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FOREWORD

CORRUPTION – A THREAT TO THE RULE OF LAW FUNCTIONING

It has become a truism that, at the level of the European Union, corruption affects, in various proportions, all states, therefore the adoption of common policies aimed at combatting corruption is a major objective of the European Parliament and the European Commission.

Corruption costs the European economy approximately 120 billion euros per year. The scandals on political corruption at the highest level have reached the headlines of the European media.

The outcome of a Euro-barometer survey on the attitude of Europeans towards corruption of 2013 reveals that three quarters (76%) of the Europeans believe that the phenomenon of corruption is widely spread and more than a half (56%) consider that the level of corruption in their countries has increased in the last three years.

The Preamble of the Criminal Law Convention on Corruption drawn up under the aegis of the Council of Europe refers to corruption as being a threat to the rule of law, democracy and human rights, which 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 United Nations Convention against Corruption reveals as well the gravity of problems raised by corruption and the threat it represents for the stability and security of societies, undermining institutions and democratic values, ethical values and justice, compromising the secure development and the rule of law.

The Treaty on the Functioning of the European Union (consolidated version) provides, in article 83, competencies for the European Parliament and Council, which may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime, including corruption.

Starting 2013, the European Commission publishes, every two years, an anti-corruption report that will constitute a European Union specific mechanism of monitoring and assessing corruption. The report will identify the tendencies and deficiencies that must be corrected and will stimulate the exchange of best practices.

Given all the afore-mentioned, we have attempted to discuss, in the current issue of the Journal, and according to our possibilities, aspects of the activities aimed at combatting corruption in the former communist states, today members of the European Union, involved in the common effort of suppressing the scourge of corruption.

The board of Editors

DNA (National Anti-Corruption Department) a Specialized Structure for Combating High Level Corruption in Romania

ANCA JURMA*

Abstract:

During the same period of time, more precisely in 2002, the first prosecutor's office specialized in investigating corruption offences was set up as an independent structure, called the National Anticorruption Prosecutor's Office (PNA). Currently, the anticorruption prosecution structure functions as a Department within the Prosecutor's Office Attached to the High Court of Cassation and Justice (DNA), yet it still holds many characteristics of autonomy. DNA is led by the General Prosecutor of Romania through the chief prosecutor of DNA, who is assimilated to the prime deputy of the General Prosecutor of Romania.

DNA's jurisdiction does not cover the entire category of corruption offences but only those of high and medium level. The prosecutor's offices attached to tribunals are still in charge with the rest of corruption offences (the small corruption).

DNA has jurisdiction in the whole state, having a central structure in Bucharest, as well as a territorial one. The central structure is divided in sections, services and offices. The territorial structure of DNA is made of 14 territorial services with their offices located in the cities where there are courts of appeal

DNA's activity was constantly followed and appraised by the European institutions in charge with monitoring Romania, and this is to be found in every Report on Progress in Romania under the Cooperation and Verification Mechanism.

Keywords: *high level corruption; DNA (National Anti-Corruption Department); organization and structure; jurisdiction; notification procedure; special methods of investigation.*

1. The DNA's Background

At the beginning of 2000, Romania was in the middle of negotiating its accession to the European Union. On this occasion, the topic of the fight against corruption was re-launched at the national level, as a major issue. Combating corruption was one of the important requirements for closing the negotiations chapter regarding justice and internal affairs. Consequently, a law on preventing and sanctioning corruption was adopted, *i.e.* the Law no. 78/2000 which, inter alia, added to the classic corruption offences, that had already been incriminated by the Penal Code (taking, giving bribe, traffic of influence, receiving of undue benefits) a series of new offences, assimilated and connected to those of corruption, suitable for the new political, economic and social realities of the state. The new incriminations reflected the methods used to defraud the public money and the abuse of power, which had become increasingly visible in the

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transition process from a closed economy to a market economy and also in the development of a democratic society. Thus, specific incriminations were introduced with regards to the defrauding of the privatization procedures, or of the procedures dealing with the sale of assets belonging to state institutions or state economic agents (usually by under evaluating the assets in question). Other specific incriminations referred to the use of nonpublic information for the purpose of private enrichment or to the abusive use of influence given by a political position in order to receive undue benefits in favor of certain private persons etc. These new incriminations proved to be modern and necessary, well-adjusted to the social and economic realities, but several years had to pass before these offences could be consistently prosecuted and sanctioned.

During the same period of time, more precisely in 2002, the first prosecutor's office specialized in investigating corruption offences was set up as an independent structure, called the National Anticorruption Prosecutor's Office (PNA). PNA's activity was mainly focused on the aspects dealing with the institution's organization and logistic endowment. After the revision of the Romanian Constitution in 2003, the institutional structure of PNA as an independent prosecutor's office was no longer suitable, a decision of the Constitutional Court stipulating that it couldn't investigate Members of the Parliament, the jurisdiction for such cases belonging only to the Prosecutor's Office Attached to the High Court of Cassation and Justice. Thus, in 2005, in order to keep the highest category of state dignitaries under the jurisdiction of the anticorruption prosecutors, the status of this institution's structure was changed. Currently, the anticorruption prosecution structure functions as a Department within the Prosecutor's Office Attached to the High Court of Cassation and Justice (DNA), yet it still holds many characteristics of autonomy. It is worth mentioning here that the specialization of the anticorruption prosecutors, the setting up of specialized structures for combating this type of crimes, either as prosecutor's offices, police units or any other type of body, is not a solution only to be found in Romania. The international conventions in this matter recommend setting up anticorruption specialized authorities, endowed with the necessary legal framework and technical and material resources.

A first example can be found in Spain. Moreover, the setting up of the anticorruption prosecutor's office in Romania was the result of an institutional twinning project financed by UE, in partnership with the Anticorruption Prosecutor's Office from Spain. Several anticorruption prosecutor's offices have been set up since then in Austria, in Moldova, or prosecutor's offices specialized in combating economic crimes including corruption, such as the recently created Financial Prosecutor's Office in France or the Prosecutor's Office OKOKRIM in Norway (a country located at the opposite side from Romania when it comes to the level of corruption, but who considers this topic to be a priority). There are prosecutor's offices specialized in combating organized crime and corruption, such as USKOK, from Croatia. In other states, there are anticorruption agencies with police or administrative functions.

2. The DNA's organization and structure

DNA is led by the General Prosecutor of Romania through the chief prosecutor of DNA, who is assimilated to the prime deputy of the General Prosecutor of Romania. He is assisted by two deputies assimilated to the deputies of the General Prosecutor of Romania.

The appointment of the chief prosecutor of DNA, of his/her deputies and of the chief prosecutors of sections follows the same procedure as the appointment of the general prosecutor, of his/her deputies and of the chief prosecutors of sections from the Prosecutor's Office Attached to the High Court of Cassation and Justice. This procedure implies the proposal of the candidate by the Minister of Justice, the approval of the Superior Council of Magistracy and the appointment by the President of Romania. The mandate of the chief prosecutor of DNA and of the other prosecutors with management positions is of 3 years with the possibility of renewing it once. DNA has jurisdiction in the whole state, having a central structure in Bucharest, as well as a territorial one.

The central structure is divided in sections, services and offices. The territorial structure of DNA is made of 14 territorial services with their offices located in the cities where there are courts of appeal. Both the central structure, and the territorial services have the same material jurisdiction, but the territorial services usually prosecute cases regarding facts committed in their area of territorial jurisdiction. The prosecutors' activity is carried out according to the traditional division of criminal proceedings, *i.e.* the criminal investigation stage and the trial. Therefore, the central structure is divided into criminal investigation sections (carrying out the inquiries) and the judicial section (functioning with prosecutors who plead the DNA cases in courts, both on the merits of the case as well as on legal remedies the means of appeal, are working).

A feature that illustrates the specificity of the National Anticorruption Department and distinguishes it from the other prosecutor's offices is the fact that DNA is a complex structure. The prosecutors of the National Anticorruption Department are supported in their activity of criminal investigation by police officers, and specialists in the economic, financial, banking, customs, IT fields. 145 prosecutors, 220 judicial police officers, 55 specialists, as well as 200 auxiliary, administrative and economic personnel are employed by DNA.

To be appointed in DNA, the prosecutors need to have at least 6 years of experience and a good reputation. They have an unlimited mandate in DNA. The police officers are seconded by order of the Ministry of Internal Affairs for 6 years that can be renewed. Once seconded, the police officers are paid by DNA, they work under the direct leadership and control of the DNA prosecutors and do not keep any link of command with the hierarchy in the Ministry of Internal Affairs. This way, working in mixt teams is insured and the risk of information leaking is minimized. The DNA specialists are also a very useful category of personnel in corruption investigations; they are highly-qualified people in fields such as economy, finances, banking, customs, IT etc., their task being to clarify the technical or economic details necessary to prosecutors in their criminal investigation activity. Prosecutors ask them to draft experts reports that can become pieces of evidence in the file (such as: the assessment of the damage caused as a result of the offence; the explanation of the fraud mechanism used in a public procurement or privatization procedure, the explanation of the financial circuit of the money laundering coming from bribery etc.).

3. The DNA's jurisdiction

DNA's jurisdiction does not cover the entire category of corruption offences but only those of high and medium level. The prosecutor's offices attached to tribunals are still in charge with the rest of corruption offences (the small corruption). Why this

separation and why was this a very good decision? In order to answer these questions, one should remember the strong critics addressed to Romania during the pre-accession negotiations since, at the time, prosecutors used to focus only on investigations related to small civil servants, the last links of sophisticated but undisclosed networks, the number of these files being large, but their relevance and impact upon the system being absolutely irrelevant. This has substantially changed since the specialized prosecutors have started investigating large and complex cases, related to civil servants in high positions, state dignitaries placed on top of the criminal pyramid, and the courts have started confirming the investigations of the anticorruption prosecutors, by ruling final conviction decisions.

The jurisdiction of DNA, as established by the law, is defined by three

- the public positions owned by the persons suspected to have committed a corruption offence;
- the value of the caused damage;
- the value of the given or received bribe.

Briefly, at present, DNA is competent to investigate and prosecute cases regarding the following categories of criminal offences:

- Bribery offences – if the value of the bribe is over 10.000 Euro;
- Offences assimilated to corruption, incriminated by the Law no. 78/2000, such as: establishing a diminished value of the assets of a company in way of privatization, using information obtained by virtue of the official position or duty in order to carry out financial operations incompatible with the position or duty, using the influence as leader of a political party, trade union, or a non-governmental organization, all these in order to obtain undue advantages – if the value of the damage caused is over 200.000 Euro;
- the same two categories of offences, regardless the value of the bribe or damage – but when they are committed by persons with certain high level public positions (*i.e.* Members of Parliament, Members of Government, generals, magistrates, prefects, mayors, police officers, directors of national companies etc.);
- Offences against the financial interests of the European Communities – regardless the value of the damage;
- Serious economic offences, such as abuse of office, diversion of public tenders, usurpation of functions – if the damage caused is over 1.000.000

One of the key factors of a successful activity of an anticorruption prosecution office is the inter-institutional cooperation, to be more precise – the support that the state institutions with attributions of control, audit, law enforcement and intelligence agencies have to give to the anticorruption prosecutors, by sending them all the data they have regarding the perpetration of the corruption offences, or other data that could help the investigation of this

Thus, according to the law, the state agencies with control attributions, intelligence services and police – are under the obligation to provide DNA with all the data and information they detain regarding the perpetration of corruption offences that fall under the DNA competence. Besides providing DNA with information regarding the perpetration of corruption offences, these state agencies, according to their competence, give also further assistance to the investigations carried out by DNA, following the prosecutors' request.

4. How does the DNA get notified?

In the daily activity of the National Anticorruption Department, the most frequent ways to notify the prosecutors about the perpetration of offences under the jurisdiction of this institution are as follows:

Notifications from citizens and legal persons:

- The complaint – a situation in which a person informs DNA, with regards to a damage that was caused to him/her as a result of an offence under the jurisdiction of the Department;
- The denouncement – a situation in which a person who holds pieces of information about the perpetration of corruption offences communicates them to DNA;
- Self-denouncement – a situation in which a person who committed a regards to a damage that was caused to him/her as a result of an offence under the jurisdiction of the Department of information about the perpetration of corruption offences communicates them to DNA corruption offence wishes to benefit of mitigating circumstances or exemption from criminal liability under the law, and notifies the judicial authority about the perpetration of the offence before the latter finds out about it from other sources.

Notifications from public authorities and institutions:

- Notifications received from authorities with control tasks, such as Control Bodies of ministries, as well as of the Prime Minister, the National Agency of Fiscal Administration, the Anti-fraud Department;
- Notifications received from police units;
- Notifications received from other prosecutor's offices;
- Notifications and reports received from services specialized in gathering information.

Ex officio notifications – as a result of the data/information obtained by prosecutors in their current activity or as a result of articles published.

5. Special investigation means

It is generally known that corrupt actions are among the most difficult to detect and prove, due to the secret pact that ties the corrupt and the corruptor, where, as a rule, both partners are happy with the result obtained and have no interest to denounce it, therefore many national legislations provide for special means that can be used in order to facilitate the carrying out of the anticorruption investigations. The Romanian Criminal Procedure Code stipulates a list of special investigative techniques that can be used by the prosecutors and investigators in order to gather evidence and identify perpetrators in cases regarding certain very serious criminal offences, among which corruption and corruption assimilated offences. These measures should be authorized by the judge of rights and freedoms. As a matter of consequence, an anticorruption investigation can use the following special methods:

- interception of communications;
- access to an IT system;
- video, audio, photo surveillance;
- locate and tracking through technical means;
- obtaining financial transactions data;
- seizing postal mailings;
- use of undercover investigators and collaborators;
- authorized participation to certain activities;

- controlled deliveries;
- obtaining of data generated by electronic communications public service providers.

6. The DNA's activity and results

The current year has been probably the most intense in its history and this thing will most likely be confirmed when it ends and the activity is reviewed and assessed. We will provide you with some figures relevant for this year's activity.

In the first 10 months of 2014, over 4000 files have been registered within DNA. The criminal investigation of corruption offences and offences assimilated to it has been conducted in these cases. These files are in different stages of the criminal proceedings.

Over 800 defendants have been indicted, among them being: 8 members of the

Parliament (6 Deputies and 2 Senators), 1 State Secretary from the Ministry of Transport, 5 presidents and vice-presidents of national agencies, 1 President of the Romanian Chamber of Commerce, 1 army General, 1 Prefect and 1 Sub-Prefect of a county, 6 Presidents and 1 Vice-President of County Councils, 20 Judges (1 from the High Court of Cassation and Justice), 3 Chief Prosecutors, 3 Prosecutors, 21 mayors, 4 vice-mayors etc.

During the same period of time, when talking about indicted cases (some of them during the current year, but most of them sent to trial during the previous years), it is worth mentioning that final conviction decisions have been ruled against over 1000 defendants, at the end of the criminal proceedings. Among the people against whom such final conviction decisions have been ruled, there have been: the former Prime Minister of Romania, other 2 former ministers, 5 members of the Parliament (4 Deputies and 1 Senator), 2 Presidents of national agencies, 1 Prefect, 2 Sub-Prefects, 22 mayors, 6 judges and 9 prosecutors etc.

As in previous years, the convictions rate in DNA files is of over 90%, which in our opinion, is a very good success rate, one that can be compared to that of prosecutors from other European democratic states and also from the United States of America.

As to the typology of the corruption offences and of those assimilated to corruption, which have been investigated by the DNA prosecutors, it is noteworthy that files revealing fraud and corruption situations from different areas of economic and political life have been opened.

Thus, DNA prosecutors have started criminal investigations in cases dealing with the illegal granting of contracts from public funds, or their execution under preferential conditions, either by involving national public funds or European funds. Criminal liabilities have been recorded to all the decision making levels, from civil servants with competence in the public procurement field, to managers of institutions, of public agencies, to representatives of local authorities (mayors, presidents of councils) – when it involved procurement from local funds – and up to ministers and state secretaries who protected these criminal networks, in favor of approved natural persons or private companies and at the expense of the state budget. There have been situations when the value of the damages was of tens of millions of Euro, and that of the undue benefits was also worth millions of Euro.

The seriousness of these facts is obvious, and they lead not only to the impoverishment of the state and local communities (many times, the projects fraudulently won by companies without economic potential are not executed or are executed poorly),

but such facts also cause the distortion of competition and discourage the investors, either Romanian or foreign.

Many cases, especially those involving the investigation of representatives of local authorities, the so-called local barons, or managers of state agencies, have dealt with offences of taking and giving bribe or abuse of office regarding the restitutions of properties that had been nationalized by the communist regime (forests, plots of land, houses etc.) or the payment of compensations for the properties which could no longer be restituted in kind given the fact that, either the people requesting the restitution or the compensation were not entitled to it, or the compensations were highly over-evaluated. Furthermore, several of the investigated files were related to the deliberate under-evaluation of the assets belonging to the public fund, during their privatization process or their sale in favor of certain people, or by conditioning the issuing of certain authorizations in exchange for the payment of the bribe.

Using pieces of information not meant for publicity by the civil servants who had access to them by virtue of their position and for their own interest was also an area of interest for DNA's investigations. DNA intervened in situations in which the very issuing of pieces of legislation or their content were subject to fraudulent transactions conducted by high ranked officials from the Executive or the Parliament, in order to favor certain people, groups of people or certain companies. This type of offences is particularly dangerous because it undermines the Rule of Law in the most direct way, through the so-called „state capture" – a form of political corruption in which restricted private interests influence the decision-making process of the state for their own personal gain, by using different occult methods.

We also investigated, and these cases were the very first in the Romanian jurisprudence, cases in which leaders of political parties – some at the central level, some at local level – were indicted for offences related to the illegally financing of political parties or electoral campaigns.

The members of the Parliament prosecuted by DNA are a special category, for several reasons. Generally speaking, they have been investigated by the Department for having committed corruption offences or abuse of office committed in their former capacities, usually as mayors, council presidents or managers of national companies. In other cases, their capacity as leaders of a trade union or a party organization, which allowed them to use their influence to receive undue benefits, was relevant from the point of view of the constitutive elements of the offence. In all situations though, their capacity as members of the Parliament was relevant from the procedural point of view. As it has already been mentioned, the parliamentarians can only be tried by the High Court of Cassation and Justice, and their capacity as members of the Parliament raises a procedural impediment (or a protection measure, depending on the viewer's perspective) when it is mandatory to take measures for deprivation of liberty or house search, respectively it is necessary to receive the approval of the Chamber to which the parliamentarian belongs.

Besides, there are also procedural impediments when talking about the criminal investigation of ministers and former ministers, investigations conducted for acts committed during their mandates. Thus, for the criminal investigation of such people, it is necessary to request the approval of the Romanian President or of the Chamber to which the Minister belongs, if he/she is a parliamentarian as well. More than once, our requests addressed to the Chambers of the Parliament, in order to allow DNA to conduct the criminal investigations against a Minister have been denied, and it has happened

regardless of the political party to which the respective minister belonged (from the Governing party or from the opposition ones).

DNA has also sent to trial judges, prosecutors, police officers, most of the time indicted for taking or requesting bribe in order to solve judicial procedures in a favorable manner to the person paying the bribe or to exercise their influence for.

7. International Evaluations

DNA's activity was constantly followed and appraised by the European institutions in charge with monitoring Romania, and this is to be found in every Report on Progress in Romania under the Co-operation and Verification Mechanism. "The professionalism and objectivity of DNA investigations" are highly appreciated. Moreover, in 2014, the European Commission issued the Anticorruption Report of the European Union, a first report of this kind ever drafted at EU level, in which the Union intends to provide an overall image upon the status of corruption, as well as upon the anticorruption measures and policies applicable in every member state. This report highlights DNA as one of the examples of good practice at EU's level. Furthermore, the Euro-barometer survey taken into consideration by the report indicates that the level of trust of the Romanian population in the chances of the anticorruption investigations to discourage corruption exceeds the European average (Ro 34%, UE average).

8. Pillars securing the DNA's success

There is a series of pillars securing DNA's success; pillars that can prove in time to be solid or fragile, according to the political will to keep the pace of the fight against corruption.

A first important element is the complex structure that DNA is provided with by law. Police officers paid from DNA's budget work together with the prosecutors and they are exclusively coordinated by DNA prosecutors (they don't receive orders from their former superiors). DNA prosecutors also work with specialists in the fields of economy, finances, banking, IT etc., who contribute to the clarification of technical, economic details that are necessary to prosecutors in their criminal investigation activity. This activity is conducted in complex teams, which leads to a higher celerity, guaranteeing at the same time the necessary level of confidentiality.

Another advantage is represented by the fact that we enjoy an increasingly higher level of trust from the citizens, and it also helps a lot when it comes to denouncements regarding the perpetration of offences investigated by DNA. The number of notifications received by DNA in 2014 indicates that it has doubled compared to 2013.

The most important aspect for DNA to continue to accomplish its mission is *to maintain the stability of the legislative and institutional framework in terms of combating corruption*. With regards to DNA, we take into account, on the one hand, the legislation ensuring its structure and competences, its financial and human resources, as well as its independence as an institution; on the other hand, the criminal legislation and the procedural criminal legislation providing the prosecutors with the necessary instruments to take action against complex forms of criminality.

In this regard, we can trust the fact that this institution will continue to exist and will accomplish its mission for as long as there are no significant changes in the legislative framework that could limit its jurisdiction, its tasks, its organizational

structure, or that could sink into irrelevance the work of the anticorruption prosecutors through initiatives, such as the one for adopting a law for amnesty and pardoning that can set free the people convicted for corruption offences. It is the right of any state to enact, at certain periods of time, acts of clemency, but they have to address very well balanced criminal policy reasons. At this moment, when corruption in Romania continues to be at an alarming level, such a measure could have a negative impact, the message it transmits to society would be completely disheartening.

Along the years, there have been other legislative initiatives or projects, which were not put into practice and which could have led to a limited capacity of the anticorruption agents to take action. We recall the December 2013 moment, when amendments of the Criminal Code were adopted that were eliminating members of the Parliament from the definition of categories of people who could be held liable for corruption and abuse of office, while the local elected people were eliminated from the category of those who could be sanctioned for conflict of interests. Such measures, once entered into force, would have been in gross conflict with the anticorruption conventions adopted at the international level. Fortunately, following the alarm signal raised by the judicial institutions and the anticorruption agencies, by the European Commission and the civil society engaged in the fight against corruption, this law did not enter into force and was declared unconstitutional.

As a conclusion, the irreversibility of the progress achieved up to the present moment and the continuation of the fight against corruption depends significantly on the political will of our governing people, to approach corruption through a coherent ensemble of public policies that are equally related to the prevention and the fight against corruption. At the same time, we need the support of citizens to refuse to tolerate corruption, to notify us about corruption deeds when they encounter them, and to wish to be our partners in the efforts to create a clean economic and political environment in Romania.

Political corruption and the funding of political parties

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Abstract:

Political corruption appears under more shapes than those set out in the Criminal Law Convention on Corruption. The lack of transparency in the funding of political parties favours and generates corruption, as shown by the case law of the courts.

In order to combat political corruption, the criminal penalties are simply insufficient; instead, there is a great need for political decisions to restructure the electoral system and to finance political parties.

Keywords: *corruption, case law, political parties, funding transparency.*

1. On political corruption

It is almost bookish to argue that corruption is the cancer of democracy, but, if all the other forms of corruption can be fought against, to a lesser or greater extent, by the deterrent effect of criminal sanctions, political corruption, due to the fact that it reaches even the top of the political hierarchy, often protected by a series of immunities and inviolabilities, cannot be easily combated merely through criminal law means since it is a problem in the system and, therefore, requires political will and actions to reduce state bureaucracy and to render the administrative decision more transparent.

Political corruption erodes the confidence in public institutions and democracy, favours tax evasion and undermines the national economy, hinders foreign investments and helps the organized criminal groups to gain access to the political leadership of the state, thus jeopardizing its safety.

Corruption generalized at the top of the political and administrative leadership of the state generates the emergence of failed states,[1] unable to ensure the protection of their own citizens.

Political corruption, according to our view, does not limit itself to the deeds of active or passive bribery and trading of influence, defined by the Criminal Law Convention on Corruption,[2] adopted in Strasbourg, on 27.01.1999, taking also the form of the use of political influence with a view to obtaining material advantages for oneself or for the party, or the form of electoral corruption, which consists in buying the electors' votes and, why not, also that of the conflict of interest, which, although in the Romanian Criminal Code (Article 301) is seen only as an office offense, it reveals a public official just as corrupt, if not even more corrupt, as the one who accepts the receiving of undue advantages since, using the powers invested in him/her, s/he awards onerous procurement contracts to companies controlled by him/her or his/her relatives.

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[1] Noam Chomski, "State esuate. Un abuz al puterii si un atac asupra democratiei", Antet Publishing House, 2007.

[2] Ratified by Romania by Law no. 27/2002, Official Journal of Romania no. 65 of January, 30th 2002.

The Convention against Corruption[3] elaborated under the auspices of the United Nations includes, otherwise, among the offenses of corruption also the abuse of functions (Article 19) as the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity, as well as the illicit enrichment (Article 20), consisting in the deeds committed with the intention of illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income, out of which only the abuse of functions is incriminated by Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts[4] as an offense assimilated to corruption offenses.

Although the concept of political offense was abandoned in the classification of offenses in the European criminal codes, it is still functioning in the matter of extradition, Article 3 of the European Convention on Extradition allowing the refusal of extradition if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.

Subjectively, the act of corruption may be politically motivated, but this does not mean that the offense is a political offense.

The Criminal Law Convention on Corruption provides the following obligation for the signatory states: "the criminal offences established in accordance with this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between or among the Parties. The Parties undertake to include such offences as extraditable offences in any extradition treaty to be concluded between or among them". (Article 27)

Political corruption supposes, at the same time, the diversion of the power obtained by means of the electoral process in favour of the political clientele with a view to gaining material advantages by diverting public money for private use or for that of the party to which they belong, but also the gain of political power through the diversion of the electoral process using the practises of political corruption.

Even if one avoids the recognition of the fact that the candidates' registration on the electoral lists is mainly conditioned by the financial contribution made by them during the election campaigns, this is indeed the reality, and the place of a political meritocracy is taken by a corrupt and corrupting plutocracy, which offers administrative functions to a political clientele, motivated in exercising the functions in which they were appointed by recovering and multiplying the money invested in the election campaign.

The system of legislative elections in uninominal constituencies, in a single round of voting, with proportional distribution of the seats has proved inadequate, allowing the access in Parliament particularly of MPs of the kind.

The costs of election campaigns are clearly higher than the donations received and declared by the political parties and the political or electoral alliances at the Permanent Electoral Authority, a fact which is noticeable from the multitude of electoral materials and the scale of media campaigns, or these costs can only come from undeclared, untaxed "black money".

Accompanied by the bureaucratic corruption, political corruption "is characterized by the domination of political life through a monopolist organization or group, partially

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[3] Published in the Official Journal of Romania no. 903 of October, 5th 2004.

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

based on corruption and obtaining significant advantages from the use of corrupt practices".[5]

In recent years, Romania has taken important steps against corruption, yet their effects were limited, fragile and easily reversible, the latest charges in the matter of corruption made by the National Anticorruption Directorate being aimed at the top of the political class, emphasizing at the same time the cross-party nature of corruption networks.

The former European Commissioner for Home Affairs, Cecilia Malmstroem, stated in the presentation of the 2013 report that corruption alone is estimated to cost the EU economy EUR 120 billion per year, among the most vulnerable areas include the financing of political parties, corruption of local authorities, public procurement and health systems.[6]

In Romania, both petty and political corruption remains a significant problem. Although some positive results have been observed when it comes to prosecution of high level corruption cases, political will to address corruption and promote high standards of integrity has been inconsistent, the report said.

In this report, the European Commission suggests that Romania "ensures that all necessary guarantees remain in place to safeguard the independence and continuation of non-partisan investigations into high-level corruption cases, including with regard to elected and appointed officials".

We aim to examine to what extent the funding of political parties favours the phenomenon of political corruption, starting from the way in which the financing of political parties is currently regulated and the way in which political corruption is reflected in the case law of the courts.

2. On the financing of political parties

Law no. 334/2006 on the financing of the activity of political parties and electoral campaigns[7] aims at ensuring equal opportunities in political competition and transparency in the financing of the activity of political parties and electoral campaigns, which, we must admit, was partially failed mostly in what concerns the transparency of the funding and the deterrent effect of the sanctions for breach of funding rules.

The funding of political parties is ensured both through subsidies from the state budget, and through the contributions of members of the party, donations and liberalities, whose quantum is quite generously set by law.

The contributions paid during a year by a party member cannot exceed 48 minimum gross salaries at the country level. The gross minimum salary at the country level taken as a reference is the one existent on the 1st of January of that year.

Political parties are required to publish in the Official Journal of Romania, Part I, the total amount of revenues from contributions by the 31st of March of the following year, as well as the list with the party members who have paid, in a year, contributions whose aggregate value exceeds 10 minimum gross salaries at the country level.

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[5] M. Johnson, A. Doig, *Puncte de vedere asupra principiilor unei bune guvernari şi a strategiilor durabile de combatere a corupției,* in vol. The World Bank, Corupția şi combaterea ei. Spre un model de construire a integrității naționale, Institutul IRECSON, Bucharest, 2003, p. 25.

[6] Commission unveils first EU Anti-Corruption Report, europedirect.cdimm.org/...

[7] Republished in the Official Journal of Romania no. 510, from July, 22nd 2010.

The donations received by a political party in a financial year cannot exceed 0.025% of the revenues provided in the state budget for the respective year. In the financial year in which there are elections, either local, general, parliamentary, for the European Parliament or the election of Romania's president, the ceiling will be of 0.050% of the revenues provided in the state budget for the respective year. Donations can be made both by natural and by legal persons. Donations received from an a *natural person* in a year can be of up to 200 minimum gross salaries at the country level, at the value existent upon the 1st of January of that year.

In the financial year in which there are several elections, the donations received from a natural person can be of up to 400 minimum gross salaries at the country level, at the value existent upon the 1st of January of that year, for each election or referendum campaign.

Donations received from a *legal person* in a year can be of up to 500 minimum gross salaries at the country level, at the value existent upon the 1st of January of that year. In the financial year in which there are several elections, the donations received from a legal person can be of up to 1,000 minimum gross salaries at the country level, at the value existent upon the 1st of January of that year, for each election or referendum campaign. The total amount of the donations made by legal persons directly or indirectly controlled by another person or group of natural or legal persons can not exceed the limitations stipulated by the law.

The fair value of the movable and immovable assets donated to the party, as well as of the services provided to the same free of charge shall be included in the value of the donations. Price discounts exceeding 20% of the value of the goods or services offered to political parties and independent candidates shall be deemed as donations and shall be registered separately in the accounting records of the party or independent candidate in case, according to the standards issued by the Ministry of Public Finances. Upon receiving a donation, the identity of the donor shall be mandatorily checked and registered, irrespective of the public or confidential character of the same. Upon the donor's written request, its identity remains confidential if the donation does not exceed annually 10 minimum gross salaries at the country level. All donations shall be adequately registered in accounting records, specifying the date when they were made and other information which should allow the identification of the financing sources.

Political parties shall publish in the Official Journal of Romania, Part I the list of natural and legal persons who during a financial year made donations whose cumulated value exceeds 10 minimum gross base salaries at the country level, as well as the total amount of the confidential donations received by 31 March of the following year.

Donations from other states or foreign organizations, as well as from foreign natural or legal persons are forbidden. The amounts received in breach of the provisions stipulated under paragraph (1) shall be confiscated and included in the state budget.

The Permanent Electoral Authority is the public authority authorized to check the compliance with the lawful provisions on the financing of political parties, political or electoral alliances, independent candidates and electoral campaigns.

The control of the subsidies from the state budget shall be carried out simultaneously by the Court of Audit, according to the provisions of Law no. 94/1992 on the organization and operation of the Court of Audit, as republished.

Within 15 days from the publication of the election result, the financial agent shall submit to the Permanent Electoral Authority a detailed report on the electoral income and expenses of each political party, political alliance, electoral alliance, organization of citizens belonging to national minorities or independent candidates.

The infringement of these provisions represents an offence, unless committed in such a way as to constitute a crime, according to the criminal law, and they shall be sanctioned by fines between RON 5,000 and RON 25,000. The sanctions can be applied, if case be, to the political party, independent candidate, financial agent and/or donor in breach of the provisions stipulated here above.

In case based on a final court decision, one or several candidates of a political party that have been declared elected were convicted for a crime related to the financing of the political party or, if case be, of the electoral campaign, they become incompatible with the status of MP or local representative for the mandate obtained, which shall be annulled.

According to the 2013 Report of the Permanent Electoral Authority[8] regarding the verification of the income and expenditure made by the political parties during the election campaign for the local elections of 2012, there have been applied a total of 884 contravention sanctions, mainly for failure to file within 15 days from the date of the election, by the financial agent, of the detailed report on the electoral income and expenditure.

Deviations having a contravention nature targeted issues connected to:

- organization of the parties' accounting in accordance with accounting provisions in force;
- legality of the funding sources;
- regime of donations and legacies during election campaigns and outside electoral periods;
- non-disclosure by political parties in the Official Journal of Romania, Part I, of the mandatory data regarding the incomes from the financial year 2012.

The Permanent Electoral Authority's controls capture rather formal breaches of the legal provisions regarding the funding of political parties, without being able to reveal the aspect of the funding of each candidate with undeclared money.

The European Commission's report on corruption holds: "High-profile corruption cases show vulnerabilities in the supervision of party and electoral campaign financing, as well as in the prevention of electoral fraud. In its compliance report of December 2012, GRECO pointed out that 10 out of its 13 recommendations on party funding are still not fully implemented. Legislative amendments are being prepared and, if adopted, will fill a number of existing gaps, notably on access to annual financial statements of political parties. Moreover, existing provisions are not being properly implemented".[9]

We think that the law on the funding of political parties should provide greater financial sanctions, applicable also to the parties, not only to their representatives, for violation of the legal provisions regarding the legality of the sources of party funding, as well as in the case their representatives use, during the election campaigns, means of corrupting the electorate.

[8] www.roaep.ro/.

[9] Commission unveils first EU Anti-Corruption Report, europedirect.cdimm.org/...

3. Political corruption before justice

The European Commission's Report holds that, in the last seven years, 1 496 defendants were convicted in final court decisions, of which almost half held political offices (including: one former prime minister, one minister, 8 MPs, one state secretary, 26 mayors, deputy mayors and prefects, 50 directors of national companies and public institutions, 60 officials from control authorities), the tendency for the years subsequent to the report (2013-2014) being that of an increase of such cases.

From these decisions, we shall directly refer to several cases connected to the funding of political parties.

Law no. 78/2000 incriminates as an offense assimilated to corruption offenses the deed of a person who has a leading position in a party, in a trade union or employers' association or in a non-profit legal person who uses its influence or authority for the purpose of himself or herself or for another person money, goods or other undue advantages.

The High Court of Cassation and Justice found that the constitutive elements of this offense are met if the defendant used his influence and authority as president of the party in order to obtain an illegal funding of his election campaign. What is of interest in this case is whether, in fact, at the time the defendant used his influence or authority, he had at least the definite vocation for being the party's candidate in the elections, a fact that might induce him the concern to ensure funding sources for the election campaign, be it licit or illicit. The mere use of influence and authority by the defendant in order to illicitly obtain money for the election campaign is circumscribed to the analyzed incrimination, being irrelevant whether he had envisaged the funding of his own campaign (presidential or parliamentary) or that of other candidates, nominated or not, of the party, regardless of the type of elections. The fact that there was a financial representative who dealt with the management of the financial resources for the campaign not does exclude the perpetration of illegal acts by the candidate himself, through which the latter had secured additional and non-transparent funding sources for the campaign.[10]

The fact of the defendant who, acting as an inspector-in-chief at a regional labour inspectorate, demanded that the informer should deposit at the cashier of a party a certain sum of money in order to block the application of some sanctions against the company in which the informer was an associate, constitutes an offense of bribe taking, since the claiming of the material gain could be used for oneself or for another.[11]

Most convictions for acts of corruption are in connection with the award of contracts financed from public funds. Local and county councillors, mayors, presidents of county councils, MPs or other public officers have unlawfully awarded such contracts or have intervened to favour certain companies. Although not all of these cases are directly related to the funding of political parties, it is evident that at least some of this money reach the treasury of the parties or represent a consequence of the sums advanced in order to accede to such positions.

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[10] High Court of Cassation and Justice, c. 5, criminal decision no. 160/20.06.2012; https://cristidanilet.files.wordpress.com/2012/11/trofeulcalitatii-decizie.pdf.

[11] Timis Tribunal, criminal decision no.519/21.12.2011, dismissal of the plea by the High Court of Cassation and Justice, criminal decision no. 2479/2012.

The Romanian criminal law provides the criminal liability of the legal person, but it is difficult to conceive the application of criminal penalties, especially in the case of multinationals which, in their marketing policy, accept even the use of corrupt practices.

4. Conclusion

In order to combat political corruption, the criminal law means are simply insufficient; the reform of the electoral system and a greater transparency of the funding sources for the election campaigns, coupled with financial penalties imposed upon the parties, could contribute to controlling corruption.

Corruption prevention in Lithuania: moving forward from dark to bright side

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Abstract:

This article focuses on the issues of corruption prevention overview, institutional framework, preventive measures and development of criminal justice in the light of corruption prevention. One can said, that the preventive measures, it seems to be, are under the nature of complexity, but one of the most effective ways to tackle corruption roots and preconditions is severe criminal policy. The authors do not want to emphasize, that the severity of laws is the cure from corruption as such. It has to be stated, that the severity should be considered as flexible and dynamic reaction to the social relations, which are sometimes poisoned of „the misuse of public office for private gain".

Keywords: *corruption, Lithuania, measures for prevention, criminal laws, legal regulation, developing of national legislation.*

As one could found in the scientific literature, it is stated, that coruption is still a painfull problem in Lithuania, as in most other post-communist states. In Lithuania as well as in the other Central and Eastern European countries, discussion about the roots of corruption is very often concentrated on the problem of the heritage of previous communist system. According to popular opinion, the lack or responsibility, transparency and accountability in the public sector of Lithuania could be explained by the fact that corrupt practice is deeply ingrained in the so-called Soviet-type mentality that could not be automatically replaced during the last decades of political independence.[1] Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of human life, and allows organized crime, terrorism and other threats to human security to flourish. This co-called „evil phenomenon" is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.[2]

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[1] Dobryninas, A: *Lithuania's Anti-Corruption Policy: between the "West" and the "East".* European Journal on Criminal Policy and Research. 2005, No. 11, p. 77.

[2] Thompson, K: *Does anti-corruption legislation work?* International Trade and Business Law Review, 2013, vol. XVI, p. 99-135.

Nowadays, it should be noted, the situation of prevention of corruption in Lithuania has definitely changed. But, in the eyes of the authors, this situation is not under satisfaction. The development is carried on step by step.

1. General overview of corruption prevention regulation in the Republic of Lithuania

Corruption means different things to different people and aggregate definitions are moulded by cultural factors. Thus there can be no universal definition of this phenomenon. Rather, both international organisations and national jurisdictions develop their own definitions of corruption. In the current academic and political discussions, „corruption“ is a broad term used to describe a wide spectrum of behaviours, ranging from criminal offences, the giving or receiving of a bribe, to concepts of good governance related to inefficiencies in public service delivery. Its most popular definition is „the misuse of public office for private gain“.[3]

Lithuania has ostensibly done much to fightcorruption in the last 20 or so years. Lithuania has ratified[4] the United Nations Convention against Corruption that provides for a sufficient range of anti-corruption measures. The implementation of the Convention against Corruption has been put under scrutiny based on the mechanism for the review of Implementation of the United Nations Convention against Corruption. It would also be useful to perform social studies on negative impact of corruption on human rights topics and present them to the society, which may considerably increase public awareness of this issue. An engaged civil society and media that value and demand accountability and transparency are vital in addressing corruption. Transparency and accountability are key principles of a human rights-based approach to development that are also integral to successful anti-corruption strategies. Some of the measures that can enhance transparency and accountability and contribute to sustainable anti-corruption measures are the adoption of laws ensuring the public's access to information on governmental processes, decisions and policies as well as institutional reforms which strengthen transparency and accountability.[5]

The LithuanianParliament, like most other countriesin the region, has adopted laws on the financingof political parties and political organisations, public procurement, and the prevention of corruption. In January 2002, anti-corruption work wasseemingly co-ordinated through the implementationof the National Anti-Corruption Programmewhich – again like many anti-corruption programmesin the Central and Eastern European (CEE)region, consisted of a strategy document and anaction plan.[6]

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[3] Gounev, Ph.,Dzhekova, R., Bezlov, T: *Study on anti-corruption measures in EU border control*. 2012. See: http://frontex.europa.eu/assets/Publications/Research/Study_on_anticorruption_measures_in_EU_border_control.pdf.

[4] The Law for ratifying Convention against Corruption was adopted on the 5th of December, 2006.

[5] Reply of Lithuania on the negative impact of corruption on the enjoyment of human rights. 22/11/2013. Also see: http://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Corruption/Lithuania.docx.

[6] Jonauskis, M: *Anticorruption in Education and Training in Lithuania. In Anti-Corruption Training Programmesin Central and Eastern Europe*. Working Group on Preventing Corruption in Public Administration, The Council of Europe, Strasbourg, France, 2004. Also see: Bryane, M., Kennon, E., Hansen, J.K.: *The Future of Anti-corruption Measures in Lithuania.* Public Policy and Administration. Vilnius: 2006, No. 16, p. 7.

According to the Law on Prevention of Corruption, adopted in 28 May 2002[7] (No. IX-904) (hereinafter – the Law) by the Parliament of the Republic of Lithuania, corruption prevention should be understood as detection and elimination of the causes and conditions of corruption through the development and implementation of a system of appropriate measures as well as deterrence of persons from the commission of crimes of corruption, which includes such criminal offences as acceptance of a bribe, subornation, other criminal offences committed in the public sector by giving a bribe or seekingpersonal gain, *i.e.*: abuse of office, unlawful involvement of an official in the commercial, economic or financial activities of an enterprise, abuse of discretion, misrepresentation, fraud, appropriation or embezzlement, disclosure of an official secret, disclosure of an industrial, commercial or bank secret, abuse of confidence in commercial, economic and financial activities, violation of the public procurement procedure, intentionally fraudulent income or profit statements, money laundering, interfering with a voter in the exercise of his voting rights in an election or a referendum, smuggling, intentional and criminal forgery of an account or entrygiving false or inaccurate information or an unlawfulfailure to register a payment where-commission of the above offences is aimedt seeking or soliciting a bribe or subornation or concealing or disguise acceptance or giving of a bribe.

So, traditionally, corruption is associated with the governmental sector; however, recently it has also been referred to when talking about thenon-governmental sector (private companies, mass media, public bodies etc.). Corruption can be sorted by its range (grand and petty corruption); goal (political, state capture, and administrative corruption, the latterreferring to the application of favourable laws and regulations); the modeof operation (bribery, nepotism, abuse of office etc.), the context ofoperation (monetary corruption in a market economy and favouritismin a traditional or planned economy), and the mode of conduct (activeor passive corruption) etc. Corruption is often claimed to be an inevitable response to unsoundmanagement and defective public administration, a natural attempt toavoid decision-making routine, red-tape obstacles and incompetence ofpublic officials.[8]

In general sense the national institutions, that are responsable for coping with corruption, shall to act under the following principles of prevention (Art. 4 of the Law): *1) legality* – the measures for the prevention of corruption shall be implemented in compliance with the requirements of the Constitution of the Republic of Lithuania, laws and other legal acts, ensuring the protection of the fundamental human rights and freedoms; *2) universal applicability* – any person may be an entity of corruption prevention; *3) interaction* – effectiveness of the measures for the prevention of corruption may be achieved through co-ordinated efforts of all the entities of corruption prevention, exchange of relevant information and provision of any other assistance; *4) continuity* – effectiveness of the measures for the prevention of corruption may be achieved through a continuing oversight and review of the results of implementation of the measures for the prevention of corruption, making proposals about enhancing the effectiveness of the relevantmeasures to a competentinstitution authorised to implement such proposals. These are the general principles, which have to be taken into account, while the key tasks of corruption prevention are implemented.

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[7] Law on Prevention of Corruption of the Republic of Lithuania. *Official Gazette,* 2002, No. 57-2297.

[8] Lithuanian Map of Corruption 2001–2005. See: http://transparency.lt/en/mediaen/tilc-publications/.

Systemically it should be noted, that the key tasks of this prevention should be as follows: 1) disclosing and elimination of the contributing factors and conditions of corruption; 2) deterrence of persons from the commission of crimes of corruption; 3) securing a workable and effective legal regulation of corruption prevention; 4) setting up of an adequate and effective mechanism of organisation, implementation, oversight and control of corruption prevention through legal, institutional, economic and social measures; 5) involvement of the public and public organisations in the prevention of corruption; and fine lone – 6) promotion of transparency and openness in the provision of public services.

General consideration of the measures for prevention of corruption within the state

Lithuania has done much to fight corruption in the last decades. It adopted various legal acts regarding corruption, made changes to its public administration and public procurement organizations, implemented several national anti-corruption programmes, established an independent anti-corruption agency, became a member of several international organizations and acceded to their legal instruments to fight corruption. The country joined the Council of Europe in 1993 and benefited early on from the organization's technical assistance. It ratified the Council's Criminal and Civil Law Conventions against Corruption in 2002 and 2003, respectively. Since 1999, Lithuania has been a member of the Council's Group of States against Corruption (GRECO), which monitors, through a process of peer review, the conformance of member countries' anti-corruption frameworks with the Conventions. Lithuania signed the United Nations Convention against Corruption in December 2003 and ratified in 2006.[9]

So, remembering Article 5 of the Law on Prevention of Corruption, it emphasises, that there are minimum 7 measures to prevent and combat corruption. Other measures for the prevention of corruption are provided for by other laws.

The first one is corruption risk analysis, which shall mean anti-corruption analysis of the activities of a state or a municipal institution following the procedure prescribed by the Government,and presentation of motivated conclusions about the development of an anti-corruption programme and proposals about the content of the programme; recommendations concerning other corruption prevention measures to state and municipal institutions which are responsible for the implementation of such measures.

The second one is drafting, adopting and development of anti-corruption programmes. Anti-corruption programmes may range from the National Anti-corruption Programme of the Republic of Lithuania to sectoral, institutional and other programmes. Programme shall be developed and its implementation shall be organised and controlled by the Government with the participation of the Special Investigation Service. The sectoral (embracing the areas of the activities of several state or municipal institutions), departmental and other anti-corruption programmes shall be developed by the state, municipal and non-governmental institutions which have been charged with the development of such programmes by the National Anti-corruption Programme and other regulatory acts. Institutional anti-corruption programmes may also be developed by state and municipal institutions where after corruption risk analysis suggestions were made to develop such a programme. The development those

[9] Velykis, D: *A Diagnosis of Corruption in Lithuania.* European Research Centre for Anti-Corruption and State-Building.Working Paper No. 10. See: http://www.againstcorruption.eu/wp-content/uploads/2012/09/WP-10-Diagnosis-of-Corruption-in-Lithuania-new.pdf.

programmes shall be governed by the Law, the National Anti-corruption Programme and other regulatory acts, having regard to the proposals made by the Special Investigation Service and other information available. Programme shall be approved by the *Seimas* (Parliament of the Republic of Lithuania) on the recommendation of the Government. Other anti-corruption programmes shall require approval by the head of a state or municipal or non-governmental institution which developed the programme concerned. The head of the institutionhall bear personal responsibility for the implementation of the programme approved. Finally, the coordination and oversight of the implementation of the programmes shall be carried out by the heads of the agencies or the structural subdivisions thereof or persons therein who have been authorised by the head of the corresponding institution to conduct corruption prevention and control at the institution. The Special Investigation Service shall monitor the implementation of the proposals made by it.

The national anti-corruption programme for 2011-2014 sets out a comprehensive action plan and identifies institutions responsible for its implementation. Objectives include expanding e-services by the tax inspectorate, publishing land-planning projects online, and sponsoring anti-corruption advertisements in the media. Implementation of the programme is facing delays. While recent public discussions have focused on the punishment of corruption, its prevention also merits closer attention.[10]

The third one is anti-corruption assessment of legal acts or their drafts. A state or municipal institution drafting or passing a legal act regulating public relations particularly prone to corruption must carry out the anti-corruption assessment of the draft and examine the anti-corruption assessment of the same draft carried out by other state or municipal institutions. The assessment of the effective legal acts shall be carried out taking into account the practice of their application, and shall be submitted to the state or municipal institution which adopted them or on whose initiative they were adopted. This agency shall determine whether it would be expedient to amend the legal act in question. The Special Investigation Service shall carry out the anti-corruption assessment of the effective or draft legislation on its own initiative or on the proposal by the President of the Republic, the Chairman of the Seimas, the Prime Minister, a parliamentary committee, a commission, a parliamentary group or a minister.

The fourth one is provision of the information about a person seeking or holding office at a state or municipal agency. This measure shall mean furnishing, at the request of the head of a state or municipal institution or on the initiative of the law enforcement and control institutions, following the procedure laid down in legal acts, of objective and legally gathered information held by the law enforcement and control institutions about a person seeking or holding a position at a state or municipal institution, to the head of the institution who has appointed or is appointing the public servant in question, or to a state politician in order to ensure that only persons of high moral standing hold office at a state or municipal institution.

The fifth one is provision of the information to the registers of public servants and legal entities. The Register of Public Servants shall be provided the information about public servants who, by a final and effective court judgment, have been charged with the commission of corruption-related criminal acts, or against whom administrative or

[10] EU Anti-Corruption Report. Lithuania. Brussels, 3.2.2014.COM(2014) 38 final. ANNEX 15. See: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti -corruption-report/docs/2014_acr_lithuania_chapter_en.pdf.

disciplinary proceedings have been initiated for serious misconduct in office, related to the violation of the provisions of the Law on the Adjustment of Public and Private Interests in the Public Service and committed in pursuit of illegal gain or privileges for themselves or other persons. The Register of Legal Entities shall be provided the information about legal entities who, by an effective court judgment, have been charged with the commission of corruption-related criminal acts, or whose employee or an authorized representative has, by an effective court judgment, been found guilty of corruption-related criminal acts while acting for the benefit or in the interests of the legal entity concerned.

The sixth one is education and awareness raising of the public. Anti-corruption education is an integral part of raising public awareness with a view to promoting personal integrity, civic responsibility, understanding of human rights and duties to society and the State of Lithuania, and ensuring the implementation of the aims of corruption prevention. This education of the public shall be carried out at the educational institutions of all types and levels in accordance with the appropriate educational programs, through media and by other means. The state and municipal institutions shall inform the public through the media or by other means about their activities in the fight against corruption.

Moreover, the final one – *the seventh* – public disclosure of detected corruption cases.

Concluding, one can say, that the measures, mentioned above, are the basic one, what means, that there may be other legal regulations for preventing corruption phenomenon. One of those – developing of criminal justice regulations, i.e. provisions of Criminal Code[11] of Lithuanian Republic. Before this article focuses on the overview of developing of criminal laws, the institutional framework should be observed first.

Institutional Framework

The following bodies (Art. 12 of the Law) shall implement corruption prevention: 1) The Government; 2) The Chief Institutional Ethics Commission; 3) The Special Investigation Service; 4) Other state and municipal and non-governmental institutions.

Government is ensuring that the corruption prevention measures are implemented by the ministries and institutions subordinate to the Government; allocating the funds necessary for an effective implementation of the corruption prevention measures; together with the Special Investigation Service developing the National Anticorruption Programme and submit it to the Seimas for approval, as well as make proposals as to the amendment of the said programme; making proposals to the Seimas as to the enactment and amendment of the laws and other legal acts necessary for the implementation corruption prevention.

Chief Institutional Ethics Commission is analyzing ethical problems confronting the public servants, and, seeking to eliminate the factors contributing to a conflict between public and private interests, shall make proposals concerning adoption and improvement of anti-corruption programmes and legal acts; making proposals to the Seimas, other state and municipal institutions related to the implementation of the provisions of this Law; summing up the application of legal provisions setting out the institutional ethics requirements in different areas, and shall participate in the drafting

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[11] Criminal Code of the Republic of Lithuania (with amendments). *Official Gazette*, 2000, No. 89-2741.

and codifying such provisions; and implementing the corruption prevention measures assigned to it together with the other state and municipal institutions.

The Special Investigations Service is participating in the development of the National Anticorruption Programme by the Government, and shall make recommendations as to the amendments thereto; putting forward proposals to President, the Seimas and the Government as to the introduction and improvement of the new legislation necessary for the implementation of corruption prevention; also taking part in the functions of co-ordination and supervision of the activities of state and municipal institutions in the field of corruption prevention discharged by the Government; together with the other state and municipal institutions, implementing corruption prevention measures; and together with the other state and municipal institutions, implementing the National Anti-Corruption Programme.

So the Special Investigation Service is in charge of prosecuting and preventing corruption. The Immunity Service, reporting to the Commissioner General of the Police, is responsible for the prevention and investigation of corruption within the Police. The prosecution service contains a division on investigation of organised crime and corruption. The Judicial Ethics and Discipline Commission decides on disciplinary action against judges. The Chief Official Ethics Commission (COEC) is charged with supervising adherence to institutional ethics standards, regulating public and private interests in civil service, and controlling certain lobbying activities. UNCAC reviewers called for stronger inter-agency coordination and cooperation in enforcing anti-corruption laws.

It seems to be, that there are current number of institutions, which are responsible for the mechanism on prevention of corruption. However, as the scholars say "the judicial system, including policy, prosecuting magistracy, courts of justice, Special Investigation Service, Department of State Security and other acting judicial institutions are created to fight corruption. Unfortunately, all of them may also easily yield to corruption because it is impossible to avoid individual decision-making and other conditions creating a possibility to corrupt. That is why we should rely upon traditional fighting corruption methods: leavings of civil servants, strict rules and control. And we should not forget that the clearness of procedures, precise and simplicity might eminently decrease the possibility to corrupt".[12]

2. Developing of criminal justice in the light of prevention of corruption

As generally recognized, corruption is often thought of as an economic or "white collar crime". That ignores the greater implications of corruption, the abuse of power at the expense of the many, which perpetuates social injustice and the exploitation of the vulnerable: denial of healthcare, education, economic opportunity and justice, as well as preventing the holding to account of leaders for the theft of resources.

Such is the human cost of corruption – the denial of access to public services, to economic opportunity, to a voice and to justice – that it cannot be seen as anything but a criminal act of whom the victim is society at large: in short, a crime against society.[13]

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[12] Markuckaite, V: *Political Corruption in Baltic States: Lithuanian Case*. See: http://www.10iacc.org/content-ns.phtml?documents=300&art=40.

[13] Swardt, C: *Corruption: a crime against society*. See: http://blog.transparency.org/2011/07/18/corruption-a-crime-against-society/.

One of the real steps, making it chance to tackle corruption offences in Lithuania – is developing and improving criminal laws, regulating liability for crimes against state and public interests.

This part of the article will focus on Lithuanian efforts to make the best on developing regulation and application of criminal laws concerning prevention of corruption preconditions as such.

In the light of developing Lithuanian criminal laws, it is worth to emphasize, that Lithuanian legislative authorities are doing the best to tackle corruption with the help of proper regulation and application of criminal laws. As the social relations are dynamic, so the legal regulation always has to go in the same step line with these relations. That is why there are a lot of efforts to develop national legal acts. Especially, it is needed to go in line with the provisions of international documents concerning corruption prevention.

After the Third Round Evaluation Report was adopted at GRECO's 43rd Plenary Meeting (2 July 2009) and made public on 17 February 2010, following authorization by Lithuania (Greco Eval III Rep (2008) 10E and after the subsequent Compliance Report was adopted at GRECO's 51st Plenary Meeting (23-27 May 2011) and was made public on 27 May 2011, following authorization by Lithuania (Greco RC-III (2011) 7E), Lithuania has implemented most of recommendations, that were formulated by GRECO Evaluation Team[14].

First, it should be noted, that GRECO recommended for Lithuania to extend the concept of bribe in the incriminations of bribery and trading in influence so as to cover clearly any form of benefit (whether material or immaterial and whether such benefits have an identifiable market value or not), in line with the concept of "any (undue) advantage" used in the Criminal Law Convention on Corruption.

The amendments to Article 230, Paragraph 4 of the Criminal Code (hereinafter – CC) of the Republic of Lithuania have been adopted and entered into force on 5 July 2011. Both the bribery provisions of Articles 225 and 227 CC and the trading in influence provisions of Article 226 CC refer to the concept of bribe as defined in the amended Article 230, Paragraph (4) CC. Article 230 CC in its amended form reads as follows:

"**Article 230 CC: Interpretation of Concepts**

1. For the purposes of this Chapter, public servants shall mean State politicians, State officials, judges, public servants specified in the Law on Public Service and other persons who, while working at State or, on other grounds provided for by law, holding positions at State or municipal institutions or agencies, perform the functions of a government representative or hold administrative powers, also official candidates for such office.

2. A person holding appropriate powers at a foreign State or European Union institution or organisation, an international public organisation or at an international or

[14] Group of States against Corruption. Third Evaluation Round.Second Compliance Report on Lithuania. "Incriminations (ETS 173 and 191, GPC 2)" and "Transparency of Party Funding". Greco RC-III (2013) 6E.Adopted by GRECO at its 60th Plenary Meeting (Strasbourg, 17-21 June 2013). See also: Group of States against Corruption. Third Evaluation Round. Second Compliance Report on Lithuania. "Incriminations (ETS 173 and 191, GPC 2)" and "Transparency of Party Funding". Greco RC-III (2011) 7E.Adopted by GRECO at its 51st Plenary Meeting (Strasbourg, 23-27 May 2011).

European Union judicial institutions, also official candidates for such office shall be held equivalent to a public servant.

3. Moreover, a person who works or, on other grounds provided for by law, holds a position at any public or private legal entity or organisation, or engages in professional activities and holds appropriate administrative powers, or has the right to act on behalf of this legal entity or organisation, or provides public services, as well as an arbitrator or a juror shall also be held equivalent to a public servant.

4. For the purposes of this Chapter, a bribe shall mean any unlawful or undue advantage in the form of any property or other personal benefit (whether material or immaterial, of an identifiable market value or without such value) intended for a public servant or a person of equivalent status or a third person for a desired legal or illegal act or omission in the discharge of powers of a public servant or a person of equivalent status."

Second, GRECO recommended making it clear for everyone that instances in which the advantage is not intended for the bribe-taker him/herself but for a third party are covered by the provisions on active bribery under Article 227 of the Criminal Code.

Such amendments in the CC have been adopted and have entered into force. The amended Article 227 CC reads as follows:

"**Article 227 CC: Graft**

1. A person who, whether directly or indirectly, offers, promises or agreed to give, or gives a bribe to a public servant or a person equivalent thereto or to a third party for a desired lawful act or inaction of a public servant or a person equivalent thereto in exercising his/her powers or to an intermediary seeking to achieve the same results shall be punished by a fine or restriction of liberty or by detention or by imprisonment for a term of up to four years.

2. A person who commits the actions provided for in paragraph 1 of this article by seeking an unlawful act or inaction by a public servant to be bribed or a person equivalent thereto in exercising his powers shall be punished by a fine or detention or imprisonment for a term of up to five years.

3. A person who commits the actions provided for in paragraph 1 or 2 of this article by offering, promising, agreeing to give or giving a bribe in the amount more than 250 MSL3 shall be punished by imprisonment for a term of up to seven years.

4. A person who commits the actions provided for in paragraph 1 or 2 of this article by offering, promising, agreeing to give or giving a bribe in the amount less than 1 MSL shall be considered to have committed a misdemeanor and shall be punished by a fine or restriction of liberty, or by detention.

5. A person shall be released from criminal liability for grafting where s/he was demanded or provoked to give a bribe and s/he, upon offering, promising to give or giving the bribe as soon as possible, but in any case before being recognized as a suspect, notifies a law enforcement institution thereof or also in cases where s/he promises to give or gives the bribe with the law enforcement institution being aware thereof.

6. A legal entity shall also be held liable for the acts provided for in paragraphs 1, 2, 3 and 4 of this article."

Third, GRECO recommended to incriminate trading in influence in line with Article 12 of the Criminal Law Convention on Corruption. So, the amendments have been made as follows:

“**Article 226 CC: Trading in Influence**

1. Any person who, seeking that another person, by using his/her social position, office, powers, family relations, acquaintances or any other kind of possible influence on a State or municipal institution or agency, an international public organisation, their servant or a person of equivalent status, exerts influence on the appropriate institution, agency or organisation, the public servant or the person of equivalent status so that they act or refrain from acting legally or illegally in the exercise of their powers, offers, promises or agrees to give or gives a bribe to such person or a third person directly or indirectly, shall be punished by restriction of liberty or a fine, or detention, or imprisonment for a term of up to 4 years.

2. Any person who, by using his/her social position, office, powers, family relations, acquaintances or any other kind of possible influence on a State or municipal institution or agency, an international public organisation, their servant or a person of equivalent status, promises or agrees to take a bribe, demands or provokes to give, or takes a bribe, directly or indirectly for his/her own benefit or for the benefit of other persons, by promising to exert influence on the appropriate institution, agency or organisation, the public servant or the person of equivalent status so that they act or refrain from acting legally or illegally in the exercise of their powers, shall be punished by a fine or detention, or imprisonment for a term of up to 5 years.

3. Any person who commits the acts specified in paragraph 1 of this article by offering, promising or agreeing to give or giving a bribe in the amount exceeding 250 MSL, shall be punished by imprisonment for a term of up to 7 years.

4. Any person who commits the acts specified in paragraph 2 of this article by promising or agreeing to take, demanding or provoking to give or taking a bribe in the amount exceeding 250 MSL, shall be punished by deprivation of liberty from 2 to 8 years.

5. Any person who commits the acts specified in paragraphs 1 or 2 of this article by offering or agreeing to give or by giving, promising or agreeing to take, demanding or provoking to give or taking a bribe in the amount less than 1 MSL, commits a misdemeanor, and shall be punished by restriction of liberty or a fine, or detention.

6. A person may be released from criminal liability for the acts provided for in paragraphs 1, 3 or 5 of this article, if s/he is extorted or provoked to give a bribe and s/he, after offering, promising, agreeing or giving the bribe, voluntarily reports it to an appropriate law enforcement institution before s/he is recognized a suspect, or if a bribe is promised, agreed or given by him/her with the knowledge of an appropriate law enforcement institution.

7. A legal person shall also be held liable for the acts provided for in paragraphs 1, 2, 3, 4 and 5 of this article.”

Fourth, GRECO recommended (i) to ensure that Lithuania has jurisdiction in respect of bribery and trading in influence offences where the offence is committed in whole or in part in its territory, and in all situations where the offence involves one of its public officials or any other person referred to in Article 17 paragraph 1 subparagraph c of the Criminal Law Convention on Corruption; (ii) to abolish the dual criminality requirement for the prosecution of bribery and trading in influence offences committed abroad by its nationals, public officials or members of domestic public assemblies.

Lithuania has been adopted amendments to Article 7 CC, which have entered into force (see the new items 6, 7 and 8 under article 7 CC). The amended article 7 CC reads as follows:

"**Article 7 CC: Criminal Liability for the Crimes Provided for in International Treaties**

Persons shall be liable under this Code regardless of their citizenship and place of residence, also of the place of commission of a crime and whether the act committed is subject to punishment under laws of the place of commission of the crime where they commit the following crimes subject to liability under treaties:

1) crimes against humanity and war crimes (articles 99-1131);

2) trafficking in human beings (article 147);

3) purchase or sale of a child (article 157);

4) production, storage or handling of counterfeit currency or securities (article 213);

5) money or property laundering (article 216);

6) bribery (article 225);

7) trading in influence (article 226);

8) graft (article 227);

9) act of terrorism (article 250);

10) hijacking of an aircraft, ship or fixed platform on a continental shelf (article 251);

11) hostage taking (article 252);

12) unlawful handling of nuclear or radioactive materials or other sources of ionising radiation [articles 256, 256(1) and 257];

13) the crimes related to possession of narcotic or psychotropic, toxic or highly active substances (articles 259-269);

14) crimes against the environment (articles 270, 270(1), 271, 272, 274).

After all these amendments were made, the Group of States against Corruption (GRECO) has concluded, that Lithuania has shown remarkable progress since the adoption of the Evaluation Report. That was pleased that the comprehensive reform process, already welcomed in the Compliance Report, has been completed by Lithuania through the enactment of significant amendments to the Criminal Code. GRECO was pleased that all the recommendations issued in the Evaluation Report have been implemented. The most recent amendments to the criminal law include notably such important issues as clarification of the concepts of "bribe" and of "third party beneficiaries", criminalisation of active trading in influence, coverage of jurors and arbitrators by bribery law, review of the system of sanctions and jurisdiction over bribery and trading in influence offences committed abroad. GRECO very much hopes that these amendments will prove their efficiency in practice.

Taking into account development of the criminal justice as mentioned above, it should be noticed, Lithuanian criminal laws are getting closer to effective prevention of corruption time to time. Even there are enough space to further development of criminal justice, one may say, that Lithuanian legislation and application of criminal laws are specifically getting in line with the requirements of international legal regulation.

3. Conclusions

1. In Lithuania the key tasks of corruption prevention should be disclosing and elimination of the contributing factors and conditions of corruption; deterrence of persons from the commission of crimes of corruption, securing a workable and effective legal regulation of corruption prevention; setting up of an adequate and effective

mechanism of organisation, implementation; oversight and control of corruption prevention through legal, institutional, economic and social measures, involvement of the public and public organisations in the prevention of corruption; and finally promotion of transparency and openness in the provision of public services.

2. The Government, the Chief Institutional Ethics Commission, the Special Investigation Service and other state and municipal and non-governmental institutions are responsible for implementing minimum 7 measures to prevent and combat corruption, as such as corruption risk anglysis, drafting, adopting and development of anti-corruption programmes, anti-corruption assessment of legal acts or their drafts, provision of the information about a person seeking or holding office at a state or municipal agency, provision of the information to the registers of public servants and legal entities, education and awareness raising of the public, public disclosure of detected corruption cases and others.

3. While criminal justice in the light of prevention of corruption is developed, lots of amendments were made in the Criminal Code of the Republic of Lithuania. These are concerned with interpretation of concepts, related to corruption crimes, graft, trading in influence, criminal liability for the crimes provided for in international treaties and others.

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Moral Considerations on Bribery and Corruption

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Abstract:

In this paper we seek to analyse the core moral issues of bribery and corruption. Starting with problems of definitions and typical moral loopholes, we examine the praxis-theory of bribery. From some critical considerations of this theory we reach a common ground for justification of inherent moral wrong of bribery, the notion of public good can be seen as a ground for that. Following the arguments of pure utilitarian approaches, we may accept certain kinds of bribery, but with putting the issue into a broader context, this justification is misleading because of several morally unjustifiable consequences of such practices. The paper try to demonstrate both the main morally wrong elements embedded in bribery, and corruption's several inherent negative consequences to the public good.

Keywords: *moral loopholes, praxis-theory, inherent wrong, utilitarianism, public good.*

We may consider the corruption as an inherent ingredient of our everyday life, at least in this region.[1] If we had more and more experiences about the phenomenon, we tend to approach to it as „natural" even though think that is moral wrong. Typically persons seek for moral loopholes involved in such activities. Just some examples for generally shared propositions;

- All the individuals in collective units are expected to adjust themselves to the habits, behaviour of their fellows, and bosses.
- The political or professional loyalty (toward the institution, company or party) of an individual may override his/her moral considerations.[2]
- The gratitude might be a rational expectation as a reward for corrupt practices
- Sometimes a person must act immorally in order to achieve morally immaculate outcomes.
- The most frequent loophole is to refer any advantage both material, or career, of which the person have desperate need.

Let me clarify my position about corruption. The term corruption is a broad term, means a secret agreement have been made between two parties. The aim of this agreement is to take immoral and/or illegal advantage for one involved in the practice, through infringing, violating the explicit or implicit moral expectations attached to a given position (not necessarily office), usually, but not necessarily infringing legal norms as well, while the other offers material or immaterial reward for the decision-maker. The criminal law developed a narrower definition, focusing solely on the bribery.

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[1] E-mail: szabo.gabor@ajk.pte.hu; Gál István László: A korrupciós bűncselekmények. In: Polt Péter (Szerk.) Új Btk. kommentár: 5. kötet: Különös rész. Nemzeti Közszolgálati és Tankönyv Kiadó Zrt., Budapest, 2013. pp. 183-185.

[2] see. András Zoltán Nagy: A korrupció társadalmi hatásai és a jog. In: Korrupció Magyarországon. (Szerk. F. Csefkó-Cs. Horváth) Pécs 2001.

The ethics have already made significant efforts to grasp the substance of bribery. According to Michael Philips the bribery is simply a payment (or promise of that) for a service, in order to have the passive party infringe his/her duties or responsibilities stem from their offices. In every case of bribery, the decision is based on malevolent, bad motives. The accidental convergence of the things could lead to the decision-maker to the right and just decision, in spite of the ill intent. At first sight we could think, that for the bribery an official position (politician, public servant, office holder) is necessary.[3]

As Philips follows, a football player can also take part in a bribe act, so we'd better to enlarge the definition, since we can include all, who are affiliated to certain organizations. The organizations set roles, norms and responsibilities for the individuals involved, even if these can either be in written and explicit form or implicit (but well known) expectations. But we should not stop here at that point, rather a new term should be introduced; the „praxis".

The praxis refers to the moral expectations, duties and responsibilities stem from a certain socially recognized role. The bribery then is an agreement to act in contrast with the expectations stem from a given praxis, and act in a way the briber likes in recompense for.

Two conditions are important here; first the agreement should not be explicit, implied conduct is enough. Second, the compensation must not be permanent, it should be accomplished after every single agreement. For example a spy, who is paid by a foreign government for leaking information about a state can be considered as a „profession", not a person who involved in a briber act. If the agreement is about a particular, singular transfer of information to abroad for a certain compensation, then it seems bribery. Strangely enough, that if the agreement has been made, the bribery have completed, even when the decision maker change his mind, and try to keep his role, try to act in accordance with his/her duties and responsibilities. Indeed, when a police officer accept the offered money from the checked car driver for not being punished by the officer, and still inflict the punishment upon the briber, that can be considered as double dishonesty. According to Philips' praxi- theory, the roles have immediately been changed after the agreement.[4]

The advantage of the praxis-theory is that it makes easier to distinguish between the bribery and the gift. What we can find wanting in that theory is the fine elaborating of the inherent ethical wrong of the bribery. Is it enough for us to emphasize the roles, duties and responsibilities attached to the praxises for understanding the wrongness of the practice?

Let me compare the problem of bribery with the so called „whistle-blowing."[5] Here, a member of a firm or a state department informs for example the media regarding irregularities or even illegalities committed by his superiors or colleagues, under some circumstances violating a formal legal duty (such as confidentiality). We are concerned with a moral question of whether such behavior is permissible, especially when an official of an agency concerned.

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[3] It is uncommon to examine the issue of the corruption of judges especially in the Middle-Eastern European countries, as László Kőhalmi states. See: Kőhalmi László: Korrupció és hatalom- gondolatok az igazságszolgáltatás befolyásolhatóságáról. In.: Korrupció Magyarországon (szerk. Csefkó, F.-Horváth, Cs.) (Pécs PTE ÁJK 2001.) pp.117-119.

[4] See, Philips, M.: Bribery. In.: ETHICS 94, July 1984.

[5] See, Gál István László: A pénzmosás és a terrorizmus finanszírozása az új magyar büntetőjogban. Belügyi Szemle 2013/6. pp. 27-31.

The first steps should be made within the office or firm to manage the problem, by first speaking with those concerned before the public is informed, during the daily collaboration in a corporate group or the office, or maybe even in common leisure activities. But if attempts at internal reform fail, then even an official should remember that he/she has stronger duties to his country (to justice) than his/her colleagues and superiors. In the case of corruption he/she should certainly inform the media, with sacrificing that he/she can show himself to be a faithful civil servant or loyal employee of a firm.[6]

Both the whistle-blower[7] and the one who was bribed violate the norms of their praxises. But while in the first case the purpose of the actor must be to serve the common good, (sometimes the whistle-blower miscalculate the costs and benefits of course), then in the second case the actor seemingly not willing to take into consideration of the public good.

Hence we should analyze the phenomenon from the viewpoint of public good. The key for understanding the inherent wrong in bribery should be its secrecy. Typically the whistle-blowings are also secret leakings but its secrecy based on the whistle-blowers risks-advantages analyzes. Obviously it is natural effort by them to avoid to be laid off, the secrecy is a mean for alliviating the risks of the act. The greater (public) good is attained, the better the act was in moral terms. At the same time the two parties involved in a bribery uses the secrecy without any sensitiveness to the public good, rather they are aware of their misconduct, misusing of the power, influence.

Before we step further in clarifying the undesired effects of bribery, we also have to note a counter-example.

Consider an airplane manufacturer who has spent enormous amounts of money developing a new airplane. The company badly needs cash because of it is financially overextended. If it does not get some large orders soon, it will have to close down part of its operation. Doing that will put several thousand workers out of jobs. The result will be not only disastrous for the workers but also for the town in which they live. The president of the company has been trying to interest the government in a large purchase. He learns that one of the key people in charge of making the final decision is heavily in debt because of gambling. He quietly contacts that person and offers him 100 000 Dollars in cash if he awards the contract to his firm. The contract is awarded, the money is paid, and the business is saved.[8]

The case at first sight seems to justify certain kinds of bribery on utilitarian grounds. The utilitarian tradition holds that if the beneficial outcomes of an act surpass of the negative consequences, than the act should be counted as morally good. The president of the firm points out all the benefits that result from the bribe when he seeks to justify his action. Why should be seen that wrong, he might ask, if everyone who had involved in the deal, won by that. The government purchases excellent planes, the company gets the contract and stays in business, and the workers at the plant do not lose their jobs, and last, but not least a government official escapes from debt crisis.

When we try to decide what to do, we often seek to evaluate the possible results of our action, with weighting the good against the bad, and try to choose the best one,

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[6] See, Hösle, Vittorio: Morals and Politics. (Translated by Steven Rendall). University of Notre Dame Press, 2004. p. 799.

[7] See, Kőhalmi László: A korrupcióról. JURA 2014.1. p. 152.

[8] The example is from: De George, Richard T.: Business Ethics. (Macmillan Publishing Company, New York) p. 58.

when the good overweights the bad. What would be the result of abstaining from bribery in that case? It seems, that no good would have been achieved, and the result would clearly have been worse.

This argument can only be plausible, if we take into consideration only the direct consequences of our act, and exclusively those persons, who are directly affected. But every act and practice is deeply embedded in a certain social, cultural, and legal background. Insofar as we try to stick our moral evaluations to the direct, immediate effects of our acts and behavior, we would be misled by our practical sense. Depth analysis seems necessary to evaluate the broader consequences.

The dominant consideration in evaluating them is the harm done to the *system* of doing business, to the notion of fair competition, to the equality of opportunity assumed in business and to the integrity of government officials. Let's see in sum the morally unjustifiable consequences of that action:

1. If the government official's action is discovered, he/she would likely be charged with crime, lose his/her job, and if convicted, be heavily fined, or go to the jail.

2. The story does not mention competing firms. The effects on them probably are detrimental. Will their workers be out of jobs?

3. Effects on general public. The government official is spending their money. He/she undoubtedly is misusing public funds and hence harming the taxpayers. The amount of bribery had come from somewhere. The amount may come from the taxpayers, or it may come from the profit of the company, thereby came from the shareholders. In sum, that money was taken from those who had legitimate claim to it.

4. The bribery has an effect on the general system of business, especially on the practice on competition, and on the integrity of those engaged in these practices. The question is at stake is whether the people will get the best value for their money.

Now we can conclude that the inherent wrong of bribery that only a few people benefit from the practice but the expense of a great many other people, including society and business in general.

Another important unjust ingredient factor of the bribery is its appearance of just.[9] Everything happens behind close doors, in the disguise of justice. The outsiders do not know anything about the deal, although this secret pact influences their chances, their money directly, or indirectly. And furthermore, those who are in the decision-maker position, actually their position was put on the market, and the briber exactly buys that. The serious moral problem here is that he/she is trying to sell something, which is not his/her own property, he is just in a given position what makes him/her possible to possess the decision-maker authority. The bribery is strictly in contrast with the notion of private property.

The duty of loyalty as demonstrated above may be less important than the responsibility for public good. Those who are involved in a bribery are ready to make every efforts to sustain the illusion of loyalty, and the illusion of just, fair and legal decision. The real evil is hidden in the illusion of just, legal, right decision, and all these are in sharp contrast with the notion of sincerity, telling the truth and honesty. The inherent meanness of the bribery is its embedded hypocrisy.

The corruption in its broadest sense can be understood as the rulers are able to buy the people, in order to have them to give up their very important rights.[10] In a bit

[9] Andrássy, György: Filozófia és jogászi etika. (Pécs, PTE ÁJK 2008) 208.p.

[10] Hankiss Elemér: A korrupció játékai Közép-Kelet Európában 1945-1999. In.: A korrupció Magyarországon. (Pécs 2001.)19.p.

narrower meaning it refers to a wide network in a given society, in which bribery, secret deals, awarding the political clients, buying the decision of the decision makers and legislators are widespread activities. The evident effect of these activities is undermining the public trust, the rule of law, worsening the public moral and the people's sense of justice, burdening the fair competition on markets, deforming the justifiable system of redistribution, and weakening the general sense of responsibilities. Paradoxically those who get involved into corrupt practices doing this through violating their own communities' norms in order to gain some advantages, but as more individual are ready to leave their community in that way, the less advantage can be attainable by every single person. There will be a point of no return, when everybody get worse position than they originally held.

The notion of public utility may not have been better summarized, than David Hume did as follows:

„The convenience, or rather necessity, which leads to justice is no universal, and everywhere points so much to the same rules, that the habit takes place in all societies: and it is not without some scrutiny, that we are able to ascertain its true origin. The matter however is not obscure, but that, even in common life, we have, every moment, recourse to the principle of public utility, and ask: *What must become of the world, if such practices prevail? How could society subsist under such disorder?"*[11]

[11] Hume, David: An Enquiry concerning the Principles of Morals. (London, 1772.) 353, p. 356.

Fraud and Corruption in Insurance

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Abstract:

Since the creation of mankind, fraud and corruption existing and it will exist, and Insurance did not stay immune to the occurrence of to this phenomenon in the Society. Insurance can be defined as a contractual agreement between an insurer (insurance company) and the insured on which basis the second is bound to other or a third person from the moment of occurrence of the insured event to cash out a certain amount of money (sum insured) with the fact that the insured is obliged, independently of the occurrence of the insured case to pay to insurer a fee of insurance (premium) in accordance with the terms of insurance The mentioned illegal activities pose a threat to the integrity and reputation of the insurance companies and the stability of the entire financial system. The paper deals with critically considered an act of fraud in the insurance referred to in Article 208a of the Criminal Code of the Republic of Serbia. In this article we will first take a look at criminal act of fraud in insurance, examine the justification for the introduction in Criminal Code, particularly bearing in mind the form in which it is done. The authors analyzed and preventive measures for the detection and fight against insurance fraud. The aim is to highlight the unexploited possibilities to be in Serbia, to join forces insurers, policy holders and other insurance in the fight against that fraud. With timely preventive and repressive operation simultaneously in multiple directions they may be largely mitigated or prevented, and the perpetrators of that acts can be legally sanctioned. The second part is devoted to the problem of corruption in insurance. Topic of corrupt crime is so complex and important that it has become not only a serious internal, but also an international problem. The task set in front of all states means that the problem of corruption to be taken seriously and to be confronted with the problem appropriately, because this "disease" is a danger to all segments of human activity, including in the field of insurance.

Keywords: *fraud, corruption, insurance, prevention, insurer.*

1. Instead of introduction

With the increase of the economic crisis, there is a growing number of fraud and corruption in insurance. According to estimates by the Association of Serbian Insurers, insurance companies in Serbia annually lose two to four million Euros for insurance fraud. Scams most likely occur in motor insurance. Even if you pass a car accident without injuries, it does not mean that one of the participants will not soon get a call of insurance company to pay part of the damages that this house was already paid to

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another accident participant. This happens when the insurance company tricked, and individual amounts go up to several thousand euros.

Traffic accidents almost as a rule happen at night, without witnesses, at the small traffic roads. In them participate expensive vehicle that's kasko insured, and one old, almost worthless. After the alleged incident, the participants call the police to conduct an investigation, after which they apply for the payment of damages. Scams are usually the result of falsifying medical reports or police reports, which are reached in a illegal way.

Most often charged so. Whiplash neck injuries, which usually comes up when the car is hit from behind. For it can receive up to 3,000 euros. Often sought compensation for the fear, which is paid around 500 euros.

Insurance is charged and because of the "faked" charges of theft, but also for arson, usually in the business premises, and as a rule, when a client took a loan, which can not be returned. The specialty is definitely a massive registration of whiplash injury in the city transport company in Novi Sad, in which fraud was attended by employees of the carrier.

Fraud is difficult to prove, and therefore the number of insurance companies addressing the Ministry of Interior and the prosecution is relatively small. However, the police discovered in previous years even several organized groups who participated in fraud. During 2013, in Novi Sad the competent court initiated criminal proceedings against the doctor orthopedics, medical technicians, traffic police (for false records of the accident were given 1,000 euros), lawyers and others due to fraud and corruption in connection with insurance.

So although is apparent increase of this form of prohibited behavior, until an only few years ago there were no criminal charges, and not any convictions for these offenses.

Final judgment for insurance fraud, despite numerous machinations, however missing! According to data from the National Statistics, in 2010, were submitted only two reports, but no indictments issued. Two years ago, it was not even charges. The situation is slowly changing, and it is expected not only repressive, but also preventive action in relation to such behaves, as well as the education of all participants in that operation. But, we need to start step by step!

2. The criminal justice aspect of insurance fraud

The statement that there is no perfect crime at the same time does not mean that there is no ideal crime, for whose execution tends to. Under ideal crime we mean on such action that brings huge profits with minimal risk. Action concerned is difficult to uncover, and if found, the crime in court is difficult to prove. In short, it is a fraud.

For study of the phenomenon of fraud in insurance necessary precedes the introduction to the Institute of fraud in law with an emphasis on prevention that accompanies this whole paper. The possibility of fraud exists in all commercial contracts, except the fact that in insurance contract, the insurer is often in a more difficult position, especially if takes into account that the contractual relationship between the insurer and the insured is relationship of trust.

(uberrimae fidei).

In this paper, the Civil Aspects of fraud will be largely left out. Amendments to the Criminal Code of the Republic of Serbia[1] from 2009 to Serbian criminal legislation

[1] Službeni glasnik Republike Srbije, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013 i 108/2014.

introduced the offense of fraud in insurance, which is incriminated in Article 208a, in the group of crimes against property. In the theory of law raised the issue of the introduction of this crime in the legal system of the Republic of Serbia, bearing in mind that the actions that are subsumed under this criminal offense are covered by „ordinary" fraud under Article 208 of the Criminal Code. Eighty years ago, the Criminal Code of the Kingdom of Yugoslavia (1929) had known, „the insurance fraud," with the far better incrimination than today.[2]

The crime of fraud in the insurance referred to in Article 208a of the current CC stands out as the act of committing the intention of guiding a person to do or not do so at the expense of their own or someone else's property. Guidance is performed by another person in delusion another misleading or by maintaining him in delusion, *i.e.* deception. Delusion is to create misperceptions about some facts, such as an existing fact masquerading as different than it really is, or so as to conceal the existence of certain facts. If we bear in mind that fraud can also be done keeping in delusion, guiding means securing and supporting others to do or not to do something, and the perpetrator knows of that can result in property damage. There must be a causal connection between the fraud and the act or omission.

The ways in which the other person can be brought or maintained in delusion, when is word about the criminal offense of fraud in insurance are:

1) misrepresentation of facts;
2) false concealment of facts;
3) giving false opinions and reports;
4) Giving false evaluation;
5) submitting false documentation;
6) as well as in some other way.

If we compare the action of the criminal act insurance fraud, and action of criminal act of „ordinary" fraud in Article 208 CC, we can notice some similarities. First of all, the first two modes which are expressed in the basic forms of fraud under Article 208 of the Criminal Code. Misrepresentation exists when it is claimed that there is something that does not exist or when something exists and its shown as false. Concealing the facts means misleading about unexisting of existed facts or concealing their existence or their contents, in cases where there was an obligation of communicating these facts.[3]

One of the most common forms of fraud is the submission of false documents. This criminal offense can be done only from person who has filed a claim for damages. This may be the Insured, *i.e.* "injured party" or a proxy. It is believed that proving is more difficult if the submission of documents is going over a proxy, whether it be a lawyer or other person. The problem of proving includes consideration of whether the attorney knew or had reason to know that he submits false evidence. In this case, the injured party who has given power of attorney may be liable for a criminal offense of incitement insurance fraud – referred to in Article 208a, in conjunction with Article 34 CC.[4]

[2] Stojanović, Z., Da li je Srbiji potrebna reforma krivičnog zakonodavstva?. Crimen-časopis za krivične nauke. broj 2. 2013. str. 121.

[3] Ljubiša Lazarević. Komentar Krivičnog zakonika Republike Srbije. Savremena administracija. Beograd. 2006. strana 586.

[4] Novica Mihajlović. Krivičnopravni aspekt prevara u osiguranju s primerom iz prakse. Zbornik radova Osiguranje u CEFTA regionu. Privredna komora Srbije. Zlatibor. 2010. strana 402.

Operations of making false statements and opinions and giving false estimates represent the elements of the criminal acts incriminated in Insurance Law[5]. Specifically in Section 223 of this Act regulates the offense of making false statements and opinions which stipulates that the certified actuary or certified auditor, who contrary to the provisions of the Insurance Act, makes a false opinion or report, shall be punished for a criminal offense punishable by imprisonment of one to three years. If we compare the formulation of this crime with the crime of insurance fraud under CC observe that the perpetrator of this crime under the Insurance Act is certified actuary or certified auditor. However, it should be borne in mind that the opinions and statements that may arise from a variety of profile of the profession (doctors, engineers, and others), where on the basis of such reports may result in delusion of authorized persons from insurance companies. Object of the criminal offenses is construction of a false opinion or false report. Article 208a CC action is referred to as „giving" and Article 223 of the Insurance Act as "making" of false opinions and reports. However, in general it is one and the same activity. With regard to the provision of false opinions and reports, only one of the possible ways of bringing or maintaining in delusion in this context could be taken as the act referred to in Article 223 of the Insurance Act contained in the offense of fraud in insurance scheme under Article 208a CC. This criminal offense can be done only with the direct intent

Insurance Act predicts the offense (Article 224) of false estimates that regulates that the responsible person of the insurance company, insurance brokerage, insurance agencies or insurance agency for providing other services in insurance, company or other legal entity which has a special department for providing other insurance services, as well as insurance agents, which in the determination and assessment of risk and damage assessment and make a false statement, shall be punished for the offense by a fine or imprisonment up to three years. And this work belongs to the so-called circle *delicta propria*, because as the offender may arise responsible person in the insurance company and other companies that have a special department for providing other insurance services, as well as insurance agents. The action consists in compiling estimates and statements in the determination and assessment of risks and damages at insurance. The work can be done only with the direct intent.[6]

It is essential that deception should be related to the security and that applies to both life and non-life insurance[7] in terms of the Insurance Law, while what we call social insurance covers the incrimination of the abuse of social insurance rights under Article 168 of the CC.[8]

Furthermore, imprecise provisions it can be seen in the fact that the legislator has predicted that in mind can come and „other ways" of bringing/maintaining in delusion.

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[5] Službeni glasnik Republike Srbije, br. 55/2004, 70/2004 - ispr., 61/2005, 61/2005 - dr. zakon, 85/2005 - dr. zakon, 101/2007, 63/2009 - odluka US, 107/2009, 99/2011, 119/2012 i 116/2013.

[6] Emil Ćorić. Prevara u osiguranju u Krivičnom zakoniku Srbije sa predlogom de lege ferenda. Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena. Srpsko udruženje za krivičnopravnu teoriju i praksu. Zlatibor. 2013. strana 465.

[7] As a rule, at national insurance market where premiums of auto liability recorded the largest share in total annual premium, most fraud occurs in connection with automobile liability insurance. If the national market insurance premiums from life insurance accounts for the largest share in total annual insurance premium, then the most fraud occurs in connection with life insurance.

[8] Emil Ćorić. ibid, str. 463.

In theory, the question is why this formulation if we take into account the generality of the first two modes of commission of of this crime.[9] But on the other hand we find in the legal theory the opinion that the resolution of the legislator is positive, because mankind technologically and intellectually faster and more developing than legislation, so it is impossible to predict all cases of fraudulent activities and modalities of deluding.[10]

Object of protection is the property in general, assuming the totality of the property rights of a person. Under damage must be understood any form of impairment of property. It is possible just attempt of this crime which exists when the offender deception started or finished specifying the act or omission, but there is not damage achieved at the expense of the property of the victim or any other person. The subjective element of the offense, except intention, is intent to be bringing or maintaining in delusion the passive entity obtains for himself or another kind of unlawful material gain. This intention should exist at the offender when the other person is misleading. Intent should include awareness of how labeling the act or omission, and the awareness that it can be made by deception or maintaining deception. The developer may be, according to the legal formulation any person.

It is the same with the passive subject, however, stated it is questionable, because it should be an insurance company, possibly to another person who is engaged in the insurance business.[11]

The privileged form of fraud in insurance differs from the basic shape only in terms of intentions. The privileged circumstance is the intention to deceive others, and only to damage them and not to obtain unlawful material gain. In theory rightly raises the question of whether the regulation of this form should be justified. Indeed, it is unclear why for the insurance area is predicted only this form, because you can not see what purpose would be achieved only in damage to another, without intent to unlawfully benefitting from it.[12] Also, a comparison of this legislative solution with the criminal offense of fraud under Article 208 paragraph (2) of CC leads to the conclusion that this is a legal solution taken from the description of the basic fraud charges. Heavy (qualified) forms of fraud in insurance, existing in two cases, which are tied to the amount of the material benefit or damages.

Fraud often have contact points with other acts. Then raising the question of relations with that fraud offenses, and in particular with the problem of concurrence. In practice, the problem of concurrence occurs in cases where the execution of the fraud was accompanied by abuse of official position, using falsified documents, destruction of official documents, bribery, misrepresentation and other offenses. However, when is fraudulently or in connection with fraud achieved another crime, there is in principle concurrence of offenses, except in cases where that other work appears as a mode of scams. In such cases there is just a scam.[13]

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[9] Emil Ćorić, *ibid.*

[10] Novica Mihajlović. Krivičnopravni aspekt prevara u osiguranju s primerom iz prakse. Zbornik radova Osiguranje u CEFTA regionu. Privredna komora Srbije. Zlatibor. 2010. strana 402.

[11] Zoran Stojanović: Komentar Krivičnog zakonika. Službeni glasnik. Beograd. 2012. strana 624.

[12] Emil Ćorić. *ibid,* strana 464.

[13] Miloš Samardžić. Ljubiša Serdarević. Sociloškopravni aspekt prevara u osiguranju i odnos sa koruptivnim krivičnim delima. Zbornik radova Osiguranje u CEFTA regionu. Privredna komora Srbije. Zlatibor. 2010. strana 412.

3. Measures for combating insurance fraud

Insurance fraud, as well as the type of business risk, insurers and reinsurers from developed economies have already started to pay a lot of attention. Insurance is based on the principle of reciprocity and is designed to protect against significant but unexpected losses. Insurance fraud, however, undermine the system as claims for damages scammers exhaust the funds that are intended for payment to honest customers that cover the costs of actual losses. For Europe's approach to the fight against insurance fraud is characterized by great diversity of forms of organization.

On the territory of a State often has at least one, and sometime two or more bodies responsible for the fight against insurance fraud. If the territory of the country has more than one body, responsible for the fight against insurance fraud, other bodies are not competitors to the first, but there is division of labor, so that one specialize in life insurance fraud and other scams in nonlife insurance.

As a general observation mentioned bodies, committees or general associations to the development of the insurance business is growing number of fraud, and therefore losses in the insurance business.[14] The legal framework for the selection of forms of organization of insurers and reinsurers for the fight against fraud is an important Article 220 of the Insurance Act which in paragraph (1) provides that the insurance company may form an association of insurance companies. This article represents a legal basis for insurers and reinsurers in Serbia to found the kind of organization, a special body or a specialized committee what they already have other European countries to combat insurance fraud.

At the international level, in addition to the United Nations, the World Trade Organization and the Council of Europe, one of the specialized bodies to combat insurance, is the International Association of supervisory authorities in the insurance[15].

Sub-committee that association, in which the scope are fraud, published a "Report on the study of preventing, detecting and resolving the consequences of insurance fraud"[16]. This report has inspired the adoption of secondary legislation supervisory body Serbia on the insurance business. Specifically, Article 18 of the Insurance Act provides that the National Bank of Serbia shall supervise the insurance business and performs other duties prescribed by law. The National Bank of Serbia adopted the Guideline No. 6 on the prevention, detection and elimination of fraud in the insurance

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[14] Slobodan Iilijić. Javnopravni aspekti prevara u osiguranju u Srbiji. Zbornik radova Osiguranje u CEFTA regionu. Privredna komora Srbije. Zlatibor. 2010. strana 390.

[15] International Association of supervisory authorities in the insurance (IAIS) is an organization of insurance supervisors and regulators, which consists of 200 bodies in nearly 140 countries. This association has more than 130 observers representing international institutions, professional associations of insurers and reinsurers, as well as consultants and other professionals who participate in the activities of the IAIS. Founded in 1994, the IAIS is an international body which is responsible for development and assistance in implementing the principles, standards and other rules for the supervision of the insurance sector. More at: http://www.iaisweb.org/About-the-IAIS-28.

[16] Primary goal is to, on the one hand, internally mounted measures to combat money laundering and fraud to legislator being presented acceptable and complete treatment of suspected cases. On the other hand, it is necessary to prevent damage to the reputation of their own financial institution or financial damage.

More at: Christian R. Drescher. Suzbijanje pranja novca i prevare u fokusu osiguravajućih društava. Integracija (Prava) osiguranja Srbije u evropski (EU) sistem osiguranja": [zbornik radova] / [X] Savetovanje. Palić, 24-26. april 2009. strana 86.

business.[17] This policy was adopted in order to protect the interests of policyholders and beneficiaries, and to create confidence in the financial system and the insurance sector, and in order to establish the conditions for an efficient, fair, safe and stable insurance market and the functioning of market discipline. Also, this guideline aims to propose ways in which the possible risks of fraud can be identified and prevented. The National Bank of Serbia should ensure that its guidelines are applicable.[18] At public law aspect of the fight against fraud in insurance at the international level has an important role EUROPOL and the European Police Office for the area of the European Union. Europol aims to establish close cooperation between the Member States that joined forces to successfully fight against terrorism, drug trafficking, money laundering, organized fraud,[19] money counterfeiting and trafficking.[20] Established a special unit for fight against fraud European Anti-fraud Office (European Anti-Fraud Office, OLAF), which protects the financial interests of the European Union investigating fraud, corruption and any other illegal activities.[21] Identifying, reducing and preventing insurance fraud are priorities of Insurers Association of Europe (Insurance Europe).[22] Insurance Europe is the umbrella association of European insurers and reinsurers, which was founded in Paris in 1953, whose activities are primarily focused on the exchange of information and joint action in the fight against insurance fraud.[23] Due to the fact that attempts fraud not limited to one country, on the initiative of the Croatian Insurance Bureau was signed on 12 April 2011, the Protocol on cooperation in the prevention of insurance fraud which were associations of insurers from Hungary,

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[17] Guideline No. 6 is available on the internet page: http://www.nbs.rs/internet/latinica/scripts/showContent.html?id=1868&konverzija=no.

[18] The Insurance Act is supervision of insurance undertakings entrusted to NBS, because the time as outlined in the explanation of the proposal creates the conditions for the future establishment of an integrated supervision of the whole financial sector and reinforces cooperation between banks and insurance. It is a known fact that nonbank services in Serbia in 1990 was not effective enough. That is why he entrusted to the central bank, not a special body that would only cover insurance activities. He did not, however, take into account the fact that the world's central banks are not trusted even Banking Supervision of insurance that is entrusted to a separate independent bodies. Given the importance of banking services in relation to insurance services within an integrated surveillance emphasis would be on the operations of banks and insurance would be neglected even though it requires specially trained personnel. There is an opinion that the establishment of a special expert body under the relevant ministries (Finance, Justice) which would include individuals from the science and practice of insurance, representatives of the central bank and other state authorities acted in the best interest of insurance policyholders and the national economy.

Look at: Jasna Pak. Pravo osiguranja. Univerzitet Singidunum. Beograd. 2011. strane 151-152. On the other hand, points out that the independence of the central bank, infrastructure and staff training for the tasks of supervision, as well as the connection between banks and insurance companies, are the most important advantages of entrusting these responsibilities to the National Bank of Serbia. Compare: http://nbs.rs/internet/latinica/60/index.html.

[19] The objective of Europol is to increase the efficiency of work at the national level in the field of prevention and fight against organized crime, and in this framework that certain inputs and fraud in insurance.

[20] https://www.europol.europa.eu/content/strana/about-us.

[21] http://ec.europa.eu/anti_fraud/about-us/mission/index_en.htm.

[22] Insurers Association of Serbia obtained the status of an associate member of the Association of Insurers of Europe (Insurance Europe) in 2011. Associate member status to the Association of Serbian Insurersamong other things to take an active role in making proposals and suggestions during the adoption of new or amend existing regulations of the European Union with regard to insurance.

[23] http://www.insuranceeurope.eu/.

Slovenia, Macedonia, Montenegro Montenegro, Bosnia and Herzegovina, Croatian and Serbian commitment to cooperation and exchange of experience in the field. Bulgaria, Switzerland, Austria, Romania, and the Czech Republic have subsequently signed the said Protocol. The protocol envisages exchange of information between countries or with respect to the regulations governing the protection of personal data. Interested parties are obliged to cooperate and exchange information on the activities of preventing insurance fraud at the level of association of insurance companies, on statistical and other indicators that indicate the presence of different aspects and consequences of fraud on their own insurance markets, as well as the systems of detection and prevention of fraud and development of national legislation in this area and existing jurisprudence.

In addition to developing a variety of instructions for the implementation of the conditions of insurance and training to insurance agents and insured as a customer of the polis, it is necessary to state authority responsible for the supervision perform the control over the insurance companies or their business acts (conditions, tariffs), as well as over application of these laws in practice.[24] Detecting fraud involves a joint effort of insurance companies in the prevention and detection of fraud from insured in order to make fraudulent action. This requires the elaboration and adoption of the methodology of control that are specific for each type of insurance and the establishment of specialized departments in the fight against fraud in insurance companies.[25] To protect against fraud, insurance companies need to establish greater cooperation and access to information on cases of fraud and that such cases are needed to being entered into register. Should be organized seminars to be and conducted training for staff to detect and prevent fraud. It is necessary to create a separate manual for detecting and preventing fraud, to awaken the media and educate the public, because undetected fraud rates increase the cost of premiums and thus affect the budget of honest users. People are aware that fraud in insurance illegal but it is not perceived as a crime but as a most likely to driving car at illegal speed. This attitude of the public insurers must be changed through marketing activities and warning policyholders about the legal consequences.[26] Then, it is necessary to establish as soon as a database of damages for all types of insurance in the framework of the Forum for the prevention of insurance fraud[27] which operates in the Serbian Chamber of Commerce or the Commission for fraud in the Association of Serbian Insurers[28]. Insurance companies should play an

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[24] Tomislav Petrović, Prevare u osiguranju života. Zbornik radova Osiguranje u CEFTA regionu. Privredna komora Srbije. Zlatibor. 2010. strana348.

[25] Elena Popa, Insurance fraud. AGORA International Journal of Juridical Sciences 2008/2. strana 232.

[26] Živorad Ristić. Nastanak i mogucnosti suzbijanja prevara u osiguranju sa posebnim akcentom na osiguranje motornih vozila. XI Simpozijum sa međunarodnim učešćem: ''Veštačenje saobraćajnih nezgoda i prevare u osiguranju''. Zlatibor. 05 - 08. april 2012. strana 177.

[27] Forum for the prevention of fraud in insurance was established in order to prevent insurance fraud. Forum members are representatives of insurance companies who are responsible for their companies' business of preventing, detecting fraud and operational risk managemen.; more at: http://www.pks.rs/ONama.aspx?id=376.

[28] One of them is the Commission to prevent fraud which analyzes the causes of fraud as well as methods for their control, which was established by the Decision of the Assembly of the Serbian Association of Insurers. As one of the measures of prevention to detect fraud Insurers Association of Serbia has signed an agreement on cooperation with the Ministry of Interior (MOI) according to which in the next period by the Ministry of Interior to submit to police reports on traffic accidents in digital form.

active role in criminal proceedings as the injured parties, and to monitor the criminal proceedings until the completion, as is often the perpetrators of criminal acts insurance fraud occur and employees of insurance companies. Creating a "close" cooperation platform primarily the Ministry of Internal Affairs, Prosecutor's Office, the entire judicial system (for example, through proposing stricter sanctions) through coordinated action and treatment should lead to uncovering, prosecution and punishment of perpetrators of fraud in insurance.[29]

4. Corruption in theory and corruption as a criminal act in Serbia

To start let's say that the criminal justice legislation in Serbia does not recognize the concept of "corruption". This does not mean that corruption is not punishable – on the contrary, it has always been. The point is that the authors of the criminal law must be as precise as possible to describe the action of the crime and that usually prescribe different punishments for heavier and easier forms of execution of these crimes. On the other hand, questions about what should be meant by corruption among theorists can not be a general consensus. Precisely because there is still no unified and generally accepted concept and definition of corruption,[30] although it is a phenomenon that comes from ancient times, in to the legal, sociological, philosophical, security, politicological and other literature can find various definitions of this term.

At the same some authors provide clear and concise definitions as opposed to those who are trying to with descriptive way to make broader range of different forms manifestation of corruption brought under a features and characteristics of this concept.[31] Corruption (corumpere – spoil, deface, bribe) is an abuse of official position in the administration, economy and politics, with the aim material or immaterial benefit, which is not legally based. Corruption offenses have until the new Criminal Code of the Republic of Serbia, which entered into force on 1st January 2006 was systematized in a separate head behind „offenses against official duties" under the heading „Criminal acts of corruption." Although the theory and practice of corruption subsumed under the concept of different criminalized behavior, however, can be found inside systematics of all these individual conceptual definitions. In a broader sense, corruption offenses or quasi-offenses of corruption include: dereliction of business operations, service and embezzlement. In a narrow sense or in law, pure corruption offenses include: active and passive bribery, trading in influence and forgery of official documents.[32] In the classical sense, corruption is always an active and passive bribery as well as the abuse of public

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These data will be stored in databases Information Center Association and made available to authorized persons from insurance companies that deal damage, which will improve the entire process of claims handling, primarily due to greater availability of data from the record of the Ministry of Interior and the various possibilities for their processing and analysis as part of the Information System.More at: Živorad Ristić. Aleksandar Đoković. Prevare u osiguranju u Republici Srbiji. XII Simpozijum sa međunarodnim učešćem: ''Veštačenje saobraćajnih nezgoda i prevare u osiguranju''. Divčibare 2013. strana 308.

[29] Berislav Matijević. Prijevare u osiguranju motornih vozila. Naknada štete, bezbednost saobraćaja i obavezno osiguranje / XII Međunarodni naučni skup. Zlatibor. 2009. strana 215.

[30] Davor Derenčinović. Mit o korupciji. Zbornik Pravnog fakulteta u Zagrebu 2001/6. Zagreb. strane 1465-1468.

[31] Dragan Jovašević. Marina Gajić Glamočlija. Problem korupcije u svetlu zaštite ljudskih prava. Beograd. 2008. strane 231-243.

[32] Dragan Jovašević. Korupcija u pravnoj teoriji i praksi. Teme-časopis za društvene nauke 2008/4. Univerzitet u Nišu. strana 861.

office. These are works that deserve the attention not only of theory and practice, but also the professional and general public by a series of its characteristics, of which the most important are: 1. these acts perform officials (domestic or foreign) persons responsible, 2. It shall be in line of duty which violates and abuse in various ways, 3. illegality of the conduct of officials in the the execution of duty, due to actions taken or passed legislation, 4th harm to other persons or entities or injury of their rights or obtaining benefits for officials to which they have no right 5. breach of trust in the service of the public authority, including in the legal system and government institutions in the framework of the rule of law and 6. corruption, depravity, corruption of public authorities.[33] Protective object of criminal acts against official dutiesis the official duty or lawful, proper, efficient and well-functioning official duties. It is characteristic that for these offenses as a perpetrator appears official. The concept of a public official is defined in Article 112, paragraph 3 of the Criminal Code. Official deemed to be: 1) a person in a state body perform official duties; 2) elected, appointed or designated person in the state authority, local government, or a person who regularly or occasionally perform official duties or official functions in these bodies; 3) The notary public, executor and arbitrator, and the person in an institution, company or other entity who is vested with public authority, which decides on the rights, obligations or interests of natural or legal persons or the public interest; 4) the officer is considered and persons who are entrusted with the performance of certain official duties or tasks; 5) military. As the perpetrator of these crimes may appear and responsible person. A responsible person is considered to be the owner of the company or other business entity or person in the company, institution or other entity which is due to its function, funds invested under the authority delegated specific tasks in the management of property, production or other activities or in the exercise of supervision over them or he actually entrusted with certain tasks. As a business entity shall be considered: 1) the company; 2) other legal entity that carries out an economic activity, and 3) an entrepreneur. According to the „National Strategy for Combating Corruption for the period from 2013 to 2018," the notion of constituent elements of corruption, are not yet in a unique uniformly defined. So far, the definition used in the Republic of Serbia, as prescribed by the Law on the Anti-Corruption[34] defines corruption as a relationship based on the abuse of official or social position or influence, in the public or private sector, in order to gain personal benefit or the benefit for another. In comparative practice in the world, corruption is most often understood as the abuse of authority for personal gain („abuse of power for private gain"). This concept is used in the Global Programme of the United Nations Convention against Corruption, which was adopted in the practice of the European Union (particularly mentions the announcement of the European Union on the fight against corruption from 2011).[35] About extent of the problem indicates the Corruption Perceptions Index of Transparency International, according to which Serbia in 2013 was on 72 place.[36]

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[33] Dragan Jovašević. Korupcija u pravnoj teoriji i praksi. Teme-časopis za društvene nauke 2008/4. Univerzitet u Nišu. strana 863.

[34] Službeni glasnik RS br. 97/08, 53/10, 66/11-US i 67/13-US.

[35] http://www.acas.rs/sr_cir/zakoni-i-drugi-propisi/strategija-i-akcioni-plan.html.

[36] http://www.transparentnost.org.rs/index.php?option=com_content&view=article&id=359%3Apomak-srbije-na-listi-transparency-international&catid=14%3Avesti&Itemid=40&lang=sr

5. Corruption in Insurance

Dangers of corruption[37] are particularly exposed places of third parties whose conduct may be expected to benefit. Because of the conditions in which in some developed countries and developing countries being transmitted resources to private companies, the risk grows, cause the insurance industry in the future will increasingly be a target of corruption. Politicians are in fact willing to make certain concessions to insurance companies, but they expect a favor in return.[38] In the meantime, many companies, in addition to the question of the organization of monitoring compliance with law, deal with the issue effective and sustainable prevention of corruption. How, for example, in the past has shown, there is corruption not only through bribery in an insurance company, but also through bribery by the insurance company.

For an effective fight against corruption is not enough repression.[39] Contemporary trends in combating corruption are increasingly turning to the prevention of a way to recognize the risks of occurrence of corruption and are trying to remove it with preventive measures, *i.e.* adoption of the law, institution building and awareness of citizens and the media is trying to forestall and prevent corruption before it comes at all. System approach to the fight against corruption should be carried out in several directions. First, the legislative level, it is necessary to adequately enforce existing laws and legal framework to make corrections where is necessary to harmonize national legislation with the relevant international standards and obligations. At the institutional level, it is necessary to strengthen the capacity of institutions, as a prerequisite to effective enforcement. The emergence of various forms of corruption and unethical behavior is primarily explained as a consequence of the lack of democratic reputation, which today is a special feature of developing countries.[40]

In the fight against corruption in the insurance is set as a priority the improvement of professional and ethical conduct of employees, increase employee satisfaction, as well as customers, and increase corporate social responsibility society. Ethics should be included as an important part of education in the fight against corruption. In order to detect and punish corruption, it is necessary that, in addition, as many believe, the political will, there is a team of experts who know the job for the early detection of corruption in Insurance (knowledge gained through scientific research).

6. Conclusion

The specificity of insurance fraud in relation to fraud, reflects in fact directed against whom the criminal act is directed. It is directed towards insurers, other elements are the same. Insurance fraud has existed since the insurance, only legislator in Serbia

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[37] Professor Stanko Pihler lists three groups of causes of corruption: economic, political and legal. more at: Stanko Pihler, Karakteristike i problemi definisanja i suzbijanja korupcije, osnovni rezultati istraživanja, Tematsko izdanje Univerzalne karakteristike i regionalne i nacionalne specifičnosti organizovanog kriminaliteta, 1/2005. strana 98.

[38] Wolfgang Rohrbach. Privatno osiguranje kao sredstvo u borbi protiv korupcije. Evropska revija za pravo osiguranja 2006/3. strana 14.

[39] Poslovna etika i antikorupcijsko delovanje u Croatia osiguranju d.d. strana 30. preuzeto sa http://www.crosig.hr/media/o_nama/antikorupcija/publikacije/poslovna_etika_i_antikorupcijsko_djelovanje.`pdf.

[40] Dragan Lajović. Uticaj etičkog kodeksa na smanjenje korupcije u privatnom sektoru. Preduzetnik 8/2012. Ekonomski fakultet u Podgorici. strana 36.

until to the Amendment of the Criminal Code of 2009 did not attach great importance to that.

The fact that it prescribes a specific criminal offense of fraud in insurance talks about the intention of the legislator to this area specifically regulates and protect due to more frequent and more organized insurance fraud, as well as connections to other acts with corruptive elements. There is justification for the notion that an act of fraud in insurance does not offer anything new, as are the actions described in Section 208a CC covered by the frauds.

Approaches to combat fraud are different, but each state has the appropriate form of coordination for the fight against fraud. This diversity of forms of organization enables the legislature, insurers and reinsurers to choose the form of organization which will focus on the fight against fraud with results. Detecting and preventing fraud in insurance requires a serious approach and professional association of different subjects that should contribute to the detection and prevention of harmful consequences of this crime. Prescribing certain procedures can reduce or eliminate the risk of insurance fraud and prevent the exercise of corrupt acts and other illegal activities. It is necessary to educate employees about the rules, procedures and methods and allow the application of legal norms. Although the Criminal Code prescribes penalties for execution of those criminal offenses, individuals can still choose to participate in these illegal activities and to prevent the commission of the same should work on continuous education, training, interview and efficient control system. Corruption as an issue of our time has not missed the insurance. It is a global problem, especially for countries in transition. If the problem of corruption is not resolved in an adequate way there will be serious consequences in the field of insurance.

Finally, insurance companies in this area in these matters are not and can not be competitive in the market, but on the contrary partners that mutual exchange the information on new forms, individuals and groups that have a exclusive goal to obtain illegal money, can significantly disable perpetrators in start and prevent damage.

Judicial Corruption – *Quis custodiet costodes?* [1]

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Abstract:

The supposition that even jurisdiction can be influenced is undoubtedly a sensitive topic in democracies. A certain kind of myth of intangibility hovers around the functioning of courts. On the one hand, it is good, because the judicial power is one of the basic instruments of Rule of Law, and for this very reason it would be difficult for it to function within the cross-fire of constant criticism – coming mainly from the political and executive powers –, on the other hand, the respect for courts cannot mean the negligence of critical realist thinking either.

The topic of judicial corruption counts both in foreign[2] *and in Hungarian literature*[3] *as a rather poorly published matter. This is partly because of the low number of cases, partly because of the latency.*

Quis custodiet costodes?[4] *– Who watches over the shepherds?*[5] *– I asked this question in the title of the study. Who is entitled to check the course of justice? Most of the jurisdiction does not provide for it substantially. Presumably, the intense political manifestations are to be explained by it, which are to be observed in the politics or in the media in connection with certain court judgements of public interest.*

International standards of judicial corruption cases show a high rate in the Latin countries.[6] *This figure is in Hungary so negligible – only a few cases have become known since the change of the system in 1989 – that accepting the official crime statistics, it might not be worth dealing with this phenomenon, but from the point of view of crime prevention, this kind of prevention can necessarily be useful. Corruption or the attempted intrusion into the independent and impartial functioning of judiciary can be assumed or perceived partly from the side of the executive power,*

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[1] Illés Károly Edvi, *Quis custodiet custodes? [Who watches over the shepherds?]*, Jogállam, 1903. p. 478.

[2] Sergio Moccia, *Das korrumpierte Strafrechtssystem – Eine nur italienische Geschichte?, [The corrupt criminal law system – only one italien history?],* In: Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001, hrsg.: Bernd Schünemann, Wilfried Bottke, Hans Achenbach, Bernhard Haffke, Hans-Joachim Rudolphi, Walter de Gruyter, Berlin-New York, 2001. p.150.

[3] László Kőhalmi, *Korrupció és hatalom [Corruption and power],* In: Korrupció Magyarországon (Ed.: Ferenc Csefkó Ferenc – Csaba Horváth), Pécs – Baranyai Értelmiségi Egyesület, PTE Állam – és Jogtudományi Kar, 2001. p. 150.

[4] Edvi, *op. cit.*, p. 478.

[5] Csaba Varga, *A jog mint folyamat*, [The law as a process], Budapest, Osiris Kiadó, 1999. p. 302.

[6] Evaluation of Judicial Corruption in Central America and Panama and the Mechanism to Combat it. Executive Summary & Regional Comparative Study. Due Process of Law Foundation, Washington, D.C. 2007, p. "Judicial corruption in Central America is a serious problem and must be attacked purposefully and vigorously. Corruption in the judiciary erodes the rule of law, undermines democratic mechanisms, and conspires against adequate economic performance in the countries of the region."

partly from the side of the private sector. In the following, this topic will be presented after a brief historical and theoretical overview.

Keywords: *judicial corruption; executive power; private sector; guarding the guardians; prevention.*

1. Historical retrospect

The issue was raised as early as in the Roman political literature, namely 'Who watches over the shepherds?'[7] *i.e.* the necessity of the control of the guardians of political-executive power, but it remained only a desire to a large extent, because at that time the institutional control of the leaders had not been established yet.[8] The need of controllability of leaders had been known in the ancient and medieval political thinking all along, yet the institutional solution of monitoring leaders had not been introduced anywhere,[9] and not more than *ad hoc solutions were used* (*e.g.* driving away the tyrant).

From among the medieval thinkers, the doctrine of St. Thomas Aquinas on the dethronement and accountability of the tyrant deserves special mention.[10]

The establishment of the structure of the civil society and with it the gradual separation of the powers meant the real separation of the mandate of the administration and the justice, and the influence or the possibility of influence of the independent *justice* taken in the modern sense emerged not earlier than in the New Age with an increased importance. It should be noted that even today – however with limited authorisation –, the judicial power adhering to public management functions is to be found (*e.g.* the pardon power of the President of the Hungarian Republic).

The impeachment of those passing a sentence, *i.e.* the judges may arise from two aspects. First, history unfortunately provides a fair number of examples that *innocent* people are imprisoned and slandered for political, religious, ethnic, and race grounds – just think of the masses of people convicted in the Nazi, the communist or in the apartheid systems. (Unfortunately, earlier there were some among the Hungarian judges as well, who proved to be partners in serving inhuman political systems, e.g. in the sham show-trials. On the other hand, even in the so called modern justice systems, the possibility of error is inherent in the process of taking of evidence, and it is possible that a convicted person has not committed the acts alleged at him. This is commonly called *"Justizmord"* (miscarriage of justice).

While in the latter case – if the judex has conducted their task *lex artis* – no impeachment against the judge is required, the *praetor's* (judge's) criminal responsibility for making his judgment according to a concept is to be established, although the impeachment of judges is still a somewhat unclear issue[11] both in the field of regulations and in the literature.

[7] Mihály Samu, *Jogpolitika* [Legal politics] Budapest, Rejtjel kiadó, 2000. p. 72.
[8] Samu, *op. cit.,* p. 72.
[9] Samu, *op. cit.,* p. 72.
[10] Samu, *op. cit.,* p. 72.
[11] Samu, *op. cit.,* pp. 72-76.

2. Attempts of the executive power against the independence of the judiciary

In this section we attempt to answer the question, in which particular situation or field of the *practice* the influence of the judiciary by the executive power is possible.

2.1. The executive power appoints the judges from among its supporters and *sympathizers*[12]

In the Hungarian legal system, professional judges are appointed by the President of the Republic, so practically such a case is not likely to happen. However, it is a fact that it is the President of the National Judicial Office (hereinafter referred to as NJO) that proposes the appointment of judges. The President of the NJO is elected by the National Assembly, however, and this fact in turn inevitably leads to political elements, because the majority political parties in the Parliament elect a person who they find suitable for them. It would be better, perhaps, if the judges could choose the President of the NJO from among themselves or they would recommend three persons they deem appropriate for the post of Chief Justice and the Parliament could choose only from among these three persons. This solution is more in line with the principle of the separation of powers by *Montesquieu.*

The public sphere has been fairly *politicised* in Hungary since the change of regime of 1989, thus the post of the Chief Justice may easily become the subject of *political bargaining*.

However, getting the *judicial office* can take place not only through appointment but through choice as well (*e.g.* as in the US). In the case of a choice, there may be two conflicting principles: *populism* and *professionalism*. It is conceivable that the person with excellent professional skills but who is less familiar with *electoral tricks,* image-creation and electoral marketing, cannot win against a candidate who is popular but has modest professional qualities.

The participation of *lay* persons in the Hungarian judiciary is gradually less and less present. Earlier the so called people's assessors took part in the adjudication in a relatively wide range (especially in criminal matters and employment litigation), but with reference to the *acceleration* of the adjudication the lay element has been gradually suppressed in the Hungarian *judicature.* However, the real and by the power never mentioned reason was – in my opinion – *economy.* Thus, they can pay much less fee for the mandate of simple assessors, which is anyway a very modest remuneration (approx. 10 euro/process hour). The gradual marginalization of the lay element in justice is also contrary to the requirement of the separation of powers.

To obtain the assessor's mandate is seemingly a non-political issue, as according to the Act CLXII of 2011 on the status and remuneration of judges, assessors are designated by the representative body of local self-governments and associations, but it is the responsibility of the representative body of the local self-government at the headquarters of the District Court to elect the assessors of the given District Court. In the representative bodies – particularly in cities – there are the representatives of the parties, however, so there may come to political pressure here as well.

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[12] János Bódi, *A korrupció mint társadalmi és büntetőjogi jelenség* [Corruption as a social and criminal phenomenon] Rendészeti Szemle 1991. pp. 1-28.

The issue of the personal composition of those making the judgments may become of growing importance in the case of the *jury;* which has a similar function as that of the assessors'. In the United States, the question often arises in connection with criminal cases – at least at the level of journalism – whether the different skin colour or the race of the jury influence the decision as to the guilt pro or con. The lottery-like jury selection method does not provide an institutional solution to resolve this problem either.

2.2. The "loss" of judicial documents

The "loss" of an important document submitted either in the trial phase or at an earlier stage may significantly affect the decision making. In our time when the technical developments provide countless opportunities for the reproduction of evidence, it is a legitimate expectation of the parties or the defendant to decide their case on the basis of original evidence and not on the basis of copies of uncertain origin. The deliberate loss of documents may be committed by those who have the right or the opportunity to have access to the files. However, it is a different case when the loss of a file is due to some negligence or fault. In practice, of course, the distinction is rather difficult, mainly because of the courts' operating with immense caseload, where there are almost chaotic filing conditions prevailing – due to lack of space –, and which may inadvertently lead to the disappearance of some documents.[13] Still, these cases may give rise to the assumptions challenging the correct handling of cases. The e-filing (digital access) unfortunately does not work at the level of daily practice yet.

2.3. Selection of judges without discrimination

A basic requirement of the Rule of Law is that any person, regardless of their origin, nationality, religion, sex, skin colour or political opinions, i.e. free of discrimination, should be able to hold a judicial office. However, this principle – in my opinion – is not contradictory to the fact if only a citizen of a given country can become a judge, similarly to other professions representing state power. It is a question concerning the future what the governing rules would be concerning the determination of the composition of the court personnel in the event of the setting up of a "Single European Criminal Court".

2.4. The permanence of the judicial office and the irremovability of judges

It is not a negligible requirement that nobody should be dislodged from their office without *good cause* and *due process.* The Hungarian court law complies with this requirement, although the executive power has recently tried to send judges under 70 years of age but over the age of retirement (62 years) into retirement through legislative amendments.

2.5. Signalling abuse

The directed *„signalling-out"* of cases – when the so-called "friend judge" decides in a case – is easily to be prevented by accurate internal records management policy, which

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[13] László István Gál, *A pénzmosás és a terrorizmus finanszírozása az új magyar büntetőjogban* [Money laundering and], Belügyi Szemle 2013/6. pp. 28-35.

has been solved at domestic courts. The sentencing judges are given the files according to a pre-established case-distribution order, and if any bias or interest on behalf of the judge arises in relation with any participants of the legal dispute, the judge is obliged to report it and he cannot deal with that particular case.

2.6. The judicial administration and the financial appreciation of judges

It is a fundamental requirement that the *government* should affect the operation of the courts and the decision making in any administrative way. The law provides, however, that the judicial base salary is determined by the Act on the central budget and its sum cannot be less than that of the amount in the previous year, but I do not consider it to be sufficient.

An *impartial* and influence-free adjudication[14] is to be expected from a person who has got guaranteed stability and economic independence and who is not forced to carry out other work because of living issues or whose low income does not create a *corruptible* situation.[15] In addition to fulfilling the office of a judge, a judge may carry out only scientific, artistic, literary, educational or technical creative work as a gainful activity, but all these can be done only if they do not threaten their independence, their impartiality or they do not hinder the fulfilment of the duties of their office.

2.7. Depriving someone from his/her legal judge

It is a fundamental *guarantee* rule of the judicial procedure that nobody can be deprived from their legal judge (court), *i.e.* from the judge having authority and venue.

During the period of communism in Hungary, the Supreme Court could take over a case at any stage of the process for judgment, and it is conceivable that it might have given way to the enforcement of factors other than law.

3. The dangers of the intrusion of the private sphere

Sometimes the justice-seekers do not shy away from using means prohibited by *criminal law* in order to enforce their perceived claims. The history of Hungarian crime can hardly present any judiciary "faults" – apart from those in the period of the "blood-judges" of the communist dictatorship.[16] The rumour was common knowledge that some party officials were not held accountable for ordinary criminal offenses in the socialism, but these cases were mostly "resolved" already in the investigation phase.

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[14] Siri Gloppen, *Courts, corruption and judicial independence*, In: Tina Søreide, Aled Williams*:* Corruption, Grabbing and Development: Real World Challenges, Cheltenham and Northampton (MA), Edward Elgar Publishing, Bergen, 2014, pp. 68-69. "Anti-corruption efforts may jeopardize the independence of the judiciary and thus undermine judges' ability to fulfill their accountability functions. In fact, limiting judicial independence may be the real motive behind such measures. So while we should care about corruption in the court system, we should also keep in mind that corruption charges and measures against judicial corruption may serve as a way to rein in bothersome judges."

[15] Transparency International, *Combating Corruption in Judicial System, Advocacy Toolkit*, Transparency International, Berlin, 2007. pp. 17-25.

[16] László Lengyel, *Esszé a politikai korrupcióról* [Essay of the political corruption], Belügyi Szemle 1998.10. p. 9.

Among the recently uncovered cases, the case was given media coverage when the president of a local (town) court sent his own daughter in his place to judge and the case when a former County Court President accepted bribe for passing a more favourable judgment for the defendant. (The judge was sentenced to 10 years imprisonment without effect.)

3.1. Criminal matters

For almost every person, it is their own freedom that is one of the most precious things, so attempts may take place to bribe the judge so that the accused is not declared to be guilty or that they should get a milder sentence than it would be lawful – writes Mariann Kránitz.[17]

In addition, there may be some kind of "request" that the judge declines to adopt certain measures of *coercive measures* – *e.g.* to terminate a confiscation or sequestration –, as it can be very important in a certain case for an organised criminal group *e.g.* a high value vehicle used for transporting drugs.

I highlight the decision of *pre-trial detention* as a potential breeding ground for corruption from among the coercive measures. The Hungarian Criminal Procedure Law gives too much room for judicial discretion in respect of the imposition of pre-trial detention, and it is a serious temptation for potential bribers.

3.2. Civil- and economic legal disputes

The transition to capitalism has created a high *retention of pooling assets* both in the case of legal and natural persons, for the keeping of which the parties are obviously willing to sacrifice (*e.g.* litigation relating to business contracts, compensation disputes).

Processes in which companies with large capital and an extensive *network of connections* are involved may be factors with increased risk.

In particular, *liquidation processes* may pose a danger zone of corruption, as corruption is possible on behalf of the liquidator firms in order to obtain the appointment as a liquidator.

3.3. Protracted lawsuits, regardless of the stage of the trial

One of the biggest problems of judicial systems is the time-dimension of the processes. If courts cannot deliver justice within a reasonable period of time, the justice-seeker might try to use illegal means in order to get a speedier judgment of their cases.

4. Suggestions

In the previous sections we examined how the executive power and the private sector may intervene into the independent and impartial functioning of the judiciary. It is necessary, I think, to make some suggestions as to the prevention and reduction of situations of corruption as well.

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[17] Mariann Kránitz, *Korrupció a világban – internacionális korrupció* [Corruption in the world – international corruption], In: Kriminológiai és Kriminalisztikai Évkönyv, XXX.kötet, IKVA, Budapest, 1993. p. 134.

4.1. The judge's moral restraint[18]

The most difficult aspect in respect of the selection of *judge candidates* is that they should dispose of a moral strength[19] which is contrary to any temptation to influence the impartiality of the judgment. The courts do conduct so-called career aptitude tests, but this means only the measurement of the health, physical and mental condition of the candidate. We have to admit that we do not have a meter that could test the human moral. We can only conclude to it – *e.g.* upbringing, past performance etc., although it is one of the weakest links in terms of being corruptible.

4.2. The substantive appreciation of judges[20]

What has been said about the substantive appreciation of judges is to be complemented with the remark that in addition to the office worthy salary, the *valorisation* of the salary is also required.[21]

4.3. „Guarding the Guardians"

As I have suggested in the introduction, the control of judges is an unresolved issue, as it takes the form of *self-control.* The institutional guarantee could be provided if a separate panel with special status could control the judges. These so-called *„screening-judges"* could be the judges controlling the judges.

4.4. Increasing the number of judges

Corruption situations resulting from protracted cases can easily be avoided by the acceleration of adjudication. However, this would mean a significant *increase in the number of judges* – besides the reduction of workload –, because under the current disproportionate workload the number of unresolved cases keep increasing and the quality of judgments deteriorates.

4.5. Mandatory declaration of assets

The Orbán-Government's package of anti-corruption law includes the judges' compulsory declaration of assets. The declaration of assets is a seemingly good legal institution; but it does not work properly in the Hungarian legal practice.

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[18] Judit Bellér, *A bíró hatalma és felelőssége a késői –feudális jogtudományban* [The power and the responsibility of the judge in the late feudal legal science] ELTE, 1989, A jogi felelősség – és szankciórendszer elméleti alapjai – p. 4.

[19] Judit Soltész, *A bíráskodás szerepelméleti aspektusai* [The aspects of the role theory of arbitration], Jogtudományi Közlöny, 2002/6, p. 298.

[20] Soltész, Op. cit. p. 298.

[21] Office of Democracy and Governance USAID Program Brief: *Reducing Corruption in the Judiciary*, U.S. Agency for International Development, Washington, D.C. 2009. p. 13. "The judiciary needs adequate and assured financing in order to combat corruption. There are costs associated with attracting good people, providing them with reasonable working conditions, and developing and implementing management systems and educational programs that will further the values and practices of independence, integrity, accountability, and transparency."

4.6. Judge protection

It is to be considered in connection with the unbiased adjudication by judges if it would be necessary for judges as well to receive protection in cases with special weight in criminal matters as an inalienable right, similarly to the *witness protection* provisions.

4.7. The criteria of becoming a judge

The Hungarian Court Act allows that a judge can not only be a person going through the *hierarchy* of becoming a judge – court clerk then judge appointed for a fixed period –, but practicing lawyers from other areas of legal practice as well. In the case of leading judicial positions, however, – even in the case of a panel chairman – the vacancy for the position of a judge is done in a different way, which precludes external candidates from other *fields of law,* as the prerequisite is a career of several years as a judge, which obviously only few judges can have. It is not conducive for the transformation of the composition of the leaders of the judiciary and thereby for the elimination of possible concentrations.

In the hierarchical *supply of judges* – in my opinion – the selection of court clerks and secretaries does not always happen on the basis of objective criteria, but, unfortunately, the suspicion of *favouritism* arises.

The Anglo-Saxon system, where someone can become a judge after a long-time lawyer's (prosecutor's) practice, can develop a much more innovative judiciary.

5. Concluding thoughts

The best method of defence against criminal corruption is *prevention. Corruption* is not to be detected in today's Hungarian judicial adjudication, but the *precautionary principal* is valid here as well.

I think that no branch of power – not even the sentencing power – is to be left without control,[22] and if something is appropriate to be taken over from the American model of law, it is nothing else than the principle of "brakes and balances".

According to a well-known – already deceased – lawyer from Budapest: There can be no doubt that one of the most important requisites of good adjudication (administration of justice) is a scientist judiciary. The judges' profession is definitely the first and most important profession in a state. Whoever fills in this position that should be the first man in honesty, he/she should know the law but also know life as well … And he/she should have a tried and tempered character, someone who wants to keep the law steadfastly midst evil, the temptations of life and its enticements.

[22] László Korinek, *A korrupció néhány kriminológiai vonatkozása* [A few criminological aspects of corruption] – Korunk 1993/7. p. 35.

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.

The Approver in Corruption Cases: A Witness in His Own Trial?

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Abstract:

The study aims at analyzing a controversial issue of criminal trials when it comes to corruption offenses, namely the legal standing of the approver. It examines the compatibility of the approver with the status of witness of the accusation, his possibility to participate in a trial as a distinct subject, as well as the impossibility of using his testimony as evidence. A distinction is made between the approver who assisted or found out about an offense, thus revealing facts from the perspective of an observer, and the approver-participant to an offense, a situation in which, given certain exculpatory defenses or circumstances that entail a decrease in the limits of penalties which operate in his benefit, he appears as a person with an interest at trial. Several examples from case-law are discussed, in order to assess the manner in which judicial authorities addressed the topic under debate, as well as the arguments of the doctrine in the same matter. Finally, the study focuses on the criteria applied to assess the evidence derived from the approver or obtained with his support, from the perspective of the new evidentiary standard, i.e. 'beyond a reasonable doubt', which has emerged in the Romanian criminal trial.

Keywords: *approver; corruption offenses; witness of the accusation; exculpatory defenses; reasonable doubt.*

I. According to the least complicated definition, an approver is the author of a denunciation. There is a legal definition for the denunciation, *i.e.* the reporting of a person to the authorities about the commission of an offense (art. 290 in the Romanian New Code of Criminal Procedure, hereinafter 'the New Code'). This reporting has a private nature, which distinguishes it from the formal notice, a duty of public clerks that hold high offices within a public authority or a legal entity of public law, as well as of persons acting as supervisors in the course of their duties or perform services of public interest (art. 291 in the New Code). In this case, the denunciation has been referred to as 'formal report'.

The Romanian Code of Criminal Procedure is silent as to the status of the approver. In order to clarify this issue, it is necessary to start our debate from the question on how a private individual comes to be in possession of information that allows him to report an offense. Several sources can be thus identified: (i) he found out about the offense indirectly, from the accounts of third parties, (ii) he was present upon commission of the offense or (iii) he was involved in the commission of the offense as a participant.

The first two hypotheses can be easily assimilated to the position of a witness at trial. A witness is the person who has knowledge of facts or circumstances that represent evidence in a criminal trial (art. 114 in the New Code). According to art. 115 of the New Code, any person can be summoned and heard as a witness in a criminal trial,

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except for the parties (the defendant, the aggrieved party, the party incurring civil liability) and the main subjects that participate in a trial (the suspect and the injured party). Therefore, if the approver does not participate in a trial in any of the qualities mentioned before, and he has direct or indirect knowledge of aspects related to the criminal case, he could be heard as a witness.

The third hypothesis refers to the situation in which the approver was involved in the commission of the offense. In such a case, we are not confronted with a mere denunciation, but with a specific category of denunciation, namely the self-incriminating report. Although the self-incriminating report has not been provided by the Code of Criminal Procedure, we consider that the legal rules governing denunciation will correspondingly apply. When an approver has taken part to an offense, he does not reveal facts about its commission from the position of a neutral person, uninvolved in the criminal activity, but as a person who, given the opportunity to collaborate with judicial authorities, can be easily assimilated to an interested party.

In what follows we deem necessary to analyze in detail the status of the approver-participant to an offense in a criminal trial, and, especially, due to their sensitive nature, his involvement in corruption offenses. We shall approach the situation of the approver as a voluntary participant to an offense, in order to distinguish it from the case where the participant was constrained, by any means, to commit the offense. In this last situation, if the constrained person also makes a denunciation, there is no impediment to hear the denunciator as a witness, since the act he took part in shall not constitute an offense, therefore it cannot be imputable on him [art. 290 para. (2) of the Penal Code].

As regards the criminal liability of the participant to an offense, the New Penal Code has set out, in art. 51 para. (1) that he shall not be punished if, before the discovery of the offense, he reports about its commission, so that completion of the offense can be prevented, or if the participant himself prevents completion of the offense. The new dispositions are different from the ones in the former Penal Code, which provided only the prevention, by the participant himself, of the commission of the offence (ex-art. 30 of the Penal Code).

Presently, if a report to the authorities has the ability to prevent completion of the offense, shall be legally qualified as a new exculpatory defense. This defense applies to all offenses, since the law aims to encourage the reports on crimes and to grant impunity if completion of offenses is deterred. *A contrario,* if the report takes place after the offense has been committed, even though before the discovery of the act by the authorities, the exculpatory defense is no longer applicable, yet the authorities can use it as a mitigating circumstance.

In case of corruption offenses, the situation is rather different. Thus, the person who offers the bribe (art. 290 of the Penal Code) or the influence peddler (art. 292 in the Penal Code) shall not be punished if they report the act before the investigation authorities have been informed about it. Such instances represent, according to criminal law, exculpatory defenses of special nature, and apply in situations that are not covered by the general defense stipulated at art. 51 of the Penal Code. Thus, in case of corruption offenses, even after the moment the offense has been completed, reporting about it shall lead to impunity. Such provision is aimed to be an instrument destined to efficiently combat corruption, by stimulating individuals to reveal commission of such acts.

Further on, pursuant to art. 19 of the Government's Act no. 43/2002[1] on the National Anti-Corruption Department, the person who has committed one of the offenses prosecutable by the Department, but who, during the criminal investigation reports and facilitates the identification and prosecution of other persons who have committed such offenses, shall benefit from the decrease by a half of the limit of penalties provided by law. In this case, there operates an exculpatory defense.

It is recommendable to address as well the dispositions governing art. 19 of Act no. 682/2002[2] on the protection of witnesses which provide that a person who is a witness[3] in a criminal trial and who committed a serious offense, and who, before or during the criminal investigation or the judgment, reports and facilitates identification and prosecution of other persons who committed such offenses, shall benefit from the decrease by a half of the limit of penalties provided by law. In this case, too, there shall operate an exculpatory defense.

Therefore, there are four stages depending on which criminal law draws legal consequences for the person who makes a report to authorities. The first is the stage when the offence was completed, the report being due before completion, so as to prevent it. The second is the stage when judicial authorities find out about the offense, the report being due before they are notified about the offense by other means. The third stage is when criminal investigation of the corruption offense initiates, the report being due any time during said investigation. Finally, the fourth stage is when the judgment has started, the report being due at any moment within the trial. Either we refer to an exculpatory defense (in the first two situations) or to a decrease in the limits of penalties (in the last two cases), the benefit that the law offers is consistent and tempting for a report to be made, and it thus becomes clear that the approver has a well-defined interest at trial.

The Romanian Code of Criminal Procedure does not actually condition the hearing of a person on a lack of interest at trial. At the same time, it does not prohibit the hearing of a person who has an interest at trial. The best example in this sense is that the injured party who has been affected by the offense (art. 79 in the New Code) has the right to be heard (art. 81 and art. 111 in the New Code). It is obvious that the injured party has an interest therefore he/she shall participate in a criminal trial. In case the injured party does not want to participate in a criminal trial, he/she can be heard as a witness [art. 81 para. (2) of the New Code]. Similarly, when the judge aims at hearing the spouse or the relatives (art. 117 of the New Code), the law confers these persons the possibility to refuse to testify, the reason for that being precisely the existence of an interest at trial. Corroborating such provisions with those of art. 115 in the New Code, it seems to appear that a witness cannot be but a person devoid of interest at trial.

Additionally, according to art. 116 para. (2) of the New Code, the hearing of a witness can be extended to all circumstances necessary to verify his/her reliability. Although this condition of reliability is quite uncommon for Romanian criminal procedure, the fact is the New Code allows to be used in a trial only those subjects who

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[1] Published in the Official Journal no. 244 of April 11th 2002.

[2] Republished in the Official Journal no. 288 of April 18th 2014.

[3] A witness, according to the special law (subsidiary laws), also means the *person devoid of legal standing* in a trial, who, by his/her determinant information or data, can contribute to the discovery of truth in cases of serious offenses or to the prevention of substantial damage that could result by commission of such acts, or to the recovery of said damage; this category also includes the person who is a defendant in another case [art. 2 letter a) paragraph (2)].

enjoy a high degree of credibility. Hence, we must admit that a person with an interest at trial could not be a witness, because this legal status would be affected by lack of credibility.

The requirements of good-faith and reliability seem to result as well from the examination of international conventions to which Romania is a contracting party. Thus, the United Nations Convention against Corruption[4] adopted at New York on October 31st 2003 provides that 'Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports *in good faith and on reasonable grounds* to the competent authorities any facts concerning offences established in accordance with this Convention' (art. 33).

Similar provisions are to be found in the Council of Europe's Civil Law Convention on Corruption[5] adopted at Strasbourg on November 4th 1999, which states that 'Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have *reasonable grounds to suspect* corruption and who *report in good faith their suspicion* to responsible persons or authorities' (art. 9).

Consequently, an approver could not have the legal standing of a witness, being easily assimilated to an interested party of low credibility. The legal standing of the approver needs explanations also due to the fact that there are cases where such quality becomes the essential element in a criminal trial. We shall present three cases and try to analyse the way in which the approver may have a certain legal standing.

II. In a case,[6] the first instance court refused to grant the good-faith presumption to approvers when the only direct and immediate evidence on which the accusation was based was their testimony. By comparing the testimony of the approver with the statement of the defendant, the court conferred a higher evidentiary value to the latter, whose content revealed that the defendant did not admit to having accepted bribe. Consequently, the court acquitted the defendant.

Commenting on this case, the author noted that according to the provisions of the former code, there is no order of preference between the statement of the defendant and the testimony of a witness, even if the latter is an approver. Excluding the testimony of the approver based on the fact that it is a singular one, doubled by a presumption of his interest at trial, would be against the provisions that govern the assessment of evidence. Thus, according to the ex-art. 69 in the former code, the statement of the defendant shall have an evidentiary value only if it is corroborated with other facts and circumstances that result from all the evidence of the case-file. Instead, the testimony of the witness has an evidentiary value in itself, unconditioned by the existence of other evidence that it must be corroborated with.

Finally, pursuant to art. 63 para. (2) of the former Code of Criminal Procedure, no evidence shall have a previously established value. Presently, the references in the former code related to the conditional or unconditional nature of the statements made

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[4] Ratified by Romania through Act. no. 365 of September 15th 2004, published in the Official Journal no. 903 of October 5th 2004.

[5] Ratified by Romania through Act. no. 147 of April 1st 2002, published in the Official Journal no. 260 of April 18th 2002.

[6] Tribunal of the Mureș County, Penal judgment no. 100 of July 1st 2011, critically commented upon by *Cristian-Valentin Ștefan* in Caiete de drept penal no. 4/2013, pp. 142-145.

by the defendant or the witness no longer exist, since the New Code has not provided them at all.

Since we deal with the testimony of an approver, in order to assess whether or not it reflects the truth, other criteria should be applied, distinct from that of the singularity of such evidence. Thus, the following elements should be taken into account:

- the interest of the approver at trial;
- the relation between the approver and the bribed person;
- the criminal record of the approver;
- existence of data about the influence or incitement to report the offense, derived from the conduct of judicial authorities;
- if the approver is involved in pending criminal proceedings or whether he is arrested;
- if the approver incited to the commission of the offense, in order to obtain evidence.

As to the circumstances of the case, it has been pointed out that the only interest of the approver at trial is to recover the amounts of money unduly pretended from him, that he paid in exchange for a service to which he was entitled for free. Also, the approver did not use to have a criminal record, was not subject to a pending criminal proceeding, did not have prior connections with the defendant, did not have the initiative to commit the offense and was not influenced by judicial authorities in his activities.

On the other hand, one must be very careful when assessing the evidence provided by the approver. This is due to the fact that the author who offers the bribe is necessarily involved in the acceptance of bribe, and that is why his objectivity is reasonably questioned.

The conclusion was that, from a practical point of view, it is extremely difficult that the person who accepts the bribe be convicted solely on the testimony of the person who correlatively offers the bribe. For that conviction, the testimony of the approver is not enough, but other evidence is required, in order to supplement the factual elements contained in the testimony. In the absence of such elements, the acquittal is a more cautious solution than a conviction.

As we may notice, the above-cited case has not solved the issue of the legal standing of an approver. The court assimilated the approver to a mere witness, and solved the problem guiding itself by the evidentiary value of his testimony. The invalidation of his testimony was not done on grounds of incompatibility between the status of the approver and that of the witness, but on the impossibility to corroborate his testimony with further evidence.

In accordance with the provisions of the Romanian New Code of Criminal Procedure, we consider that the case is able to be solved by using other coordinates, as well. Thus, pursuant to art. 103 para. (2) of the New Code, conviction shall be ruled only when the court is convinced that the accusation has been proved beyond a reasonable doubt. The idea is repeated in art. 396 para. (2) of the New Code. In commenting upon such texts, the doctrine[7] has underlined that the standard in assessing evidence is no longer that of the intimate conviction of the judge (art. 63 of the former code), but one

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[7] Cristinel Ghigheci, *Principiile procesului penal în noul Cod de procedură penală* [Principles of criminal trial in the new Code of Criminal Procedure], Universul Juridic Publishers, Bucharest, 2014, p. 93.

that is specific to the adversarial system, *i.e.* beyond a reasonable doubt. The effect of this approach shift is that the judge is not convinced by himself, but he must be convinced in order to rule conviction. Applying these new coordinates to the above-mentioned case, it results that the mere statement of the approver and its denial by the defendant do not satisfy the exigencies of the new standard, so it becomes obvious that conviction could not be ruled beyond a reasonable doubt.

III. In another case, judicial authorities decided to prosecute the defendant for accepting bribe, as he pretended certain amounts of money from the administrator of a company where he was performing a control, in order to refrain himself from fulfilling activities in the discharge of his duties. In the critical comments upon this case[8], it was noted that the audio recording on magnetic tape, made by the approver who used a tape recorder, of a conversation secretly recorded in a private place, without the defendant being aware of it, shall not be treated as lawfully obtained evidence, therefore, shall be excluded from the case-file. The case addresses the involvement of the approver beyond his testimony in front of judicial authorities, denoting much or less interest. The issue here is to establish the legal regime of the evidence obtained by the approver or with his essential contribution.

According to the former Code of Criminal Procedure, the audio recordings made by the parties could be used as evidence, if they are not forbidden by the law [art. 91[6] para. (2)]. In such a context, it was highlighted that the recording offered by the approver is contrary to the law, since, on the one hand, the approver is not a party in a trial, and, on the other hand, the secret nature of the recording represents a violation of the fundamental right to private life, being affected by the presumption that the approver aimed to incite the defendant to commit the offense in order to obtain evidence, which was prohibited by the law [ex-art. 68 para. (2) in the former code].

When examining the situation of the case, it must be taken into account that upon receipt of the magnetic support that contains the recording (the audio cassette), no official delivery-receipt report was concluded, and the transcript of the conversation into the transcript-report was done according to the perception of the prosecutor, in the absence of technically specialized assistance. The prosecutor would not have the competence to transcribe an audio-recording obtained without a warrant issued to that end. This competence belongs solely to an expert, after having certified the authenticity of the recording and the absence of elements that might alter its content.

The New Code settles this issue in a different manner, including, alongside with the parties, other persons that may perform audio-recordings, on condition that said recordings refer to their own conversations or communications with third parties [art. 139 para. (3) of the code].

From this perspective, the approver could be qualified as ‘another person’ and his recordings would be susceptible of being used in a trial.

The case is interesting because it allows the possibility that, when all conditions provided by the law were respected, an audio recording made by the approver, although ‘unauthorized’ by a judge, but authenticated by an expert, may have the ability to be used as legal evidence. In such hypothesis, the hearing of the approver as a witness can

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[8] The Prosecutor’s Office attached to the Court of Appeal of the Cluj County, Indictment no. 166 of March 22nd 2002, critically commented upon by *Gheorghe Cocuța, Magda Cocuța* in Dreptul no. 7/2004, pp. 155-156.

no longer be prevented on the ground of his lack of reliability. This can no longer represent, as in case of his testimony, a criterion of admissibility.

The issue can be dealt with from another perspective, namely the principle of loyalty in obtaining evidence, according to which it is forbidden to incite a person to commit an offense in order to obtain evidence. In this sense, it is relevant to know who had the initiative of the conversation or the communication, the manner in which the discussion took place, as well as the terms used by the approver, namely if they reveal the intention of inciting a person to commit the offense.

IV. In another case[9], it was sustained that the approvers had been illegally heard as witnesses, because they made financial claims as aggrieved parties, soliciting the amounts of money or the equivalent of the goods offered to the defendant. Examining the file documents, the court noticed that the persons who reported the offense gave testimonies as witnesses and were applied the exculpatory defense set out by art. 255 para. (3) in the former Penal Code.

The fact that these persons solicited the restitution of money or the equivalent of the goods offered to the defendant does not confer them the legal standing of aggrieved parties, since their right is consecrated by art. 255 para. (5) in the former Penal Code, pursuant to which the money, the items of value or other goods shall be restituted to the person who offered them, in case he/she reports the offense to judicial authorities before said authorities were notified about its commission, a condition fulfilled in the present case. Therefore, as regards the approvers who were heard as witnesses and legal rules were respected, the dispositions on nullity (art. 197) or those set out by art. 64 para. (2) in the former Code of Criminal Procedure are not applicable.

The case is of interest, since it raises the question whether, following the solicitation to be restituted the amounts of money offered as bribe, the approver becomes incompatible to give testimony at trial, since his legal standing can be assimilated to that of an aggrieved party. The Supreme Court stated that the compensation of the damage incurred by the approver is not grounded on the status of an aggrieved party, but on a special provision in the criminal law [art. 255 para. (5) in the former Penal Code]. The legal text represented the incorporation into national law of the dispositions of the Council of Europe's Civil Law Convention of Corruption. According to art. 3 of said Convention: '1. Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. 2. Such compensation may cover material damage, loss of profits and non-pecuniary loss' Also, pursuant to art. 4, '1. Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated:

i the defendant has committed or authorized the act of corruption, or failed to take reasonable steps to prevent the act of corruption;

ii the plaintiff has suffered damage; and

iii there is a causal link between the act of corruption and the damage.

2. Each Party shall provide in its internal law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable'.

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[9] The High Court of Cassation and Justice, Criminal Chamber, Penal judgment no. 3690 of November 10th 2009, available at http://www.scj.ro/SP%20rezumate%202009/SP%20dec%20r%203690%202009.htm.

As regards this issue, it is to be noted the legislative solution recommended by the New Code of Criminal Procedure, according to which a distinction must be made between the participant constrained to commit the offense and the approver who participated to the offense. The money, the items of value and other goods that were given to the defendant shall be fully restituted in case of a person who was constrained to offer bribe. Whereas, in case of the approver, there shall be restituted only the goods given to the defendant after the formal report about the offense, namely under control of judicial authorities. The goods offered before the formal report about the offense shall not be restituted, a legislative solution that is remote from the one in the former code, where no such distinction was applicable. Thus, the law protects the good-faith persons, who, confronted with a solicitation from a corrupt public officer, notify judicial authorities and offer goods in order to catch the dishonest agent in the act, following the official notification. The person who offers bribe and does not notify judicial authorities, accepting the commission of the offense, shall be exempt from liability if he makes an official report, but shall not benefit from restitution of his goods. In this case, the immorality of the person must be sanctioned from the civil law perspective.

V. In its turn, the Romanian doctrine has adopted a different approach on the issue whether the approver who participates to an offense can cumulate the legal standing of a witness at trial. According to one opinion,[10] the approver can be a witness, on the reason that the law does not expressly provide the interdiction to cumulate both statuses. Where the legislator had a well-defined aim, he provided interdictions for a certain person to be a witness or set out his/her right to refuse to give testimony (art. 115-117 in the New Code). On the other hand, the testimony of an approver may be extremely useful in order to hold criminally liable the persons who committed offenses, thus ensuring the discovery of truth.

Therefore, a strategic goal, the discovery of truth, would legitimize this type of evidence, given that the New Code does no longer provide for a limited enumeration of what can constitute evidence in a trial. It becomes thus possible, according to art. 97 para. (1) f) in the New Code which stipulates that in a criminal trial, evidence shall be obtained by all evidentiary proceedings that are not prohibited by the law, to comprise within the case-file, the testimony of the approver, even without assimilating him to a witness.

According to another opinion,[11] the approver is not a witness and cannot be heard in such a legal standing, in order to prove the criminal law acts that he himself notified to judicial authorities. By its very essence, the denunciation, which can be used to notify judicial authorities, becomes an instrument of the accusation. The testimony of the approver cannot be evidence to be used in a criminal trial, since it is merely a source of information for judicial authorities as to the commission of an act provided under criminal law. By participating to the accusation, the approver cannot be his own witness, namely the witness to the accusations he referred to in the denunciation, since he would thus cumulate several legal standings and it would be contrary to the principle that promotes the separation of functions within a trial.

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[10] Florin Radu, Cristiana Radu, *Considerații referitoare la cumularea calităților de denunțător și martor* [Considerations upon aggregation the approver and witness in the same person], Dreptul no. 9/2007, pp. 206-207.

[11] Horia Diaconescu, Ruxandra Răducanu, *Reflecții cu privire la calitatea procesuală a denunțătorului* [Reflections upon the legal standing of the approver], Dreptul no. 10/2011, p. 218.

These arguments are indeed fascinating, if we take into account the fact that the New Code seems to set out such interdiction in an equivalent situation. Thus, according to art. 61 in the code, the report concluded by the authorities expressly indicated in its content, while they officially report the commission of an offense, shall constitute an official notification of judicial authorities, and cannot be subject to review in administrative proceedings before the court. Such a solution is obviously miles away from the provisions in the former code, which stated that the above-mentioned report could be used as evidence in a trial, a solution vehemently criticized by the doctrine.[12] Consequently, since according to the new trial philosophy, the findings contained in reports no longer have an evidentiary value, being merely acts of formal notification and instruments to be used in the accusation, the same reasoning should be applied to denunciation, for similar motives.

However, this conclusion is relativized by another legal provision (art. 114 of the New Code) which states that the persons who concluded a report in the conditions of art. 61 can also be heard as witnesses. So, it is perfectly possible for a person who is authorized to issue a report about the commission of an offence, to acquire later on the legal standing of a witness and be heard in order to reveal the circumstances under which he drew up the report.

As the studies in this area[13] have demonstrated, there are at least three reasons for which the approver who participated to an offense should be approached with reserve:

(a) the participant to an offense is susceptible of false statements in an attempt to defend from responsibility. This hypothesis is all the more plausible as the self-incriminating report is not an exculpatory defense for all offenses, if it occurs after their completion;

(b) the participant to an offense must be presumed to be an immoral person, susceptible of disregarding the oath taken at the beginning of the hearing;

(c) the participant gives testimony in exchange of the promise that he shall benefit from impunity, which leads to the risk that he shall sustain the version of the accusation. The approver shall declare all that judicial authorities require him to declare, in order to make their task easier, a version which may later on prove far from the truth.

Hence, a conclusion is clear: the necessity to corroborate the testimony of the approver with further evidence. This corroboration rule results from art. 103 in the New Code, according to which no evidence shall have a previously established value, being subject to the free assessment of judicial authorities, after an evaluation of all evidence adduced in the case. In ruling upon the existence of the criminal act and the guilt of the defendant, the court shall pronounce a motivated decision, by referring to all evidence that has been assessed and only when convinced that all accusations have been proved beyond a reasonable doubt.

The law on the application of the New Code of Criminal Procedure added a new paragraph within art. 103 on the assessment of evidence, which stipulates that conviction, cannot be based, in a determinant proportion, on the testimony of the investigator, the collaborator or the protected witnesses.

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[12] Diana Ionescu, Gheorghiță Mateuţ, *Inadmisibilitatea utilizării ca mijloc de probă în procesul penal a proceselor-verbale și a actelor de constatare obținute în procedurile administrative de control* [Impossibility of using documents issued in administrative proceedings as evidence], Caiete de drept penal no. 1/2005, pp. 11-40.

[13] http://www.lawteacher.net/criminology/essays/evidentiary-value-of-an-approvers-testimony-law-essay.php#ixzz3IajXPqfI.

The approver cannot be integrated in any of the three categories. We therefore consider that there is a legislative gap in this domain, and it is recommendable for the future, that the approver be included in that enumeration. He cannot be assimilated to a collaborator of justice, given his involvement as a participant to the offense. It is true that the approver may have the legal status of a protected witness, in case there is a reasonable suspicion that the life, the corporal integrity, the freedom or the goods of the witness or a member of his family could be endangered as a result of the data that he provides for judicial authorities or of his testimony (art. 125 in the New Code). Although it is obvious that the approver runs a risk when he accepts to give a testimony, as he may be subject to serious pressure by threats, this is not necessarily a rule in cases of corruption. In such situations, the category of protected witnesses does not include the approver, therefore the issue of basing the conviction on his testimony in a determinant proportion, is still open.

Returning to the rule of corroboration, we consider that the following observations need to be taken into account, namely:

- it is not necessary that the testimony of the approver be corroborated in detail with other evidence, since it would thus become useless;
- the testimony of the approver must refer to and involve the defendant, in order to prove their connivance;
- the testimony of the approver must not constitute direct evidence against the defendant, being sufficient that it reveals a chain of causation between the approver and the offense;
- the evidence that is corroborated must not derive from another participant to the offense.

VI. In conclusion, the approver may be a witness in a criminal trial. On the one hand, no provision in the New Code prohibits this. On the other hand, the present code has not granted much attention to this issue. In order to avoid judicial errors, it is recommendable to approach with utmost reserve the testimony of the approver and to absolutely apply the rule on corroboration of evidence with other evidence adduced in the case. Under no circumstances, the testimony of the approver shall by itself support a decision of conviction nor represent the determining element on which it is based. All such exigencies are intrinsic to the new standard on the assessment of evidence, which binds the court that, upon ruling the conviction, it must be convinced that the accusation has been proved beyond a reasonable doubt [art. 103 para. (2) and art. 396 para. (2) in the New Code]. Or, in the case of an approver, there are multiple reasons for which his testimony should be approached with caution. Only by providing reasonable guarantees of objectivity, the approver shall be metamorphosed into a trustworthy trial participant, able to contribute to the respect of the right to a fair trial.

Penal Means of Substantive Law against Acts of Corruption and Organized Crime in the Hungarian Witness Protection

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Abstract:

The phenomena of corruption and organized crime had been considered as relatively unknown for a long time in Hungary. After the political transformation of the country, from the 1990s did official politics acknowledge the more and more powerful presence of organized crime and of the closely connected acts of bribery, which offered one serious challenge after another for criminal investigators. Undoubtedly, the "large-scale influx of capital caused by the political transformation, the internal contradictions of the reformation of the economy, privatization, the conspicuous polarization and moral crisis of society fulfilled the conditions for crime to become organized and to change in quality."[1] *As a result of this, the presence of organized crime had become more and more perceptible also in Hungary, and the situation had been worsened further by the fact that the types of crimes that had been previously committed in organized circumstances became different, and turned more severe. The economic system and the structure of wealth distribution in the previous social establishment were not favorable for the formulation of the modern organized crime, although the trading of illegal goods and services (basically certain fashion and luxury articles, and other articles of personal use) proved partially to be organized.*[2]

Keywords: *corruption; organized crime; Hungarian criminal law; witness protection.*

Although even its existence had been the topic of debates earlier, by the end of the 1990s, the problem of organized crime was considered as a nation-wide issue, and as the source of difficulties caused by crime in general.[3] According to Zoltán Márki: *"The truth is in between. Organized crime exists in Hungary, and causes serious problems, but it only covers a small percentage of crimes, a percentage that can and should be eliminated."*[4] At the same time we must admit however that the conduct of an actual

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[1] Gábor Kemény, *The witness protection-related modifications of our criminal procedure law, in light of the possibilities in them,* Review of Internal Affairs, 2000, Issue 10, p. 85.

[2] More details on this: Endre Bócz, *The confession of a district attorney – Experiences of prosecution in the fight against organized crime in Hungary,* Review of Internal Affairs, 1997, Issues 7-8, pp. 11-12.

[3] In relation to this, Endre Bócz states the following: *„Today, the statement that organized crime is the plague of our age almost sounds as a cliché among people engaged in criminal science or dealing with the problems of criminal jurisdiction."* Bócz, *The confession* […], p. 11.

[4] Zoltán Márki, *The third phase of the anti-mafia regulation: the present state of national codification* In: *Criminal-political answers to the challenges of crime, with special attention to organized crime and the penal law system of sanctions: The records of the 4th National Criminology Congress. Győr, October 13-14th, 2000* [edit: Erika RÓTH], Criminology Proceedings, Special Edition, Bp., 2001, p. 24

quantitative analysis of organized crime is hindered by *"that deep conspiracy, which is a significant trait of both the formulation and the operation of the organization."*[5]

While previously, in the second half of the 1970s and in the 1980s, one could see a certain level of organization in the way burglaries were committed – which phenomenon was defined by András Szabó as "socialist organized crime" in a witty way[6] –, later this already appeared at vehicle thefts, drug crimes, serious crimes against wealth (oil and mafia cases) and human trafficking. Before the political transformation in Hungary, the extremely severe incarcerations imposed in relation to organized crimes against wealth were thought to discourage criminals from formulating similar organizations. But a new situation emerged from 1980 on, as *"the criminal organizations, that were apart from each other before, started a loose, but continuous co-operation, and the distribution of operational areas has begun as well."*[7] It became obvious that the problem cannot be solved only with penal means of substantive law.

From the 1990s, the restructuring of the political and economic life opened new perspectives for organized crime, the extortion of the so-called protection money, the use of usurious loan and money collectors, and later explosion and hand-grenade killings, showdowns, and execution-style murders became wide-spread. Parallel to this, during the criminal procedures the organized crime groups methodically used different forms of intimidation against witnesses and other participants of the procedure. The number of acts of corruption rose, the already high latency of which, together with the phenomena mentioned above, reduced the faith of society in jurisdiction, and the readiness of citizens to bear witness became significantly lower, due to these phenomena. It was more and more necessary to formulate such regulations, that are able to assure the physical and mental protection of very important witnesses. In the second half of 1997 and in 1998, the Penal Code and the Law XIX of 1998 of Criminal Procedure have been modified in the spirit of the intervention against organized crime, the goal of which was to create as effective means as possible. Among others, the notion of criminal organization and the crime of formulating a criminal organization have been introduced, and in case of many crimes, participation in a criminal organization has been ruled as a qualifying condition.

All this was justified because in a democratic state founded on the rule of law, society's expectations in connection with crime are expressed by the penal law, thus we can say that it is *"one of the 'most national' branches of law."*[8] Considering this, it is very important for the legislator to assure the possibility of using means of penal law when it comes to witness protection. In his excellent monograph about witness verification, Lajos NAGY mentions already in 1966 the criminal law protection of the witness in the first place among the rights due to the witness, which *"provides increased safety for witnesses in case of crimes committed against them as a result of their testimony."*[9] One

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[5] Imre Kertész, *The scope of organized crime* In: *Criminal-political answers to the challenges of crime, with special attention to organized crime and the penal law system of sanctions: The records of the 4th National Criminology Congress. Győr, October 13-14th, 2000* [edit: Erika RÓTH], Criminology Proceedings, Special Edition, Bíbor, Bp., 2001, p. 69

[6] Cites: Bócz, *The confession* […], p. 12

[7] András Horváth, *A few practical experience on organized crime,* Police Review, 1994, Issue 10, p. 5.

[8] Péter Csonka, *The perspective of the Council of Europe in the fight against economic and organized crime,* Review of Internal Affairs, 1998, Issue 11, p. 33.

[9] Lajos Nagy, *Witness verification in the criminal trial,* Economic and Law Publishing, Bp., 1966, p. 229.

decade later, during the codification of the Penal Code, it emerged as a possibility that the crimes committed against the witness as a result of their testimony would be regulated separately, as a standalone statement of fact, which may ensure bigger safety and motivational force for every citizen co-operating in a criminal procedure.

It can be considered a fact, that every external effect focusing to influence witness testimony endangers the valid establishment of facts by the proceeding authorities, thus, jurisdiction must be protected from this by all means.[10] The scope of witness protection includes the means protecting against influencing by violence or threat, although the latter has other known ways, for example promising material or personal advantage, acts of corruption, against which there are also penal means of substantive law available.

In connection with the penal means of substantive and procedural law, Flórián Tremmel aptly notes, that *"substantive penal law in our country is in a significant shortfall compared to procedural law."*[11] However, the witness protection means of procedural law are not sufficient to address the problem of witness protection in a satisfactory way.

In spite of the above, the person threatening and intimidating witnesses was, for a very long time in Hungary, only punishable in case of committing the so-called traditional crimes[12], and only the Law CXXXI of 2001 codified a factual situation serving specifically the protection of the witness into the provisions of Penal Code, by criminalizing the obstruction of public authority proceedings. However, many international documents specify the protection of witnesses by penal means of substantive law, and in this regard, one of the most obvious witness protection methods is clearly the penal law prohibition of influencing the witness by threat. As per the third section of the Recommendation No. R (97) 13 of the Committee of Ministers of the Council of Europe on the intimidation of witnesses and the right to protection, the intimidation of witnesses must be considered a punishable act, either as a standalone factual situation, or as part of the factual situation of a prohibited threat.

The Palermo Convention also specifies the criminalization of the obstruction of justice. The penal means of substantive law to protect witnesses are enacted by point a) of article 23, according to which, each State Party shall adopt such legislative and other measures, as may be necessary to establish as criminal offenses among others, when committed intentionally, the use of physical force, threats or intimidation, or the call to induce false testimony, or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to organized crime.

In spite of the above, clearly different viewpoints have been formed between jurists of theory and practice in Hungary regarding whether it is necessary to regulate retaliatory acts against witnesses as *sui generis* crimes at all, or not. As of now, the majority of the opinions think it is not. Imre Kertész analyzes the arguments of law politics and legal dogma, which either support or oppose the treatment of factual situations serving witness protection as *sui generis* crimes.[13] One of the most important argument of law politics supporting standalone factual situations is that they would represent the increased danger these acts impose on society in a better way, and its

[10] Balázs ELEK, Influencing testimonies. TKK, Debrecen, 2008, p. 62.

[11] Flórián Tremmel, *Approaching witness protection from a systemic aspect* In: *Theoretical and practical problems of witness protection* [edit. Bence MÉSZÁROS], Faculty of Law at the University of Pécs, Pécs, 2009, p. 111.

[12] For example, through the factual situation of murder or battery of a foul motive or aim.

[13] Imre Kertész, *The witness needs protection,* Hungarian Law, 1993, Issue 4, pp. 196-197.

judgment by penal law.[14] Undoubtedly, the qualification of some of the factual situations that incidentally were to be codified in Penal Code would be manageable in the already existing legal framework, but, at the same time, *"in such cases, symbolic legislation does not resolve a loophole, but signifies the political need for the restriction of a phenomenon considered damaging."*[15]

Considerations of law dogma also demand the codification of specific legal factual situations, as the duality of these acts regarding their subjects of law and commission – namely, that they are not only and not primarily against life and health, but also against jurisdiction – justifies their relocation from under the scope of crimes against life and health. Lajos Nagy considers specific regulations justified exactly because of this: *"According to our viewpoint, it would be* de lege ferenda *necessary to punish violent behavior against witnesses because of their testimony as specific crimes against jurisdiction."*[16] Furthermore, Gábor Kemény states, that the codification of provisions on the obstruction of jurisdiction in the Penal Code would function as an important means for protection, since *"by all probability, it would lower the number of those who undertook the punishment for the crime of intimidating the witness, which is the basis of the proceeding."*[17] Edina Gorza, in the middle of the 1990s,[18] went as far as to give a textual suggestion for the formulation of such new legal factual situations for the Special Part of the Penal Code as for example the misuse of personal information of the protected witness, subornation to perjury, forcing someone to suppress extenuating circumstance. In her opinion, based on these factual situations, judges would order those threats to be punished that *precede* witness testimony in case of the realization of a qualified subornation. However, for punishing the retaliations *subsequent* to testimony, she considers the establishment of murder and battery of a foul motive as enough. Anita Cserháti also insists on the introduction of factual situations that regard witness protection especially.[19]

One can mention as a counter-argument for the above opinions, that we could probably not expect too many judgments with this qualification in everyday practice, and thus, in my opinion, it is not justified to raise the number of penal norms any further.

According to István Vavró, it would be one of the possible penal means of substantive law for witness protection, if the legislator allowed the same special protection for a witness, that an official enjoys.[20] An argument against this could be that *"statistical analysis* [...] *has shown that a perpetrator is not intimidated by either the knowledge that they commit a crime against an official, or the fact that their punishment is going to be more severe"*[21], thus an increased penal law protection on the person of the

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[14] This is also why Ákos Borai suggests these factual situations to be regulated as *sui generis* crimes. Ákos BORAI, *Witness protection Part II,* Police Review, 1994, Issue 11, p. 28.

[15] Imre Kertész, *The even more specially protected witness,* Review of Internal Affairs, 2001, Issue 11, p. 44.

[16] Nagy, *op. cit.,* p. 230.

[17] Kemény, *op. cit.,* p. 95.

[18] Edina Gorza, *Witness protection and organized crime*, Review of Internal Affairs, 1997, Issue 7-8, pp. 30-33.

[19] Anita Cserháti, *Means of procedural law in witness protection. Protection Program*, Lawyer's Magazine, 2006, Issue 4, p. 22

[20] More on this: István Vavró, *On the procedural law means of witness protection,* Review of Internal Affairs, 1993, Issue 9, p. 27.

[21] Kemény, *op. cit.,* p. 96.

witness would probably not ensure real and effective protection for the witness. Furthermore, it would imply a disadvantage during verification, that the perpetrator must be made aware of the special status of the witness – namely, that the perpetrator committed the crime against a person who is a witness in a criminal procedure –, the publicizing of which is just the thing that is a threat to witness protection, and not desired.

In my opinion, when it comes to so-called traditional crimes, it is not justified to relocate them from their position in legal taxonomy, but at the same time, it has become necessary to codify new crimes that have not been regulated before, because of the national expansion of organized crime. All these factual situations must be suitable in themselves to deter the organized crime groups from intimidating or threatening witnesses, and this system of penal means of substantive law is complemented by tools of witness protection related to procedural law and security. The factual situations of the old (Law IV of 1978) and the new (Law C of 2012) Hungarian Penal Code related to witness protection in cases concerning organized crime are the following:

- subordination of perjury [old Penal Code, Section 242; new Penal Code, Section 276];
- obstruction of public authority proceeding [old Penal Code, Section 242/A] – constraining in a public authority proceeding [new Penal Code, Section 278];
- bribery (culpability of influencing witnesses with bribe) [old Penal Code, Section 255; new Penal Code, Section 295];[22]

I am going to introduce the specific legal factual situations here only in light of their relation to witness protection, omitting the detailed analysis of the related special literature on penal substantive law and of the specific crimes.

Subornation of perjury

The prohibition of perjury reinforced by penal law and the century-old culpability of subornation of perjury should serve to assure the reliability of witness testimonies, and to motivate the witnesses to tell the truth. The opinion of Endre Bócz in 1996, in connection with prohibiting witness intimidation by penal law, was that in this regard *"the Hungarian penal law has no debt, as subornation of perjury has been punishable here for almost a century, even if the question is emphasized not by threat, but by a promise."*[23] Subornation of perjury is a so-called *sui generis* crime, or a preparatory behavior, which is evaluated as a standalone, complete basis by the legislator. Based on subsection (1) of Section 242 of the old Penal Code, and subsection (1) of Section 276 of the new Penal Code, due to the criminal basis of subornation of perjury, one who strives to persuade someone to give a false testimony should be punished. If someone commits this crime in a civil case, a disciplinary case, in a case of petty offense, in a case processed by an arbitral tribunal or another authority, then it is considered an offense.

The behavior of perpetration for the crime: the strive to subornation, the call for perpetration, and in accordance with that, the act becomes a factual situation, if the

[22] The listing of this factual situation as a penal means of substantive law can only be found in the works of Mihály Tóth in the Hungarian special literature. See: Mihály Tóth, *Additions to the formative years of our new criminal procedure law (Witness protection and arraignment rights in the drift of modifications)* In: *Papers for Mr Erdei* [edit. Katalin Holé, Csaba Kabódi, Barbara Mohácsi], ELTE-ÁJK, Budapest, 2009, p. 418-433, 425

[23] Endre Bócz, *On witness protection,* Criminology Proceedings, 1996, Issue 54, p. 108

perpetrator did everything to make someone give a false testimony, but it did not lead to success. This scope does not include the influencing attempt, the target of which is not a false testimony, thus, when someone is forcing the witness to tell the truth during examination. In this case, neither false testimony, nor the call to make one is realized – since the witness recounts the truth –, thus, no fact of crime can be established. The call's arrival to the addressed person is a condition for the crime to be considered completed.

The crime can already be committed when the case is not being processed yet, but the perpetrator, considering the possibility of a future procedure, strives in advance to persuade the potential witness to give a false testimony. This also shows that as far as witness protection is concerned, it can not only cover people who meet the traditional criteria of a witness in a criminal procedure, but has a larger scope.

Obstruction of public authority proceeding – Constraining in a public authority proceeding

Article 23 of the Palermo Convention (already cited above) orders that each State Party shall adopt such legislative and other measures, as may be necessary to codify the obstruction of jurisdiction as a crime. Based on point a) of article 23, one must establish as criminal offenses among others, when committed intentionally, the use of physical force, threats or intimidation to interfere in the giving of testimony or the production of evidence.

The Law CXXI of 2001 codified the legal factual situation of the obstruction of public authority proceeding as a provision of the old Penal Code, enforced from 1st April, 2002. In case of an obstruction of public authority proceeding, someone uses physical force or threats to persuade another person not to exercise his or her lawful rights, or not to fulfill his or her duties during a court procedure, or another official procedure; thus, this factual situation is basically a peculiar case of constraining. János Bánáti notes in connection with this, that *"it is undoubtedly necessary to make the constraining of a witness punishable."*[24] However, what he did not consider justifiable was the making of the misleading of witnesses – which was mentioned in previous suggestions, but remained not codified – punishable, the point of which would have been to consider the act criminal even when committed for the above aim, not via physical force or threats, but by a simple misleading. According to the regulations of the old Penal Code, one should understand the notion of another person as referring to the witness, a specialist, or the accused. As per the regulation, the obstruction of public authority proceeding is a much more severe threat in a criminal case, than in a civil or other procedure. Section 278 of the new Penal Code includes the related provisions with new naming, along with unchanged elements of factual situations.

Bribery

Assuring the purity of public life is an especially important duty of the state also in criminal procedures, which is, considering the increasing number of crimes of a corrupt nature, not an easy task at all. It also goes without saying that corruption is becoming more and more international, so not only national, but international measures are

[24] János Bánáti, *Some questions on witness protection* In: *Criminal-political answers to the challenges of crime, with special attention to organized crime and the penal law system of sanctions: The records of the 4th National Criminology Congress. Győr, October 13-14th, 2000* [edit: Erika RÓTH], Criminology Proceedings, Special Edition, Bíbor, Bp., 2001, p. 124

needed to force it back. A part of the practice and system of corruption does not necessarily also qualify as a punishable act, which makes it obvious that the notion of bribery is wider than what corruption means in the sense of criminal law.[25]

According to subsection (1) of section 255 of the old Penal Code, the crime of bribery in an official procedure is committed by someone who gives unlawful advantage to another person, or to a third person on account of such person, to induce him to refrain from exercising his lawful rights in a court or other judicial proceeding, or to induce him to neglect his duties. The perpetrator shall be exonerated from punishment if he confesses the act to the authorities first hand and reveals the circumstances of the criminal act. According to subsection (2), any person – in our case, the witness – who accepts unlawful advantage so as to refrain from exercising his lawful rights in a court or other judicial proceeding, or to neglect his duties shall be punished according to subsection (1). However, the bribed person shall be exonerated from punishment if he confesses the act to the authorities first hand, surrenders the obtained unlawful financial advantage in any form to the authorities, and reveals the circumstances of the criminal act.

The subsection (1) of section 295 of the new Penal Code orders any person to be punished for bribery in court or other judicial proceedings who promises or gives unlawful advantage to another person for himself or for a third party for him to refrain from acting in accordance with his duty or in the exercise of his rights in court, arbitration or other judicial proceedings. As per subsection (2), the provisions of subsection (1) shall apply not only in a procedure conducted by Hungarian authorities, but also when the acts defined therein are committed in the course of or in connection with, proceedings of an international criminal court installed under international convention promulgated by an act, or under a statutory resolution adopted by the United Nations Security Council, or by the Court of Justice of the European Union. According to subsection (3), the penalty may be reduced without limitation – or dismissed in cases deserving special consideration – against the perpetrator of a criminal offense defined in subsections (1)-(2) if he confesses the act to the authorities first hand and unveils the circumstances of the criminal act.

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[25] For more details, see: Csonka, *op. cit.,* p. 52.

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Entrapment in Case of Corruption Offenses – Breach of the Right to a Fair Trial

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Abstract:

The adoption of the Romanian New Code of Criminal Procedure has entailed endless debates in the doctrine, generated by the imperfect structure of the new procedural law.

Many provisions of the new law, that have the value of fundamental principles, gradually lose their consistency, as they are infirmed by rules contrary precisely to those that consecrated them. On the one hand, it is worthwhile that the New Code provided for a much clearer principle of loyalty in obtaining evidence, expressly setting out the interdiction to induce a person to commit an offense with the purpose to obtain evidence. On the other hand, though, the same Code settled less conventional methods of criminal investigation, such as the possibility of state agents (undercover investigators) to participate to authorized activities that would otherwise be illegal, precisely in order to collect evidence, which includes, among others, the commission of an act similar to the actus reus of a corruption offense.

The present study aims at a sober analysis of the new procedural dispositions, from the perspective of the perpetual conflict between the state's public interest to fight against corruption, and the private interest of the person against whom the criminal investigation is conducted.

Keywords: *the principle of loyalty in obtaining evidence; entrapment; authorized participation to otherwise illegal activities; breach of the right to a fair trial; the new Code of Criminal Procedure.*

In law, there is a rather gloomy, yet true saying that any legislative work is fatally imperfect.

The statement is illustrative for the manner in which the Romanian New Code of Criminal Procedure[1] was conceived, as a structure of weak balance, due to the frequent lack of correlation between its procedural norms, as well as to the massive import of institutions from foreign judicial systems, that has generated serious mismatches with internal judicial practice.

In the Explanatory Note preceding the draft law on the Romanian New Code of Criminal Procedure[2] (hereinafter 'the New Code'), the authors referred to some innovating principles of criminal procedure, which "alongside with the classical ones" are destined to "bind judicial organs to create a criminal justice that is independent and impartial, able to inspire the public opinion with respect and confidence in the acts of justice".

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[1] The New Code has been in force starting the 1st of February 2014.

[2] The Explanatory Note preceding the draft of Act no. 135/2010 referring to the New Code of Criminal Procedure is available at www.just.ro.

Among said principles, in the field of evidence, one principle stands out, namely the loyalty in obtaining evidence, set out in article 101 of the New Code. The reason behind this principle was, by the words of the same authors, that in the new law, the rules of obtaining evidence were elaborated so as to determine "an increase in the professionalism of judicial authorities when it comes to obtaining evidence and, as well, to guarantee the effective respective of the right of parties to a fair trial".

In this context, as compared to former procedural dispositions [ex-art. 68 para. (2) in the Code of Criminal Procedure of 1968], the present provisions have much better settled *the interdiction to induce a person to commit offenses* in order to obtain evidence in a criminal trial [the current art. 101 para. (3) in the Code of Criminal Procedure]. Art. 101 para. (3) underlines that judicial authorities or other persons acting for the former shall refrain from inducing a person to commit or continue to commit a criminal act, in order to obtain evidence.

With a view to correctly understanding what entrapment means, in the absence of national case-law on this topic, it is necessary to turn first of all to the common law systems where this issue was largely debated in the practice of courts, especially in that of the U.S. Supreme Court. Secondly, the case-law of the European Court of Human Rights (hereinafter the 'ECHR') will be taken into account, since the European Court dealt firmly with the limits of using state officers (undercover agents) to incite persons to commit offences so as to obtain evidence for the accusation.

In the common law system, one of the most famous corruption cases, where the issue of entrapment was examined, is *United States v. Kelly* (1983).[3] At this stage, it is good to mention that the U.S. courts based their interpretations on entrapment on two procedural approaches or tests, the first being the subjective test, the second- the objective test.

The subjective test (used in the majority of cases, as the official standard of the U.S. Supreme Court) requires the meeting of two main conditions in determining whether entrapment took place: first, it looks at the defendant's state of mind; entrapment can be claimed if the defendant had no predisposition to commit the crime. Second, it implies a chain of causation between the offence and the conduct of the undercover agent.

The objective test looks instead at the government's conduct; entrapment occurs when the actions of government officers would usually have caused a normally law-abiding person to commit a crime. Although at first it emerged only in the dissenting opinions of American judges, the objective test soon became widespread, focusing rather on the conduct of state agents, than on the predisposition of the defendant to commit crimes. The courts would rule entrapment whenever the state agents exceeded a reasonable limit in performing their activities.[4]

In the pre-cited case of *Kelly*, upon motivating senator Kelly's conviction to 13 months of imprisonment for corruption, the federal court applied the subjective test in order to determine whether entrapment occurred, stating that the accused was merely offered an opportunity to commit the offence, without being provided with the means to

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[3] Available at la http://www.leagle.com/decision/19841439748F2d691_11303. In this case, the FBI used as a special method of investigation – the video surveillance during the operation that later became known as "the Abscam operation (Arab scam). The operation initially targeted trafficking in stolen property and corruption of prestigious businessmen, but was later converted to a public corruption investigation.

[4] V. Puşcaşu, *Agenţi sub acoperire. Provocarea ilegală a infracţiunii. Consideraţii (I)*, Caiete de Drept Penal nr. 2/2010, C.H. Beck Publishers, Bucharest, pp. 45-46.

do it, and the conduct of state agents aimed only at testing unwary criminals and not at testing unwary innocents[5].

The U.S. Supreme Court failed to apply the "reasonable suspicion" standard (A/N consecrated by the ECHR case-law) on the person against whom the undercover activity was carried out, an aspect which was harshly criticized by the doctrine[6].

For this reason, the suggestion was that a requirement expressly stipulated by the dispositions on entrapment should be that the persons targeted by judicial authorities may be persons engaged in criminal activities or reasonably suspected of being engaged in such activities; thus, the test of the predisposition to commit crimes would be replaced with the reasonable suspicion test.

The conditions of entrapment were also analyzed in the ECHR case-law on many occasions, including in cases against the Romanian state, such as *Alic v. Romania* (judgment of November 9th, 2010), *Bulfinsky v. Romania* (judgment of June 1st, 2010), and, more recently, *Sandu v. the Republic of Moldova* (judgment of February 11th, 2014)[7].

In the pre-cited judgment of *Sandu*[8], the European Court held by a majority of votes that the applicant's right to a fair trial was infringed, due to the fact that there was entrapment in the sense of inducing a person to accept bribe by a private individual, who was not an authorized undercover agent: "As no police officer was directly involved, the present case does not concern undercover police work, but rather the acts of a private individual, acting under police supervision" (paragraph 32 of the judgment). In order to verify whether the applicant was incited to commit the crime, the Court had to determine whether he could be reasonably considered as having been engaged in the relevant criminal activity prior to the police involvement. In other words, the Court was supposed to check "whether the applicant would have committed the crime in the absence of the alleged incitement" (paragraph 33 of the judgment). The Court also noted that there were no objective suspicions that the applicant had been involved in any criminal activity prior to the relevant events. Nor was there any evidence that he was predisposed to commit offences. According to the Court, "the Government's argument that the police could not initiate a criminal investigation against the applicant, before they obtained evidence that he had actually committed a crime", only confirmed the conclusion of the lack of evidence (paragraph 37).

The Court considered that the domestic courts failed to properly assess whether C.'s actions (A/N. the inciting agent), acting on behalf of the police, had the effect of inciting the applicant to commit the offence of which he was subsequently convicted or whether there had been any clues that the offence would have been committed without such intervention.

Although in the case the domestic courts had reason to suspect that there was an entrapment, they did not analyze the relevant factual and legal elements which would

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[5] See the similar case *Sherman v. United States* 356 U.S. 369 (1958), available at https://supreme.justia.com/cases/federal/us/356/369/. The U.S. Supreme Court (Justice Warren) used a dictum that would become famous in all cases of entrapment, namely: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal".

[6] P. Chevigny*, A Rejoinder*, Nation, Feb. 23, 1980, pp. 201-202.

[7] A. Crişu, *Câteva considerații privind regulile generale în materia probelor, mijloacelor de probă și procedeelor probatorii din noul Cod de procedură penală (I),* Analele Universității din București, Supliment 2014, C.H. Beck Publishers, Bucharest, 2014, p. 298.

[8] Available in Romanian at http://hudoc.echr.coe.int/sites/.

have helped them to distinguish entrapment from a legitimate form of investigative activity In view of the above, and of the use of evidence obtained through C.'s active involvement under police supervision to convict the applicant, his trial was deprived of the fairness required by Article 6 of the Convention. Therefore, the Court concluded that there existed a violation of Article 6 paragraph (1) of the Convention (paragraph 38).

Returning to the Romanian Code of Criminal Procedure, it provides in art. 101 para. (3) the possible incitement of a person to commit an offence by judicial agents or other persons acting for the former, during the development of activities allowed by law in the course of a criminal investigation. More precisely, the legislator of the New Code refers to the dispositions of art. 138 para. (11), completed by the dispositions of art. 150 that allow authorized participation of criminal investigation officers, namely undercover investigators or collaborators, to certain otherwise illegal activities.

Somehow in contradiction with the noble purpose of the above-mentioned principle, that of ensuring effectiveness of the right to a fair trial by the interdiction of entrapment, the New Code has for the first time provided for the *authorized participation to certain activities* (as a special method of criminal investigation) which implies, according to the new provisions [art. 138, para. (11)], the commission of an *actus reus* similar to that of a corruption offense, the conclusion of transactions, operations or any other agreements with respect to a good or to a person who is suspected of having been missing, is the victim of human trafficking or has been kidnapped, the performance of drug dealing, as well as other services carried out with the authorization of competent judicial authorities, *in order to obtain evidence.*

Pursuant to art. 150 para. (1) of the New Code, authorized participation to certain activities can be ordered by the prosecutor who conducts or supervises the criminal investigation on a maximum period of 60 days, on condition that the following requirements are met:

a) there is reasonable suspicion as to the preparation or commission of an offense of drug dealing, weapons trafficking, human trafficking, acts of terrorism, money laundering, counterfeiting of currency or other valuable goods, blackmail, kidnapping, tax evasion, corruption and similar offenses, offenses against the EU's financial interests, or other offenses punishable under the law by imprisonment of 7 years or more, whether there is reasonable suspicion that a person is engaged in criminal activities that are related with the above-mentioned acts;

b) the measure is necessary and proportional with the limitation of fundamental rights and freedoms, given the particulars of the case, the importance of information or evidence to be obtained or the gravity of the offense;

c) evidence could not be obtained by using other means or their obtainment would imply serious difficulties that would obstruct the investigation or endanger the safety of persons or valuable goods.

From a procedural standpoint, the text addresses strictly the fulfillment of requirements needed for the authorization of certain activities, otherwise illegal, whereas the establishment of entrapment is a material law issue that will be determined on the merits of each case.

Due to the apparently antagonistic content of the two texts quoted above, namely art. 101 para. (3), and, respectively, art. 138 para. (11) in the New Code, which, on the one hand prohibit entrapment used to obtain evidence, on the other hand, allow infiltration of undercover investigators up to the point where they can commit activities that are similar to the *actus reus* of a corruption offense, an essential distinction must be

made, based on which there will be established the limits within which the judicial police can conduct a legal investigation, the exceeding of said limits qualifying as entrapment, expressly prohibited by procedural law.

Thus, one needs to distinguish between the passive attitude of investigating agents, who, while participating to the activities enumerated by art. 150, must restrict themselves to the role of careful observers, involved in an ongoing activity, with an aim to collect evidence, and their pro-active attitude of inciting a person to commit an offense, with the same aim to obtain evidence. Entrapment must imply a conclusive intervention, in the absence of which the offense would not have been committed.

Correlatively, one needs to make a distinction between *undercover investigators*[9] who, pursuant to art. 148 para. (4) of the New Code, represent law enforcement officers who belong to the judicial police and adopt a passive attitude of collecting data and information that they later submit to the prosecutor, and, respectively, *inciting agents*, who have been defined only by the doctrine. Thus, an inciting agent represents an infiltrated agent of the state or any other person acting under the coordination or supervision of a competent judicial authority, and who, in the course of his activity, goes beyond the limits imposed by the law, thus acting not only in order to reveal the criminal acts of a person, but to incite that person to commit offenses so as to obtain evidence for the accusation.[10]

The different attitudes adopted by investigating agents are essential and have been highlighted by the ECHR on the occasion of the well-known case of *Teixeira de Castro v. Portugal* (June 9th, 1998), being reaffirmed in all similar cases that followed. Although the subject-matter of the case was the investigation of drug dealing, the legal reasoning of the Court has remained valid for all cases of serious offenses (including corruption offenses) in which entrapment is debated.

Thus, in paragraph 36 of the above-mentioned judgment, the Court clearly stated that "The public interest cannot justify the use of evidence obtained as a result of police incitement". By this dictum, the ECHR actually introduces the rule of using undercover agents only in exceptional cases, in well-determined conditions, so as to ensure the safeguard of the defendant's procedural rights. The Court in Strasbourg explicitly mentioned that a justifiable goal, such as such as the suppression of serious crime, cannot account for abusive measures. In paragraph 39 of the cited decision, the Court deemed that "the two police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial. Consequently, there has been a violation of article 6 para. (1)".

Therefore, it is completely unfair to use state mechanisms in order to trigger the criminal liability of a person whose act was generated precisely by the state agents.

In those situations where entrapment was proved, there emerged a serious problem which has not yet been solved by the New Code, namely that of the sanction applicable to evidence obtained as a result of entrapment.

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[9] The collaborator of the undercover investigator is part of the larger category of undercover agents. For further details, see V. Pușcașu, *Agenți sub acoperire. Provocarea ilegală a infracțiunii. Considerații (I)*, Caiete de Drept Penal nr. 2/2010, C.H. Beck Publishers, Bucharest, p. 32.

[10] O. Predescu, M. Udroiu, *Jurisprudența Curții Europene a Drepturilor Omului cu privire la agenții provocatori,* Dreptul no. 1/2009, p. 243.

Certainly, the first solution at hand would be the exclusion of evidence, by correlating the provisions of art. 101 para. (3) – interdiction of entrapment – with those of art. 102 para. (2) in the New Code, according to which illegally obtained evidence (A/N including by the incitement of a person to commit crimes) shall not be used in a criminal trial.

The doctrine[11] has made innovative proposals in this sense, sustaining that solutions such as the exclusion of evidence as unlawful or the approach to entrapment as a mitigating circumstance are not enough to counterbalance the unfairness of judging and convicting a person under these conditions. The preferable solution would be not to prosecute an incited person or, in any case, not to convict him.

In all circumstances, if the evidence consists in the testimony of an undercover investigator, and where the court is not convinced beyond a reasonable doubt that entrapment took place, the judge should be cautious in ruling conviction, a logic sustained by art. 103 para. (3) in the New Code, according to which conviction cannot be based, in a determinant proportion, on the testimony of the investigator, the collaborator or the protected witnesses.

Difficulties of practical applicability are to be found also in art. 150 (pre-cited) of the New Code, related to the authorized participation to certain activities, therefore it needs to be further examined.

Thus, the second condition required [art. 150 para. (1) b)], in order for the prosecutor to authorize participation of undercover investigators to certain activities, otherwise illegal, is that the measure be proportional with the limitation of fundamental rights and freedoms, given the particulars of the case, the importance of *information* or evidence to be obtained or the gravity of the offense. From the manner in which this condition has been settled, it results that the prosecutor could authorize participation to certain activities (a measure of subsidiary, exceptional character) even when simple information must be obtained, not necessarily evidence. If judicial authorities need to resort to such unconventional proceedings that must be used by exception, given the obvious inequality of arms between the state agents (undercover investigator/ collaborator) and a person reasonably suspected of preparing or committing a serious offense, the pretext of this special method of criminal investigation is not justified. In this context, the principle of proportionality between such measure and the restriction of fundamental rights becomes diluted and devoid of content. Since there is no proportionality between the fundamental rights of a person and the authorization of undercover investigators whose limits are pushed up to the commission of *an actus reus* of a corruption offense, with the sole aim to collect information. In my opinion, information can be easily obtained by using other evidentiary proceedings, and not by resorting to such tricky operation to which the New Code itself confers a peculiar, subsidiary character, of temporary validity.

Similarly, interpretation dilemmas still arise in art. 150 para. (7), according to which judicial authorities can use or place at the disposal of the person who performs the authorized activities, *any writings or objects* destined to support such activities.

In case of a corruption offense, the sensitive issue is to know whether the undercover agent can use *money* in order to collect evidence about the preparation or commission of a corruption act. In other words, can money be assimilated, legally

[11] V. Puşcaşu, *Agenţi sub acoperire. Provocarea ilegală a infracţiunii. Consideraţii (I)*, Caiete de Drept Penal nr. 2/2010, C.H. Beck Publishers, Bucharest, p. 77.

speaking, to writings or objects necessary for the agent to carry out the activities for which he was authorized?

I believe that the significance of the term should remain autonomous, namely that of "monetary inscriptions" as defined by Act no. 384/2004 on the denomination of national currency[12], therefore money can be qualified neither as writings, nor as objects. The doctrine[13] came up with a definition of 'writing' as being the unilateral or conventional document that issues from one or more natural persons or legal entities of public (including judicial authorities) or private law or that belongs to such persons/entities.

In fact, a distinction between these notions can be drawn by that, although there is no strict definition either in the New Penal Code[14] or in the New Code of Criminal Procedure, their legal meaning can be inferred. Thus, pursuant to art. 197 para. (1) of the New Code, objects that contain or are impregnated by a trace of the act committed, as well as any other objects that may lead to the discovery of truth, represent material evidence; and according to art. 198 para. (1) of the code, writings can be used as evidence if their content may express facts or circumstances that can contribute to the discovery of truth.

In my opinion, if the undercover investigator places at the disposal of the person suspected of preparing or committing a corruption offense – a sum of money – the investigator exceeds his limits of a passive observer, infiltrated in the operation with an aim to collect evidence. Therefore, this shall count as entrapment, expressly forbidden by art. 101 para. (3) of the New Code.

The special method of investigation that consists in authorizing participation to certain activities to undercover agents is an absolute novelty for Romanian procedural legislation in criminal matters. Perhaps more than any other methods of supervision and investigation (also set out in our former Code of Criminal Procedure) this one raises many questions, because the limits of the authorization within which undercover investigators or collaborators may operate seem very generous, since the New Code grants state agents the occasion to commit an act close to the *actus reus* of a corruption offense; this implies a very broad range of ways in which the act can be committed, that will theoretically ensure the success of the operation conducted by the undercover agent, and will leave little chance of defense to the suspected person.

From this perspective, due to the risk of confusion generated by the New Code, in judicial practice the task of the courts will be precisely to determine as accurately as possible the limits up to which the authorized participation to certain activities may extend, and the point wherefrom entrapment occurs.

Analyzing the above-cited case-law solutions reached by international courts (the U.S. Supreme Court and the ECHR) in cases of corruption where entrapment took place, there emerge essential aspects that lead to the same conclusion and that need to be taken as models.

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[12] Published in the Official Journal no. 664 of July 23rd 2004.

[13] M. Udroiu, *Procedură penală. Partea generală. Noul Cod de procedură penală. Sinteze și grile*, C.H. Beck Publishers, Bucharest, 2014, p. 277.

[14] The New Penal Code defines only 'official writings' as being any type of writings that issue from a legal entity referred to by article 176 (A/N public authorities, public institutions or other legal entities that administer or exploit goods that are property of the public domain) or from the person referred to by article 175 para. (2) (A/N the public officer) or that belong to such persons/entities.

There shall exist entrapment, so the legal limits within which a state agent could act in order to collect evidence were surpassed, if *four essential conditions* are fulfilled, namely: 1. there is no reasonable suspicion that a person prepares the commission of a corruption offense or already participates to it; 2. the activity of police agents or their collaborators has not been authorized under the law; 3. the state agents did not play the role of passive observers, but instead offered the suspect more than a mere opportunity to commit an offense; 4. there can be established a chain of causation between the conduct of the state agent and the offense committed.

While the increase in corruption offenses undoubtedly requires that appropriate measures be taken, the right to a fair trial of the accused that could guarantee his fundamental rights holds such a prominent place, that it cannot be sacrificed for the sake of expedience.

In such conditions, judicial authorities should award utmost value to that principle consecrated by art. 101 para. (3) in the New Code – interdiction of incitement to commit offenses in order to obtain evidence – since it is the unique procedural guarantee which ensures the respect of fundamental rights, by protecting defendants from trial abuses against them.

In the contrary case, the much-praised right of the accused to a fair trial shall unmistakably be breached.

About the Causes of Corruption in the Hungarian Public Procurement System

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Abstract:

The Swiss State Secretariat for Economic Affairs defined corruption in 2009 as „the abuse of public power or position for private gain”.[1] *Based on this definition and the Hungarian public procurement it can be said that the use of public funds is a section of the government operations where unfair advantage can be obtained directly, in a way that the decision-maker can transform the public funds at its disposal into private funds with very low risk. According to practical experience and research, the functions of the Hungarian state – mainly the system of public procurement – are greatly involved in corruption. This is also backed by the respective study of Transparency International Hungary and Corvinus University Budapest from 2009.*[2] *According to an opinion in the book: „the government sector is corrupt to the core even the major government procurements”. Table number 2 of the authors justifies this opinion: „Public procurement as a hotbed of corruption was the second most frequently mentioned issue by the interviewees.”*[3] *Similar reports came from GKI (Hungarian Economic Research Institute) issued on November 3, 2009 regarding the research on corruption of public procurements, which was based on 120 deep interviews (buyers, bidders, official procurement advisors) and a sociological model of 900 person involved (buyers and bidders). Vértes András, president of GKI, summarized the research as such: „Corruption is a real issue in public procurements, and according to certain international organizations it is involved in 90% of the public procurement procedures, although this figure could be over-estimated. According to our research, the major part of the procedures is involved (although there is undue suspicion in certain cases) and approximately two-third or three-fourth of the domestic public procurements could be affected by corruption.”*[4]

Not even the Council of the Public Procurement Authority disputes the aforementioned involvement in corruption. In their parliamentary report J/9457 of 2009 on the credibility, clarity and transparency of public procurements[5] *they frequently highlighted the influence of corruption on public procurements. Firstly, they proposed a research in 2007, which is yet to have any official results. Secondly, the report also highlights the fact, that observations made on corruption must be cautious: „the research obviously showed that bidders are usually far more aware and suspicious*

[1] Hogyan előzzük meg a korrupciót? Szerk. Liliana de Sá Kirchknopf; SCO-Budapesti Corvinus Egyetem, Budapest 2009. 8. oldal.

[2] Pálinkó-Szántó-Tóth: Üzleti korrupció Magyarországon. Korrupciós kockázatok az üzleti szektorban; Szerk. Szántó Zoltán – Tóth István János; TI-Corvinus 2009. 37. oldal.

[3] Pálinkó-Szántó-Tóth: im. 41. oldal.

[4] GKI: ez a korrupció melegágya; www.stop.hu/articles/article.php?id=562287 (2009. november 3.)

[5] Beszámoló a Közbeszerzések Tanácsának a közbeszerzések tisztaságával és átláthatóságával kapcsolatos tapasztalatairól, valamint a 2008. január 1. - december 31. közötti időszakban végzett tevékenységéről (Budapest, 2009. július).

about possible corruption behind procurement procedures, than buyers"[6]. I would like to add that the attitude of buyers is not unexpected since their interest is to avert the suspicion of corruption. Várday György, procurement officer, expressed his experience in a different way, stating that regarding procurement procedures 6 out of 10 are subject to some kind of problem. As a jurist working in this field I am hardly as optimistic, as I think that we could find a problem in case of 8 or 9 out of 10 procedures. Sometimes it would be enough to analyze the public procurement invitations, in which the subjectivity and intentions are impossible to be overlooked by the peer reviewers. I would like to add, that a characteristic of the current legislation is that the peers are legally responsible for the invitations according to the civil law[7], however if the contracting authority places the invitation again without any correction then the Drafting Committee must publish the invitation that way.

The aim of this study is to examine the social background regarding the corruption of public procurement after a brief historical overview, through investigating the overlapping phenomena and highlighting the importance of the legislation and the compulsory citizenship behavior which could easily be a subject to the abuse of cunning perpetrators.

Keywords: *corruption; public procurement system; Hungarian Act on Public Procurement; the call for bids (tender system).*

I. The public procurement system – similarly to taxation – already appeared in the organized societies of the classical antiquity (Greece, Rome) with legal institutions similar to current ones. In Greece, the emergence of the modern buyer-bidder positions (contracting authorities and tenderers), the determination and allocation of resources were linked especially to public constructions, acquisition of war material, and mining operations. An example was the regulation of the Athenian city-state that specified where and how the participants could purchase throughout the campaign. These issues were solved in most Greek city-states by preliminary talks and contracts that appeared to be the ancestor of the modern order-services interaction.[8] A very mature system was developed regarding public construction projects that ensured the concept of public participation. The key role in the process was the so-called *„polétés"*, who used or leased the elements of state property, the public funds, via public procedures, often at public sales.[9] Contracts concluded by the polétés are „reviewed by the Council, and should the Council determine any unlawful act related to the contracts, the polétés are subject to accusation by the public and handed over to the judge".[10] The polétés made public reports about the contracts that were published in People's Assembly and were guarded by public slaves. From a modern perspective, this publicity reflected the concept of public interest. The details of the winner entry work were carved into marble in order to make the terms and conditions of the project public.

[6] Közbeszerzések Tanácsa J/9457-es beszámoló 28-as oldal.

[7] Erről részletesen lásd a közbeszerzési és tervpályázati hirdetmények megküldésének és közzétételének részletes szabályairól, a hirdetmények ellenőrzésének rendjéről és díjáról, valamint a Közbeszerzési Értesítőben történő közzététel rendjéről és díjáról szóló 34/2004. (III.12.) Korm. rendeletet.

[8] Soós Adrienn: Közbeszerzés Athénban és Rómában; PhD Tanulmányok 7. PTE 2008. 336. oldal

[9] Todd, S. C., The Shape of Athenian Law. (Oxford 1993.)

[10] Arisztotelész: Athéni állam XLVI. 2.

In ancient Rome, certain entrepreneurs were specialized in public procurements, however the transaction of major public investments were the task of the „censors", who also specified serious tendering securities and guarantees regarding the proposals. The procurement orders could be acquired at public sales, and the evaluation of the tendering securities and guarantees of the winner bid was also the censors' duty. As a result of the entrepreneurs' bidding war, the tender with the lowest price won the order. Ancient authors like Cicero and Livius frequently reported on such occasions.[11] Acknowledging the work was a cornerstone of the contracts, and if the buyer was not satisfied with the quality of work performed, it could force the entrepreneur to correct and recondition the defects at its own expense. Certain elements of the current legislation are somewhat similar to the aforementioned practices, namely the collaterals. Even at that time, public constructions were subject to corruption.

In some cases the contractual parties invited to the public auctions were limited and predetermined. This happened „in the famous Castor-church case, when the buyer (Verres) – besides the limited publicity – had chosen the winner even before the auction, and later rejected the more favorable bidder."[12]

From the long history of the Hungarian public procurement, I would like to highlight, that the purveyors to the Royal Court and the supplier channels had developed quite early, and at the end of the nineteenth century several sections of the Act XX of 1897 on public accounting determined the spending of public funds.

„The conclusion of contracts, or conventions by the state or the acceptance of proposals of such, as well as the establishment of legally valid and binding transcripts are all subject to public competition" (Section 38 of Act XX of 1897). Furthermore, Sections 39 and 40 added, that „the minister can ignore public competition to renew or extend expired contracts only in specific cases when public interest demands it, only with the permission of the minister council, and only if there were equally or more favorable options available", as well as „Contracts concluded on behalf of the state regarding construction, sales, lease, equipment or acquisition, that values 5000 forints or more; it shall be reported to the directorate of the department of treasury, secretariat of legislative affairs in order to provide opinion on the terms and conditions of the contract, especially on the collaterals". Detailed regulations before the socialist era regarding the supply of public procurements had been enacted from 1907, in which certain factors were taken into account such as the benefits and subsidies given to Hungarian suppliers, and participation in the First World War, disability and war cripples. Act 19 of 1987 on tendering that came into effect during the socialist era, that: „allowed international tendering only for a few, allowed the so-called restricted invitation to tender without any specific requirements, where the number of entrants was predetermined"[13]. Act XXXVIII of 1992 on the State Budget did not contain – until the new millennium – the rules of public procurement in full details, and therefore the act on tendering – still in force – was applied. Later, on November 1, 1995 the Act XL of 1995 came into effect that brought a significant advancement with its perspective, however the establishment of a well-functioning procurement system could not become a reality due to the lack of its traditions. The regulations in force complied with the requirements of the European Union only partially. It should be noted however, that this

[11] Idézi: Soós Adrienn, im. 329. oldal.

[12] Soós Adrienn: im. 334-335. oldal.

[13] Dessewffy Anna: A közbeszerzés és a korrupció összefüggései; Korrupció 2000. tanulmánykötet, 72. oldal.

law stated from the very beginning, that in case of violation of the law „not only the offending party, but also the individual responsible for the infringement can be fined. Despite this, the Public Procurement Authority did not impose fine on natural persons."[14] Based on this study of Dessewffy Anna, it can be seen, that the number of legal remedies were low during the late 90s, while 45% of such proceedings were against local governments and their financial institutions, 28% of the legal proceedings were against central financial and budgetary institutions. „Only 22 legal proceedings were related to infringement regarding the call for bids, or the conditions of the documents".[15] The continuous criticism from both professionals and the public led to a completely new law, Act CXXIX of 2003 on public procurements that came into effect on May 1. Before I provide some thoughts on the aforementioned law, I would like to briefly analyze the sociological, legal, and political reasons behind the corruption in public procurement. 2000 billion forints were spent from the Hungarian State Budget on public procurements. Assuming, that we can eliminate the corruption premium – which is estimated at around 5-15% – then we could save up to hundreds of billions of forints for the state budget, that would make the continuous tax reforms, overtax, and the permanent state budget reforms unnecessary. This huge amount makes the certain links of corruption in public procurement worth analyzing at a social level. I would like to highlight some of these, as they could explain the strong influence of corruption on public procurement.

II. The first factor that could explain the situation is the fact that in case of the Hungarian society the willingness to comply with the law is very low. It can be observed in case of the enforcement of several legislations, that the compliance of Hungarian citizens with the legal norms is selective. Examples include the rules of the Highway Code, tax laws, the rules of civil law, and the norms of public procurement which are usually subject to the inaccurate use, misuse and misunderstanding by civilians, companies and sometimes even by state organizations.

Hungary is currently in an impaired condition that has negative consequences on public procurement as well. In this situation, managing public money should be of great importance. Those in the decision-making positions, who could access public funds or entitled to through their positions or connections, often aim at acquiring these public funds – what the American literature call, the „easy money" – through the accomplishment of public procurement procedures. The transformation of public funds into private money has become a part of our life, and although irrelevant to parties it generally characterizes the political life.

Similarly to taxation, the decision-makers in public procurement positions can directly experience the conflicts between private and public interest, self-interest and social solidarity.

A politician is just a man after all, and therefore can draw the line between social solidarity and the well-being of his or her own, as well as the well-being of its family, with hardly any social control. The decisions made regarding public procurement procedures are often the results of such selfish motivations. Since public money counts as easy money for some people, the lack of continuous and consistent control overshadows the social responsibility, which eventually loses against self-interest. I see

[14] Dessewffy Anna: im. 77.
[15] Dessewffy Anna: im. 76.

the morally empty, atomized social environment as the reason for the widely acknowledged and accepted levels of corruption, as the society lacks interest in the fair and righteous use of public funds. An equally serious and important problem is the professional career built on the foundations of self-licensing, self-interest and performance, therefore the possibilities of unfolding the human skills in the politically influenced human resource system of the modern public administration. Some of today's decision-makers cannot or do not want to understand their responsibility in this process, and therefore cannot or do not want to take into account the public interest. Some of them socialized in a way, that human morality, the basic ethical, legal orders did not shape them as much in becoming a politician, while in case of others the process of becoming a professional politician made them insensitive. Only in such system could it happen that a politician convicted of tax evasion was delegated as member of an Eastern-Hungarian board responsible for the allocation of EU funds. I would like to highlight a domestic deterrent example about a young politician from Bács-Kiskun County, who has been in detention, with no qualification or professional background, yet he could actively participate in project management and the allocation of public funds, as well as establish deep and valuable connections. Normally this could be impossible in a well-functioning society.

As a counterexample I would like to add the case of Lónyai Menyhért, minister of finance during the era of dualism, who was accused of renting real property (land) with far too favorable terms, yet he did not rely on his parliamentary immunity, nor did he turn to the media to argue about the case. Instead, he resigned from his position and said: I am coming back to you, when the Hungarian Court declares my innocence. There has been no inherited steady and legal increase in wealth or cultural and ethical background behind the Hungarian people nowadays. As Percel Tamás psychologist stated: three generations of library are missing, that would ensure a safe family, property and intellectual background for all of us, and would provide the foundations of the ethical social behavior. This country has been severely plundered and has broken several times in the past 100 years. It not only lacks 150-year-old libraries, but the fundamentals as well. Imagine the mayor, who, at the age of 50, can finally conduct a billion-forint project. He has never been a well-paid employee throughout his career, and his living standards cannot be compared to his western counterparts. Therefore, what he sees in this procurement project is not public interest, but rather the golden opportunity of making money. The attitude of these individuals and politicians, as they aim to grab such golden opportunities may be understandable humanly, but as a jurist it is unacceptable.

The second factor that promotes corruption is the low standard of the legal-financial traditions. It is hardly arguable that the continuous reforms of the state budget as well as the never-ending governmental reforms had discouraged professionals as well as civilians from getting acquainted with the laws a long time ago, and shook their confidence in legislation. As the way I see a reform is a positive process. We make progress from a negative position towards a more positive one. The people and the professional in Hungary have witnessed in the past 60 years, that we are living in the era of permanent reforms with continuously tightening our belts. They have learned that laws can quickly fade away, are not mandatory for everyone, and change so rapidly that it is not worth aligning with them. This is especially true for the tax laws and the rules of the public procurement law, which are essentially technical in nature. The current Act on Public

Procurement is over 400 sections and includes more than 70 proceedings. This legislative text changed drastically since April 1, 2009, while several newer changes took place throughout this year. A significant part of the law is a mere adaptation of the European Union laws hence it completely lacks coherence. Consequent logical order, social security, public interest or ethical rules can hardly be identified in these norms. A series of practical research prove, that merely 4-5 out of 100 Hungarian civilians can name a public revenue, and from the deep interview-based research, that I conducted and involved 2500 people[16], it can be seen that the majority agrees on the fact that tax evasion has no consequences in Hungary, and tax liabilities could be evaded through the right connections. It can be seen, that the Hungarian legal system is not consistent regarding either legislation or judgment. It is difficult to argue with Fricz Tamás, who states that this is „a country without consequences". If we look at a few major public procurement procedures, that caused great debates, then we can ask the question what consequences the three unsuccessful port construction projects of Gönyű had, the continuous delay and cost increases of Metro 4, the fine of 10 billion forints imposed on the Csepel waste water treatment plant, or the significant delay of the European Cultural Capital project of Pécs. In my opinion those liable for these intentional or negligent acts will not be found or impeached, because no one aims at doing so. This attitude perfectly fits with the legal framework of the Hungarian public finance, where not just the public procurement problems have no consequences at all, but the legal institutions have become obsolete as well. I would like to add further examples, unrelated to public procurement, such as the failure in the detection of bleaching, the low number of final judgments regarding tax evasion proceedings (more people are convicted of homicide than tax evasion in Hungary), the cartels regarding highway constructions, and the position and management of offshore companies in the Hungarian legislation. The biggest problem is the lack of predictability and stability of the legal system. Legal compliance is impossible when something prohibited today becomes legal tomorrow, what can be done with impunity becomes punishable tomorrow, and all this happening in the pervaded and rampant web of the growing legislation. Let's imagine how the continuous and significant changes in the family support services or rental assistance and housing programs affect the Hungarian society and the population as a whole. To mention a current example for public procurement: since April 1, 2009 agricultural producers could receive millions or even billions of government subsidies without the restrictions to use the funds on public procurement projects. According to current rules, investments above the value of 1.3 billion forints, if the amount of subsidy is less than the own resources, then there is no need for public procurement procedure, while in case of investments below the value of 1.3 billion forints there is no need to execute the public procurement procedure even if the subsidy amounts to 75%. This resulted in the fact, that agricultural companies waited till this term, and therefore they could use the subsidies to commission their friends to carry out the projects.

The third factor that I would like to analyze in this study is the role of politics. What I would like to highlight from the several problems of this system is that the Hungarian legislation does not use clear and sophisticated definitions, concepts, and morality.

[16] Ld. Bővebben: Dr. Szilovics Csaba Adózási ismeretek és adózói vélemények Magyarországon (2002-2007) 2009 Pécs.

Nowadays politics cannot even decide whether our country is „poor or rich". If we think ourselves rich, then we should know that no rich country can be founded on a poor society. Because this is an impoverished society, where hardly more than 50% of the working-age population are employed, where employees in the public sector have not received pay rise since 2002, where overconsumption is a continuously mentioned but false myth, and where besides the extremely low personal income levels, 80% of the taxpayers are subject to the highest tax rate of the Personal Income Tax (SZJA). If the political elite could admit the fact, that we are a poor country, then the public funds would be used wisely and would be spent in a fair and modest way. Therefore the appropriation of public funds, the continuous replacement of the vehicles, cell phones and furniture of the state budget institutions, the reputation-based foreign investments from public funds, the digital boards, the foreign military missions and the waived claims against the so-called developing countries must be stopped. We should think over the critical super-sized projects that never see the light of day, like EXPO, Olympia, the government quarter, water steps, since each and every forint spent on such investments is a loss. If we are a poor country, then we shall build a modest, but effective state. In this situation, the politicians should provide an example, that civilians could follow, pay their taxes, and so that they could sense the service-consideration balance at a macro level.

Ordinary people can understand the message of politics regarding public money, they understand these processes, and they are ambivalent regarding the fact that the government tries to collect every single forint from them, economizes on public services, while the wasteful spending can be seen in other areas. In my opinion, the big overlap between the political and the economic (market) players is a huge problem. Even back in 900 B.C in Théba was it prohibited for individuals to be a politician and then a business person within a short amount of time. Normally it could not happen that in a lawsuit between a private company and the state, a politically exposed person represents both the defendant, then later also represents the plaintiff. The level of government redistribution must be lowered radically. As a conclusion, I would like to mention the classic example of wasteful spending: the case of the digital blackboards, a public procurement which has cost 20-25 billion forints, while most of the schools have no central heating or even flush toilet, yet they could still have digital blackboards. Now, in November 2009, we know that the invitation to tender regarding the supply of digital school equipment has ended without results for the second time, because the only entrant that reached the second round returned an invalid tender. Further public tenders will not be issued.

The last factor that I would like to examine, which could be the first in the priority order and in my opinion goes hand in hand with corruption, is the operation of the Hungarian tender system. One of its main characteristics is that in most cases the winner could be predicted. The corruption often starts with the invitation to tender.

The first problem is that local governments cannot even finance the submission of the tender, the preparation of projects, and they do not even have the needed contributions. An important question is why the requesting parties insist on dealing with the same contractors that have caused damage during a previous project. The answer is the dependency that arises between the requesting party and the winning entrant, namely the project that binds them. The requesting party runs after its money, it wants to deliver the project on time however it forms a great relationship with the

contractor, who in turn asks for a more flexible accounting that often includes allowance for additional work, or not enforcing the performance bond.

Therefore they look for companies that have a performance related reward system and could settle the public procurement with its own contributions. One way to do this is to find a company that could be a potential winner with the required funds. That company then wants no more in return than to become the contractor for the project. This implicitly suggests the directional nature of public procurement, since the system can only be maintained if those who have to win will eventually win.

Naturally, the bidder knows this, and a wide range of experts have specialized in government projects, who work closely with one another and undertake all stages of the work, from tendering to conducting the project, in exchange for a considerable profit. Obviously, these groups could not maintain their activities without political support, and these experts are often related to political parties. Organizations aimed at acquiring public funds have emerged around each and every political party, similarly to the feudal system, mutually helping each other in realizing their goals at the disadvantage of the society. The fact that those win the procurement projects who eventually has to and may provide a return leads to the fact that demanding a quality service and enforcing claims and complaints becomes almost impossible due to the interwoven mutual interests. This results that public roads quickly deteriorate due to the low quality of constructions, trams are not equipped with air-conditioning, new buildings function inefficiently. In such cases in Hungary, instead of repairing the roads by the winning contractor at its own expense, a speed limit sign is placed at the critical distances due to the above mentioned problems. They don't redress the real problems, but instead they teach the civilians to accept the deteriorating conditions in such ways, that they not only set these speed limits at certain points but also enforce them, and the police can fine those who do not comply. Due to the current controlling mechanisms bidders can have a great advantage, because they can easily implement additional costs during the preparation of plans such as a 2-6% premium for the architectural plan and design, the architect's site supervision, and further 1-2% for the procurement, legal consultant, and quality assurance. However, the entrants can spend these amounts however they want and on whatever they want, as long as they keep it formal and legal. Since April 1, 2009 the legislature has facilitated their work, since official consulting on public procurement do not have to be reported if the respective costs are lower than 53-54 million forints. This consulting is often disguised as a legal service that involves the execution of the whole procurement procedure. In several cases, the invitation to tender specifies the implementation of a certain technology (certain ways of audio engineering or water treatment techniques for instance). Not to mention the fact, that the controlling and financing authorities often imply or implicitly suggest what architecture, supplier, and expert should be hired for the project. The threat of legal remedies and recourses, the preliminary control, and the possibility to cease funds can have a great pressure on the projects. A major flaw of the current public procurement procedures is that the examination of the winning entrant regarding the quality of a potential procurement procedure is perfunctory. Although the State Audit Office does its best with the limited tools at its disposal, the public procurement procedures are not, or only formally and subsequently checked, and the disputes are resolved through legal remedies. The monitoring is usually subsequent and involves only the formal verification of the legal documentation. The Council of the Public Procurement Authority does not supervise the actual implementation, while the National Tax and Customs Administration is not

capable of carrying this out, and the attitude of the financing authorities depend on the parties involved in the project. I would like to note, that nowadays in Hungary the delay or postponement of financing can kill any project. The respective monitoring of the European Union should not be overrated: this usually means the assignment of a law firm. The European Union reckons that the member states use these funds rationally and that everyone acts as one would expect. If the European Union finances Christmas projects, it does not take summer Santa Clauses into account that the projects would be carried out in the summer. This is unimaginable for them, and therefore they do not even deal with it. A major problem of the Hungarian public procurement system, that until the deadline expires, no delays in performance or default could be ascertained, and the party causing the delay could not be expelled. It could be mentioned as a positive change, that the amendments of April 1, 2009 ceased the preposterous situation with the so-called resource providing entities by restricting and limiting the possibility of acquiring funds.

Brief Considerations on the Delimitation between the Crime of Influence Trafficking and the Crime of Deception

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Abstract:

The need for delimitation between the crime of influence trafficking and that of deception has resulted from the possibility of confusion between the two acts, confusion generated, mainly to mislead the victim. Both in the case of influence trafficking-realised by speculating the alleged influence of the public functionary and in the case of deception-by presenting false facts as true, the victim is presented with a distorted reality, and the purpose of the offender is to obtain for himself or for another, a unjustly patrimonial benefit. However, a careful analysis of both regulations clearly reveals the elements that make the exact delimitation between the two offenses. This analysis should consider the social value protected in each of the two offenses and also pursue the other constituents (result, form of guilt, consumption etc.).

Keywords: *influence trafficking, deception, error inducing, benefits, public servant, work duties.*

1. Introductory notions regarding the regulation in influence trafficking offenses and deception as in the 2009 Penal Code

Sanctioning corruption has always been a concern for legislators, corruption being a phenomenon that alters the members of a community's confidence in the integrity of public servants and the effective exercise of institutions where they carry out their work duties. After 1990, many changes were made to corruption offenses, both increasing the penalties provided by law in their desire of an effective eradication of corruption, and supplementing them with new incriminations of similar offenses or in connection with them provided by Law no. 78/2000.

Although by the material element, influence trafficking is not related to the activity of civil servants, committing this offense discredits the authority of the institution in which the public servant operates, creating a state of suspicion, mistrust about its fairness and honesty[1]. Indirectly, the offense violates the effective exercise of service, creating suspicion that civil servants are incorruptible, sufficiently serious danger that could determine the legislator to incriminate these facts as corruption offenses.

The offense of influence trafficking is stipulated and incriminated by the provisions of art. 291, Penal Code, and consists of demanding, receiving or accepting the promise of money or other benefits, directly or indirectly, for himself or for another committed by a person who has influence or who suggest possessing influence over a public servant and promises that it will determine him to accomplish, not to accomplish, to expedite or

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[1] Dobrinoiu, V., Neagu, N., *Drept penal. Partea specială. Teorie şi practică judiciară. Conform noului Cod penal*, Universul Juridic Publishing House, Bucureşti, 2012, p. 463.

delay the performance of an act falling within the duties of his office or to perform an act contrary to these duties.

Regulation of influence trafficking offense in Title V "Crimes of corruption and service" Chapter I "corruption offenses" means, in terms of the object of criminal protection, the legislator wanted to protect the effective exercise of the service, conditioned by the confidence and prestige which the civil servants in the line of duty benefit of. The offense poses an actual or alleged sale of influence that the perpetrator claims he has on a public servant.

On the other hand, the offense of deception covered by Article 244 Penal Code consists of misleading a person by presenting false facts as true, or true facts as false, for the purpose of obtaining for himself or for another, unjustly patrimonial benefits though causing prejudice.

Placing the offense of deception in Title II "Crimes against property" in section III "Crimes against property by disregarding trust" means that the legislator intended to protect the patrimony which can be efficiently achieved if the patrimonial relations are governed by trust and good faith of those who are involved in these patrimonial relations.

The need for delimitation between the influence trafficking crime and that of deception resulted from the possibility of confusion between the two offenses, the confusion generated, mainly by misleading the victim. Both in the case of influence trafficking-realised by speculating the alleged influence of the public functionary and in the case of deception-by presenting false facts as true, the victim is presented with a distorted reality. On the other hand, another factor that may make it difficult to distinguish between the two offenses is the purpose of the perpetrator represented by obtaining for himself or for another, an unjust patrimony – for deception, or demanding, receiving or accepting the promise of money or other benefits, directly or indirectly, for himself or for another – for influence trafficking. Both offenses may involve obtaining an unjustified patrimony by the offender.

However, a careful analysis of the two regulations clearly shows the elements that make exact delimitation between the two offenses. This analysis should consider the social value protected in each of the two offenses and also pursue the other constituents (result, form of guilt, consumption etc.).

2. Elements of delimitation between the offenses of influence trafficking and deception

The premise situation of the offense of influence trafficking consists in the pre-existence of a service owned and operated within an agency, institution that has the power to examine and perform acts of the kind that this buyer of influence is interested in.[2] Within this service, the public servant must fulfill the duties of public officials, real or fake influence that the perpetrator prevails. Unlike, the offense of deception does not require the existence of a premise situation and is not circumscribe around the exercise by the public servants of their duties.

If the offense of influence trafficking we can not speak of the existence of a material object, because the action of the perpetrator is not directed against a good. Money or

[2] Diaconescu, H., *Infracțiunile de corupție și cele asimilate sau în legătură cu acestea*, All Beck Publishing House, București, 2004, p. 110.

benefits regarding which the offender claims, receives or accepts a promise of, does not represent the material object, but the benefit sought by the seller in exchange for the benefit of his influence.

Instead, the offense of deception has as material object a movable or immovable good or a document that has economic value and that is obtained by the offender as a result of his action of misleading the victim.[3]

An essential requirement of the material element of the offense of influence trafficking consists in the prevalence of real or alleged influence on the civil servant, influence which is determinant to convince the victim that the civil servant will meet or not an act falling within the duties of his work. This is, in fact, the essence of the offense of influence trafficking consisting in trafficking actual or perceived influence that the offender has or suggests of having over the appropriate official.

The offense of influence trafficking exists both when the perpetrator has a real influence on an official, and when the perpetrator creates the delusion that he has influence over an official, although in reality there is no such influence. Therefore, the act of claiming and receiving a sum of money, committed by a person who suggests that he has influence over an official, to induce him to do or not to do an act falling within his work duties, even if the perpetrator does not actually have such an influence, he meets the constitutive elements of the offense of influence trafficking and not those of the offense of deception.[4]

In the case where the influence of which the active subject prevails is real, the existence of the offense of deception is excluded, since the essence of this act is to mislead the victim by altering the truth. We can not speak of altering the truth while the perpetrator uses real influence on the public servants, therefore, the classification as influence trafficking is possible without getting in the domain of deception.

The prevalence of a presumed influence on the civil servant, what the perpetrator does is to present a false statement as true, misleading the victim. Misleading the victim is required to convince it that the offender will determine a certain behavior of the public servants.

Prevalence of a non-existent influence, over an official, although it constitutes of presenting false facts as true – action that makes the material element of the offense of deception – through the legislator's will, constitutes a separate offense, if the other conditions provided by the text of the law are met, influence trafficking exists, unlike deception, regardless whether or not it has caused material damage or not. This element brings it very close to influence trafficking offenses and makes it difficult to set their delimitation.

Also in the offense of deception, the victim is being induced in error by the offender who presents false facts as true or true facts as false. The perpetrator may use different means to achieve misleading the victim, and inducing a false representation of reality may be in the prevalence of the offender to influence a public servant. In such a situation a possible delimitation must consider the social value endangered by the actions of the perpetrator.

[3] Dongoroz, V., Fodor, I., Kahane, S., Iliescu, N., Oancea, I., Bulai, C., Stănoiu, R., Roşca, V., *Explicații teoretice ale Codului penal român*, vol. III, partea specială, Academiei Publishing House, București, 1971, p. 319.

[4] High Court of Cassation and Justice, secția penală, dec. nr. 3420/25 june 2007, available at www.scj.ro.

In the case of the offense of influence trafficking, the effective exercise of the service, the confidence and prestige that civil servants have in their duty attributes is being protected. Therefore, it is necessary that the act fulfilled or omitted by the official on which the perpetrator claims to have influence, comes into his work duties; otherwise, the act is incriminated as a crime of deception.

Therefore, for the existence of the offense of influence trafficking it is necessary that civil servants have the functional attributes to perform the solicitated act. The public servant's competency can only be seen and accepted in the exercise of his duties, so that, in theory,[5] it was concluded that the requirement for the existence of the crime of influence trafficking are two attributes which are determined, and interdependent.

Thus, receiving money, promising to influence police officers to obtain not sending the offendant to trial meets the requirement that the act must relate to the duties of the civil service on which the perpetrator claims to have influence, as the police, although not having attributions to hear the case, may act in conducting research so as to determine a specific solution adopted by the prosecutor.[6]

Another essential element that helps clearly delimitate between the two offenses regards the good faith of the one giving money to the offender from action of misrepresentation. If the offense of deception it is necessary to remark the good faith of the person on whom the misleading is exercised, which is why the crime of deception is incriminated as an economic offense which rejects confidence. In the offense of influence trafficking, the influence buyer has bad-faith pursuing his own interest in an illegal way.[7]

In judicial practice the question of delimitation of the offense of deception from the offense of influence trafficking which also involves obtaining a material benefit from the action of the offender pretending to have influence over an official, which is similar to the action of deceit characterizing deception. A criterion that has emerged in order to distinguish the two offenses is the good or bad faith of the person who gives the money or goods. Thus, in the offense of deception, the person who gives money or goods is in good faith, while in the offense of influence trafficking the person who gives money or goods is in bad faith and seeks that the author determines an official to do or not to do an act falling within the duties of his work.[8]

On the other hand, for the offense of influence trafficking to affect the confidence and prestige that civil servants benefit of in their duty it is necessary that when the perpetrator prevailing influence on a public official, he must indicate, identify or give sufficient evidence for identifying the civil servant who promises to intervene.

Therefore, the offense of the culprit who said that through the intervention of friends she will determine a certain teacher to promote more students, from which she received numerous sums of money, does not constitute the offense of influence trafficking but that of deception, because the culprit did not state that she would influence the teacher herself, but claimed that she will achieve this through other

[5] Diaconescu, H., *Infracțiunile de corupție și cele asimilate sau în legătură cu acestea*, All Beck Publishing House, București, 2004, p. 116.

[6] High Court of Cassation and Justice, completul de 9 judecători, dec. nr. 15/2001, Revista de Drept Penal nr. 3/2002, p. 117.

[7] Mădulărescu, E., *Traficul de influență. Studiu de doctrină și jurisprudență*, Hamangiu Publishing House, București, 2006, p. 96.

[8] High Court of Cassation and Justice, secția penală, dec. nr. 5438/ 7 december 2001, available at www.scj.ro.

people, whom she did not individualize.[9] It is not necessary that the offender should indicate the names and the official's specific tasks; is sufficient to indicate the position and authority. Therefore, the constitutive elements of the crime of influence trafficking are met when the culprit promises that by her relations she will obtain leases of public housing apartments, deceiving that is a clerk in the Autonomous Urbis and showing them a list of several apartments and houses state property and using first names of officials who worked in the town hall.[10]

Another aspect that determines the existence of the crime of influence trafficking is the moment the action that constitutes the material is to be committed. Thus, influence trafficking presumes that any actions which may constitute the material element to be committed before the official located under the influence performed the act to the duties of his office requested, or at latest during the performance or while performing the act. If the action of receiving or claiming money, other benefits or accepting their promises were made after the performance of the official act it not an offense of influence trafficking, but that of deception[11].

Another essential element that distinguishes influence trafficking offenses and deception offenses is the result that occurs for each of them. Deception, is a crime against property and is characterized by obtaining interests by the perpetrator; Moreover, the production of damage is stipulated as a constituent in the criminalizing text of the offense. In contrast, influence trafficking is conditioned by obtaining money or profits for the perpetrator. Obviously, if the act is accomplished by receiving money or profits, it takes place when handing their possession and reaching the perpetrator. But in the other two ways of realizing the material element of the offense (that of it claiming or accepting the promise of money or other benefits), the offense does not require the perpetrator to receive money or consideration. It is consumed, considering the social value protected, when demanding or accepting the promise.

Therefore, if in the case of deception, the immediate consequence is that of damage, in the case of influence trafficking the immediate consequence is the state of danger for the effective exercise of an institution in which's service the civil servant operates. If influence trafficking the state of danger occurs regardless of whether or not the damage is caused, if the perpetrator had received the money or not.

As regarding the form of guilt characterized by the subjective position of the perpetrator for the two offenses there are differences in this aspect as well . Although both crimes are committed with direct intent, characterized by the purpose of the perpetrator, this purpose is the essential difference between the two offenses. The offense of deception is dominated by the purpose of obtaining for himself or for another of an unfair patrimony, whereas for influence trafficking the purpose is to determine the public official to violate official duties by performing, failure in performing, speeding or delaying of an act falling within the duties of his office or performing any act contrary to these duties. Even the purpose of the perpetrator in the two cases analyzed gives clear indications about the social value protected by the legislator by incriminating these

[9] Court of Appeal București, dec. nr. 36/A/1996, Revista de Drept Penal nr. 4/1996, p. 149.

[10] Court of Appeal Timişoara, secția penală, dec. 180/12 february 1998, in Mădulărescu, E., *Traficul de influență. Studiu de doctrină și jurisprudență*, Hamangiu Publishing House, București, 2006, p. 98.

[11] Diaconescu, H., *Infracțiunile de corupție și cele asimilate sau în legătură cu acestea*, All Beck Publishing House, București, 2004, p. 118.

facts, value that the perpetrator is aware he will harm and sets out to obtain either one of the purposes mentioned.

Therefore, influence trafficking committed by the prevalence of false influences on the civil servant of the offender contains in its structure the elements of the offense of deception, this is why it can not be retained in competition with this crime. It has been retained that the influence trafficking situation can constitute a way of offence for deception which becomes a crime of purpose. When the perpetrator that claims to intervene with the official demands a greater amount of money than required for payment of influence, saying that the difference is required to provide a reward for the official, but in reality, the alleged gift giving is a delusion to obtain an unfair profit. In this case the delusion from which the offense took place becomes autonomous and is itself an offense of deception and will be accepted in competition with influence trafficking that served as a means for achieving fraudulent deception.[12]

3. Conclusions

So even if if the perpetrator relies on an alleged influence on civil servant, there are difficulties in delimiting the offense of influence trafficking offense of that of deception, though the doctrine and practice have shown many elements that facilitate correct classification of the facts from a legal point. Correct identification of the affected social value by the action of deception is the main element from which the other criteria that help delimitation derive. Establishing the civil servant's jurisdiction and the authority that operates as a criterion for differentiation occurs and it becomes necessary only as far as it concludes that the action of deceit throw doubt on the fairness and honesty of the civil servant. Even the goal that the perpetrator pursues in each of the two cases shows that he is aware of the social value that will be affected by the action. A correct and complete analysis and understanding of all the constituent elements of each offense in part outlines the criteria that helps the correct delimitation.

[12] V. Dobrinoiu, *Traficarea funcţiei şi a influenţei în dreptul penal,* Ştiinţifică & Enciclopedică Publishing House, Bucureşti, 1983, p. 229.

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