CRIMES AGAINST PATRIMONY FROM THE PERSPECTIVE OF THE NEW CRIMINAL CODE AND OF THE APPLICABLE CRIMINAL CODE

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Abstract:

The author underlines the amendments brought to the offences against property, set out under Title II of the special part of the new Criminal Code of 2009, under review in terms of systematisation and of the legal content of various criminalization norms, highlighting both positive aspects and the arguable ones, in relation to which he puts forward several de lege ferenda proposals.

Furthermore, the author achieves a comparative research of the criminalization norms that have a correspondent in the criminal law currently in force, a quick review of the ex novo criminalization norms; this analysis is accompanied by several observations and recommendations (de lege ferenda proposals) for improving the texts under review.

Keywords: *Criminal Code, criminal law, crime, punishment, property.*

I. *The crimes against patrimony* (art. 228-256[1]) are set forth in title II of the special part of the new Criminal Code (hereinafter referred to as the Criminal Code of 2009), adopted under the Law no. 286/2009 regarding the Criminal Code[2], as subsequently amended and supplemented.

The new Criminal Code, according to art. 246 of Law no. 187/2012 for the enforcement of the Law no. 289/2009 on the Criminal Code[3] will come into force on February 1, 2014, when the Law no. 15/1968 on the Criminal Code of Romania, as republished[4] (hereinafter referred to as the Criminal Code of 1969 or the previous Criminal Code or the previous criminal law) will be repealed.

These indictments provide the protection of the patrimony by fighting against the deeds turned upon the things being part of the *asset* of the patrimony, so that in the criminal matter, the concept of patrimony has a more limited meaning than the meaning specific to the civil law.

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[1] 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.

[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] Republished in the "Official Gazette of Romania", part I, no.65 of 16 April 1997, as subsequently amended and supplemented.

In the Romanian criminal doctrine[5], *the patrimony* was defined as a set of legal relationships regarding the assets capable of meeting the material and spiritual needs of people. In this conception which we subscribe to, *the thing* means a segment of the outside world, a physical entity with autonomous existence towards which the action or inaction of the offender is directed or any entity of the outside world, which is different from the human being, capable of meeting a material or spiritual human need.

The rules of indictment of art. 228-256 were **systematized** in 5 chapters [chapter I – Theft; chapter II – Robbery and piracy; chapter III – Crimes against patrimony by overlooking trust; chapter IV – Frauds committed through computer systems and electronic means of payment; chapter V – Destruction and disturbance of possession], in relation to the issues in fact where the assets may be found as patrimonial entities and to the type or nature of the illegal actions by which these issues in fact may be changed.

This planning does not represent an opening for the Romanian criminal laws, but a return to the tradition since the Criminal Code from 1865 grouped the crimes and the offences of property into 9 sections, and the Criminal Code from 1937 provided the crimes and offences against patrimony in Title XIV (art. 524-573) which comprised 4 chapters (chapter I – Theft; chapter II – Robbery and piracy; chapter III – Offences against patrimony by overlooking trust; chapter IV – Displacement of borders, removal of border signs, damages and other troubles caused to property).

The solution of the classification of crimes against patrimony into several categories is promoted also in the criminal codes more recently adopted in certain Member States of the European Union, such as the case of the French Criminal Code (The 3rd Book – Crimes and offences against assets – comprising two titles, each of these being divided into 4 chapters) or of the Spanish Criminal Code (The 12th Title – Crimes against patrimony and social and economic order – comprising no less than 14 chapters), but also of the older codes (for example, the Italian Criminal Code, the German Criminal Code etc.)[6].

The punishments set forth in the rules of indictment of the crimes against patrimony were reexamined, being much more diminished than in the previous Criminal Code[7]. This election of criminal policy based upon the following judgments in the opinion of the drafting commission of the new Criminal Code[8]:

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[5] See George Antoniu, *Crimes against patrimony. Generalities*, in the "Journal of criminal law" no. 4/2000, p. 20.

[6] For more details, see George Antoniu, *op. cit.*, p. 12-16.

[7] For a review of this legislative election of alleviation of punishments, see: Constantin Duvac, *Deceit in the new Criminal Code*, in the journal "Law " (Dreptul) no. 1/2012, p. 133; Gheorghe Ivan, Mari-Claudia Ivan, *Certain questionable innovations of the new Criminal Code*, in the journal "Law" („Dreptul") no. 11/2012, p. 99.

[8] In the opinion of the commission, the sanctioning treatment for the offences incriminated in the special part is thus reset within normal limits. The new provisions shall not be understood as a simple reduction of the limits of punishment, which could determine a diminution of the criminal repression, but they represent the expression of a modern vision about the function of the punishment in the social reintegration of the persons who committed crimes. The practice of the last decade demonstrated that the exaggerated increase of the limits of punishment was not the efficient solution for fighting against criminality. In this way, although the punishment for the first degree theft in the previous law involved the imprisonment from 3 to 15 years, this legal sanction – not being present in any other legal system of the European Union - did not determine a significant reduction of the number of these offences. As a matter of fact, during the years 2004, 2005 and 2006 about 80% of the punishments in course of enforcement by deprivation of liberty for theft and first degree theft were of maximum 5 years of imprisonment, which indicates that the courts had no need for applying sanctions of the maximum superior limit set forth by law (12 years in case of simple theft, respectively 15 years, 18 years and 20 years in case of first degree theft). On the other hand, the extremely large time interval between the minimum limit and the maximum limit of the punishment (from one to 12

a) the punishments concretely enforced by the courts for this category of offences;

b) the need for the correlation with the provisions of the general part concerning the sanctioning mechanisms of the plurality of crimes, and also the limits of punishments provided for the enforcement of the alternate ways of individualizing the execution of sanctions;

c) the need for the reflection within the legal limits of the punishment, regarding the ordinary hierarchy of the social values representing the subject matter of criminal protection[9];

d) the need for returning to the tradition of the previous Criminal Codes (the Criminal Code from 1865, from 1937 and the Criminal Code from 1969, in the form they had when adopted in 1968).

We are not aware of the reasons which determined the legislator in 2009 to waive the circumstance of generating very serious consequences resulted from the aggravated content of certain crimes against patrimony (for instance theft, robbery, deceit, destruction), even if the editors of the draft of the new Criminal Code[10] (hereinafter referred to as the Draft) had proposed to maintain it. The chosen solution is the more questionable so as the reduction of the special limits of punishment diminishes much more the possibility of the legal individualization of the punishment by the judge in relation to the damage caused within the new established limits which are not so extended as they were in the previous regulation.

It should be noted that the crime of concealment (art. 270) was systematized by the legislator in 2009 in the title IV (crimes against the course of justice) so that it does not take part of the group of crimes against patrimony, as it was provided in the previous regulation.

A. Chapter 1 – ***Theft***– includes: theft, first degree theft, theft for the purpose of use, preliminary claim and reconciliation of the parties ad sanction of the attempt to commit this crime, rules in relation to which the legislator in 2009 made several amendments regarding the texts of the previous criminal law.

1. The theft (art. 228) has mainly, the same legal content as in the previous Criminal Code, together with the specification that the special limits of punishment were reduced

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years, from 3 to 15 years, from 4 to 18 years) put into practice much different solutions in relation to the punishments actually enforced for similar offences or higher punishments for the offences with a low degree of danger, this aspect not ensuring the foreseeable nature of the judicial process. So, the advisable solution is not the increase of the limits of punishment which had been made absurd and whose purpose was to simply overlook the hierarchy of the social values in a democratic society (for instance, the theft of a vehicle amounting to more than RON 200,000 is sanctioned by the present law into force in the same way as the murder). In a state subject to the rule of law, the scope and the intensity of the criminal repression shall remain within its established limits, firstly be referring to the importance of the injured social value for those who defeat the criminal law for the first time, and shall increase progressively for the persons committing several crimes before being finally convicted and so much the more for those who are in a relapse status. Therefor, the limits of punishment set forth in the special part have to be correlated to the provisions of the general part, which allow a proportional aggravation of the sanctioning regime provided for the concurrence of offences and relapse. Last but not least, we have to mention that the new limits of punishments comply with the limits set forth by most European criminal codes for similar crimes, but also with the limits of punishments traditionally set forth in our law, including the previous criminal code, prior to the amendments made by the Law no. 140/1996. These were the arguments of the commission with regard to the reduction of the special limits of punishment for most of the offences set forth in the special part of the new Criminal Code.

[9] See, to this end, as well, George Antoniu, *op. cit.*, p. 17. The author notices rightfully, that the sanctioning system provided in the Criminal Code from 1969 for the crimes against patrimony does not observe the constitutional hierarchy of the fundamental values, even if according to the Constitution of Romania from 1991, as republished, (art. 22) the protection of life, of corporal integrity, of the freedom of citizens is foreground as compared to the protection of the private property which is hardly provided in art. 41.

[10] The draft of the new Criminal Code is available at http://www.just.ro/MeniuStanga/Normativepapers/Proiectedeactenormativeaflate%C3%AEndezbatere/tabid/93/Default.aspx, posted on the website of the Ministry of Justice on 24 January 2008 (last accessed on 10 March 2012).

drastically (imprisonment from 6 months to 3 years or the payment of a fine against the imprisonment from one to 12 years). This is defined in para. (1) as the act of taking a movable asset from another person's possession or use, without the latter's consent, in order to make it one's own without right.

The act is a theft even if the asset belongs fully or partly to the perpetrator, if at the time of commission that asset was in the legitimate possession or use of another person - para. (2).

Since the text refers to the legitimacy of possession or use at the time of commission of the act by the owner of that asset, it seems to us that in other situations (for instance, when the owner recuperates his asset from the hands of the holding thief immediately after the latter has committed the offence) the owner of the stolen asset is entitled to take it himself from the illegal holder.

As opposed to the previous regulation, the electric power (together with any documents and any other type of power with economic value) is explicitly considered as a movable asset.

The theft for the purpose of use, provided as an assimilated and species variant of the theft in the previous criminal law, received a separate indictment, in art. 230, but this time as an attenuated variant of the offence of theft, provided in art. 228.

Although the commission had proposed to condition the initiation of the criminal proceeding for theft upon the preliminary claim of the injured person, this proposal being based upon the fact that the patrimonial rights are by excellence available for the plurality of thefts with a reduced social danger, being deemed even mere trifles, especially in the rural environment, and the legislator in 2009 did not appropriate this election, as the theft was prosecuted ex officio, similarly as in the previous criminal law. Instead, the legislator in 2012, under art. 245 item 23 of the Law no. 187/2012, introduced the institution of reconciliation of parties in case of these offences.

2. The first degree theft (art. 229) sets forth at least 16 aggravating circumstantial elements, and neither the commission (which had entered 10 aggravating assumptions[11]) nor the legislator in the year 2009 could waive the disputable election, instituted after the year 1996, according to the amendments of the previous criminal law in this matter, of transforming this rule of indictment into a casuistic rule, contrary to the challenge expressed in the prior sentences of the new Criminal Code for the simplification of the content of the rules of indictment. Still, a reduction of these unambiguous aggravating circumstances was made in the new formulation, since art. 209 of the Criminal Code from 1969 provided 20 aggravating assumptions.

The commission waived certain aggravating circumstantial elements provided in the previous Criminal Code, regarding: the commitment of the crime of theft by two or several persons against a person unable to express her will or to defend herself; during a disaster, due to the fact that these circumstances are set forth, with the same content or with a similar content, as legal aggravating circumstances, resulting in the increase of the limits of punishment according to art. 78. Likewise, the aggravating circumstances of committing theft in a public space and with regard to a document used to prove the marital status, for identity check or identification.

Concurrently, certain new circumstances were introduced being determined either by the manner of committing certain thefts at present by putting the alarm or the surveillance system out of service, or by making an end to the existing controversy under the previous Criminal Code with regard to the legal classification of the theft committed by the illegal insinuation in a dwelling place or a place of business.

[11] See art. 220 of the Project.

The doctrine drew attention to the fact that the manner provided in para. (1) letter d) would cause any discussions as compared to that mentioned in para. (2) letter b) as the breach of close includes, as well, the illegal insinuation in a dwelling place, according to certain opinions. On the other hand, but without the existence of para. (2) letter b), these cases shall always include a concurrence of offences, theft and violation of domicile[12].

As far as this concerns us, with regard to the provision of para. (2) letter b), if the theft is committed by violation of domicile or of a place of business, the deed shall be only classified in art. 229 para. (2) letter b), and the provisions of art. 224 or 225, as the case may be, shall not be incidental, since, in this normative manner, the theft is a complex crime (legal complexity) which includes the violation of domicile and of the place of business, as well. In such cases, the admission of the solution of the concurrence of offences would mean that the same circumstance should be given efficiency twice: once as an aggravating circumstantial element in case of first degree theft and again as an independent offence, which lead to *bis in idem*.

The new formulation keeps the aggravating circumstance of committing of theft by an armed person, however it does not resume the assumption according to which the person holds a narcotic substance. For the purpose of its scope, the weapon has the meaning defined in art. 179 para. (1) and it must not be noticeable by the victim.

The variant provided in para. (3) of art. 229 has the same legal content as that provided in para. (3) of art. 209 of the previous criminal law.

The theft regarding cables, lines, equipment and installations of telecommunication, radio communication, as well as communication components shall be punished if only at the stealing time, they were effectively integrated in a network or in a communication system in operation or not[13].

The new regulation, in a disputable manner, does not absorb the aggravating circumstance of the occurrence of certain very serious consequences, even if the commission had proposed this thing, in an independent text (art. 222 of the Draft). If such a consequence subsequent to the immediate effect occurs, this shall be charged only in the trial of the punishment individualization.

Concurrently, the preparatory deeds provided in art. 209 para. (5) of the previous Criminal Code were decriminalized.

In case any offences of theft or of first degree theft are incriminated under special laws with criminal provisions, in compliance with the principle of specialty, as a main method of the settlement of the concurrence of rules (texts), the special rule shall be enforced, no matter the extent of the special limits of punishment attached hereto, which may be small, equal[14] or larger than the limits set forth in art. 228 or in art. 229, if appropriate. For instance, the stealing of toxic chemical substances or of predecessors to be used for the purposes of chemical weapons shall be punished by imprisonment from 3 to 10 years and by the interdiction of the exercise of certain rights according to art. 56 para. (2) of the Law no. 56/1997 for the enforcement of the provisions

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[12] See George Antoniu, *Remarks with regard to the preliminary draft of a second new Criminal Code (II)*, in "Journal of criminal law" no. 1/2008, p. 17. The author proposes the removal of the assumption set forth in para. (2) letter b) since neither the doctrine, nor the judicial practice requested it.

[13] See "The High Court of Cassation and Justice", United Sections, Decision no.. II/2006, published in the "Official Gazette of Romania", part I, no. 291 of 31 March 2006.

[14] See, to this end: art. 103 of the Gas Law no. 351/2004, published in the "Official Gazette of Romania", part I, no. 679 of 28 July 2004, as subsequently amended and supplemented; art. 85 para. (1) of the Electricity Law no. 13/2007, published in the "Official Gazette of Romania", part I, no. 51 of 23 January 2007, as subsequently amended and supplemented.

of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and their destruction, as republished[15]. Likewise, when the theft has as its object any fallen or cracked trees, seedlings or sprouts which were cut or torn up and occurs under certain conditions, art. 110 of the Law no. 46/2008 – of the Forest Code shall be charged[16].

In case a first deed of concealment exists, followed by another action of the same receiver who promises to ensure thenceforth the capitalization of another stolen goods, the constituent elements of the complicity to the offence of simple theft or of the theft on an ongoing basis are met, as the case may be, in an actual concurrence with the offence of concealment, even if the anticipated promise of concealing goods was not made, the decision no. II/2008 of the supreme court[17] remains valid, together with the mention that, in relation to the provision of art. 35 para. (1), as compared to the previous regulation, the theft on an ongoing basis shall be charged only in case of the injury of a single passive subject.

It must be noted that according to art. 238 of the Law no. 187/2012 the enforceability of art. 35 para. (1) was extended with regard to this condition of the existence of the offence on an ongoing basis in the sense that it is deemed to be fulfilled also when the goods representing the object of the offence, are the joint property of several persons or at the time the respective offence prejudiced certain different secondary passive subjects, but the main passive subject is unique.

3. Theft for the purpose of use (art. 230), as opposed to the previous regulation in which it was punished by the penalty for the simple of first degree theft, is incriminated as a distinct deed[18] and punished by a more reduced penalty considering the obvious difference between the degree of the abstract social danger of the two deeds.

Hence, according to art. 230 para. (1), the theft having as object a vehicle, committed for the purpose of using it unjustly, shall be punished by a penalty set forth in art. 228 or in art. 229, if appropriate, whose special limits are reduced by one third.

Similar solutions are provided also in other legislations, such as in art. 244 of the Spanish Criminal Code, art. 208 of the Portuguese Criminal Code, § 260 of the Norwegian Criminal Code or in Chapter 8, section 7 of the Swedish Criminal Code).

In the content of this different indictment of the theft, the legislator in 2009 added a new assumption – the species and assimilated variant – consisting of the unjust and use without right of a communications terminal belonging to a third party or the use of a communications terminal connected to a network without right, if a damage has been produced. Under this assumption assimilated to the theft for the purpose of use, the commission finally separated the controversial situations existing in the judicial practice and in the doctrine regarding the legal classification of the deed of the illegal connection to a phone network or to another communications network. Moreover, the text shall bring within the scope of criminal unlawfulness the deeds of use without right of a communications terminal belonging to a third party, and these deeds are deemed to be dangerous and their number has increased at present (for instance, the deed committed by a

[15] Republished in the "Official Gazette of Romania", part I, no. 116 of 10 December 2004, as subsequently amended.

[16] Published in the "Official Gazette of Romania", part I, no. 238 of 27 March 2008, as subsequently amended and supplemented.

[17] Published in the "Official Gazette of Romania", part I, no. 859 of 19 December 2008.

[18] *De lege ferenda*, the introduction of an attenuated variant was proposed "if the vehicle is given back within 24 hours" – See, to this end, George Antoniu, *Remarks with regard to the preliminary draft of a second new Criminal Code (II)*, *cit. supra*, p. 17.

person penetrating into the house of another person and making over charged calls, hence causing substantial prejudices sometimes).

The wording of the text was inspired by the provisions of art. 255-256 of the Spanish Criminal Code.

It must be mentioned that the editors of the criminal law had placed this text in the content of theft, but not of the theft for the purpose of use, which result in a softer criminal treatment as opposed to the solution found by the commission.

4. The preliminary complaint and reconciliation (art. 231) has basically, the same content as the corresponding indictment of art. 210 of the previous criminal law, with some insignificant differences. According to this text, the deeds set forth in this chapter, committed in the family by a minor child and injuring the guardian or by the person who lives with the injured person or is housed by the latter, are punished only according to the preliminary complaint of the injured person.

In the first instance, this time, the legislator, in his concern of settling as many controversial situations as possible, set forth explicitly that the text under discussion was to be enforceable to all the deeds set forth in this chapter, namely to theft, first degree theft and theft for the purpose of use.

Thereafter, the phrase "close relatives" was replaced by the formula of "family member" in order to correlate this text with the new terminology consecrated by the Criminal Code from 2009, this concept being broader than the concept used in the previous criminal law.

The specialty literature[19] initiated the idea according to which these assumptions of theft should have been mentioned after the simple theft, and regarding the first degree theft, a mention should be made in the sense that the provisions of art. 231 shall not apply in case of this offence.

Under art. 245 item 23 of the Law no. 187/2012, the marginal denomination of this text was changed from "the punishment of certain thefts upon preliminary complaint" into "preliminary complaint and reconciliation", and following para. (1), para. (2) was added, according to which in case of the deeds set forth in art. 228, art. 229 para. (1), para. (2) letters b) and c) and in art. 230, the reconciliation removes the criminal liability.

5. According to art. 232 (**sanctions for attempt**), the attempt to commit the offences set forth in this chapter shall be punished.

B. Chapter 2 – ***Robbery and piracy*** – includes robbery in its typical variant, first degree robbery and piracy, the provisions of the previous Criminal Code being kept in a great measure and also with certain amendments, with the indication that the praeter-intentional consequence of the death of the victim subject to robbery and piracy was punished in a distinct and common text.

1. The robbery[20] (art. 233) has the same content as that set forth in art. 211 para. (1) of the previous criminal law ("theft committed by use of violence or threat, or by making the victim unconscious or unable to defend him/herself, as well as theft followed by the use of such means in order to keep the stolen goods or to remove the traces of the offence, or to ensure the perpetrator's escape"), the difference consisting of the fact that the special limits of the penalty of imprisonment were reduced from the period of 3 to 18 years to 2 to 7 years, and the complementary penalty of the interdiction of exercising certain rights was added, as well.

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[19] See George Antoniu, *Remarks with regard to the preliminary draft of a second new Criminal Code (II), cit. supra*, p. 17.

[20] Starting from the differences existing between the *ante furtum* robbery and *post furtum* robbery, the indictment of these deeds was proposed distinctly, however this proposal was not appropriated by the legislator from 2009 – See George Antoniu, *Remarks with regard to the preliminary draft of a second new Criminal Code (II)*, *cit. supra*, p. 17-18.

With regard to the new limits of penalty set forth in art. 233, this complex offence absorbs the threat (art. 206) or the hitting or other violences (art. 193), or both criminal deeds, as the case may be.

If the consequences of the exercised violence are more serious (of those set forth in art. 194), the concrete deed shall be classified in art. 234 para. (3) and punished by a more severe penalty, respectively by imprisonment from 5 to 12 years and the interdiction of exercising certain rights, and the complementary penalty was added under art. 245 item 24 of the Law no. 187/2012.

If the praeter-intentional death of the victim occurs, art. 236 (robbery or piracy followed by the victim's death) shall be enforced, and the penalty shall consist of the imprisonment from 7 to 18 years and the interdiction of exercising certain rights.

2. The first degree robbery (art. 234) reproduces certain aggravating circumstantial elements associated to the specific deed in the previous criminal law [art. 234 para. (1) letters c), d), e) sentence I], amends some of them [art. 234 para. (1) a), f)], and others represent a new solution [art. 234 para. (1) letter b), letter e) sentence II or para. (2)].

Thus, certain aggravating circumstantial elements provided in the previous criminal law were waived, respectively the robbery committed: by two or more persons together; during a disaster or in a dwelling place or the outbuildings attached to it. The reason of the amendment resides in the fact that the first two circumstances are set forth, having an analogous content, as legal aggravating circumstances [art. 77 letters a) and g)], and the last circumstance was reformulated ("by violation of domicile or of the place of business") for the same reasons as those above-mentioned in case of first degree theft.

Hence, in relation to the provision of para. (1) letter f), if the robbery is committed by violation of domicile or of a place of business, the deed shall be only classified in art. 234 para. (1) letter f), and the provisions of art. 224 or 225, as the case may be, shall not be incidental, since, in this normative manner, the robbery is a complex offence (legal complexity) which includes the violation of domicile or/and the violation of the place of business, if appropriate. Accordingly, the Decision no. XXXI/2007[21] of the supreme court ceases to be valid.

At the same time, the circumstance set forth in art. 211 para. 2 letter b) of the previous criminal law ("by a person holding a weapon, a narcotic or paralysing substance") was given a superior wording ("by *using* a weapon or an explosive, narcotic or paralysing substance") in art. 234 para. (1) letter a).

New aggravating assumptions were introduced in art. 234, being incident in the case in which the deed is committed "against a means of transportation" or by simulating "official qualities", under the conditions in which the judicial practice showed relatively frequent cases in which the offenders appeal to such proceedings.

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[21] Published in the "Official Gazette of Romania", part I, no. 772 of 14 November 2007. By admitting the second appeal in the interests of justice and declared by the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, the supreme court had decided:

1. The deed of penetrating, in any manner, into a dwelling place or the outbuildings attached to this, followed by committing a robbery shall represent a true concurrence between the offence of violation of domicile provided in art. 192 of the previous Criminal Code and the offence of robbery set forth in art. 211 para. 2^1 letter c) of the previous Criminal Code.

2. The deed of penetrating, in any manner, into an enclosure or a surrounded place belonging to the domicile of the person, followed by committing a robbery shall represent a true concurrence between the offence of violation of domicile provided in art. 192 of the previous Criminal Code and the offence of robbery set forth in art. 211 of the previous Criminal Code, except the circumstance incriminated in art. 211 para. 2^1 letter c) of the previous Criminal Code.

Likewise, the robbery of certain goods of those mentioned in art. 229 para. (3) shall represent a particular and new aggravating element of the specific deed – art. 234 para. (2), having own sanction limits (imprisonment from 5 to 12 years and the interdiction of exercising certain rights), the same penalty being set forth also in case in which the robbery resulted in the bodily injury of the victim – art. 234 para. (3).

The robbery having produced very serious consequences does not represent an aggravating form of the offence anymore, despite the election of the commission (art. 228 of the Draft), so that it shall represent an element in the trial of the individualization of the criminal repression.

3. The piracy (art. 235) was better defined, and the expression "robbery" was replaced by the legislator from 2009 with the expression of "theft", and the phrase "for personal purposes" was eliminated. Thus, in its typical variant, the piracy consists of the theft committed by acts of violence or threat, by a person who is part of the crew on a ship or by the passengers on a ship against persons or goods on that ship, or against another ship, if the ships are in the open sea and shall be punished by imprisonment from 3 to 15 years and the interdiction of exercising certain rights.

A species variant was introduced in para. (2) of the text without any corresponding item in the previous criminal law, represented by capturing a ship in the open sea or by causing its wreck or grounding by any means, for the purpose of appropriating its cargo or of robbing the persons on board of that ship.

The legal content of the piracy kept the aggravating assumption in which the deed resulted in the bodily injury of the victim, and in this case the penalty is the imprisonment from 5 to 15 years and the interdiction of exercising certain rights.

Likewise, as in the previous regulation, there is also piracy if the offence was committed on aircraft or between aircrafts and ships.

The aggravating circumstance of producing certain very serious consequences was removed from the content of the indictment by the legislator from 2009, even if the commission had kept it.

4. Robbery or piracy followed by the victim's death (art. 236). If the offences provided in art. 233-235 resulted in the victim's death, the penalty is the imprisonment from 7 to 18 years and the interdiction of exercising certain rights.

5. According to art. 237 (**sanctions for attempt**), the attempt to commit the offences set forth in art. 233-235 shall be punished.

C. Chapter 3 sets forth the **offences against patrimony by overlooking trust** (art. 238-247), this category including, besides certain deeds incriminated under the previous Criminal Code, such as: breach of trust, fraudulent management, appropriation of the good found (this indictment was given a new *nomen iuris*) and deceit, other new deeds, as well, such as: breach of trust by defrauding creditors, simple bankruptcy, fraudulent bankruptcy, deceit regarding insurances, embezzlement of public tenders and the management of leased assets of a vulnerable person.

In agreement with the members of the commission on drawing up the new criminal law[22], we consider that it would have been required, with regard to certain offences of this chapter, to introduce an aggravating circumstantial element of the very serious consequences caused to the patrimony of the passive subject.

[22] See art. 241 of the Draft.

1. For the first category of deeds (those provided also in the Criminal Code from 1969), certain amendments were made furthermore, intended to put the respective texts in the situation to better meet the requirement of restraining certain forms of committing the respective offences emphasized by the judicial practice. Thus, in case of the **breach of trust** (art. 238) the commission introduced a new form of committing the deed, by the use without right, of an asset entrusted for a certain purpose, by the person who received it. In the opinion of the editors of the new criminal law, the text takes into consideration both the situation in which the person was not entitled to use the asset anymore (for instance, a vehicle's owner entrusts it to a mechanic for the purpose of performing a repair and the latter drives it in its personal interest or in the interest of certain third parties), and the situation in which the person who received the asset has the right to use it, but he uses it for other purpose than that for which it was entrusted to him (for instance, a vehicle is entrusted to the author in order to drive it for a ride, but he uses it in order to carry goods whose weight exceeds the limit admitted for the respective vehicle).

Expressing reservations regarding this planning deemed to be excessive, the doctrine stated that it was not necessary to restyle the breach of trust, as the formulation of the previous criminal law was fully adequate. At the same time, it was also stated that the action of disposal includes also the action of use, so that it was not necessary for both notions to be mentioned. Moreover, it was stated that the purpose for which the asset was entrusted to the offender is not essential anymore, however it is important that he was given temporary use in order to perform certain material operations regarding the asset, without the loss of possession by its owner or of hold by its holder[23].

Consequently, in the new edition, the breach of trust consists of the appropriation, disposal or use without right, of a movable asset belonging to a third party, by the person to whom it was entrusted under a title and for a certain purpose, or the refusal to return it shall be punished with imprisonment from 3 months to 2 years or a fine.

The refusal of the return of the movable asset shall not represent an inaction as it involves an explicit statement of refusal of the return or a previous manifestation from which this aspect should result implicitly. In relation to the provisions of art. 16 para. (6) sentence I, the characterization of the refusal as an action or inaction, as opposed to the solution of the previous criminal law regarding the form of guilt specific to these two types of deeds (commissive and omissive deeds), diminished its significance, since, in both situations, the deed is incriminated only when committed intentionally.

The criminal proceedings in case of this offence are initiated upon preliminary complaint of the injured person.

The preliminary complaint is addressed to the criminal investigation body or to the prosecutor, according to law and must be lodged within 3 months from the day in which the injured person found about committing the deed. When the injured person is a minor child or a disabled person, the period of 3 months elapses from the date on which the person entitled to claim found about the committing of the deed. In case the preliminary complaint is lodged against their legal representative, the mentioned period shall elapse from the date of the appointment of another legal representative.

The preliminary complaint which is wrongly communicated shall be deemed valid, if it was lodged to the incompetent judicial body within due time, on administrative way, to the competent judicial body.

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[23] See George Antoniu, *Remarks with regard to the preliminary draft of a second new Criminal Code (II), cit. supra*, p. 18.

The injured person may withdraw his preliminary complaint until ruling a final decision and having as effect the removal of the criminal liability of the person for whom it was withdrawn.

It is noted that, in the new regulation, the withdrawal of the preliminary complaint removes only the criminal liability of the person with regard to whom the complaint was withdrawn (*in personam* effect), as this does not produce any effects regarding all the participants in committing the offence (*in rem*)[24].

2. An *incriminatio ex novo* was introduced under art. 239, the **breach of trust by defrauding creditors**[25] which may be committed in two variants, either by the deed of the debtor to dispose, hide, damage or destroy totally or partially, any values or assets of his patrimony or by the deed of invoking fictitious acts or debts for the purpose of defrauding creditors [the typical simple or basic variant – para. (1)], or by the purchase of goods or services, as the debtor knows upon conclusion of the transaction that he will not be able to pay and in this way he causes a damage to the creditor [an assimilated and species variant – para. (2)]. The penalty provided for this criminal offence is the imprisonment from 6 months to 3 years or a fine.

In the opinion of the commission, adopted also by certain authors[26], both forms of committing the deed have been emphasized in the recent years practice, as the judicial bodies have not had an explicit legal text which allows the repression of these actions, and similar indictments are set forth also in art. 150 and 164 of the Swiss Criminal Code, art. 313-5 and 314-7 of the French Criminal Code, art. 227 of the Portuguese Criminal Code, art. 257-258 of the Spanish Criminal Code, as well as in § 282 of the Norwegian Criminal Code.

With regard to the deed set forth in para. (1), it has been stated that the author has to be objectively in the impossibility of payment, without any interest in "what he knew". It is possible for him to consider himself as solvable, even if he is not objective. His criminal liability shall be attracted by the existing objective situation, however not by his thoughts. The offender shall not be able to benefit from the error of fact as a business operator which keeps records of its businesses in a legal manner, knows its financial condition at any time[27].

The purpose set forth in the typical variant of the offence has the meaning of finality, and qualifies the intent with which the active subject must act. As such, the specific deed, even if it is directed against patrimony, from the point of view of the immediate prosecution is a danger offence, but not a result offence.

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[24] For a detailed examination of this institution, see Viorel Paşca, *Lack of preliminary complaint, withdrawal of preliminary complaint and reconciliation of the parties in the new Criminal Code*, in the joint volume "The New Codes of Romania", Universul Juridic Publishing House, Bucharest, 2011, p. 502-509; Vasile Teodorescu, *Lack of preliminary complaint at withdrawal of preliminary complaint* (Causes removing criminal liability), Comments, in "Preliminary explanations of the new Criminal Code (art. 53-187), vol. II, by George Antoniu (coordinator and co-author), Bogdan-Nicolae Bulai, Constantin Bulai, Ştefan Daneş, Constantin Duvac, Mioara-Ketty Guiu, Constantin Mitrache, Cristian Mitrache, Ioan Molnar, Ion Ristea, Constantin Sima, Vasile Teodorescu, Ioana Vasiu, Adina Vlăsceanu, Universul Juridic Publishing House, Bucharest, 2011, p. 447-454; Mihai Adrian Hotca, *Lack of preliminary complaint and withdrawal of preliminary complaint* (Comment), in the "New commented criminal code. General part", volume I, by Ilie Pascu, Vasile Dobrinoiu, Traian Dima, Mihai Adrian Hotca, Costică Păun, Ioan Chiş, Mirela Gorunescu, Maxim Dobrinoiu, Universul Juridic Publishing House, Bucharest, 2012, p. 755-762.

[25] For a detailed examination of this indictment, see: Florin Radu, *A new offence – Breach of trust by defrauding creditors*, *in* "Law" no. 6/2010, p. 79-88; Sergiu Bogdan, *Breach of trust in the creditors' fraud*, in the joint volume "The New Romanian Codes", Universul Juridic Publishing House, Bucharest, 2011, p. 553-559.

[26] See Florin Radu, *op. cit.*, p. 88.

[27] See George Antoniu, *Remarks with regard to the preliminary draft of a second new Criminal Code (II), cit. supra*, p. 18.

Under para. (2) some deeds are incriminated which objectively cause a damage to the creditor. In this case the offence is a result offence, however, without qualified intention[28].

3. The text of art. 240 para. (1), incriminating the **simple bankruptcy**[29], has the same content as art. 143 para. (1) of the Law no. 85/2006 regarding the insolvency procedure[30] (text abrogated by art. 176 item 5 of the Law no. 187/2012), however, in a different planning. If the special law sets forth the sanction firstly and the description of the deed in the second place, the new Criminal Code acts oppositely: it firstly describes the deed and provides the sanction in the second place.

The simple bankruptcy consists of the non-submission or the late submission by the debtor - natural person or by the legal representative of the debtor - legal entity, of the application for opening the insolvency procedure, within a deadline not exceeding the deadline set forth by law by more than 6 months upon emergence of the state of insolvency [the deadline of 6 months elapses from the expiry of the 30-day period from the emergence of the state of insolvency or 35 days from the emergence of the state of insolvency, under the conditions and cases provided in art. 27 para. $(1)^1$ and $(1)^2$ of the law – our addition] or its submission after the expiry of the deadline set forth by law.

For the existence of the offence of simple bankruptcy, the existence of the state of insolvency is required as a *permitted situation* into which a natural person or a legal entity of private law, which carries on business activities, as well, among those referred to as in art. 1 of the Law no. 85/2006, has got and which therefore becomes a debtor according to the same regulation.

Likewise, from the point of view of the criminal law, only the case of *obvious* insolvency is of interest, but not the case of immediate insolvency, since the obligation to submit the application for opening the insolvency procedure exists only in the first case.

The provisions of art. 240 have the form of an incomplete rule since a part of the description of the content of the incriminated deed is found also in art. 27 of the Law no. 86/2006 which sets forth that the legal deadline to which the provision of art. 240 para. (1) refers to, is, as previously shown, of maximum 30 days from the emergence of the state of insolvency.

In default of an explanatory legal rule of the phrase of bankruptcy, the legal content of the offences of simple bankruptcy and of fraudulent bankruptcy can be investigated only by taking into consideration the legal rules regulating the insolvency procedure[31], provided in the Law no. 86/2006, a special procedure which shall have priority in relation to the procedure of common law set forth in the Code of civil procedure.

The criminal doctrine[32], according to the existing *ab initio* regulation in art. 876-877 of the Romanian Commercial Code (abrogated at present), promoted the idea according to which

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[28] *Ibidem*. In the author's opinion, the phrase "claim services" may be used, as the services are not purchased, and the text should introduce the phrase "fictitious acts or other acts".

[29] For more details, see Constantin Duvac, *Simple Bankruptcy in the new Criminal Code*, in the "Journal of Criminal Law" no. 4/2011, p. 67-81.

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

[31] Although the insolvency procedure has a joint nature, as opposed to the forced execution procedure which has an individual nature, it does not exclude the possibility that a single creditor ask for the opening of the procedure.

[32] See Ioan I. Tanoviceanu, *Criminal law course*, vol. I, "Socec & Co" Graphic Workshops, Joint Stock Company, Bucharest, 1912, p. 677. For the same purpose, see: M. Paşcanu, *The Romanian bankruptcy law*, Cugetarea Publishing House, 1926, p. 660-661; Vasile Berchesan, Nicolae Grofu, *Tax avoidance and fraudulent bankruptcy (Criminalistics – theory and practice)*, Little Star Publishing House, Bucharest, 2004, p. 192. The

the fraudulent bankruptcy includes the simple bankruptcy in its content (this had a different legal content than that established in the new Criminal Code), being an aggravated variant of the latter.

In our opinion, if the offences provided in art. 240 and in art. 241 are committed by the same debtor, the rules governing the actual concurrence of offences shall be enforceable, but not those regarding the inclusion of the simple bankruptcy in the fraudulent bankruptcy. The text of art. 241 in relation to the description of the prohibited deed, uses neither any of the phrases representing *verbum regens* of the simple bankruptcy, nor its marginal denomination, so that the conclusion may be drawn that the fraudulent bankruptcy is a complex deed which includes the simple bankruptcy.

The legislator, incriminating different activities within a single complex activity, should have (in a perfect legislative technique) named the absorbed offence in a way in which he should leave no doubt about this absorption [either by the use of the phrases expressing the material element of the absorbed offence (for instance, the fraudulent bankruptcy represents, amongst others, "the offence of the person who, defrauding the creditors *counterfeits*… the records of the debtor" which means that whenever the counterfeit document takes part of the records of the debtor, the deed set forth in art. 241 shall be deemed as a complex offence which shall absorb the deed set forth in art. 322), either by taking over the name of the absorbed offence in the content of the absorbing offence (*exempli gratia*, first degree theft – art. 229 represents "*the theft* committed under the following circumstances:...", which means that is absorbs the offence of theft, provided in art. 228)]. Or, it results from the content of the rule of indictment provided in art. 241 that the legislator did not use any of these drafting techniques from which it may result unequivocally his intention to absorb the simple bankruptcy in the content of the fraudulent bankruptcy, *explicitly* or *implicitly* (by the use of certain phases which are similar to those used for expressing the material element of the simple bankruptcy).

As a matter of fact, it might be stated that this was also the reason for which the legislator from 2009, upon taking over the offences of bankruptcy of the special legislation (where they were provided in a single text) incriminated them in two different separate texts.

The criminal proceedings for the simple bankruptcy are initiated upon preliminary complaint of the injured person.

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authors describe the fraudulent bankruptcy, set forth in the Commercial Code, as an aggravated variant of the offence of simple bankruptcy.

The Romanian authors, in a wrong way after the year 1990, assign this sentence of the inclusion of the simple bankruptcy in the fraudulent bankruptcy to the professor Vintilă Dongoroz, even if in the comments of his professor's treaty, he does not state anything in this regard, limiting himself only to the reproduction of the idea expressed by Tanoviceanu. See, to this end, Vintilă Dongoroz, in Ioan I. Tanoviceanu, *Treaty of law and of criminal procedure,* vol. II, the second edition, revised and supplemented by Vintilă Dongoroz (doctrine), Corneliu Chiseliță, Ștefan Laday (references to the laws of Bucovina and Ardeal), Eugen Decusară (case law), "Curierul Judiciar" Printing Shop, Bucharest, 1925, p. 300.

To the contrary (of the existence of the concurrence of offences), see: Cas. II no. 852/1901; Cas. II no. 572/1904 and Cas. II no. 423/1905, cited by Paul I. Pastion, Mihail I. Papadopolu, in the *Annotated Criminal Code*, Publishing House of Socec Comp. Bookshop, Joint Stock Company, Bucharest, 1922, p. 67 and by Constantin Rătescu, H. Asnavorian, I. Ionescu-Dolj, Traian Pop, I. Gr. Perieţeanu, Mihail I. Papadopolu, Vintilă Dongoroz, N. Pavelescu, in the *Criminal code "King Carol II"*, *annotated*, *general part*, vol. I, Publishing House of Socec & Co. Bookshop, Bucharest, 1937, p. 252. Our former supreme court decided that "when a bankrupt is taken to court, both for the offence of simple bankruptcy and for the fraudulent bankruptcy, the provisions of art. 40 of the Criminal Code (Criminal Code from the year 1865 – our parenthesis - *C.D.*) have to be enforced, as the elements of both offences differ one from the other or are deemed as special offences".

4. The provisions of art. 241, incriminating the **fraudulent bankruptcy**[33], represents an essential reproduction of the provisions of art. 143 para. (2) of the Law no. 85/2006 (text abrogated by art. 176 item 5 of the Law no. 187/2012), however, in a formulation with some amendments.

The fraudulent bankruptcy is the deed committed by the person who intending to defraud the creditors: counterfeits, steals or destroys the records of the debtor or hides a part of the asset of the latter's estate; or who presents non-existent debts or presents any non due amounts in the records of the debtor, in another document or in the financial statement; or who disposes, in case of the debtor's insolvency, a part of the latter's assets. The penalty provided by law for this offence is the imprisonment from 6 months to 5 years.

As with the simple bankruptcy, in drafting this text, the legislator from 2009, as compared to the formulation used when drawing up the Law no. 85/2006, adopted another legislative technique, firstly describing the principle of the rule (prohibited actions), afterwards providing the related sanction.

Another amendment to the legal content of the fraudulent bankruptcy refers to the supplementation of the condition "defrauding creditors" to all the normative forms in which this criminal deed may be described, while in the previous regulation the mentioned requirement was provided only in the last assumption of indictment [art. 143 para. (2) letter c)].

Likewise, the new Criminal Code, as opposed to the Law no. 85/2006, conditions the initiation of the criminal proceedings for the fraudulent bankruptcy upon the preliminary complaint of the injured person.

Based upon the examination of the text of art. 241, it results that the fraudulent bankruptcy, in certain normative forms, is a *complex* offence, as its content includes, as a constituent element, actions or inactions which represent by themselves the deeds provided by the criminal law such the theft, the forgery of official documents, the intellectual forgery, the forgery in deeds by private signature and destruction. If the content of the rule of indictment of the fraudulent bankruptcy is not drafted, the deeds shall be punished, if the conditions set forth in the absorbed rules of indictment are met, as theft, forgery or destruction offences.

Likewise, if the creditor was caused a damage as a result of the fact that the debtor disposed, in case of insolvency, a part of the assets, the fraudulent bankruptcy may come into concurrence with the offence of deceit provided in art. 244.

In the doctrine and in the law case, according to the previous regulations, the debates were ample whether in the legal content of the offence of fraudulent bankruptcy the bankruptcy represents an issue of law (*ens iuris*), as a preliminary finding was necessary for this under a final court order or an issue in fact (*ens facti*), and it was admitted that the criminal proceedings for bankruptcy might be initiated independently of declaring the merchant insolvent, as his condition of cessation of payments was sufficient.

In our opinion, as the criminal law is strictly interpreted, the requirement of the state of insolvency (*ens facti*) is necessary only in case of the normative form of the fraudulent bankruptcy provided in art. 241 para. (1) letter c). In the other normative forms of the fraudulent bankruptcy, as this is not a constituent condition of the offence, it has to be considered as an irrelevant circumstance for the existence of the offence.

The subjective element for any of the normative forms of the fraudulent bankruptcy is the *direct intention qualified by purpose* - "defrauding creditors" as this essential requirement

[33] For more details, see Constantin Duvac, *Fraudulent bankruptcy in the new Criminal Code*, in the "Journal of Criminal Law" no. 1/2012, p. 42-70.

concerns all the incriminated actions reflecting the form of the intention which the offender has to manifest[34].

The inclusion of the offences of (simple or fraudulent) bankruptcy in chapter III of Title II (Offences against patrimony) of the Special part is a fair solution and in compliance with the nature and significance of the social values and relationships protected under these indictments. In this way, the knowledge of this category of deeds by the persons requested to enforce the criminal law shall be facilitated, as the judicial bodies are reserved to some extent to find and settle this type of criminal deeds indicted in special laws containing criminal provisions, even if these deeds are actually very frequently committed.

The text would be more efficient in achieving the criminal policy of our legislator if the formulation of the rule of indictment was clearer and emphasized the fraudulent deeds of the debtor, but not of the other persons who will have to account for in their capacity as accomplices if they help the debtor commit the investigated offence. In this way, the legal content of this offence would be more adequate to the needs for defending the social patrimonial relationships for whose establishment, conduct and development it is required a certain trust that the debtor natural persons and legal entities have to stimulate and observe in their civil legal relationships, in order to ensure the protection of the interests of the partners, shareholders and holders of bonds, of the third party creditors of the Romanian companies and of the Romanian state.

De lege ferenda it would be required, besides the reformulation of the text, also the replacement of the phrase "defrauding creditors" with the phrase "for the purpose of defrauding the creditor", in order to eliminate any ambiguity regarding the meaning of this expression, and implicitly the form of guilt with which the investigated criminal deed may be committed, the immediate consequence and its consumption.

5. The fraudulent management (art. 242), in its typical variant, was taken over in its formulation existing in the applicable law from which the phrase "in bad faith" was properly eliminated, and the penalty of imprisonment was reduced from 6 months to 3 years, to which the penalty of fine was alternatively added.

Consequently, the fraudulent management represents the act of causing prejudice to a person, on occasion of administering or preserving his/her assets, committed by the person charged with the administration or preservation of those assets – para. (1).

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[34] For the same purpose, see Alexandru Boroi, *Criminal law. Special part*, C. H. Beck Publishing House, Bucharest, 2011, p. 212. To the contrary, see: Tiberiu Medeanu, *Fraudulent bankruptcy* (Offences against patrimony by overlooking trust), in "Criminal law manual". Special part", vol. I by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 341. The author considers that the fraudulent bankruptcy may be committed, in all its forms, with direct or indirect intention; Vasile Dobrinoiu, Norel Neagu, *Criminal law. Special part (Judicial theory and practice)*, Universul Juridic Publishing House, Bucharest, 2011, p. 244; Tiberiu Medeanu, *Fraudulent bankruptcy* (Offences against patrimony by overlooking trust), in "Criminal law manual". Special part", vol. I by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 343; Norel Neagu, *Fraudulent bankruptcy* (Comment), in the "New commented criminal law, vol. II, special part" 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. 299; Cătălin-Răzvan Chiriac, *Theoretical and practical considerations regarding the offence of fraudulent bankruptcy provided by art. 241 of the new Criminal code*, in the joint volume "The new criminal legislation discussed by the members of the Romanian Association of Criminal Sciences", Universul Juridic Publishing House, Bucharest, 2012, 172. The author states that the *direct intention qualified by purpose* – "defrauding creditors" – is specific only to the deed set forth in art. 241 para. (1) letter a), and in the other normative forms the incriminated deed may be committed also with *indirect intention*, but we do not agree to this last opinion.

This variant was supplemented by a new circumstance as an aggravating element, in which the specific deed is committed by the judicial administrator, by the liquidator of the estate of the debtor or by one of their representatives or attorneys-in-fact, and in this case the penalty is the imprisonment from one to 5 years – para. (2).

It should be reflected whether in its joint aggravated variant of para. (3) consisting in committing the deeds set forth in para. (1) and in para. (2) for the purpose of acquiring any patrimonial benefit, this last word should not be replaced by the phrase "material" used by the previous criminal law. The penalty provided by law for this offence is the imprisonment from 2 to 7 years.

According to the provision of the general part of the new Criminal Code of a special sanction system, in case in which the committing of the offence aims at acquiring a patrimonial benefit [art. 62 para. (2)], certain authors[35] consider this indictment variant is questionable. In such a situation, only art. 242 para. (3) shall be enforced, as this represents the special rule in relation to that provided in art. 62 para. (2), and this solution avoids to aggravate the penalty twice for the same deed.

The criminal proceedings in case of this offence are initiated upon preliminary complaint of the injured person.

6. Appropriation of the asset found or coming through error into the offender's possession (art. 243) is regulated in a form similar to that existing in the Criminal Code from 1969.

The rule of indictment set forth in art. 243 para. (1) has the same content as the rule provided in art. 216 para. (1) of the previous Criminal Code, respectively the act of not handing over within 10 days an asset found to the authorities or to the person who lost it, or of using that asset as if it were one's own.

The species variant of para. (2) was supplemented by the phrase "in a fortuitous manner" and an alternative normative form of committing consisting of the fact of not handing over the asset within 10 days from the time the offender recognized that it did not belong to him.

According to the provisions of art. 16 para. (6), the deeds set forth in art. 243, including in their ommissive form, shall be committed only with direct or indirect intention.

The special limits of punishment are similar to those provided in art. 216 of the previous criminal law, respectively imprisonment from one to 3 months or a fine.

7. Deceit[36] is indicted in art. 244 in two variants, a simple and an aggravated variant.

The simple deceit consists in the act of deceiving a person, by presenting a false fact as being true or a true fact as being false, in order to obtain unjust material benefit for oneself or for another and if damage was caused – para. (1). The penalty provided for this offence is the imprisonment from 6 months to 3 years.

This is punished more seriously (imprisonment from one to 5 years) when the offence is committed by using untruthful names or capacities or other fraudulent means. If the fraudulent means is in itself an offence, the rules for concurrence of offences shall apply - para. (2).

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[35] See Vasile Dobrinoiu, *Fraudulent management* (Comment), in "The new commented Criminal Code, vol. II, special part" 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. 301.

[36] For more details, see: Constantin Duvac, *Deceit in the new Criminal Code*, in the journal "Law " (Dreptul) no. 1/2012, p. 104-134 and in the joint study "Justice, state subject to the rule of law", Universul Juridic Publishing House, Bucharest, 2011, p. 800-814; Idem, *Similarities and differences between deceit and other indictments in the new Criminal Code*, in the "Law" („Dreptul") no. 2/2012, p. 74-103.

In a disputable and unjustified way (since neither the doctrine, nor the judicial practice has requested it), the text does not reproduce anymore the para. (3), (4)[37] and (5) of art. 215 of the previous Criminal Code (implicit abrogation), this fact giving the appearance of the decriminalization of the deceit regarding the agreements[38], with cheque notes[39] or which has produced very serious consequences, but these shall represent, according to the provisions of art. 244, *factual* forms of committing the offence of simple or qualified deceit, as the case may be.

As such, except us[40], others authors as well, in a fair manner[41] proposed to reintroduce this circumstantial elements in the aggravated content of the deceit.

Perhaps the legislator from 2009, despite the election of the editors of the new criminal law[42], did not consider to be necessary to take over these paragraphs, intending to simplify the text of art. 215 and since the special limits of the punishment provided in case of deceit were significantly reduced, a legal diversification of them in terms of certain unambiguous aggravated circumstances would have been very difficult to accomplish.

Thus, the legislator allowed the judge to consider these circumstances within the trial of the judicial individualization of the penalty.

From our point of view, in the matter of offences against patrimony, the elimination from their aggravated content, of the circumstance when very serious consequences were produced, including the deceit, seems questionable to us, all the more so as their value threshold increased from RON 200,000 to RON 2,000,000.

It must be mentioned that the elimination of certain normative forms of the aggravated content of the offence of deceit is a question of criminal policy and legislative technique, without representing a decriminalization, as shown above, of this special type of antisocial deeds. However, following the abrogation of para. (4) of art. 215 of the Criminal Code from 1969, it is possible that the controversy should be reanimated if in such situation only the provisions of art. 244 or those of art. 311 are kept (falsification of credit instruments or of payment instruments), or both in concurrence[43].

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[37] For more details regarding the examination of this aggravated variant of the deceit (in the previous regulation), see Valerică Dabu, Remus Borza, *Cheque in different forms. Legal classification,* in the "Journal of criminal law" no. 4/2009, p. 35-59.

[38] To the contrary, see: Gheorghe Ivan, *Criminal law. Special part*, the 2nd edition, C. H. Beck Publishing House, Bucharest, 2012, p. 314; Gheorghe Ivan, Mari-Claudia Ivan, *op. cit.*, p. 102. The authors state, in a disputable way, that a decriminalization took place in this case (*abolitio criminis*).

[39] For a detailed presentation of the evolution of the regulations regarding the defense of the cheque by means of criminal law, see Tiberiu Medeanu, *Involutions in defending the cheque by means of criminal law*, in the joint study "The Romanian law in the context of the requirements of the European Union", Hamangiu Publishing House, Bucharest, 2009, p. 700-707.

[40] See Constantin Duvac, *Deceit in the new Criminal Code*, *cit. supra*, p. 104-134.

[41] See Mirela Carmen Dobrilă, *Amendments brought by the new Criminal Code in case of the offence of deceit*, in the joint study "The new criminal laws: tradition, rectification, reform, legal progress", vol. II, Universul Juridic Publishing House, Bucharest, 2012, p. 166-167.

[42] See art. 235 and art. 241, both of the Draft.

[43] For more details, in terms of the provisions of the previous criminal law, see Florentina Duvac, *Blank cheque Legal implications,* in "Current problems in the banking law" (this monograph integrates the proceedings of the international conference "Current problems in the banking law" organized by the Association of the Legal Advisers of the Financial and Banking System and the Faculty of Law within the West University of Timişoara, during the period 31 October – 2 November 2007), Wolters Kluwer Publishing House, Bucharest, 2008, p. 915-939.

According to art. 215 of the previous criminal law, the High Court of Cassation and Justice, in United Sections, admitted a second appeal in the interests of justice and under the Decision no. IX/2005[44] it disposed:

1. The act of issuing a cheque with regard to a credit institution or a person, while being aware that the supply or cover necessary for its realisation does not exist, as well as the act of withdrawing the supply, wholly or in part, after the issuing, or of prohibiting the acceptor from paying before expiry of the presentation term, in order to obtain unjust material benefit for oneself or for another and if damage was caused against the owner of the cheque, constitutes the offence of deceit set forth in art. 215 para. (4) of the Criminal Code from 1969.

2. If the beneficiary of the cheque is aware, on the issue date, that there is no available cash necessary for the cheque coverage at the acceptor, the deed constitutes the offence provided in art. 84 para. (1) item 2 of the Law no. 59/1934.

Under art. 23 of the Law no. 187/2012 art. 84 para. (1) item 2 of the Law no. 59/1934 was restyled and shall have the following content "the issue of a cheque without having enough available cash at the acceptor or the total or partial disposal of the available cash had before elapsing of the deadlines established for the submission" the penalty provided by law being the imprisonment from 6 months to one year or a fine, if the deed does not constitute a more serious offence.

According to these provisions and to those of art. 244, we consider that the above-mentioned decision shall remain valid, together with the specification that the deed described at item 1 of the latter shall be classified in art. 244 para. (2).

The issue should be reflected upon whether an extremely drastic reduction of the special limits of punishment provided for the offence of deceit shall contribute to the decrease of crime in the matter. In our opinion, the answer is only negative. The expediency of the criminal repression and a faster action taken in relation to the reasons for committing the offence of deceit, could contribute to the decrease of the number of this category of unsuitable facts or, if appropriate, to the removal of the damages caused by these, however associated to a penalty corresponding to the serious nature of the committed deed.

De lege ferenda, we consider that the cheque deceit should be reintroduced as an aggravating circumstantial element[45], as well as the circumstance under which very serious consequences resulted from committing the offence of deceit, for the purpose of art. 183. As such, the increase of the special limits of penalty of imprisonment would be required, from one to 5 years, in case of the specific deed, respectively from 2 to 7 years, for the deed set forth in para. (2).

8. Deceit regarding insurances[46] (art. 245), in its first *typical* variant, consists of the act of destroying, damaging, making unfit for use, concealment or alienation of an asset insured against destruction, damage, wear, loss or theft, in order to obtain for oneself or for another, the insured amount – para. (1).

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[44] Published in the "Official Gazette of Romania", part I, no. 123 of 9 February 2006.

[45] The commission had proposed an indictment of this deed in a distinct text, respectively in art. 235 of the Draft. Likewise, under art. 237 it had proposed the indictment of the measurement deceit, and under art. 238, the deceit regarding the quality of goods. Concurrently, the occurrence of very serious consequences was set forth art. 241 of the Draft as an aggravating circumstantial element for certain offences of this chapter. All these solutions, in a disputable way, were not resumed by the Romanian legislator from 2009 in the new Criminal Code.

[46] For more details, see Constantin Duvac, *Deceit regarding insurances in the new Criminal Code*, in the "Law" ("Dreptul") Journal no. 6/2012, p. 72-91.

The second *typical* variant is represented by the deed committed by the person who, for the purpose provided in para. (1), simulates, provokes self-injury or aggravates bodily injuries or wounds caused by an insured risk – para. (2).

This criminal deed was not regulated in the previous criminal law in this form, even if certain factual forms were present in the broader indictment of the deceit regarding the agreements, set forth in art. 215 para. (3) of the Criminal Code from 1969.

By the indictment of the deceit regarding insurances as an *assimilated* (from the point of view of the indictment) and *aggravated* deed (from the perspective of the sanctioning regime) of the offence of deceit, which exists independently, the legislator from the year 2009 returns to the traditional solution consecrated by the Criminal Code from 1937 setting forth the respective deed in art. 554, the text being reproduced from art. 642 of the Italian Criminal Code from 1930.

Art. 245 under a single marginal denomination (*nomen iuris*) two different deeds are incriminated (one in relation to the insurance of goods, punished by imprisonment from one to 5 years; the other deed regarding the insurance for persons, punished by imprisonment from 6 months to 3 years or a fine), as distinct offences, each of them having its own legal content.

The new indictment provided in art. 245 finds its rationalization in the social reality, punishing any deeds which have become more and more frequent in the recent years. Under the circumstances of the consistent development of the insurance market, of the increase of the number and of the weight of the compulsory insurances, the temptation of certain persons was enhanced as well, for defrauding the insurers in order to obtain certain unjust patrimonial benefits.

On the other hand, the reason for the special indictment of this type of deeds is justified by the fact that the deceit regarding insurances presents, under the conditions of indictment, certain characteristics different from those of the deceit, with which it is in a special relationship, and by its registration in the Criminal Code as an *obstacle deed* (danger offence) it was intended to prevent committing the offence of deceit set forth in art. 244.

In order to explain the meaning of art. 245, the provisions of the civil law in this matter are of interest, as well. The legal regime regarding the insurance[47] and reinsurance[48] is regulated in art. 2.199-2.241 of the Civil Code, adopted under Law no. 287/2009, as republished[49] and by Law no. 136/1995 on insurance and reinsurance in Romania[50].

It should be reflected whether the punishment provided by law in case of this offence would have to be correlated with the punishment for deceit, as it is difficult to admit that a deed of danger and of obstacle should be punished more seriously than a subsequent result offence, under the circumstances in which these are related (take part of the same subgroup of offences characterized by overlooking trust).

Likewise, *de lege ferenda,* the assumption in which the purpose provided in the rule of indictment is achieved, could be introduced as an aggravating circumstantial element (obtaining an insured amount). In this way, the possible controversies likely to appear regarding the relationship between the two indictments provided in art. 244 and in art. 245 could be removed

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[47] *The insurance* constitutes the operation under which an insurer provides, based upon the mutuality principle, an insurance fund by the contribution of a certain number of insured persons exposed to the occurrence of certain risks, and compensates the persons suffering a prejudice from the fund made up of the collected amounts, as well as based upon other revenues resulted from the activity carried on.

[48] *The reinsurance* is the operation consisting of taking over the risks waived by an insurer/reinsurer.

[49] Republished in the "Official Gazette of Romania", part I, no. 409 of 10 June 2011.

[50] Published in the "Official Gazette of Romania", part I, no. 303 of 30 December 1995, as subsequently amended and supplemented.

and a more just penalty for the offender should be provided, in relation to all the relevant consequences of the correct deed.

9. Embezzlement of public tenders[51] (art. 246) constitutes the deed of removing, by constraint or corruption, a participant in a public tender or the agreement among participants to embezzle the adjudication price.

The embezzlement of public tenders was not previously regulated in the Criminal Code from 1969, and this provision essentially reproduces the provisions of art. 260 para. (5)[52] (the *typical* variant[53] within the offence of deceit) and is influenced by certain provisions of art. 329[54], both from the first new Criminal Code from 2004, adopted by Law no. 301/2004[55].

The practice of the recent years showed that in certain cases, the participants in a public tender appealed to different fraudulent means, for the purpose of excluding certain prospective participants, thus intending to influence the adjudication price.

Until this rule of indictment is introduced, such deeds were classified, as the case may be, in the provisions regarding: deceit[56], abuse of office, bribery[57], intellectual forgery[58] or material forgery in official documents.

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[51] For more details, see Constantin Duvac, *Embezzlement of public tenders in the new Criminal Code*, in the "Law" ("Dreptul") Journal no. 8/2012, p. 84-105.

[52] Art. 260 para. (5) of the Criminal Code from 2004 – *Deceit* – "The use of fraudulent means in order to exclude a person from the public tender or to limit the public tenders or the number of participants is punished by strict imprisonment from one to 5 years".

[53] See George Antoniu, *The New Criminal Code. The previous criminal code. Comparative study*, All Beck Publishing House, Bucharest, 2004, p. 105. On that occasion, professor Antoniu recommended that this text should be written as a distinctive paragraph within art. 329 as the fraudulent means used by the offender and to which art. 260 para. (5) referred to, were intended to prevent or influence the competition in the public tenders, and the legal matter in this case would be the patrimonial relationships only secondarily.

[54] Art. 329 of the Criminal Code from 2004 – *Preventing competition in the public tenders* – "(1) Preventing or influencing the free competition in the public tenders, in order to eliminate any competitors therefrom, is punished by imprisonment from 2 months to one year or by days-fine.

(2) The same penalty is applied also on the deed of the tenderer or of the competitor requesting or receiving money directly or indirectly, promises or any other kind of profit in order to give up to participate in the tender.

(3) If the deed provided in para. (1) or (2) is committed by several persons who agreed upon from this point of view, the penalty is the strict imprisonment from one year to 3 years or days-fine".

This indictment had been introduced in Chapter III (Crimes and offences against public interests committed by any person) of Title VI – Crimes and offences against public interests of the Special Part of the new Criminal Code from 2004.

For a detailed examination of this rule of indictment, see Constantin Duvac, *Preventing competition in the public tenders* (Crimes and offences against public interests committed by any person), in "Criminal Law. Special Part. The New Criminal Code", academic course, vol. I, by Gheorghe Diaconescu, Constantin Duvac, Publishing House of România de Mâine Foundation, Bucharest, 2006, p. 547-552.

[55] 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, the Law no. 301/2004 was repealed without having ever entered into force.

[56] See the Supreme Court of Justice, Criminal Section, decision no. 2708/2002, www.juristprudenta.org. In this case, the court, in order to enforce the provisions regarding the attempt to commit deceit by prejudicing the owner of the assets bided for, upheld that during the period March-April 2000 the defendants, in order to receive any benefits from S. M., decided to bid for officially and to behave in an appropriate manner in the tender as regards S. M. so that they do not raise the price of the assets subject to tender at a significant difference from the starting price. Consequently, it was found that there was an agreement between the defendants and the witness, so that the owner

In relation to these non-unitary solutions, the introduction in the Criminal Code of a new indictment which might correspond to the need for protecting this social value, namely the good development of the competition in the public tenders, was necessary.

For the understanding and interpretation of the rule of indictment, the provisions of art. 747-848 of the new Code of criminal procedure have to be considered, being adopted under Law no. 134/2010[59]; art. 162-167 of the Code of tax procedure[60] (Government Ordinance no. 92/2003, as republished) and Law no. 188/2000 on bailiffs, as republished[61].

Consequently, the public tenders are conducted according to the regulations of the civil trial, and the tenders in which the Romanian state is the creditor, are subject to the rules provided in the special law (Code of tax procedure) which shall be supplemented by the provisions of common law.

In our opinion, the text of art. 246 is incidental regarding the public tenders organized by bailiffs or by other persons provided by law (for instance, the tax execution bodies), however it is not enforceable in relation to the public procurements achieved by the contracting authorities according to the Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, of public works concession contracts and of services concession contracts[62] and of the Government Decision no. 925/2006[63] for the approval of the Rules of implementation of the provisions regarding the award of public procurement contracts of the Government Emergency Ordinance no. 34/2006.

The rule of indictment provided in art. 246 is undoubtedly needed for a complete protection of the free competition in case of public tenders, however, it should be reflected whether the assumption in which the tenderer or the competitor claims, in a direct or indirect

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selling the assets, E. M. Cavnic, may obtain a very low price in favor of S. M. This deed would have resulted in an illegally altered tender, which might hijack it from its ordinary purpose and maintain the low price of the assets put on sale by their owner, to the latter's detriment. These deeds represent an enforcement of the decision to mislead E. M. Cavnic, in order to obtain unjust material benefits for the defendants and S. M., with damaging consequences for the tender organizer, which were not produced due to the intervention of the criminal prosecution bodies.

[57] See the High Court of Cassation and Justice, Criminal Section, decision no. 4206/2007, not republished. In fact, the defendant, in her capacity as president of A.T.C.O.M. Gorj, claimed from the indicter, who was the director of a company, the amount of RON 25,000 and received RON 10,000, according to the organized flagrant, in order to foster the indicter to purchase some business premises situated in Rovinari, sold in the tender by A.T.C.O.M. Gorj during the period February - March and at the same time in order to foster the same indicter, subsequent to the adjudication, on 2 March 2005, did not apply the provision of item 4 of the sale-purchase agreement regarding the termination in case of non-payment of the price in full by the purchaser until 1 May 2005.

[58] See the High Court of Cassation and Justice, Criminal Section, decision no. 1363/2009, available at the address www.iccj.ro. In this case, the court upheld that the defendant, in his capacity as bailiff, upon performing his job requirements, respectively on the occasion of conducting a tender in his office regarding the sale of a flat, scheduled on 21 July 2003, drafted a false tender report and its related adjudication document (both dated on 21 July 2003, at 9:00 o'clock), while, actually, no tender took place in his office.

[59] Published in the "Official Gazette of Romania", part I, no. 485 of 15 July 2010.

[60] For a detailed examination of this distinctive notes, see Ioan Leş, *Code of civil procedure. Comment on articles,* 2nd edition, All Beck Publishing House, Bucharest, 2005, p. 1146-1148; Evelina Oprina, *Forced execution in the civil trial*, 3rd edition revised and supplemented, Universul Juridic Publishing House, Bucharest, 2009, p. 417-428.

[61] Republished in the "Official Gazette of Romania", part I, no. 738 of 20 October 2011.

[62] Published in the "Official Gazette of Romania", part I, no. 418 of 15 May 2006, as subsequently amended and supplemented.

[63] Published in the "Official Gazette of Romania", part I, no. 625 of 20 July 2006, as subsequently amended and supplemented.

way, money or other undue benefits in order to give up participating in the tender, could be introduced as an assimilated variant.

Concurrently, committing these deeds by several persons who agreed upon to this end, should constitute an aggravating circumstantial element of the simple variant.

In order to avoid any confusions and a non-unitary enforcement of the text by the criminal judicial bodies, according to the provisions of the Government Emergency Ordinance no. 34/2006 and of the Government Decision no. 925/2006, another paragraph should be added to the text, which provide that this rule is applied also to the public procurement procedures (open tender, restricted tender, competitive dialogue, negotiation and supply and demand), hence providing a criminal protection of the free competition also in the public procurement for the business operators (candidate[64], competitor[65] or tenderer[66]), as well as making sure of the efficient use of public funds.

An extension of the indictment in this respect is the more necessary so as the breaches of law in this matter were enhanced. Thus, the public Report for the year 2011 of the Romanian Court of Account[67], shows that in the year 2011, the state budget was prejudiced by 1,172.99 million lei (263.59 million Euro) by the public institutions, a significant weight being determined by the deviations in the field of public procurement regarding: the initiation and the launch of the public procurement procedures (9 cases – a damage of 27,364 million lei – 2,33% of the total amount); the conduct of the public procurement procedures (6 cases – a damage of 30, 611 million lei – 2,61% of the total amount) and the management of the public procurement contract (911 cases – a damage of 208,381 million lei – 17,76% of the total amount). The most frequent violations of the laws in the matter referred to: the payment of some capital costs for quantities of over-dimensioned works based upon the statements of works approved for settlement; statements of works approved for payment for the non-delivered goods or non-rendered services; the payment of certain non-executed and accepted investment works; payments for products, services or works based upon the supporting documents not reflecting the actual situation.

Likewise, for a more efficient criminal protection of the public property, an extension would be required in relation to the indictment and in case of concession contracts for the state-owned assets, whose regime is regulated by the Government Emergency Ordinance no. 54/2006[68]

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[64] *The candidate* is any business operator which submitted its candidature in case of a restricted tender procedure, negotiation or competitive dialogue – art. 3 para. (1) letter c).

[65] *The competitor* is any business operator which has submitted a project in a concurrence of solutions – art. 3 para. (1) letter e).

[66] *The tenderer* is any business operator which has submitted its offer within the submission deadline of the offers mentioned in the announcement/invitation to tender – art. 3 para. (1) letter p); *The offer* is the legal document by which the business operator shows its will to commit himself from the legal point of view in a public procurement contract; the offer includes the financial proposal and the technical proposal – art. 3 para. (1) letter q); *The business operator* is any supplier of products, services provider or works performer - natural person/public or private law legal entity, or a group of such persons carrying on their activity in the field which legally provides products, services and/or execution of works in the market – art. 3 para. (1) letter r).

The tenderer has the capacity as participant in a public procurement procedure until it becomes the *contractor* (the tenderer which became, according to law, a party to a public procurement contract).

[67] Available at http://www.curteadeconturi.ro/sites/ccr/RO/Publicatii/Documente%20publice/Raportul%20public%20pe%20anul%202011.pdf

[68] Published in the "Official Gazette of Romania", part I, no. 569 of 30 June 2006, as subsequently amended and supplemented.

and by the Government Decision no. 168/2007[69] for the approval of the Methodological rules of implementation of the Government Emergency Ordinance no. 54/2006.

Accordingly, the marginal denomination of the indictment should be "Hijacking the public tenders or procurements".

10. Management of leased assets of a vulnerable person[70] (art. 247) consists of the deed of the creditor which, upon lending money or assets, taking advantage of the obvious vulnerable condition of the debtor, due to his age, condition of health, disability, or to his dependency on which the debtor is in relation to the former, determines him to grant or to assign, for oneself or for another person, a real right or a receivable right of an obviously disproportionate value as regards this allowance – para. (1).

Its aggravated variant incriminates the act of putting a person under an obviously condition of vulnerability by causing an intoxication by alcohol or by other psychoactive substances for the purpose of determining him/her to agree to grant or assign a real right or a receivable right or to waive a right, if a damage was caused – para. (2).

The management of leased assets of a vulnerable person was not regulated in the previous Criminal Code (*incriminatio ex novo*). The solution is not completely new for the Romanian criminal law, as art. 542 of the Criminal law from 1937 provided a similar offence, namely the offence of the management of weaknesses and of vices, which took part of the patrimonial damage offences.

The offence provided in art. 247 was accepted within limits in the Romanian doctrine, stating that such deeds do not happen in our society and that their indictment would represent an abuse[71].

However, in the opinion of the editors of the new criminal law, the indictment of the management of leased assets of a vulnerable person intended to repress certain deeds proliferating in the recent years and sometimes causing serious consequences for the persons who became their victims, as the media showed almost on a daily basis some cases of old persons or of persons with a poor health condition and who lost their houses as a result of such patrimonial disproportionate agreements. Moreover, this kind of deeds are incriminated in most of the European laws.

In our opinion, this indictment, together with that provided in art. 351 (usury), was necessary for repressing this kind of unsuitable deeds following which many simple or low-lived persons often lost their houses owned in a legal manner.

De lege ferenda it would be required to replace the phrase "lending money or assets" by the phrase "conclusion or execution of a document which would produce a bad legal effect for itself or for another document".

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[69] Published in the "Official Gazette of Romania", part I, no. 146 of 28 February 2007, as subsequently amended and supplemented.

[70] For more details, see Constantin Duvac, *Management of leased assets of a vulnerable person in the new Criminal Code*, in the "Journal of Criminal Law" no. 3/2012, p. 29-43.

[71] See George Antoniu, *Remarks with regard to the preliminary draft of a second new Criminal Code (II), cit. supra*, p. 19. The author recommends to reproduce the text of art. 260 para. (6) of the Criminal Code from 2004, and this indictment is deemed to have a more adequate content.

Art. 260 of the Criminal Code 2004 – *Deceit* "(6) By the penalty set forth in para. (1) (strict imprisonment from one year to 7 years – our parenthesis – *C.D.*) punishes the exploitation of ignorance or of lack of experience of a minor child or of the state of weakness of the vulnerable persons due to their age, disease or pregnancy, in order to persuade them to conclude any prejudicial documents for them".

Concurrently, the phrase "or to other causes" may be introduced following the word "disabilities", as the materiality of the indictment is not the cause of the obviously vulnerable state of the debtor, but the act of taking advantage of this state by the creditor.

Likewise, for the identity of reason (protection of the assets of the vulnerable person) it would be required to introduce also the phrase "or to waive a right" in the legal content of the essential deed, following the word "allowance".

The management of the leased assets of a vulnerable person is punished, in its basic variant, by the imprisonment from one to 5 years, and in its aggravated variant by the imprisonment from 2 to 7 years.

11. According to art. 248 (**sanctions for attempt**), the attempt to commit the offences set forth in art. 239 para. (1), art. 241 and art. 244-247 is punished.

D. Chapter IV – Frauds committed by computer systems and electronic payment means[72] **–** is introduced by the legislator from 2009, and is not resumed in the Draft drawn up by the commission and includes the patrimonial frauds committed through computer systems and electronic payment means: computer fraud, performance of financial operations in a fraudulent manner and approval of financial operations performed in a fraudulent manner.

The frauds committed through computer systems and electronic payment means have no corresponding term in the Criminal Code from 1969, however they are resumed with certain amendments from the Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignity, of public office and in the business environment, and to prevent and punish corruption[73] and from Law no. 365/2002 on e-commerce, as republished[74].

In this manner, a modern regulation framework was established, ensuring the protection corresponding to the social values and relationships aimed at by these indictments.

1. Computer fraud (art. 249) consists in the entry, change or deletion of computer data, the restriction of the access to these data and the hindrance in any way of a computer system to operate, for the purpose of obtaining a material benefit for oneself or for another, if a damage was caused to any person.

The rule of indictment of art. 249 represents the resuming, with significant amendments, of the provisions of art. 48 of the Law no. 161/2003 (text abrogated by art. 130 item 2 of the Law no. 187/2012), except the penalty which remained unchanged, respectively the imprisonment from 2 to 7 years.

First of all, the condition of special anti juridicity "without right" and the requirement "resulting data inadequate to the truth" regarding the immediate consequence were eliminated.

The requirement "for the purpose of being used to produce a legal consequence" was replaced by the phrase "for the purpose of obtaining a material benefit for oneself or for the another person", to which the constituent condition "if a damage was caused to a person" was added, the examined offence being changed from a danger offence into a material (damage) offence.

Likewise, another new normative form was added, consisting of the "hindrance in any way of a computer system to operate".

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[72] For a more detailed examination of this matter, see George Zlăți, *Certain considerations regarding the computer offences from the perspective of the applicable laws, as well as of the new Criminal Code*, in the "Law" („Dreptul") no. 10/2012, p. 204-229.

[73] Published in the "Official Gazette of Romania", part I, no. 279 of 21 April 2003, as subsequently amended and supplemented.

[74] Published in the "Official Gazette of Romania", part I, no. 959 of 29 November 2006.

The phrases “computer system” and “computer data” have the meaning defined in art. 181 (computer system and computer data).

2. Performance of financial operations in a fraudulent manner (art. 250) is incriminated in three variants (a typical one, an assimilated one and an attenuated one) and represents a resuming, with certain amendments, of the provisions of art. 27 of the Law no. 365/2002 (text abrogated by art. 107 item 2 of the Law no. 187/2012). The text was given a superior drafting by waiving the use of the extra criminal supplementing rules within the scope of the principle.

In its simple variant, this represents the performance of an operation of cash withdrawal, charge or discharge of an instrument of electronic currency or of transfer of funds, by using, without the holder’s consent, an electronic payment instrument or the identification data allowing its use – para. (1).

The performance of one of the operations set forth in para. (1), by the unauthorized use of any identification data or by use of any fictitious identification data – para. (2) is punished by the same penalty (imprisonment from 2 to 7 years).

Para. (3) provides that the unauthorized transmission of any identification data to another person, in order to perform one of the operations set forth in para. (1), is punished by the imprisonment from one to 5 years.

As opposed to the previous regulation, we firstly note a reduction of the special limits of punishment attached to the specific deed and to the assimilated deed from 1 to 12 years to the imprisonment from 2 to 7 years.

The species variant of para. (3) of art. 27 of the Law no. 365/2002 was changed into an attenuated variant, and the maximum special limit of the penalty by imprisonment decreased from 12 years to 5 years.

The legislator from 2009 did not resume anymore in the content of art. 250 the aggravated variant set forth in art. 27 para. (4) determined by a certain implicit capacity of the offender (immediately circumstantiated active subject) and by the job requirements of this subject, which are circumscribed either to the performance of technical operations needed for the issue of the electronic payment instruments, or to the access to the security mechanisms involved in the issue or use of the electronic payment instruments. According to the provisions of art. 250, these circumstances shall be considered by the judge in the complex trial of the legal individualization of the penalty, as it must aggravate concretely the penalty applicable to the active subject of the offence.

The electronic payment instrument has the meaning defined in art. 180 (electronic payment instrument).

3. The approval of the financial operations performed in a fraudulent manner (art. 251) was drafted starting from the provisions of art. 28 of the Law no. 365/2002 (text abrogated by art. 107 item 2 of the Law no. 187/2012), which were restyled, as this time the rule of indictment is complete, but not split. The special maximum limit of the penalty by imprisonment, provided for both indictment variants - typical and species variants - decreased from 12 years to 5 years.

In its basic variant, the deed consists of the approval of a operation of cash withdrawal, charge or discharge of an instrument of electronic currency or of transfer of funds, being aware of the fact that it is performed by using a falsified electronic payment instrument or used without the content of its holder – para. (1).

The assimilated and species variants punish the approval of one of the operations set forth in para. (1), being aware that it is performed by the unauthorized use of any identification data or by use of any fictitious identification data.

4. According to art. 252 (**sanctions for attempt**), the attempt to commit the offences set forth in this chapter shall be punished.

E. Chapter V – Destruction and disturbance of possession – includes destruction, first degree destruction, destruction out of negligence and disturbance of possession.

1. The destruction (art. 253) has basically, the same content as the content set forth in art. 217 of the previous Criminal law.

In its basic variant, this consists of the act of destroying, damaging, or making unfit for use an asset belonging to another person or preventing the preservation or saving measures for such an asset, as well as the removal of the measures taken and is punished by the imprisonment from 3 months to 2 years or a fine – para. (1).

A new aggravating variant was introduced in the text, consisting of the "destruction of a document by private signature", which belongs to another person and serves to prove a patrimonial right, if any damage was caused by this variant" – para. (2). The penalty provided for this offence is the imprisonment from 6 months to 3 years or a fine.

In the opinion of the commission, this assumption is justified by the fact that in the social reality, in the circumstances in which such a document may be the single means of evidence for proving a patrimonial right of a considerable value (for instance, a handwritten testament). The material object of this deed of destruction is represented by a document by private signature, however, not an original deed, because in case the destruction concerns an original document kept by one of the units or persons to which art. 175 para. (2) or art. 176 refers, the concrete deed shall be classified in art. 259 (stealing or destruction of documents) and shall be punished by a harder penalty (imprisonment from one to 5 years). If an original document being in the possession of another person is destroyed, the inclusion of the deed in the aggravating circumstance is not justified, in this conception, as the interested person may obtain any time a copy of from the authority issuing the document.

The other aggravating variants of the offence of destruction provided by the previous criminal law ere mentioned in the new Criminal Code, with certain reformulations necessary for aligning them with the requirements of the doctrine and of the judicial practice.

Thus, if the destruction deed concerns any goods belonging to the cultural patrimony[75], the penalty is the punishment from one to 5 years – para. (3).

The act of destroying, damaging or making an asset unfit for use, if the act is committed by arson, explosion or by any other such means and if it endangers other persons or goods, shall be punished by imprisonment from 2 to 7 years – para. (4).

These provisions of para. (3) and (4) of the examined text shall apply also when the good belongs to the offender.

For the offence of destruction, the typical variant and the first aggravating variant (*incriminatio ex novo*) the criminal proceedings are initiated upon preliminary complaint of the injured person.

The attempt of the deeds provided in paragraphs (3) and (4) is punishable.

[75] The legislator from 2009 did not adopt the proposal of the commission to consider that the deed is more serious when the specific deed is related to equipment, installations or components thereof, whether these are goods of public interest or boundary stones, pillars, beacons or any systems used to demarcate the state border – See art. 243 para. (3) letters b) and c) of the Draft.

2. The first degree destruction (art. 254) exists only in case in which the destruction resulted in a disaster, and in this case it is punished with imprisonment from 7 to 15 years and the deprivation of certain rights. The content of this indictment, in a disputable way, did not uphold anymore the assumption in which the destruction caused very serious consequences.

The disaster was defined as "the destruction or damaging of some movable assets or works, equipment, installations or components thereof and which resulted in the death or bodily injury of two or more persons", as the assumption of the destruction or damaging of means of public transportation either for persons or merchandise was eliminated, introducing however, the phrase "movable assets" (a contextual original interpretation).

3. The destruction out of negligence (art. 255) was simplified as opposed to the previous regulation and even to the formulation elaborated by the commission on the occasion of drafting the corresponding text of the Draft[76].

In its simple variant, the deed consists of destroying, damaging or making an asset unfit for use, out of negligence, even if it belongs to the offender, if the act is committed by arson, explosion or by any other such means and if it endangers other persons or goods and shall be punished by imprisonment from 3 months to one year or by a fine – para. (1).

In this normative assumption the phrase "if it results in public danger" was replaced by the phrase "if it endangers other persons or goods".

The legislator from the year 2009 waived the provision of para. 2 of art. 219 of the previous criminal law ("the act of destroying or damaging, out of negligence, an oil or gas pipe, a high voltage cable equipment or installations for telecommunication or for broadcasting radio and television programs, or water supply systems and main water supply pipes, if this made them unfit to use"), and in para. (3) of the same text the formulation "the destruction, damage or making unfit for use, out of negligence, of a good, even if it belongs to the offender, if it had particularly serious consequences", was eliminated.

If the act resulted in a disaster, the punishment is the imprisonment from 5 to 12 years - para. (2).

The editors of the new criminal law did not keep anymore the offence of destruction out of negligence in the variant described in art. 217 para. 4 of the previous Criminal Code, considering that such a deed constitutes, first of all, malfeasance while in office as it is committed by breach of a job duty (abandonment of the office or of any other deed committed by the management staff of a public means of transportation or by the staff ensuring the security of such transports directly), and secondly, it is difficult to accept that such a deed should be committed out of negligence, as the practice did not record any cases of the application of the respective text.

If any deeds of destruction or first degree destruction or destruction out of negligence are incriminated under special laws with criminal provisions, these texts shall apply, according to the specialty principle, with high priority as compared to those of art. 253, 254 or 255, if appropriate. For instance, art. 108[77] of the Government Ordinance no. 29/1997 regarding the Civil Air Code, as republished[78].

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[76] See art. 245 para. (2) and (3) sentence I of the Draft.

[77] Art. 108 of the Government Ordinance no. 29/1997 – "(1) The destruction or serious damaging, by using a device, a weapon or a substance, of the civil airport installations or of a aircraft which is not in service, but is on the airport, as well as the cessation of the airport services, if the deed affects or may affect the safety and security of the respective airport, are punished with imprisonment from 2 to 7 years.

(2) The destruction or damaging of the air navigation plants or services or the disturbance of their operation, if the deed endangered the safety of the flight, is punished with imprisonment from 5 to 12 years and the deprivation of certain rights.

4. Disturbance of possession (art. 256) consists of the act of occupying, either wholly or in part, without right, by violence or threat or by elimination or displacement of the border signs, of a building in the property of another and is punished with imprisonment from one to 5 years or by a fine.

This criminal deed is incriminated in a simplified form as compared to the previous text, in compliance with the tradition of our criminal laws and with the other regulations in the matter.

Hence, first of all, the conditions were not provided regarding the committing of the deed incriminated "without its consent or without a prior approval received according to law" at the same time with the waive of the normative form of committing by "the refusal of leaving the estate".

Secondly, the indictment of the disturbance of possession was waived when not committed by violence or threat and by the displacement or elimination of the border signs. For this kind of deeds, the commission considered that the solution provided by the civil laws – possessory action – is sufficient, and a criminal penalty of these deeds is not justified according to the principle of the minimum intervention[79]. It should be mentioned that this was the legal solution also in the Criminal Code of 1937 (art. 556-558), but also in the Criminal Code from 1969, prior to its amendment under the Law no. 140/1996 and is set forth also in other laws at present (see art. 215 of the Portuguese Criminal Law).

Likewise, it has been deemed that the different aggravating variants of the offence of disturbance of possession provided in the previous Criminal Code are not justified, and the penalties provided in case of committing them were much more serious than in relation to the offence of theft or destruction, so that their revaluation was required.

The assessment made by the legislator when drafting this text was positively welcomed in the specialty literature, being deemed more realistic than the previous regulation[80].

The doctrine[81] drew attention to the form of "patrimonial right", which is a contradictory phrase due to the ambiguous content of the concept of patrimony which include not only the rights and obligations of a person, but also its intangible assets, as well as the future assets.

If the disturbance of possession is incriminated under special laws with criminal provisions, these texts shall apply, according to the specialty principle, with high priority as compared to those of the new Criminal Code (criminal law), if appropriate, if no subsidiarity

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(3) The destruction of an aircraft in service or causing damages which make it unavailable for flight or which may endanger the safety during the flight is punished with the penalty provided in para. (2), as well.

(4) The act of assembling on a civil aircraft, by any mean, a device or a substance which may destroy it or cause damages which make it unavailable for flight or which may imperil its safety during the flight is punished with imprisonment from 7 to 18 years and the deprivation of certain rights".

[78] Republished in the "Official Gazette of Romania", part I, no. 45 of 26 January 2001, as subsequently amended and supplemented.

[79] To the contrary, see Tiberiu Medeanu, *Disturbance of possession* (Destruction and disturbance of possession), in "Criminal law manual". Special part", vol. I by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 382; Idem, *Disturbance of possession* (Destruction and disturbance of possession), in "Manual of criminal law. Special part", vol. I by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 382; The authors deems as doubtful the possibility of certain persons to request and obtain the due right under a civil action.

[80] See Monica Buzea, *Offence of disturbance of possession – an historical perspective and the regulation in the new Criminal Code*, in the "Law" („Dreptul") no. 3/2012, p. 144.

[81] See George Antoniu, *op. cit.*, p. 19. The author recommends to avoid this concept in the criminal law and to replace it by the word "material". At the same time, he emphasises that the text refers only to the deed by private signature, but not to the original document as in art. 263 para. (4) of the first Criminal Code, adopted by Law no. 301/2004, and art. 255 shall not resume anymore para. (2) and (4) of art. 265 of the Criminal Code from 2004.

clause is provided which may defeat this principle. For instance, according to art. 65 of the Law on the cadastre and on the real estate publicity no. 7/1996, as republished[82] the amendment of the materializations of the property limits, the establishment or displacement of the border signs and of the benchmarks of the limits of the area of railways, roads, channels, airports, ports, waterways, cadastre, forest, survey and mining delimitations of borders, without right, constitutes an offence and is punished with imprisonment from 3 months to 2 years or by a fine, if the deed does not constitute a more serious offence. Consequently, this text shall not be incidental if only the concrete deed cannot be classified in art. 256 setting forth a harder punishment.

II. *Conclusions.* The solutions of the Romanian criminal law in this matter comprise many traditional elements, but also frequent innovations either by resuming certain older Romanian solutions, or by the creation of the members of the commission, all these expressing the intent of the Romanian legislator to ensure an efficient and modern restraining of the offences against patrimony.

In our opinion, the manner in which the texts were drawn up regarding the offences against patrimony, except the formulated observations, is consistent with the principles of criminal policy which led to the drafting of a new criminal legislation and with the techniques of drafting the regulations, such regulations formulated ensuring adequate protection of social values aimed under these incriminations and of the relationships which are established and developed around them.

These texts have settled some disputes existing in the specialty literature and in the judicial practice in relation to the previous regulation. Although sometimes the chosen method or solution is not out of the critique, the legislator's merit of 2009 cannot be denied and implicitly, the merit of the commission on drawing up the Draft, as well as the merit of the legislator of 2012 to try to settle as many controversial cases as possible, so that the new criminal legislation might provide an unitary enforcement of the criminal law by the judicial bodies.

For more offences against patrimony, the limits of the punishment were significantly reduced (sometimes in an unjustified way, for instance, as in the situation of the offences of first degree theft or of deceit), and the principle of availability in terms of initiating the criminal proceedings, respectively the reconciliation of the parties, has been extended.

[82] Republished in the "Official Gazette of Romania", part I, no. 201 of 3 March 2006, as subsequently amended and supplemented.