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Evaluation Report on Romania on Incriminations (ETS 173 and 191, GPC 2)

(Theme I)

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Secrétariat du GRECO
Conseil de l'Europe
F-67075 Strasbourg Cedex

www.coe.int/greco
☎ +33 3 88 41 20 00

GRECO Secretariat
Council of Europe
Fax +33 3 88 41 39 55

I. INTRODUCTION

1. Romania joined GRECO in 1999. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2001) 13E) in respect of Romania at its 8th Plenary Meeting (8 March 2002) and the Second Round Evaluation Report (Greco Eval II Rep (2005) 1E) at its 25th Plenary Meeting (14 October 2005). The aforementioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (http://www.coe.int/greco).

2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:

   - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).

   - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).

3. The GRECO Evaluation Team (hereafter referred to as the "GET") carried out an on-site visit to Romania from 21 to 25 June 2010. The GET for Theme I (21-22 June) was composed of Mr Frederik DECRUYENAERE, Department of Special Criminal Law, Federal Office of Justice (Belgium) and Mr Elnur MUSAYEV, Senior Prosecutor, Anticorruption Department of the General Prosecutor's Office (Azerbaijan). The GET was supported by Mr Christophe SPECKBACHER from GRECO's Secretariat. Prior to the visit the GET experts were provided with a reply to the Evaluation questionnaire (document Greco Eval III (2010) 1E, Theme I) and relevant pieces of legislation.

4. The GET met with officials from the following governmental organisations: Ministry of Justice (Department for the Reform of the Judiciary and Countering Corruption, Drafting Legislation Department, International Law and Treaties Department), National Anti-Corruption Directorate, Prosecutor's Offices attached to the High Court of Cassation and Justice and to the Court of Appeal of Bucharest, High Court of Cassation and Justice (Criminal Section), Court of Appeal of Bucharest, the General Anti-Corruption Directorate and the Inspectorate of Romanian Police (of the Ministry of Administration and the Interior). The GET also held meetings with representatives from the Romanian Academic Society, Romanian Transparency International, Law faculty (Criminal Law Department) of the University of Bucharest and the Police Academy.

5. The present report on Theme I of GRECO's Third Evaluation Round – Incriminations – was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Romanian authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Romania in order to improve its level of compliance with the provisions under consideration.

6. The report on Theme II – Transparency of party funding – is set out in Greco Eval III Rep (2010) 1E, Theme II.

II. INCRIMINATIONS

Description of the situation

7. Romania ratified the Criminal Law Convention on Corruption (ETS 173) on 11 July 2002 and its Additional Protocol (ETS 191) on 29 November 2004. These treaties entered into force in respect of Romania on 1 November 2002 and 1 March 2005, respectively. Romania did not make any reservations to either of these treaties.

8. At the moment, the main provisions criminalising corruption are contained in the Criminal Code (CC) of 1968 (as subsequently amended and re-published), as well as in the *Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts*. The GET understood, however, that the Criminal Code provisions which incriminate bribery and trading in influence (articles 254 to 257 CC) can be considered as "traditional" corruption offences in the sense that they date back to a time when the communist regime did not make it necessary to distinguish between public sector and private sector corruption; in fact, the various bribery and trading in influence offences appear in the Chapter of the CC entitled "Service and service-related offences" which apply to all areas of activity. The Romanian concept of *functionariul* is sometimes translated by "official or "employee" but the nearest concept would be functionary – see paragraph 14 in this respect. Due to the implications of international treaty ratification and legal implications connected therewith, it became necessary to expand the scope of offences to cover i.a. cross-border corruption involving foreign public officials and officials working for an international organisation, among other categories of persons. At the same time, there was a need to step up anti-corruption efforts by providing for new offences which are related to corruption and economic crimes aimed at personal enrichment, and to introduce new investigative tools and specialist institutions to deal with complex and sensitive cases involving senior officials. All this was done with the adoption of Law no. 78/2000. The relevant CC provisions remained unchanged over years, all necessary adjustments required by European and international treaties being made though amendments to Law no. 78/2000.

9. A new Criminal Code, prepared by the Government, was approved in Parliament as Law no. 286 of 17 July 2009 and then published in the Official Journal of Romania; it still needs to be enforced and the entering into force will not happen before 1 October 2011 (see paragraph 94 for further information).

Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

Definition of the offence

Current Criminal Code and (future) new Criminal Code

10. Passive bribery of domestic public officials is criminalised in articles 254 and 256 of the Criminal Code (hereafter: CC) which are applicable in relation to "officials", a concept which covers both public and private sector personnel. These provisions make a distinction between the offences of taking a bribe for the purpose of a future act (article 254 CC), and receiving of an undue advantage connected with an act already accomplished (article 256 CC). The new Criminal Code (hereafter NCC) will provide, in article 289, only for the offence of taking a bribe but the GET noted that the wording used suggests that it covers both future acts and acts already accomplished (the current provisions use the expression "for the purpose of" whereas the future provisions refer to "in connection to". Article 289, paragraph 2 provides for a limitation since

offences committed by private sector persons vested with public service attributions are only liable in case the bribery offences involve a negative (abstention) act, the delaying of an act or an act which constitutes a breach of duties.

Criminal Code (CC)

Art. 254 – Taking a bribe [by an official - functionarului]
(1) The deed of the official who, directly or indirectly, requests or receives money or other advantages which are not due to the official, or accepts or does not reject the promise of such advantages for the purpose of accomplishing or not accomplishing or delaying the accomplishment of an act related to his duty attributions or for the purpose of acting against these duties, is punished with imprisonment from 3 to 12 years and the interdiction of certain rights.
(2) The deed provided in para. (1), if it is committed by an official with control attributions, is punished with imprisonment from 3 to 15 years and the interdiction of certain rights.
(3) The money, valuables or any other goods that made the object of taking the bribe shall be confiscated and if they cannot be found, it is mandatory for the convicted person to pay their equivalent in money.

Art. 256 – Receiving undue advantages [by an official- functionarului]
(1) The deed of receiving, directly or indirectly, money or other advantages by an official, after he/she accomplished an act by virtue of his/her position and which he/she is compelled to accomplish by the nature of his/her position, is punished with imprisonment from 6 months to 5 years.
(2) The money, valuables or any other goods that were received shall be confiscated and if they cannot be found, it is mandatory for the convicted person to pay their equivalent in money.

Future provisions of the New Criminal Code of 2009 (NCC)

Art. 289 - Taking a bribe [by a public official - functionarului public]
(1) The deed of the public official who, directly or indirectly, for himself or for another, requests or receives money or other advantages which are not due to the official, or accepts the promise of such advantages, in connection to acting, refraining from acting or delaying an act falling within his/her duty attributions or in connection with the performance of an act contrary to these duties, shall be punished with imprisonment from 2 to 7 years and deprivation of the right to hold a public office or to exercise the public profession or activity in the execution of which the deed was committed.
(2) The deed referred to in para. (1), committed by one of those provided by art. 175 para. (2) [persons vested by public authorities with public service attributions, or who are subject to their control when they carry out such attributions], shall be an offence only where the offender has refrained from acting or delayed an act related to his/her legal duties, or performed an act contrary to these duties.
(3) The money, valuables or any other goods received are confiscated and where these do not exist anymore, confiscation applies to assets of an equivalent amount.

11. Active bribery of public officials is criminalised in article 255 CC. The provision aims at mirroring the passive bribery incrimination of article 254 CC through an express reference to this provision. In addition, article 255 CC provides for the defence of "effective regret" (see further paragraphs 84 et seq. below). In the NCC, article 290 provides for the future active bribery offence which is, as the GET notes, very similar to that of article 255 CC; it also makes a cross reference to the passive bribery offence (under article 289 NCC) and provides for the mechanism of effective regret. Under both the CC and NCC provisions, the bribe is returned to the bribe-giver in case of effective regret (it shall be confiscated in the other cases).

Criminal Code

Art. 255 – Giving a bribe [to an official - functionarului]
(1) Promising, offering or giving money or other advantages, in the ways and purposes set out in art. 254, are punished with imprisonment from 6 months to 5 years.

(2) The above mentioned deed is not considered an offence when the person giving the bribe was constrained by any means by the person taking the bribe.
(3) The person giving the bribe is not punished if he/she informs the authorities about it before criminal investigation bodies are notified of the offence.
(4) The provisions of art. 254 para. (3) are applied accordingly, even though the offer was not followed by an acceptance.
(5) The money, valuables or any other goods are returned to the person who gave them in the cases mentioned in para. (2) and (3).

Future provisions of the New Criminal Code of 2009

Art. 290 - Giving a bribe [to a public official - functionarului public]
(1) The promise, offering or giving money or other advantages, under the conditions set out in art. 289, shall be punished with imprisonment from 2 to 7 years.
(2) The deed referred to in para. (1) shall not be considered an offence when the person giving the bribe was constrained by any means by the person taking the bribe.
(3) The person giving the bribe shall not be punished if he/she informs the authorities about it before the criminal investigation bodies are notified of the offence.
(4) The money, valuables or any other goods shall be returned to the person who gave them, if they were given in case of para. (2) or after denunciation provided for in para. (3).
(5) The money, valuables or any other goods offered or data are subject to seizure, and if they cannot be found, the confiscation through equivalent shall be ordered.

Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts

12. Additional provisions are contained in the *Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts*: these concern – under Section 2 of this law – the application of more severe sanctions for offences committed under the Criminal Code (Articles 6, 7 and 9 of Law no. 78/2000 – see below) and the criminalisation of active trading in influence, bribery in the private sector or involving an employee / official working abroad or for an international body (articles 6^1, 8, 8^1 and 8^2 of Law no. 78/2000, which will be discussed in the relevant sections of the present report).

Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts
Section 2 - Corruption offences

Art. 6
The offences of taking a bribe - provided in art. 254 from the Criminal Code, of giving a bribe - provided in art. 255 in the Criminal Code, of receiving undue advantages - provided in art. 256 in the Criminal Code and of trading of influence - provided in art. 257 of the Criminal Code, are punished according to those texts of law.

Art. 6^1:
(1) Promising, offering or giving money, gifts or other advantages, directly or indirectly, to a person who has influence or lets the other think (s)he has influence over an official to make him/her accomplish or fail to accomplish an act that is part of the latter's duty attributions, is punished by 2 to 10 years imprisonment.
(2) The perpetrator is not punished if (s)he denounces the act before the criminal investigation body is notified about that act.
(3) The money, valuables or any other goods which represented the object of the offence provided in paragraph (1) are confiscated and if they are not found the convicted person is compelled to pay for their equivalent in money.
(4) The money, valuables or any other goods are given back to the person who gave them in the case provided in paragraph (2).

Art. 7
(1) The deed of taking a bribe, provided by art. 254 from the Criminal Code, if committed by a person who, according to the law, has attributions in ascertaining or sanctioning contraventions or in ascertaining, prosecuting or judging offences, is sanctioned with the penalties provided by art. 254 para. (2) of the Criminal Code regarding the perpetration of the offence by an official with control attributions.
(2) The deed of giving a bribe committed against one of the persons provided in para. (1) or against an official with control duties is sanctioned with the penalty provided by art. 255 of the Criminal Code, the maximum of which is increased by 2 years.
(3) If the offences provided in art. 256 and 257 of the Criminal Code, and the offences provided in art. 6^1 and 8^2 of the present law are committed by one of the persons mentioned in para. (1) and (2), the special maximum limit of the penalty is increased by 2 years.

Art. 8 - The provisions of art. 254 - 257 from the Penal Code and art. 61 and 82 from the present law also apply to the managers, directors, administrators and censors or other persons with control attributions of trading companies, national companies and societies, autonomous regimes and to any other economic agents.

Art. 8^1
The provisions of art. 254 – 257 of the Criminal Code (taking bribe, giving bribe, receiving of undue advantages, trading in influence) and of art. 6^1 (buying of influence) and 8^2 (bribing a foreign or international official within international economic operations) of the current law, shall be applied accordingly to the following persons too:

a) officials or persons who carry out their activity based on a labour contract or other persons who have similar attributions within an international public organization to which Romania is a party;
b) members of parliamentary assemblies of the international organizations to which Romania is a party;
c) officials or persons who carry out their activity based on a labour contract or other persons who have similar attributions within the European Communities;
d) persons with judicial positions within the international courts which have their competence accepted by Romania, as well as clerks working for such courts;
e) officials of a foreign state;
f) members of parliamentary or administrative assemblies of a foreign state.

Art. 8^2 - Promising, offering or giving money, or other benefits, directly or indirectly to an official representing a foreign state or an international organisation in order to determine that specific official to do or not to do an activity that is in his/her competence, with the purpose of obtaining an undue advantage within international economic operations, is punished with imprisonment from one to 7 years.

Art. 9
In the case of the offences provided in the present section, if committed in the interest of a criminal organisation, association or group or of one of their members or to influence the negotiations of international commercial transactions or the international exchanges or investments, the maximum of the punishment provided by law for such offences shall be increased by 5 years.

13. Moreover, Law no. 78/2000 provides for a series of crimes which are considered by the Romanian legislation as “Offences assimilated to corruption offences” (Section 3, articles 10 to 16)[1], insofar as the offender commits them with the “purpose of obtaining for him/herself or another person, money, goods or other undue advantages”, and “Offences directly connected to corruption offences (Section 4, articles 17 and 18).

[1] The valuation of assets below their real market value in the context of privatisations/forced execution/judiciary reorganisation etc., the granting of credits and subsidies contrary to the law or credit rules, the use of credits and subsidies for purposes other than the intended ones (article 10); failure of a person entrusted with certain supervisory and liquidation functions (article 11); performing of financial operations incompatible with the position and the misuse of information obtained by virtue of this position (article 12); the misuse of his or her influence by a person with leadership functions in a political formation / trade union etc. (article 13)

Elements/concepts of the offence

"Domestic public official"

14. The Criminal Code provides in article 147 and 145 for definitions of a "public official" (*functionar public*), and "official" (*functionar*) and of what is to be considered as "public". The concept of "official" is broader as it includes all the categories of persons captured by the expression "public official", as well as any person employed by a legal entity (including private sector employees). These definitions are to be applied when interpreting the CC provisions on active and passive bribery and on the receiving of undue advantages, and that the doctrine and the legal practice have given a wide interpretation to the terms "official" and "public official". These terms include, for example: a) police officers or agents, b) the personnel of public authorities or institutions, such as public administrations, governmental agencies, ministries etc.; c) the personnel of city halls; d) local councillors, county councillors; e) mayors and prefects; f) judges, prosecutors and clerks. The GET wondered during the visit about possible differences with other definitions, for instance those provided in statutory rules such as those of Law 188 /1999 on the statute of civil servants (*Legea nr. 188/1999 privind Statutul functionarilor publici, consolidata 2009*. The Romanian authorities explained that the criminal law definition is autonomous and that as a result, it is not limited to the categories of persons who are subject to the above law and/or enjoy particular conditions of employment or tenure.

> **Art. 147 CC – The public official and the official**
> (1) "Public official" [functionar public] means any person who temporarily or permanently performs a task of any nature, under any title, regardless of the mode of investment, with or without remuneration, in the service of one of the entities mentioned in art. 145.
> (2) "Official" [functionar] means the person mentioned in paragraph 1, as well as any employee who performs a task in the service of another legal person besides those provided by that paragraph.
>
> **Art. 145 CC - Public**
> The term "public" includes everything regarding public authorities, public institutions, the institutions or other legal persons of public interest, administrating, using or exploiting the goods under public property, the services of public interest, as well as any other goods, which according to the law, are of public interest.

15. The GET noted that art. 7 of Law no. 78/2000 refers explicitly to persons entrusted with law enforcement, prosecution and adjudicating functions (see above) as an aggravating circumstance when such categories of officials are involved in a bribery offence.

16. The new Criminal Code (NCC), article 175, contains a definition of the "public official" which represents a concept different from that of the CC:

> **Future provisions of the NCC**
>
> **Art. 175 NCC - Public official [*functionar public*]**
> (1) Any person who, permanently or temporarily, with or without remuneration:
> a) has attributions or responsibilities, according to the law, within the legislative, executive or judicial branch,
> b) performs a public dignity or a public office of any kind,
> c) performs, alone or with others within an autonomous administration, within another business operator or a legal person fully or majority state owned or a legal person declared as public utility, tasks linked to the object of its activity.
> is considered to be a public official [*functionar public*], for the purpose of the criminal law.

(2) The person exercising a public service for which he/she was invested by the public authorities or is subject to their control or supervision for the performance of the public service is considered also a public official [*functionar public*] in the criminal law.

17. The GET also noted that only the definition / concept of "public official" was retained. The on-site discussions confirmed that in the NCC, there will be no distinction anymore between "public officials" and officials" (the relevant offences being applicable to bribery and trading in influence involving public officials). The GET also noted that the NCC makes a distinction between the core services of state in paragraph 1 and persons providing general interest or public utility services in paragraph 2. Although both are to be treated equally as public officials, article 308 NCC maintains a distinction when it comes to the level of punishment, which is reduced by one third for some of those persons assimilated to public officials (see the text of article 308 NCC in paragraph 47.

"Promising, offering or giving" (active bribery)

18. Article 255 CC and the corresponding new provisions of article 290 NCC, explicitly refer to the terms "Promising, offering or giving". In a decision 181/2008[2], the High Court of Cassation (HCC) has confirmed that the active and passive bribery offences are prosecutable separately and that the active bribery offence is complete even when the bribe-taker has not reacted positively to the bribe-givers' expectations; it is therefore also irrelevant whether the act expected by the bribe-giver took place or not. The replies to the questionnaire indicated that the objective element of the offence implies that: a) money or another benefit promised, offered or given is undue, therefore a matter of retribution, that is it constitutes payment (or reward) to carry out a specific act; b) the promising, offering or giving of money or other favours must be prior to the accomplishment, non-accomplishment or delaying in the accomplishment of the specific act.

"Request or receipt, acceptance of an offer or promise" (passive bribery)

19. Article 254 CC on passive bribery and the corresponding new provisions of article 289 NCC refer to the request or receiving of money or an advantage which is not due to the official, or the

[2] ***1. High Court of Cassation and Justice Decision 181/2008 - Art. 255 para. (1) related to art. 7 para. (2) of Law no. 78/2000 – active bribery***
The first instance court noted that in August 2005, at one of the border crossing points, CV tried entering the country, driving a bus with 43 persons. After the regular documents' check, the police officer BI ascertained that 8 out of 43 travellers had outstayed the legal period abroad, requiring CV to call the 8 persons, in order to add them to the database of the border police. Returning to the coach, CV requested the 8 persons to give 200 euro each. After collecting the sum of 1,500 euro, CV went to the control desk and offered the police officer the amount of money collected, in a carton of cigarettes.
The court noted that the act of CV to offer BI, border police officer, the amount of 1500 euro, in order to refrain from acting in the exercise of his functions, meets the constituent elements of bribery, as provided by art. 255 para. (1) CC, with the application of art. 7 para. (2) of Law no. 78/2000. The material element of the crime of corruption consist of actions that can be achieved either by promising or by offering or the giving by a person to an official of an amount of money and other benefits, in ways and purposes stipulated in art. 254.
The court also noted that: "*For the offence of bribery, it is not necessary that the promise or offer of money or other favours to be followed by acceptance; the official's refusal to accept the promise or the offer of money or other favours is also not relevant. At the same time, it is unnecessary that the promise or offer of money or other favours be followed by enforcement, the fact of promising or offering is enough. Finally, it is not necessary to meet the aimed purpose that is to have accomplished or not accomplished or delayed the accomplishment of the specific act related to the duties of office. It is also not necessary to have committed the specific act contrary to duties of office, being sufficient to have been proposed, offered or given money or other benefits".*
(…) Therefore, the High Court of Cassation and Justice maintained the sanction imposed by the first instance court, namely 2 years of imprisonment, without suspension.

acceptance of a promise of such advantages. The current provisions of article 254 CC also incriminate the behaviour of the bribe-taker who "does not reject the promise for such advantages"; this element is absent in the NCC incrimination. The GET also noted that the offence of receiving an advantage after the performance of an official act (article 256 CC), which will be suppressed as a stand-alone offence in the NCC, but incorporated in the passive bribery offence, only contains the element of "receiving" (and not the "requesting" nor the "acceptance of an offer or promise"). One case of 2009[3] was mentioned in the replies to the questionnaire. After the visit, the Romanian authorities explained that the offence of receiving of an advantage of article 256 CC does not imply the existence of a preliminary agreement; should such an agreement exist, the offence would fall under article 254 CC.

"Any undue advantage"

20. Article 254 CC on passive bribery (and article 255 CC because of the cross reference between active and passive bribery) uses the expression "money or other advantages which are not due to the official". Article 256 CC on passive bribery *ex parte* refers to "money or other advantages". Article 8[2] of Law 78/2000, which provides for the specific offence of active bribery connected with international economic operations also uses the expression "money or other advantages". The future offences of passive and active bribery (articles 289 and 290 NCC) will follow the same approach as the current provisions of the CC.

21. The replies to the questionnaire explain that the term "advantages" refers to both material and non-material benefits and that according to the Explanatory Dictionary of the Romanian Language, the term "advantage (*benefit*)" is defined as a "*moral or material gain; advantage, profit*". In the criminal law doctrine the term "other advantages" means any kind of material advantages, other than money[4], as well as non-patrimonial advantages and moral advantages (awarding some academic, university, scientific, cultural, artistic, sportive titles, awarding medals,

[3] ***High Court of Cassation and Justice, decision 1114/2009 - Article 254 para. 2 Penal Code, related to art. 7.1 Law no. 78/2000 – passive bribery***. On May 14, 2008, LI (judge in a criminal section of a county tribunal), contrary to his duty attributions, deriving from his position as a judge, claimed from the denouncer MS the amount of 30.000 euro, indirectly, in order to issue a favourable decision in a file he had to rule upon. At the same time, he communicated the denouncer that if he did not accept the proposal to submit him the amount of 30,000 euro, he would allow the injured party complaint and would try the case.
To reinforce the belief that those communicated by the judge are real, the intermediary STM assured the denouncer that the judge, during the next term of court, would postpone issuing a decision, in order to enable him to purchase the amount of money.
Subsequently, the denouncer handed over to the defendant STM, in 2 instalments, the amount of 25.000 euro to be remitted to the judge, in order to give him the possibility to obtain the entire amount demanded, and to issue a favourable decision, namely the rejection of a complaint made by the injured party, a company, against the prosecutor's order for not starting the criminal investigation.
In exchange for the money, the judge postponed several times, unduly, the decision in that case, and the last term he issued a favourable one.
The criminal section of the High Court of Cassation and Justice, the competent court in this case, ascertained the following: a) the acts of LI meet the elements of bribery, under article. 254 para. (1), Criminal code, with reference to art. 7 para. (1) of Law no. 78/2000; b) the acts of STM, to help LI, after a preliminary agreement with him, to receive amounts of 25.000 euro, in order to rule favourably for the denouncer, meet the constituent elements of complicity to bribery under article. 26 CC related to art. 254 par. (1) with reference to art. 7 para. (1) of Law no 78/2000.
In terms of guilt, LI acted with specific direct intent, specific to crimes of corruption, by conditioning the observance of office duties or their exercise in a legally manner, of receiving an unjust and unfair material benefit. The court sentenced LI to 2 years and 6 months' imprisonment and STM to 1 year and 1 month imprisonment, both without suspension.

[4] i.e. goods, commissions, loans, selling or buying, postponing or cancelling debts, performing free services or in advantageous conditions, favourable exchanges for the official or the deliberate loss in favour of the official when gambling.

distinctions, military ranks, etc.)[5]. Some interlocutors considered that sexual favours are not a form of bribe; the Romanian authorities advised after the visit that there have been two (non-final) convictions for bribery involving sexual favours, which suggests the contrary.

22. The concept of "undue" is present in the incriminations of bribery. In the criminal law doctrine, it is provided that the money or other advantage which constitutes the bribe is everything that is not legally owed to the official or to the structure for which he/she works. In the case of passive bribery under article 254 CC, the "money or other undue advantage" represents a reward, a retribution for the official's incorrect behaviour[6].

23. If the perpetrator requests, receives, etc. a sum of money or other advantages that are not due, not as an equivalent for his/her incorrect behaviour, but as an obligation that must be met by the person requesting the carrying out of the act, even though such an obligation is not imposed by the law, the deed is not prosecuted as taking bribe, but as abuse of office against the persons' interests, as provided by art. 246 of the Criminal Code[7].

24. In this respect, legal practice considers as abuse of office and not taking bribe, when the official claims and receives material advantages from his subordinates, under the pretext that he could not fulfil his own duty attributions because he had to travel in order to procure orders and raw materials[8].

"Directly or indirectly"

25. The terms "directly and indirectly" are expressly mentioned in the bribery offences of articles 254 and 255 CC (as well as the future articles 289 and 290 NCC), and receiving of advantage offences under article 256 CC. The Romanian authorities indicate that if the offence is committed "indirectly", the middleman or intermediary, who acts on behalf of the perpetrator and with the intention of helping the latter, has the quality of an accomplice to the offence of taking or giving a bribe and s/he shall be punished according to art. 27 CC – and the corresponding provisions of the NCC (see the chapter on participatory acts hereinafter). A case of 2009 on bribery involving a judge was mentioned in the replies to the questionnaire in connection with the general aspects of bribery of public officials (see footnote 3, *High Court of Cassation and Justice, decision 1114/2009*); it involved an intermediary and the judge found guilty was convicted to imprisonment for 2 years and 6 months.

"For himself or herself or for anyone else"

26. The wording of the incriminations of active and passive bribery (articles 254 and 255 CC) and of receiving of advantages (article 256 CC) does not mention expressly the above terms or another expression referring to third party beneficiaries. Nevertheless, in the criminal law doctrine it is provided that the bribe may be given, offered, promised, respectively claimed, received, accepted by the official both for himself personally and for another person[9]. For instance, the receiving of money or goods can be accomplished by handing them over to a third party with whom the

[5] V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, V. Roşca "Theoretical explanations of the Romanian Criminal Code. Special Part.", vol. IV, the Academy Publishing House., Bucharest 1972, page. 133; Gh. Nistoreanu, Al. Boroi, I.Molnar, V. Dobrinoiu, I. Paşcu, V. Lazăr, "Criminal Law. Special Part", Nova Publishing House, Bucharest 1997, page 351.

[6] Gh. Nistoreanu, Al. Boroi, "Criminal Law. Special Part", Second Edition, All Beck Publishing House, 2002, page 286

[7] T. Toader, "Romanian Criminal Law. Special Part", Second Edition, Hamangiu Publishing House 2007

[8] The Supreme Tribunal, Criminal Section, Decision no. 1956/1973

[9] C. Bulai, A. Filipas, C. Mitrache, Criminal law institutions. Selective course for the licentiate degree exam, Trei Publishing House, 2008

official is in debt, thus relinquishing his/her obligation in this way. The new Criminal Code (NCC) explicitly refers to the expression "for himself or for another" in art. 289 NCC (taking a bribe) and this applies also in respect of art. 290 NCC (giving a bribe) since the latter makes a cross reference to the former's modalities of bribery. The on-site discussions showed that there is broad understanding that the third party beneficiary can be a natural person or an entity (an association, a political party etc.)

"To act or refrain from acting in the exercise of his or her functions"

27. According to the incriminations of active and passive bribery (articles 254 and 255 CC), the deed is committed *"for the purpose of accomplishing or not accomplishing or delaying the accomplishment of an act related to his duty attributions or for the purpose of acting against these duties".* The above formulations cover both positive and negative acts, whether or not they constitute a breach of duties. The GET observes that the wording of the offence of receiving of advantages (article 256 CC) is slightly different: *"after he/she accomplished an act by virtue of his/her position and which he/she is compelled to accomplish by the nature of his/her position".* In the new Criminal Code, active and passive bribery offences of articles 289 and 290 NCC use the same approach with the expression "in connection with acting, refraining from acting or delaying an act falling within his/her duty attributions or in connection with the performance of an act contrary to these duties". The GET observes, however, that in accordance with article 289, paragraph 2 NCC, offences committed by persons employed by private sector entities which are assimilated to public officials in accordance with article 175, paragraph 2 (because they are vested with public service attributions) are criminalised only insofar as the bribe is in connection with the *non-accomplishment* or with *delaying* of an act within his/her duty attributions or in connection with the *performance* of an act *contrary* to these duties, but they are not criminalised if the bribe is in connection with the *accomplishment* of an act.

28. Criminal law doctrine considers that it is irrelevant whether the act requested from the official is legal or illegal, both situations being covered by the incriminating texts. It is also irrelevant whether that act concerns a specific or a generic duty or task, and whether the official has limited attributions in relation to the requested act. Legal practice considers that the offence is committed when, for instance, a policeman receives undue advantages in exchange for not drawing up criminal investigation documents regarding a traffic violation and not mentioning in his activity report that the driver and his vehicle had been subject to a control / search[10]. Furthermore, when the head of a parking office within a Public Domain Administration requests and receives money in order to approve a parking authorisation, it comprises the constitutive elements of the offence of taking bribe, even though the delivering of parking authorisations is not one of his duty attributions, but he has the attribution of carrying out the preliminary acts for the issue of the authorisation (drawing up the file, carrying out the verifications and formulating a proposal to approve or not to approve the authorisation)[11]. Otherwise, if the act for which the undue advantages are claimed is not part of the official's duty attributions, the deed may constitute another offence, for instance fraud (when the official makes the bribe-giver believe that the carrying out of the act is in his duty attributions whereas in reality it is not[12]).

[10] Supreme Court of Justice, Criminal Section, Decision no. 3952/2001
[11] Supreme Court of Justice, Criminal Section, Decision no. 391/1999
[12] Supreme Tribunal, Criminal Section, Decision no. 5846/1970

"Committed intentionally"

29. The replies to the questionnaire indicate that the offences of active and passive bribery imply a behaviour with direct intention, qualified through purpose. The pursued goal is to accomplish, not to accomplish or to delay the accomplishment of the act regarding the official's duty attributions or to accomplish an act contrary to these. The law does not require the intended purpose (the result of the offence) to be actually achieved. The offence of taking a bribe is complete even though the official does not actually carry out the act. If the intended purpose is achieved and the perpetrator carries out an act contrary to his duty attributions and which constitutes in itself another offence (for example, forgery of official documents) the offence of taking a bribe is concurrent with that offence[13]. The GET noted that under article 254 CC (passive bribery of officials), the bribe-taker is prosecutable not just in cases where he/she accepted the promise of an advantage but also in situations where he/she has not rejected such a promise. The future passive bribery of article 289 NCC has not retained this element and different feelings were expressed during the on site discussions (for some interlocutors it was a useful tool to avoid proving the existence of a formal acceptance, whereas others found it timely to abolish such a provision which had been a source of legal problems in practice).

Sanctions

30. The sanctions for the various corruption offences, including certain aggravating circumstances, are provided for under the relevant provisions of the Criminal Code and new Criminal Code, and of the Law no. 78/2000. Moreover, the draft law on the enactment of the NCC, adopted by the Government and made available after the visit, foresees to amend the aggravated forms of offences of Law no. 78/2000. In an attempt to clarify the situation, the GET has tried to summarise the system of sanctions in the following table:

Offence	**Simple form**	**Aggravated forms**	
		(1) The deed committed by (respectively - against) an official who has control attributions (art. 254 para.2 CC) or (2) who has attributions in ascertaining or sanctioning contraventions or in ascertaining, prosecuting or judging offences (art. 7 Law 78/2000) – **Would be amended, according to the (draft) law on the enactment of the NCC and would also apply to public officials, and arbitrators of article 293NCC**	The deed committed for the interest of an organisation, association or criminal group or one of their members or for the purpose of influencing the negotiations regarding international commercial transactions or the international exchanges or investments (art. 9 Law 78/2000) – **Would be abolished according to the (draft) law on the enactment of the NCC**
Taking a bribe	**Art. 254 CC**: 3 to 12 years' imprisonment and interdiction of certain rights	(1) and (2): Imprisonment from 3 to 15 years and interdiction of certain rights	Imprisonment from 3 to 17 years and interdiction of certain rights
	Art. 289 NCC: 2 to 7 years' imprisonment and professional disqualification	-	-
Giving a bribe (see also below **art. 8[2]** of Law no. 78/2000)	**Art. 255 CC**: 6 months to 5 years' imprisonment	6 months to 7 years' imprisonment	6 months to 10 years' imprisonment
	Art. 290 NCC: 2 to 7 years' Imprisonment	Limits are increased by one third under draft law on enactment of NCC (2 years and 8 months to 9 years and 4 months)	-

[13] Supreme Tribunal, Criminal Section, Decision no. 3839/1970.

Bribery in the private sector and the sector assimilated to public sector	**Art. 8[2]**, **Law no. 78/2000**(Giving a bribe within International economic operations): 1 to 7 years' imprisonment	1 to 9 years' imprisonment	1 to 12 years' imprisonment
	Art 308 NCC: special limits are reduced by one third	1 year and 4 months to 4 years and 8 months	-
Receiving undue advantages	**Art. 256 CC:** 6 months to 5 years' imprisonment [suppressed in the NCC]	6 months to 7 years' imprisonment	6 months to 10 years' imprisonment
(passive) Trading in influence	**Art. 257 CC**: 2 to 10 years' imprisonment	2 to 12 years' imprisonment	2 to 15 years' imprisonment
	Art. 291 NCC: 2 to 7 years' imprisonment	Limits are increased by one third under draft law on enactment of NCC (2 years and 8 months to 9 years and 4 months)	-
(active) Buying of influence	**Art. 6[1], Law no. 78/2000**: 2 to 10 years' imprisonment	2 to 12 years' imprisonment	2 to 15 years' imprisonment
	Art. 292 NCC: 2 to 7 years' imprisonment	-	-
Other criminal offences (for comparative purposes)			
The offence	**Simple form**	**Aggravated forms**	
Abuse of office against the public interests	6 months to 5 years' imprisonment and interdiction of certain rights	The deed had extremely serious consequences: Imprisonment from 5 to 15 years and interdiction of certain rights	
Embezzlement	1 to 15 years' imprisonment	The deed had extremely serious consequences: Imprisonment from 10 to 20 years	

31. Corruption offences are always punishable with imprisonment (there are no fines), with both lower and upper limits. In addition, in the case of passive bribery under article 254, paragraph 1 CC, the offender is subject to deprivation of certain rights (to be determined by the judge on the basis of article 64 CC[14]); in the new Criminal Code, the incrimination of passive bribery of article 289 NCC provides specifically for the "*interdiction of the right to hold a public office or to exercise the public profession or activity in the execution of which the deed was committed*". Finally, confiscation of the bribe is mandatory for the offences of giving and taking a bribe (art. 255 and 254 CC, and art. 290 and 289 NCC), receiving of undue advantages (art. 256 CC), active trading in influence (art. 6[1] of Law 78/2000 and art. 292 NCC), passive trading in influence (art. 257 CC and art. 291 NCC). The above incriminations of the CC and NCC make specific provision for the confiscation of "the money, valuables or any other goods that made the object of the offence and if these assets cannot be found, it is mandatory for the convicted person to pay their equivalent in money". There is one exception: in case of active bribery under articles 255 CC and 290 NCC, the bribe may be given back to the bribe-giver in certain circumstances (see also underneath, the

[14] Criminal Code
Art. 64 – The interdiction of certain rights
(1) The complementary penalty of forbidding some rights consists of forbidding one or more of the following rights:
a) the right to elect or to be elected within the public authorities or in public elective positions
b) the right to hold a position involving the exercise of state authority;
c) the right to hold a position or to exercise a profession or to carry out an activity of the same nature as the one the convicted person used to commit the offence;
d) parental rights;
e) the right to be a guardian or a trustee.
(2) The interdiction of the rights provided by letter b) can be ruled only together with the interdiction of the rights provided by letter a), unless the law provides otherwise.

developments on special defences). Art. 118 CC (112 NCC) also provides for the list of goods subject to confiscation[15]. Moreover, article 19 of Law 78/2000 provides for the mandatory confiscation of all offences cited in Chapter III of the Law, including those of articles 254 to 257 CC, if they are not returned to the injured person and to the extent that they do not serve to his/her compensation.

32. For comparative purposes, the offence of *Abuse of office against the public interests* provided by art. 248 CC is punishable with 6 months to 5 years' imprisonment and interdiction of certain rights, and *embezzlement* provided by art. 215^1 CC with 1 to 15 years' imprisonment or with 10 to 20 years' imprisonment and interdiction of certain rights, if the offence produced serious consequences.

Bribery of members of domestic public assemblies (Article 4 of ETS 173)

33. The definition of "public official" of articles 145 and 147 CC (see above, paragraph 14) is broad enough to include also members of domestic public assemblies such as members of the Parliament, local councillors, county councillors (this was confirmed in court practice – for instance 2 local councillors received final convictions in 2007 and 2008, and a senator in 2010). Therefore, the incrimination of active and passive bribery of articles 255 and 254 CC, and those of articles 289 and 290 NCC, apply accordingly.

34. The constitutive elements of the offence and the sanctions are the general ones. In the new Criminal Code (NCC), article 175, paragraph 1a covers any person who, permanently or temporarily, with or without remuneration, has attributions or responsibilities (…) within the legislative, executive, or judicial branch". The GET understood that covering all the three state powers would make it irrelevant in future as to which power the elected assembly member exerting only administrative functions would be assimilated.

Bribery of foreign public officials (Article 5 of ETS 173)

35. The replies to the questionnaire indicate that bribery of foreign public officials is criminalised by article 8^1 of Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts.

> **Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts**
> **Art. 8^1**
> The provisions of art. 254 – 257 of the Criminal Code (*taking bribe, giving bribe, receiving of undue advantages, trading in influence*) and of art. 6^1 *(buying of influence)* and 8^2 (*bribing a foreign or international official within international economic operations*) of the current law, shall be applied accordingly to the following persons too:
> a) officials or persons who carry out their activity based on a labour contract or other persons who have similar attributions within an international public organisation to which Romania is a party;
> b) members of parliamentary assemblies of the international organisations to which Romania is a party;
> c) officials or persons who carry out their activity based on a labour contract or other persons who have similar attributions within the European Communities;

[15] Art. 118 CC. - The following are subject to special confiscation:
a) the goods resulted from the deed provided in the criminal law;
b) the goods that were the instruments or that were intended to be the instruments for the perpetration of an offence, if they belong to the offender;
c) the goods which were granted for the perpetration of an offence or for the rewarding of the offender;
d) the goods obtained in a clear way for the perpetration of the offence, if they are not restituted to the injured person and to the extent to which they serve the injured person's compensation;
e) the goods possessed in non-compliance with the legal provisions.

d) persons with judicial positions within the international courts which have their competence accepted by Romania, as well as clerks working for such courts;
e) officials of a foreign state;
f) members of parliamentary or administrative assemblies of a foreign state.

36. This provision extends the applicability of articles 254 to 257 CC (passive and active bribery, receiving of undue advantages, trading in influence) to various categories of persons, including officials of foreign countries. Therefore, the applicable elements of the offence and the sanctions are those described earlier in respect of domestic public officials (see paragraphs 10 et seq) and those on trading in influence presented below (see paragraphs 55 et seq.). The replies to the questionnaire indicate no court cases or jurisprudential developments in respect of bribery of foreign public officials.

37. The provisions of this article were incorporated word for word into the new Criminal Code (NCC); article 294 NCC thus covers i.a. "officials of a foreign state" under lit. e):

Future provisions of the New Criminal Code

Art. 294 - Acts committed by foreign officials or in connection with them
The provisions of this chapter ["crimes of corruption"] shall apply to the following persons, if by international treaties, to which Romania is a party, it is not otherwise specified:
a) officials or persons operating under a contract of employment or other persons with similar responsibilities in an international public organisation which Romania is party;
b) members of parliamentary assemblies of the international organisations to which Romania is a party
c) officials or persons operating under a contract of employment or other persons with similar responsibilities within the European Communities;
d) persons with judicial positions within the international courts which have their competence accepted by Romania, as well as clerks working for such courts;
e) officials of a foreign state;
f) members of parliamentary or administrative assemblies of a foreign state.

38. As the GET noted, article 8^1 of Law no. 78/2000 also extends to the same categories of persons the incriminations of article 6^1 *(buying of influence)* and 8^2 (*bribing a foreign or international official within international economic operations*). The latter provides for an additional and specific incrimination of active bribery of foreign public officials, which is restricted to active bribery in connection with international economic operations. The protected subject is the "official of a foreign state" (or international organisation).

Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts
Art. 8^2 Promising, the offering or giving money, or other benefits, directly or indirectly to an **official of a foreign state** or an international organisation in order to influence that specific official to do or not to do an activity that is in his/her competence, with the purpose of obtaining an undue advantage within international economic operations, is punished with imprisonment from one to 7 years.

39. This article presents several analogies with the active bribery offences of article 255 CC and 290 NCC and it does not explicitly mention that the beneficiary can be a third person. The level of penalties – i.e. one to 7 years' imprisonment, combined with possible aggravating circumstances – is different (see the comparative table in paragraph 30). The Romanian authorities explained

that these various regulations were introduced for increasing visibility of the incriminations and in the context of Romania's accession to the EU (and the transposition of protocol K3).

40. The notion of "official" – as opposed to "public official" – was used in order to extend the sphere of the active subjects of corruption offences to some categories provided by the Criminal Law Convention on Corruption, as well as by the Convention on the protection of the European Communities' financial interests and its additional Protocols. Article 1 of Law no.78/2000 provides a general umbrella provision (not a definition) for the application of the Law:

> **Law no. 78.2000**
> **Art. 1** - The present law institutes measures for preventing, discovering and sanctioning of corrupt acts and applies to the following persons:
> a) who exercise a public position, irrespective of the way in which they were invested, within public authorities or public institutions;
> b) who fulfil, permanently or temporarily, according to law, a position or a task, to the extent to which they participate in decision-making process, or they can influence the decisions, within public services, autonomous *regies* [private sector entities entrusted with the providing of a public service], trading companies, national companies, national societies, cooperative units or other economic agents;
> c) who carry out control attributions according to the law;
> d) who grant specialised assistance to the units stipulated in letters a) and b), to the extent to which they participate in the decision-making process or can influence the decisions;
> e) who, irrespective of their position, achieve, control or grant specialised assistance, to the extent to which they participate in the decision-making process or can influence the decisions, with regard to operations that involve capital circulation, banking operations, hard currency exchange or credit operations, investment operations in stock exchanges, in insurance, in mutual investment or regarding the bank accounts or those assimilated to them, domestic and international transactions;
> f) who have a management position in a political party or formation, in a trade union, in an employer's organisation or in a non-profit society or foundation;
> g) other natural persons than those stipulated in letters a) - f), under the terms stipulated by law.

Bribery of members of foreign public assemblies (Article 6 of ETS 173)

41. Bribery of members of foreign public assemblies is criminalised under lit. f of article 8^1 of Law no. 78/2000, which, as indicated earlier, extends the scope of the provisions of art. 254 – 257 CC (*taking a bribe, giving a bribe, receiving of undue advantages, trading in influence*) and of art. 6^1 *(buying of influence)* and 8^2 (*bribing a foreign or international official within international economic operations*) of Law no. 78/2000. Article 8^1 lit. f) uses the following terminology (see the text in paragraph 36 above): "f) members of parliamentary or administrative assemblies of a foreign state."

42. Therefore, the applicable elements of the offence and the sanctions are those described earlier in respect of domestic public officials (see paragraphs 10 ff) and those on trading in influence presented underneath (see paragraphs 55 et seq.). The GET notes that contrary to the situation of domestic members of assembly (who are covered by the general provisions on public officials), Romanian law provides for a specific category of persons in relation to foreign assembly members. The law also spells out clearly that administrative and legislative functions are explicitly and equally covered by the incrimination. The replies to the questionnaire indicate no court cases or jurisprudential developments in respect of bribery of members of foreign public assemblies.

43. The above provision of article 8, Law 78/2000 was included in article 294 of the new Criminal Code (see paragraph 36 above); this article comprises the element "f) members of parliamentary or administrative assemblies of a foreign state".

Bribery in the private sector (Articles 7 and 8 of ETS 173)

Definition of the offence

44. The incrimination of the offences of taking and giving a bribe, as stipulated in the Criminal Code, uses the same concept both for taking and giving a bribe in the public sector and in the private sector. The difference results from the use of the terms "official" and "public officials", as defined by art. 147 para. (1) and (2) CC (see paragraph 14 ff). The term *official*, which is wider than, and thus includes the term *public official*, refers, according to article 147, para. (2) CC to "any other employee who performs a task in the service of another legal person, besides those provided by that paragraph"; this is to be understood as referring to legal persons other than those with a public character. Moreover, in the legal practice, art. 147, para. (2) CC must be interpreted in the way that: "*the person performing a task in the service of a legal person has the quality of an official, regardless of that person being registered or not with a labour contract and it is enough if that person has been given a task in the legal person's service which may or may not be remunerated*"[16].

45. In fact, article 8 of Law no. 78/2000 extends explicitly the above provisions (as well as articles 6^1 and 8^2 of the Law – respectively on active trading in influence and active bribery in the context of international business – see paragraphs 55 and 38) to categories of persons entrusted with responsibilities within trading companies, state controlled entities and all economic agents more generally.

> **Law no. 78/2000**
> **Art. 8**
> "The provisions of art. 254 - 257 of the Criminal Code and art. 6^1 and 8^2 of the present law also apply to the managers, directors, administrators and censors or to other persons with control attributions within trading companies, national companies and societies, autonomous administrations and within any other economic agents."

46. The replies to the questionnaire indicate that the offence does not involve a breach of duties by the bribe-taker since Art. 254 of the Criminal Code uses the following terminology: "for the purpose of accomplishing or not accomplishing or delaying the accomplishment of an act related to his duty attributions or for the purpose of acting against these duties". Also, the offences of taking and giving a bribe provided by art. 254 and, respectively, 255 of the Criminal Code, include but are not limited to the offences committed during business activities.

47. The GET noted that the new Criminal Code will contain a new provision which extends the applicability of various articles, including those on bribery and trading in influence, to categories of persons other than public officials:

> **Future provisions of the New Criminal Code**
>
> **Art. 308 - Crimes of corruption and committed in connection with the service by other persons**
> (1) Articles 289 to 292 and articles 297 to 301 related to public officials shall also apply to the deeds/acts committed by or in relation to persons who temporarily or permanently, with or without remuneration, exercise a task of any kind in the service of a natural person referred to in Article 175, para. (2), or within any legal person.
> (2) In this case, the special limits of the penalty are reduced by one third.

[16] The Decision 3954/1999 of the Supreme Court of Justice

48. The on-site discussions confirmed that this article is meant to cover corruption in the private sector: the incriminations provided in the new Criminal Code for passive and active bribery (art. 289 and 290 NCC), as well as passive and active trading in influence (art. 292 and 293 NCC), among other offences. The elements of the offence have been examined earlier (see the paragraphs on bribery of public officials). From the point of view of articles 7 and 8 of ETS 173, the incrimination is not based on a breach of duties nor limited to acts taking place in the course of business activity (it thus also applies in relation to bribery involving non-profit organisations, associations and other legal entities).

49. The sanctions applicable under the CC to private sector bribery are those examined earlier in respect of officials (see also the table in paragraph 30), including the interdiction of acting in a position or activity similar to the one used for committing the crime of corruption. As for the NCC, Article 308, paragraph 2 NCC will provide for lighter penalties since special limits are reduced by one third (for example, if the punishment is imprisonment from 3 to 9 years, by reducing both limits with one third, the resulting punishment will be imprisonment from 2 years to 6 years). One case of private sector bribery was described in the replies from Romania[17].

Bribery of officials of international organisations (Article 9 of ETS 173)

50. As indicated in paragraph 34, article 8^1 of Law 78/2000 extends the application of the CC to various categories of persons. These include in paragraph a) "officials or persons who carry out their activity based on a labour contract or other persons who have similar attributions within an international public organisation to which Romania is a party". Paragraph c) deals specifically with officials of the European communities. The coverage extends to officials, persons hired on the basis of a contract and other persons with similar responsibilities. As indicated earlier, the notion of "official" – as opposed to "public official" – was used in order to extend the sphere of the active subjects of corruption offences to some categories provided by the Criminal Law Convention on Corruption, as well as by the Convention on the protection of EU financial interests and its additional Protocols.

> **Article 8^1 of Law 78/2000**
> The provisions of art. 254 – 257 of the Criminal Code (*taking a bribe, giving a bribe, receiving of undue advantages, trading in influence*) and of art. 6^1 *(buying of influence)* and 8^2 (*bribing a foreign or international official within international economic operations*) of the current law, shall be applied accordingly to the following persons too:

[17] ***Criminal decision of Targu Mures Court of Appeal 32/A/2009 - Article 254 para. (1) and (2), with reference to art. 6 and 8 of Law 78/2000 and art. 255 para. (1) with reference to art. 6 and 8 of Law 78/2000 – giving and taking bribe***
The act of the defendant OI, who, as administrator, director and president of the Board of directors of a trade company, between May 2002 and November 2003, repeatedly and based on the same criminal resolution, demanded and received from defendant OV, manager and sole member of another trade company, the total amount of 218.150 lei, as building materials and manual labour for the house owned by defendant OI, in order to facilitate the obtaining, maintaining and extending of trade contracts between the two companies, meets the constitutive elements of passive bribery, under article. 254 para. (1) and (2) CP, with reference to art. 6 and 8 of Law 78/2000.
In addition, act of the defendant OV, who, as manager and sole member of a trade company, between February 2002 and November 2003, repeatedly and based on the same criminal resolution, offered and gave the defendant OI building materials and manual labour for building a house, in order for the defendant OI, in his capacity, to facilitate the obtaining, maintaining and extending of the trade contract between the two companies and to make payment with priority, meets the constitutive elements of active bribery, under art. 255 para. (1) CC, with reference to art. 6 and 8 of Law no. 78/2000.
In the light of the above mentioned facts, the sanction applied to OI by the court is 2 years' imprisonment, with suspension of the execution. The sanction applied to OV by the court is 2 years' imprisonment, with suspension of the execution.

a) officials or persons who carry out their activity based on a labour contract or other persons who have similar attributions within an international public organisation to which Romania is a party; (…)
c) officials or persons operating under a contract of employment or other persons with similar responsibilities within the European Communities.

51. As indicated in paragraphs 36 to 39: a) article 8^2 of Law 78/2000 provides, in addition, for a specific incrimination of bribery applicable also in relation to officials representing an international organisation, but which is limited to active bribery of such officials in the context of international economic operations; b) article 8^1 of Law 78/2000 was incorporated into the new Criminal Code as article 294 NCC, which thus covers the above category of international and European Community officials.

52. As a result of the legal technique employed (extension of the scope of general provisions), the elements of the offence and the sanctions applicable are those applicable to domestic public officials.

Bribery of members of international parliamentary assemblies (Article 10 of ETS 173)

53. As indicated in paragraph 34, article 8^1 of Law 78/2000 extends the applicability of the CC to various categories of persons. These include "b) members of parliamentary assemblies of the international organisations to which Romania is a party." Also, as indicated in paragraph 36, this article was incorporated into the new Criminal Code as article 294 NCC; the latter thus contains the same reference. Therefore, the elements of the offence and the sanctions applicable are those applicable to domestic public officials.

Bribery of judges and officials of international courts (Article 11 of ETS 173)

54. As indicated in paragraph 34, article 8^1 of Law 78/2000 extends the applicability of the CC to various categories of persons. These include "d) persons with judicial positions within the international courts which have their competence accepted by Romania, as well as clerks working for such courts." Also, as indicated in paragraph 36, this article was incorporated into the new Criminal Code as article 294 NCC. The latter thus contains the same reference. Therefore, the elements of the offence and the sanctions applicable are those applicable to domestic public officials.

Trading in influence (Article 12 of ETS 173)

Definition of the offence

55. Passive trading in influence is incriminated by article 257 CC and active trading in influence by article 6^1 of Law no. 78/2000.

Criminal Code

Art. 257 - Trading in influence
(1) The receipt or the request for money or other advantages or the acceptance of promises, gifts, directly or indirectly, for himself or for another, by a person who has influence or lets the other believe she/he has influence over an official to make him/her accomplish or fail to accomplish an act that is part of the latter's duty attributions, shall be punished by 2 to 10 years' imprisonment.

(2) The provisions of art. 256 para. (2) are accordingly applied. [NOTE: Para. 2 of art. 256 of the Criminal Code stipulates: "The money, valuables or any other goods received are confiscated, and if these cannot be found, the convicted person has to pay for their equivalent in money"].

Law no. 78/2000 on preventing, discovering and sanctioning the corruption crimes
Art. 6[1]:
(1) Promising, offering or giving money, gifts or other advantages, directly or indirectly, to a person who has influence or lets the other think (s)he has influence over an official to make him/her accomplish or fail to accomplish an act that is part of the latter's duty attributions, is punished by 2 to 10 years' imprisonment.
(2) The perpetrator is not punished if (s)he denounces the act before the criminal investigation body is notified about that act.
(3) The money, valuables or any other goods which represented the object of the offence provided in paragraph (1) are confiscated and if they are not found the convicted person is compelled to pay for their equivalent in money.
(4) The money, valuables or any other goods are given back to the person who gave them in the case provided in paragraph (2).

56. The new Criminal Code (NCC) criminalises both passive and active trading in influence, respectively under articles 291 and 292 NCC. These provisions are the same as the currently applicable ones mentioned above, with additional detailed wording for the behaviour expected from the official who is supposed to be influenced: "to expedite or delay the accomplishment of an act falling within the duties of his office or to perform an act contrary to these duties".

Future provisions of the New Criminal Code

Art. 291 - Trading in influence
(1) Requesting, receiving or accepting the promise of money or other advantages, directly or indirectly, for himself or another, committed by a person who has influence or lets the other believe she/he has influence over a public official and who promises that she/he will determine the latter to accomplish, not to accomplish, to expedite or delay the accomplishment of an act falling within the duties of his office or to perform an act contrary to these duties, shall be punished with imprisonment from 2 to 7 years.
(2) The money, valuables or any other goods received are subject to confiscation, and if they are no longer found, the confiscation of the equivalent shall be ordered.

Art. 292 - Buying of influence
1) Promising, offering or giving money or other advantages, directly or indirectly, to a person who has influence or lets the other believe she/he has influence over a public official, in order to determine the latter to accomplish, not to accomplish, to expedite or delay the accomplishment of an act falling within the duties of his office or to perform an act contrary to these duties, shall be punished with imprisonment from 2 to 7 years and prohibiting the exercise of rights.
(2) The perpetrator shall not be punished if he/she denounced the act before the criminal prosecution body has been notified about it.
(3) The money, valuables or any other goods shall be returned to the person who gave them, if they were given after denunciation provided for in para. (2).
(4) The money, valuables or any other goods given or offered shall be subject to confiscation, and if they are no longer found, the confiscation of the equivalent shall be ordered.

57. The GET also noted that article 13 of Law 78/2000 comprises an offence specifically related to a "person who has a leadership position in a party or in a political formation, in a trade union or in employer's organisation or a foundation":

Art. 13 of Law 78/2000
The deed of the person who has a leadership position in a party or in a political formation, in a trade union or in employer's organisation or a foundation that uses its influence or authority for the purpose of obtaining for himself or for somebody else money, goods or other undue advantages, shall be punished by imprisonment from 1 to 5 years.

58. The Romanian authorities explained that this offence is not meant to criminalise trading in influence but to address a specific form of abuse of power.

Elements/concepts of the offence

"Asserts or confirms that s/he is able to exert an improper influence over the decision-making of [any person…]"

59. The terminology used in art. 257 of the Criminal Code and in art. 6^1 of the Law no. 78/2000, as well as in articles 291 and 292 NCC, is as follows: "[…] has influence or lets the other think she/he has influence over an official, to make the latter […]". The criminal law doctrine[18] mentions that "to have influence" over an official means to have personal relationships or other kinds of relationships which show that the trafficker of influence enjoys the trust of that official. "To let the other think that she/he has influence" over an official means to mislead the buyer of influence into thinking that he/she can influence that official. The request is accomplished if the official really exists. Whether or not the perpetrator mentioned the name of the official, over which she/he claims to have influence, is of no importance. To make the other believe by only mentioning the capacity of the official is sufficient[19]. The important part is that the real or presumed influence of the perpetrator represents for the interested person the determinant reason for the transaction.

60. The Romanian incriminations in the CC, NCC and article 6^1 of Law 78/2000 do not refer to influence on decision-making (as in article 12 of the Convention); but they refer to the influence aimed at the accomplishment, non-accomplishment, delay or expedition of an act. According to the doctrine of the criminal law, in order for this criminal offence to exist, the legal person of which the official is a part, has to have the competency to perform the act with the view to which the criminal offence is traded and, moreover, the respective official has to have the competency to carry out the requested act. If the act for which the intervention is promised is not a part of the duties attributed to the respective official, the deed is not considered a trading in influence offence, but possibly an offence of fraud. The criminal offence exists whether or not the intervention took place, or, if through the promised intervention, a legal or illegal act was pursued.

"*any person referred to in Articles 2, 4 to 6 and 9 to 11 [of ETS 173]*"

61. The GET noted that article 257 CC (passive trading in influence) and article 6^1 of Law no. 78/2000 (active trading in influence) both refer to "officials" as the target of the influence. Since this expression includes persons employed in both the public and private sectors, the incrimination of trading in influence goes beyond the requirements of article 12 of the Convention (which does not extend to trading in influence within the private sector). The GET understands that given the fact that this notion may not necessarily capture the various categories of persons employed / working abroad or at international level, article 8^1 of Law no. 78/2000 ensures the

[18] Gh. Nistoreanu, Al. Boroi, Gh. Nistoreanu, Al. Boroi, "Criminal law. The special part", the IInd edition, ed. All Beck 2002, page 299, T. Toader, "Romanian Criminal Law. The special part", the IInd edition, ed. Hamangiu 2007, page 257
[19] Supreme Tribunal, the penal section, decision no. 19/1973

applicability of trading in influence also in respect to them ("the provisions of art. 254 – 257 of the Criminal Code [*taking a bribe, giving a bribe, receiving of undue advantages, trading in influence*) and of art. 6^1 [*buying of influence*] and 8^2 [*bribing a foreign or international official within international economic operations*] of the current law, shall be applied accordingly to the following persons (…)".

62. In the new Criminal Code (NCC), articles 291 and 292 NCC refer to "public officials" in the same way as the other corruption offences. As indicated earlier (see paragraphs 16 and 37, the new definition of (domestic) "public official" is provided in article 175 NCC and a new definition of article 8^1 of Law no. 78/2000 was incorporated into the provisions of article 294 NCC which extends the applicability of the chapter on corruption (thus including the trading in influence offences) to the various specific categories of foreign and international bribe-takers contemplated by the Convention. The new articles 291 and 292 NCC also refer to persons employed in the private sector, as specified in article 308 NCC.

"Promising, offering or giving" (active trading in influence); "Request or receipt, acceptance of an offer or promise" (passive trading in influence)

63. These elements are all present (with the exception of accepting an offer) both in the current provisions (CC and article 6^1 of Law 78/2000) and those of the NCC.

"Any undue advantage"

64. Article 257 CC and article 6^1 of Law 78/2000 refer to money, gifts or other advantages, whereas articles 291 and 292 NCC refer to "money or other advantages".

"Directly or indirectly"

65. Article 257 CC and article 6^1 of Law 78/2000, as well as the future provisions of articles 291 and 292 NCC all refer explicitly to those words.

"For himself or herself or for anyone else"

66. Whilst reference to third party beneficiaries is explicitly made in the passive trading in influence offences of article 257 CC, and the future provisions of articles 291 and 292 NCC, this is not the case for the current active trading in influence provisions of article 6^1 of Law 78/2000. The Romanian authorities stress, however, that the doctrinal solution mentioned earlier as regards bribery offences (third party beneficiaries are considered to be included even without an explicit reference to this) applies equally to trading in influence offences.

"Committed intentionally"

67. The replies to the questionnaire indicated that the offences of trading in, and buying of influence are committed with intention qualified by purpose.

"Whether the influence is exerted or not"; "*whether the influence leads to the intended result or not*"

68. The replies to the questionnaire indicate that "Whether or not the influence was exerted is not relevant. If the perpetrator really intervenes in order to make the official perform an illicit action, the criminal liability is established both for the offence of trading in influence and for instigation to abuse of office. However, if the trafficker of influence, after asking/receiving the benefit or

accepting the promise thereof from the influence buyer, offers/gives/promises advantages to the public official's, he/she will be held responsible both for the trading in influence and for the bribe giving". Whether or not the influence was successful is not relevant.

Sanctions

69. Under the current provisions of the CC and article 6[1] of Law 78/2000, active and passive trading in influence is punished with 2 to 10 years' imprisonment. In the NCC, it is 2 to 7 years; in addition, the judge must impose a disqualification from certain rights in case of active trading in influence under article 292 NCC (but not under article 293 NCC). In principle, the bribe is subject to mandatory confiscation except where special defences apply (see paragraphs 84 et seq.).

Court decisions

70. The replies to the questionnaire referred to a decision of the Valcea Tribunal decision 101/F/2008 where a public official was convicted for passive trading in influence on the basis of article 257 CC to 3 years' imprisonment (suspended sentence). The court found that the offender (who was also the executive secretary of a territorial branch of a political party) had sold his influence stemming from party affiliation[20]. In further court decisions, it was considered that it is irrelevant whether the claimed influence is real or not and whether the public official is identified or not (it is sufficient that reference is made to the position held by the public official)[21].

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[20] ***Valcea Tribunal decision 101/F/2008 - art. 257 CC related to art. 6. (1). a) and c) of Law no. 78/2000***
FV was holding the office of Executive Secretary of a territorial branch of a political party. According to the political party's statute, the Executive Secretary is part of the Permanent Delegation, which is the second signatory, along with the president of the organisation, of all documents issued by that branch, both to the National Council, as well as to other organisations.
Between 1992 and 1997, FV held the position of chief county inspector of the County Police Inspectorate, having over time other leading positions in the police.
Between 2001 and 2004, FV was the head of the control body of the Prefect's Office. From 2005 until being sent to trial, he was head of a Senatorial office, being at the same time Secretary Executive of the political party.
Holding over time executive positions, FV created and maintained the image of a powerful and influential person, being perceived as such by the public opinion.
The court noted that in December 2004, the witness CG reported to the DNA that, in 2004, he gave a significant amount of money to FV (13.000 RON), so that, based on his influence on officials with leading positions from the General Directorate of Public Finance and the Financial Guard, FV would intervene and influence controls performed at a trade company, managed by the denouncer CG.
FV was "regarded", by the public opinion, as Head of the Control Body of the Prefect's Office, being not only a friend of the director general of the General Directorate of Public Finance in the county, but also implying a certain authority over the other public officials, such as public finance or Financial Guard.
Therefore, FV left the impression that he had influence over the other public officials, being also members of the same political party, a fact that caused the buyer of influence, CG, to call on his services, in order to either delay the control on the trade company managed by CG, or obtain a favourable report, ascertaining that the trade company had no debts to state or that it carried out its activities in compliance with "the best practices of trade activity".
The court noted that: *"In respect of the objective side, the offence of trading in influence, provided by art. 257 CC, related to art. 1 lets. a) and c) and art. 6 of Law no. 78/2000, was committed in one of three possible actions, namely, by accepting the promises. By its nature, trading in influence is a negotiation, a sale of the influence one has or lets other believe he/she has on a public official, by the fact that, in exchange of the benefit or advantage received or claimed, he/she obliges himself/herself to intervene in the interest of a third party to whom he/she concludes the agreement".*
Related to the special subject of trading in influence, FV is a public official, being employed on the basis of a working contract within the Control Body of the Prefect's Office, having the position of executive secretary of a territorial branch of a political party.
Taking the above into consideration, the sanction applied by the court was 3 years' imprisonment, with suspension of the execution. The second appeal court, the High Court of Cassation and Justice, maintained the decision of the tribunal.
[21] High Court of Cassation and Justice, Penal Section, decision no.1083 of 25 March 2009, as well as decisions no.3690 of 10 November 2009, no. 3363 of 21 October 2009, no. 1470 of 2 April 2009, no. 3420 of 35 June 2009, no. 2398 of 25 April 2009.

Bribery of domestic arbitrators (Articles 1-3 of ETS 191)

71. The (current) Criminal Code and Law no. 78/2000 do not provide for an explicit incrimination of corruption of "arbitrators". This category of persons is in fact assimilated to the notion of "official" provided by art. 147 para. (2) CC and the elements of the offence of bribery of domestic public officials apply accordingly. The Romanian authorities explain that in the judicial practice, according to art. 147 para. (2) CC, *the referee designated by the Romanian Football Federation* was considered to be an "official", since he/she exerts a task in the service of a legal person of private law, namely the Referee Central Commission within the Romanian Football Federation, an activity that is restricted to the notion of "official" as a notion defined by art. 147 para. (2) of the Criminal Code."[22] In support of this solution, the Tribunal invokes a decision of the Superior Court of Justice[23] through which it was shown that "the person who exerts a task in the service of a legal person has the capacity as an official, whether or not he/she has an employment contract, being sufficient the existence of a task in the service of the respective legal person, a task that may or may not be remunerated". For the time being, there have been no court decisions regarding bribery of arbitrators – members of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, but the same reasoning used for sports referees is applied also in this case.

72. Bribery of arbitrators is expressly criminalised in article 293 of the new Criminal Code (NCC) as follows:

> **Future provisions of the NCC**
>
> **Art. 293**
> The provisions of articles 289 and 290 shall apply accordingly in relation to persons who, on the basis of an arbitration agreement, are called upon to decide on a dispute settlement given to them by the parties to the agreement, irrespective if the arbitration procedure is conducted according to the Romanian law or another law.

73. Bribery of arbitrators is punishable with the sanctions applicable to bribery of "officials" provided in the CC and those on domestic public officials provided in the NCC (see paragraph 30 for an overview).

Bribery of foreign arbitrators (Article 4 of ETS 191)

74. The replies to the questionnaire indicate that there is no such offence in the current Criminal Code nor in Law 78/2000. In the NCC, bribery of foreign arbitrators is not explicitly provided for.

Bribery of domestic jurors (Article 1, section 3 and Article 5 of ETS 191) and bribery of foreign jurors (Article 6 of ETS 191)

75. The replies to the questionnaire indicate that the current Romanian legal system does not know the institution of jurors, and that therefore, the current Criminal Code and Law 78/2000 do not provide for the incrimination of bribery of domestic or foreign jurors. The situation is the same under the NCC.

[22] The closing no. 29 CC/23.04.2009 of Arges Tribunal ruled with the occasion of taking the temporary custody measure against a number of defendants among whom a football referee.
[23] Decision 3954/1999 of the Superior Court of Justice.

Other questions

Participatory acts

76. In the Criminal Code (CC), participatory acts are covered by Chapter III, i.e. articles 23 to 31 CC, which provide for the various categories of participants (author, instigator, accomplices). By virtue of article 27 CC, the instigator and the accomplice are subject to the penalty applicable to the author. The same applies in case of participation provided for by article 31 CC. In the new Criminal Code (NCC), participatory acts are covered by articles 46 to 52 NCC; they provide for the same mechanisms as the current provisions. The NCC also explicitly regulates the co-author, thus reflecting developments in legal theory and jurisprudence.

Jurisdiction

77. The replies to the questionnaire quoted the text of articles 3 to 6 CC which provide jurisdiction for all bribery and trading in influence offences committed within the territory of Romania (principle of territoriality, Article 3 CC) as well as those committed abroad by Romanian citizens and permanent residents of Romania (principle of (extended) nationality, Article 4 CC). Article 5, paragraph 1 gives universal jurisdiction to prosecute in Romania acts against the state security or against a Romanian citizen if the prosecutor general has consented to the proceedings. As the GET was confirmed on-site, the relevance of this clause is marginal in the context of the fight against corruption (except where there is a connection between corruption and the state security). In all other circumstances not covered by article 5 CC, Romania has universal jurisdiction on the basis of article 6 CC for offences committed outside Romania by a foreign citizen or by a person without citizenship and who is not residing in Romania if the principle of dual criminality is fulfilled and if the perpetrator is in Romania.

Criminal Code

Art. 3. - Criminal law applies to offences committed on the Romanian territory.

Art. 4. - Criminal law applies to offences committed outside Romania, if the perpetrator is a Romanian citizen or if, possessing no citizenship, the perpetrator has residence in Romania.

Art. 5. – (1) Criminal law applies to offences committed outside Romania, which act against the Romanian state security or against a Romanian citizen's life, or which seriously damaged physical integrity or health of a Romanian citizen and which are committed by a foreign citizen or by a person without citizenship and who is not residing in Romania.
(2) The initiation of a criminal action for the offences provided in the previous paragraph must be preliminarily authorised by the general prosecutor.

Art. 6. – (1) Criminal law also applies to other offences than those provided in art. 5 paragraph 1, namely to offences committed outside Romania by a foreign citizen or by a stateless person who is not residing in Romania, if:
a) the respective action is considered a offence as well by the criminal law of the country where the action was committed;
b) the perpetrator is in the country.
(2) For offences against the Romanian state interests or against a Romanian citizen, the offender can be tried also in case his extradition has been obtained.
(3) The provisions in the preceding paragraphs do not apply if, in accordance with the law of the country where the offender committed the offence, there is any cause preventing initiation of penal pursuit or continuation of the criminal trial or penalty enforcement, or when the penalty was executed or considered as having been executed. When the penalty was not executed at all or only part of it was executed, the next procedure will be in accordance with legal provisions on compliance with foreign sentences.

78. During the on-site visit, the authorities explained that territorial jurisdiction needs to be interpreted in the context of article 143, paragraph 2 CC which provides for extended territorial jurisdiction, i.e. an offence is considered to be committed in Romania if an act of execution or a consequence of the offence occurred on Romanian territory:

Criminal Code

Art. 143. – (1) "Offence perpetrated on the country's territory" means any offence committed on the territory mentioned in article 142 or on a Romanian ship or plane.
(2) An offence is considered committed on the country's territory also when an act of execution or a consequence of the offence occurred on this territory or on a Romanian ship or plane.

79. To date, there has been no court decision dealing with jurisdiction issues in relation to bribery offences.

80. In the New Criminal Code (NCC), the above principles are contained in articles 8 to 11 NCC: article 8 NCC on the territoriality principle, to be understood as applying also to acts committed partly in Romania and aboard aircrafts and vessels operating under Romanian flag; article 9 NCC on nationality-based jurisdiction – including for legal persons; article 10 NCC on extended jurisdiction justified by the security of the Romanian state and its citizens; article 11 NCC on extended jurisdiction under certain conditions, and article 12 NCC on the alternative character of domestic provisions compared to international treaty rules:

New Criminal Code

Art. 8 NCC - Territoriality of criminal law
(1) Romanian penal law shall apply to offences committed on Romanian territory.
(2) The Romanian territory means the extent of land, territorial waters and soil, subsoil and airspace between frontiers.
(3) The offence committed on Romanian territory is any crime committed on the territory indicated in para. (2) or a Romanian-flagged vessel or on an aircraft registered in Romania.
(4) The offence is deemed committed on Romanian territory when that territory or by a Romanian-flagged vessel or aircraft registered in Romania was made an act of execution, or aiding or abetting occurred, even in part, result of the offence.

Art. 9 NCC - The personality of the criminal law
(1) Romanian criminal law shall apply to crimes committed outside the country by a Romanian citizen or by a Romanian legal person, if the penalty provided by Romanian law is life imprisonment or imprisonment of more than 10 years.
(2) In other cases, the Romanian penal law shall apply to offences committed outside the country by a Romanian citizen or by a Romanian legal person if the act is intended to crime and criminal law of the country where it was committed or whether it was committed in a place that is not subject to the jurisdiction of any state.
(3) The initiation of the criminal action shall be done with prior permission of the general prosecutor of the prosecutor's office attached to the Court of Appeal in whose territorial area the first prosecutor's office notified is located or, where appropriate, the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Art. 10 NCC - The reality of the criminal law
(1) The criminal Romanian law shall apply to offences committed outside the country by a foreign citizen or a stateless person, against the Romanian state, against a Romanian citizen or a Romanian legal persons.
(2) The initiation of the criminal action shall first be authorised by the general prosecutor of the High Court of Cassation and Justice and only if a the act is not subject to legal proceedings in the State in which it was committed.

Art. 11 NCC – Universality of the criminal law
(1) The Romanian criminal law shall also apply to other offences than those provided in art. 10, committed outside the country by a foreign citizen or a stateless person who is voluntarily in Romania, in the following cases:
a) an offence was committed which the Romanian state has undertaken to suppress on the basis of an international treaty, whether provided or not by the criminal law of the State on whose territory it was committed;
b) the extradition or surrender of the offender was demanded and it was refused.
(2) The provisions of para. (1) b) shall not apply when, under the law of the state where the offence was committed, there is an issue that prevents the initiation of the criminal action or further criminal proceedings or execution of sentence or when the sanction was executed or is deemed to have been executed.
(3) When the sentence was not executed or was executed in part, the legal proceedings regarding laws relating to recognition of foreign judgments shall be applied.

Statute of limitations

81. Leaving aside crimes against peace and mankind, the prosecution of criminal offences committed by natural persons is time-barred, under article 122 CC, after the lapse of a period of: a) 15 years in case the sanction provided by the law is a life sentence or imprisonment for more than 15 years; b) 10 years, when the sanction provided by the law is more than 10 years' (but less than 15 years') imprisonment; c) 8 years, when the sanction provided by the law is more than 5 years' (but less than 10 years') imprisonment; d) 5 years, when the sanction provided by the law is more than one year (but less than 5 years') imprisonment; e) 3 years when the sanction provided by the law is imprisonment up to one year or a fine. Since the adoption of Law no. 278 of 2006, special rules are applicable to the prosecution of offences committed by legal persons[24]. In the new Criminal Code (NCC), the time limits provided by article 154 NCC are the same (15, 10, 8, 5 and 3 years respectively).

82. In case of continuous crimes, the term is running from the date of termination of the action or non-action, and in case of repeated crimes, since the date of the last action (or non-action). The term is interrupted by every procedural step which is to be communicated to the defendant and it cannot be prolonged, in any event, by more than one half of the initial term.

83. The replies to the questionnaire contained no further explanation as to how corruption offences fit into the above categories. The GET noted that in the light of the level of sanctions discussed earlier in this report (see paragraph 30) and the information available in the NCC, the statute of limitation is 8 or more years for the majority of bribery and trading in influence offences of the CC, NCC and Law 78/2000 (5 years for active bribery under article 255 CC and for receiving of undue advantages under art. 256 CC, as well as for private sector bribery under article 308 NCC).

Defences

84. The replies to the questionnaire describe three series of special defences under Romanian legislation: 1) in case where the bribe-giver was constrained to commit the act; 2) in case the bribe-giver denounces him/herself before the investigation body is notified about the offence; 3) in case the offender assists the National Anti-Corruption Directorate in elucidating the crime.

85. As regards those cases where the bribe-giver was constrained to commit his/her act, the provisions on active bribery of article 255, paragraph (2) CC and 290 paragraph (2) NCC provide

[24] The statute is as follows for offences committed by legal persons: a) 10 years, when the penalty for the offence committed by the natural person is life sentence or imprisonment for over 10 years; b) 5 years, when the penalty for the offence committed by the natural person is up to 10 years imprisonment or a fine.

that "(2) The (…) deed is not considered an offence when the person giving the bribe was constrained by any means by the person taking the bribe." The Romanian authorities explain that, according to criminal law doctrine[25], the constraint of art. 255 paragraph (2) CC has to have a real character and be strong enough to suppress or restrain the freedom or the ability of self-determination of the person over which it is exerted, to compel the person to the behaviour imposed or claimed by the criminal, under the circumstances in which the briber pursues the achievement of his/her legal interests. The constraint may be exerted by any means. "Constraint" also implies that the bribe-giving initiative does not belong to the briber.

86. The constraint provided by art. 255, paragraph (2) is different from the general cause for removing the criminal character of the deed provided by art. 46 of the Criminal Code under the concept of "moral constraint". The difference lies in the fact that, on the one hand, in the case of art. 46, the means of constraint is represented by the threat of a serious danger and, on the other hand, in the case of art. 255, paragraph (2), the constraint can be achieved by any means. Even the rejection of the official to perform the legitimate act requested by the briber, if the official will not receive certain advantages from the briber, under certain circumstances and taking into account the psychological state of mind of the briber, can represent an act of constraint. In addition, if, in the case of moral constraint provided by art. 46, the person over whom the constraint is exerted has no other option, the danger that he/she is threatened with can be removed only by performing the imposed deed, in the case of art. 255 para. (2), the person over whom the constraint is exerted would theoretically have other possibilities, for example to renounce the legitimate act requested of the official (for instance, the patient leaves the hospital because s/he is not willing to pay or cannot afford the bribe requested by the surgeon in order to operate him/her). The importance of the act for the respective applicant makes the latter yield to coercion[26].

87. The constraint related to the bribe-giving was excluded in the judicial practice in the following circumstances (as examples): a) if the briber, with a view to obtaining an advantage, gave to the defendant a sum of money instead of notifying the competent bodies to take the necessary measures in order for his/her request to be legally solved[27]; b) when the initiative belonged to the briber, even if, afterwards, the official kept insisting on receiving the bribe[28].

88. As for the <u>second series of special defences – cases where the bribe-giver denounces him/herself</u> before the investigation body is notified about the offence – the provisions on active bribery of article 255, paragraph (3) CC and 290 paragraph (3) NCC provide that "The briber is not punished if she/he informs the authorities of his/her deed before the investigation body is notified of the crime". The same rule applies in case of active trading in influence, according to the current incrimination of article 6^1 paragraph 2 of Law no. 78/2000 and to the new provisions of article 292, paragraph (2) NCC. In criminal law commentaries[29], the cause for not punishing the defendant is valid if, in the first place, the briber denounces the deed whether or not the form of the denouncement is according to the law. The fact that the perpetrator acknowledges the deed, before the criminal investigation body which ascertained the perpetration of the bribe-giving offence, does not have the character of a denouncement in the meaning of art. 255, para. (3) of the Criminal Code. Secondly, the denouncement has to take place before an authority and it does not matter whether the latter has formal jurisdiction to deal with the criminal matter in question

[25] Gh. Nistoreanu, Al. Boroi, op. cit., page 293
[26] V. Dongoroz, S. Kahane and others, op. cit, page 142
[27] Supreme Tribunal, criminal section, decision no. 786/1977
[28] Supreme Tribunal, criminal section, decision no. 2878/1972
[29] Gh. Nistoreanu, Al. Boroi, op. cit., pag. 294

(the respective authority is itself under the obligation to notify the competent criminal investigation bodies). Thirdly, the denouncement has to take place before the criminal investigation body is notified about the offence.

89. In both types of defence mechanisms described above, the bribe must be returned to the bribe-giver since under article 255, paragraph (5) CC as well as under article 290, paragraph (4) NCC, "The money, valuables or any other goods are returned to the person who gave them in the cases described in para. (2) and (3)". It stems from the previous paragraph that for active trading in influence offences, only the second category of special defence (self-denunciation) is relevant and in those cases, the mandatory restitution provided in article 6^1, paragraph 4 of Law 78/2000 and in the new article 292, paragraph 3 NCC is applicable.

90. The last defence mechanism (in case the offender assists the National Anti-Corruption Directorate in elucidating the crime) is provided in art. 19 of the Government Emergency Ordinance no. 43 on the National Anti-corruption Directorate: "Art. 19 – The person who committed one of the crimes assigned by the current emergency ordinance in the competence of the National Anti-corruption Directorate, and, during the criminal investigation denounces the crime and facilitates the process of identifying and holding criminally liable other persons who committed such crimes, shall benefit from a reduction to half of the penalty limits provided by the law."

91. Contrary to the first two mechanisms which provide for a possible total exemption from liability, the mechanism under the Government Emergency Ordinance no. 43 (which is similar, in the GET's view, to what can be found for "collaborators of justice" or "pentiti" in other countries) provides for partial exemption by halving the upper and lower limits of the applicable sanctions.

General statistics on cases of bribery and trading in influence

92. The Romanian authorities have provided detailed statistics regarding the number of criminal investigations / prosecutions and convictions pertaining to corruption offences for the years 2007, 2008 and 2009 (see the summary in the table below). The GET noted that over these three years, the most frequently pronounced sentence is imprisonment from 1 to 5 years. Suspended sentences were pronounced in approximately 75% of the total number of convictions. The Romanian authorities further indicated that in the first 10 months of 2010, the ratio between sentences with imprisonment and suspended sentences has evolved and that only approximately 55% of the total number of convictions has been pronounced with suspended sentences.

	2007	**2008**	**2009**
Corruption cases handled by the prosecutors (total)	6565	6639	7901
Solved by the prosecutors (Nr of suspects involved)	3896 (1873)	3489 (2055)	3815 (1640)
Out of these, sent to trial (Nr of defendants)	312 (541)	270 (698)	307 (662)
No of convicted persons	286	213	186

Legislative amendments

93. As indicated in paragraph 8, the New Criminal Code – NCC (Law no. 286 of 17 July 2009) was published in the Official Journal of Romania no. 510 of 24 July 2009; as expected, a draft law on the application of the NCC was eventually prepared and, published, on 22 June 2010, on the

website of the Ministry of Justice[30] and sent to the Government, for approval, before submission to the Parliament. It reportedly contains practical measures for the transition between the CC and NCC (especially as regards sanctions) and includes some amendments to Law no. 78/2000, aiming to increase the overall consistency of the legal framework since the NCC is meant to incorporate provisions from Law no. 78/2000. The draft law on the application of the NCC, including the revision of Law no. 78/2000, is expected to be finalised by the end of the year 2010 and it would appear that the draft NCC can still be amended before it enters into force. The Government also started, in February 2009, to prepare a New Criminal Procedure Code – NCPC –, which was subsequently adopted and published in the Official Journal of 15 July 2010. A study on the impact of the NCC and NCPC is planned for 2011 and the GET was told that it was reasonable to expect the entering into force of both codes in 2012 – "hopefully" as some interlocutors added. The GET noted that this legislative process was criticised in April 2009 by a group of 19 NGOs for the way it took place (insufficient consultations, impact study done *ex post facto* and not before the adoption of the NCC etc.). After the visit, the Romanian authorities informed the GET that the current version of the draft Law on the application of the NCC foresees its entering into force on 1 October 2011.

III. ANALYSIS

94. Given the context described in the previous paragraph, the Greco Evaluation Team (hereinafter the GET) included in its analysis not just the currently applicable legislation, but also the future provisions likely to be enforced in 2011. In principle, the New Criminal Code (NCC) is a final version and the debate of its content is closed, but the Romanian authorities advised that technical changes could still be made before its final enactment.

95. The combination of the provisions contained in the Criminal Code (hereinafter, the CC) and Law no. 78/2000 *on preventing, discovering and sanctioning of corruption acts* (hereinafter, Law 78/2000) results in a legal framework on corruption which is comprehensive and reflects largely the requirements of the Criminal Law Convention on Corruption (ETS 173) and its protocol (ETS 191). Most interlocutors stressed that the current context would not make it possible to adopt again as powerful a piece of legislation for the fight against corruption as was Law 78/2000. This being said, from the point of view of legal technique, the co-existence of incriminations of bribery and trading in influence in the Criminal Code and in Law 78/2000 has led to a legal framework characterised by occasional overlapping and redundancies. The situation has at times led to inconsistent court practice, as the High Court of Cassation and Justice pointed out in a judgement of 2007 (Judgement LIX (59) of 24 September 2007). Although the – yet to be enforced – NCC incorporates several provisions on bribery and trading in influence contained in Law 78/2000, it was unclear at the time of the visit how the latter will be affected when the NCC is enacted. It would appear that the current version of the draft law implementing the NCC repeals all the bribery and trading in influence offences (and leaves untouched most of the other offences and arrangements of Law 78/2000, which constitutes the legal basis for the jurisdiction of the National Anti-Corruption Directorate). The GET strongly believes that in the light of the perceived instrumentalisation of law in Romania[31], special care should be taken to ensure a smooth

[30] According to art. 446, para. (3) of the Law no. 286/2009, within 12 months from the publication of the Law in the Official Journal, the Government will have to submit to Parliament for adoption the draft law on the enforcement of the Criminal Code.

[31] The fact is that in recent years, various interlocutors of the GET inside and outside state institutions, observed a strong politicisation of the legislative process and amendments were sometimes passed in a way that they were perceived to be disguised amnesties or to hinder the prosecution of corruption or corruption-related offences; for instance a number of proceedings have been initiated in recent years against senior officials and a large part of the political class who had used undue influence and complicity in the financial institutions to obtain loans that did not correspond to their financial capacity;

transition between the current and the future Criminal Code by means of transitional arrangements in the law enforcing the NCC, as has been done in other countries when introducing a new Criminal Code.

96. The Romanian legislation dissociates active and passive forms of bribery and trading in influence, in line with the spirit and requirements of ETS 173: in practice, the bribe-taker or bribe-giver are prosecutable separately. It seems broadly accepted in theory and practice that there is no need that both be in agreement (that the solicitation of either party was accepted by the other) for them to be prosecutable. It was confirmed to the GET that in practice, in case of accepted solicitation, a clear link has to be proven between the undue advantage and the act, as well as between the bribe-giver and the bribe-taker. In this context, it should be stressed that in Romania, evidence in criminal matters is free and can be based on objective factual circumstances to substantiate this link. Nevertheless, many cases prosecuted under the current procedural legislation involve the use of audio-video recording in connection with a controlled delivery (or simulated offence) to apprehend the offender whilst committing the offence.

97. Passive and active bribery of domestic public officials (including members of domestic public assemblies) is criminalised under articles 254 and 255 CC. The offence applies to bribery in connection with a future (positive or negative) act of an "official", including the delaying of such acts. Article 256 CC criminalises the receiving of undue advantages by an "official" in connection with an already accomplished act; the experience in other countries has shown that this is a useful tool not just to facilitate the prosecution of bribery where payments take place after the expected behaviour of the official (and where the existence of a prior agreement cannot be substantiated), but also to address the phenomenon of regular "greasing" in order to retain a contractual relationship or nourish a positive inclination of the official. Interlocutors of the GET stressed that the offence of article 256 CC was not retained as a separate offence in the (future) NCC; however, the wording retained for the active and passive bribery offences of articles 289 and 290 NCC ("in connection with acting, refraining from acting or delaying an act") can be read as including both *ex ante* and *ex post* bribery or payments of a bribe. The GET considers that for obvious reasons the absence of a provision on active bribery mirroring article 256 CC is problematic. Since article 256 CC and *ex post* bribery generally go beyond the requirements of articles 2 and 3 of the Convention, the Romanian authorities may wish to ensure that the future incriminations of both passive and active bribery in relation to acts already committed are harmonised, as is foreseen in articles 289 and 290 of the – yet to be enacted – New Criminal Code.

98. Concerning the central elements of active and passive bribery (giving, promising, offering, requesting, receiving, accepting an offer or promise), the bribery offences of the CC (as well as those of the future NCC and all current and future trading in influence offences) use the same wording as articles 2 and 3 of the Convention except that the current and future offences of passive bribery and passive trading in influence (articles 254 CC, 257 CC, 289 NCC and 291 NCC) refer only to the "acceptance of a promise" and not to the "acceptance of an offer or promise". Romanian legal theory does make a distinction between "offering" and "promising" and both concepts are included in the definition of active bribery and trading in influence offences[32].

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the provisions of Law 78/2000 which provided for a specific offence in this area was repealed shortly before the on-site visit and the offenders were released from liability despite efforts by the anti-corruption bodies to obtain a recognition of the applicability of other, less specific criminal offences (fraud etc.). One interlocutor of the GET also expressed fears that some of the new provisions of the NCC could be misused in due course by certain layers of society to obtain an annulment of current proceedings and earlier sentences concerning corruption offences.

[32] The GET was informed on site that according to Romanian legal theory, the "promising" concerns a future undue advantage whereas "offering" implies that the undue advantage is actually presented to the potential bribe-taker. As

The Romanian authorities acknowledge this technical gap in the passive bribery and trading in influence offences but they stress that it has had no practical implications until now and that legal theory has also confirmed that this was a technical mistake without legal consequence for the scope of the incrimination. Nevertheless, the Romanian authorities may wish to keep this matter under review.

99. Since the current Criminal Code offences are basically the original ones from 1969, Romania has inherited from the communist period a broad definition of "officials" (which basically covers any person employed by a public or private law entity) and of "public officials" (which is restricted to persons performing a public task at central and local level or who are entrusted with such a task by a public body)[33]. The GET was informed that changes in society and the economy have inevitably triggered some legal controversies[34] as to the exact scope of these concepts. For the time being, the possible uncertainties are apparently without real consequence since categories of persons such as mayors, ministers and judges are covered, in line with article 1 of ETS 173. Likewise, there have been no real difficulties in connection with the concept of "official with control attributions" in the passive bribery offence of article 254, paragraph 2 CC. The NCC aims at simplifying the situation since the basic definitions of article 175 NCC will only provide for the concept of "public official" and the bribery and trading in influence offences will in principle refer only to "public officials" (the parliament itself reportedly discussed the scope of the definition for three days when it examined the draft NCC). The GET notes the persistence of minor inconsistencies – apparently of a technical nature – that the Romanian authorities may wish to look at in due course (in particular article 294 NCC still contains two references to "officials" as opposed to "public officials").

100. The current incriminations of bribery and trading in influence of the CC and of Law 78/2000 use various wordings to designate the undue advantage, which is clearly not limited to "money" since a more general concept is always used to cover other forms of advantage ("another advantage", "other advantages not due to the official", "another benefit"), sometimes also besides "gifts". The on-site discussions confirmed that the concept of advantage or benefit is to be understood broadly under Romanian law as including also immaterial advantages (favours, titles and honorific distinctions etc.)[35] and the GET did not come across major problems in this area. On the other side, the GET wondered about the occasional absence of a reference to the fact that the advantage has to be undue, which suggests that there are situations where any advantage is "undue" by nature and others where a distinction has to be made between acceptable advantages and illegal ones. This lack of consistency still exists in the NCC but here too, the GET was not made aware of particular difficulties in practice. The Romanian authorities may wish to keep this matter under review.

101. The on-site discussions confirmed that the expression "an act related to the duty attributions", which is present in all the current and future provisions on bribery and trading in influence, is a source of problems in practice since the investigation/prosecution must show that the act is

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indicated in the explanatory report of the Convention, *"Promising" may, for example, cover situations where the briber commits himself to give an undue advantage later (in most cases only once the public official has performed the act requested by the briber) or where there is an agreement between the briber and the bribee that the briber will give the undue advantage later. "Offering" may cover situations where the briber shows his readiness to give the undue advantage at any moment. Finally, "giving" may cover situations where the briber transfers the undue advantage.*

[33] The Romanian concepts used are *functionariul* and *functionariul public*.

[34] As a result, certain professions such as doctors, lawyers, notaries do not fall under either concept unless the person is employed by a public or private law entity.

[35] The authorities advised that in practice, when it comes to the application of confiscation measures, they may resort to specific civil law procedures to cancel certain decisions and their effect.

indeed part of the official description of the duties or the post of the bribe-taker. Practitioners referred to concrete bribery cases in which a formal description of duties was not available or had been difficult to obtain. The authorities explained after the visit that in court practice, the above expression is interpreted in a rather broad manner in the sense that these attributions can be identified not only in a formal job description, but also in the law or in the internal regulations of a public institution or body and it does not matter if the official has only limited attributions in relation to the requested act. A court decision provided to the GET after the visit further supports this interpretation[36]. However, the GET was informed that the current approach followed by the criminal legislation leaves aside the possibility for an official to ask or receive a bribe in return for an act which is entirely outside the scope of his/her duties, but that he/she has the opportunity to commit because of the function he/she occupies. For example, a court clerk could be bribed for adding or removing documents from a judicial file that is not assigned to him/her. The authorities explained that in principle, the official's behaviour would in any event be prosecuted under other offences, such as fraud or abuse of office. However, the GET doubts that all cases of bribery within the meaning of Articles 2 and 3 of the Criminal Law Convention would indeed be covered by the provisions currently in force and those of the NCC or more general offences of the criminal code (e.g. cases where a person unsuccessfully asks a public official to act outside his/her formal competence). Moreover, as regards trading in influence, article 12 of the Convention addresses the improper influence over the decision making of an official and the offence is not defined by reference to the actual duties of the official who is the target of the influence; the liability of the one "buying" or "selling" influence should not be limited by the way the duties and competencies of the official are defined. The condition that the act of the official pertains to the official duty attributions adds an – excessively restrictive – additional element to the criminalisation of bribery and trading in influence which is clearly at variance with the wording and the spirit of the Criminal Law Convention. This element may make prosecution of the offence more difficult by requiring proof that the official was expected to act within his/her competence. The GET therefore recommends **to criminalise active and passive bribery in the public sector and trading in influence so as to cover all acts/omissions in the exercise of the functions of a public official, whether or not within the scope of the official's competence.**

102. The current offences of articles 254 and 255 CC (passive and active bribery of officials) and 256 CC (receiving undue advantages from an official), and the specific bribery offence of article 8^2 (active bribery of an official representing a foreign state or international organisation in the context of international economic operations) do not state explicitly that the undue advantage can be for a third party beneficiary. The same goes for the active trading in influence offence of article 6^1 of Law 78/2000. In fact, only the passive trading in influence offence of article 257 CC reflects the requirements of ETS 173 in this respect. The future provisions on both passive and active bribery of article 289 and 290 NCC cover clearly this kind of circumstance, but for some reason this will still not be the case for all offences of trading in influence[37]. As indicated in the descriptive part, it is considered in legal theory that the offence is completed where the beneficiary of the undue advantage is a third party and the example given in paragraph 26 seems to support this theory. But the on-site discussions showed that there are different views on this matter: some consider that it is the expression "other (undue) advantages" which covers third party beneficiaries; for others, it is the expression "directly or indirectly" (one interlocutor, however,

[36] In one of its decisions, the High Court of Cassation and Justice (penal Section, decision 3334/2004) considered that "the condition that the official's act be committed in relation with the accomplishment of his duty attributions is met also in the situation where the accomplishment of the act falls in the attributions of another official if the perpetrator, by the way he performs his own duties, is in a position to influence the competent official in the accomplishment of the act".

[37] The active trading in influence offence of article 292 NCC does not provide for the third party beneficiary element and it makes no cross reference to the passive trading in influence offence of article 291 NCC.

restricted this to situations where the third party acted in fact with criminal intent, as an accomplice of the bribe-giver or taker). Case law discussed on site was of variable relevance (in one famous case which involved a third person as beneficiary, the undue advantage was in fact also partly for the public official himself, in a couple of other cases, the third party was the sole beneficiary). Besides that, the on-site discussions confirmed that there is sometimes a strong belief in society that these situations do not constitute a corruption offence[38]; this could constitute an incitement to circumvent the incriminations by transferring the undue advantage directly into the possession of third parties. The GET considers that it is important to further limit the risks that cases be jeopardised, and that incriminations need to be clear enough that it is irrelevant whether the bribe is for the bribe-taker or a third party (irrespective of the latter's criminal intent or participation in a corruption offence). This could be clarified in various ways (besides a legal amendment). The GET recommends **to take the appropriate measures to ensure that all offences of bribery and trading in influence unambiguously cover instances where the advantage is not intended for the official him/herself but for a third party who may not be involved in the offence.**

103. As indicated earlier, the bribery and trading in influence provisions contained in the current CC do not address the international dimension of corruption. Art. 8^1 of Law 78/2000 (which will be incorporated word for word into article 294 NCC) therefore extends the applicability of articles 254 to 257 CC to *a) officials or persons who carry out their activity based on a labour contract or other persons who have similar attributions within an international public organisation to which Romania is a party; b) members of parliamentary assemblies of the international organisations to which Romania is a party; c) officials or persons who carry out their activity based on a labour contract or other persons who have similar attributions within the European Communities; d) persons with judicial positions within the international courts which have their competence accepted by Romania, as well as clerks working for such courts; e) officials of a foreign state; f) members of parliamentary or administrative assemblies of a foreign state*. With the exception of a minor technical issue that the Romanian authorities may wish to look at[39], the Romanian incriminations of bribery thus meet in principle the requirements of articles 5, 6, 9, 10 and 11 of ETS 173. This being said, the GET found the arrangements of Law 78/2000 not entirely consistent and satisfactory for the following reason: article 8^2 creates a specific offence of bribery of an "*official representing a foreign state or an international organisation (…) with the purpose of obtaining an undue advantage within international economic operations*" (which is punishable with imprisonment from one to 7 years). In the opinion of the GET, this distinct offence overlaps to a large extent with article 8^1 of the same law, which is much broader and already includes the various situations addressed in article 8^2. Moreover, article 8^2 of Law 78/2000, which is limited to active bribery (and is limited to obtaining an undue advantage, and misses the element of third party beneficiaries), applies also to the various categories of persons covered by the provisions of article 8^1. The on-site discussions confirmed that there are no particular reasons to keep these specific provisions of article 8^2 as the current situation creates unnecessary complications and confusions. The draft law for the enactment of the NCC, which was finalised on the last day of the visit, foresees that articles 8, 8^1, 8^2 and 9 will be repealed and that this should be supported in order to increase the consistency of the Romanian anti-corruption legislation. The GET recommends **to repeal article 8^2 of Law 78/2000 as it is envisaged in the draft law on the implementation of the New Criminal Code, or to otherwise harmonise the incrimination of bribery involving officials and assembly members of foreign countries, international organisations and international courts.**

[38] Some interlocutors stressed that this as a recurring phenomenon among the suspects or accused they are dealing with.

[39] The future article 294 NCC should in principle use the concept of "public official" as opposed to "official" since article 175 of the NCC does not distinguish anymore between these two concepts and only refers to *functionar public.*

104. The incrimination of trading in influence is split between the CC (article 257 CC covers passive trading in influence) and Law 78/2000 (article 6^1 covers active trading in influence) and Romania has managed to obtain a significant number of convictions. These offences will be incriminated in the future NCC under articles 291 and 292 respectively and the GET welcomes the consolidation of the provisions in a single text. The first sentence of article 8^1 of Law 78/2000 extends the applicability of article 6^1 of this Law and of article 257 CC to the relevant categories of foreign and international officials and elected officials enumerated in article 12 of ETS 173 (see also the preceding paragraph). Leaving aside the fact that both under the CC and the NCC, the aim of the influence is the accomplishment (or non-accomplishment) of a specific act (as opposed to the improper influence over the decision making), which was discussed at paragraph 101, the GET notes the absence of explicit incrimination of trading in influence also in situations where the influence is not exerted or does not lead to the behaviour expected from the official; the legal doctrine considers that these situations are covered indirectly[40]. Moreover, as indicated in paragraph 70, it was repeatedly confirmed in case law that it is irrelevant whether the influence is exerted or not and whether the influence that the influence peddler claims to have is real or not. The Romanian authorities consider that this shows that the offence is also complete even where the influence is not exerted or does not lead to the intended result. The GET accepts this explanation.

105. The incriminations of passive and active bribery in the private sector are currently ensured by the general provisions of articles 254 and 255 CC discussed earlier. The offence of receiving undue advantages of article 256 CC applies as well. The general strengths and weaknesses of these provisions were discussed earlier. From the perspective of articles 7 and 8 of ETS 173, the Romanian incriminations applicable to private sector bribery go beyond the requirements of the Convention as they are not limited to situations which involve a business transaction or a breach of duties by the bribe-taker. Although the scope of the CC provisions – combined with the definition of "official" of article 147, paragraph 2 – is potentially fairly broad, it seems that there have been uncertainties as to the adequacy of this approach for dealing with the broad variety of economic and business entities, including their managerial structures, that emerged after the transition. Strictly speaking, the CC provisions are limited to bribery of "*employees who perform a task in the service of a legal person*"; this explains perhaps why article 8 of Law 78/2000 extended the scope of incriminations to bribery of managers, directors, administrators and censors [and] other persons with control attributions within trading companies, national companies and societies (…) and within any other economic agents".

106. The draft of the law enforcing the NCC, in the wording communicated to the GET, repeals various provisions of Law 78/2000, including article 8. The NCC itself includes a new provision on bribery in the private sector, namely article 308 paragraph 1, which extends the applicability of public sector bribery incriminations to offences committed by or in relation to persons who temporarily or permanently, with or without remuneration, exercise a task of any kind within any legal person[41]. It thus eliminates the controversies that appear sometimes in practice, on the basis of the current CC, as regards the categories of persons – other than public officials – covered by the bribery offences. It also goes beyond the requirements of the Convention as its scope is not restricted to

[40] As indicated in the descriptive part, Romanian legal doctrine considers that the offence is constituted whether or not the intervention took place and whether the intervention was aimed at a legal or illegal act.

[41] The incrimination of private sector bribery will appear at the end of a Chapter of the NCC now devoted entirely to public sector offences (offences of corruption and committed in the service); the GET wondered whether this could affect the awareness and understanding of the future incrimination of private sector bribery but recognises that this is a non-issue from the point of view of the content of incriminations.

the context of business activities.. However, the GET is not entirely convinced that the way the current and future incrimination of bribery in the private sector are construed, adequately reflects the requirements of articles 7 and 8 of the Convention as far as the bribe-taker and the private sector entity are concerned. According to the Convention and its explanatory report, the loffence of bribery in the private sector should include any persons who work, in any capacity, for private sector entities, i.e. consultants and commercial agents for instance, who are not employees of the business entity. Moreover, the concept of business entities should not be limited to those which are incorporated as legal persons (contrary to what the Romanian legislation suggests) and it should in principle include also individuals. It appears that if the current legislation does not entirely cover any persons who work on a basis other than a labour contract for a business entity, this element will be covered – according to the Romanian authorities – by article 308 NCC since the expression "within a legal person" is to be understood broadly (a more accurate translation of the Romanian language would be "in the framework of any legal person"). The Romanian authorities confirm that the new provision thus applies also to consultants and commercial agents who are not employees of the legal person (as possible bribe-takers). On the other hand, the NCC maintains the limits of the applicability of these offences to entities incorporated as legal persons. In the light of the above, the GET recommends **to ensure that the incrimination of bribery in the private sector – including in the New Criminal Code –covers as bribe-taker the full range of persons who work, in any capacity, for private sector entities whether legal persons or not.**

107. Although Romania ratified, in 2004, the Protocol to the Criminal Law Convention on Corruption (ETS 191), in the opinion of the GET, the incrimination of bribery of domestic and foreign arbitrators and jurors is not satisfactory under the current provisions of the CC. There are no specific provisions on this matter although it could be envisaged that corruption involving an arbitrator who is an employee of the International Commercial Arbitration section of the Romanian Chamber of Commerce would, in principle, fall under the provisions applicable to bribery of officials given the provisions of article 147, paragraph 2 CC. Even so, bearing in mind that Romanian law accepts both *ad hoc* and institutionalised arbitration and that, under Article 341(1) of the Civil Procedure Code, parties may agree that a litigation be submitted either to a permanent arbitration institution but also to a third (natural) person, it is likely that arbitrators who do not act under the aegis of the Chamber of Commerce are not covered by the concept of office. Foreign arbitrators are not addressed at all. The GET noted that under the NCC, specific provisions exist in its article 293, which extend the applicability of the (future) incriminations of the NCC chapter on corruption to deeds involving "any person" who acts as an arbitrator on the basis of a domestic or foreign law procedure. Although this is a positive development (and there is no exclusive focus on institutional arbitration), it remains unclear whether this last portion of the sentence addresses only nationals acting as arbitrators abroad and arbitration agreements/clauses concluded under the regime of a foreign law but executed in Romania, or whether it also aims at foreign arbitrators[42].

108. Finally, as indicated in the descriptive part of this report (paragraph 75), bribery of jurors is absent from the legal provisions currently in force, and apparently also from the provisions of the NCC

[42] Logically, the former would prevail since articles 290 to 293 NCC cover, in principle, the domestic dimension of corruption, and article 294 NCC extends their applicability to foreign and international categories of persons. On the other hand, one could argue that article 293 NCC should be interpreted as covering also bribery of foreign arbitrators since they are not considered as officials anymore (otherwise there would be no need for the specific incrimination of article 293 NCC) and the provisions of article 294 NCC (paragraph (e) on officials of a foreign state) are therefore not applicable – except perhaps its paragraph (a) on members of international organisations to which Romania is a party) – which would then cover bribery involving arbitrators of the Permanent Court of Arbitration (generally, other similar institutions such as the International Chamber of Commerce are non-governmental bodies).

applicable in future. The GET wishes to underline that even if a country has no jury system, as is the case with Romania, ETS 191 obliges countries to criminalise bribery of foreign jurors. In light of the above, the GET recommends **to provide for clear incriminations of bribery of domestic and foreign arbitrators and foreign jurors, in line with the provisions of articles 2 to 6 of the Protocol to the Criminal Law Convention on Corruption (ETS 191).**

109. As indicated in the descriptive part (for an overview, see the table in paragraph 30), the main sanction provided by the CC (and Law 78/2000) for the offences of bribery and trading in influence is imprisonment. On paper, the level of sanctions provided for public sector bribery and trading in influence is quite high both as regards the minimum and the maximum limits, even though active bribery offences are subject to lower limits compared to those applicable for passive bribery (by contrast, all trading in influence offences are treated equally): the basic passive bribery offence of article 254 CC is punishable with 3 to 12 years' imprisonment, and the basic active bribery offence of article 255 CC with imprisonment of 6 months to 5 years. The future provisions of the NCC will harmonise these sanctions (2 to 7 years' imprisonment for all public sector bribery and trading in influence offences, 1 year and 4 months to 4 years and 8 months' imprisonment for private sector bribery offences). In the opinion of the GET, although the current and future upper limits are certainly effective and dissuasive enough, lower limits which start at 2 years are quite severe even though in practice, in the vast majority of convictions, the execution is suspended (see the detailed statistics in the attached tables). The intended partial decrease in the level of sanctions in the NCC was occasionally criticised during the on-site discussions by interlocutors who underlined the high level and tolerance of corruption in Romania (the country is under pressure from the EU to increase the effectiveness of its anti-corruption efforts) and the fact that judges tend to pronounce penalties that are too low in practice. In the GET's view, the intended decrease still meets the requirements for effective, proportionate and dissuasive sanctions of the Convention.

110. As indicated in the descriptive part (paragraph 83), the limitation period for the prosecution of corruption offences varies between 5 and 10 years for bribery and trading in influence offences; the limitation period is interrupted by every judicial act and it can therefore be prolonged by one half. The National Anti-Corruption Directorate underlined that the trials which involve, in particular, high ranking officials continued in recent times to be delayed due to one or several exceptions of unconstitutionality raised by the defendants. The Romanian authorities indicated after the visit that the law on the Constitutional Court was amended in October 2010 to the effect that exceptions of unconstitutionality do not anymore suspend trials automatically; this is a positive development since civil society representatives recalled that Romania has still not managed to obtain final convictions for senior officials. However, no particular concerns were voiced during the visit that the current limitation periods, as such, would be inadequate; in any event they are comparable to those of most other GRECO member States.

111. Romania has several provisions on effective regret that apply to certain bribery and trading in influence offences and which will also be kept to some extent in the NCC; these concern two types of situation: a) in case the bribe-giver was constrained by the bribe-taker, he/she is not prosecutable at all (article 255, paragraph 2 CC, article 290, paragraph 2 NCC); b) in case the bribe-giver him/herself informs the authorities before criminal investigation bodies become aware of the offence, he/she is not liable (article 255, paragraph 3 CC, article 6^1 Law 78/2000, articles 290, paragraph 3 and 292, paragraph 2 NCC). The third mechanism mentioned in the descriptive part, provided as a general rule under article 19 of the Government Emergency Ordinance no. 43 on the National Anti-Corruption Directorate, is similar to the institution of collaborators of justice

known in other countries (the judge has to take into account the level of collaboration of the offender and may decide to apply a less severe penalty).

112. As regards the effective regret mechanisms as such (items a) and b) in the above paragraph), they were a particular source of concern to the GET since: a) it appears that prosecutors decide on the applicability of the provisions and there is no real judicial control; b) the active briber is not prosecuted at all and the effective regret provisions apply regardless of the fact that the initiative came from him/her in the first place (article 255, paragraph 3 CC, article 6^1 Law 78/2000, article 290 NCC) except in case of constraint under article 255, paragraph 2 CC; c) the bribe is given back to the bribe-giver in all cases; d) there is no time limit for reporting and in most cases it is sufficient that the confession occurs before the authorities became aware of the offence; e) there are inconsistencies in the provisions and these were a source of diverging practice as the High Court of Cassation and Justice noted in a judgement in 2007 (see paragraph 95). Several practitioners met on site regarded the provisions on effective regret as generally positive and a crucial tool for the fight against corruption. It was sometimes considered that more than half of the bribery and trading in influence cases were uncovered thanks to these provisions. The GET recognises the usefulness of these tools for the fight against corruption but it considers at the same time that there is room for abuse of the effective regret mechanisms in practice if proper safeguards are not in place (a bribe-giver could use the mechanism to blackmail or exert pressure on a bribe-taker, there is no requirement to immediately report the offence etc.). Some interlocutors of the GET confirmed that the concept of extortion is applied in a loose manner in practice and that bribe-givers often turn to the authorities at a late stage when they can feel the presence of the investigating bodies (which goes against the spirit of the provisions). In view of the above, the GET is concerned about the effective regret provision in article 255, paragraph 2 and 3 CC, article 6^1 Law 78/2000, articles 290, paragraph 2 and 3 and 292, paragraph 2 NCC. The GET recommends **i) to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery and trading in influence in cases of effective regret; ii) to clarify the conditions under which the defence of effective regret can be invoked; iii) to abolish the restitution of the bribe to the bribe-giver in such cases.**

113. The classical principles of territorial and nationality-based jurisdiction laid down in articles 3 and 4 CC, in combination with the extended territorial jurisdiction of article 143, paragraph 2 allow Romania to assume broad jurisdiction for cross-border offences of bribery and trading in influence, and therefore to comply to a large extent with the requirements of article 17 of ETS 173. Where these are not enough (for instance a case of active bribery committed abroad by a domestic public official who has no Romanian citizenship), Romania also assumes – in accordance with article 6(1) – universal jurisdiction; however, it is subject to a dual criminality requirement which imposes a restriction which is not contemplated by the Convention and which is therefore unnecessary. It would appear that the NCC will fill this gap: in accordance with article 11(1), paragraph a), Romania will assume universal jurisdiction for any crime that it has undertaken to combat by virtue of a valid international treaty (which is the case of ETS 173 and its Protocol); this would not be subject to dual criminality anymore and it is enough that the person to be prosecuted is voluntarily present in Romania. This change should therefore be supported. The GET recommends **to ensure that jurisdiction for bribery and trading in influence offences is established in accordance with article 17 of the Criminal Law Convention on corruption (ETS173) without the condition of dual criminality, as is already foreseen in the – yet to be enacted – new Criminal Code.**

IV. CONCLUSIONS

114. The combination of the provisions contained in the Criminal Code (hereinafter, the CC) and Law no. 78/2000 *on preventing, discovering and sanctioning of corruption acts* (hereinafter, Law 78/2000) results in a legal framework on corruption which is comprehensive and reflects largely the requirements of the Criminal Law Convention on Corruption (ETS 173) and its Protocol (ETS 191). Most interlocutors met by the GRECO evaluation team stressed that the current context would not make it possible to adopt again as powerful a piece of legislation as was Law 78/2000 and anti-corruption bodies are currently struggling to preserve their legal powers and ability to deal with cases involving the political and economical elite. The legal framework offers many good tools but the incriminations of bribery and trading in influence are characterised by occasional overlapping and redundancies and the situation has at times led to inconsistent court practice. The new Criminal Code is expected to enter into force in October 2011 and to harmonise this legal framework, bringing it even closer to the Convention and its Protocol. However, there is still room for improvement, for instance covering bribery and trading in influence aiming at all acts/omissions (in the exercise of the functions of a public official) whether or not within the scope of the official's competence. Romania also needs to broaden its jurisdiction so as to be able to deal more effectively with cross-border cases involving domestic public officials or nationals employed at international level, for instance. Although they are considered as important tools for preventing and uncovering bribery and trading in influence offences, the existing arrangements concerning effective regret are a particular source of concern given the limited safeguards in place to prevent their abuse by bribe-givers.

115. In view of the above, GRECO addresses the following recommendations to Romania:

i. **to criminalise active and passive bribery in the public sector and trading in influence so as to cover all acts/omissions in the exercise of the functions of a public official, whether or not within the scope of the official's competence** (paragraph 101);

ii. **to take the appropriate measures to ensure that all offences of bribery and trading in influence unambiguously cover instances where the advantage is not intended for the official him/herself but for a third party who may not be involved in the offence** (paragraph 102);

iii. **to repeal article 8[2] of Law 78/2000 as it is envisaged in the draft law on the implementation of the New Criminal Code, or to otherwise harmonise the incrimination of bribery involving officials and assembly members of foreign countries, international organisations and international courts** (paragraph 103);

iv. **to ensure that the incrimination of bribery in the private sector – including in the New Criminal Code –covers as bribe-taker the full range of persons who work, in any capacity, for private sector entities whether legal persons or not** (paragraph 106);

v. **to provide for clear incriminations of bribery of domestic and foreign arbitrators and foreign jurors, in line with the provisions of articles 2 to 6 of the Protocol to the Criminal Law Convention on Corruption (ETS 191)** (paragraph 108);

vi. **i) to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery and trading in influence in cases of effective regret; ii) to clarify the conditions under which the**

defence of effective regret can be invoked; iii) to abolish the restitution of the bribe to the bribe-giver in such cases (paragraph 112);

vii. **to ensure that jurisdiction for bribery and trading in influence offences is established in accordance with article 17 of the Criminal Law Convention on corruption (ETS173) without the condition of dual criminality, as is already foreseen in the – yet to be enacted – new Criminal Code** (paragraph 113).

116. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the Romanian authorities to present a report on the implementation of the above-mentioned recommendations by 30 June 2012.

117. Finally, GRECO invites the authorities of Romania to authorise, as soon as possible, the publication of the report, to translate it into the national language and to make this translation public.