

PROCEDURAL ASPECTS REGARDING CORRUPTION CRIMES AS STIPULATED IN THE CRIMINAL CODE OF LAW AND LAW NO. 78/2000

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Abstract

The intensification of the European political and economic integration also requires that our country contributes to continuing the tradition of incriminating criminal deeds perpetrated in the business field. Romanian authorities display their constant interest in expanding their knowledge of the crime phenomenon in this field, while looking to identify effective means to control it. Within this context, corruption crimes approached in the Criminal Code of Law and in Law no. 78/2000 take a distinct place within the group of crimes for which prevention and combating is regulated under the Business Criminal Code of Law. In order to ensure celerity in solving criminal cases involving corruption crimes, certain derogations from the usual procedure were required, as well as enforcement of a special procedure; also, specific procedural aspects regarding corruption crimes need to be retained as we look at the coming into force of the new criminal and criminal procedure legislation.

Keywords: *business criminal law, corruption deeds, special procedure, law changes, New Criminal Code of Law, New Criminal Procedure Code*

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The development of a free market requires that commercial activities be organised and deployed under regulation of a set of juridical norms that ensure crime prevention and control in the field of business. This set of juridical norms has given birth to an independent branch of law, namely the business criminal law, which regulates social relationships emerged from preventing and combating crimes perpetrated within companies, tax fraud, money laundry and other crimes, such as crimes regarding the capital markets, banking systems, customs systems, land, insurance, e-commerce, accounting juridical systems, etc.

The intensification of the European political and economic integration also requires that our country contributes to continuing the tradition of incriminating criminal deeds perpetrated in the business field. Romanian authorities display their constant interest in expanding their knowledge of the crime phenomenon in this field, while looking to identify effective means to control it.

On the other hand, on the background of the international economic-financial crisis, within the context of a market economy, we witness secondary phenomena that have major implications on altering interpersonal relationships, and generate corruption with severe consequences at all levels of structures in the society. Within this context, corruption crimes approached in the Criminal Code of Law³ and in Law no. 78/2000⁴ take a distinct place within the group of crimes for which prevention and combating is regulated under the Business Criminal Code of Law.

1. Current legal framework and views on regulating corruption crimes

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³ Criminal Code of Law, enacted in 1968, republished in the Official Gazette no. 65 of April 16, 1997, as subsequently amended and complemented

⁴ Law no. 78/2000 to prevent, discover and sanction corruption deeds, published in the Official Gazette no. 219 of May 18, 2000, as subsequently amended and complemented

The phenomenon of corruption has been around since the old ages and is one of the most serious and widespread behaviour patterns among civil servants⁵. Changes along the time in the traditions and historical-geographic circumstances have brought about modifications in the perceptions of authorities and citizens regarding identification and evaluation of such behaviours, as well as in the way in which they are approached under the current legal regulations⁶.

Several ways of explaining this term⁷ have been used to define the word „corruption”⁸; along the time, it has taken on several forms of manifestation within different fields of activity⁹, therefore at the present time we could analyse it either as a particularly complex social phenomenon, or from the point of view of political science, economic theory, criminal or civil codes of law¹⁰.

Corruption can be seen in all structures of the society, and it severely affects the political and economic spheres, the judiciary, the central and local administration¹¹, which results in weakening of the state authority, deterioration of the standards of living, altered activity of the judiciary, diminished levels of trust in the population towards social institutions and values¹². Because of the size of this phenomenon with extremely serious consequences upon the general or regional social-economic development, the international community has generated useful tools to effectively prevent and combat corruption¹³.

To this respect, the UN Convention Against Corruption¹⁴, developed at international level as a universal recognition of the existence of corruption in all the states of the world, promotes a set of measures to prevent and incriminate corruption deeds, ensure international co-operation with a view to catching and bringing to justice of those who perpetrate such deeds of corruption or assimilated as corruption, as well as recovering the goods acquired illicitly as a result of perpetrating such deeds; the Convention is implemented based on the Legislative Implementation Guide for the UN Convention Against Corruption, developed in 2006¹⁵.

At a European level, the legal instruments of the Council of Europe¹⁶ against corruption are based on three specific elements, namely creating and establishing effective rules and

⁵ Vasile Dobrinou, *Corupția în dreptul penal român*, Atlas Lex, Bucharest, 1995, p. 5

⁶ Ibidem

⁷ In the Romanian Language Explicative Dictionary (*Dicționarul explicativ al limbii române*), the definition of corruption refers to a deviation from morality, honesty, duty, but also to degradation, depravity (*Dicționarul explicativ al limbii române*, Academiei, Bucharest, 1975, p. 201). The *Merriam Webster* dictionary defines corruption as a violation of integrity, of virtue, of a given moral principle; inciting to a prejudicial deed by using incorrect, illegal means such as corrupt payment (the document is available online at www.m-w.com). The definition that the World Bank gives to the term of corruption is the ‚illegal use of public resources for the purpose of gaining personal benefits’ (see *Helping countries combat corruption: The role of the World Bank*, „The International Bank of Reconstruction and Development”, Sept. 1997, p. 19); the definition given by the International Monetary Fund to corruption is ‚abuse of public power or confidence, for a private gain’; the document is available online at www.imf.org/external/np/gov/eng/index.htm

⁸ From an ethymological point of view, the term ‚corruption’ comes from the Latin *corrumpere* (to tear, to destroy).

⁹ Carl Joachim Friedrich, *Corruption concepts in historical perspective*, p. 15; Jean Gardiner, *Defining corruption*, p. 25, in „Political corruption - Concepts and contexts”, Third Edition, Arnold Heidenheimer, Michael Johnston editors, New Jersey, 2009, document available online at www.books.google.com

¹⁰ Claudia Florina Ușvat, *Infrațiunile de corupție în contextul reglementărilor europene*, Universul Juridic, Bucharest, 2010, p. 7.

¹¹ Elena Cherciu, *Corupția – caracteristici și particularități în România*, Lumina Lex, Bucharest, 2004, p. 4

¹² Vasile Dobrinou, cited work, p. 6

¹³ Sorin Corlățeanu, Dorin Ciuncan, *Infrațiunile de corupție și infrațiuni privind piața de capital*, Universul Juridic, Bucharest, 2009, p. 21.

¹⁴ The UN Convention Against Corruption (the Merida Convention) was adopted through Resolution 58/4 of 31 October 2003 and has entered into force on December 14, 2005, ratified by Romania through Law no. 365/2004, published in the Official Gazette no. 903 on 5 October 2004.

¹⁵ Document is available online at www.unodc.org

¹⁶ At the Parliament Assembly level, there is Resolution 1214 (2000) regarding the Role of Parliaments in the fight against corruption; Resolution 1492 (2006) regarding Poverty and fight against corruption of the Council of Europe member states. At the Council of Ministers level, there is the Anti-Corruption Action Plan (1996); The 20 Guiding Principles in Fighting Corruption

standards in fighting corruption; monitoring implementation and compliance to such rules and standards, as well as developing co-operation programmes that are offered to the member states. At the same time, the EU has a set of legal instruments¹⁷ that have the purpose to prevent and combat corruption through a joint policy of the European states.

In Romania before December 1989, corruption deeds were present at the high level of the country leadership, but due to the existing censorship system, awareness on such deeds was limited. After December 1989, however, we witness a significant increase in the phenomenon of corruption, and the transition to the market economy is marked by a number of financial scandals such as “Caritas” or “FNI”, which could not have existed without the involvement of high-level civil servants¹⁸. Therefore, it was necessary to establish a set of laws that would have prevention and fight against corruption as their main goal, mostly relying on the international legislative instruments and materialised in documents adopted by the Government. To this respect, we could mention the National Corruption Prevention Programme and the National Action Plan Against Corruption in 2001¹⁹, the National Anti-Corruption Strategy for 2005-2007 and the Action Plan for Implementation of the National Anti-Corruption Strategy for 2005-2007²⁰, and the 2008-2010 National Anti-Corruption Strategy Regarding Vulnerable Sectors and Local Public Administration²¹. With a view to implementing these programmes and establishing the means to fight the phenomenon of corruption, the Government and Parliament have passed a large number of normative documents, which, alongside the provisions in the current Criminal Code of Law, can be used effectively in preventing and fighting corruption in Romania.

Thus, the domestic legal framework represented by the *provisions of the Criminal Code of Law* incriminates and sanctions corruption deeds under Chapter I („Crimes while on duty or duty related”) of Title VI – „Crimes affecting activities of public interest or other activities regulated under the law”, through the provisions of art. 254 (taking corrupt payment²² or passive corruption), art. 255 (giving corrupt payment²³ or active corruption²⁴), art. 256 (receiving undue benefits²⁵) and art. 257 (traffic of influence²⁶).

(1997); the Criminal Convention on Corruption (adopted in Strasbourg on 27 January 1999, ratified by Romania through Law no. 27/1999, published in the Off. Gazette no. 65 on 30 January 2002) and the Civil Convention regarding Corruption (adopted in Strasbourg on 4 November 1999, ratified by Romania through Law no. 147/2002, published in the Off. Gazette no. 260 of April 18, 2002); the Resolution (99) 5 (adopted on 1 Mai 1999) regarding GRECO (The Group of States Against Corruption); the Civil Servant Code of Conduct Model (2000) – the Code was adopted through Recommendation no. (2000)10 (adopted at 11 May 2000) and is accompanied by an explanatory memorandum; the document is available online at www.coe.int/greco.

¹⁷ The Convention regarding protection of the financial interests of the European Communities (1995); the Convention regarding fight against corruption involving officials of the European Communities or officials of the EU member states (1997); the Framework Decision 2003/568/JHA of 22 July 2003 of the European Union Council on combating corruption in the private sector; the Framework Decision 2005/212/JAI of the Council on 24 February 2005 regarding seizure of products, instruments and goods that are connected to the crime.

¹⁸ Costică Voicu, Alexandru Boroi, Florin Sandu, Ioan Molnar, *Drept penal al afacerilor*, Rosetti, Bucharest, 2002, p. 441; Sorin Corlăţeanu, Dorin Ciuncan, cited work, p. 22.

¹⁹ Approved through Government Decision no. 1065/2001, published in the Off. Gazette no. 728 of 15 November 2001.

²⁰ Approved through Government Decision no. 231/2005, published in the Off. Gazette no. 272 of 1 April 2005.

²¹ Approved through Government Decision no. 609 /2008, published in the Off. Gazette no. 514 of 8 July 2008

²² Art. 254 Criminal Code of Law:

“The deed of the clerk who, directly or indirectly, asks for or receives money or other benefits that are undue, or accepts the promise of such benefits or does not reject such promise, for the purpose of performing, not performing or delaying performance of an action regarding his/her duties or for the purpose of performing an action contrary to such duties, shall be punished with 3 to 12 years in prison and interdiction on some rights.

The deed stipulated under par. 1, if perpetrated by a clerk with inspection attributions, shall be punished with 3 to 15 years in prison and interdiction of some rights.

The money, values or any other goods that have been the object of taking corrupt payment shall be seized, and if such cannot be found, the convict is obliged to pay the equivalent in money.”

²³ Art. 255 Criminal Code of Law:

At the same time, *the provisions of Law 78/2000 regarding prevention, identification and sanctioning of corruption deeds*, as modified by Law no. 161/2003 regarding some measures to ensure transparency in deployment of public office functions, public mandates, and within the business environment, and sanctioning of corruption²⁷ regulates for the following categories of crimes: corruption crimes, crimes assimilated to corruption crimes, crimes in direct connection to corruption crimes or to crimes assimilated to corruption crimes, and crimes against the financial interests of the European Communities.

The category of *corruption crimes* (art. 6-9 of Law no. 78/2000) includes first of all the crimes provided for in art. 254-257 of the current Criminal Code of Law; other deeds included as corruption crimes are those stipulated under art. 6¹ and 8² of Law no. 78/2000, as well as the crimes provided for in special laws, described as specific modalities of the crimes mentioned under art. 254- 257 CCL and art. 6¹ and 8² of Law no. 78/2000²⁸.

The framework for the *crimes assimilated to corruption crimes* is set by the provisions of art. 10-13² of Law no. 78/2000 – for instance, dishonest appraisal of a value smaller than the real value for goods belonging to economic entities in which the state or a local public administration authority holds shares, within the privatisation or forced execution, judiciary restructuring or liquidation procedures, or on the occasion of a commercial transaction, or for the goods belonging to the public authority or public institutions, within sales transactions or forced execution procedures, by persons with attributions in leadership, management, administration, forced execution, judiciary restructuring or liquidation structures, with a view to gaining undue money, goods or other interests for self or for others.

Crimes in direct connection to corruption crimes are mentioned under art. 17-18 of Law no. 78/2000, for instance: concealment of goods resulted from corruption crimes or crimes assimilated to corruption crimes; partnering up with a view to perpetrating such crimes; abuse while on duty against public interests; abuse while on duty against interests of people, and abuse

²⁴ “The promise, offering or giving of money or other benefits, in the ways and for the purposes presented in art. 254, shall be punished with 6 months to 5 years in prison.

The deed mentioned in the previous paragraph is not a crime if the briber has been coerced in any way by the one who took the corrupt payment.

The briber shall not be punished if he/she denounces the deed to the authorities before it is referred to the prosecution body as a crime.

The provisions of art. 254 par. 3 apply accordingly, even though the offer is not followed by acceptance.

The money, values or any other goods shall be returned to the person who gave them in the cases presented in par. 2 and 3.”

²⁴ The terms ‘active corruption’, respectively ‘passive corruption’ were imported by the Romanian legislation from the Criminal Convention on Corruption signed in Strasbourg on 27 January 1999 and ratified by Romania through Law no. 27/2002 regarding ratification of the Criminal Convention on Corruption, published in the Off. Gazette no. 65 of 30 January 2002

²⁵ Art. 256 Criminal Code of Law

“A clerk receiving money or other benefits, directly or indirectly, after having performed an action according to his/her duty that he/she would have been obliged to perform as part of his/her duty, shall be punished by 6 months to 5 years in prison.

Money, values or any other goods received shall be seized, and if such are not found, the convict is obliged to pay the equivalent in money.”

²⁶ Art. 257 Criminal Code of Law:

“Receiving or asking for money or other benefits, or accepting promises, gifts, directly or indirectly, for self or for another, by a person that has influence or claims to have influence over a servant in order to determine such servant to perform or not perform an action that falls under his tasks while on duty shall be punished by 2 to 10 years in prison.

The provisions of art. 256 par. 2 apply accordingly.”

²⁷ Law no. 161/2003, published in the Off. Gazette no. 279 of 21 April 2003, as subsequently amended and complemented.

²⁸ Art. 6¹ and 8² of Law no. 78/2000 were added through Law no. 161/2003; the crimes provided for in these articles are: promising, offering or giving money, presents or other benefits, directly or indirectly, to a person that has or claims to have influence over a servant, in order to determine such servant to perform or not perform an action that falls under his attributions while on duty (art. 6¹) and promising, offering or giving, directly or indirectly, money or other benefits to an official of a foreign state or of a public international organisation, in order to perform or not perform an action regarding his/her tasks while on duty, for the purpose to obtain undue benefits within international economic operations (art. 8²).

while on duty by restricting certain rights; money laundry crimes; trafficking in drugs; trafficking in toxic substances, and failure to comply with fire arms and ammunition protocols.

The provisions of art. 18¹-18⁵ of Law no. 78/2000 (in a distinct section called „*Crimes against the financial interests of European Communities*”)²⁹ incriminate the following deeds: using or presenting fake, inaccurate or incomplete documents or statements that result in unduly acquiring funds from the general budget of the European Communities or from the budgets managed by or on behalf of such Communities; intently failing to provide the data required under the law for obtaining funds from the general budget of the European Communities or from the budgets managed by or on behalf of such Communities, if such deed results in funds being acquired unduly. Other deeds that are incriminated are: changing the destination of the funds obtained from the general budget of the European Communities or from budgets managed by or on behalf of such Communities, without compliance to legal provisions, as well as unlawful modification of the destination of a legally obtained interest, if such deed results in illegal diminution of the resources of the general budget of the European Communities or the budgets managed by or on behalf of these communities. At the same time, these provisions incriminate negligence while on duty of the managers of businesses that results in perpetration of one of the crimes against the financial interests of the European Communities, or of a corruption crime, or of money laundry crime, by their subordinates acting on behalf of the respective business.

On the other hand, *from the point of view of the new Criminal Code of Law*³⁰, we could point to a number of content modifications in the texts incriminating corruption deeds³¹.

Regarding the crime of *taking corrupt payment* (art. 289 of the New Criminal Code of Law), the content of the incrimination norm no longer includes the fourth modality of this crime, as stipulated in art. 254 of the current Criminal Code, namely ‘non-rejection’ of a promise of benefits as a material element of the objective aspect of the crime of taking corrupt payment – the modality is no longer stipulated in the texts of the criminal conventions that define corruption deeds³². The new incrimination norm also extends the norm’s area of implementation, to include the deed of the civil servant receiving the money or the undue benefits after they have performed the action, based on their attributions while on duty; also, the punishments stipulated under the law for the crime of taking corrupt payment are diminished now, which ought to be objectionable, considering the shortening of the deadlines for prescription of criminal liability and enforcement of the imposed penalty.³³

As a result, the text of the New Criminal Code of Law no longer incriminates distinctly the deed of receiving undue interests, in the way in which it is described in art. 256 of the current Criminal Code³⁴; instead, the content of art. 289 of the New Criminal Code includes receiving by

²⁹ Art. 18¹ – 18⁵ of Law no. 78/2000 were introduced through Law no. 161/2003; incrimination of these corruption deeds was achieved as a result of the need to respond to the obligations taken through the 1995 Convention regarding protection of the financial interests of the European Communities.

³⁰ Law no. 286/2009, published in the Off. Gazette no. 510 on 24 July 2009. According to art. 446 of Law no. 286/2009, this code comes into force on the date that will be established in its implementation law, while within 12 months from publication of this code in the Official Gazette of Romania, the Government shall submit to the Parliament the draft law for the implementation of the criminal code of law; this draft law is currently undergoing parliamentary procedures.

³¹ In the New Criminal Code of Law, corruption crimes are regulated in Chapter I („Corruption crimes”) of Title V - „Corruption crimes and crimes while on duty” of the Special Part (art. 289-294).

³² Claudia Florina Uşvat, cited work, p. 56.

³³ Alexandru Boroi, *Drept penal. Partea specială, conform Noului Cod penal*, C.H.Beck, Bucharest, 2011, pg.377; Claudia Florina Uşvat, cited work, p. 60.

³⁴ The current code regulates the crime of receiving undue benefits as distinct from the crime of taking corrupt payment; in this sense, see also Maxim Dobrinoiu, Ciprian Raul Romiţan, *Primirea de foloase necuvenite și infracriune de luare de mită. Delimitări*, in „Revista de Drept Penal” no. 2/2004, p.106.

the clerk of the undue money or benefits after the action has been carried out based on their attributions on duty under the content of the material element of the objective aspect³⁵.

Regarding the crime of *giving corrupt payment* (art. 290 of the New Criminal Code), there are no substantial modifications compared to the incrimination norm included in the content of art. 255 of the current Criminal Code; however, we could notice an extended scope of the law, to include corruption deeds perpetrated subsequent to the clerk performing an action connected to their attributions on duty, because, according to the new provisions, the promising, offering or giving of money is “in connection with” performing or not a certain action, not “for the purpose” that the clerk performs the action envisaged by the briber³⁶.

According to art. 293 of the New Criminal Code („Deeds perpetrated by or in connection with the members of arbitrage courts”), the provisions regarding taking corrupt payment (art. 289) and giving corrupt payment (art. 290) apply accordingly to people who, based on an arbitrage agreement, are called to pronounce a sentence on a dispute case assigned to them by the parties of the respective agreement, irrespective of whether the arbitrage procedure is carried out based on the Romanian or some other law; these provisions are the translation to national level of the provisions in the Additional Protocol to the Criminal Convention on Corruption³⁷, adopted in Strasbourg on 15 May 2003, which requires the member states of the Council of Europe and the other member states signing this protocol to sanction corruption deeds.

Regarding the crime of *traffic of influence* (art. 291 of the New Criminal Code), it is easy to notice that, compared to the provisions of art. 257 in the current Criminal Code, two more alternatives have been included in the content of the objective aspect, regarding the purpose why the traffic of influence occurs³⁸: „to speed up or delay performance of an action that falls within his/her duties, or to perform an action against such duties”.

The new regulation of the *crime of purchasing influence* (art. 292 of Law no. 286/2009), in comparison to the provisions of art. 6¹ of Law no. 78/2000, brings about modifications regarding the alternative modalities of perpetrating this crime, in the sense that it could be perpetrated for the purpose of delaying, but also for the purpose of speeding up performance by the civil servant of an action that falls within his/her duties.

As stated in the content of art. 294 of the New Criminal Code („Deeds perpetrated by or in connection with foreign servants”), the provisions regarding corruption crimes included in Chapter I of Title V of the Special Part of the New Criminal Code also apply to foreign civil servants, if not stipulated otherwise in international treaties that Romania is part of; this provision only translates the provisions of art. 8¹ of Law no. 78/2000 into the content of Law no. 286/2009.

2. The need to establish special procedures for prosecuting and judging corruption deeds

In order to ensure celerity in solving criminal cases involving corruption crimes, certain derogations from the usual procedure were required, as well as enforcement of a special procedure. Thus, initially, an emergency procedure was regulated under Law no. 83/1992³⁹ regarding prosecution and trial of certain corruption crimes, namely: taking corrupt payment, giving corrupt payment, receiving undue benefits, and traffic of influence (in the way in which these crimes were incriminated under the Criminal Code of Law). Subsequently, compared to the

³⁵ Claudia Florina Uşvat, p. 294

³⁶ Ibidem, p. 223.

³⁷ Ratified through Law no. 260/2004, published in the Off. Gazette no. 612 of 7 July 2004.

³⁸ Claudia Florina Uşvat, cited work, p. 316.

³⁹ Law no. 83/1992 regarding the emergency prosecution and trial procedure for some corruption crimes, published in the Off. Gazette no. 173 of 22 July 1992.

1992 regulation, certain amendments were introduced with the coming into force of Law no. 78/2000 regarding prevention, identification and sanctioning of corruption crimes, regarding the prosecution and trial procedure for some corruption crimes.

The juridical procedure system established in 1992 would vary depending on whether the corruption crimes falling under the special procedure were flagrant or not:

- flagrant crimes would be prosecuted and judged according to art. 465 and art. 467-479 of the Criminal Procedure Code⁴⁰ (the special emergency procedure applicable to certain flagrant crimes);

- crimes that were not flagrant would be prosecuted according to a procedure combining norms of the usual procedure with norms of the special procedure, with trial celerity⁴¹ being strengthened by the shorter terms provided (the case to be prosecuted within maximally 10 days from the date of its referral to the criminal prosecution authorities). On the other hand, the trial for such crimes would be carried out using the norms of the special procedure established for some flagrant crimes (art. 471-479 Criminal Procedure Code), with some derogations and additions (deadlines for evidence presentation were not to exceed 15 days all together; and legal assistance for the defendant was compulsory, even in cases not stipulated under the Criminal Procedure Code as requiring compulsory legal assistance).

Law no. 78/2000 was passed for the same considerations (effective prevention and combating of corruption crimes by enhancing speed of response in solving corruption cases); however, this law includes procedural provisions that are different from those stipulated under Law no. 83/1992, while expanding the range of crimes that such provisions would apply for⁴².

As we were showing earlier, the provisions of Law no. 78/2000 do not refer only to the four corruption crimes provided for in the Criminal Code (taking corrupt payment; giving corrupt payment; receiving undue benefits, and traffic of influence), but also to their specific modalities, provided for in special laws, as well as to crimes assimilated to corruption crimes, crimes in direct connection to corruption crimes, and crimes against the financial interests of European Communities.

Thus, according to art. 21 of Law no. 78/2000, corruption crimes, crimes assimilated to corruption crimes and crimes in direct connection to corruption crimes, if flagrant⁴³, shall be prosecuted and judged according to the provisions in art. 465 and art. 467-479 of the Criminal Procedure Code (emergency procedure for some flagrant crimes)⁴⁴; if not flagrant, prosecution and trial are to be conducted according to the common procedure.

3. Specificities of prosecution in cases of corruption

Law 78/2000 as well makes a distinction, in terms of the applicable procedure, between flagrant and non-flagrant crimes. Thus, if corruption crimes, crimes assimilated to corruption crimes or crimes in direct connection to corruption crimes *are flagrant*, they shall be prosecuted according to the provisions in art. 465 and 467-470 of the Criminal Procedure Code. This means that these cases are prosecuted according to the norms of the *special procedure applicable to some flagrant crimes*, without requiring that all conditions mentioned in art. 466 of the Criminal

⁴⁰ The Criminal Procedure Code, adopted in 1968, republished in the Off. Gazette no. 78 of 30 April 1997, as subsequently amended and complemented; the New Criminal Procedure Code was adopted through Law no. 135/2010 (published in the Off. Gazette no. 486 of 15 July 2010); however, the date of its coming into force is to be established through the implementation law.

⁴¹ Nicolae Volonciu, *Tratat de procedură penală, Partea specială*, vol. II, Paideia, Bucharest, 1994, p. 442.

⁴² Anca Lelia Lorincz, *Drept procesual penal (cu modificările legislative operate prin Mica reformă și referiri la prevederile Noului Cod de procedură penală)*, III edition reviewed and complemented, Universul Juridic, Bucharest, 2011, p. 545

⁴³ In this case (if crimes are flagrant), the provisions of Law no. 78/2000 do not differ from those of Law no. 83/1992.

⁴⁴ The New Criminal Code of Law no longer regulates a special, distinct procedure for some flagrant crimes.

Procedure Code be met (flagrant crime; punished by law with more than 1 year and no more than 12 years in prison, and perpetrated in specific places). Thus, ascertaining that the respective crime is flagrant is sufficient for triggering the emergency procedure for prosecution of some flagrant crimes.

If corruption crimes, crimes assimilated to corruption crimes or crimes in direct connection to corruption crimes *are not flagrant*, the cases will be prosecuted *according to the common law procedure*. It is visible that Law no. 78/2000 has amended the provisions in Law no. 83/1992 regarding setting up deadlines for carrying out the criminal prosecution; actually, if such deadlines could not be complied with, the criminal prosecution would continue according to the common law procedure.

A number of special provisions regarding identification and prosecution of such crimes are added in Law no. 78/2000, both to the emergency procedure applicable to flagrant corruption crimes and to the common law procedure applicable to non-flagrant corruption crimes. For instance, regarding the *reference information*, it is stipulated that persons with controlling attributions are obliged to inform the criminal prosecution authority or, as case may be, the authority assigned by law to ascertain the crime, regarding any data that contain clues that an illicit transaction or deed has been perpetrated, that could incur criminal liability (art. 23 par. 1).

At the same time, while carrying out the control procedures, persons with controlling attributions are obliged to proceed to *ensuring and preserving the traces of the crime*, the goods and any other evidence that might be of use to the criminal prosecution authorities (art. 23 par. 2).

With a view to preventing, identifying and sanctioning corruption deeds, *the banking and professional confidentiality*, except for professional confidentiality in the case of lawyers, as exerted under the requirements of the law, are not opposable to the prosecutor – nor to the court – after the criminal prosecution has been initiated. The data and information requested by the prosecutor or by the court shall be communicated following the prosecutor's written request during the criminal prosecution, or the court's request during trial (art. 26).

Precautionary measures are also compulsory (according to art. 20) in the case of corruption crimes, crimes assimilated to corruption or crimes in direct connection to corruption crimes.

Precautionary measures are process measures of real nature, consisting of the freezing of the movables and immovables of the accused, of the defendant or of the party under civil liability, with a view to carrying out special seizure of the goods, settling the damage generated by the crime, and also ensuring that the fine shall be paid.

As resulting from art. 163 par. 1 of the Criminal Procedure Code⁴⁵, precautionary measures consist of the freezing of certain goods through seizure, which does not allow the goods to be alienated or encumbered.

In principle, enforcement of the precautionary measures is optional, but the law also regulates for certain cases where precautionary measures are compulsory, among which – as we mentioned earlier – the case provided for in art. 20 of Law no. 78/2000, that is, if a corruption crime has been perpetrated.

The recent law changes in the matter of seizure, introduced through Law no. 28/2012⁴⁶, require some clarification regarding precautionary measures.

⁴⁵ Art. 163 of the Criminal Procedure Code, as modified by Law no. 281/2003 and by Law no. 356/2006.

⁴⁶ Law no. 28/2012 to modify and complement some normative documents with a view to improving the activity of capitalising seized goods or, as case may be, goods assimilated into the state's private property, published in the Off. Gazette no. 189 of 22 March 2012

Therefore, freezing of the goods as a precautionary measure occurs by establishing a seizure that can take one of the following forms: seizure as such, mortgage registration, garnishment. Considering the object of the precautionary measure, the seizure is established on movables; the mortgage registration applies to immovables, while the garnishment focuses on the amounts of money owed to the suspect, defendant or the party responsible in the civil lawsuit.

According to art. 166 par. 1 of the Criminal Procedure Code, the body applying the seizure shall draw up minutes including the following, besides the general entries:

- indicate the activities performed by the body in charge;
- provide a detailed description of the goods seized and indicate their value;
- indicate the goods excepted from prosecution by law, found at the person that the seizure has been applied for;
- write down the objections of the parties or other interested parties.

With a view to improving the activities of capitalising seized goods, Law no. 28/2012 brought some modifications to the content of art. 166 of the Criminal Procedure Code – namely, a new paragraph (par. 1¹) was inserted after par. 1, according to which the minutes envisaged under par. 1 should also mention that the parties have been informed that:

a) they can ask for the good(s) seized to be capitalised, on grounds of art. 168¹ par. 1 Criminal Procedure Code.⁴⁷;

b) during the criminal lawsuit, before the court having passed any sentence, the movables under precautionary seizure can be capitalised by the judiciary body, even without the consent of the owner, if the requirements stipulated under art. 168¹ par. 2 of the Criminal Procedure Code are met.⁴⁸

Also, Law no. 28/2012 has added new provisions in the matter of seizure as a precautionary measure in a criminal lawsuit: special cases of capitalisation of the movables seized (art. 168¹ Criminal Procedure Code); capitalisation of the movables seized during prosecution (art. 168² Criminal Procedure Code); capitalisation of the movables seized during trial (art. 168³ Criminal Procedure Code); challenges against enforcement of the capitalisation of the seized movables (art. 168⁴ Criminal Procedure Code).

During the criminal prosecution, when there is no agreement from the owner, if the prosecutor establishing the seizure evaluates that capitalisation of the seized goods is required, a deadline is established – not less than 10 days – and the parties are invited, as well as the custodian of the goods, if any has been assigned.

At the deadline established, the parties and the custodian are informed about the intention to capitalise the movables seized, and told that they have the right to make objections or requests regarding the goods to be capitalised. After examining the objections and requests filed by the parties or the custodian, the prosecutor shall issue an ordinance regarding the capitalisation of the

⁴⁷ During the criminal trial, before a final sentence is passed, the criminal prosecution body or the court that has established the seizure can order immediate capitalisation of the movables seized, by request of the owner of the goods or when the owner's agreement is given (art. 168¹ par. 1 Criminal Procedure Code).

⁴⁸ According to art. 168¹ par. 2 Criminal Procedure Code, during the criminal trial, before a final sentence is ruled, when there is no agreement given by the owner, the movables on which precautionary seizure has been established may be capitalised, as an exception, in the following situations:

- a) when, within one year from the date when the seizure was established, the value of the goods seized has diminished significantly, respectively at least 40% compared to the value at the time of establishing the precautionary measure;
- b) when there is a risk of exceeding the expiry date or when the precautionary seizure was applied on live animals or birds;
- c) when the precautionary seizure was established on flammable or oil products;
- d) when the precautionary seizure was applied on goods that require disproportionate expenses for storage or maintenance compared to the actual value of the goods.

movables specified under art. 168¹ par. 2; the absence of the legally summoned parties does not hinder the procedure. The parties, the custodian, as well as any other interested party may challenge the ordinance deciding on capitalisation of the movables seized by filing a complaint to the relevant court, to solve the case in trial court within 10 days. The complaint against the ordinance results in suspended enforcement. The case shall be judged as urgent and priority matter, and the decision of the court in which the complaint has been solved is final.

During trial, *ex officio* or at the prosecutor's request, the court may rule regarding capitalisation of the movables seized. For this purpose, the court shall establish a deadline that cannot be shorter than 10 days, where the parties are invited, as well as the custodian of the goods, if any has been appointed.

At the deadline established, capitalisation of the movables seized is presented to the parties for discussion, in public session, and the parties are informed that they are entitled to have observations or requests regarding such; the absence of the legally summoned parties does not hinder the deployment of the procedure. The court rules on the capitalisation of the movables seized through a final sentence.

As for complaints regarding the modality of capitalising the seized movables, the law stipulates that the suspect or the defendant, the party responsible in the civil lawsuit, the custodian, as well as any other interested party may file a complaint during the criminal lawsuit, against how the ordinance or, as case may be, the sentence regarding capitalisation of the movables seized is enforced, asking the court in charge to solve the case in trial court. The complaint should be filed within 15 days from completion of the challenged document and shall be ruled upon by the court as urgent and priority case, in public session, with the parties summoned, through a final sentence.

After the final ruling on the criminal lawsuit, if no complaint has been filed against the enforcement of the ordinance or, as case may be, the sentence regarding capitalisation of the movables seized, a complaint may be filed according to the civil code of law.

As resulting from the provisions of art. 22 of Law no. 78/2000, in the case of crimes provided for in this law, irrespective of whether they are flagrant or not, the criminal prosecution has to be carried out *by the prosecutor*.

Since 2000 up to now, the structures specialising in carrying out the criminal prosecution in cases of corruption deeds have witnessed some changes⁴⁹. Thus, Law no. 78/2000 established the Department for Combating Corruption and Organised Crime, within the Prosecutor's Office at the Supreme Court of Justice, as the national-level specialised structure in this field. The same law established anti-corruption and anti-organised crime services within prosecutors' offices in appeal courts, and anti-corruption and anti-organised crime offices within prosecutors' offices in courts, as specialised territorial structures in this field at national level.

The prerogatives of the Department for Combating Corruption and Organised Crime established within the Prosecutor's Office at the Supreme Court of Justice, as well as those of the services and offices previously mentioned, have been absorbed by the National Anti-Corruption Prosecution Body⁵⁰. The National Anti-Corruption Prosecution Body was conceived as an independent structure within the Public Ministry; it was established at a national level as a prosecution body specialising in fighting corruption crimes.

⁴⁹ Anca Lelia Lorincz, cited work, p. 547

⁵⁰ Emergency Government Ordinance no. 43/2002 cancels the Department for Fighting Corruption and Organised Crime within the Prosecution Body at the Supreme Court of Justice, as well as the territorial services and offices; their competences are assimilated (from September 1, 2002) by the National Anti-Corruption Prosecution Body.

Emergency Government Ordinance no. 134/2005⁵¹ established the National Anti-Corruption Department, as an independent structure within the Prosecutor's Office at the High Court of Cassation and Justice, through a restructuring of the National Anti-Corruption Prosecution Body.

Law no. 54/2006⁵² turned the National Anti-Corruption Department into a National Anti-Corruption Directorate within the Prosecutor's Office at the High Court of Cassation and Justice.

The National Anti-Corruption Directorate carries out the criminal prosecution for the crimes mentioned in Law no. 78/2000 perpetrated in certain conditions (art. 13 par. 1 of Emergency Government Ordinance no. 43/2002⁵³):

- conditions regarding the consequences produced (material damages higher than the RON equivalent of 200,000 Euro or very serious disturbance of the activity of a public authority, public institution or any other legal entity) or the value of the amount or the goods that make the object of the crime (higher than the RON equivalent of 10,000 Euro), irrespective of the capacity of the perpetrators,
- conditions regarding the capacity of the perpetrator (deputies, senators, members of the Government, secretaries or deputy secretaries of state and assimilated functions, advisers of ministers, judges of the High Court of Cassation and Justice and of the Constitutional Court, etc.), irrespective of the value of the material damage or severity of the disturbance generated for a public authority, public institution or any other legal entity, or of the value of the amount or the goods that makes the object of the corruption crime.

Crimes against the financial interests of the European Communities also fall under the competence of the National Anti-Corruption Directorate (art. 13 par. 1¹ of Emergency Government Ordinance no. 43/2002).

According to art. 13 par. 1² of Emergency Government Ordinance no. 43/2002, the National Anti-Corruption Directorate has the capacity to carry out the criminal prosecution, if the material damage caused was higher than the RON equivalent of 1,000,000 Euro, in the case of crimes provided for under art. 215 par. 1, 2, 3 and 5 of the Criminal Code (fraud)⁵⁴, art. 246, 247, 248 and 248¹ of the Criminal Code (abuse while on duty against interests of parties; abuse while on duty by restricting certain rights; abuse while on duty against public interests; qualified form of abuse while on duty)⁵⁵, and crimes provided for under art. 175, 177 and 178-181 of Law no. 141/1997 regarding Romania's Customs Code, as subsequently amended and complemented, and in Law no. 241/2005 regarding tax fraud prevention and combating.

For crimes that fall under the competence of the National Anti-Corruption Directorate, prosecution has to be carried out by specialised prosecutors within the National Anti-Corruption Directorate.

In cases regarding crimes that fall under the competence of the National Anti-Corruption Directorate, perpetrated by active members of the military, the criminal prosecution shall be carried out by military prosecutors within the National Anti-Corruption Directorate, irrespective of the army rank that the persons investigated are carrying.

⁵¹ Emergency Government Ordinance no. 134/2005 to modify and complement Emergency Government Ordinance no. 43/2002, published in the Off. Gazette no. 899 of 7 October 2005.

⁵² Law no. 54/2006 to approve Emergency Government Ordinance no. 134/2005, as modified and complemented, published in the Off. Gazette no. 226 of 13 March 2006.

⁵³ Art. 13 of the Emergency Government Ordinance no. 43/2002, as amended by Law no. 161/2003 and by Emergency Government Ordinance no. 134/2005.

⁵⁴ Art. 244 of the New Criminal Code.

⁵⁵ In the New Criminal Code, the crime of abuse while on duty is provided for in art. 297.

The crimes provided for in Law no. 78/2000 that are not under competence of the National Anti-Corruption Directorate according to art. 13 of Emergency Government Ordinance no. 43/2002 fall under the competence of the prosecution bodies within courts, as provided for in the Criminal Procedure Code.

4. Specific aspects of the trial procedure in corruption cases

If corruption crimes, crimes assimilated to corruption crimes, crimes in direct connection to corruption crimes, or crimes against the financial interests of the European Communities *are flagrant*, they shall be judged upon according to art. 471-479 of the Criminal Procedure Code (*the emergency procedure applicable to some flagrant crimes*).

If corruption crimes, crimes assimilated to corruption crimes, crimes in direct connection to corruption crimes, or crimes against the financial interests of the European Communities *are not flagrant*, they shall be judged upon *according to the common law procedure*. Unlike the provisions of Law no. 83/1992, according to which, irrespective of whether corruption crimes were flagrant or not, the trial procedure should be the same (the emergency procedure applicable to flagrant crimes), Law no. 78/2000 introduced a different procedure (just like with the criminal prosecution), depending on the flagrant or non-flagrant nature of the corruption deeds.

According to art. 29 par. 1 of Law no. 78/2000, specialised court panels shall be established for dealing with the crimes provided for in this law in trial courts. With par. 2 of art. 29 of Law no. 78/2000⁵⁶ cancelled (stipulating that the specialised court panels in county courts, district courts and appeal courts would include 2 judges), the general provisions regarding the making up of the court panel stipulated in Law no. 304/2004⁵⁷ will apply; this means that, for trial-court corruption cases, the panels in county courts, district courts and appeal courts will include only one judge.

5. Changes envisaged through the draft laws for implementation of the New Criminal Code of Law and the New Criminal Procedure Code

With a view to harmonising the existing criminal legislation with the provisions of Law no. 286/2009 (the New Criminal Code of Law), the *draft Law for the implementation of the Criminal Code of Law, and to modify and complement some normative documents that contain criminal law provisions*⁵⁸ proposes a number of changes, also regarding Law no. 78/2000 on prevention, identification and sanctioning of corruption deeds. These modifications mainly tackle on the domain of corruption deeds that fall under the provisions of Law no. 78/2000.

Thus, regarding the categories of crimes regulated by the provisions of Law no. 78/2000, the classification is envisaged to include corruption crimes and crimes assimilated to corruption crimes⁵⁹, plus the crimes against the financial interests of the European Union, the sanctioning of which ensures protection of the European Union's funds and resources:

⁵⁶ Par. 2 of art. 29 of Law no. 78/2000 was cancelled through Emergency Government Ordinance no. 50/2006 regarding some measures to ensure proper functioning of courts and prosecution bodies and prorogation of some deadlines, published in the Off. Gazette no. 566 of 30 June 2006.

⁵⁷ Law no. 304/2004 regarding judiciary restructuring, republished in the Off. Gazette no. 827 of 13 September 2005, as subsequently complemented and amended

⁵⁸ The draft Law for implementation of the Criminal Code of Law (in the form in which it was submitted to public debate), the document is available online at www.minjust.ro

⁵⁹ The Law for implementation of the Criminal Code of Law will cancel the provisions regarding the category of crimes in direct connection with corruption crimes (art. 17 and 18 of Law no. 78/2000).

- *corruption crimes* are deemed to be only the crimes provided for under art. 289-292 of the New Criminal Code of Law (taking corrupt payment, giving corrupt payment, traffic of influence, purchasing of influence);

- *crimes assimilated to corruption crimes* are those provided for in art. 10-13 of Law no. 78/2000 (the way it will be amended by the Law for the implementation of the Criminal Code of Law); for instance, according to art. 11, par. 1, the deed of a person who, while having the duty to monitor, control, restructure or liquidate a private economic operator, performs any tasks, intermediates or facilitates commercial or financial transactions or contributes capital to such an economic operator, if it could generate undue benefits directly or indirectly, is deemed to be a crime and shall be punished by one to five years in prison and restricted rights (we may notice that, unlike the current regulation, the proposal here is to reduce the punishment stipulated by the law: one to five years in prison, compared to 2 to 7 years in prison);

- *crimes against the financial interests of the European Union* (the phrase “European Communities” from the current regulation will be replaced by “European Union”⁶⁰) will be the deeds incriminated in art. 18¹-18⁵ of Law no. 78/2000 (as it shall be modified by the Law for the implementation of the Criminal Code of Law); for instance, according to art. 18¹ par. 1, using or presenting documents or statements that are false, inaccurate or incomplete for the purpose of unduly obtaining funds from the general budget of the European Union or from the budgets managed by or on behalf of the EU shall be punished with 2 to 7 years in prison and restricted rights (compared to the current regulation, the same change is noticed, towards reducing the punishment provided by the law: 2 to 7 years in prison compared to 3 to 15 years in prison).

The *draft Law for the implementation of the Criminal Code of Law, and to amend and complement some normative documents that contain criminal process provisions*⁶¹ proposes a number of modifications for Law no. 78/2000.

First of all, since the new Criminal Procedure Code no longer regulates a distinct, special emergency procedure for some flagrant crimes, abrogation of art. 21 of Law no. 78/2000 is envisaged, as it distinguishes between implementation of the special emergency procedure and the common law procedure depending on the flagrant or non-flagrant nature of the corruption crimes. Therefore, there will be no special emergency procedure for corruption crimes, but only some special provisions stipulated expressly in the Law.

Passing of the Law for the implementation of the Criminal Procedure Code will also result in abrogation of other provisions in Law no. 78/2000 – for instance, those regarding the possibility for the prosecutor to authorise, for a duration longer than 30 days: monitoring of bank accounts and accounts assimilated to such; monitoring or interception of communications; access to information systems; communication of documentary evidence, banking, financial or accounting documents (art. 27). Abrogation of such provisions is required in order to harmonise the legislation with the provisions of Law no. 135/2010 regarding the Criminal Procedure Code, considering that, according to art. 139 of the new Criminal Procedure Code, technical surveillance shall be ordered by the rights and liberties judge (among others, in the case of corruption crimes and crimes against the financial interests of the European Union); what is meant by ‘technical surveillance’ is the use of one of the following special monitoring or investigation techniques:

⁶⁰ According to art. 2 point 2 of the Lisbon Treaty, the words “The Community” or “The European Community” will be replaced with the ‘Union’, and the words “of the European Communities” or “of the CEE” shall be replaced with “(of) the European Union”.

⁶¹ The draft Law for implementation of the Criminal Procedure Code (in the form in which it was submitted to the public debate), the document is available online at www.minjust.ro

- interception of calls and communications;
- access to an information system;
- video, audio or photo surveillance;
- localisation or surveillance using technical means;
- requesting and obtaining, according to the law, data regarding the financial transactions, as well as the financial data of a person.

As a conclusion, considering the coming into force of the new criminal and criminal procedure legislation, some specific procedure aspects are maintained regarding corruption crimes, although we will no longer be able to talk about a special emergency procedure that would ensure celerity in solving the cases that deal with such crimes; the speeding up of all criminal procedures – therefore, not only of some special procedures – is actually one of the main requirements that the new Criminal Procedure Code intends to respond to, as it was mentioned in the very Exposé⁶² of the draft of this normative document.

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⁶² The exposé for the draft Criminal Procedure Code developed in 2008, the document is available online at www.minjust.ro