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Incrimination of passive bribery in the Romanian criminal legislation

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Abstract:

The present study shows how the Romanian criminal law incriminated passive bribery, in accordance with the obligations assumed by Romania through the two international conventions on corruption – the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption. As regards the incrimination of the passive bribery of public officials, Article 289 of the new Criminal Code criminalizes the taking of bribery, and, as concerns corruption in the private sector, Article 308 of the same code stipulates that the incriminating provisions regarding acts of corruption apply correspondingly also to the acts committed by or in connection with persons who exercise, permanently or temporarily, with or without payment, an assignment of any nature in the service of a natural person from those referred to in Article 175 para. (2) within any legal person.

Keywords: *passive bribery, taking a bribe, trading in influence, public official, public officer.*

1. Preliminaries

The fight against corruption and, in particular, against the corruption of public power officials has become a priority across Europe, meaning that, under the aegis of the Council of Europe was adopted in Strasbourg, on January 27th 1999, the Criminal Law Convention on Corruption (hereinafter referred to as the "Convention"), which entered into force on July 1st 2002. Romania has joined this continental approach primarily due to the desire of joining the European Union, by ratifying through Law no. 27/2002[1] the Convention, after having previously adopted Law no. 78/2000 on the prevention, detection and sanctioning of corruption,[2] a law which, subsequently, was amended and supplemented in accordance with the provisions of the Convention.

Subsequently, in accordance with the desiderata of the Convention, our country, as a member of the European Union, continued this path by harmonizing its legislation in the field, a trend which culminated with the adoption, in 2009, and the putting into force, in 2014, of the new Criminal Code.[3]

In transposing the desire to fight against corruption – "the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against

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[1] Published in the Official Journal of Romania no. 65 of January 30th 2002.

[2] Published in the Official Journal of Romania no. 219 of May 18th 2000.

[3] The Criminal Code was adopted by Law no. 286/2009, published in the Official Journal of Romania no. 510 of 24 July 2009 and entered into force on February 1st 2014, being enacted by Law no. 187/2012, published in the Official Journal of Romania no. 757 of November 12th 2012.

corruption, including the adoption of appropriate legislation and preventive measures", both in public and private spheres, the Member States of the Council of Europe and the European Community have adopted in Strasbourg, on November 4th 1999, the Civil Law Convention on Corruption.[4]

The Civil Law Convention on Corruption gives, in Article 2, a definition of corruption, which "means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof".

The 1968 Criminal Code[5] did not use within its content, probably due to ideological reasons, rooted in the socio-political reality at the time of its adoption, the notion of "corruption", incriminating in Title VI of its Special Part the offenses against public interest activities or other activities regulated by the law,[6] and in Chapter I of this title, together, misfeasance in public office and corruption offenses under the term "office offenses or office-related offenses",[7] this regulatory approach being criticized ever since the publication of the Code, under the consideration that "in a perfect classification, the chapter should have included only the office offenses, yet, the requirements of a perfect classification could not be met because the close relationship which they have with the office duties has imposed the inclusion in this chapter of the office-related offenses as well".[8]

The notion of corruption was, however, used even under the old Criminal Code, together with the adoption of Law no. 78/2000, where it appears from the very title, the law providing, in its Article 5, by reference to the provisions of the Criminal Code and those contained in itself, which are the corruption offenses, those assimilated to corruption offenses and those directly related to corruption offenses.[9]

The new Criminal Code incriminates in Title V of its Special Part "Corruption and public office offenses", and the title is divided into two chapters: Chapter I – "Corruption offenses" (Articles 289-294) and Chapter II – "Public office offenses" (Articles 295-309). By restoring the order of the social values protected by the criminal law and,

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[4] In the Explanatory Report of the Civil Law Convention on Corruption it was pointed out that: "the specificity of the Council of Europe lays its multidisciplinary approach, meaning that it deals with corruption from a criminal, civil and administrative law point of view".

[5] The Criminal Code was adopted by Law no. 15/1968, published in the "Official Bulletin of the Socialist Republic of Romania", Part I, no. 79-79bis of 21 June 1968, and entered into force, according to the provisions of Article 363, on 1st of January 1969. This was republished in the "Official Journal of Romania" no. 65 of April 16th 1997.

[6] Initially, the name of Title VI of the Special Part was "Offences which breach the activity of state organizations, citizens' organizations or other activities provided by the law".

[7] It was argued that office offences "can have as immediate active subjects only officers or other employees", whereas in the case of office-related offences, "the immediate active subjects can be any persons". In this respect, S. Kahane, Explicații introductive (Infracțiuni care aduc atingere activității organizațiilor de stat, organizațiilor obștești sau altor activități reglementate de lege) in „Explicații teoretice ale Codului penal român. Partea specială" by V. Dongoroz et al., vol. IV, Academy Publishing House - All Beck Publishing House, Bucharest, 2003, p. 68.

[8] *Idem.*

[9] At present, after the modification brought by Law no. 187/2012, in accordance with Article 5 of Law no. 78/2000, „are considered as corruption offences those offenses provided by Articles 289-292 of the Criminal Code, when they are committed by the persons provided in Article 308 of the Criminal Code", and, according to the same law, "are considered as offenses assimilated to corruption offenses those offenses provided by Articles 10-13".

consequently, the order of incriminations, the new Criminal Code has achieved this goal by regulating, in Title V of its Special Part, the two chapters, the organization into a hierarchy of the offenses through the placing in a pre-eminent regulatory position of corruption offenses being generated by the importance given to the fight against corruption, both in Romania, and in the European social and political context.

2. Active bribery - passive bribery in the public field

Underlining the fact that, according to the Council of Europe, "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society", the Convention classifies corruption, according to the subject initiating the act of corruption, in: *active bribery*, regulated by Article 2 and, respectively, *passive bribery*, regulated by Article 3.

Thus, active bribery represents the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions, whilst passive bribery represents the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

In our national legislation, the legal texts corresponding to Articles 2 and 3 of the Convention are Articles 290 and 289 of the Criminal Code, texts which present extensions to the conventional text in terms of their scope, matters on which we shall return hereinafter.

As it results from the literal interpretation of the provisions of Article 3 of the Convention, in the category of passive bribery offenses would fall exclusively the offence of bribery, incriminated at present in Article 289 of the Romanian Criminal Code.

In establishing the dichotomy active bribery – passive bribery, the criterion used by the Convention is the active subject of the offense, who, in the case of passive bribery, is represented by the public official (the "corruptee") and, in the case of active bribery, by any person (the "corruptor") and, equally, the desired scope – "to act or refrain from acting in the exercise of his or her functions", common in both forms of corruption, this scope regarding always the behaviour proper to the corruptee.

Given this double determination related to the active subject, who is or lets himself/herself be corrupted and, respectively, corrupts and the aimed purpose, it results, unquestionably, that the offenses which have the necessary typicality, by reference to the provisions of the Criminal Code, are: the taking of bribe, incriminated by Article 289 of the Criminal Code, as a form taken by the passive bribery of public officials and, respectively, the giving of bribe, incriminated by Article 290 of the Criminal Code, as a form of the active bribery of the latter.

In a conservative approach, based on the discussions regarding the higher degree of social hazard, in a certain sense, of the act committed by the public official in comparison with the act of the corruptor, who can be any person, the 2009 criminal legislator kept the incrimination order from the 1968 Criminal Code, incriminating first the taking of bribe, in Article 289 and in Article 290 the giving of bribe, unlike the text of

the Convention, where passive bribery is regulated by Article 3 and, respectively, Article 8, after the active bribery.

Overlooking the criminological discussions regarding social dangerousness and the famous witticism according to which corruption cannot exist without a corruptor, although initially, in the version adopted in Parliament, the taking of bribe was sanctioned in the same manner as the giving of bribe, at present, due to the amendment of Law no. 187/2012, the taking of bribe is sanctioned with a higher punishment – from 3 to 10 years, as opposed to the giving of bribe, which remained sanctioned with a punishment ranging from 2 to 7 years.

The offense of bribe taking, as regulated by Article 289 of the Criminal Code and by Article 7 of Law no. 78/2000, republished, knows a standard version, an assimilated version, a mitigating version and an aggravated version.

The standard version is provided by Article 289 para. (1) of the Criminal Code, consisting in "the deed of the public officer who, directly or indirectly, for himself or herself or for anyone else, claims or receives money or other undue advantages or accepts the promise of such advantages in connection with carrying out, not carrying out, pressing or delaying an act which falls in the exercise of his or her functions or in connection with carrying out an act contrary to these functions", the penalty provided being imprisonment ranging from 3 to 10 years and the deprivation of the right to hold a public office or to exercise the profession or activity in the performance of which the respective person committed the deed.

The assimilated version is provided in para. (2) of the same incrimination text, which stipulates that "the deed provided in para. (1), when committed by one of the persons mentioned in Article 175 para. (2), constitutes an offense only when committed in connection with not carrying out or delaying an act which falls in the exercise of his or her functions or in connection with carrying out an act contrary to these functions.

The mitigating version is provided by Article 308 of the Criminal Code and consists in the deed provided by Article 289 committed by or in connection with the persons who exercise, permanently or temporarily, with or without payment, an assignment of any nature in the service of a natural person from among those referred to in Article 175 para. (2) or within any legal person, in this case the special limits of the penalty being reduced by a third, according to the provisions of Article 308 para. (2) of the Criminal Code.

The aggravated version is provided by Article 7 of Law no. 78/2000, republished, in which case, when the active subject is one of the subjects provided by letters (a)-(d) of the statutory text quoted above, the penalty limits provided by Article 289 of the Criminal Code shall be increased by one third. Thus, the categories of subjects provided by Article 7 are the following:

a) persons who exercise a function of public office;

b) judges or prosecutors;

c) persons who are an authority of criminal investigation or have prerogatives of ascertaining or sanctioning misdemeanours;

d) persons referred to in Article 293 of the Criminal Code, respectively those persons who, on the basis of an agreement for arbitration, are called upon to pronounce a decision with regard to a dispute which is given for judgment by the parties to this Agreement, regardless of whether the arbitration procedure is conducted in accordance with the Romanian law or on the basis of another law.

As regards the material element of the objective side, this is done through the action of requesting or receiving money or other undue advantages by the active subject or through accepting the promise of such advantages.[10]

Thus, requesting involves claiming, directly or indirectly, for himself pr herself or for any other person, of money or other undue advantages, without being necessary that the request made in this regard be satisfied; receiving supposes the giving, directly or indirectly, for himself or herself or for any other person, of money or other undue advantages as a result of the briber's initiative,[11] as long as accepting the promise of money or other undue advantages requires the express or tacit (but undoubted) consent of the perpetrator regarding the offer made.[12]

The new Criminal Code, unlike the 1968 Criminal Code, no longer maintained as a version of the material element of the objective side to bribe taking also the failure to reject the promise of promise of money or other undue advantages, which supposed the lack of a firm reaction of rejection coming from the public officer when faced with a promise of money or other advantages. Regarding this aspect, the books of authority in the field expressed two different opinions. Thus, according to a first opinion,[13] it is held that "Article 289 of the new Criminal Code sanctions any type of acceptance of a sum of money or other advantages, be it tacit or express, so that, although the failure to reject the receipt of a sum of money or other advantages is not present in Article 289, the person to whom the money is being offered shall commit the offense of bribe taking, if the acceptance is tacit". In another opinion,[14] much more rigorous from a scientific point of view, it was argued that the new Criminal Code, by choosing not to provide as an alternative version of the material element of the offense the failure to reject the receipt of a sum of money or other advantages, has decriminalized this manner of committing the offense provided by the old Criminal Code, "to the extent to which there is no tacit and undoubted acceptance of the promise".

Another issue of novelty is that, at present, the offense of receiving of undue advantages regulated by the provisions of Article 256 of the old Criminal Code is no longer incriminated. The new Criminal Code provides, in exchange, in *verbum regens* that the act be committed "in connection with carrying out, not carrying out, pressing or delaying an act which falls in the exercise of his or her functions or in connection with carrying out an act contrary to these functions", and not for the purposes mentioned hereabove, as provided by Article 254 of the old Criminal Code. In this context, the specialty literature[15] has argued that one cannot talk about a decriminalization of the offense of receiving of undue advantages, "the deeds incriminated by Article 256 of the Criminal Code. (the old Criminal Code - *n.n.* – *A. F.-M.*) being found within the constitutive content of the offense of bribe taking provided by Article 289 of the new Criminal Code".

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[10] V. Dobrinoiu, *Infracțiuni de corupție (Infracțiuni de corupție și de serviciu)* in „Noul Codul penal comentat. Partea specială" by V. Dobrinoiu et al., vol. II, Universul Juridic Publishing House, Bucharest, 2012, p. 533.

[11] If previous to the receiving, the perpetrator had accepted the promise to receive such goods, the deed is consummated at the moment of the acceptance.

[12] M. Udroiu, *Drept penal. Partea specială. Noul Cod penal*, C.H. Beck Publishing House, Bucharest, 2014, p. 345.

[13] V. Dobrinoiu, *op. cit.*, p. 527.

[14] M. Udroiu, *op. cit.*, p. 345.

[15] *Ibidem,* p. 341.

The legislator has understood to expressly provide in Article 289 para. (3) that "the money, the values or any other goods received shall be subject to confiscation, and when they would not be able to be found, confiscation through equivalent is prescribed", although the safety measure of special confiscation is regulated by Article 112 of the Criminal Code. As shown in the statutory text mentioned hereabove, in order to be seized, money or any other goods must have been actually received, since those only promised to the bribe cannot be confiscated. Also, in accordance with the dispositions of Article 112^1 para. (1) letter (m) of the Criminal Code, the court can order the safety measure of the extended confiscation in the case of the offense of bribe taking.

3. Private bribery

From the reading of the provisions of Articles 7 and 8 of the Convention, it results that the dichotomy *active bribery - passive bribery* must be applied in the private sector as well, each state being bound to adopt "such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties", as regards active bribery and, respectively, "the request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties", as regards passive bribery.

In the Romanian criminal law, we do not have a separate incrimination for the deeds of active and passive bribery in the private sector, but Article 308 of the Criminal Code provides that, alongside other corruption and office-related offenses, the provisions of Articles 289 and 290 of the Criminal Code regarding public officers apply accordingly to those deeds committed by, or in connection with people who exercise, permanently or temporarily, with or without remuneration, a task of any nature in the service of a natural person as referred to in Article 175 para. (2) or within any legal person.

4. Trading in influence – offense assimilated to passive bribery

The Convention regulates, distinctly, in Article 12, the trading of influence under two forms – that of the deed of "promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else", as well as that of "the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result". Apart from the differences referring to the active subject and the protected legal object (the confidence and prestige that the staff from public institutions should enjoy), Article 12 of the Convention provides for an active modality in the first part of the section and, respectively, a passive modality in the second part of the text.

It should be noted that in the case of the trading in influence, the deed does not have a qualified active subject, as is the case with passive bribery, in both versions, that of the public officials, regulated by Article 3, as well as the one from the private sector, where the active subject can only be a "person who directs or works for a private sector entity".

Unlike the Convention, in the new Criminal Code, by taking on the model established by Law no. 78/2000[16] and, probably, the model consecrated by the separate, and yet joint, of the bribe taking and giving, the Romanian criminal legislator has opted for a dissociated incrimination of the trading in influence and the buying of influence, incriminating, in Article 291, the trading in influence and, in Article 292, the buying of influence, firstly, the passive version and, afterwards, the active one.

In this context, it should be noted that the trading of influence, in its version provided by Article 12, second sentence, of the Convention and, respectively, by Article 292 of the Criminal Code, even if it does not meet the prerequisite of the existence of a qualified active subject, given the modality of the action from the *verbum regens* and the fact that the deed is regulated by both the conventional text and that of the Criminal Code amongst the corruption offenses, can be assimilated to the acts belonging to the category of passive bribery.

5. Public official – public officer – assimilated public officer

The Convention, naturally, did not force the signatory states to directly transpose its provisions directly into the national law, drawing only their obligation to "adopt such legislative and other measures as may be necessary to incriminate as criminal offenses, in accordance with national law" several categories of deeds. This led to the creation of a terminological parallelism, the Convention using the notion of "public official", whilst the Romanian Criminal Code that of "public officer", notions which have a particular importance in our study, since they indicate the active subject of passive bribery and, respectively, of the offense of bribe taking.

The Convention gives, in Article 2 letter (a), a definition of the notion of "*public official*", stating that "for the purposes of this Convention, "public official" shall be understood by reference to the definition of "official", "public officer", "mayor", "minister" or "judge" in the national law of the State in which the person in question performs that function and as applied in its criminal law".

The text continues with letter (b), where is defined the term *judge,* mentioned in letter (a), as including "prosecutors and holders of judicial offices". Also, letter (c) of Article 2 also establishes a limitation in the use of the term "public official", for the purposes of the Convention, stating that "in the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its national law".

Thus, taking into account the diversity of the administrative and judicial systems of the Member States of the Council of Europe, the Convention avoided giving its own definition of the term "public official", a fact which, incidentally, was not necessary as long as it did not incriminate deeds, but only establish the signatory states' obligation to incriminate certain deeds. Therefore, the Convention stated that in assessing the notion

[16] The offense of buying of influence was incriminated for the first time in Romania by Article 6[1] of Law no. 78/2000, together with the amendment brought by Law no. 161/2003.

of "public official", the Member States shall take into account the definition of the notions of "official", "public officer", "mayor", "minister" or "judge" in the national law, as well as the way in which this is applied within their own criminal law, especially since most national criminal legislations employ a set of legal definitions of the used terms and, at present, we are quite far from achieving a terminological harmonization in this respect, even merely at the EU level.[17]

Nevertheless, it should be noted that, from the terminological system used in the Convention, it results that the notion of public official has, on the one hand, a narrow sense of national public official, as defined by Article 2 letter (a) and as referred to by the texts from Articles 2 and 3, but also a broad sense, as established by the referral provisions used in Articles 4-6 and 9-11. Thus, the following categories are assimilated to that of public official: members of domestic public assemblies, members of foreign public assemblies, officials of international organisations,[18] members of international parliamentary assemblies,[19] judges and officials of international courts.[20]

The new Criminal Code, abandoning the dichotomy public officer – officer used by the 1968 Criminal Code,[21] gives in Article 175 para. (1) the legal definition of the notion of "public officier" as follows: "A public officer, for the purposes of criminal law, is the person who, on a permanent or temporary basis, with or without remuneration:

a) exercises the powers and responsibilities, as set out under the law, with a view to the achieve the prerogatives of the legislative, executive or judicial power;

b) exercises a function of public authority or a public office of any kind;

c) exercises, alone or together with other persons, in the framework of an autonomous organization, of another economic operator or of a legal person with a share of whole or major state capital, prerogatives associated with the performance of its object of activity."

The assimilated public officer. In accordance with the dispositions of para. (2) of the same article, "it is considered a public officer, for the purposes of criminal law, the person exercising a public service for which s/he has been invested by the public authorities or who is subject to their inspection or supervision with respect to the fulfilment of the respective public service". It should be noted that this notion is not found in the text of the Convention and, therefore, the protection established by the Romanian criminal law is more extended.

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[17] Such a harmonization could be achieved, possibly, through the adoption of a European criminal code, a process which is still at a rudimentary phase.

[18] According to Article 9 of the Convention, an official of international organisations is "any official or other contracted employee, within the meaning of the staff regulations, of any public international or supranational organisation or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents".

[19] According to Article 10 of the Convention, the members of international parliamentary assemblies are "any members of parliamentary assemblies of international or supranational organisations of which the Party is a member".

[20] By judge and, respectively, official of an international court one understands, according to Article 11 of the Convention, is "any holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party", respectively, „an officer from the clerk office of such court".

[21] According to Article 147 para. (1) of the 1968 Criminal Code, by "public officer" one understood "any person who exercises, permanently or temporarily, with or without remuneration, an assignment of any nature in the service of an entity from those referred to in Article 145". According to para. (2) of the same article, by "officer" one understood "the person mentioned in para. (1), as well as any employee who exercises an assignment in the service of a legal person other than those provided in the respective paragraph".

From the reading of the provisions of Article 308 of the Criminal Code it results that, in order to be active subjects of corruption and office-related offenses, those people who are not public officers, as understood by criminal law, must either perform a task of any kind in the service of one of the natural persons set out in Article 175 para. (2), namely a person "exercising a public service for which s/he has been invested by the public authorities or who is subject to their inspection or supervision with respect to the fulfilment of the respective public service", or perform a task of any kind within any legal person.

Thus, if, in the case of the persons who perform a task in the service of a natural person, the legislator requires that this natural person be one of those who, in turn, either exercises a public interest service or is subject to the inspection or supervision of a public authority with respect to the fulfilment of the respective public service, in the case of those persons who perform a task within a legal person, no special condition is required. This distinction which the legislator makes between the persons acting in the service of a natural person and those acting in the service of a legal person is justified by the fact that the organization of a legal entity is controlled by the state through its registration formalities, since there should be established, inherently, a discipline regulated either through the act of establishment issued by the public authority competent to dispose the establishment of the legal person, or self-imposed, by means of the articles of association of the legal person, whilst in the case of natural persons, only those exercising certain particular activities must have a certain organizational structure, being able to use other persons in the achievement of their purpose. Therefore, always, a natural person may act within a legal person only on the basis of a document issued either by the legal person itself or by the authority which ordered its establishment.

Public service has been addressed in the doctrine of administrative law in a double perspective. From a material point of view, public service is an activity of general interest, carried out by public administration or by an individual authorized in this respect. From a formal point of view, public service represents a set of structures from public administration or a set of private bodies undertaking such activity and, therefore, one could argue that public administration represents a network of public services.[22]

Also, public service has also been defined as "an administrative body created by the state, county, commune, with determined competencies and powers, with financial means secured from the general patrimony of the public administration responsible for its creation, and made available to the public in order the satisfy, regularly and continuously, a need having a general nature, for which any private initiative could offer only an incomplete or intermittent satisfaction".[23]

Established relatively recently, the public service benefits of a legal definition also, offered by the provisions of Article 2 para. (1) letter (m) of Law no. 554/2004,[24] which stipulate that, by the notion of "public service" it is meant "the activity organized or, where appropriate, authorized by a public authority with the purpose of meeting a legitimate public interest".[25]

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[22] J. Rivero, J. Waline, *Droit administratif*, Dalloz, Paris, 1998, pp. 429-430.

[23] P. Negulescu, *Tratat de drept administrativ*, Institutul de arte grafice E. Mervan, Bucharest, 1934, vol. I., p. 123, quoted in F. Dragomir, *Răspunderea penală a magistratului*, C.H. Beck Publishing House, Bucharest, 2011, p. 82.

[24] Published in the "Official Journal of Romania", Part I, no. 1154 of 7 December 2004.

[25] The legitimate public interest is defined by Article 2 para. (1) letter (r) of Law no. 554/2004 as "the interest related to the rule of law and constitutional democracy, guaranteeing the fundamental

Since here above we have defined the notion of public service, extremely helpful in this respect being the definitions offered by Article 2 para. (1) letters (m) and (r) of Law no. 554/2004 to the notions of "public service" and, respectively, "legitimate public interest",[26] the two being fully enlightening on the meaning conferred within public law to these notions, one must also define the notion of "public authority", for which purpose we shall use the same dictionary established by Article 2 para. (1) of the Administrative Litigation Act.

Thus, according to letter (b) of this statutory text, by public authority we should understand "any state body or body belonging to the territorial administrative unit, which acts, as public power, to satisfy any legitimate public interest; for the purposes of the present law, are assimilated to public authorities the private law legal persons who, under the law, have obtained the status of public utility or are authorized to perform a public service, as public power".

6. Foreign officers

The 2010 Criminal Code introduces in the sphere of corruption offenses, by means of Article 294, the notion of "foreign officers", a notion which the 1968 Criminal Code did not regulate, but which was found in Article 8^1 of Law no. 78/2000, as a result of our criminal law's harmonization with the text of the Convention. The only difference between these two regulations is represented by the provision from Article 294 of the 2010 Criminal Code, according to which the provisions of this legal text apply "if in the international treaties to which Romania is a party it is not otherwise specified" and, therefore, there is the possibility of not applying these provisions when otherwise provided by international treaties signed into by our country,[27] a possibility which Law no. 78/2000 did not provide, although stipulated by Article 35 of the Convention.

Thus, according to the provisions of Article 294 of the 2009 Criminal Code, the incrimination rules concerning the offenses of bribe taking, bribe giving, trading of influence and buying of influence also apply for the following categories of persons:

a) officers or persons operating under a contract of employment or other persons exercising similar functions within a public international organization to which Romania is a party. This quality shall be determined not on the basis of the Romanian legislation in the field, but on the basis of the statutory provisions of the respective international organization, as ratified by Romania;[28]

b) members of parliamentary assemblies of international organizations to which Romania is a party. This refers to the persons delegated by the Member States in the parliamentary assemblies of international organizations to which our country is a party, since they do not have the quality of official and do not perform activities under an

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rights, liberties and duties of the citizens, satisfying the needs of the community, establishing the competence of public authorities".

[26] The 2010 Criminal Code uses the notion of "public interest service", a notion whose meaning is limited by Article 2 para. (1) letter (m) of Law no. 554/2004, this text defines the "public service", mentioning that the purpose for which a public service is exercised is always the "satisfaction of a legitimate public interest", a context in which we consider that the notion of "public service" and that of "public interest service" are synonyms.

[27] V. Dobrinoiu, *op. cit.*, p. 566.

[28] *Idem,* pp. 566-567.

employment contract, having only the quality of representative of the state within the respective parliamentary assembly;[29]

c) officers or persons operating under a contract of employment or other persons exercising similar functions within the European Communities. The legislator, given the fact that Romania is a Member State of the European Union, provided the quality of active subjects of the offenses mentioned above also for the officers or persons operating under a contract of employment or other persons exercising similar functions, using a broader expression, which covers a wide range of people, the aim being that of being able to sanction as active subjects of corruption offenses all public officials operating in the European Union's bodies and institutions. Open to criticism is the fact that the text of Article 294 of the 2009 Criminal Code kept the outdated expression "within the European Communities" after the adoption of the Treaty on the European Union;[30] according to Article 1, "The Union shall replace and succeed the European Community", so the proper phrase to be used should have been "within the European Union";

d) persons exercising legal functions in international courts whose jurisdiction is accepted by Romania, as well as clerks from those courts. As shown by the specialty literature[31], "this regards mainly magistrates, as well as officers, from the European Court of Human Rights, the International Criminal Court, the International Court of Justice of the United Nations, but also other international courts whose jurisdiction is accepted by Romania, including some international criminal tribunals which are still operating". According to the same author, given the provisions of Article 294 letter (c), the magistrates and officers of the Court of Justice of the European Union are not included here, but in the aforementioned text, since they have the quality of "officer within the European Union";

e) officers of a foreign state. This category includes any person who is an officer in a foreign country. Thus, "the status of the officer is determined not according to the definition from the Romanian law, but according to the legislation of the state to which the officer belongs".[32] It should be noticed that the legislator used in the text the notion of "officer", and not that of "public officer", although the 2009 Criminal Code no longer defines the notion of "officer", the legislator opting for this formulation in order to cover a wider content, given the fact that the notion must be rendered compatible with the legislation of the state to which the officer belongs;

f) members of parliamentary or administrative assemblies of a foreign state. This category includes people who occupy public positions in a foreign country, regardless of whether they belong to the legislature or the judiciary. The legislator included this category of persons within the sphere of "foreign officers" taking into account, first of all, the legal definition of the notion of "public officer" given by Article 175 para. (1) letter (b) of the 2009 Criminal Code, as well as the possibility that such categories of persons may not be included in the category of officers, under the legislation of the respective state[33]. The aim of such measure was to eliminate the positive discrimination as regards

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[29] For a list of parliamentary assemblies of international organizations to which Romania is a party, see V. Dobrinoiu, *op. cit.*, p. 567.

[30] The consolidated version of the Treaty on the European Union was published in the "Official Journal of the European Union", no. C 83/13 of 30 March 2010.

[31] V. Dobrinoiu, *op. cit.*, p. 567.

[32] *Idem*, p. 568.

[33] *Ibidem.*

the public dignitaries from those states which would not assimilate them from a criminal point of view with officers, in the context in which in Romania this category of persons is assimilated to public officers and sanctioned as such.

7. Conclusions

When comparing the text of Article 289 of the Criminal Code with that of Article 3 of the Convention, it results undeniably that the former is more rigorous in comparison with the text of the Convention, in the first place, because it represents a rule of incrimination. Thus, it should be noticed that in defining the material element, the text of Article 289 of the Criminal Code uses, largely, the same terminology as the conventional one, using instead of the term "request", its synonym, namely "claims". Unlike the conventional text, the Romanian incrimination text is more accurate when describing the conduct of the public officer, namely "carrying out, not carrying out, pressing or delaying an act which falls in the exercise of his or her functions" or "carrying out an act contrary to these functions", as long as the text of Article 3 from the Convention merely provides that it refers to "acting" or "refraining" from "acting in the exercise of his or her functions". In this context, the 2009 Criminal Code provides, at present, the general framework for the fight against corruption, fully satisfying the requirements of the Convention and, at the same time, offering to the judicial bodies involved in this process the opportunity to respond in an adequate manner.