

Overview on anti-corruption rules and regulations in Romania

Author: Mihai Mareş

I. What is the anti-corruption legal framework in your country (including brief overview on active / passive bribery, bribery of foreign officials, and commercial bribery)?

The main legislative acts that govern corruption offences in our country are:

The Romanian Criminal Code (hereinafter "RCC");

Law no. 78/2000 on the prevention, discovery and punishing of corruption acts (hereinafter "Law no. 78/2000");

Act ratifying the United Nations Convention against Corruption, adopted in New York on October 31, 2003;

Act ratifying the Criminal Convention on Corruption, adopted in Strasbourg on 27 January 1999;

Act ratifying the Civil Convention on Corruption, adopted in Strasbourg on November 4, 1999.

Romanian criminal law distinguishes four categories of corruption offenses, **the Criminal Code** stipulating in the special part, Title V, Chapter I ("Corruption offences") – **bribery** (art. 289 – passive bribery), **bribery giving** (art. 290 – active bribery), **influence peddling** (art. 291) and **buying influence** (art. 292).

Law no. 78/2000 regulates three categories of offenses which fall within the sphere of acts of corruption, plus a fourth that covers offenses against the financial interests of the European Communities. As amended and supplemented, Law no. 78/2000 refers to the following three categories of crimes: corruption offenses, offenses assimilated to corruption offenses; offences directly related to corruption offenses or assimilated offenses.

The offense of bribery is provided by the Criminal Code and Law no. 78/2000 in a type version, an assimilated version, an attenuated version and an aggravated version.

Therefore, article 289 para. 1 from the Criminal Code incriminates *the act of a public servant who, directly or indirectly, for themselves or on behalf of others, solicits or receives money or other undue benefits or accepts a promise of money or benefits, in exchange for performing, not performing, speeding up or delaying the performance of an action which falls under purview of their professional duties or with respect to the performance of an action contrary to their professional duties.*

The act described in the paragraph above **committed by a public servant** (as described in article 175, paragraph 1 of the RCC) is considered an offence only when committed in connection with the failure, delay of the fulfilment of their duties regarding a legal act, or in connection with performing an act contrary to these duties.

In our Criminal Code the author can only be a public servant. Moreover, in the 2nd paragraph of article 289, bribery is stipulated as a attenuated version of the crime, if the author is a person associated with a public servant (as described in article 175 paragraph 2) and, according to article 308 of the RCC, the punishment being lowered by a third of the period of imprisonment provided for the crime stipulated in article 289 paragraph 1.

The main punishment for acts which fall in the material element of bribery offense may be imprisonment from 3 to 10 years. Article 289 para. 3 states that, in addition to the main penalty, a complementary penalty of prohibition of exercising the right to hold public office or to exercise the profession or activity in performance of which the offender has committed the act, for a period of 1 to 5 years. For this offense, considering the gravity of the criminal act, the additional punishment above mentioned is mandatory, the court no longer being required to check, in each case, whether, given the nature and gravity of the offense, the circumstances of the case and the person of the offender, this penalty is necessary. After enforcement of main punishment or considering as enforced, the same rights will be banned as accessory punishment.

In the version incriminated by Law no. 78/2000, the act is punishable with the penalty provided by art. 289 of the Criminal Code, whose limits are increased by one third, thereby reaching the limits of punishment from 4 years to 13 years and 4 months, stressing the crime more serious character of this type of offence.

Correspondent to the offence of Bribe taking, our legislation regulates the bilateral offence of **giving bribe**. *The promise, the giving or the offering of money or other benefits in the conditions provided under Article 289 shall be punishable by no less than 2 and no more than 7 years of imprisonment.*

The protected social value is the same as for the offense of bribery, namely the honesty of state officials, who must not seek or accept any additional benefit for exercising a public function nor must sell the benefit of their status to those who are interested in a particular conduct.

Regulating the offense of bribery as bilateral offense has an important preventive nature; it also represents an effective means for proving offenses of bribery. First, the briber is punishable with a milder punishment than the corrupt official. In addition, through self-denunciation the briber has the opportunity to provide a strong probation means that will help authorities to prove bribery taking.

However, given the decreased difference between the penalty limits of the two crimes, leads to the conclusion the Romanian legislator has considered that the act of giving or offering bribes must be sanctioned about the same as the act of receiving bribes.

Also included in the corruption chapter of our Criminal Code are found the offences of **influence peddling** punished by article 291 and **buying influence** punished by article 292.

Influence peddling is defined as *soliciting, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or who alleges that they have influence over a public servant and who promises they will persuade the latter perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties* and is punishable by no less than 2 and no more than 7 years of imprisonment.

Buying influence is *the promise, the supply or the giving of money or other benefits, for oneself or for another, directly or indirectly, to a person who has influence or who alleges they have influence over a public servant to persuade the latter perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties* and is punishable by no less than 2 and no more than 7 years of imprisonment and the prohibition to exercise certain rights.

II. Does this framework also cover extra-territorial corruption?

In Romania, the primary basis for criminal jurisdiction is the traditional **territorial principle** – our criminal law applies to all offences committed on Romanian territory, no matter what nationality the offender has. Moreover, an offence is considered committed on Romanian territory when an act of enforcement, instigation or complicity or when the results of the offense occurred, even if in part, on this territory.

This means that not only acts entirely committed in our country will fall under the influence of Romanian criminal law, but also those that have been initiated in the country and completed abroad or started those initiated abroad and completed in Romania. Acts which have not been committed in Romania, but whose results occurred in our country will also fall under Romanian criminal law.

One of our fundamental principles is **the personality principle**, which consists in the applicability of Romanian criminal law to offenses committed outside the country's territory by a Romanian citizen or a Romanian legal entity, if the sentencing is life imprisonment or a term of imprisonment longer than 10 years. In all other cases (when the penalty is lower than 10 years of imprisonment), the offence will fall under Romanian criminal jurisdiction under if it meets the **double criminality condition**, namely the criminal act must be provided as an offense both by the legislation of the state where it has been committed as well as by our criminal law.

III. Is there a concept of corporate criminal liability?

Under Romanian law, legal entities, except state and public authorities, are criminally responsible for crimes committed in achieving the object of activity or interest or on behalf of the legal person. Public institutions are not criminally liable for offences committed in the exercise of these activities.

Basically criminal liability may arise to any legal entity. From this rule, by law, were provided exceptions regarding public legal entities, namely the State, public authorities and public institutions, but only for crimes committed in carrying out an activity not subject to private domain. These exceptions are justified, because engaging criminal liability for such entities cannot be conceived or would have negative consequences on society.

The conditions of the criminal liability for legal persons are stipulated in article 135 of the RCC. Thus, in order to attract criminal liability of legal persons the offense is necessary to be committed:

In achieving the object of its activity, meaning the offense must be directly related to the activities carried out to achieve the core activity of the legal entity or its corporate policy;

In the interests of the legal entity, meaning the offense has to be committed in order to obtain a benefit or to avoid a loss or other negative effect;

On behalf of the legal person, for example by an agent, representative or proxy;

Further to a resolution issued by a legal entity or because of its negligence, taking into consideration the conduct of the managing bodies of such legal entity.

The Romanian Criminal Code has consecrated a general criminal liability of legal entities. At least theoretically, a legal person may be criminally liable for any offense provided under criminal law.

The provisions of articles 289 – 292 of the RCC also apply to the managers, directors, administrators and auditors of trading companies, national companies and societies, autonomous administrations and to any other economic units.

There are a number of crimes that cannot be committed by legal entities, as principal perpetrator, such as bribery, given the special quality the person who commits such an offense must meet, which, according to art. 175, has to be a public servant. However, is not excluded its participation in committing the offence as instigator or accomplice. The other corruption offenses – giving bribe, influence peddling and buying influence – are possible to be committed by a legal entity, subject to the conditions above mentioned.

IV. What are the penalties for legal entities (if applicable) and natural persons?

1. Penalties applicable to individuals

As mentioned above, corruption offences committed by an **individual** are punished with imprisonment within the following limits:

- 3 to 10 years for **bribery** (art. 289 – passive bribery);
- 2 to 7 years for **bribery giving** (art. 290 – active bribery);
- 2 to 7 years for **influence peddling** (art. 291);
- 2 to 7 years for **buying influence** (art. 292).

In addition to the main penalty, some rights will be forbidden as a complimentary penalty, such as:

- The right to be elected in a public authority position or any other public office;
- The right to hold a position that involves exercising state authority
- The right to hold the position, to practice the profession or perform the activity used in order to commit the offense;
- The right to hold a managerial position within a public legal entity.

In matter of corruption offences, our criminal legislation stipulates that money, valuables or any other benefits received shall be subject to confiscation and, when such can no longer be located, the forfeiture of the equivalent shall be ordered.

In case of bribe taking or influence peddling, Article 293 paragraph 3 RCC and Article 291 paragraph 2 does not limit the scope of persons to whom confiscation can be applied only to the convicted person, therefore extended confiscation being possible; in the same way, confiscation is not limited to only the equivalent in cash of the received benefits, any property liable to be assessed in money may be subjected to confiscation.

For giving bribe or buying influence also, money, valuables or any other benefits offered or given shall be subject to confiscation, and when such cannot be located anymore, the forfeiture of the equivalent shall be ordered, except if they were given following the denunciation, when these assets shall be given back to the briber who denounced the act of corruption.

2. Penalties applicable to legal entities

The criminal penalties applicable to **companies** are the consequences pursuant to a court decision issued within a criminal trial. The penalties are divided in **main penalties** and **complementary penalties**.

The **main penalty** is represented by fines, which consist of the money a legal entity is ordered to pay to the State. The fine is determined based on the *fine per day system*, meaning the amount corresponding to one fine-day, varying between RON 100 to 5000, shall be multiplied by the number of days subject to the fine (between 30 and 600 days).

The special limits of the days subject to the fine range between:

- 60 and 180 days, when law provides only fine penalty;
- 120 and 240 days, when the law provides a term of imprisonment of maximum 5 years, applied as single penalty or as alternative to fine;

- c) 180 and 300 days, when the law provides a term of imprisonment of maximum 10 years;
- d) 240 and 420 days, when the law provides a term of imprisonment of maximum 20 years;
- e) 360 and 510 days, when the law provides a term of imprisonment exceeding 20 years or life imprisonment.

When, by committing the offense, the legal entity aimed to obtain a material benefit, the punishment limits of the fine-days provided by law may be increased by one-third. When determining the fine, the value of the material benefit shall be considered.

The court shall decide the number of days subject to the fine considering the general criteria for the penalty individualisation. The amount of the fine-days, in case of business legal entities, is determined by taking into account the turnover.

The **complementary penalties** consist of:

Winding-up;

- The suspension of the company's entire activity (or a segment of its activity) for a period of 3 month to 3 years;
- Closing of the company's working units for a period of 3 month to 3 years;
- Disqualification from public procurement procedures/prohibition to public tender for a period between 1 and 3 years;
- The placement under judiciary surveillance
- Public release of the court's judgment.

V. Which local authorities are competent for corruption investigations?

The **National Anticorruption Directorate** (DNA) is a criminal investigation body specialized in combating corruption, created as a necessary tool in detecting, investigating and bringing to court cases of medium and high corruption.

DNA is independent in its relations with the courts and with the prosecutor's offices attached to them, as well as in its relations with other public authorities, exercising its duties under the law and only for its enforcement.

DNA exercises its rights and fulfils its procedural tasks provided by law in matters regarding the offences provided by Government Ordinance no. 43/2000 under its jurisdiction.

According to Government Ordinance, DNA is set up as a structure with legal personality, within the Prosecutor's Office attached to the High Court of Cassation and Justice, has its headquarters in Bucharest and exercises its duties on the entire Romanian territory with specialised prosecutors in combating corruption.

The General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice leads the National Anticorruption Directorate through the chief prosecutor of this Directorate. In performing his/her duties, the Chief Prosecutor issues orders.

VI. Are there whistle-blower regulations?

There are criminal law provisions according to which whistle-blowers have some benefits in exchange of the provided information, some of them being relatively recent subject of an unconstitutionality decision. Thus, article 19 of Law no. 682/2002 on witnesses' protection stipulates that *a person who is a witness in a criminal cause and has committed a **serious crime** if before or during the criminal investigation phase or trial phase, denounces and facilitates the identification of others who have committed such crimes or helps the judicial bodies to be held such persons criminally liable, will have the punishment limits reduced to half.*

On March 2015, the Romanian Constitutional Court decided that this legislative solution is unconstitutional because it excludes from this benefit a person who is a witness **and did not commit a serious crime**, extending therefore the applicability of the legal text for all categories of offenders.

In addition, Law no. 78/2000 sets up a **legal obligation** for the persons with control duties who must **notify** the criminal investigation bodies on any data or clues that an unlawful operation or act which can attract criminal liability under this law was performed.

Moreover, failure to fulfil this obligation represents an offence.

VII. Are there voluntary disclosure / self-reporting programmes and procedures?

In Romania, self-reporting is regulated as a particular **impunity cause** within the offences of giving bribery and buying influence.

According to article 290 paragraph 3 RCC the bribe giver shall not be punishable if he reports the action prior to the criminal investigation bodies be notified thereupon. Likewise, article 292 para. 2 stipulates that the perpetrator shall not be punishable if they report the action prior to the criminal investigation bodies be notified thereupon.

The particular impunity cause if the following conditions are met:

- The briber/purchaser of influence must report the criminal act
- The denunciation must be made before the criminal body is notified.

Article 290 paragraph 3, as well as Article 292 paragraph 2 provisions, are designed to prevent bribery offense by creating, for those who would be tempted to take bribes, the fear that they will be denounced.

In this case, **the money, valuables or any other assets will be given back to the briber/purchaser of influence** if they were given following the denunciation.

VIII. What are the consequences for assessment of guilt or admission of wrongdoing for future business, work, permits e.a.?

As mentioned above, there are some penalties both for the individuals, as well as for legal entities. For example, in addition to the main penalty, some rights will be forbidden as a complimentary penalty, such as:

- The right to be elected in a public authority position or any other public office;
- The right to hold a position that involves exercising state authority
- The right to hold the position, to practice the profession or perform the activity used in order to commit the offense;
- The right to hold a managerial position within a public legal entity.

Also, a legal entity might find itself in the situation of being sanctioned with one of the following complementary penalties:

- Winding-up;
- The suspension of the company's entire activity (or a segment of its activity) for a period of 3 month to 3 years;
- Closing of the company's working units for a period of 3 month to 3 years;
- Disqualification from public procurement procedures/prohibition to public tender for a period between 1 and 3 years;
- The placement under judiciary surveillance
- Public release of the court's judgment.

IX. What are the latest developments in anti-corruption in your jurisdiction?

In Romania, during last years, the anticorruption fight appears to have intensified so much that, according to the activity report of National Anticorruption Directorate (DNA) – the main authorized body in the field – in 2014 were recorded the most criminal complaints, the most indictments issued and it seems to be the year with the most high-ranking officials investigated.

DNA's activity in 2014-2015 covered a wide spectrum of high-level corruption involving public officials and public figures from different political parties. There have been sent to court and have been subject of investigations former and current ministers, parliamentarians, mayors, judges and prosecutors with important management positions.

An increase in corruption cases among magistrates was noted, which is a highly corrosive form of corruption. According to DNA, this high figure does not reflect an increase in corruption acts in the judiciary system, but rather, an increasing number of complaints from the population. Such cases are complex and a new unit was established within DNA, which was responsible for investigating these cases.

Although we have a relatively new criminal legislation - which came into force last year – there have already been several attempts to amend the Criminal Code and Criminal Proceedings Code within the Parliament. Some of them have partially succeeded, others just passed certain stages.

The last attempt to change the Romanian criminal law, both material and procedural, included no less than 22 amendments, but as having received a negative opinion from the Superior Council of Magistracy, these amendments have been postponed.

On the other hand, Romania is still under the Cooperation and Verification Mechanism of the European Commission supervision which provides, inter alia, the stability of anticorruption legislation penalizing attempts by lawmakers to change it.

During last year there have not been adopted legislative amendments affecting bribery legislation or DNA's functioning.

X. The Author



Mihai is one of the founders and the Managing Partner of Mares / Danilescu / Mares, as well the partner in charge of the white-collar crime department. He leads a team of 4 associates dealing exclusively with defending the clients through all phases of investigations as well as criminal enforcement proceedings

Founded in 2011 by an association of leading attorneys with a solid track record in leading international and local law firms, presently, our firm benefits from the contribution of a total number of 15 fee-earners highly specialized in various business related law areas.

Prior to this position, he was the managing partner of Garrigues in Romania, which originally merged with Mares & Asociatii in 2008. When Garrigues pulled out of Romania, Mihai joined as Of Counsel, the Romanian law firm, Musat & Asociatii, being in charge with the "Iberian desk", before re-launching his firm in September 2011.

Since 2014, his practice focuses mostly exclusive on criminal defence for senior executives, entrepreneurs, major industrial groups, financial institutions and large international and domestic companies, in a wide range of matters involving accounting, financial, securities and tax fraud; bribery, antitrust or money laundry cases.

In addition, he advises clients in internal investigations and audits involving money laundering, fraud and other corporate misconduct. In international criminal law, Mihai acts in international corruption, freezing of assets, multi-jurisdictional investigations and extradition.

Mihai Mares is member of European Criminal Bar Association and International Bar Association (Business Crime Committee), speaking regularly in local and international seminars related to white-collar crime matters.

He is on a daily basis in front of the prosecutors of D.I.I.C.O.T. (Directorate for Investigating Organized Crime and Terrorism) and D.N.A. (National Anticorruption Directorate).

Contact details:

Mihai Mares, managing partner

MAREȘ / DANILESCU / MAREȘ

attorneys at law

55 - 55 bis Carol I Blvd.

2nd District, Bucharest 020915

Romania

T: (+4) 0314 378 324

F: (+4) 0314 378 327

M: (+4) 0722 256 803

mihai.mares@mares.ro

www.mares.ro