

ABOUT CORRUPTION WITHIN THE PUBLIC-PRIVATE PARTNERSHIP

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Abstract:

The domains in which there is a risk for corruption acts are diverse, even if we talk about clear objectives, with clear tasks, as the ones established for Romania's adhesion to Schengen space. In the same manner, the corruption phenomena can take place at any level.

The manner of prevention and combating of corruption depends on the stage of this phenomenon within a certain environment. As it emerges from the explanation attempts in this paper, the corruption develops in relation with the business and economic environment, furthermore, at the interference of the public and private environment, within the domains in which the public decisions affect the activity of the private agents from the economic point of view. Besides the large number of laws that refer to corruption, there have been created institutions with the purpose of fighting against this phenomenon.

In spite of the ancient history of corruption and of the presence of this phenomenon in every society, it has been said that a definition of corruption could never have the same level of acceptance in all countries.

The active corruption within the private sector¹ has been treated, during the last century by the civil law (for example within the law regarding the competition), by the merchant law or by general dispositions of the criminal law. The incrimination of the private corruption has emerged as a necessary and innovative effort to avoid all the gaps of a global strategy of fighting against corruption.

Keywords: corruption, public sector, private sector, national legislation, lobby.

The roots of corruption can not be known in time, as this phenomenon has been mentioned since Ancient Greece, where the bribery was so frequently met that Platon proposed death punishment for the civil servants who receive gifts for doing

¹ Idem note 4, p.38.

their duty. You shouldn't accept gifts –he said- not for the good things you've done, or for the bad ones².

In spite of the ancient history of corruption and of the presence of this phenomenon in every society, it has been said that a definition of corruption could never have the same level of acceptance in all countries. The international community didn't find a widely accepted definition of corruption. The Council of Europe³ Criminal Law Convention on Corruption defines „active corruption” as being „the promise, offering or giving, directly or indirectly, by any individual, of any undue advantage to any of its public officials, for him or her to act or refrain from acting in the exercise of his or her functions” and „passive corruption” as being „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, in order to act or refrain from acting in the exercise of his or her functions”⁴.

The Explanatory Report of The Council of Europe Criminal Law Convention on Corruption⁵ describes different types of corruption within the public and private sector. Therefore, „the active corruption of public national agents”⁶ requires an action from those who corrupt, who can be anyone and can act in different roles (business man, public agent, private person etc.). The corrupted one needs to be a public agent. It is of no importance if the beneficiary is the agent himself of somebody else.

These undeserved advantages are generally of economic or financial nature, but they can also have a non material character. The important thing is that the person who corrupts (or a third party or relative) is seeing his own position improved comparing to that before the crime and this improvement is undue. These undue advantages can take in different forms: money, vacations, lawns, food or drinks, the speed-up in resolving a paper, better perspectives in career etc.

The material elements of the passive corruption of the national public agents⁷ include the requirement or acceptance of an undue advantage or to accept an offer or a promise already expressed.

² G. Antoniu, Marin Popa, St. Danes, *The penal code for everybody*, Political Publishing House, Bucharest 1970, p.210, cited by Dobrinou, Vasile, *Corruption in the Romanian Penal Code*, Atlas Lex Publishing House, Bucharest, 1995, p. 85.

³ *The Council of Europe Criminal Law Convention on Corruption adopted at Strasbourg*, 27th of January 1999, ratified by Law no. 72/2002, published in Official Monitor no. 65/30th January 2002

⁴ Mădulărescu, Emilia. *Traffic of influence: study of doctrine and jurisprudence*, Hamangiu Publishing House, Bucharest, 2006, p. 8.

⁵ *The Council of Europe and The Criminal Law Convention on Corruption, The Explanatory Report The Civil Convention regarding the Corruption, The Explanatory Report*, Bucharest: R.A. Official Monitor, 2001, http://www.coe.ro/biblioteca_carti.php.

⁶ Ibidem, p. 34-35.

⁷ Idem note 4, p.36.

The active corruption within the private sector⁸ has been treated, during the last century by the civil law (for example within the law regarding the competition), by the merchant law or by general dispositions of the criminal law. The incrimination of the private corruption has emerged as a necessary and innovative effort to avoid all the gaps of a global strategy of fighting against corruption. There have been arguments stated, arguments which sustain the necessity of incriminating this type of corruption: it influences certain values, such as trust and loyalty, which are necessary for the conservation and development of social and economic relations, it also prejudices the society unit and it favors the disloyal competition. The passive corruption within the private sector⁹ surprises the comments related to the passive corruption of the national public agents regarding the corruption acts and the moral element.

The manner of prevention and combating of corruption depends on the stage of this phenomenon within a certain environment. The researchers¹⁰ have identified 4 categories, 4 „syndromes” of the corruption, with different characteristics and which claim different combating methods: influence markets (within the mature democracies: USA, Japan, Germany), elite coalitions (within the democracies in course of consolidation: Italy, Korea, Botswana), oligarchs and clans (within the regimes in transition- Russia, Mexico, Philippines), official moguls (within the non-democratic regimes- China, Kenya, Indonesia).

From the point of view of the effect gravity on social level, there have been outlined three types of corruption¹¹: the routine corruption (using bribe to make easier the processing of certain documents), the fraudulent corruption (using bribe to pay lower taxes), and the criminal corruption (using bribe to overlook illegal operations, for example illicit drugs trade or slave trade).

The domains in which there is a risk for corruption acts are diverse, even if we talk about clear objectives, with clear tasks, as the ones established for Romania’s adhesion to Schengen space. In the same manner, the corruption phenomena can take place at any level. If we consider the external interactions, there can be made a distinction between the relations with the citizens and those with other organizations (public-central or local- or private). Within the relations with the citizens, the levels exposed to corruption are the ones represented by those civil servants or office workers who are coming in direct contact with the citizens. On the contrary, within the relations with other organizations (public – public

⁸ Idem note 4, p.38.

⁹ Idem note 4, p.40.

¹⁰ Johnston, Michael, *Corruption and its forms: richness, power and democracy*, Polirom Publishing House, 2007, Iași, p.53-80.

¹¹ Mihaiela Ristei, Nenad Senic, *Corruption and European Integration: Comparative Study of Romania and Slovenia*, 2007, Department of Political Science Western Michigan University

http://www.allacademic.com//meta/p_mla_apa_research_citation/2/0/9/9/0/pages209905/p209905-5.php.

partnerships or public – private partnerships), the segment in sight on the top of the administrative hierarchy¹² ..

The general conditions which favor the phenomenon vary considerably from a society to another, but the reactions regarding the politics are framed in three categories: factual, structural, and moral¹³. The general tendency is that of resolution of the corruption facts by punitive judicial laws. Thus the internal and international legislation abounds in norms, conventions, laws which either try to define, outline, describe the corruption phenomenon, or stipulate sanctions for such deeds. We will only remind some of them. At international level, there have been adopted: The Civil Convention regarding the Corruption¹⁴, The Convention regarding the protection of the financial interests of the European communities¹⁵ (PIF Convention) 1995, The European Union Convention regarding for the fight against corruption, The ONU Convention against Corruption¹⁶.

The ONU Convention against corruption doesn't define corruption, considering the concept as being in a continuous evolution, as its nature bears multiple approaches. The Convention adopts a descriptive manner, which covers various forms of corruption existing today, but also offers the frame for other forms that may appear in the future. The Convention also obliges to incriminating the corruption facts committed by legal entities, as well as facts of participation to or preparation of attempt of such deeds¹⁷.

The internal legislation cannot explain either this concept's sense, the only definition being the one stated in the Anticorruption National Strategy during 2005-2007¹⁸, which is:

- i) the systematic deviation from the principles of impartiality and equity which need to exist at the basis of public administration and which assume that the public goods should be distributed universally, equitable and equally.

¹² Parlagi, Anton P. Profiroiu, Marius, Crai, Eugen, *Ethics and corruption in the public administration*, Economic Publishing House, Bucharest, 1999, p.33.

¹³ Stapenhurst, Rick. Kpundeh, Sahr J., Polocoser, Simona, *Corruption and the fight against it : to a model of national integrity's building*, Irecson Publishing House, Bucharest, 2003.

¹⁴ *The Convention regarding the protection of the financial interests of the European communities* 26th of July 1995 (Known as PIF Convention) (JO C 316, 27.11.95, p. 48).

¹⁵ Adopted by The Council of Europe at 4th of November 1999, ratified by Law no.147/2002, published in Official Monitor no.260/18 of April 2002.

¹⁶ *The ONU Convention against Corruption, adopted at New York*, 31st of October 2003 ratified by Law no.365 from 15th of September 2004, published in Official Monitor no.903/5 of October 2004.

¹⁷ <http://cristidanilet.wordpress.com/2008/01/09/coruptia-judiciara-2-ce-este-coruptia/>.

¹⁸ Decision no.231/2005 regarding the approval of the Anti-corruption national strategy on 2005-2007 and of The Action Plan for implementing The Anti-corruption national strategy on 2005-2007, published in Official Monitor no.272 from 1st of April 2005.

- ii) Their substitution with practices which lead to the assignment by certain individuals or groups of a disproportionate part of public goods as compared to their contribution.

The corruption acts are those steps which are injurious to the universal and equitable distribution, with the purpose of bringing profit to certain individuals or groups. Law no 78/2000 for the prevention, detection and sanction of the corruptive facts¹⁹ established as a central element the use of public position as a source of income, of acquirement of material advantages, or of personal influence, for yourself or for others. This approach converges towards the definition given to corruption within the Global Program against corruption, lead by ONU: „the essence of the corruption phenomenon is in the power abuse in order to obtain a personal favor or profit, directly or indirectly, for yourself or for someone else, in the public or private sector”²⁰.

Within the internal legislation, we can find norms which hint at corruption prevention and combative norms, like Law no 78/2000 for the prevention, identification, and sanction of the corruption facts, with the ulterior completions. The law sets up measures of prevention, identification and sanction of the corruption facts, the problem of European funds and the protection of their usage being stipulated in the „Infringements against the European Communities funds” chapter.

The stipulations of the mentioned law refer to the big corruption which is delimited by three categories of competences regarding: the important people in the public and private life (the material competence), important domains of activity of the public and private life (activity sectors- material competence), and important activities (commercial transactions, privatization activities, financial operations money laundering- material competence)²¹.

As it emerges from the attempts of explaining the phenomenon previously, the corruption develops in relation with the business and economic environment, furthermore, at the interference of the public and private environment, within the domains in which the public decisions affect the activity of the private agents from the economic point of view. In order to limit this phenomenon and to make the influence of the private environment over the public one more transparent, in some countries there has been legitimated and institutionalized the lobby activity.

The concept of lobby has received a negative connotation; in fact, it represents the expression of the constitutional right of citizens to address to the

¹⁹ Published in Official Monitor no. 219 from 18th of May 2000, modified and completed by Urgence Ordinance no.43 from 4th of April 2002; Law no. 161 from 19th of April 2003; Law no. 521 from 24th of november 2003; Urgence Ordinance no.124 from 6th of September 2005.

²⁰ http://www.mai-dga.ro/downloads/cadrul_legal/HOT%20231%20din%2030%20martie%202005.pdf.

²¹ Ciuncan, Dorin, *Jurisprudence and penal doctrine in the corruption's domain*, Lumina Lex Publishing House, Bucharest, 2004, p.116.

decision factors and having the character of influencing the legislative body vote for or against a legislative measure²², „the citizens being able to maximize their power, in order to make them heard”²³. What is essential though in the lobby activity is the fact that the „venality of the decision factor” is excluded, as opposed to the traffic of influence, where the goods, the advantages, are obtained illicitly? In Romania, Law 78/2000 prohibits implicitly the lobby activity, as in the present legal conditions the influence cannot be exerted transparently. There have been expressed some arguments pro and against a lobby law in Romania²⁴. Formally, by Law 52/2003 regarding the decisional transparency in public administration²⁵, the mechanisms for the influence of the public decisions have been created, and the individuals interested could make proposals in order to sustain their interests. A normative act to regulate the lobby activity would diminish the corruption through the traffic of influence due to the inexistence of the legal frame, which would determine the groups of interests to intervene by other means, putting pressure on the decision factors. The conclusion²⁶ formulated as a result of the analysis underlines the fact that „we cannot be sure that the legalization of such activities would contribute to the fight against corruption, but it would at least change the fight tactic, which, until now, has proves to be inefficient”.

Another significant normative act is Law no. 161/2003, regarding certain measures for assuring the transparency in the exercise of public dignities and in the business environment, the prevention and sanction of corruption²⁷, which introduces new regulations in different domains and modifies a series of previous regulations from the prevention and combating of corruption, financial crimes, of business environment and public clerks.

Besides the numerous laws referring to corruption, there have been created institutions with the purpose of fighting against corruption. The Anticorruption General Directorate created within The Ministry of Interior and Reform Administration as a specialized structure of preventing and fighting against the corruption of the ministry personnel. According to its structure and perspectives, this ministry is seen at the intersection of the public and private environment and thus considered to be exposed to corruption.

The Anticorruption General Directorate has been created per Law no. 161/2005, regarding the settlement of certain measures for the prevention and sanction of corruption²⁸ and was considered as a measure adopted by Romania for accelerating the fight against corruption within the public administration, being one of the priority tasks for accomplishing the engagements assumed by Romania in

²² Mădulărescu, Emilia. *Cited paperwork*, p.98-99.

²³ St.Deaconu, *The necessity of law regarding the lobby in Romania*, in The Law Magazine no.2/2001, p.59, cited by Mădulărescu, Emilia, *Cited paperwork*, p. 99.

²⁴ Mădulărescu, Emilia, *Cited paperwork*, p.101-103.

²⁵ published in Official Monitor no.70 from 3rd of February 2003.

²⁶ Mădulărescu, Emilia, *Cited paperwork*, p.103.

²⁷ Published in Official Monitor no.279 from 21st of April 2003.

²⁸ Published in Official Monitor no.476 from 6th of June 2005.

the process of European Union integration, Chapter 24 – „Justice and Internal Affairs”.

Upon the modifications and ulterior completions of the Urgent Ordinance no. 120/2005 regarding the operational of The Anticorruption General Directorate from MIRA and of the Law no. 385/2005²⁹ for the approval of The Ordinance no. 120/2005,³⁰ the judicial police officers part of The Anticorruption General Directorate, the Ministry of Interior and Reform Administration have the competence to do, under law restrictions, activities for the prevention and discovery of corruption, as well as criminal law investigations disposed by the competent prosecutor regarding the crimes committed by the MIRA personnel and mentioned by Law no 78/2000 for the prevention, identification, and sanction of corruption acts, with the ulterior completions.

As mentioned by The Urgent Ordinance no. 30/2007³¹ regarding the organization and functioning of the Ministry of Interior and Reform Administration, The Anticorruption General Directorate is a specialized structure of the ministry for the prevention and sanction of corruption among the ministry personnel. The Anticorruption General Directorate is a central structure of the Ministry of Interior and Reform Administration in the direct subordination of the minister.

The analysis³² of failures and achievements as they resulted from the efforts of sanctioning corruption in different countries lead us to identify some key elements which can represent obstacles to the progress. One of them consists in exaggerated confidence in judicial solutions. Modifying laws and improving their application is an unsafe strategy for changing people’s behavior.

An exaggerated confidence in law application leads to repression, power abuse and the rise of a larger number of corruption cases³³. That’s why it is preferably to introduce some ethics programs and to periodically organize discussions on ethics dilemmas specific to the clerk’s work, so as the right behavior has an internal motivation, based on socially desirable valuable systems.

As a matter of fact, the vulnerabilities to corruption derive from the administration of public funds too. As the specialists said³⁴, the public funds

²⁹ Published in Official Monitor no.1159 from 21st of December 2005.

³⁰ Published in Monitorul Oficial no.809 from 6th of September 2005.

³¹ Published in Official Monitor no.309 from 9th of May 2007 and aproved with modiffication by The Law no.15 from 14th of February 2008 for the approuval of The Urgence Ordinance no.30/2007 regarding the organization and functioning of The Ministry of Interior and Reform Administration, published in Official Monitor no.127 from 19th of February 2008.

³² Stapenhurst, Rick. Kpundeh, Sahr J.. Polocoşer, Simona, *Corruption and fighting against it :to an example of a national integrity’s building*, Irecson Publishing House, Bucharest, 2003, p. 110.

³³ Ibidem.

³⁴ Birle, Vasile, *The tax didging and the corruption in the fiscal system*, Casa Corpului Didactic Publishing House, Baia Mare, 2003, p.210-211.

represent the temptation of financial crimes as well as of corruption, the attraction being different depending on the budget phases: in the first phase, that of collecting the taxes, it is seen as exemption from taxation for the groups of interests, and as the resolving of financial crime cases in the favor of those who broke the law, and in the final stage, that of the use of public funds, there are auctions organized, whose winners are previously well known.

The requirements for Romania's adhesion to Schengen space impose the continuation of the anticorruption measures, focalizing on the vulnerable domains from this process's perspective, that is, the control at the external borders in the context of the adhesion to Schengen space and the administration of nonrefundable funds which constitute Schengen Facility. In this context, for the implementation of Schengen Facility from the Ministry of Interior and Reform Administration, the integrity of the ministry personnel sustained by the corruption prevention and sanction programs becomes vitally important.

Among the Anticorruption General Directorate objectives is that of preventing and sanctioning the corruption facts which can involve the MIRA personnel. This structure's activity has as a goal the development of an integrity attitude among the ministry personnel, the improvement of their understanding regarding the corruption mechanisms, as well as the stimulation of a civic anticorruption attitude through information campaigns.