

Corruption Crimes from the Point of View of the New Regulations of Law no. 286/2009

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Abstract: The corruption phenomenon in Romania is one of the factors that have slowed the progress of economic and political development, and therefore the fight against this phenomenon constitutes a primary concern of the entire Romanian society, in order to increase the level of integrity and trust towards state institutions and in order to integrate the Romanian society in the European community. Law no. 286/2009 regarding the new Criminal Code brings a number of changes in terms of corruption offenses, changes that have drawn much criticism. The faulty wording in the general part has resulted in the decriminalization of the largest part of the corruption crimes already committed and, as such, a partial indirect amnesty of the corruption acts, which have seriously affected the social system and Romania's development. The manner in which a crime is defined by law or the ambiguity of the definitions regarding the criminal nature of an act seriously affects the clarity and predictability of the criminal policy. Moreover, the draft Criminal Code and the draft Criminal Procedure Code contain a number of provisions which are contrary to the Constitutional Court's jurisprudence and may affect the efficiency of the law.

Keywords: bribery; influence trafficking; public servant

In the process of adaptation of the socio-global system to the situation of competitive economic market, risk factors increased, while corruption became a structured, specialized and professional phenomenon that, through informal networks of organizations and people, can influence decision factors from the fields of politics, law, administration or justice, affecting national safety.

The doctrine underlines the difficulty of giving a definition to corruption due to its multiple forms of manifestation, it is also expressed the idea that it is impossible for the phenomenon of corruption to be identified with one definition, because it has multiple forms of manifestation.

“The phenomenon” of corruption is more visible nowadays because of press campaigns, of various media sources that have transformed corruption in a hot topic for the public. Moreover, economic change, both nationally and internationally speaking, diminished the degree of acceptance of corruption. Consequently, it can be easily understood that fighting against corruption became one of the main preoccupations of the international community. (Madulescu, 2006)

Romania's fight against corruption is the main objective of internal politics, this can be seen in the field of laws, a series of normative documents have been approved and they encourage the development of a safer social environment.

The phenomenon of corruption has been identified as being a problem, not based on clear direct evidence, but because of the inappropriate law system, because of the gaps that exist in the given laws and which may lead to corruption events. (Mădăşescu, 2003, p. 319)

As far as the settlement of corruption contravention is concerned, including acceptance and offering of bribery, trading in one's influence, these are all referred to by Law no. 286/2009 regarding The Penal Code, published in Official Monitor no. 510/2009, we notice the fact that all these above are incriminated in Title V of the Special Part, article 289-291, referring to corruption and job infractions. We can easily notice that these contraventions have been modified in time as far as component elements and enforcement treatment are concerned.

The material element of accepting bribery, referred to in art. 289 of the Law no.286/2009 remained unchanged. On one side, action is taken by the same three alternative methods: claiming, receiving money or other benefits or acceptance of promises of money or benefits, having the same meaning. On the other side, the fact that the promise of money or other benefits is not denied is not incriminated directly as a distinct manner of committing the infraction. Furthermore, the fact that such a promise is not rejected means implicit acceptance, but the legislative person, incriminating acceptance, did not make the distinction between implicit or direct acceptance. Or, *ubi lex non distinguit, nec nos distinguere debemus*. Moreover, we notice that the new law was referring to claiming, accepting or agreeing to accept money or other benefits for oneself or for another person, so it is explicit that benefits can be claimed for somebody else, this hypothesis hasn't been explicitly made clear in the law that had been valid before the change.

As far as the active subject of infrastructure is concerned, this was qualified, the new law in The Penal Code concerns public clerks and not only clerks, as it is mentioned in the article 147 from the nowadays valid Penal Code.

If we search deeper into the problem and we analyze it, the new laws no longer define the term of public clerk regarding penal laws only, as it was in paragraph 2 article 147 from the current valid Penal Code. Therefore, the active subject should be a public clerk, as it is mentioned in art. 175 paragraph 1 from the Law no. 286/2009, to be more specifically, *"the person who has a permanent or temporary job, being paid or not, having responsibilities and tasks to solve which are established by the law, in order for the legislative, executive or judicial field to exercise its power (letter a), is in public service, no matter the nature of the job (letter b) or has activities inside an autonomous company, an economic operator or a legal person having a partial or total capital from the state, or working for another legal person offering public services (letter c)"*. Paragraph 2 of the same article underlines the fact that the public clerk, in the view of penal laws, is *the person that works for the public benefit, being subjected to public authorities, to control or supervising regarding the completion of that specific public service*. As far as this first category is concerned, paragraph 2 article 289 from Law no. 286/2009 regarding The Penal Code mentions that the infraction from line 1 is to be punished only in connection to lack of accomplishment, delay or accomplishment of an action which is contrary to job duties.

In conclusion, the infraction of accepting bribery was reconsidered for certain people that are public clerks, according to art. 147 paragraph 2 Penal Code. Therefore, the actual code punishes corruption deeds in a classic way, including all categories, such as doctors, teachers, clerks from public institutions, except for people hired in private institutions.

According to article 175 from the Project of The Penal Code, line (1) *"The clerk is the person that has temporary or permanent tasks to solve, these requirements allow one to make decisions, to take part in making decisions or to influence the process of making decisions inside a legal organization that cannot be private.*(2) *Furthermore, it is considered to be a clerk responding from a judicial point of*

view the person that has an activity which one was named for by a public authority and which is controlled by it.”

Art. 288 paragraph 3 from the Project of Penal Code sanctions the infraction of accepting bribery, if this has been committed by another person than those from art. 175, so people who are not clerks (referring to the categories mentioned above), in this special case, the penalty for committing the infraction of accepting bribery is reduced to half.

In the published version of Law no. 286/2009, this disposal is not mentioned; the infraction of accepting bribery is no longer sanctioned for this type of people. In this respect, The Superior Council of Magistracy, in the Notice referring to The Penal Code¹, appreciated the definition of the term “clerk” as “extremely limited, not containing all that it should have, because it lets people outside the law, not covering corruption activities in private and public areas (for example, corruption in health organizations or public education system). Moreover, there are left aside penalties referring to infractions of corruption, deeds of people that do not work in the public sector.” Due to this observation, the definition from article 175 from the Project of Penal Code has been very much transformed, this is the way it has arrived in the nowadays format of the Law no. 286/2009.

The subjective dimension of the infraction of accepting bribery is fundamentally different in the two laws, in the context of Law no. 286/2009 no longer offering information related to accomplishing or not or delaying the completion of tasks or of an action which is contrary to required responsibilities, having a direct or indirect intention of committing the infraction. By its nature, accepting bribery can only be seen as having a direct intention, while the disappearance of the expression “for the purpose” from the legal text brings nothing but confusion and doctrine discussions on a topic which has been clearly established in practice.

In reality, a contemporary legislator claims that, by defining accepting bribery as an infraction “connected to accomplishment, lack of accomplishment or delay of accomplishment of tasks related to one’s job, or completion of a task which is contrary to the required tasks” and by not relating it to aim in the nowadays law, the new form of the legal text of this infraction covers all the situations in which a person receives bribery, connected to accomplishment, lack of accomplishment or delay of accomplishment of tasks related to one’s job, or completion of a task which is contrary to the required tasks².

In this respect, towards the controversy of decriminalization of receiving inappropriate benefits and towards the modification of the legal text of the infraction of accepting bribery, The Ministry of Justice and Citizen Liberties claims that these modifications are in accordance with The Penal Convention regarding corruption, approved in Strasbourg on the 27th of January 1999, ratified by Romania, by Law no. 27/2002, art. 3, showing that “each part can appeal to legislative measures and others which prove to be necessary in order to incriminate an infraction, according to law or internally speaking, when that infraction has been done on purpose, one of the agents having asked for or having received, directly or indirectly, any inappropriate benefit for oneself or for another person or accepting offers or promises in order to accomplish an action or to make it be accomplished, making use of one’s status in society.” Therefore, the text from article 289 of Law no. 286/2009 perfectly matches the laws given in the mentioned convention; this one does not refer to the clerk’s deed of not rejecting the promise of money or other benefits.

¹ Annex to Decision of Plenum of The Superior Council of Magistrature no. 1317/27.11.2008 regarding the favourable notice given to the Project of Penal Code.

² Point of view about criticism from mass-media – The Ministry of Justice and Citizen Liberties.

On the other hand, we remark the fact that the disposals from art. 3 of the Convention directly underline the purpose of accomplishing an action or not, this action being among the tasks related to job, despite explanations offered by contemporary legislators in this respect. It is also mentioned that similar law can be found in art. 2 paragraph (1) letter (b) from Frame-Decision of Council of The European Union no. 2003/568/JAI from the 22nd of July 2003¹, referring to fight against corruption in private sector. According to this text, the member states must sanction the deed of “asking for or receiving, directly or indirectly, an inappropriate benefit of any kind, for oneself or for a third person involved, or accepting the promise of such an advantage, in order to complete an action or refrain from completing it, not respecting one’s job duties”. Even in this case, we notice the presence of the special purpose which must be in the mind of the legislator.

In accordance to the nowadays system of sanctions, we have solid arguments that Romania did not take into account international settlements rules, such as The penal Convention regarding corruption adopted by The Council of Europe in 1999², ratified by Law no.27/2002³, which underlines in art.19 the obligation of signatory to established sanctions and effective measures, which are appropriate and do not encourage corruption. Moreover, in art.30 point 1 from The Convention of The United Nations against corruption from 2003, ratified by Romania through Law no. 365/2004, the main criterion for establishing penalties for corruption acts is only the gravity of the facts, not the practice of instances.

The infraction of offering bribery, referred to in art. 290 from Law no. 286/2009, consisted of, just like the old one, in “the promise, offering or giving money or other benefits” under the conditions presented in article 289 from the same law, regarding bribery. The special notice that makes the penal fact disappear is maintained, based on lack of guilt as far as the constrained person is concerned, there is also the special notice which attracts lack of penalty in the following three conditions: the person that offers bribery reveals his/her act to authorities before they find out about it. As far as seizure is concerned, this may happen in the case of committing infraction, a small modification appears in the legal text compared to the nowadays rule: money, valuables things or any other offered material benefits are to be confiscated, and when all these are not to be found anymore, the equivalent of these is to be taken. In comparison, the nowadays Penal Code has in paragraph 4, art. 255 the fact that the disposal regarding confiscation of the equivalent goods from art. 254 paragraph 3 is to be applied in accordance, even if the offer has not been followed by approval.

Moreover, in the context in which the rule which incriminates giving bribery explicitly sends us to accepting bribery “under the conditions mentioned in art. 289”, we can conclude that offering bribery to a private clerk, in order for him to correctly do his work at job or to rush the completion of such tasks is no longer considered an infraction.

The new incrimination of influence peddling brings novelties, being referred to in article 291 from Law no.286/2009 regarding The Penal Code, having the following in the first line: “asking, accepting money or other benefits, directly or not, for oneself or for another person, this infraction committed by a person which has the power to influence or lets other people believe he/she has influence over a public clerk, promising that he/she will make that person complete a task, perform it faster or later than normal, delaying things which are part of his/her job or accomplishing tasks which are against his/her legal attributes, this is to be punished with imprisonment from 2 to 7 years.” If we analyze the words from art. 257 from nowadays laws, we notice that the area of ways of committing an infraction

¹<http://eurlex.europa.eu/>

²http://www.cccec.gov.md/Sites/cccec_md/Uploads/Conventia%20penala%20privind%20coruptia.94DDB44F64044B9B97BAA4F1771B4E19.pdf.

³ The Official Monitor, no. 65/30th of January 2002.

has remained the same in time, consisting in accepting and asking, the only visible difference is that fact that nowadays viable legislation refers to “accepting promises, gifts”, while future legislation has the words “the acceptance of a promise of money or other benefits”, “gifts” are no longer mentioned.

In the same time, the area of promises of the wrong-doer regarding his/her influence, which may be real or not regarding the possibility of influencing a public clerk is evidently extended by the legislator through the Law no. 286/2009, the wrong-doer promises that he/she will convince the respective public clerk to complete a task or not, to rush things or to slow them down, all these being part of that clerk’s duties at job, in accordance with the viable incriminating law.

Taking into account the presented topics, we consider that new present laws do not correspond to international standards; therefore fight against corruption cannot be done efficiently, by having a permissive enforcement system that does not envisage the discouragement of such illegal actions

Final Remarks

In Romania, corruption continues to be a largely-spread phenomenon, affecting society in all its forms. Though control and prevention programs have been created, most actions became visible in disproof and punitive actions whose effect was far from being the expected one.¹

The nowadays laws that are characterized by excessive diverse judicial rules, lack of coherence in legislation, lack of clear and firm norms, parallel actions, empty spaces, remains encrypted as it was before, this time in new settlements. Because the new regulation system presents already known concepts in a new light, this aspect clogs prevention and investigation of corruption deeds. In this respect, we notice the fact that according to the new legislative settlement, Law no. 78/2000 will be changed, a new legislative process is necessary in order to update this law to correspond to new incriminations of corruption acts.

As far as the enforcement system treatment is concerned, we appreciate that the new settlement is an obstacle in the fight against the phenomenon of corruption, by reducing penalty limits; this opposes communitarian laws that propose a more severe penalty treatment, in order to discourage such infractions.

From a judicial point of view, there are two successive premises for corruption: the first is the interference of private interest in the horizon of social benefits associated to working in public service, being compulsory premises of every penal deed of corruption, while the second is the arbitrary exercise of the position held, from a judicial or deontological point of view, generating a behaviour which leads to illegal actions. (Opris, 2/2004)

At a European level, fight against corruption is based on judicial and police cooperation inside The European Union, corruption being considered a serious offence in the Directive of the European Council no. 2001/97/CE regarding money laundering. The Commission suggested that a financial prosecutor’s institution should be created, this person’s competence should be exercised in corruption matters that affect the financial interests of the European Union, but this advice has not been taken and transformed into reality yet.

¹ Regular Report.ro. 2003, Strategy paper 2003, The European Commission’s Report regarding Romania.

At a national level, compared to the nowadays viable settlement, the way in which the new Penal Code was designed and elaborated has the effect of not effectively sanctioning corruption deeds. The text of the future code refers to the fact that such illegal actions will have the execution of penalties suspended. Moreover, the prescription of penal responsibility is more rapid, while the given penalties are smaller.

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