

OFFENCE OF BRIBE TAKING IN THE NEW CRIMINAL CODE

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***ABSTRACT:** IN ROMANIA CORRUPTION HAS REACHED ALARMING PROPORTIONS, BURDENING THE GOOD FUNCTIONING OF THE INSTITUTIONS AND THE PUBLIC AUTHORITIES IN ALL OF THE AREAS OF ACTIVITY. THE DISCOVERY, PENALIZING AND THE FIGHT AGAINST CORRUPTION HAVE BECOME PRIORITIES IN ADMINISTRATIVE POLICIES AND STRATEGIES OF THE ROMANIAN STATE, BEING CREATED FOR THIS PURPOSE A SERIES OF STRUCTURES SPECIALIZED IN THE ERADICATION OF CORRUPTION. FURTHERMORE, THE POLICY OF CRIMINAL PROTECTION OF CONSTITUTIONAL VALUES RELATED TO THE EXERCISE OF THE AUTHORITY OF THE STATE HAS BEEN STRENGTHENED UNDER THE AMENDMENTS BROUGHT BY THE CRIMINAL CODE TO THE EXISTING INSTITUTIONS OF LAW, SO AS TO OPTIMIZE THE PROCESS OF DISCOVERY AND PENALIZING OF THE ACTS OF CORRUPTION. IN THIS CONTEXT, THE CRIMINAL CODE IN FORCE PROVIDES SUBSTANTIAL IMPROVEMENTS IN THE TEXT WHICH INCRIMINATES THE DEED OF TAKING BRIBE COVERING COMPREHENSIVELY ASPECTS RELATED TO THE SUBJECTS OF THE OFFENCE AND ITS OBJECTIVE SIDE, CREATING THE GENERAL FRAMEWORK OF CIRCUMSCRIBING ALSO FOR THE SPECIAL LEGISLATION INCIDENTAL TO THE SCOPE OF COMBATING CORRUPTION.*

***KEY WORDS:** CORRUPTION, FIGHT AGAINST CORRUPTION, BRIBE TAKING, CIVIL SERVANT, FOREIGN OFFICIAL, SANCTIONING CORRUPTION.*

1. Introductory considerations

In Romania corruption crimes in general, but especially an offense of bribe taking are closely related to the public, central and local administration system, of the function and the public servant. However, an offense of bribe taking is committed in a wider range of areas of activity, such as justice, health, sport, etc., being labeled as a negative social phenomenon and bringing serious disturbance to the optimal functioning of the authorities and state institutions.

Analyzing criminal offense of bribery is necessary in order to highlight from a technical point of view additions and amendments, which the Criminal Code has brought to this offense in order to cover comprehensively lawful situations occurring in the process of detection, pursuing and judgement of such facts.

The old Criminal code provided in Article 254 the bribe taking as the deed of the officer who, directly or indirectly, claims or receives money or other benefits which are not

his due, either accepts the promise of such benefits or do not reject it, in order to fulfill, or not, or to delay carrying out an act regarding his duties of service or for the purpose of performing an act contrary to these duties.

In the Criminal Code in force - Law No 286/2009, amended and supplemented by Law No 187/2012 for the implementation of the New Criminal Code, in accordance with Article 289 Paragraph(1) Criminal Code the bribe taking consists in the deed of the civil servant who, directly or indirectly, for himself or for another person, claims or receives money or other benefits regarding carrying out or not carrying out, pressing or delaying an act in his duties or related to an act which is contrary to these duties.

Also, according to article 289, paragraph (2), the deed of the person who exercises a public service for which he has been invested by the public authorities or which is subject to their inspection or supervision with respect to the fulfilment of public service.

It can be ascertained that Article 289 of Criminal Code includes two variants of committing bribe taking: a type variant, covered by the text of paragraph (1) and an assimilated variant, provided for in paragraph (2), identified firstly, by the permanent or temporary quality owned by the active subject, their functions and legal powers of the latter, in the context of an institution or public authorities or in carrying out a public service for such entity under its supervision and control [1].

The bribe taking is to be found in an attenuated variant in Article 308 of Criminal Code entitled "service corruption offenses committed by other people", and involves the deed provided for in Article 289 Criminal Code 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 paragraph (2) or within any legal person.

In addition to the provisions of Criminal Code, an offense of bribe taking is laid down in an aggravated variant by Article 7 of Law No 70/2000 concerning the prevention, discovery and the fight against corruption [2]. According to the text of the special law, taking bribe is more serious if it was committed by a person:

- a) exercise a function of public office;
- b) is a judge or prosecutor;
- c) is an authority of criminal investigation or has prerogatives of ascertaining or penalizing contraventions ;
- d) is one of the persons referred to in Article 293 Criminal Code.

The text of Article 293 Criminal code, referred to in Article 7 of Law No 78/2000, contains provisions related to 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 arbitration procedure is conducted in accordance with the Romanian law or on the basis of another law.

A novelty element incidental to the offence of bribe taking is represented by inclusion in the Criminal code of Article 294 entitled "Deeds committed by foreign officials or in connection with them" according to which the provisions of the Chapter relating to corruption offenses are applied to certain categories of persons, if, by international treaties to which Romania is a part, does not provide otherwise. Application of the provisions of Article 294 Criminal Code shall be made in respect of:

- a) the functioning or persons who carry out their activities on the basis of a contract of employment or other persons who exercise similar prerogatives within the framework of a public international organization to which Romania is a part;

b) members of parliamentary meetings of international organizations to which Romania is a part;

(c) operation or persons who carry out their activities on the basis of a contract of employment or other persons who shall exercise similar powers, in the framework of the European Union [3];

(d) persons exercising judicial office in the international courts whose competence is accepted by Romania, as well as officials from registries of such bodies;

(e) operation of a foreign state;

(f) members of parliamentary or administrative meetings of a foreign state;

g) Jury in foreign courts [4];

2. Pre-existing conditions

The pre-existing conditions are at the time of execution of the deed prior acts, which constitute the offense, fulfill the conditions required by the rules incriminating, about on the subject, subjects, time and place of the offense [5].

a) The legal object of offence

The generic legal object of the offense of bribe taking is represented by social relationships regarding the most favourable functioning of the service activity, which is to be carried out properly and honestly by civil servants and assimilated persons as contained in Articles 175 and 294 Criminal Code, without being influenced or corrupted in the performance of their duties.

Special legal object of the offense affects social relations which relate to the conduct in appropriate and legal conditions of the activities of their service with the establishments, the authorities, institutions and bodies in the public domain, as well as of the activities carried out in the framework of freelancers or some legal persons governed by private law, which involve benefits achieved with honesty and correctness.

b) The material object of the offense

The offense of bribe taking does not have a material object material because the activity of civil servants or assimilated persons does not directly concern an asset or person, tangible assets being not anything other than things acquired by committing the offence, objects of bribery which are subject to confiscation [6].

In doctrine have been issued opinions in accordance with which an offense of taking bribe has a material object which is made up of bribe taking, the money or the benefits that are not the perpetrator's due" [7]. Some authors claim that there are situations of exception when the material object of the offence of bribe taking can exist, when the perpetrator committed the act for which he received money or gifts not to be due to him and, if the act refers to a material object, it means the material object of the offence [8].

With respect to the bribe taking by way of provision of work in the specialized literature has been argued that the object on which work is performed also becomes a material object of the offence [9]. In a critical sense, some authors consider that specific to the bribe taking are the actions, or inactions of claiming, receiving or acceptance or non-rejection of a promise, not the acts carried out by the author on some goods, so that they would become a material object of the offence and that performance of the act is the purpose of the action, which is not conditional on the existence of an offense of bribe taking [10].

c) Subjects of the offence

The subjects of offense are those involved in the crime [11].

The active subject of the offense of bribe taking is qualified and circumscribed to certain categories of persons who have certain qualities or perform certain activities expressly provided for by the Criminal Code or laws which contain criminal provisions. Thus, within the meaning of paragraph (1) of Article 289 Criminal Code, the deed can be performed only by a civil servant, as defined by Article 175 Criminal Code. According to the text of Article 175 paragraph (1) of Criminal Code a civil servant is the person who, on a permanent or temporary basis, with or without remuneration:

- a) exercises the powers and responsibilities, as set out by provisions of law, with a view to the completion of their respective legislative, executive or judicial authority;
- 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.

In addition, in accordance with Article 175 (2) Criminal Code a civil servant is the person exercising a public service for which 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. The text of Article 175 (2) of Criminal Code finds its application conditionally, by reference to the provisions of Article 289 (2) of Criminal Code, in the sense that the deed provided for in paragraph (1) of Article 289, committed by one of the persons referred to in Article 175 paragraph (2), is an offense only when it is committed in connection with the failure, the delay of completion of an act related to his legal duties or in connection with carrying out an act contrary to these duties.

The active subject of the offence of bribe taking can be a person who holds qualities or exercises the prerogatives listed in Article 294 of Criminal code (referred to), as well as any other person who exercises, 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 paragraph (2) or under any legal person or the crime is committed in connection with such a person.

In accordance with Article 7 of the Law No 78/2000 may be an active subject of the offence of bribe taking the person who exercises the powers of ascertaining and penalizing contraventions or of ascertaining, pursuing or judgement of criminal offenses. The same decree lays down, in Article 8, as well as active subjects of potential infringement managers, directors, administrators and auditors of companies, national companies, autonomous companies, as well as any economic agents.

We can see that the legislator has introduced in the text of Article 175 of the Criminal Code the provisions set out in Article 8 of the Law No 78/2000, in a compressed and comprehensive manner, took over in full Article 8¹ of special law and, with additions and amendments that were required, he constituted Article 294 Criminal Code.

The passive subject of the offence of bribe taking is represented by the unit, component, the institution, the public authority in Romania, in which The perpetrator carries out his activity in accordance with provisions of Article 175 Criminal Code, the natural persons or legal entities covered by Article 308 Criminal Code, as well as any institution, body, organization or international or European court, such as presented in Article 294 Criminal Code.

Criminal participation is possible in all its forms, but in the case of coauthorship the perpetrator must have the special quality of author required by law. The bribery author is not participating in an offense of bribe-taking, because he is an author of other distinct crimes, bribe giving, as provided for by Article 290 Criminal Code [12].

In the situation in which bribery goes from bribery author to bribed person through an intermediary, he would be subject to penal investigation for complicity in bribe-taking not in his capacity as the author of, although he effectively performs the constituent action of claiming, receiving, etc.

3. Constitutive Content of offence

a) Objective side

Bribe taking may be achieved, under the aspect of the material element, either by action or by inaction. The action can consist of claiming or receiving money or other benefits that are not the perpetrator's due, or in accepting the promise of such benefits, and inaction consists in non-rejection of such a promise.

To claim something means to request, to make a claim; no matter if this claim was or not satisfied. In the case of requesting the initiative belongs to the active subject, being irrelevant whether the potential bribery author accepts or not to give bribe [13]. The way of requesting is performed directly or indirectly, by oral or written request, explicit gestures or by any other means of communication.

To receive means taking something in possession, an asset or a sum of money, which is not one's due. In this case, it is necessary to have a correlative action of effective offering (bribe giving) of the asset or the benefit. Receiving can be done directly or through an intermediary, but also by other means, such as, for example, turning a sum of money in a bank account. In order to gain relevance in the existence of offense, the action of receipt must not be the result of the requesting action performed initially.. Receipt of goods or undue benefits must temporarily overlap over acceptance in order to count for incriminating procedure, otherwise the passage of an interval of time between the moment of acceptance of offer and actual receipt, would legally consolidate the variant of bribery acceptance.

To accept a promise means to give the agreement on the promise, offer, made by someone. Promise acceptance of bribery may be either express or tacit, but in any case in a manner which would exclude ambiguity.

The old Criminal Code, in Article 254, provided the possibility of committing the offense by non-rejecting the promise, which was in fact the tacit acceptance of bribery author's promise. In the new Criminal Code the legislator considered that it was no longer necessary to maintain such hypotheses, whereas non-rejection of promise to bribing shall be considered to be equivalent to a tacit acceptance.

For the existence of the offence of bribe taking must be fulfilled certain essential conditions:

- claiming, receiving or accepting promise must have as their object money or other benefits; The expression *other incentives* used in Article 289 Criminal code means any advantage of patrimonial nature (loans, prizes, free use of goods, etc.) or nonpatrimonial (distinction, title, degree, etc.). There is also an offence of bribe-taking when an official requests a sum of money borrowed for performance or non-performance of an act, because the loan is considered to be a benefit, an undue advantage.

Unlike the Criminal Code of 1969, the Criminal Code in force does not also include in the context of other benefits requesting or acceptance by the public servant of sexual favors for the performance, failure, speeding or the delay of completion of an act that falls within the scope of its service prerogatives, since such a criminal activity is covered by another incrimination, provided for in Article 299 Criminal Code.

- Money or undue benefits should be requested, received or accepted for oneself or for another person. Thus, there is an offence of bribe taking even if the beneficiary of the money or the benefit is another person (friend, relative, husband) because it is essential for retaining the offence that the advantage created for anyone should be in direct with the act of the public servant and the latter should have required such an approach or be aware of the benefit generated for another person by his deed.

- The act of whose performance, non-performance, speeding or delay must be in the of public servants' duties of service.

This condition is fulfilled if in accordance with the law, in relation to the instrument of appointment to public office and the powers and duties established by his job description, should be obliged to the performance of the act claimed by bribery author. It doesn't matter if the employee subsequently lost quality, dignity or public office owned and also if the act which fulfilled, speeded or delayed produced its effects or not.

In the current Criminal Code there is no more conditioning that action or inaction should be carried out prior to, or concurrently with the performance, non-performance, speeding up or delay of the act within the scope of their duties in the service of civil servants, being sufficient that his deed be committed in connection with his duties .

Immediate consequence consists in creating a state of danger regarding social relations which involve the exercise of state authority through civil servants whose duties and responsibilities shall be established by law for the carrying out of their prerogatives of public power. Also, the immediate result assumes a detriment of social relations relating to the good course of the activity of authorities and public institutions and other legal entities from the country or abroad.

The relation of causality between action or inaction of perpetrator and immediate consequence resulting from the very materiality of the offense.

b) Subjective side

The offence of taking bribery is committed only with direct intent [14]. We notice that the text of the Criminal Code in force no longer includes the word *purpose*, which in the past has brought controversy in doctrine, being regarded as either an element of the subjective side, or just as a finality of criminal activities.

An offence of bribe taking can enter the contest with another crime such as, for example, the false in official documents, if the perpetrator performs an act which is contrary to his job competencies and this act is in itself a criminal offense.

4. Forms. Penalty

The attempt [15] on the offence of bribe taking is not punished by law. The offence shall be consumed at the time of claiming or receipt of money or undue benefits or at the time when the perpetrator accepts a promise of such benefits, the bribe taking being an instant crime. The offence is likely to be performed in the continued form, if bribery is received in the form of installments [16].

The bribe taking in the form laid down in Article 289 (1) and (2) shall be punished with imprisonment from 3 to 10 years and prohibition on taking up a public office or to

exercise the profession or activity in which he has committed crime. In the aggravated variant provided for by Article 7 of Law No 78/2000, with subsequent amendments and additions, taking bribe is punishable by penalty provided by Article 289 (1) Criminal Code whose limits shall be increased by one-third. The deed provided for by Article 308 Criminal Code in an attenuated version is punishable by penalty provided by Article 289 (1) whose limits shall be reduced by a third.

In accordance with Article 289 (3) Criminal Code, 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.

5. Conclusions

For the purpose of establishing contents of corruption offenses in the new Criminal Code, category that includes an offense of bribe-taking, it has been taken into account both the regulation of these facts in the Criminal Code of 1969, as well as the provisions of Law No 78/2000 with its subsequent amendments and additions, including those produced by Law No 161/2003, without any actual significant changes to be made .

The new Criminal Code provides for new elements in the structure and content of bribe taking. So, in a distinct paragraph - (2) of Article 289 is incriminated the bribe taking when it is committed by a person pursuing an activity in the public interest, but on the condition that this deed be committed not to fulfill, to delay carrying out an act concerning his legal duties or for the purpose of not performing an act which is contrary to these duties.

This provision clarifies aspects related to the criminal liability of the public professions related to justice , such as notaries or judicial executors, in the sense that they can be active subjects of taking bribe.

Within Article 289 paragraph (1) in the Criminal Code it was provided as an additional punishment a ban on exercising the right to occupy a public office or to exercise the profession or activity in which crime has been committed .

By Article 175 Criminal Code it has been effected a more clear criminal definition of the notion of civil servant, about which we can say that it has a far wider scope than the definition given to the civil servant in Law no. 188/ 1999 regarding the Status of civil servants, with subsequent amendments and additions.

The chapter on corruption crimes includes a new article, such as the Article 294, which is taken from Law No 78/2000, amended and supplemented, where it is provided that the provisions contained in this chapter shall apply accordingly to the acts of corruption committed by foreign officials or in connection with their work. Also, by introducing Article 308, Criminal Code in force extends the sphere of persons criminally liable responsible for committing criminal offenses of corruption and of service.

In the new Penal Code is to be found, as a matter of novelty, a provision regarding the extension of the respective criminal norms in respect of acts of giving and taking bribery committed by persons involved in the settlement through domestic or international arbitration, provision introduced as a result of the ratification, by Romania, of The Additional Protocol to The Penal Convention of the European Council regarding Corruption.

Under the aspect of the material element we specify that the deed may be committed in connection with speeding up of carrying out an act, and non-rejection of a promise of bribery, asa variant of carrying out the deed, was excluded from the new text,

since it was considered to be a tacit acceptance, its maintenance having a redundant effect.

It is necessary for the future to be clarified in practice matters relating to the criminal liability of the legal person for the crime of bribe-taking, if bribery is taken by a natural person who is acting in order to achieve its object of activity, considering the provisions of Article 135 Criminal Code.

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