REMARKS ON CORRUPTION AND MALFEASANCE OFFENCES WHILE IN OFFICE, PROVIDED BY THE NEW CRIMINAL CODE

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The author provides a detailed analysis of the new provisions introduced by the Criminal Code of 2009 and its implementing law in matters of corruption offenses provided for in art. 289-292.

He does not hesitate to present his point of view regarding the systematization of these crimes, their content, the constitutive character, their relations with the provisions of Law no. 78/2000 on preventing, discovering and sanctioning corruption, as amended and supplemented, and to advance some of his own ideas and solutions in this regard.

Finally, the author is advancing some of his own opinions concerning applicable law in the case of transitory situations (mitior lex).

Key words: **Criminal law, Criminal Code of 1969, the new Criminal Code offense, punishment, giving and receiving bribery, trading in influence, buying influence.**

Title V "Corruption and malfeasance offences while in office" is structured in two chapters: the first chapter comprises the corruption offences, while the second chapter comprises the malfeasance while in office, since the lawmaker of 2009 waived the third chapter which the commission had dedicated to those deeds prejudicing the financial interests of the European Communities and which shall be further incriminated under the provisions of Law no. 161/2003.

I. *General remarks.* The lawmaker of 2009 systematized the corruption offences in the first chapter of the title V "Corruption and malfeasance while in office offences" of the special part of the new Criminal code, and dedicated six texts to them in that category of criminality elements, respectively from art. 289 to art. 294, and a joint text containing certain malfeasance in office offences, respectively art. 308, in chapter II of the same title.

In chapter 1, having the heading "Corruption offences", when establishing the contents of those criminality elements, it was considered, on the one hand, the regulation of these offences in the Criminal Code of 1969, and on the other hand, the provisions of Law no. 78/2000 on preventing, discovering and sanctioning corruption offences[1], and the texts were significantly amended both under Law no. 286/2009 on the Criminal Code[2], and under Law no. 187/2012 on the application of Law no. 286/2009 on the Criminal Code[3], as compared to how they had been designed by the commission for drawing up the Draft of the Criminal Code (hereinafter referred to as the Draft[4]).

Therefore, the framework of the corruption offences (art. 289-294, art. 308) was completely revised and systematised not only by taking over the criminality elements contained in Law no. 78/2000 in the content of the Code, but also by reformulating some texts or by merging other texts.

In the category of *corruption offences* there were introduced the offence of taking bribes (art. 289), the offence of giving bribes (art. 290), the offence of trading in influence (art. 291) and the influence peddling offence (art. 292), and the offence of receipt of undue advantage provided in

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[1] Published in the "Official Gazette of Romania", part I, no. 219 of 18 May 2000, as subsequently amended and supplemented.

[2] Published in the "Official Gazette of Romania", part I, no. 510 of 24 July 2009, as subsequently amended and supplemented.

[3] Published in the "Official Gazette of Romania", part I, no. 757 of 12 November 2012.

[4] Available on the site of the Ministry of Justice, where it was posted at the address http://www.just.ro/MeniuStanga/Normativepapers/Proiectedeactenormativeaflate%C3%AEndezbatere/tabid/93/Default.aspx (last accessed on 10 March 2012).

art. 256 of the Criminal Code of 1969 was no more taken over, and all texts were regularly amended for the purpose of extending their scope.

The heading of title V of the special part of the new Criminal Code was deemed as questionable by certain authors, since each of these categories of offences (corruption and malfeasance in office) have a distinct legal object. These could coexist under a common name (having a common legal category matter), such as that of "offences against public interests", as provided by the new Criminal Code of 2004 (adopted by Law no. 301/2004[5]) which, under this heading, systematized both the corruption offences, and malfeasance in office, as well as other offences which are classified in this common legal matter. The name of the heading cannot consist in a simple association of the name of the component offences, but rather it should express the common features of the categories of component offences[6].

The regulation of the corruption offences in the new Criminal Code is in accordance with the provisions of the Council of Europe Criminal Law Convention on corruption, ratified by Romania under Law no. 27/2002[7], act which defines active corruption[8] and passive corruption[9].

After Romania ratified the Additional Protocol to the Criminal Law Convention on Corruption, under Law no. 260/2004[10], the framework of the corruption offences was supplemented with a provision regarding the extension of the applicability of the respective criminal rules on the offences of taking bribes and of giving bribes committed by persons involved in the settlement of disputes by internal or international arbitration (art. 2-4 of the Protocol).

Thus, according to art. 293 – Offences committed by the members of the arbitration panel [11] or in relation to them –, the provisions of art. 289-290 shall be adequately applied to those persons who, under an arbitration agreement, are called to rule an arbitration award related to a dispute which was submitted to them for settlement purposes by the parties to this agreement, whether the arbitration procedure is conducted according to the Romanian law or to another law. These offences were not explicitly incriminated in the previous criminal law.

According to art. 294 – Offences committed by the foreign officials or in relation to them [12] – (text taken over with some amendments from art. 8^1 of Law no. 78/2000), as amended by Law no. 187/2012, the provisions of this chapter shall apply in relation to the following persons, unless otherwise provided in the international treaties to which Romania is a Party: the officials or persons carrying on their activity according to an employment agreement or other persons exercising similar prerogatives within a public international organization to which Romania is a Party (for instance, United Nations Organization, International Monetary Fund, Council of Europe etc.); the members of the Parliamentary assemblies of the international organizations to which Romania is a Party; the officials or persons carrying on their activity according to an employment agreement or other

[5] Published in the "Official Gazette of Romania", part I, no. 575 of 29 June 2004. Its entry into force was however postponed successively by: The Government Emergency Ordinance no. 58/2005, published in the "Official Gazette of Romania", part I, no. 552 of 28 June 2005; The Government Emergency Ordinance no. 50/2006, published in the "Official Gazette of Romania", part I, no. 566 of 30 June 2006 and the Government Emergency Ordinance no. 73/2008, published in the "Official Gazette of Romania", part I, no. 440 of 12 June 2008), until 1 September 2009. Pursuant to art. 446 paragraph (1) and (2) of the Law no. 286/2009 on the Criminal Code, the Law no. 301/2004 was repealed without having ever entered into force.

[6] See George Antoniu, *Remarks with regard to the preliminary draft of a second new Criminal Code*, in "Journal of criminal law" no. 1/2008, p. 26.

[7] Published in the "Official Gazette of Romania", part I, no. 65 of 30 January 2002.

[8] *Active corruption* represents the promise, offering or giving money or other benefits, directly or indirectly to a public servant, for oneself or for another, for the purpose of performing or refraining from the performance of an act in the exercise of his/her office.

[9] *Passive corruption* represents the request or receipt with intent, by a public servant, directly or indirectly, of an undue benefit, for oneself or for another, or the acceptance of an offer or promise of such a benefit, for the purpose of performing or refraining from the performance of an act in the exercise of his/her office.

[10] Published in the "Official Gazette of Romania", part I, no. 612 of 7 July 2004.

[11] See, to this end, art. 533-612 (internal arbitration) and art. 1096-1118 (international arbitration) of the new Code of civil procedure, adopted by Law no. 134/2010 and entered into force on 15 February 2013.

[12] For further details about the explanation of these categories of persons, see Vasile Dobrinoiu, Norel Neagu, *Criminal Law. Special part (Treaty). According to the new Criminal Code,* (*Drept penal. Partea specială (Tratat). Conform noului Cod penal)*, Universul Juridic Publishing House, Bucharest, 2011, p. 445-446.

persons exercising similar prerogatives in the European Union; the persons exercising judicial offices in the international courts whose jurisdiction is accepted by Romania, as well as the servants working within the registrar's offices of these courts; the officials of a foreign State; the members of the Parliamentary or administrative assemblies of a foreign State; as well as the juries of certain foreign courts.

Likewise, according to art. 308 ("Offences of corruption and malfeasance in office committed by other persons"), an attenuated version of the offences which this text refers to, in the content established by Law no. 187/2012, the provisions of art. 289-292 regarding public officials shall adequately apply as well, to the offences committed by or in relation to the persons who exercise, on a permanent or temporary basis, with or without any remuneration, any kind of duty to serve an individual of those provided in art. 175 para. (2) or within *any legal entity,* in which case the special limits on punishment shall be reduced by one third. The corruption offences committed in the private environment or in the field of liberal professions are sanctioned under this text.

In relation to the content of art. 175 para. (1) letter c), as it had been established under Law no. 286/2009, some doubts[13] were expressed whether the simple declaration of an association or foundation as a public utility confers its officials the capacity of public officials. Under the influence of the doctrine, according to Law no. 187/2012 the content of the concept of public official, provided in art. 175 para. (1) letter c) was rightly limited by the removal of the phrase "or of a legal entity declared as a public utility", as in the case of the Romanian Association of Criminal Sciences[14] or of the Criminologists Association of Romania[15].

Art. 79 item 5 of Law no. 187/2012 repealed art. 8, 8^1, 8^2 and 9 of Law no. 78/2000, the single criminality rule maintained by the lawmaker of 2012 in Section 2 – "Offences of corruption" of chapter III – "Offences" of Law no. 78/2000 being that of art. 7 which provides a joint aggravated version of the offences of taking bribes or influence peddling, when they are committed by certain categories of persons.

In case of *temporary situations*, the new criminal law shall be more favourable as regards the special limits of the sentence of imprisonment provided for the offences of taking bribes, trading in influence and influence peddling, in all their cases of criminality set forth in the new Criminal Code or in Law no. 78/2000, as the case may be. In relation to the offence of giving bribes, the previous law shall remain in force as it sanctioned this offence less severely.

As regards the precept of those four criminality elements, since it has undergone significant amendments, the necessary explanations will be given upon examination of each text separately, for the settlement of temporary situations. In a principled way, the previous criminal law shall be more favourable since, as a rule, under the new Criminal Code the content of criminality under discussion was extended also to some cases not provided by the previous criminal law.

II. *Particular remarks in relation to each criminality separately.* 1. Bribe taking (art. 289) represents the act of a public servant who, either directly or indirectly, for oneself or for another, claims or receives money or other undue benefits, or accepts the promise of such benefits, in order to perform, not to perform, to urge or to delay the accomplishment of an act with regard to his service duties or in order to perform an act that is contrary to these duties and shall be punished by imprisonment from 3 to 10 years and the interdiction of the right to hold a public office or to exercise the profession or the work in which performance he/she committed the offence – para. (1).

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[13]See Constantin Duvac, *Public official* (Comments), in "Preliminary explanations of the new Criminal Code", (*Funcționar public* (Comentarii), în „Explicații preliminare ale noului Cod penal"), vol. II, articles 53-187 by George Antoniu and so on, Universul Juridic Publishing House, Bucharest, 2011, p. 525.

[14] Government Decision no. 1553/2007 regarding the recognition of the Romanian Association of Criminal Sciences as a public utility, published in the "Official Gazette of Romania", part I, no. 889 of 21 December 2007. The sole article of this regulation sets forth that: "The Romanian Association of Criminal Sciences, a legal entity of private law, without patrimonial purpose... is recognized as a public utility".

[15] Government Decision no. 1240/2005 regarding the recognition of the Criminologists Association of Romania as a public utility, published in the "Official Gazette of Romania", part I, no. 939 of 20 October 2005. Under this decision (sole article): "The Criminologists Association of Romania, a legal entity of private law, without patrimonial purpose... is recognized as a public utility".

As opposed to the version of art. 280 of the Draft submitted by the commission, the lawmaker of 2009 significantly amended the legal content of this criminality as regards the area of the individuals who may directly commit this offence (public servant instead of servant[16]), the objective side from which content the regulatory modality of the non-repudiation of the promise of certain undue benefits was eliminated, as well as the aggravated version characterized by the offence being committed by certain public servants (a public servant holding a position of public official, having a leading position or control tasks or holding a position involving the exercise of State authority) and the form of guilt with which the offence of taking bribe may be committed.

Thus, if according to the provisions of art. 254 of the Criminal Code of 1969, the bribe-taking could be committed only with direct intent, which is qualified by the aim pursued by the perpetrator in committing the incriminated action, in relation to the new regulation, this offence shall be committed also, with oblique intent[17].

By replacing the phrase "for the purpose" with "in relation to", at the same time with repealing art. 256 of the previous criminal law and waiving art. 282 of the Draft, under which it had been proposed the distinct criminality of the receipt of undue benefits, this offence was not decriminalized, however, it was included as a factual way within the offence of taking bribe, provided in art. 289, but this time with a more severe criminal treatment.

The incriminated act, in the new regulation, may be performed by the direct active subject, both for oneself and for another. It should be reflected whether the concept "another" means only another individual different from the author or a legal entity, as well.

The person who, in the exercise of his/her job duties or of the received task, (according to art. 308) shall not reject the promise of money or of other undue benefits, shall not be criminally responsible (this offence was decriminalized), but possibly from the disciplinary point of view, as such an inaction may be interpreted as an inadequate action at work or in the society, however, not as a factual way of a tacit acceptance.

The actions which are alternatively incriminated by the text shall fall within its provisions if they are committed as well, in relation to urge the accomplishment of an act, this assumption not being provided in the previous criminal law.

Certain critical remarks were stated in relation to the Draft version, it being asserted that the event in which the offence is committed by a person who performs a service of public interest, was not recorded as an attenuation circumstantial element. As he/she is a freelancer, lower-level sanctions should be applied against him/her. On the other hand, if the limits of punishment provided in para. (1) had been increased, it could have been avoided the enumeration of the aggravating circumstances which, if they had remained in this elaboration, would have determined the need for explaining the position of public official, which should have been different from the position involving the exercise of State authority, distinctly provided in letter c)[18].

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[16] It should be mentioned that the editors of the Criminal Law Draft had kept the concept of servant, together with that of public servant, whom they had defined in art. 177 of the Project as being "the person provided in art. 176 (public servant, out parenthesis – C. D.) as well as any person permanently or temporarily exercising a duty, serving another legal entity than those provided in art. 174 (this text explains the concept of "Public", within the meaning of the criminal law, our parenthesis – C.D.), or serving an individual among those mentioned in art. 176 para. (2)."

[17] See Constantin Duvac, *Bribe-taking in the new Criminal Code,* (*Luarea de mită în noul Cod penal*), in "Law" ("Dreptul") no. 4/2013, p. 116-117. To this end, see Vasile Dobrinoiu, *Bribe-taking (Luarea de mită)* (Comment), in "The New Criminal Code commented, vol. II, the special part" („Noul Cod penal comentat, vol. II, partea specială") by Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiş, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, Universul Juridic Publishing House, Bucharest, 2012, p. 538. To the contrary, see: Alexandru Boroi, *Criminal law. Special part, (Drept penal. Partea specială)*, C. H. Beck Publishing House, Bucharest, 2011, p. 374; Viorel Paşca, *Bribe-taking (Offences of corruption and malfeasance in office) (Luarea de mită* (*Infracţiuni de corupţie şi de serviciu*)), in "Criminal Law manual. Special part", vol. II („Manual de drept penal. Partea specială"), by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2011, p. 183-184.

[18] See George Antoniu, *op. cit.*, p. 26. The author further states that the exception provided in para. (3) of the Draft text is impossible to understand, as the offence of taking bribe is most often committed "in order to accomplish" an act related to the performance of the job duties. Therefore, in relation to this exception, if the person referred to in

The lawmaker of 2009 partially appropriated these remarks and removed from the content of bribe-taking, in the form drawn up in the Draft, its aggravated versions, and according to Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code[19] tightened the special limits of the sentence of imprisonment provided for the specific deed from 2 to 7 years to the limit of 3 to 10 years.

Thus, a correct differentiation was made as regards the abstract social danger which the bribe-taking involves as compared to the bribe-giving since primarily, Law no. 286/2009 on the Criminal Code[20] had provided identical limits of punishment for those two offences, which could put in question the legitimacy itself of their distinct criminality, by way of derogation from the provisions of art. 49, as the bribe-giving is essentially, only an act of inciting, aiding or abetting bribe-taking, as the case may be.

Instead, certain aggravating circumstances of the offence of taking bribe, as they had been provided in the Draft, were introduced, according to Law no. 187/2012, in Law no. 78/2000 on preventing, discovering and sanctioning corruption offences[21]. Thus, the deed of bribe-taking committed by a person who: holds a position of public official; is a judge or prosecutor; is a criminal prosecution body or has duties of finding or of sanctioning offences; is one of the persons provided in art. 293[22], shall be punishable by the sentence provided in art. 289, whose limits are increased by one-third (art. 7 of Law no. 78/2000).

The reason of these circumstantial aggravating elements shall be determined by the need for increasing the exigency in relation to those categories of public servants who, by the nature of their job duties, hold and exercise important powers for the society, and their corruption seriously influences the public trust in the public authorities or institutions.

Likewise, as opposed to the previous regulation, in art. 289, in a questionable manner, the assumption in which the bribe-taking is committed by a servant having control tasks, has not been provided as an aggravated version, in which case these persons shall be liable within the limits set forth for the specific deed. At the same time, the concept of servant has been eliminated, but without any influence upon the applicability of the criminality under discussion, which was extended in compliance with the provisions of art. 308 to the private individuals as well, who are not employees, within the meaning of the labour law, of the public servants treated as such or of certain private legal entities (we consider the individuals who are not hired under an individual employment agreement) and who were not able to commit such a deed, in their capacity as author, according to the previous criminal law.

A distinct paragraph – para. (2) – incriminates the bribe-taking when it is committed by a person practising a profession of public interest – a public servant treated as such –, but if only this deed is committed in relation to the non-performance, delay in the accomplishment of an act regarding its legal duties or in relation to the performance of an act contrary to these duties.

This provision intended to solve the controversy whether the notary public, the bailiff or other individuals holding a position of public interest, for which it is necessary a special empowerment on the part of public authorities, may be or not the author of bribe-taking. In these cases, the reply can only be positive, as we also stated at other times[23].

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art. 176 para. (2) of the Draft had taken bribe in order to accomplish an act, he/she would not have been criminally responsible.

[19] Published in the "Official Gazette of Romania", part I, no. 757 of 12 November 2012.

[20] Published in the "Official Gazette of Romania", part I, no. 510 of 24 July 2009, as subsequently amended and supplemented.

[21] Published in the "Official Gazette of Romania", part I, no. 219 of 18 May 2000, as subsequently amended and supplemented.

[22] For reasons of space, in the content of this study, where the normative papers is not indicated by the number of an article, we consider the Criminal Code adopted by the Law no. 286/2009, as subsequently amended and supplemented.

[23] See Constantin Duvac, Concept of public servant in the light of the new Criminal Code (*Conceptul de funcționar public în lumina noului Cod penal)*, in "Law" („Dreptul") no. 1/2011, p. 118-123. For the same purpose, see Vasile Dobrinoiu, *op. cit.*, p. 527.

In the new regulation, the deeds provided in art. 289 para. (1) shall not fall within the scope of the criminal law if they are committed by one of the individuals provided in art. 175 para. (2) in relation to the accomplishment or urging the accomplishment of an act related to his/her job duties, and this provision has been criticized by the relevant literature[24].

In order to achieve general prevention under better conditions, in case of taking bribe, the prohibition to exercise the right to hold a public office or to exercise the profession or the activity in which performance the deed was committed was set forth as a complementary punishment, since the commission of such a deed of corruption is incompatible with the moral and professional requirements needed for holding a public office.

Last, but not least, in the studied matter, under Law no. 187/2012, art. 5 of Law no. 12/1990 on the protection of population against unlawful commercial activities, as republished [25], which set forth some aggravating circumstantial elements of the offences of: taking bribe, receipt of undue benefits and trading in influence, in relation to the author's capacity, was repealed.

The money, values or any other goods received shall be subject to confiscation, and in case they are not found anymore, confiscation by compensation equivalent to their value is ordered – para. (3). Correctly, it was explicitly provided that the goods are seized if only they are received, however not in case of claiming or accepting promises.

As the area of the direct active subjects is larger as compared to the new law, the old law shall be more favourable.

As the criminality conditions regarding the objective element lead to an extension of the applicability of art. 289, the old law shall be deemed more favourable, except the case in which the concrete deed is performed in the way of non-repudiation of certain benefits, when the new decriminalization law is enforced (art. 4), but not mitior lex.

In subjective terms, mitior lex is the old law since it punished the offence of taking bribe if only it was committed with direct intent.

The offences of receiving undue benefits committed under the old criminal law shall be settled by referring to this law, as well, since the limits of the sentence of imprisonment provided in art. 256 of the Criminal Code of 1969 were lower than the limits set forth in art. 289.

2. Bribe-giving (art. 290) consists in the act of promising, offering or giving money or other benefits, under the conditions provided in art. 289 and shall be punished by imprisonment from 2 to 7 years.

The constituent elements of bribe-giving, in the new regulation, as well, are drawn up by the explicit provision of the alternative actions which accomplish the material element, and in relation to the other criminality conditions, reference is made to the provisions of art. 289, so that the explanations offered in case of bribe-taking in relation to these conditions remain valid also in case of bribe-giving whose legal content has been thus implicitly extended, and therefore the similarity of the content with the previous regulation is only apparent.

As a result of these amendments, it shall be incriminated also the deed of the individual who offers a benefit to the public servant after the accomplishment of the act, to thank the latter for the activity performed, which was not incriminated in the previous regulation[26], as well as the deed of the individual who gives bribe for the benefit of another individual than the person bribed.

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[24] See George Antoniu, *op. cit.*, p. 26. In the author's opinion, this exception is impossible to understand, as the offence of taking bribe is most often committed "in order to accomplish" an act related to the performance of the job duties. To the contrary, see Vasile Dobrinoiu, *Bribe-giving (Comment) (Darea de mită* (Comentariu)), *cit. supra*, p. 527. The author considers that as regards these individuals, there is no question of taking bribe to accomplish an act according to their duties, given the fact that the concerned individuals establish a fee to this end.

[25] Republished in the "Official Gazette of Romania", part I, no. 291 of 5 May 2009. The content of art. 5 of this law was the following: "The offences of taking bribe, receipt of undue benefits and trading in influence committed by the investigating officials, the criminal prosecution bodies or the court judging on deeds deemed to be contraventions or offences provided by this law, shall be punishable according to the provisions of art. 254, 256 and 257 of the Criminal Code, whose minimum and maximum limits shall be increased by 2 years".

[26] See Vasile Dobrinoiu, *Bribe-giving* (Comment), (*Darea de mită* (Comentariu)), in the "New Criminal Code commented", vol. II, special part" („Noul Cod penal comentat, vol. II, partea specială") by Vasile Dobrinoiu, Ilie Pascu,

Likewise, as with bribe-taking, the offence of bribe-giving shall be criminally punishable when it is committed with oblique intent[27].

The other amendments to the text into question are not essential and are rather deemed as styling without any influence on the applicability of art. 290 [for instance, the replacement of the phrase "in the ways and for the purposes provided in" with the phrase "under the circumstances provided in" in the content of the specific deed; or, as regards the reference to the special cause of non-imputability, the replacement of the phrase "The offence provided in the previous paragraph" with "The offence provided in paragraph (1)]".

The special limits of the sentence of imprisonment were increased (imprisonment from 2 to 7 years) as compared to those limits provided in art. 255 of the Criminal Code of 1969 (imprisonment from 6 months to 5 years).

The aggravation of criminal liability which is incumbent upon the briber was received positively by certain doctrinaires [28], who promoted the idea that a joint regime of punishment for the person bribed and for the briber (a solution adopted by the lawmaker of 2009 to which the lawmaker of 2012 correctly returned, increasing the special limits of punishment provided for the offence of taking bribe) is more adequate to the criminal policy of fighting corruption taking into account that usually, except the constraints on the part of the person bribed, the corrupting person is as active as the corrupt person.

The special cause of non-imputability was taken over, together with the insignificant amendment shown, from the previous regulation, and thus, the offence of bribe-giving do not represent an offence when the briber was forced by any means by the individual taking the bribe – para. (2).

The deletion from the content of the special cause of non-punishment, provided in para. (3), of the term "authority" as the first recipient of the briber's denunciation shall limit the applicability of the text only to those situations in which the denunciation is submitted only to the criminal prosecution bodies, even if they are not competent in terms of person's capacity or in terms of matter (for instance, it shall be valid the denunciation submitted to the criminal prosecution body from the residence of the indicter who, after checking his power, shall send it to the relevant prosecutor's office).

Certain amendments were made also regarding the provisions related to the return of goods, respectively to confiscation.

Thus, as opposed to the previous regulation, the money, values and any other goods offered shall not be returned to the person who gave them, if they were transferred before submitting the denunciation to the criminal prosecution body. In all other cases, as well as in the case provided in para. (2) – the special cause on non-imputability – the money, values or any other goods offered shall be returned to the person who gave them.

The provisions regarding the special confiscation remained unchanged, somehow stylized, and therefore the money, values or any other goods offered or given shall be subject to confiscation, and in case they are not found anymore, the confiscation by compensation equivalent to their value is ordered. The confiscation shall not be applied in case of promises of such goods.

Following the repeal of art. 6^1 of Law no. 78/2000, under art. 79 item 3 of Law no. 187/2012, Decision no. LIX (59)/2007[29] of the High Court of Cassation and Justice – United Sections ceases to be valid upon entry into force of the new criminal law, as it has become devoid of purpose.

Since the legal content of the bribe-giving is partly taken over from the content of the bribe-taking, the provisions therein regarding the settlement of temporary situations remain valid also in

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Mihai Adrian Hotca, Ioan Chiş, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, Universul Juridic Publishing House, Bucharest, 2012, p. 541.

[27] See, to this end, Vasile Dobrinoiu, *op. cit.*, p. 546. To the contrary, see: Alexandru Boroi, *op. cit.*, p. 380; Viorel Paşca, *op. cit.*, p. 190-191.

[28] See, to this end, Viorel Paşca, *op. cit.*, p. 186.

[29] Published in the "Official Gazette of Romania", part I, no. 274 of 7 April 2008.

relation to this offence, and the provisions of art. 255 of the previous criminal law regarding the percept and the penalty shall be more favourable than the provisions of art. 290.

3. Trading in influence (art. 291) consists in the request for, receipt of or the acceptance of promises of money or other benefits, be it directly or indirectly, for oneself or for another, committed by a person who is influential or who gives to believe that he/she is influential over a public servant in order to determine him/her to perform, not to perform, to urge or to delay an act included within his/her job duties or to perform an act contrary to these duties, and shall be punished by imprisonment from 2 to 7 years.

The legal content of trading in influence was supplemented by a new constituent condition[30] regarding the promise made by the direct active subject that he/she will determine the public servant to perform, not to perform, to urge or to delay an act included within his/her job duties or to perform an act contrary to these duties, that said, in relation to the attitude of the public servant, in compliance with the text of the offence of taking and giving bribe.

The term of servant was replaced with that of public servant, within the meaning given by art. 175, and this replacement, in conjunction with the provisions of art. 294 and especially with those of art. 308 para. (1) the last sentence, determined an extension of the applicability of art. 291 as regards the categories of persons who can be concerned by the influence trader.

Likewise, an extension of the criminality as well as of the influence peddling occurred also by the replacement of the term of "duties" with that of "responsibilities".

"Job responsibility" means everything which a public servant is in charge with according to the rules regulating the respective office, or which are inherent in the nature of the office. The observance of these rules by the public servants shall be a job responsibility for them[31].

The rules regulating the job activity are various and may be provided in laws, Emergency Ordinances, orders and Government Decisions, orders and directives issued by ministers or secretaries of State, by-laws and rules of organization and operation, the job description of the position held by the direct active subject, etc.

At the same time, the order or the legal directive of the hierarchical superior body shall become a job responsibility for the public servant to whom the respective order or legal directive is addressed[32].

"Job duties" are those functional attributes which mainly result from the job description and secondarily from the rules of organization and operation of the unit within which the author works. These are duties customized according to the position held by the direct active subject in the hierarchy or list of posts of the respective unit.

The text was re-stylized, the terms regarding money or other benefits were positioned after the complete enumeration of the alternatively incriminated deeds, simultaneously with the waiver of the word "gifts".

In the absence of an essential requirement regarding the purpose or the motive, the trading in influence shall be punished as well, in case it is committed with oblique intent[33], even if as a rule, it is actually committed with direct intent.

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[30] The addition of this criminality condition, which is not present in the Criminal Convention on corruption, was criticised by certain authors in an unjustified way. See, to this end, Viorel Paşca, *op. cit.*, p. 194.

[31] See Siegfried Kahane, *Negligence at work* (Malfeasance in office or in relation to the office) (*Neglijența în serviciu* (Infracțiuni de serviciu sau în legătură cu serviciul) in "Theoretical explanations of the Romanian Criminal Code. Special part", vol. IV („Explicații teoretice ale Codului penal român. Partea specială", vol. IV), by Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roşca, the Publishing House of the Romanian Academy, Bucharest, 1972, p. 104.

[32] See Doru Pavel, *Theoretical considerations on the offences of malfeasance in office* (*Considerații teoretice privind infracțiunile de serviciu)*, in "Romanian Journal of Law" („Revista română de drept") no. 10/1967, p. 37. For the same purpose, see: Valentin Mirişan, *Negligence at work* (Comment) (*Neglijența în serviciu* (Comentariu) in "Criminal Code commented" („Codul penal comentat). *Special part,* vol. II (*Partea specială*, vol. II), by Matei Basarab, Viorel Paşca, Gheorghiță Mateuț, Tiberiu Medeanu, Constantin Butiuc, Mircea Bădilă, Radu Bodea, Petre Dungan, Valentin Mirişan, Ramiro Mancaş, Cristian Miheş, Hamangiu Publishing House, Bucharest, 2008, p. 590.

[33] To the contrary, see: Alexandru Boroi, *op. cit.*, p. 387; Viorel Paşca, *op. cit.*, p. 198; Vasile Dobrinoiu, Norel Neagu, *op. cit.*, p. 468; Vasile Dobrinoiu, *Trading in influence* (Comment) (*Traficul de influență* (Comentariu), *op. cit.*, p. 556.

The special limits of the sentence of imprisonment were reduced (imprisonment from 2 to 7 years, as opposed to imprisonment from 2 to 10 years).

Certain aggravating circumstances of the offence of trading in influence, as they had been provided in the Draft, were introduced, according to Law no. 187/2012, in Law no. 78/2000. Thus, the deed of trading in influence committed by a person who: holds a position of public official; is a judge or prosecutor; is a criminal prosecution body or has duties of finding or of sanctioning offences; is one of the persons provided in art. 293[34], shall be punishable by the sentence provided in art. 291, whose limits are increased by one-third (art. 7 of Law no. 78/2000).

The reason of these aggravating circumstances shall be determined by the need for increasing the exigency in relation to those categories of public servants who, by the nature of their job duties, hold and exercise important powers for the society, and their corruption seriously influences the public trust in the public authorities or institutions.

The provisions related to the special confiscation, set forth in the previous criminal law, were maintained as such, however, in a specific enunciation, not be reference to the similar provisions of receipt of undue benefits (a rule of criminality repealed by the lawmaker of 2009), as the lawmaker of 1969 acted.

Therefore, the money, values or any other goods received shall be subject to confiscation, and in case they are not found anymore, confiscation by compensation equivalent to their value is ordered.

In case of temporary situations, in terms of conditions for criminality, the old law shall be more favourable. We particularly consider those new conditions of criminality, which are not explicitly provided in the old law (for instance, when the promise refers to the determination of the public servant to urge or to delay the accomplishment of an act with regard to his job duties or to perform an act contrary to these duties) or implicitly [for instance, if the person concerned with the author's promise shall exceed the concept of servant, as provided in art. 147 para. (2) of the Criminal Code of 1969, according to which such deeds were incriminated].

4. Influence peddling (art. 292) shall consist in promising, offering or giving money or other benefits, be it directly or indirectly, for oneself or for another, to a person who is influential or who gives to believe that he/she is influential over an employee in order to determine him/her to perform, not to perform, to urge or to delay an act included within his/her job duties or to perform an act contrary to these duties, and shall be punished by imprisonment from 2 to 7 years and the interdiction of exercising certain rights.

The influence peddling was introduced in the Code by taking it over, with some amendments, from art. 6^1 of Law no. 78/2000, to which it was added the provision related to the mandatory application of the complementary punishment of the interdiction of exercising certain rights.

First, the expression of "servant" was replaced with that of "public servant", and this replacement, in conjunction with the provisions of art. 294 and especially with those of art. 308 para. (1) the last sentence, determined an extension of the applicability of art. 292 as regards the categories of persons who can be concerned by the influence trader.

Then, the determination of the public servant may cover, in its new formulation, the urging or the delay in the accomplishment of an act within his/her job duties or to perform an act contrary to these prerogatives, the criminality being thus related to the bribe-giving.

The expression "giving gifts or other benefits" was replaced with the enunciation "giving money or other benefits".

Due to the essential requirement "in order to", enclosed to the subjective element, the office of influence peddling shall not fall within the scope of art. 292 if only it is committed with direct intent qualified by its purpose, represented by the determination of the public servant to perform, not to perform, to urge or to delay the accomplishment of an act included within his/her job duties

[34] For reasons of space, in the content of this study, where the normative papers is not indicated by the number of an article, we consider the Criminal Code adopted by the Law no. 286/2009, as subsequently amended and supplemented.

or to perform an act contrary to these duties. The purpose has the meaning of finality, so that in order for the offence to be committed, it is not necessary that it should be carried out, as it is sufficient to prove that the perpetrator pursued it upon committing the incriminated deed.

Certain amendments are not essential (for instance, the replacement of the expression "to do or not to do" with "to perform, not to perform").

According to Law no. 187/2012, the word "and" was replaced with "or", when reference is made to money or benefits, and the material element was added an essential requirement "for oneself or for another".

The special limits of the sentence of imprisonment were reduced (imprisonment from 2 to 7 years, as opposed to imprisonment from 2 to 10 years).

The perpetrator shall not be punished if he/she denunciates the deed before the criminal prosecution body has been notified to this end – para. (2).

The money, values or any other goods shall be returned to the person who gave them, in case they were given after the denunciation provided in para. (2) - para. (3).

It should be noticed that in this case, as well, the denunciation has to be submitted to the criminal prosecution body, even if this is not the competent body, and not to any other authority, and the goods shall not be returned if they were given before the submission of the respective denunciation.

The influence peddling may be committed by the foreign servants to whom art. 294 refers or in relation to them.

The money, values or any other goods given or offered shall be subject to confiscation, and in case they are not found anymore, confiscation by compensation equivalent to their value is ordered – para. (4).

According to Law no. 187/2012, the aggravated versions of this offence, provided in art. 7 and 9 of Law no. 78/2000 were repealed, however they shall fall within the scope of the criminal law, either as practical means in the content of art. 292, or in concurrence with art. 367 (Founding an organized crime group).

In case of temporary situations, in terms of criminality conditions, the old law shall be more favourable, as the new law extends its applicability also on certain assumptions which are not provided in the previous law (for instance, if the incriminated act is performed to determine the public servant to urge or to delay the accomplishment of an act with regard to his service duties or to perform an act contrary to these duties).

5. Deeds committed by the members of the arbitration panels or in relation to them (art. 293). According to this text, the provisions of art. 289 and 290 shall be adequately applied to those persons who, under an arbitration agreement, are called to rule an arbitration award related to a dispute which was submitted to them for settlement purposes by the parties to this agreement, whether the arbitral procedure is conducted according to the Romanian law or to another law, assumptions which were not provided in the previous regulation.

Non-inclusion within the scope of the text, of the cases when these categories of persons commit any of the deeds provided in art. 291 or in art. 292, was criticized in the relevant literature[35].

According to art. 243 of Law no. 187/2012, the provisions of art. 293 shall apply, whether or not the members of the arbitration panels are Romanian or foreigners.

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[35] See Vasile Dobrinoiu, *Deeds committed by the members of the arbitration panels or in relation to them* (Comment) (*Fapte săvârşite de către membrii instanţelor de arbitraj sau în legătură cu aceştia)* (Comentariu), in "The New Criminal Code commented, vol. II, special part" („Noul Cod penal comentat, vol. II, partea specială") by Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiş, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, Universul Juridic Publishing House, Bucharest, 2012, p. 564-565. Due to the formulation used by the lawmaker, in the author's opinion it results that, as regards the offence of trading in influence, it decided not to include in the criminality the trading of influence of the persons mentioned in art. 309 [(Art. 7 of Law no. 78/2000 sets forth that the trading in influence is more serious if committed by *one of the persons* provided in art. 293, and not in relation to them, as the trading of influence on such a person is not included in the criminality (which is expressly provided in art. 293 and cannot be included in any of the other categories provided in art. 175 or 308), which is regrettable]. The same applies to the influence peddling of the persons provided in art. 293.

6. Deeds committed by the foreign servants or in relation to them (art. 294). The provisions of chapter I of heading V of the special part of the new Criminal Code shall apply in relation to the following persons, unless otherwise provided in the international treaties to which Romania is Party:

a) to the officials or persons carrying on their activity according to an employment agreement or other persons exercising similar prerogatives within a public international organization to which Romania is a Party;

b) to the members of the Parliamentary assemblies of the international organizations to which Romania is a Party;

a) to the officials or persons carrying on their activity according to an employment agreement or other persons exercising similar prerogatives in the European Union;

d) to the persons exercising judicial offices in the international courts whose jurisdiction is accepted by Romania, as well as to the servants working within the registrar's offices of these courts;

e) to the officials of a foreign State;

f) to the members of the Parliamentary or administrative assemblies of a foreign State;

g) to the juries of certain foreign courts.

This text represents the taking over, with amendments, of the provisions of art. 8^1 of Law no. 78/2000 which shall be applicable unless otherwise provided in the international treaties to which Romania is Party.

III. ***General remarks.*** Chapter 2 contains criminality elements regarding the offences of malfeasance in office, committed either by public servants alone (abusive behaviour), or by this category of servants and by the persons who permanently or temporarily exercise, with or without any remuneration, any kind of duty to serve an individual among those provided in art. 175 para. (2) or within a legal entity (most of the offences of this chapter), or by the latter alone (violation of the secrecy of correspondence, in certain cases of criminality).

If the offences set forth in this chapter are committed on an ongoing basis and affect certain different secondary passive subjects, but the main passive subject is unique, the offence unity shall not be affected, and the plurality of offences is only apparent.

This subdivision kept all the offences of malfeasance in office provided by the previous Criminal Code whose content was, however, amended or supplemented, but other offences provided in certain special laws or in other subdivisions of the previous criminal law were brought.

Last, but not least, several new criminality elements were proposed, being intended to offer solutions to certain problems emphasized by the practice of the last years.

IV. ***Particular remarks.*** **1. Embezzlement (art. 295)** consists in the act, committed by a public servant, for him/herself or for another, of appropriating, using or trafficking money, values or other goods in his/her management and shall be punished by imprisonment from 2 to 7 years and the interdiction of the right to hold a public office.

If embezzlement caused serious consequences (a material damage exceeding the amount of lei 2,000,000 lei), the special limits of punishment provided in art. 295 shall be increased by half.

This criminality which is systematized as an offence against patrimony in the previous criminal law, was introduced in the category of the offences of malfeasance in office since its commission first damages the social work relationship and secondarily the patrimony of a public or private legal entity. The solution of including the embezzlement in this category of offences is traditional in our law, and it was established in the Criminal Code of 1936, as well (art. 236). The same applies in other laws, as in the case of art. 432 of the Spanish Criminal Code, art. 314 of the Italian Criminal Code and art. 432-15 of the French Criminal Code.

Although the concept of servant was replaced with that of the public servant (proper or treated as such), as in the case of bribe-taking, the area of the authors and co-authors was extended also in relation to this criminal deed, by creating the possibility of being committed also by other persons, provided in art. 308, in which case the special limits of the punishment provided for the specific deed shall be reduced by one third.

Therefore, Decision no. III/2002 of the supreme court[36], of upholding an appeal in the interest of law, remains valid, as well, in relation to the new criminal law, and this time, the administrator of the owners' or tenants' association shall benefit from a more favourable criminal treatment.

Likewise, even if art. 175 item 5 of Law no. 187/2012 repealed the species version of the offence of embezzlement, provided in art. 145 of Law no. 85/2006 regarding the insolvency procedure[37] (repealed under Law no. 85/2014 at present), which is determined by committing embezzlement by certain categories of persons (for instance, the judicial administrator or the liquidator of the debtor's estate), these deeds were not decriminalized and shall be sanctioned by including them in art. 295 in conjunction or not, as the case may be, with art. 308 and/or art. 309.

The precept of the embezzlement, as provided in art. 295, shall be identical to that of the previous law, so that it does not require any additional comments. It should be mentioned that the subjective element of this criminality, in the absence of some essential requirements which may qualify it, is represented also by intent, in its both ways: direct or indirect[38].

In terms of penalty, the sentence of imprisonment provided by the law (imprisonment from 2 to 7 years, when it is committed by a public servant, respectively from 1 year and 4 months to 4 years and 8 months, when it is committed by the categories of persons provided in art. 308) is much more reduced than the sentence existing in art. 215^1 of the Criminal Code of 1969 (imprisonment from one to 15 years). The same thing was achieved in the case of occurrence of very serious consequences, where the punishment provided by law shall be imprisonment from 3 to 10 years and 6 months, if the deed is committed by a public servant, respectively imprisonment from 2 to 7 years, when the concrete deed is committed by any of the persons mentioned in art. 308, as opposed to the sentence of imprisonment from 10 to 20 years, as it was provided in the previous law, these limits being excessive and identical to the limits established for the simple homicide.

In any of its normative instruments, the attempted embezzlement shall be punished.

The new criminal law, in all the cases of the embezzlement criminality, is more favourable than the old criminal law (art. 215^1 of the Criminal Code of 1969).

2. The abusive conduct (art. 296), in its type version, has the same legal content as that provided in art. 250 of the previous criminal law, respectively the use of offensive language with regard to a person by an employee in the exercise of job duties.

If the direct active subject (any individual who meets the general conditions of the criminal liability), in the exercise of his/her job duties, threatens or hits or uses other acts of violence against the passive subject, the special limits of punishment provided in art. 206, respectively in art. 193 (deeds absorbed in the content of the offence of abusive conduct) shall be increased by one third.

It should be reflected whether, *de lege ferenda*, it wouldn't be more appropriate to establish in this case, as well, proper limits for sanctioning the offence of abusive conduct in order to emphasize the independent nature of this criminality which shall not be deemed as an aggravated version of certain offences against the person.

The lawmaker of 2009 did not appropriate the proposal of the commission that the criminal action for this offence could be initiated only based upon the prior claim of the injured person even if the reason of such a provision has been well-founded, respectively that the described deeds always incur the disciplinary liability of the public servant, which may lead to his/her removal from office as well, and recourse to means of criminal restraint shall be possible if only the individual

[36] Published in the "Official Gazette of Romania", part I, no. 113 of 24 February 2003.

[37] Published in the "Official Gazette of Romania", part I, no. 359 of 21 April 2006, as subsequently amended and supplemented.

[38] To the contrary, see: Alexandru Boroi, *op. cit.*, p. 398. Arguably, the author states that the acts incriminated by the text suppose a purpose as well, even if it is not provided in the rule and that the direct intent would result from also from the requirement "in its own interest or in another person's interest"; Viorel Paşca, *Embezzlement (Malfeasance in office)* (*Delapidarea* (*Infracțiuni de serviciu)*, in "Criminal law manual. Special part" („Manual de drept penal. Partea specială"), vol. II, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House Bucharest, 2011, p. 215.

who directly suffered the consequences of the abusive conduct of the public servant, expresses his/her will to this end.

The text was correctly simplified by waving the cases in which a simple or serious bodily injury occurs.

In case the direct active subject, in exercising his/her job duties, uses offensive language towards an individual and then hits him causing a bodily injury for the purpose of art. 194, he/she shall be held liable for a concurrence of offences between the abusive conduct (in the type version) and the bodily injury.

3. The abuse of office (art. 297) represents the deed of the public servant who, in the exercise of his/her job duties, does not perform an act or perform it defectively and thus, causes damage or injury upon the rights or legal interests of an individual or of a legal entity and shall be punishable by imprisonment from 2 to 7 years and the interdiction of the right to hold a public office.

The species and assimilated version incriminates the deed of the public servant who, in the exercise of his/her job duties, restricts the exercise of a person's right or creates a situation of inferiority for that person on issues of race, nationality, ethnic origin, language, religion, gender, sexual orientation, political background, fortune, age, disability, non-contagious chronic disease or HIV infection and AIDS.

According to art. 308, the abuse of office may be committed by other categories of persons, as well, and this situation represents an attenuation circumstantial element (the special limits of punishment provided for the specific deed shall be reduced by one third).

The lawmaker of the year 2009 *simplifies* the way of enforcement of the legal provisions in the matter, as the offences of abuse of office against persons' interests, against public interests and due to the restriction of certain rights, provided in the Criminal Code of 1969 (art. 246-248), as well as in the Draft[39], as stand-alone offences were *unified* in a single text.

Therefore, if the active subject performs by his/her concrete criminal activity, one or more actions or inactions described in art. 297, at one time or successively, he/she shall be liable for a single offence of abuse of office, possibly continued [if the concrete deed is committed according to art. 35 para. (1)], and not for a concurrence of several offences as the offender, under the sole resolution, commits a single offence set forth in a single incriminating text, but not different offences incriminated in distinct texts.

As opposed to the previous text, in case of the criminality rule provided in art. 297 para. (1) the immediate consequence consists only in causing damage or injury upon the rights or the legal interests of an individual or of a legal entity, and consequently, the significant disturbance of the organized structure of a body or of a State institution or of another public unit shall not be provided anymore.

The new editing of the legal content of the offence, it is not concretely requested anymore that the non-performance of the act or its performance in a defective manner should be accomplished *in awareness,* and thus, the content of the criminality rule provided in art. 297 shall be correlated, in subjective terms, with the provisions of art. 16 para. (6) sentence I establishing the *rule* according to which the deed consisting in an inaction shall be deemed as offence when it is committed with intent. Under these circumstances, maintaining the expression "in awareness" in the legal content of the offence of abuse of office at the same time with the rule established in art. 16 para. (6) sentence I would be superfluous.

The aggravated abuse of office, provided in art. 248^1 of the Criminal Code of 1969, was *repealed*, but not decriminalized as in case the concrete abusive deed causes extremely serious consequences, art. 309 shall be applicable as well, in which case the special limits of the punishment provided in art. 297 shall be increased by half.

Repealing is not the synonymous concept of the decriminalization, since the repealed deed may continue to be incriminated in another law text (in our case, art. 297 in application of art. 309),

[39] See art. 289-291 of the Draft, available on http://www.just.ro/MeniuStanga/Normativepapers/Proiecte deactenormativeaflate%C3%AEndezbatere/tabid/93/Default.aspx.

with the same *nomen iuris* (as in the case of the offence of deceit, provided in art. 244, where the legal ways of deceit in agreements or cheque notes when very serious consequences resulted, became factual ways in the legal content of the type or aggravated offence, as the case may be; in this way, the background of the legal ways of deceit was restricted, and the area of factual ways was adequately extended[40]) or under another name (for instance, the offence of slanderous denunciation, provided in art. 259 of the Criminal Code of 1969, shall be incriminated in art. 268 whose name is "misleading judicial bodies").

Under the influence of the doctrine[41], the lawmaker has not upheld as legal ways of the criminality provided in art. 297, the cases in which the public servant, in the exercise of his/her job duties, appoints in a public office, permanently or temporarily, a person who does not meet the requirements provided by law for its exercise. (this supplement had been inspired from the provisions of art. 405 para. 2 of the Spanish Criminal Code) or in which the public servant, standing on or making use of his/her office, attempts to directly or indirectly determine another public servant not to perform or perform his/her job duties defectively (a solution provided in § 125 of the Norwegian Criminal Law).

4. Negligence at work (art. 298) represents the transgression, by negligence, committed by a public servant, of a job duty by its non-accomplishment or by its erroneous accomplishment, if it causes damage or injury upon the rights or the legal interests of an individual or of a legal entity and shall be punishable by imprisonment from 3 months to 3 years or by fine.

This criminal deed may also be committed by other categories of persons, explicitly described in art. 308, in which case the special limits of punishment provided by law for the basic deed shall be reduced by one third.

The material element of the criminality rule of art. 298 shall be identical to that of the previous criminal law.

However, some explicit and implicit amendments were made, in relation to the immediate consequence of this criminal deed, regarding the case of the occurrence of some extremely serious consequences upon committing the concrete deed, by holding in the content of this phrase only the amount of the material damage which should exceed lei 2,000,000.

First, the alternative legal way of the immediate consequence consisting in the significant disturbance of the structured organization of a body or of a State institution or of a public authority or private legal entity was waived (decriminalized) due to the practical difficulties of its determination based upon evidence.

At the same time, the adjective "important" attached to the noun "injury" was eliminated, which means an extension of the applicability of the text regarding any kind of injury, if it refers to the rights or legal interests of an individual or of a legal entity, as its intensity represents only an individualization element of the punishment, but not a criminality condition.

This time, injury may refer to the rights of the passive subject as well, and the scope of interests was extended from the legal to the legitimate interests. In this respect, the old law shall be more favourable.

The limits of the sentence of imprisonment provided for the simple offence were increased from one month and 2 years to 3 months to 3 years, and the limits related to negligence at work which caused extremely serious consequences were reduced (imprisonment from 2 to 10 years as opposed to the sentence of imprisonment from 4 months and half to 4 years and 6 months or a fine).

Therefore, in terms of punishment, in case of simple offence and of the offence committed by the persons referred to in art. 308, the previous law is more favourable, and in the case provided in art. 309 the new criminal law is more favourable.

5. Abusive use of office for sexual purpose (art. 299) is a new criminality created from the offence of sexual harassment provided in the previous regulation and comprising both the so-called

[40] For more details, see C. Duvac, Deceit in the new Criminal Code, (*Înşelăciunea în noul Cod penal)*, in "Law" review („Dreptul") no. 1/2012, p. 104-134.

[41] See George Antoniu, *Remarks with regard to the preliminary draft of a second new Criminal Code*, in "Journal of criminal law" no. 1/2008, p. 27. The author considers that these provisions are useless as such cases are covered by the text, and in such situations it is more desirable to use a synthetic formulation.

vertical harassment by abuse of authority and new cases of criminality. The criminality is justified, in the opinion of the commission, by the fact that this kind of offences may affect the correct performance of the job duties by the public servant. This offence is different from the sexual harassment of the category of offences against sexual freedom, due to its special legal object and material element, even if, as regards both offences, the direct active subject may be also a public servant. The provisions of art. 443 of the Spanish Criminal Code were considered as well, when drafting the text.

This offence consists in the act of a public servant who, in order to perform, not to perform, to urge or to delay the accomplishment of an act with regard to his job duties or in order to perform an act that is contrary to these duties, claims or obtains sexual favours from a person who is directly or indirectly interested in the effects of that professional act and shall be punished by imprisonment from 6 months to 3 years and the interdiction of the right to hold a public office or to exercise the profession or the work in which performance he/she committed the offence.

In its attenuated version, it is punishable by imprisonment from 3 months to 2 years or a fine and the interdiction of the right to hold a public office or to exercise the profession or the work in which performance he/she committed the deed, and the claim or getting of sexual favours by a public servant who prevails from or makes use of a situation of authority or of predominance over the victim, arising from the office held, shall be punished.

The deed, in both its criminality versions, may also be committed by one of the categories of persons provided in art. 309, in which case the special limits of punishment shall be reduced by one third.

This is similar to the offence of sexual harassment (art. 223) as in relation to both criminal offences, the claim of sexual favours is indicted, but what makes them different is the way in which this is achieved, and this issue justifies their different systematization (the different special legal object).

Some authors[42] had certain reservations about this criminality, as the reality in our country, as well as the doctrine and the case-law did not emphasize the need for such a criminality and for any harassment acts, in general.

Moreover, in the light of the previous criminal law, when the benefit obtained as bribe consists in sexual favours, such an offence may be included in the provision of art. 254 of the Criminal Code of 1969, if the other criminality conditions were due to the perpetrator's activity.

6. Usurpation of office (art. 300) is a new criminality[43] which, even if is similar to the usurpation of official capacities in terms of content, as opposed to the latter, it presents essential differences justifying the criminality, according to the opinion of the editors of the new criminal law. If the usurpation of official capacities damage the State authority, the usurpation of office influences the work relationships as the author is a public servant performing an act outside his/her job duties or continues to exercise his/her public office, however different from that which involves the exercise of State authority.

Therefore, art. 300 indicted the deed of the public servant who, during his/her work, performs an act which is not within his/her job duties, if this act caused one of the consequences provided in art. 297, and the punishment provided by law shall be imprisonment from one to 5 years or a fine.

The direct active subject of this offence may be also a person among those referred to in art. 309, in which case the special limits of punishment shall be reduced by one third.

These limits shall be increased by half in case extremely serious consequences occurred.

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[42] See George Antoniu, *op. cit.*, p. 27. The author reminds that harassment was indicted in our criminal law for the first time in the year 2001 under the influence of foreign models rather than under the pressure of certain urgent realities. He proposes to waive the criminality provided in art. 299.

[43] For partially similar criminality elements, see art. 432-3 of the French Criminal Code, art. 347 para. 2 of the Italian Criminal Code, art. 358 letter c) of the Portuguese Criminal Code.

Professor Antoniu proposes to delete the text, as such a criminality is useless since it was suggested neither by the doctrine, nor by the case-law. He considers that the criminality of the offence of usurpation of official capacities is sufficient. See, to this end, as well, George Antoniu, *op. cit.*, p. 28.

7. The conflict of interests (art. 301) has a content similar to that provided in art. 253^1 of the Criminal Code of 1969, a text which was taken over with certain non-essential amendments (the indicted act was changed from present tense to past tense; the word "for" was written in front of each beneficiary of the benefit obtained; the word "achieved" was replaced by "obtained").

This text indicts the deed of the public servant who, in the exercise of his/her job duties, performed an act or participated in a decision-making process under which a patrimonial benefit was obtained, directly or indirectly, for oneself, for his/her spouse, for a relative or for an affine until the 2nd degree, inclusively, or for another person with whom he/she had commercial or work relationships in the last 5 years or from whom he/she has been taking advantage from any kind of benefits.

The area of the direct active subjects of this criminality was extended both by redefining the concept of public servant, and also by the possibility that this criminal deed might be committed by one of the categories of persons described in art. 308, in which case the special limits of punishment provided by law for the basic deed shall be reduced by one third.

Questionably, the adjective "material" attached to the noun "benefit" was replaced with "patrimonial", a concept which has multiple implications.

The minimum limit of the sentence of imprisonment was increased from 6 months to one year, and the maximum limit remained unchanged, respectively 5 years. The complementary punishment of the interdiction of exercising the right to hold a public office was maintained without the mention that its maximum duration shall be executed.

The indicting text shall not apply in case of issue, approval or adoption of regulations.

The formulation used was deemed to be difficult and confusing, as the criminality rather refers to a theoretical case covered by the provision of art. 297^{44}.

8. Violation of the secrecy of correspondence (art. 302) was taken over, with some essential amendments, from the offences against freedom (art. 195), a sub-category of offences from the category of offences against person and was systematized by the lawmaker of the year 2009 in the category of malfeasance while in office, even if the editors of the new criminal law had adopted the solution of the previous criminal law.

The criminal rule of art. 302 was completely reformulated and new criminality cases were added to its content, as well as some special supporting causes.

The first type version indicts the unlawful opening, stealing, destruction or retention of a correspondence which is addressed to another person, as well as the unlawful disclosure of the content of such a correspondence, even if when it was sent open or was opened by mistake, and these offences shall be punishable by imprisonment from 3 months to one year or by fine – para. (1).

The unlawful interception of a conversation or of a communication made by phone or by any electronic means of communications characterizes the second type version of the offence[45] *and shall be punishable more heavily, respectively by imprisonment from 6 months to 3 years or by a fine – para. (2).*

If the offences provided in para. (1) and para. (2) were committed by a public servant who is legally obliged to keep professional secrecy and the confidentiality of the information to which he/she has access, the punishment shall consist in the sentence of imprisonment from one to 5 years

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[44] See George Antoniu, *op. cit.*, p. 28. The author states that neither the doctrine, nor the case-law required such a criminality and proposes to delete the respective text.

[45] To this end, see Ilie Pascu, *Violation of the secrecy of correspondence (Comment*) (*Violarea secretului corespondenței* (Comentariu)), in the "New Criminal Code commented, vol. II, special part" („Noul Cod penal comentat, vol. II, partea specială") by Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiş, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, Universul Juridic Publishing House, Bucharest, 2012, p. 608. Otherwise, see Alexandru Boroi, *op. cit.*, p. 420, 422. The author considers that the deed provided in para. (1) is the type version and the deed provided in para. (2) is its aggravated version, however, without justifying this sentence. Viorel Paşca, *Violation of the secrecy of correspondence (Malfeasance while in office),* in "Criminal law manual. Special part" (*Violarea secretului corespondenței* (*Infracțiuni de serviciu*), în „Manual de drept penal. Partea specială"), vol. II, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2011, p. 239, 242.

and the interdiction of certain rights. This case of criminality, which the commission had waived, was added by the committees for legal matters of both chambers of Parliament and represented the main argument for systematising the offence of violation of the secrecy of correspondence within the category of offences of malfeasance while in office, even if the assumption considered by the lawmaker is an exceptional, but inadequate for justifying such a solution.

Art. 302, under a single marginal denomination, (*nomen iuris*) indicts two different deeds (one in relation to the correspondence addressed to another person, the other deed regarding conversations or communications), as distinct offences, each of them having its own legal content, but also a special abstract social danger.

Therefore, if the complex criminal activity of a single person achieves both criminality cases which characterize the type versions of the violation of the secrecy of correspondence, the rules of the concurrence of offences between the deeds provided in para. (1) and para. (2) of art. 302 shall be applicable.

Another aggravated version is represented by the unlawful disclosure, dissemination, presentation or transmission to another person or to the public, of the content of an intercepted conversation or communication, even in the case in which the perpetrator took note of this deed by mistake or accidentally. The penalty provided by law for this offence is the imprisonment from 3 months to 2 years or a fine.

The lawmaker of 2009 introduced two special incidental supporting causes:

a) if the perpetrator captures the commission of a crime or contributes to prove the commission of an offense;

b) or if he captures deeds of public interest which are significant for the community life and their public disclosure has any larger public advantages than the prejudice caused to the injured party.

Law no. 187/2012 added a new criminality version consisting in unlawfully holding or producing specific intercepting or recording means of the communications, and these deeds shall be punishable by imprisonment from 3 months to 2 years or a fine, and the cases in which the criminal proceedings are initiated based upon the prior complaint of the injured person were reduced only to those actions specific to the basic deed.

According to art. 244 of Law no. 187/2012, the provisions of art. 302 shall apply, whether or not the deeds were committed with a view to certain work relationships or outside these relationships.

9. Disclosure of state secret (art. 303), even if it has certain common elements with the offence of disclosure of the secret which endangers national security– art. 407 – (the material object, the direct active subject, the immediate consequence) shall be different from the latter since the commission of the indicted action shall affect the interests or the activity of a public-law legal entity, which justifies the criminality in the category of malfeasance while in office.

The incriminating text was provided in a type and in an attenuated version. The basic version consists in the unlawful disclosure of certain information deemed to be state secret, by the person who knows it according to his/her job duties, whether the respective disclosure affects the interests of a legal entity provided in art. 176 and shall be punishable by imprisonment from 2 to 7 years and the interdiction of exercising some rights.

The attenuated version indicts the unlawful retention, outside the job duties, of a document containing information deemed to be state secret, if this may affect the activity of one of the legal entities provided in art. 176, and this deed shall be punishable by imprisonment from 3 months to 2 years or a fine.

The author of the attenuated deed shall not be sentenced if he immediately delivers the document to the issuing body or institution.

If the deeds provided in art. 303 caused extremely serious consequences, the special limits of punishment provided in this text shall be increased by half.

10. The disclosure of confidential or non-public information (art. 304), a criminality positively received in the doctrine[46], represents a new offence only in terms of the independent nature of the regulation as in terms of its legal content, it broadly joins the provisions set forth in art. 298 (disclosure of the trade secrecy) of the Criminal Code of 1969 and in art. 20 of Law no. 682/2002 on witness protection[47].

Therefore, the unlawful disclosure of certain confidential information or which are not intended to be made public by the person who knows it according to his/her job duties, whether the respective disclosure affects the interests of a person, represents the simple version of the criminality and shall be punishable by imprisonment from 3 months to 3 years or a fine.

The attenuated version – para. (2) – is determined by the capacity of the author who this time, is not reasoned anymore by the text, and he could be any person who takes note of this type of information and discloses it to third parties, in which case the punishment provided by the text shall be imprisonment from one month to one year or a fine.

In case after committing the type or attenuated deed, an offence was committed against the undercover investigator, the protected witness or against the person included in the Witness Protection Program, the punishment shall be imprisonment from 2 to 7 years, and in case an offence against life was committed with intent, the punishment shall be imprisonment from 5 to 12 years.

The deeds provided in art. 304 may be also committed by one of the categories of persons provided in art. 308, in which case the special limits of punishment shall be reduced by one third.

11. Negligence in keeping information (art. 305) was considered welcome in the Romanian relevant literature[48].

Negligence in keeping information maintained its content from the previous Criminal Code (art. 252) with some amendments determined by the need for correlating this text with the special law regarding the classification of information, but also with other texts which have been introduced in the category of malfeasance while in office.

The provisions of this article were re-stylized, and the requirement that the deed should damage the state interests was deleted from its content. At the same time, the special limits of the sentence of imprisonment were reduced (imprisonment from 3 months to 3 years, as opposed to imprisonment from 3 months to one year) and the criminal penalty of fine was alternatively provided for this offence.

Therefore, negligence resulting in the destruction, alteration, loss or theft of a document which contains state secrets, as well as the negligence affording another person to find out such information were indicted.

In relation to the provisions of art. 16 para. (6) sentence II and with the requirements of the principle of legality of criminal offences, the text of art. 305 para. (1) should be reformulated by explicitly introducing the subjective element (fault) in its content, as negligence is not similar to fault.

The case in which the deed provided in art. 303 para. (1) and in art. 304 was committed by fault, was arguably introduced in the text as a species version, even if it should have been introduced as attenuated version in the content of the texts to which it referred to, being inextricably linked to them.

12. Obtaining funds illegally (art. 306) consists in the use or submission of false, inaccurate or incomplete documents or data, for the purpose of receiving the approvals or guarantees necessary for granting financing obtained or guaranteed from public funds, if this results in illegally obtaining these funds, and the doctrine agrees to such a criminality[49].

The punishment provided in case of this intended result offence, shall be imprisonment from 2 to 7 years, and the lawmaker opted also for sanctioning the attempted offence.

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[46] See George Antoniu, *op. cit.*, p. 28.

[47] Published in the "Official Gazette of Romania", part I, no. 964 of 28 December 2002, as subsequently amended.

[48] See George Antoniu, *op. cit.*, p. 28.

[49] See George Antoniu, *op. cit.*, p. 28.

These limits shall be increased by half in case extremely serious consequences occurred, namely a material damage whose amount exceeds lei 2,000,000 upon committing the concrete offence.

The criminality, without any correspondent in the previous criminal law, represents a taking over of the provisions of art. 9 para. (1) of the Government Emergency Ordinance no. 64/2007 regarding public debt[50], approved as amended and supplemented by Law no. 109/2008[51], with some amendments as regards the result provided by the text (illegally obtaining financing from public funds as compared to illegally obtaining refundable financing provided in the special law with criminal provisions). Under this amendment, the applicability of the legal way was extended regarding all categories of public funds.

Art. 9 and 10 of the Government Emergency Ordinance no. 64/2007 were repealed under art. 198 of Law no. 187/2012.

Obtaining funds illegally has a special version, provided in art. 18^1 para. (1) of Law no. 78/2000, determined by the nature of the fund illegally obtained, which in this case is from the general budget of the European Union or from the budgets managed by it or on its behalf.

13. Misappropriation of funds (art. 307), a necessary criminality[52], was moved from the category of offences to the regime established for certain business activities of this chapter as, in the opinion of the committee, it has all the features of malfeasance while in office: its author is a public servant, and its commission causes damage to the activity of the public authorities or public institutions, by disturbing their normal activity.

As opposed to the previous enunciation, the change of the destination of money funds or of the material resources allocated to a public authority or public institution, without complying with the legal provisions, shall represent an offence and shall be punishable by imprisonment from one to 5 years, without the need for generating any result, and the offence shall be related to danger in relation to the new regulation.

The lawmaker of 2010 introduced also a species and assimilated version represented by the change, without complying with the legal provisions, of the destination of funds resulted from the financing obtained or guaranteed from public funds. In this case, as well, the indicted offence is simply related to attitude.

In both versions, the attempt has been indicted and punished, a solution which is not provided in the previous Criminal Code.

If, as a result of misappropriation of funds extremely serious consequences occurred, the special limits of punishment shall be increased by half.

Misappropriation of funds shall be accessory also in case of committing certain offences of those indicted under the legal way of art. 303 of Law no. 95/2006 regarding the health care reform[53], the text being repealed by art. 176 item 7 of Law no. 187/2012.

The provision of art. 307 has a special version, provided in art. 18^2 of Law no. 78/2000, determined by the nature of the funds targeted by the indicted actions, which in this case are obtained from the general budget of the European Union or from the budgets managed by it or on its behalf.

14. Offences of corruption and malfeasance while in office committed by other persons (art. 308).

By this text, the attenuated version of the offences which it refers to, the applicability of art. 289-292, 295, 297 - 301 and 304 was extended also over the offences committed by or in relation to the persons who exercise, on a permanent or temporary basis, with or without any remuneration, any kind of duty to serve an individual of those provided in art. 175 para. (2) or within any legal entity, in which case the special limits on punishment shall be reduced by one third.

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[50] Published in the "Official Gazette of Romania", part I, no. 439 of 28 June 2007.

[51] Published in the "Official Gazette of Romania", part I, no. 374 of 16 May 2008.

[52] See George Antoniu, *op. cit.*, p. 28.

[53] Published in the "Official Gazette of Romania", part I, no. 372 of 28 April 2006, as subsequently amended and supplemented.

A similar solution as regards the way of sanctioning the active subject was provided also in art. 258 (Offences committed by other servants) of the Criminal Code of 1969.

However, the author's capacity and the scope of criminality to which this text applies have been different. The categories of persons mentioned in art. 308 exceed the concept of servant, as it was defined in art. 147 para. (2) of the previous criminal law. Likewise, the offences in relation to which this attenuated version is accessory, are much more significant in the new Criminal Code as art. 308 applies, except some new criminalities, to the offences of corruption, embezzlement and disclosure of confidential or non-public information. Instead, this enumeration does not include anymore the abusive conduct due to its change from a proper offence into an offence with reasoned active subject.

15. Offences which caused extremely serious consequences (art. 309). According to art. 309 (an aggravated version of the texts to which it refers), if the deeds provided in art. 295, art. 297, art. 298, art. 300, art. 303, art. 304, art. 306 or art. 307 caused extremely serious consequences, the special limits of punishment provided by law shall be increased by half.

Such a provision, justified by the amount of the damage caused by the offences explicitly provided in the text, was not arguably introduced in the traditional material damages, as those against patrimony.

III. *Conclusions and proposals de lege ferenda.* The regulation of the corruption offences in the new Criminal Code fully agrees with the content of the international documents adopted in this matter and ratified by Romania, thus ensuring an adequate protection of the values and social relations covered by these criminality rules.

Under the new Criminal Code, to the offences of: bribe-taking, bribe-giving, trading in influence, influence peddling, it was established a more comprehensive legal content than it was provided in the previous criminal law, both in relation to the area of direct active subjects (even if the concept of servant was waived), and in relation to certain constituent elements of the content of the specific criminality – the material element (even if it was decriminalized the non-repudiation of the promise of certain undue benefits, in case of taking bribe), the subjective element (bribe-taking, bribe-giving and trading in influence may be committed with oblique intent, as well) – or aggravated (by introducing certain new circumstantial aggravating elements (item 7 of Law no. 78/2000 regarding bribe-taking or trading in influence) or by the possibility that the bribe-taking – a proper offence – should be committed also by individuals, under some circumstances.

A new element consists also in creating an assimilated version of the offence of taking bribe when it is committed by a public servant treated as such [again a new concept, introduced by art. 175 para. (2)], a solution which shall bring to an end the controversies arisen in the domestic doctrine and judicial practice in relation to the possibility for the persons who carry on a public interest activity, of being the authors of this criminal offence.

To this end, it should be noted the effort of the editors of the new criminal law, to settle as many theoretical or practical disputes as possible, arising in the light of the previous criminal law.

Nevertheless, some amendments would be required for a better editing of the texts under discussion.

Therefore, in relation to the direct active object of bribe-taking, art. 1 of Law no. 78/2000 retained certain categories of persons, which are explicitly or implicitly found in the meaning of the concept of public servant or among the persons described in art. 308 and which, since they do not involve a distinct criminal treatment (as established, for instance, for the persons described in art. 7 of Law no. 78/2000), should be eliminated as they make the matter uselessly complicated.

To this end, *de lege ferenda* it would be required to delete the categories of persons provided in art. 1 of Law no. 78/2000, except those provided at letter f).

Likewise, the case in which the offence is committed by a public servant with control tasks should be introduced as an aggravating circumstantial element in art. 7 of Law no. 78/2000.

Regarding the concept of person performing a work of public interest, it would be more adequate that this category should be regulated in a stand-alone text. The need for this distinct category was also required due to a different legal regime which he/she should have since he/she is not a proper public servant, in relation to the criminal law, between the regime applicable to the

public servant and the regime incumbent upon private individuals. In this regard, it seems to be an abuse to place the person who performs a job in the public interest and the public servant on the same line, in terms of the applicable criminal treatment.

It should be noticed that the public servant is no more defined by reference to the public term, and the definition does not contain anymore the idea that the responsibility exists "no matter how it was vested", and this mention exists also in the text of the previous criminal law. We have reservations with a view to this omission. Maintaining this condition would have better explained the lawmaker's intention.

In relation to the manner in which art. 289 is edited, "the elimination" with certain exceptions, of the offence of receipt of undue benefits, provided in art. 256 of the Criminal Code of 1969, is welcome. Nevertheless, it should be reflected whether the decriminalization of this criminal offence is justified when it is committed by a public servant treated as such, without putting into question the fact they charge an adequate fee for the accomplishment of a certain act. Therefore, the question arises about what will happen if in such a situation the public servant treated as such claims or receives a remuneration in addition to the sum legally due? Although the text of art. 289 para. (2) does not provide a clear reply, since the criminal law is of strict interpretation, we consider that such an offence could represent at most a misconduct.

Last, but not least, it would be required to add the phrase "or in the interest of a legal entity" after the word "other".

De lege ferenda, in order to avoid a useless complication of the matter and implicitly an overlap of the text of the general part regarding special confiscation, the provisions regarding confiscation of art. 289-292 should be repealed, as those of art. 112 are incidental, covering and mandatory as well, in case of those four offences of corruption which are systematized in this chapter. This legislative option would be much more welcome whether the courts generally enforced these provisions in an accurate way in their practical activity.

The tautological phrase "this" should be deleted from the content of the offence of influence peddling since the recipient of the actual or alleged influence of the direct active subject results from the use of the pronoun "him" introduced between the infinitive forms of the verb "to determine".