REFLECTIONS ON THE NEW REGULATIONS FROM LAW NO. 286/2009 REGARDING THE CRIMINAL CODE CONCERNING THE CORRUPTION OFFENCES. ASPECTS OF COMPARATIVE LAW

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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.

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JEL classification: K14

1. INTRODUCTION

In the process of adaptation of the global social system to the conditions of the competitive market economy, the risk factors have multiplied, and corruption has become a structured, specialized and professional phenomenon which, through informal networks of
organizations and persons, can influence decision factors from the sphere of politics, administration or justice, and implicitly, of national security.

From the legal point of view, for most of the criminal systems, corruption is a normative priority concept, which designates the breach of moral and legal norms that govern the exercise of a public function [Baciu D., Radulescu S.M., 1994, 16].

The doctrine emphasizes the difficulty to define corruption because of the multiple forms of manifestation, expressing also the opinion that the corruption phenomenon is comprised in only one definition, this “woe” having multiple forms of manifestation.

The presence of corruption has become a constant of our days because of the press campaigns, the multiple means of communication that have transformed it into a subject of maximum interest for the public, increasing the efforts of the international community to find more efficient fight solutions.

The battle fought by Romania against corruption represents, at this moment, the main objective of the domestic politics, aspect that is reflected on the legal field through the adoption of a series of regulations that encourage the development of a safer social environment.

In Romania, the corruption phenomenon represents a problem, due to the clear and direct evidence that can certify the existence of corruption and of the inadequate legal framework, of certain legislative deficiencies that could have as effect the production of corruption acts [Mădaşescu H., 2003, 319].

One of the main causes of the presence and perpetuation of corruption (in justice) is the lack of a coherent and stable legal framework, the magistrates being confronted with a large volume of files where the provisions of several laws are encountered, containing confusing and even contradictory, unclear provisions without juridical rigor, which determines the adoption of some controversial and objectionable solutions.

2. ACCEPTATIONS OF THE NOTION OF CORRUPTION IN THE EUROPEAN CRIMINAL LAW SYSTEMS FROM THE EUROPEAN UNION

As regards the regulation of corruption offenses, including the bribe receiving, the bribe payment and the traffic of influence by Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette no. 510/2009, we notice their incrimination in Title V of the Special Part, article 289-291 regarding the corruption offences and offences at work.

The material element of the objective side in the offence of bribe receiving, regulated by article 289 of Law no. 289/20096 did not remain unmodified. On the one hand, the action is achieved through the same three alternative modalities: pretending, receiving money or other goods or accepting the promise of such goods, with the same acceptations. On the other hand, not rejecting the promise of a certain sum of money or goods is no longer expressly incriminated as a distinctive means of the offence perpetration. Despite this, not rejecting such a promise is equal with their tacit acceptance, and the legislator, incriminating the acceptance did not distinguish between the express and the tacit acceptance. In addition, we notice that in the new regulation, claiming, receiving or accepting the promise of money or other undue goods can occur either for oneself or for another person, thus explicitly providing that receiving the undue good can also occur in another person’s benefit, other than the bribed officer, hypothesis that was not expressly regulated in the law in force.
Regarding the active subject of the crime, it remained qualified, however the position stipulated by the provisions of the New Law regarding the criminal code is that of public officer, and not only officer, as it is defined in article 147 of the current Criminal Code.

In a mode detailed analysis, we notice the fact that the new legal provisions no longer define the term of officer in the sense of criminal law, as it was defined in paragraph 2 of article 147 of the Criminal Code in force. As a result, the function that must comply with the active subject of the crime is that of public officer, as defined in article 175 line 1 of Law no. 286/2009, and namely “the person who, permanently or temporarily, with or without remuneration, exerts tasks and responsibilities, established by virtue of the law, with the purpose of achieving the prerogatives of the legislative, executive or judicial powers (letter a), exerts a function of public dignity or a public function of any type (letter b), or exerts, alone or together with other persons, within an autonomous regime, of another economic operator or another legal entity with state capital in totality or in majority, or of another legal entity defined as being of public utility, tasks related to the achievement of its object of activity (letter c).” Paragraph 2 of the same article incorporates in the public officer term, in the sense of the criminal law, the person who exerts a public interest service for which he/she was invested by the public authorities or who is subject to their control or surveillance as regards the accomplishing of its respective public service. As regards this category of persons, line 2 of article 289 of Law no. 286/2009 regarding the Criminal Code stipulates that the crime from article 1 is punished only in relation with the non-accomplishment, accomplishment with delay or the accomplishment of a contrary act to the work duties.

In conclusion, the crime of bribe receiving was disincriminated for certain categories of persons, that currently fits in the notion of officer, as the article 147 line 2 Criminal code stipulates. Therefore, the current code returns to the punishment of corruption deeds classically, in the case of public officers, including the categories of persons such as the doctors, professors, contracting personnel of the public institutions, however excluding the persons employed in the private sector.

According to article 175 of the Criminal Code Project, line (1) The officer is the person who exerts, permanently or temporarily, tasks which allow him/her to take decisions, to participate to taking decisions or have an influence on taking these decisions within a legal entity that carries out an activity that cannot be the object of the private sector. (2). Also, the person who exerts an activity for which he/she was invested by a public authority and who is subject to its control, is considered an officer.”

Art. 288 line 3 of the Criminal Code Project sanctioned the crime of bribe receiving, if it was achieved by another person that the one mentioned in article 175, therefore by other persons than the officers (referring to the categories mentioned above), case in which the special limits of the punishment were reduced to half.

In the variant adopted and published of Law no. 286/2009, however, this provision is no longer stipulated, renouncing the sanctioning of the crime of bribe receiving in the case of these categories of persons.

In this regard, the Superior Council of Magistrates, in the Notification regarding the Criminal Code [Annex to the Ruling of the Plenum of the Superior Council of Magistrates no. 1317/27.11.2008 ], mentioned that the definition of the term of “officer” is excessively limited, so that it leaves outside the scope, outside the corruption activities, all the activities from the private sector and all those activities that are not exclusively from the public sector (for example the corruption deeds accomplished by the staff from the medical units or state education). In addition, the acts accomplished by persons who exert a public interest profes-
sion, are outside the regulation regarding the sanctioning of corruption offences.” Because of this observation, the definition provided in article 175 of the Criminal Code Project was modified radically, reaching the current form from Law no. 286/2009.

The subjective side of the bribery receiving crime seems to fundamentally differ in the two regulations, in the context in which Law no. 286/2009 no longer expressly stipulates the purpose of accomplishing, not accomplishing or delaying in the accomplishment of an act regarding his/her work responsibilities with the purpose to accomplish an act contrary to these tasks. In this situation, apparently, the issue is that of accomplishing a crime only with the direct intent of the crime or the existence of the possibility to accomplish the crime and with an indirect intent. We opine that through its nature, the crime of bribe receiving is only susceptible to be accomplished with direct intent, and the elimination of the expression “with the purpose” from the legal text only gives birth to confusions and doctrinal discussions on an issue established with certitude in practice.

In reality, the contemporary legislator claims that, through the definition of the crime of bribe receiving as a crime “in connection with accomplishing, not accomplishing, expediting or delaying the accomplishing of an act regarding his/her work tasks, or in connection with the accomplishment of an act contrary to these tasks” and not by relating to the purpose as in the current regulation, the new form of the legal text on the crime covers all the situations that the person receives bribe in connection with accomplishing, not accomplishing, or delaying the accomplishment of an act regarding his/her work tasks, or in connection with the accomplishment of an act, contrary to these tasks.” [1].

Therefore, in the Point of view on the criticisms formulated in the mass-media brought to the public’s attention by the Ministry of Justice and Citizens Freedoms, they clarify the fact that this modification occurred in order to allow the renunciation to the current distinction between receiving bribe and receiving undue goods, distinction that creates difficulties in the field of proofs when the misunderstanding occurred before the perpetration of the act, but the goods were delivered afterwards. Thus, it is claimed that article 289 of Law no. 286/2009 regarding the Criminal Code contains, as a result the current regulation mentioned in article 254 (bribe receiving) and also the one currently found in article 256 (receiving undue goods).

In this sense, compared to the controversial disincrimination of the crime of receiving undue goods and the modification of the legal text of the crime of bribe receiving, the Ministry of Justice and Citizens’ Freedoms claims that these modifications are in conformity with the provisions of the Criminal Convention regarding corruption, adopted in Strasbourg in January 27th 1999, ratified by Romania, through Law no. 27/2002, which, by article 3 shows that “each part adopts the legislative measures and other measures proven necessary to incriminate as crime, according to its domestic law, when it was achieved with intent, the act of one of its public agents to request or receive, directly or indirectly, any undue good for him or anyone else or accept the offer or promise with the purpose to accomplish or abstain from accomplishing a deed in exerting his functions.” As a result, the text proposed through article 289 of Law no. 286/2009 is in accordance with the provisions of the mentioned Convention, the latter not making reference to the act of the officer of not rejecting the promise of money or other goods. On the other hand, however, we notice the fact that the provisions of article 3 of the Convention expressly refer to the purpose of accomplishing or not accomplishing an act that is among the work tasks of the perpetrator, despite the explanations offered by the contemporaneous legislator in this regard. It is also mentioned that the fact that a similar provision is found in article 2 line (1) letter b) of the Framework Deci-
sion of the European Union Council no. 2003/568/JAI from July 22nd 2003, referring to the fight against corruption in the private sector. According to this text, the member States must sanction the act of “claiming or receiving, directly or through a third party, an undue good of any nature, for himself or a third part, or accepting the promise of such an advantage, in order to accomplish or abstain from the accomplishment of an act, by breaching his tasks”. We notice in this case as well, the presence of the special purpose that must be aimed at by the perpetrator.

As regards the sanctioning regime of the crime of bribe receiving, it seems obvious the fact that it is not as drastic as the one established by the Criminal Code in force. Thus, for the bribe receiving, the penalty limits provided by the legislator are prison from 2 to 7 years, unlike the current Criminal Code, which stipulates the penalty of prison from 3 to 12 years. For the achievement of the preventive function of criminal norms under the best conditions, in the case of the norm for the incrimination of the bribe receiving, it was stipulated as complementary penalty the prohibition to exert the right to hold a public function or to exert the profession or activity in whose execution the crime was achieved.

In this regard, the Ministry of Justice and Citizens’ Freedom claims, as regards the quantum of penalties established for the corruption crimes, the fact that the project of the new Criminal Code comprises a replacement of the sanctioning treatment under normal limits. In this sense, the justification brought by the contemporary legislator invokes the fact that the practice of the last decade has proven that the efficient solution is not the exaggerate increase of the penalty limits, for combating criminality. Thus, the scope and intensity of the criminal repression must remain under the established limits, first of all, in relation to the importance of the social value prejudiced for those who breach the criminal law for the first time, growing progressively for those who commit more crimes before being finally convicted, and more for the recidivists. Besides, the project of the new Criminal Code comprises a more severe sanctioning regime for the recidivists, by instituting the arithmetical cumulation [1]. As a counter-argument, in this regard they invoke the critical position of the European Commission, which, on the subject of this aspect, considers that the courts of law of Romania do not deliver discouraging rulings for the achievement of corruption acts, pronouncing penalties with the prison within small limits or with the suspension of the penalty execution. Thus, the Report in July 2008, and the Intermediary report from 12.02.2009 shows the existence of unjustified elements of the courts towards the persons guilty for accomplishing corruption crimes.

Related to the current sanctioning regime, we can argue the fact that Romania disdained the provisions of certain international regulations, such as the Criminal Convention regarding corruption adopted by the Council of Europe in 1999, ratified by Law no. 27/2002, which in article 19 stipulates the obligation of the signatory states to establish sanctions and real measures, proportional and discouraging for the perpetration of corruption crimes. At the same time, by article 30 point 1 of the United Nations Convention against corruption from 2003, ratified by Romania through Law no. 365/2004, the criterion of establishing the penalties is provided to be only the gravity of corruption crimes, and not the practice of courts.

The crime of bribe offering, provided in article 290 of Law no. 286/2009 consisted, such as in the old regulation, in the promise, offer or payment of money or other goods” in the conditions provided in article 289 of the same law, regarding the bribe receiving. The special cause that eliminates the criminal character of the act is also maintained, founded on the lack of guilt of the perpetrator determined by constraint, and the special cause of non-
punishment, stipulating the same three conditions: denunciation of the act to the briber, to an authority, before the criminal prosecution body was notified. As regards the confiscation measure that can be ordered in the case of a crime achievement, a slight modification appears in the legal text compared to the current regulation: it is ordered that the money, values or any other goods offered or given are subject to confiscation, and when there are no longer founds, the confiscation by equivalent is ordered; by comparison, the current Criminal Code provides in paragraph 4 article 255 the fact that the clauses regarding confiscations and confiscation by equivalent of article 254 line 3 are applied accordingly, even if the offer was not followed by acceptance.

Moreover, in the context that the norm of incriminating the crime of bribe payment expressly refers to the one regarding the crime of bribe receiving, through the expression “in the conditions mentioned in article 289”, we can conclude that the bribe payment to an officer from the private sector, in order for him to concretely accomplish his work responsibilities or expedite their accomplishment, no longer represents crime.

The new incrimination of the crime of traffic of influence, brings, in its turn, a series of novelties, being stipulated by article 291 of Law no. 286/2009 regarding the criminal code, that provides in line 1 that: “claiming, receiving or accepting money or other goods, directly or indirectly, for oneself or another person, accomplished by a person who has influence or who gives the impression of having influence on a public officer and who promises that he would determine him to accomplish, expedite or delay the accomplishment of a act that represents one of his work tasks or to accomplish an act contrary to these tasks, is punished with prison from 2 to 7 years.” As regards the provisions of article 257 of the current regulation, we notice that the sphere of means to accomplish the act has remained in essence the same, consisting in the actions of receiving, claiming or accepting, the only notable difference being the fact that while the legislation in force refers to “accepting promises, gifts”, the future regulation takes into account “accepting the promise of money or other goods”, not mentioning the notion of “gifts” anymore.

At the same time, the sphere of promises of the perpetrator regarding the influence he has or claims to have on a public officer is considerably increased by the legislator by Law no. 286/2009, the perpetrator promising to intervene at the respective officer in order to determine him to accomplish, not accomplish, expedite or delay the accomplishment of an act that belongs to his work tasks or accomplish an act contrary to these tasks, compared to the accomplishment or non-accomplishment of an act that belongs to his work tasks, as the current incrimination norm stipulates.

Regarding the sanctioning regime, we notice the fact that in this case the penalty limits were decreased. We concretely refer to the special maximum penalty that was decreased from 10 to 7 years, for the same considerations mentioned above.

As regards the aspects presented, we opine that the new regulation does not comply with the international standards regarding the regulations of the crimes in this sphere, the fight against corruption being found in the impossibility to be carried out efficiently through a permissive sanctioning regime and that not tend to discourage the accomplishment of these crimes.
3. INCriminating THE CORRUPTION OFFENCES IN THE ROMANIAN LEGISLATION. THE EVOLUTION OF REGULATIONS

The crimes comprised in the generic notion of “corruption crime” are tackled in the first chapter of the title consecrated in the special part of the Criminal Code to the crimes that breach activities of public interest or other activities regulated by law, chapter entitled “work crimes or work-related crimes”.

Not only do the corruption crimes have the same generic juridical object, but they are strongly connected with their special legal object and namely the social value defended (deducted from the fascicle of values that form the generic legal object), through their incrimination aiming at defending the good development of the public authorities and units activities, of which refer to article 145 Criminal Code and implicitly, the defense of legal interests of persons. Thus, the special legal object is taken into account both when establishing the generic degree of danger, and when determining the degree of concrete danger of acts that belong to this group subdivision. The corruption crimes that we speak about – especially the traffic of influence, receiving and giving bribe are lacking material object, although in an opinion, the material object of crimes would consist in the briber’s performance” [Dongoroz V., Kahane S., s.a.].

The direct active subject (perpetrator) of the crime of bribe receiving and also that of the crime of receiving undue goods is qualified through the characteristic of officer, as it is defined in article 147 Criminal Code, even if the acceptation is much broader than the one established by Law no. 188/1999 regarding the status of public officers. When considering the necessary characteristics in order to be active subject of the mentioned crimes, they are included by the doctrine in the work crimes category.

The quality of public officer implies the existence of a work responsibility, as a de facto situation, or is the consequence of signing a labour contract with one the mentioned units, by whose virtue the subject exerts the tasks of a function. The commission can be permanent or temporary, the only condition being that the respective person belong to the work team of one of the departments mentioned in article 145 Criminal Code and is subject to the Internal Regulations Policy that regulates the work organization and discipline. In addition, the title of the commission or the modality of investment is not relevant, being sufficient that the active subject of the crime exert a commission in the service of a public authority, public institutions or other legal entity of public interest [Mastacan O., 2008, 27-28].

As regards the notion of “officer” defined by article 147 line 2 of the current regulation, it is appreciated that, no matter whether the commission in the service of a legal entity of private law is permanent or temporary, a labour contract in written form is not necessary for the respective person to be considered in the service of a legal entity. The work report supposes however that the effective exercise of the attributes specific to a function within the legal entity of private law, which confers to the legal entity a right of disposal and control on the activity of the natural person who exerts that commission, being a subordination report. They expressed the opinion that the meaning of the notion of “officer” allows the incrimination and criminal sanctioning of the so-called “private corruption”, unlike the “public corruption”, specific to the public institutions and public officers [Basarab M., Pasca V., Mateut G., Butiuc C., 2007, 697].

On the other hand, the bribe payment crimes or traffic of influence crimes, are considered crimes connected to work, with the possibility that the direct active subject is any
person, however the acts are accomplished in relation with the activity of an officer [Toader T., 2002, 158].

In the case of corruption crimes, the state is the general passive subject whose interests are prejudiced through the accomplishment of facts. The special passive subject is always the public authority or the institution in whose service the officer is employed (in the case of receiving or award of bribe) or those with suspicion of being dishonest (in the case of the traffic of influence).

Sometimes a natural person can also be the special passive subject (for example, the person who paid bribe, in the situation that he was constrained by the corrupt officer; the officer whose honesty is doubted by the traffic of influence, if he contributed with nothing to the perpetration of the act by the author). This special passive subject is however a secondary or adjacent subject, since the main subject remains in this case the state.

Under the aspect of the material element, the crimes of bribe receiving, bribe payment and traffic of influence, present several alternative modalities, in the sense that, in the case of each of these crimes, it can be achieved through several material, physical activities, alternatively provided in the incriminating text, the accomplishment of only one being sufficient for the existence of the crime. In exchange, the crime of receiving undue goods knows only one normative variant, respectively receiving money or other goods by an officer, after accomplishing an act by virtue of his function and to which he was forced according to it.

We must notice the fact that, regarded from the point of view of criminal forms, in the case of receiving and paying bribe, and in the case of traffic of influence, among the alternative actions of inactions, only one represents the active form, namely, the act accomplished (Receipt of money or other goods, to receiving bribe and traffic of influence; giving money and other goods, to giving bribe) ; the others (claiming money or goods, accepting or not rejecting the promise – to taking bribe ; the promise and offer of money or other goods – to taking bribe; claiming money or other goods , or accepting promises – to the traffic of influence ) if we consider them in their essence, they are only imperfect forms, in reality, or in other words, preparatory acts or execution acts remained in the stage of attempt, that the legislator has incriminated independently, putting them on the same side with the perfect form, with the consumed crime [Toader T., 2002].

Thus, bribe consists in the conjugate actions of giving and receiving bribe and is incriminated according to two systems : the system of incriminating the crime unit – which incriminates as crime only the bribe receiving and the system of bilateral incrimination or of double incrimination, that sanctions both the payment of bribe and the receiving of bribe, as distinctive crimes [Basarab M., Pasca V., 2008, 615].

The national legislation adopted the system of double incrimination, appreciating as necessary to repress both the passive corruption act and that of active corruption [Ciuncan D., 2007, 100-103].

In the case of crimes that we mentioned above, the material element, in any of its alternative modalities, is accompanied by several concomitant conditions that refer, among others, to the nature of the typical action’s object (money or other goods) and its character (undue) , the moment of the perpetration of the action or inaction (before or during the accomplishment of some work acts by the active subject – to receiving or giving bribe, and traffic of influence; after making the work act – to receiving undue goods) etc.

All the crimes mentioned are instantaneous crimes, consuming in the moment of the achievement of one of the alternative perpetration modalities. It is however appreciated that
the crime can have a continued character, when, for example, money or other goods are handed over in successive rates, situation when we distinguish also a moment of depletion [Mastacan O., 2008, p. 103, 106, 129, 132].

These crimes are a part of the category of formal crimes, also called danger or attitude crimes and their essence is the consummation at the same time with the performance of the incriminated action or inaction. The result does not consist either in a material consequence, or in the situation of receiving money or other material profits, but in a state of danger generated by the commission of the incriminated actions or inactions.

As an element of singularity, the literature revealed the only situation where we can talk about a material consequence consisting in an injury caused to somebody's patrimony. This aspect concerns the hypothesis where the material element consists in receiving bribe, pretended with the aim to accomplish a legal act regarding the job tasks, the immediate consequence consisting also in the damaging of the patrimony of the person forced to give bribe. In this sense, there is a report of causality between the suffered material damage and the criminal action performed by the public officer.

In the case of these crimes, the subjective part concerns the intention qualified by the goal, being susceptible of both preparation acts and attempts. The law does not stipulate though, the punishment of such crimes [Basarab M., Pasca V., 2008, 629].

The corruption crimes are punished with prison between different limits. The crime of bribe accepting also stipulates the complementary punishment of interdicting some rights, for this crime being also stipulated the aggravating form that takes into consideration the special quality of the authority’s, that of public officer with control responsibilities. For the crime of bribe offering, the legislator stipulates in paragraph 2 a special cause that removes the crime’s criminal nature, consisting in committing the crime under compulsion, thus the perpetrator being deprived of any culpability. At the same time, according to paragraph 3, there is a special cause of non-punishment, when the briber denounces the fact before the prosecution has been seized for that crime. In these two cases, the money, the values or any other goods are returned to the person who offered them [Toader T., 2002, 286].

Against the persons who committed these office or office-related crimes there are some safety measures of special confiscation of money, values or other benefits that were the subject of taking bribe, offering bribe, traffic of influence.

The corruption crimes under discussion are also covered by Law no. 78/2000 regarding the prevention, the discovery and the punishment of corruption acts. This clause regulates four categories of crimes that fall within the scope of corruption: corruption crimes, crimes assimilated by the corruption crimes, crimes that are in direct connection with corruption crimes or crimes assimilated by them, as well as crimes against the financial interests of the European Communities.

Among the facts set out in the 3rd Section of Chapter III of Law 78/2000, it is listed at article 11, as a crime assimilated by the corruption crimes the act of a person who, by virtue of his/her job, of the assignment or of the task received, is mandated to supervise, control or liquidate a private economic agent, to do a job for it, to mediate or facilitate the conduct of some commercial or financial operations by the private economic agent or to participate with capital in such agent, if the act is likely to bring unfair benefits directly or indirectly.

The active subjects of this crime are the persons who have a public job, perform a responsibility or a task, regardless the way they were invested within the public authorities or public institutions, persons who perform permanently or temporarily, according to the law, a job or a task, to the extent that they participate in or can influence the taking of decisions
within public services, autonomous administrations, trading companies, national companies, national institutions or other economic agents, persons who have control responsibilities, according to the law, who provide specialized assistance to private economic agents, to the extent that they participate in or can influence the taking of decisions, as well as for persons who, regardless of their quality, perform, control or provide specialized assistance, to the extent that they participate in or can influence the taking of decisions, regarding operations that stimulate the capital circulation, bank operations, exchange or credit operations, investments in stock exchanges, insurances, in mutual investments or regarding the bank accounts and those assimilated by these, domestic and international commercial transactions, thus excluding other natural persons [Ciuncan D., 2007].

Receiving the legal task to supervise, control a private economic agent, the subject of the crime described at article 11 of Law 78/2000 acts in the favor of the economic agent without having this right. The persons who have the task to liquidate a business, meaning the persons that exercise the job of liquidator, body that applies the legal procedure of the judicial reorganization and of the bankruptcy.

The active subject exercises these activities on the passive subject, which is a private economic agent, excluding the economic agents where the state or an authority of the local public administration is the majority stakeholder, as well as the public authorities or institutions mentioned at article 10 of Law 78/2000.

The objective side of the crime stipulated at article 11 of the law mentioned above supposes from the part of the active subjects an action of accomplishment of a task, of mediating, making easier a commercial or financial operation or an action of participation with capital.

The scope of commercial operations at large comprises also the bank operations, meaning: liabilities, term deposits, deposits at sight, in the account, with cash and securities, assets, credit granting; subsidiary operations, buying, custody, management of monetary assets, transfers and other such actions.

Financial operations may concern profit tax, tax on transactions, other taxes, exchange operations, tenders or other operations.

Money or other benefits received, claimed or promised must be unfair, meaning legally undue, to have the character of retribution, as the invocation of another title attracts the qualification of abuse of office [Ciuncan D., 2007].

4. CORRUPTION CRIMES REGULATED IN THE LEGISLATION OF THE EU COUNTRIES. COMPARATIVE ANALYSIS

The main directions of action of the EU regarding the corruption issue are referring first to the elaboration of a common policy at the level of the organization to fight against this phenomenon, not only among the community or national public officers, but also in the private sector.

Whereas the fight against corruption acts is primarily a matter of criminal law, at the community level it was felt the need to commonly agree on some definitions, incriminations and sanctions as a part of an interdisciplinary community policy (Statement of the European Commission COM (2003) 317/May 28th 2003, published in the Official Journal of the EU). The Union is decided to emphasize both the rendering in the national legislation of the provisions of the judicial instruments for fighting against corruption adopted within the organization, and fighting measures within the private sector.
The Commission states that it is very important to pay more attention to the fighting actions against corruption, as well as to the activity of its criminal prosecution and trial, making a call, at the same time, to the Member States to introduce in their laws common provisions regarding the rules of evidence, confiscation of the crime’s products, specific techniques of investigating and protecting the people who denounce corruption acts, the victims and witnesses of such acts.

To encourage the evolution of anti-corruption policies in the new member states of the Union, the European Commission proposes the intensification of the efforts to elaborate a global anti-corruption strategy and to establish some general principles in the field that are going to be put into practice by these states.

Regarding the responsibility of public officers, additionally to their criminal responsibility for corruption crimes, both the national legislation and the norms of Community Law stipulate and administrative-disciplinary responsibility, the job reports of the public officer being suspended as a consequence of the trial court for committing such a crime, and the suspension lasts until the moment that the decision given by the seized jurisdictional authority becomes final.

In the Romanian legislation, Law no. 188/1999 regarding the Status of public officers, at article 94, paragraph 1, letter m) stipulates that the job reports get suspended by right the moment the court trial of the public officer was disposed for committing a crime like those stipulated in article 54, letter h), which refers to, among other things, to job crimes and crimes connected to the job.

The status of public officers in the European Community – Board Regulation no 259/1968 stipulates their job suspension for the crimes of common law, observing the man’s fundamental rights, in the sense of assuring a minimum level of subsistence, situation that is missing in the case of national legislation and implicitly the court houses are forced to offer efficiency to the previsions of article 6, paragraph 2 from ECHR. At the same time, the community law provides the protection of the public officer also by the limitation, in time, of the suspension period.

It is estimated that the Romanian legislator, setting up the suspension by right of the public officer’s job reports, in case of court trial, for certain categories of crimes, without previous disciplinary investigations, is in the position of reversing the presumption of innocence set up by article 6, paragraph 2 from the European Convention of Human Rights. Taking into account the principle of subsidiary, the guarantee of the rights consecrated by ECHR and the need to remove the possible consequences determined by infringements of the state, the national judge is forced to apply directly the norms stipulated by article 6 of the Convention.

More than that, we specify that according to the Recommendation no. 16/2003 of the Committee of Ministers within the Council of Europe, the execution of the administrative decisions, including those that concern the suspension of job reports of public officers, must take into account the rights and interests of the individuals in order not to bring serious damage to them.

Recommendation no. 89/8/September 13th 1989 of the Committee of Ministers disposes that the competent jurisdictional authority to be forced to take appropriate additional measures when the execution of the regulation is capable of causing serious damage to individuals it addresses to. In this sense, the practice of some courts in Romania appreciates that it is imposed to take additional measures regarding the suspension of the execution of the administrative act through which it was disposed the suspension by right of the job reports.
of the public officers sent to court for corruption crimes in the situation where the legality of this act was disputed in legal department, if it is capable to damage seriously the interests of the person under discussion [Sentence no. 1014/15.09.2009, Valcea Court].

In what concerns the legislation of the member states of the EU, a comparative analysis shows that the corruption crimes are incriminated similarly under the aspect of constitutive elements, but they benefit of a more drastic sanctioning regime.

In France, the crimes of bribery and traffic of influence are comprised in articles 432, 433 of the French Criminal Code, being structured in two different categories. Thus, article 432 regulates the passive corruption and the traffic influence regarding the public jobs, and article 433 applies to the active corruption and the traffic of influence committed by individuals (private persons).

The susceptibility of committing corruption facts by French citizens invested with public power assigned with a task in the public service or a public mandate is manifested. Such a person is forbidden by law to accept benefits of any kind for assurance, or to refrain from a conduct resulting from his/her responsibilities, task or mandate, or to exercise his/her influence, either real or presumed, with the aim to obtain from a public body or a public administration body a fee, a job, a commercial transaction or any other useful decision. It is also forbidden by law to offer any form of benefit with the aim to obtain any of these facilities from a person invested with public power, which was assigned a task in the public service or a public mandate.

A separate section is dedicated to the active or passive corruption of official persons within the public administration of the European Communities, of the officials of the member states of the EU, regulated by the French Criminal Code at article 435-1.2.

"To apply the convention regarding the fight against the corruption of the public officers of the European Communities or of the public officers of the member states from the European Union signed at Brussels on May 26th 1997, it is punished with 10 years of prison and 150,000 Euro fee, the act of a community public officer or that of a national public officer from a member state of the European Union or of a member of the Committee of the European Community, of the European Parliament, of the Court of Justice or of the Court of Accounts within the European Communities to ask for or to approve, without right, at any moment, directly or indirectly, offers, promises, donations, presents or advantages of any kind in order to achieve or to refrain from achieving an act connected to his job, which is one of his responsibilities or connected to his mandate, or to facilitate the achievement of such act [www.legifrance.gouv.fr/wAsped/RechercherSimple].

Regarding the sanctioning regime, the acts committed by a person who holds a public function or by a public officer of a public entity on duty and committed with the intention to breach the law are sanctioned with a punishment of 5 years in prison and a 75,000 euro fee [article 432-1, Criminal Code]. If the crime was premeditated by a person that holds a public job or by an employee of a public entity on duty, this one is liable to a punishment of 10 years in prison and a 150,000 Euro fee [article 432-2, Criminal code].

According to the gravity of the crime and to the degree of culpability, such crimes are liable to a punishment of 2 years in prison and a 50,000 Euro fee, a punishment of 5 years in prison and a 75,000 Euro fee, respectively a punishment of 10 years in prison and a 150,000 Euro fee.

Besides the punishments presented above, the corruption crimes stipulated at article 432 from the French Criminal Code can be sanctioned also by the forbiddance of some rights – civil, social or parental, by the forbiddance of the right to hold public jobs or to ex-
exercise a profession or to develop an activity like the one that was used to commit the crime and by the confiscation of the money or of the products acquired by the committing of the criminal deed (in case that these goods are not given back to the victims), or the display and/or publishing of the conviction ruling. Thus, the confiscation represents an additional punishment that cannot be disposed by conviction ruling. It is also possible to use the prison punishment in view of ensuring the execution of the obligation to recover the value of the goods. In practice, and in order to simplify things, confiscation is disposed only on goods that were withdrawn previously. On the contrary, fees are applied.

In Germany there is a strict regulation of the corruption phenomenon, especially in what concerns judges, arbitrators and militaries within the German Army Forces.

It is qualified as a crime of “bribe offering” the deed of a person who grants a benefit to the public officer regarding the achievement of his/her responsibilities, or in case of resolution of commercial contracts. At the same time, the bribe acceptance or offering are incriminated differently when they refer to electorate, when the goal is that of influencing the votes or that of determining people to refrain from the vote.

In the German Criminal Code the bribe acceptance or offering is regulated as distinct crimes as well, in the case of parliamentarians, the goal being that of buying or sell a vote within the Federal or European Parliament.

Regarding the simple acceptance of an unjustified benefit and if this gathers the constitutive elements of the crime “bribe” even when it is not followed by an illegal conduct, there were a lot of controversies in the German doctrine. Thus, there is a clear trend to avoid the amplification of the criminal phenomenon, by extending the scope of deeds in connection to the bribe acceptance or offering, maybe even in a mediated form, on certain categories of people holding public jobs who must refrain from accepting any unjustified benefit.

The German Criminal Code sanctions the acceptance of some financial or intangible benefits by dignitaries and by persons who hold a public job with a punishment between 3-5 years, if the beneficiary is accorded in view of influencing a deed of a judge or an arbitrator [German Criminal Code, section 331, paragraphs 1 and 2].

The acceptance of some financial or intangible benefits with the goal of achieving an act regarding the obligations of a person who holds a public function or with the goal of doing an act contrary to these obligations is punished with 5 years in prison and with 10 years in case that the crime is committed by a judge or by an arbitrator [German Criminal Code, section 332, paragraphs 1 and 2].

The granting of benefits is regulated by section 333. It imposes a punishment of up to 3 years in prison or a fine for the persons engaged in a public position, and 5 years in prison for the cases when the deed was accomplished by judges or adjudicators [the German criminal code, section 333, paragraphs 1 and 2].

The person who offers or grants a benefit to another person engaged in a public position risks imprisonment from 3 months to 5 years or, for less serious crimes, a punishment of up to 2 years in prison or a fine. [The German criminal code, section 334, paragraph 1].

When bribe is given by a judge or by an arbitrator who has performed a deed that is against their work endeavors, the penalty will consist in imprisonment between 3 months and 5 years, and for deeds that will be accomplished in the future, the punishment is from 6 months to 5 years in prison [The German criminal code, section 334, paragraph 2].

More serious instances of these crimes refer to contexts in which bribery consists in a high amount of money or in which the benefits have been accepted repeatedly, and in these cases the deed is punished with imprisonment from 1 to 10 years, and if the bribed person is
a judge or an adjudicator, the punishment applied is between 2 and years. [The German criminal code, section 335, paragraph 1]. Another more serious situation refers to a crime committed in an organized manner and frame, and the legislator will take into account the fact that in these situations the purpose aimed by the perpetrator can be reached more easily.

Besides the fine and the punishment with imprisonment, German law also imposes the seizure and the loss of the property right over the goods obtained by crime. Both measures can be applied irrespective of whether a conviction has been ruled or not. Moreover, both the goods obtained by crime and the means used to perform this crime are subject to sequestration. [The German criminal code, sections 73 and 74].

The Hungarian criminal code defines two types of bribery: bribery in the public sector and bribery in the economic field (bribery in the private sector). Besides, both types of bribery can be active or passive, according to whether the defendant receives or gives bribe and whether they promise or ask for bribe [http://www.legislationline.org].

There is also a code distinction between bribery at the national level and bribery at the international level. If a specific corruption act is classified as a serious crime and represents bribery in the public sector, it will be punished with imprisonment from 1 to 5 years, with the condition for the crime not to have been committed by a person engaged in a public position, in which situation the punishment is from 2 to 8 years in prison. If the crime is a violation of the work responsibilities or an abuse on duty of the defendant, the punishment with imprisonment can be from 2 to 8 years or from 5 to 10 years, according to the circumstances in which the deed was committed. [Article 250, the Hungarian criminal code]

Bribery in the economic field is punished with up to 2 years in prison in the case of contraventions and from 1 to 5 years in prison in case a serious crime has been committed. If the deed consists in a violation of the work responsibilities, the applied punishment is between 2 and 8 years in prison or between 5 and 10 years in prison, in the case of a conspiracy or a habitual achievement of profit generating crimes. [Article no. 251 and 252, Hungarian Criminal Code].

Besides the punishments with imprisonment that can be applied to persons convicted for corruption crimes, the code imposes a seizure as a compulsory measure. [Article 77/B, the Hungarian Criminal Code]. This code imposes the seizure of the goods acquired through crimes, be these primary goods (financial earnings) or secondary goods (goods that have replaced the items resulted from crimes) and, in case that the goods resulted from crimes no longer exists or can no longer be identified, the seizure of a financial expression of these goods may be applied. [Article 77/C, Hungarian Criminal Code].

Both the British common law (unwritten laws, based on legal precedents) and statutory laws (written laws adopted by the Parliament) mention corruption crimes. Common law includes crimes that imply the bribery of persons engaged in public positions, while three different statutory criminal laws include provisions referring to corruption: the Law of 1889 regarding corrupt practices of public authorities; the Law regarding corruption, of 1906; the Law of 1916 regarding the prevention of corrupt practices. The maximum punishment mentioned for corruption crimes is 7 years in prison.

Besides a punishment of 7 years in prison, seizure may also be applied when the perpetrator has been convicted for a crime that has generated profit (financial earnings or benefits). Generally, seizure is reflected in a regulation that forces the perpetrator to pay an amount equal to the value of the benefit obtained by committing the crime. The specific goods resulted from crimes are not mentioned. Courts of law also have the possibility to im-
pose the seizure of any object that has been used in the crime (for example, means, devices, etc.).

In the Czech criminal law, the term “corruption” is not defined. Usually, “bribery” is known as a corruption deed, as mentioned in Section 3, Chapter III of the Czech criminal code, which defines crimes that harm public order. By incriminating “bribery” crimes in article no. 160-162 of the Czech criminal code, the purpose was to protect the integrity of public life and to preserve objectivity in the issues regarding the public interest of the citizens.

According to the article no. 160 of the Czech criminal code, the “bribery acceptance” crime is attributed to the criminal who, when performing public duties, accepts bribery or encourages the promise of bribery. Such a deed is punished by up to two years in prison and by prohibiting the right to remain employed on the position. In case the criminal requests bribe for accomplishing any public interest duty that is their responsibility, the punishment is imprisonment from six months to three years. If such a deed is committed by a public officer, the punishment is imprisonment from one to five years.

According to the law text of the Czech criminal code, the author of the “bribery” crime is the person who brings, offers, or promises bribe for accomplishing public duties.

Article 162 of the Czech criminal code, which regulates the “indirect bribe” crime, stipulates that anyone who requests or accepts bribe in order to try to influence a public officer in the use of their authority or because they have thus influenced a public officer may be imprisoned up to two years. The action of a person who brings, offers, or promises bribe to another person, so that the latter would influence a public officer on duty, or if the former has already influenced the public officer, is also punished with up to one year in prison.

A “bribery” crime is also considered to be the situation when a person gives bribe to a mediator who should pass it on to a public officer, irrespective of whether the mediator eventually gives the bribe to the public officer or not.

The phrase “accomplishing public activities” is interpreted by judges as referring to all the activities related to the accomplishment of important social duties. This is why judges consider that governmental and administrative bodies have a decisive function in solving public issues. Therefore, the connection between the bribe and the accomplishment of the work responsibilities of public officers must always be proven.

According to the Czech legislation, at present, “bribe” is considered an unjustified advantage, often consisting in a direct earning (financial or of a different nature), or in another type of benefit, such as, for instance, a mutual service.

In what concerns the exercise of the state and administrative power, the current Czech legislation does not tolerate bribery even when its nominal value is low.

Art. 163 of the Czech criminal law mentions a non-punishment clause, that states that the situation in which the person who brings or promises bribe because they were asked to by another person is not punished, if the former denounces the act, without delay, to the prosecutor or to the police organs, an aspect similar to the provisions of national laws, which stipulate a situation for not punishing the briber.

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<th>Table no. 1 Criminal law in EU countries</th>
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<tr>
<td><strong>FRANCE</strong></td>
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Source: [http://www.legislationline.org/documents/section/criminal-codes]
4. CONCLUSIONS

In Romania, corruption is still a widely spread phenomenon, which affects society under all its aspects. Although corruption control and prevention programs have been designed, most of the actions have not translated mainly into measures for fighting and punishing corruption, and their result is far from the one expected.

The legal frame characterized at present by an excess of diverse legal norms, legal incoherence, the lack of clear and firm regulations, parallels, and free spaces, remains equally ciphered in the new legislation.

Since the new regulation sheds a new light over already consecrated notions, this aspect makes the prevention and analysis of corruption acts even more difficult. In this context, we also stress the fact that, in relation to the new legislation, Law no. 78/2000 will be subject to a series of modifications, requiring a new legal process of update, in order to make it answer to the new incriminations of corruption crimes.

In what concerns the sanctioning regime of the crimes we have mentioned, we estimate that the new legislation, by reducing the punishment limits, represents an impediment in the fight against the corruption phenomenon, an aspect that is against community regulations, which suggest a more severe sanctioning regime, meant to discourage the accomplishment of the crimes included in this area.

Normally, the corruption relation has two subjects: the corruptor and the corrupted. A correct and balance vision of the corruption phenomenon would have to avoid focusing on one or the other of the two social actors, because no matter who has the initiative, corruption is only accomplished through the convergent actions of the two partners.

From a criminal point of view, there are two successive premises of corruption: the former is the intervention of private interest, in the horizon of the duties associated with the exercise of a public function, which are compulsory premises for any criminal corruption act, while the latter is the arbitrary exercise of the prerogatives of the position, either from a legal or from a deontological perspective, generating behaviors with a criminal character [Octavian Opris, Documentary Bulletin no. 2/2004 of P.N.A./D.N.A].

The fight against corruption at a European level is centered upon the matter of legal and police cooperation within the European Union, and corruption is qualified as a severe crime in the contents of the Directive of the European Council no. 2001/97/CE regarding money laundry. The Commission has suggested the creation of the institution of a European financial prosecutor, whose competence would also apply in corruption acts that harm the financial interests of the European Union, a suggestion that has not yet been put in concrete form.

At a national level, in comparison with the current regulation, the manner in which the new criminal Code as a whole has been conceived and drawn results in the actual lack of punishment of corruption deeds. The text of the future code states that for such deeds, it is possible to suspend the execution of punishments. Also, the banishment of criminal responsibility for such deeds is faster, and the punishments that still apply are smaller.

In spite of these aspects, a series of progresses have occurred in the fight against corruption at a legal level [TI-Global Report on Corruption 2009, Romania]. Therefore, starting with 2007, criminal responsibility of the legal persons for deeds committed by their employees has been regulated. Although this has not improved the individual responsibility of the staff, with this modification, criminal responsibility became for the first time effective
for legal persons, serving as a stimulus for companies in ensuring intolerance to corruption acts within their own organization.

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[12] Sentence no. 1014/15.09.2009, Valcea Court, commercial and administrative department, unpublished
[13] Hungary’s evaluation report adopted by GRECO within the 13th plenary session from 18th-24th March 2003, Strasbourg, France; and the second Evaluation Report of Hungary adopted by GRECO within the 27th plenary session from 6th-10th March 2006, Strasbourg, France

Note
Point of view regarding the critics formulated in the mass-media – Ministry of Justice and Citizens’ Freedoms