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Trading in Influence: Requirements of the Council of Europe Convention and the Hungarian Criminal Law**

Abstract. Active trading in influence, namely promising, giving an undue advantage to someone, who asserts or confirms that he or she is able to exert an improper influence over third persons, is not explicitly regulated by the HCC. Exceptionally this conduct may be qualified as active bribery of domestic or foreign (international) public officials, but only if the active influence trader intends that the passive influence trader (on the basis of their arrangement) will transmit the undue advantage to the public official. Other cases of active trading in influence are not punishable under Hungarian Law, e.g. when the entire advantage is given to an influence trader, who asserts only his or her influence (without pretending the commission of active bribery). In this regard the Hungarian legislation is not in conformity with the requirements of the COE Convention, which obliges member states to active trading in influence irrespective of the allegation of bribery. Hungarian criminal law shall be harmonized with the requirements of the COE Convention by penalizing active trading in influence.

Keywords: criminalization of active trading in influence, implementation of international conventions, Hungarian criminal law, GRECO

1. Introduction

Criminal liability for trading in influence is a relatively new phenomenon in national criminal laws.¹ Criminalization of corruption offences was traditionally limited to passive or active form of bribery. At the third millennium only a limited number of countries (e.g. Belgium, France, Hungary, Poland, Slovenia) provided for an explicit incrimination of trading in influence.² The scope of the offence descriptions are not identical, since e.g. certain legislations criminalise only asking or accepting the undue advantage,³ but others penalize also those perpetrators who gives or promise it.⁴ It should be noted, however, that certain conducts qualified as trading in influence in a country are penalized in other jurisdictions as bribery.⁵

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¹ Explanatory Report of COE Convention. para. 64.

² Vander Beken, T.–Siron, N.: Comparative Report. In: Vander Beken, T.–de Ruyver, B.–Siron, N. (eds): *The organisation of the fight against corruption in the member states and candidate countries of the EU*. Antwerpen–Apeldoorn, 2001. 16, 17.

³ Sections 256, 258/E of Hungarian Criminal Code (HCC).

⁴ Sect. 433-2 paras 1–2 of French Criminal Code; Bueb, J.-P.: France (National Report). In: Vander Beken—de Ruyver–Siron (eds): *The organisation of the fight against corruption... op. cit.* 179–180.

⁵ Vander Beken–Siron: Comparative Report. In: Vander Beken–de Ruyver–Siron (eds): *The organisation of the fight against corruption... op. cit.* 17; Mac Mahon, L.: Ireland (National Report). In: Vander Beken–de Ruyver–Siron (eds): *The organisation of the fight against op. cit.* 235;

The disparity of national regulations is mirrored at the international level. Certain international conventions (instruments), when oblige member states to criminalise corruption, explicitly or actually cover only the offence of bribery. The following international instruments are founded on this restrictive approach of criminalisation:

- the protocol to the convention on the protection of the European Communities' financial interests (27 September 1996);⁶
- the convention on combating bribery of foreign public officials in international business transactions (adopted on 21 November 1997 in the framework of OECD);⁷
- the convention drawn up on the basis of Art. K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of member states of the European Union (26 May 1997);⁸
- the joint action of 22 December 1998 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union, on corruption in the private sector.⁹

Only the Criminal Law Convention on Corruption adopted on 27 November 1999 in the framework of Council of Europe (hereinafter COE Convention)¹⁰ contains explicit provisions on trading in influence on public officials.¹¹ Trading in influence on executives of business organisations is not covered by this instrument, while both bribery of public officials and bribery committed in the private sector shall be penalized (at least as a principle).¹²

Slingerland, W.: *Trading in influence: corruption revisited. How a better understanding of the systemic character of trading in influence can help the Council of Europe and its Member States choosing the right instruments to tackle this form of corruption* (EGPA Study Group on Ethics and Integrity of Governance, Toulouse, 8–10 September 2010). 9. http://www.uwdierenarts.nl/cust/corruptie2.0/art.s/EGPA_paper_W.Slingerland_20100926.pdf.

⁶ *Official Journal C 313*, 23/10/1996. 1; See in details Vermeulen, G.: *The Fight Against International Corruption in the European Union*. In: Rider, B. A. K. (ed.): *Corruption: The Enemy Within*. The Hague–London–Boston, 1997. 333–342.

⁷ In: www.oecd.org. In details see Adolfs, G.–Pieth, M.: *How to Make the Convention Work: the Organisation for Economic Co-operation and Development Recommendation and Convention on Bribery as an Example of a New Horizon in International Law*. In: Fijnaut, C.–Huberts, L. (eds): *Corruption, Integrity and Law Enforcement*. The Hague–London–Boston, 2002. 349–360.

⁸ *Official Journal C 195*, 25/06/1997. 1. See in details Grotz, M.: *Legal Instrument of the European Union to Combat Corruption*. In: Fijnaut–Huberts (eds): *Corruption, Integrity and Law Enforcement. op. cit.* 383–384.

⁹ *Official Journal L 358*, 31/12/1998. 2–4. In details see Grotz: *op. cit.* 385–386.

¹⁰ See in details de Vel, G.–Csonka, P.: *The Council of Europe Activities against Corruption*. In: Fijnaut–Huberts (eds): *Corruption, Integrity and Law Enforcement. op. cit.* 364, 368–380; Salazar, L.: *The Council of Europe Criminal Law Convention on Corruption*. In: Alvazzi del Frate, A.–Pasqua, G. (eds): *Responding to the Challenges of Corruption*. Roma–Milan, 2000. 221–234. On the anti-corruption initiatives in the Council of Europe see Csonka, P.: *Corruption: The Council of Europe's Approach*. In: Rider, B. A. K. (ed.): *Corruption the Enemy Within*. The Hague–London–Boston, 1997. *passim*.

¹¹ Art. 12 of COE Convention.

¹² Arts 7–8 and 37 of COE Convention.

2. The COE Convention

2.1. *Obligation to Criminalise—Reservations*

According to Art. 12 of the COE Convention “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of [domestic public officials, members of domestic public assemblies, foreign public officials, members of foreign public assemblies, officials of international organisations, international parliamentary assemblies, judges and officials of international courts] in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result”.

Taking into account the different approaches of national legal systems, the COE Convention provides that State Parties can reserve their right not to establish as a criminal offence under their domestic law trading in influence on public officials.¹³ The possibility of reservations is unlimited with regard to Art. 12, namely states may reserve the right not to establish as a criminal offence trading in influence as such. While certain forms of bribery of public officials, namely bribery of domestic public officials,¹⁴ active bribery of foreign public officials,¹⁵ bribery of officials of international organisations,¹⁶ bribery of judges and officials of international courts¹⁷ shall be criminalized unconditionally, namely reservations in these regards are not permissible.

Certain states (Denmark,¹⁸ Netherlands,¹⁹ Republic of Slovenia²⁰) simply reserve the right not to establish as a criminal offence the conduct referred to in Art. 12. Others (as Switzerland²¹ and Finland²²) restricted the criminalization to conducts which had been already considered punishable under their domestic law. Others (United Kingdom,²³ French Republic,²⁴ Belgium²⁵) explicitly referred to certain elements by which they wanted to restrict the scope of criminalization (in line with their existing criminal law).

¹³ Art. 37 of COE Convention.

¹⁴ Arts 2–3 of COE Convention.

¹⁵ Art. 5 of COE Convention.

¹⁶ Art. 9 of COE Convention.

¹⁷ Art. 11 of COE Convention.

¹⁸ Reservation contained in a Note Verbale from the Permanent Representation of Denmark appended to the instrument of ratification deposited on 2 August 2000.

¹⁹ Reservations contained in the instrument of acceptance deposited on 11 April 2002.

²⁰ Reservation contained in a Note Verbale from the Ministry of Foreign Affairs of Slovenia, dated 4 May 2000, deposited at the time of ratification of the instrument on 12 May 2000.

²¹ Reservation contained in the instrument of ratification deposited on 31 March 2006.

²² Reservations contained in the instrument of acceptance deposited on 3 October 2002.

²³ Reservation contained in a Note Verbale handed over by the Permanent Representative of the United Kingdom to the Secretary General at the time of deposit of the instrument of ratification on 9 December 2003.

²⁴ Reservation contained in the instrument of ratification deposited on 25 April 2008.

²⁵ Reservation contained in a Note Verbale handed over by the Permanent Representative of Belgium to the Deputy Secretary General at the time of deposit of the instrument of ratification on 23 March 2004.

2.2. *Protected interest*

The Explanatory Report explicitly states: “[c]riminalising trading in influence seeks to reach [...] the corrupt behaviour of those persons who are [...] contributing to the atmosphere of corruption.”²⁶ At it was correctly pointed out by Stessens, trading in influence does not presuppose the breach of the principal-agent relationship which forms the bedrock of the classical concept of public corruption.²⁷ It should be emphasized that in certain cases even the commission of bribery of public officials do not jeopardise official duties, but only infringe the confidence in the impartiality of public administration.²⁸ Taking into account this background, the subsequent criminalisation of trading in influence seems to be self-evident, since asserting an improper influence could be as much detrimental to the trust in public administration as the (sometimes false) appearance of venality.

2.3. *Conducts on the active and passive side*

The conduct of the bribee (requesting, accepting the undue advantage or the promise thereof) is usually called “passive bribery”, while the offence of the briber (promising, offering, giving the advantage) is denominated by the attribute “active”. The distinction between active and passive side is relevant also with respect to the regulation of trading in influence. The “passive” form presupposes that a person, asserting a real or pretended influence on third persons, requests, receives or accepts an undue advantage with a view of assisting the person who supplied the undue advantage by exerting the improper influence. “Active” trading in influence means that a person promises, gives or offers an undue advantage to someone who asserts or confirms that he is able to exert an improper influence over third persons.²⁹ The terms “active” and “passive” trading in influence are not used by the conventions, but mentioned in the explanatory reports³⁰ and in the related legal literature.³¹ The COE Convention obliges states parties to penalise both passive and active trading in influence. However, states parties can use the possibility of partial reservation to restrict the scope of incrimination to the passive side. This could have been done by Hungary, when it deposited its instrument of ratification, acceptance, approval or accession.

2.4. *Influence*

2.4.1. Real, intended, exerted or successful influence

The COE Convention does not require real influence, only the assertion thereof. Factual connection between the influence trader and the public official is, therefore, not required by the definition. COE Convention covers also cases when the influence-trader only asserts, but does not intend to exert his or her real influence on the public official. It is explicitly

²⁶ Explanatory Report of the COE Convention. para. 64.

²⁷ Stessens, G.: The International Fight against Corruption. General Report. *International Review of Penal Law*, 72 (2001) 3–4, 892, 907.

²⁸ Wiener, I. A.: *Hivatali büntettek* (Offences Against Public Officials Duties). Budapest, 1972. 79–80.

²⁹ Explanatory Report of COE Convention. para. 65.

³⁰ Explanatory Report of COE Convention. paras 65–66.

³¹ Stessens, G.: *op. cit.* 907.

provided in the COE Convention that trading in influence should be criminalised “whether or not the influence is exerted or whether or not the supposed influence leads to the intended result”.³²

The possibility of the partial reservation, however, enables member states to restrict the scope of the offence description by requiring the existence of real, intended or (successfully) exerted influence. Criminal law of the United Kingdom (on the basis of the corresponding reservation) remains to be confined to those cases of trading in influence in which an agency relationship exists between the person who trades his influence and the person he influences.³³ Even partial reservations, in which (successfully) exerted influence is required as an element of trading in influence, are compatible with the COE Convention. The reservation under Art. 37 may even neutralize the explicit prohibition in Art. 12, according to which the offence shall be criminalized “whether or not the influence is exerted or whether or not the supposed influence leads to the intended result”.

According to Stessens “[i]t is a matter of some regret that the drafters of the convention have not ... required that the person concerned has influenced the decision making process [...], or, at least, he was actually able to influence it”.³⁴ In my opinion, requiring real, intended or (successfully) exerted influence would fundamentally alter the nature of the offence. By penalising the assertion of real (intended) influence or requiring (successful) exertion thereof, the offence of trading in influence protects only the decision-making process of public officials. If the confidence in the impartiality of public administration is to be secured, the alleged exertion of influence (in exchange of undue advantage) shall be criminalised as well.

2.4.2. The improper influence

According to the COE Convention the influence must be improper, therefore, as it is stated by the Explanatory Report, acknowledged forms of lobbying do not fall under the offence description.³⁵

2.4.3. Influence on domestic, foreign or international public officials

According to Art. 12 of the COE Convention the asserted influence is connected to the decision-making of following types of public officials, namely

- domestic public officials (including judges),
- members of domestic public assemblies,
- foreign public officials (including judges),
- members of foreign public assemblies,
- officials of international organisations (including judges and officials of international courts),
- members of international parliamentary assemblies,

For the purposes of the COE Convention “public official” shall be understood by reference to the definition of “official”, “public officer”, “mayor”, “minister” or “judge” in

³² Art. 12 of the COE Convention.

³³ Reservation contained in a Note Verbale handed over by the Permanent Representative of the United Kingdom to the Secretary General at the time of deposit of the instrument of ratification on 9 December 2003.

³⁴ Stessens: *op. cit.* 907–908.

³⁵ Explanatory Report of the COE Convention. para. 65.

the national law of the State in which the person in question performs that function and as applied in its criminal law. The term “judge” shall include prosecutors and holders of judicial offices.³⁶

COE Convention covers trading in influence on public officials (including members of public assemblies and judges) irrespective of whether they are exercising public power at domestic, foreign or international bodies (or organisations). The possibility of partial reservation, however, enables national legislators to exclude cases, when the asserted influence relates to foreign or international public officials. The French Republic reserved the right not to establish as a criminal offence the conduct of trading in influence defined in Art. 12 of the Convention, in order to exert an influence, as defined by the said article, over the decision-making of a foreign public official or a member of a foreign public assembly.³⁷

2.4.4. The passive influence trader

According to the COE Convention the scope of perpetrators is not confined to public officials. In the legal literature some regret was expressed that the scope of criminal liability is too wide in this respect.³⁸ It should be noted, however, that the obligation of the COE Convention can be restricted by applying partial reservation to offenders who are public officials or holders of public functions.³⁹ Belgium reserved the right not to establish as a criminal offence under its domestic law the conduct referred to in Art. 12 of the Convention which does not concern the use by a person holding a public function of the influence—be it real influence or supposed influence—that he or she disposes of owing to his or her function.⁴⁰

It should be noted, however, that this restriction of the offence description does not sufficiently protect either the impartial decision making process or the public confidence therein. Decisions of public officials may be influenced not only by their colleagues, but by relatives or friends. By asserting such an influence not only public officials, but anyone may suggest that the decision making in the public sphere is not impartial. To comprehensively protect these interests it requires that criminal law shall cover all influence traders regardless of their status as public officials.

3. Hungarian law

The first Hungarian Criminal code in 1878 provided for bribery of public officials as a single offence of corruption. Separate regulation on trading in influence on domestic public officials was introduced into Hungarian criminal law only in 1942. Trading in influence on state organs and economic enterprises was criminalised in 1971 during the socialist era. The contemporary Hungarian Criminal Code (HCC) adopted in 1978 contracted these offences in Section 256. The regulation covers trading in influence on domestic public officials and trading in influence on economic enterprises and non-profit organisations. Trading in influence on foreign or

³⁶ Art. 1 points a–b) of COE Convention.

³⁷ Reservation contained in the instrument of ratification deposited on 25 April 2008.

³⁸ Stessens: *op. cit.* 907.

³⁹ Art. 37 of COE Convention.

⁴⁰ Reservation contained in a Note verbale handed over by the Permanent Representative of Belgium to the Deputy Secretary General at the time of deposit of the instrument of ratification on 23 March 2004.

international public officials was subsequently (in 1998) introduced into Section 258/E. of the HCC as a separate offence (“trading in influence international relations”).⁴¹

Taking into account this evolution (extension of the criminalisation)

- trading in influence on domestic public officials,
- trading in influence on foreign (or international) public officials,
- trading in influence on business and non-profit organisations may be distinguished in the HCC.

Trading in influence on domestic public officials is committed by somebody, who “by asserting that he is able to influence a public official, requests or accepts an undue advantage for himself/herself or on behalf of another person”. Trading in influence on domestic officials is a felony which is punishable by imprisonment of one to five years. HCC defines the concept of domestic public official with reference to certain positions and/or functions. Particular positions, namely Members of Parliament, the President of the Republic, the Prime Minister; judges, prosecutors shall always be considered as public officials. In addition, domestic public officials are those persons whose “activity forms part of the proper functioning of” certain public authorities (state administration organs, local government organs, courts, prosecutor offices, the Constitutional Court etc.). The concept of public officials comprises persons, who entrusted with public power (public administrative duties) at organs (or bodies), which exceptionally (on the basis of a legal regulation) fulfil tasks of public power (public administration), e.g. teachers at state exams.⁴²

Trading in influence on foreign (international) officials is regulated as a separate offence in Hungarian Criminal Law. According to Section 258/E the crime is committed by any person, who—asserting to influence a foreign public official—requests or accepts an unlawful advantage for himself or on behalf of another person. *Trading in influence on foreign (international) officials* is a felony which is punishable by imprisonment up to five years. It is correctly pointed out in the legal literature that an independent offence description in Section 258/E is superfluous, since the regulation is almost identical with Section 256 (1) of HCC. Trading in influence on foreign (international) officials should have been regulated rather as an extension of Section 256.⁴³ HCC provides for a legal definition of “foreign public official”, which shall relate not only to foreign, but also to international officials. The concept of foreign public officials comprises

- a person serving in the legislative, judicial or administrative body of a foreign state,
- a person serving in an international organization created under international convention, whose activities form part of the organization’s activities,
- a person elected to serve in the general assembly or body of an international organization created under international convention,

⁴¹ Concerning the history of the regulation see Wiener, I. A.: A korrupciós bűncselekmények szabályozása a Csemegi Kódextől napjainkig (The regulation of corruption offences from the first Hungarian Criminal Code until recently). In: *Györgyi Kálmán ünnepi kötet* (Kálmán Györgyi Anniversary Volume). Budapest, 2004. 631–639.

⁴² Section 137 point 1 of HCC.

⁴³ Tóth, M.: A magyar büntetőjogi kodifikáció történetének néhány tanulsága – az új törvény megalkotásának előestéjén (Some lesson from the history of criminal law codification in Hungary—on the eve of adopting the new code). In: *Békés Imre ünnepi kötet* (Imre Békés Anniversary Volume). Budapest, 2000. 267.

– a member of an international court that is vested with jurisdiction over the territory or the citizens of the Republic of Hungary, and any person serving in such international court, whose activities form part of the court’s activities,

Trading in influence on economic enterprises and non-profit organisations is regulated by Section 256 (3) a) of HCC. The offence is committed by “any person who requests or accepts an undue advantage for himself/herself or on behalf of another person by asserting that he is able to influence employees (of members) of economic enterprises or non-profit organisations”. The concept of economic enterprise comprises budgetary organs, namely public schools, public hospitals performing public functions and financed from the state budget. If the employee (or a member) of the budgetary organ is entrusted with public power (public administrative duties), asserting influence thereon shall be qualified as trading in influence on public officials.

3.1. *Protected interest*

Criminalisation of trading in influence on public officials protects the public confidence in impartial decision making of domestic public officials.⁴⁴ It was concluded from the fact that the definition of trading in influence is fulfilled even if it is impossible that the public official breaches his or her official duties. This interpretation may be extended, *mutatis mutandis*, to trading in influence on foreign or international public officials. With regard to trading in influence on economic enterprises and non-profit organisations, the protected interest may be conceptualized as public confidence in impartial decision making of these organisations. It was correctly pointed out in the legal literature that this rationale of criminalisation should be reconsidered with regard to economic enterprises after the fall of the socialist era and at the dawn of market economy.⁴⁵ Unlike planned economy of the socialism, in a market economy the requirement of impartiality may not give reasons for the identical scope of offence descriptions for trading in influence in the public sphere and in the business (non-profit private) sector.

3.2. *The undue advantage*

With regard to bribery it is widely acknowledged that the advantage may not be considered as undue, if its acceptance is permitted by explicit legal norms or staff regulations. In absence of such a regulation the legality of the advantage is vividly disputed in the legal literature.⁴⁶

⁴⁴ Vida, M.–Juhász, Zs.: Befolyással üzérkedés (Trading in Influence). In: Nagy, F. (ed.): *A magyar büntetőjog különös része*. Budapest, 2009. 375.

⁴⁵ Kis, N.: Büntethető-e a lobbyzás? (On the punishability of lobbying). *Magyar Jog* (2003) 5, 280–281.

⁴⁶ Gál, I. L.: Molnár Csaba ügye a Fővárosi Ítéletábrán. Döntés az Országos Rendőr-főkapitányság Pénzmosás Elleni Osztálya vezetőjének vesztegetési ügyében (Case of Molnár Csaba at the Higher Appellate Court of Budapest: Bribery Case of the Chief Money Laundering Investigator of the National Police Department). *Jogesetek magyarázata (JeMa)* (2010) 1, 33–38; Hollán, M.: Molnár Csaba vesztegetési ügye: még egyszer az előny jogtalanságáról. Kritikai megjegyzések Gál István László elemzése kapcsán (Bribery case of Csaba Molnár: Once Again on the Undue Nature of Advantage—Critical Remarks of the Evaluation of László István Gál). *Jogesetek Magyarázata* (2010) 3, 45–53; Gál, I. L.: Újabb gondolatok Molnár Csaba vesztegetési ügye kapcsán. Válasz Hollán Miklósnak (New thoughts with regard to the Bribery Case of Csaba Molnár: A Reply to Miklós Hollán). *Jogesetek Magyarázata* (2010) 3, 54–56.

With regard to trading in influence criminal courts shall decide the undue nature of the advantage without any statutory basis. Act No. XLIX. of 2006 permitted to act as a registered lobbyists and excluded the undue nature of those advantages accepted in compliance with its provisions.⁴⁷ The entire act was abrogated by Section 19 b) of Act. No. CXXXI of 2010 (new regulation of civil participation in law-making), the question of lobbying became thus unregulated. It should be noted, however, that in my opinion, the legality or illegality of the advantage is closely connected to the improper nature of the influence.

3.3. *The conduct*

In contrast to bribery, the regulation of the HCC covers only passive side of trading in influence, namely requesting or accepting the undue advantage. Accepting the promise of the undue advantage, which is criminalized as bribery, is not punishable at the offence of trading in influence.

Active side of trading in influence is not explicitly punishable, namely the offence description of the HCC does not cover giving or promising of the undue advantage. In the judicial practice active trading in influence is not punished, even if it may be qualified as soliciting or aiding (abetting) of passive trading in influence. It is usually maintained that the legislation purposely leave this conduct out of the ambit of criminal law. This interpretation is mainly supported with the observation that in the context of corruption offences the active side shall be explicitly criminalized as a separate offence (as it is regulated by bribery).⁴⁸

According to the judicial practice,⁴⁹ giving or promising the undue advantage (active trading in influence) is qualified as active bribery,⁵⁰ if the passive influence trader asserts or pretends that he/she is bribing a public official. Active bribery means giving (or promising) of an unlawful advantage in connection with the official capacity of a public official to him (or her) or in consideration of him (or her) to anybody else. According to the judicial practice not only relatives of public officials, but also passive influence traders may be targets of the undue advantage. This interpretation does not depend on whether the passive influence trader intends, attempts or actually commits the asserted (pretended) active bribery.

In my opinion this interpretation of the Supreme Court is applicable *mutatis mutandis* to trading in influence on foreign (international) public officials, which definition is similar to bribery of domestic public officials. With regard to budgetary organs and private sector entities, however, the criminal liability of the active influence trader for bribery presupposes that he or she the gives or promises the undue advantage to induce the executive of the economic enterprise to breach his or her duties. The above described interpretation is derived from the definition of active bribery, and it, therefore, does not depend on the fact that the assertion of active bribery is not regulated as an aggravating circumstance of passive trading in influence.

⁴⁷ Vida–Juhász: *Befolyással üzérkedés. op. cit.* 375.

⁴⁸ Vida–Juhász: *Befolyással üzérkedés. op. cit.* 378.

⁴⁹ Opinion No. 13 of the Supreme Court (Criminal Division).

⁵⁰ Section 253 of HCC.

3.4. *Perpetrator*

The scope of influence traders is not restricted, the offence may be committed by anyone. Even public officials may be perpetrators of trading in influence by requiring or accepting an undue advantage by asserting influence on another public officials.⁵¹ If, however, a public official requires or accepts an undue advantage for instructing inferior public officials, his or her conduct is qualified as bribery. *If the passive influence trader actually bribes a public official etc.*, he or she shall be liable for active bribery and trading in influence.⁵²

3.5. *The asserted improper influence*

The perpetrator shall request or accepts the undue advantage by asserting that he/she is able to influence a public official. The connection between the public official and the influence trader can be real (friendship, love) or only purported. The actual or attempted exertion of the influence is not, consequently, contained as an element of the offence description.⁵³

The improper nature of the influence is not an element of the current offence description. It is widely acknowledged, however, that the offence description requires that the asserted influence induce the public official to take into account factors irrelevant in the case (his/her connection with the influence trader etc.).⁵⁴

3.6. *Aggravating circumstances*

The punishment for trading in influence on domestic public officials shall be imprisonment of two to eight years, if the perpetrator:

- asserts or pretends that he/she is bribing a public official;
- pretends to be a public official;
- commits the criminal act for regular financial gain.

At the offence trading in influence on foreign and international officials the HCC provides for no aggravating circumstances.

The punishment for trading in influence in the private sector is up to three years of imprisonment if the employee (or the member) is authorised to act independently. If trading in influence in the private sector is committed for regular financial gain, the punishment is imprisonment up to three years or in case the employee (or the member) is authorised to act independently the offence is punishable with imprisonment of one to five years. The assertion of bribery or pretending to be a public official is not an aggravating circumstance of this offence.

4. Evaluation of the implementation by the GRECO

When the compliance of the Hungarian legislation with the COE convention was evaluated by the GRECO, it was ascertained that “there [was] no specific provision which [...] cover active trading in influence in the Hungarian Criminal Code”.

⁵¹ Decision of Bf. I. 761/1963. of the Supreme Court. In: *Büntető elvi határozatok* (Leading Decisions of Criminal Courts). Budapest, 1973.

⁵² Court Decisions No. 1989/176.

⁵³ Court Decisions No. 1989/176.

⁵⁴ Bócz, E.: Az államigazgatás, az igazságszolgáltatás és a közélet tisztasága elleni bűncselekmények. (Offences against public administration, judiciary and purity of public life). In: Györgyi, K.–Wiener, A. I. (eds): *A Büntető Törvénykönyv magyarázata*. Budapest, 1996. 537–538.

Hungarian authorities claimed “that active trading in influence is fully covered by the provisions of active bribery of domestic public officials [...] and active bribery of foreign public officials and international officials [...] since these provisions cover all cases when “the advantage is offered/promised/given »to another person on account of« the official”. This term “refers to a person, who—regarding his/her real or pretended relation to the public official—may be able to influence the actions of the public official”.⁵⁵

The report explicitly mentions that “the representative of the Academia was clearly of the opinion that Hungarian law was not in full compliance with Art. 12 of the Convention in this respect”.⁵⁶

The GET accepted “that [...] the provisions on active bribery may apply also to situations of active trading in influence”, when the “bribe transmitted by the influence peddler to the influenced official”. It was also pointed out that according to the COE Convention, “[i]t is not a condition that the public official should be bribed by the influence peddler; the (asserted or confirmed) exertion of an improper influence over the decision-making of the official can be different from the (promised) undue advantage. In the view of the GRECO Evaluation Team “it has not been substantiated that the Hungarian criminal law covers all possible situations of active trading in influence as foreseen in Art. 12 of the Convention”. Therefore it was recommended that active trading in influence shall be regulated to be “in full conformity with Art. 12 of the Criminal Law Convention on Corruption”.⁵⁷

5. Evaluation of the author

In contrast to several states, Hungary made no reservations⁵⁸ to Art. 12 of the Convention. Therefore, it is obliged to criminalize trading in influence on public officials as it is defined by the COE Convention.

Passive trading in influence on domestic, foreign and international public officials is a separate criminal offence under Hungarian criminal law regulated by Sections 256 and 258/E of the HCC. Requesting and accepting of undue advantages is punishable irrespective of whether the undue advantage is requested or received by a public official or by anyone else. The offence description covers real, pretended, intended or exerted influence. In this regard the Hungarian criminal law is in conformity with the requirements of the COE Convention.

Active trading in influence, namely promising, giving an undue advantage to someone, who asserts or confirms that he/she is able to exert an improper influence over third persons, is not explicitly regulated by the HCC. Exceptionally, this conduct may be qualified as

⁵⁵ Group of States Against Corruption, Directorate General of Human Rights and Legal Affairs Directorate of Monitoring. Strasbourg, 11 June 2010 Public Greco Eval III Rep (2009) 8E Theme I Third Evaluation Round Evaluation Report on Hungary on Incriminations (ETS 173 and 191, GPC 2) (Theme I) Adopted by GRECO at its 47th Plenary Meeting (Strasbourg, 7–11 June 2010) 91.

⁵⁶ *Op. cit.* para 91. The author of this study was the representative of the Academy, his opinion will be presented subsequently (in title 5 of the study).

⁵⁷ *Op. cit.* para 92.

⁵⁸ Cf. <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=173&CV=1&NA=37&PO=HUN&CN=999&VL=1&CM=9&CL=ENG>

active bribery of domestic⁵⁹ or foreign (international) public officials,⁶⁰ but only if the active influence trader intends that the passive influence trader (on the basis of their arrangement) will transmit the undue advantage to the public official. Other cases of active trading in influence are not punishable under Hungarian Law, e.g. when the entire advantage is given to an influence trader who asserts only his or her influence (without pretending the commission of active bribery). In this regard the Hungarian legislation is not in conformity with the requirements of the COE Convention, which obliges member states to active trading in influence irrespective of the allegation of bribery. Hungarian criminal law shall be harmonized with the requirements of the COE Convention by penalizing active trading in influence.⁶¹

The COE Convention does not oblige state parties to criminalize trading in influence on budgetary organs, economic enterprises and non-profit organisations. Decision on upholding, decriminalising or restricting the offence of trading in influence in these spheres shall be made by national legislator. In this regard the transition to market economy may justify the restriction of the criminal offence to budgetary organs (hospitals, nurseries etc.). Trading in influence in the private owned business sector shall be decriminalised.

⁵⁹ Section 253 of HCC.

⁶⁰ Section 258/B of HCC.

⁶¹ According to Art. 37 of COE Convention reservations may be made only at the time of signature or when the state deposits its instrument of ratification, acceptance, approval or accession.