that in some cases these techniques can only be used as a matter of last resort, when other means cannot be effectively used in practice.

Moreover, an overview was provided on the relevant ECtHR case law in this area, which clearly stressed that the legitimate character of undercover techniques depends on a number of clear factors. In particular, the ECtHR jurisprudence emphasised the importance of guaranteeing that in the absence of the "intervention", the offence would have anyhow be committed and that the initial steps were already undertaken before the "intervention" to commit the offence. Very important too, in order to ensure a fair hearing and therefore respect for the right to an effective remedy, it is for the prosecutor to demonstrate that there was no "incitement" and that the offence would have been committed irrespective of the "provocation" as such.

The second part of the paper dealt with the issue of unresolved conflict of interest and how the use in this context of official power for private gains is, as act of corruption, prosecuted by Member States. The paper underlines that while there have been several attempts in the past to define the notion of conflict of interest; it is clear that this is a phenomenon with multiple facets and one which has evolved in time. While it is therefore difficult to point out precisely to a set of objective and 'set in stone' elements that constitute a conflict of interest, some key elements can be underlined. In particular, it is essential to establish the intention behind the action of the official, i.e. how an official by taking a certain decision in the use of its position, intended, voluntarily or not, to favour his personal interests, in a broad meaning of the terms. Meeting or not the intended objective is irrelevant to conclude to a breach of the deontological rules. What matters, is the objective pursued. The paper

[47] ECST, case of *Fritz* Harald *Wenig v. Commission of the European Communities* (n° F 80/08), 30.11.2009, para. 58-59.

underlines certain key principles to be followed in this area which are all meant to serve a single objective: ensuring transparency and equity in the management of public affairs.

Referring to Member States' practices in the fight against unethical behaviour, it is clear that they offer a wide range of instruments in this area and they tend not to be limited to being based on regulating these issues in law, ensuring compliance and penalising in case of non-compliance. The tendency is to invest in the prevention of conflict of interest from happening. In that respect, the Recommendation n° R(2000) 10 of the Committee of Ministers of the Council of Europe adopted on 11 May 2000 is of particular importance. Indeed, its Article 13 explains what a private interest is and how a conflict can arise between a public official's public duties and his or her private interest. He or she must be aware of the possibility of a conflict arising, takes steps to avoid it, discloses it to his supervisor at the earliest opportunity and comply with any proper instruction to resolve it. Whenever required to do so, he or she should state whether or not a conflict arises[48].

[48] Council of Europe (2000), *Explanatory Memorandum to Recommendation Rec(2000)10 on Codes of conduct for public officials*, available at www.coe.int/ (accessed on September 2015).