

OBSERVATIONS REGARDING THE OFFENCES AGAINST PROPERTY SET OUT IN THE NEW CRIMINAL CODE

Ph.D. CONSTANTIN DUVAC

Associate Researcher - „Acad. Andrei Rădulescu”
Institute of Legal Researches of Romanian Academy
Associate Professor - Faculty of Law and Economics
“AGORA” University of Oradea
ctinduvac@yahoo.com.

Abstract

The author presents at the outset certain general considerations regarding the special part of the new Criminal Code, subsequently focusing on the offences against property, set out under Title II of the special part of the new Criminal Code of 2009.

He underlines the amendments brought to the matters under review in terms of systematisation and of the legal content of various criminalization norms, highlighting both positive aspects and the arguable ones, in relation to which he puts forward several *de lege ferenda* proposals.

Furthermore, the author achieves a comparative research of the criminalization norms that have a correspondent in the criminal law currently in force, a quick review of the *ex novo* criminalization norms; this analysis is accompanied by several observations and recommendations (*de lege ferenda* proposals) for improving the texts under review.

Keywords: *Criminal Code, criminal law, offence, penalty, property*

1. GENERAL OBSERVATIONS REGARDING THE SPECIAL PART OF THE NEW CRIMINAL CODE

1. In terms of **systematisation**, the drafters¹ of the new Criminal Code, adopted by Law no. 286/2009², as further amended and supplemented, dropped the structure of our previous criminal codes, first regulating the offences against the person and against the

¹ The Committee for drafting the Criminal Code, set up at the level of the Ministry of Justice, according to the provisions Art. 26 of Law no. 24/2000 on legal drafting, recast, as further amended and supplemented, is made up of: prosecutor Katalin-Barbara Kibedi, advisor to the Minister of Justice, president of the Committee; Professor Ph.D. Valerian Cioclei, Faculty of Law, University of Bucharest; Professor Ph.D. Ilie Pascu, Faculty of Law and Administrative Sciences, “Andrei Şaguna” University of Constanţa; Associate Professor Ph. D. Florin Streteanu, Faculty of Law, “Babeş-Bolyai” University of Cluj-Napoca; judge Gabriel Ionescu, High Court of Cassation and Justice; judge Ana Cristina Lăbuş, member of the Superior Council of Magistrature; judge Andreea Stoica, Appeal Court of Bucharest; judge Mihail Udroui, Court of Bucharest, seconded to the Ministry of Justice; advisor Elena Cismaru, head of sector – Criminal Legislation and Legislation on Misdemeanours, Legislative Council and advocate Marian Nazat.

² Published in “Romania’s Official Gazette”, Part I, no. 510 of 24 July 2009.

person's rights, followed by the offences against property and only afterwards by the offences against the state's attributes or other fundamental social values. The same structure is found in most of the recent European codes (Austria, Spain, France, Portugal) and it reflects the current concept as to the place of the human being and his/her rights and freedoms in the hierarchy of the values that are also safeguarded by means of criminal law.

Thus, the offences set out under the special part of the new Criminal Code have been clustered under 12 titles (offences against persons; offences against property; offences regarding state authority and border; offences against rendering justice; offences of corruption and in relation to the official duties; offences of forgery; offences against public safety; offences that infringe upon the relations that concern social community life; election offences; offences against national security; offences against the fighting capacity of the armed forces; offences of genocide, offences against humanity and war offences), each of them having, as a rule, more subdivisions.

In the special part, 259 texts are enshrined, as compared to 209 texts which are included in the regulation that is currently in force. The increase in the number of the incrimination texts included in the code is justified either by the fact that certain texts from special criminal laws were taken over, with minor amendments (for instance, human trafficking, trafficking in minors, simple fraudulent insolvency, aggravated fraudulent insolvency, computer crime, illegal state border-crossing etc.), or by the fact that new criminalization texts were introduced (for instance, homicide at the victim's request, injuring the fetus, violation of professional seat, violation of private life, breach of trust to the fraud upon creditors, insurance fraud offences, public tender rigging etc.), even if some of them were not claimed by our doctrine and case law.

De lege ferenda, one should consider whether, given the importance of the protected social values and relations or the frequency of their perpetration, as the case may be, it would be appropriate to include under the same code certain criminalization texts such as terrorism or those regarding the illicit drug use and trafficking, or those against intellectual property or even, but not least, offences against environment.

2. The penalty arrangements for the offences enshrined under the special part have been re-positioned within normal limits – according to the opinion of the drafting committee (hereinafter referred to as “the committee”) – so that it enables to turn into practice the contemporary vision regarding the role of the penalty in the social reinsertion of the persons who committed offences³.

Under this concept, the scope and the intensity of criminal repression has to remain under determined limits, first of all depending on the importance of the infringed social value in cases of those who breach criminal law for the first time, and increasing progressively for the persons committing several offences before being finally convicted and even more for the persons in relapse.

³ For this purpose, please see the Government Decision no. 1183/2008 for approving the preliminary works of the draft Criminal Code, published in “Romania's Official Gazette”, Part I, no. 686 of 8 October 2008.

In the same vein, mention must be made that, as opposed to the criminal law in force, the new regulation introduces, for instance, the mandatory penalty increase in case of concurrence of offences when only imprisonment penalties are established (cumulative sentencing system with mandatory penalty increase), arithmetic cumulative sentencing system (grand total) as to the penalty arrangements of the post-conviction relapse or mandatory increase by half of the special limits of the penalty established by law for the new offence in the case of the relapse after serving a prison sentence.

This is the reason why the penalty limits provided in the special part have to be in line with the provisions in the general part, which enable a proportional aggravation of the penalty treatment set out for concurrence of offences and relapse, both of them being causes for the aggravation of the penalty to be applied to the active subject.

Last but not least, one should mention that the limits of the penalties provided for under the special part of the code are in line with the limits set out in most European criminal codes for similar offences, and also with the penalty limits provided traditionally in our law, both by previous codes and by the Criminal Code that is currently in force, prior to the amendments made by Law no.140/1996⁴.

This opinion, in relation to which we have expressed our reservations on previous occasions⁵, does not confirm in all cases. Thus, for instance, one should consider whether such a dramatic reduction of the special limits of the penalties established for most of the offences against property would contribute to a reduction of these offences. In our opinion, the only answer is a negative one. The promptitude of criminal repression and a firmer response in relation to the causes determining the perpetration of the offences against the property could contribute to the decrease of the number of this category of inconvenient acts or, as the case may be, to the removal of the damages caused thereof.

3. Additionally, the committee has tried and managed mostly **to streamline the criminalization norms** (there is only one exception, namely the legal content of the offence of aggravated theft, which has 16 aggravating circumstantial elements) avoiding the overlaps between various criminalization texts or to reduce the number of aggravating circumstantial contexts having a correspondent in the aggravating circumstances, set out in the general part of the Code.

Thus, when a circumstance is set out under the general part as a general aggravating circumstance, it was not mentioned again in the content of the criminalization norms from the special part, and therefore the general text is to apply. For instance, considering that the aggravating element of the perpetration of an offence by three or more persons – Art. 77 (a) – was set out in the general part, with some exceptions (possible slips of the committee), one dropped the aggravating

⁴ Published in “Romania’s Official Gazette”, Part I, no. 289 of 14 November 1996.

⁵ For details, please see C. Duvac, *Certain critical observations regarding the draft of a second Criminal Code*, “Romanian Forensic Science Review”, no. 4, 2009, pp. 147-153; C. Duvac, *Certain critical observations regarding the draft of a second Criminal Code*, in “Cross-border crime at the border between present and future”, bilingual edition (Romanian-Hungarian), T.K.K. Debrecen, Hungary, 2009, pp. 91-106, 373-390.

circumstantial element consisting in the commission of the offence by two or more persons, the differentiation between one and two offenders being adequately made when judiciary individualization is achieved. From this viewpoint, *de lege ferenda* one should consider the removal from the aggravating content of the offences set out under Art. 218 (rape), 219 (sexual assault) of the circumstance of perpetrating these criminal offences by two or more persons together. Similarly, one should remove the circumstance of perpetrating the offence by two or more members of the military together from the content of Art. 414 (desertion) and Art. 418 (constraint of the superior).

4. At the same time, in some cases, certain special aggravating circumstantial elements or variants assimilated to typical criminalization norms or even autonomous criminalization norms were **repealed**, yet without decriminalizing them thereon. Thus, fraud is criminalized in Art. 244 of the new Criminal Code, coming under the category of those offences against property that are characterised by breach of trust, laid down in Chapter III of Title II of the special part. The text does not include anymore paras. (3), (4) and (5) of Art. 215 of the previous Criminal Code, apparently decriminalizing fraud in contracts, cheque fraud or fraud producing particularly serious consequences. Yet, repealing the criminalization norms in Art. 215 paras. (3), (4) and (5) of the Criminal Code of 1968 does not mean that these anti-social acts have been decriminalized⁶. Subject to the provisions of Art. 244, they will represent *factual* modalities for the perpetration of the offence of simple fraud or aggravated fraud, as the case may be.

The same reasoning should apply in relation to the offences assimilated to fraud offence, laid down in the Criminal Code that is currently in force. The new criminal law does not include anymore certain offences assimilated to fraud offence, laid down in Art. 296 (deceitful measurement) or in Art. 297 (fraud regarding the quality of merchandises) of the Criminal Code of 1968, yet these offences, insofar as they would be committed⁷, shall come under the provisions of Art. 244 of the new Criminal Code, as *factual* modalities of fraud.

Moreover, the repeal does not equal decriminalization, since the repealed offence may remain criminalized in a different text of law, having the same *nomen iuris* (as it is the case of the fraud offence) or coming under a different name (for instance, the offence of slanderous denunciation, set out in Art. 259 of the Criminal Code of 1968 shall be laid down in Art. 268 of the new Criminal Code that has as marginal name “misleading the judiciary bodies”).

⁶ In a contrary sense, please see Gh. Ivan, *Criminal Law. Special part*, 2nd edn., Ed. C. H. Beck, Bucharest, 2010, p. 314. With respect to fraud in contracts and cheque fraud, the author asserts that they are not criminalized anymore, “although the factual reality did not require such a decriminalization (*abolitio criminis*)”.

⁷ For this purpose, please see: Supreme Court of Justice, Criminal Section, Dec. no. 4012/2001, “Criminal Law Review” no. 2/2003, p. 158; High Court of Cassation and Justice, Criminal Section, Dec. no. 5524/2003, “Criminal Law Review” no. 1/2005, p. 165.

2. OBSERVATIONS ON THE OFFENCES AGAINST PROPERTY (Art. 228 – Art. 256)

1. The criminalization texts of the offences against property, laid down under Title II, were **systematised** in 5 chapters (Chapter I – Theft; Chapter II – Robbery and piracy; Chapter III – Offences against property by breach of trust; Chapter IV – Fraud committed by computer systems and electronic payment means; Chapter V – Destruction and disturbance of possession), considering the factual situations in which the goods as patrimonial entities may be found, as well as the character or the nature of illicit actions by which these factual situations may be modified. For the Romanian criminal law, this systematisation is not made for the first time, yet it means coming back to the tradition: the Criminal Code of 1864 systematised property crimes and misdemeanours under 9 sections, whilst the Criminal Code of 1936 set out the crimes and misdemeanours against the property under Title XIV, which comprised 4 chapters.

The solution of classifying the offences against property under several categories is also promoted in the criminal codes of certain EU member states that have been recently adopted, for instance the French Criminal Code (3rd Part – Crimes and misdemeanours against goods – comprises two titles, each of them being structured on 4 chapters) or of the Spanish Criminal Code (Title XIII – Offences against property and socio-economic order – that comprises no less than 14 chapters), and also the older codes (for instance, the Italian Criminal Code, the German Criminal Code etc.).

The penalties set out under the criminalization texts of the offences against property are much lower than those set out under the Criminal Code in force. This criminal policy option was grounded on the following reasons:

- a) the penalties applied by courts for this type of offences;
- b) the need to ensure the correlation with the provisions of the general part regarding the mechanisms of punishing the plurality of offences, and also the penalty limits set out for the application of alternative modalities for establishing penalties to be served;
- c) the need to reflect within the legal penalty limits the natural rank of social values that are safeguarded by criminal law means;
- d) the need to come back to the tradition of previous criminal codes (Criminal Code of 1864, the one of 1936 and the Criminal Code that is currently in force, in the form adopted in 1968).

2. Criminalization norms under chapter III are addressed below, considering that many amendments have been brought to them.

Offences against property by breach of trust (Art. 238-Art. 247 of the Criminal Code) are laid down in **Chapter 3**; in this category, apart from certain offences criminalized in the Criminal Code in force, such as: breach of trust, fraudulent management, appropriation of found property (the criminalization norm being given a new *nomeniuris*) and fraud, new offences were introduced, such as: breach of trust to the fraud upon creditors, simple fraudulent insolvency, aggravated fraudulent insolvency, insurance fraud, public tender rigging and patrimonial exploitation of a vulnerable person.

3. As for the first type of offences (the ones that are also laid down in the Criminal Code in force), certain amendments were brought, so that the texts could provide better responses to the need to repress certain perpetration modalities as to the respective offences, highlighted by the case law. Thus, for the **breach of trust** (Art. 238), a new modality for the perpetration of the offence was introduced, namely by unlawfully utilizing an asset entrusted with a specific purpose, by the person who had received it. In the opinion of the drafters of the new criminal law, the text takes into account both the case where the person did not have the right to utilize the asset (for instance, a vehicle is entrusted by the owner to a mechanic for having it fixed, and the latter drives it for his own benefit or for the benefit of third parties), and also the situation when the person who has received the asset has the right to utilize it, but he uses it for another purpose than the one for which the asset has been entrusted to him (for instance, the perpetrator is given a car to have a ride, but he utilizes it for carrying goods whose weight exceeds the allowed limit for the named car).

By expressing reservations about this systematisation, deemed excessive, in the doctrine one argued that such a rewording of the breach of trust was not needed, as the phrasing of the law currently in force is fully adequate. At the same time, one has argued that the act of disposing of the asset also absorbs the act of utilizing it, so that both notions needn't have been mentioned. Moreover, one has deemed that the purpose for which the asset was entrusted to the offender is not essential, the important aspect being the one that the temporary use of the asset was handed over, in order to conduct certain material operations to the asset, without the loss of the possession by the possessor or without the loss of the holding of the asset by the holder⁸.

As to this offence, criminal action is initiated upon prior complaint from the injured person.

The prior complaint shall be lodged to the criminal prosecution authority or to the prosecutor, in accordance with the law and it has to be lodged within 3 months from the date when the injured person has found about the perpetration of the offence. If the injured person is a minor or lacks exercising capacity, the term of 3 months runs from the date when the person who is entitled to report the offence has found about the perpetration of the offence. If the prior complaint is made against their legal representative, the aforementioned term runs from the date of appointing another legal representative.

The prior complaint wrongfully lodged is deemed valid only if it was filed in due time at the judiciary authority lacking competence to handle it, which has to submit it, by administrative way, to the judiciary authority having competence to handle it.

The injured person may withdraw his/her prior complaint until a final judgement has been rendered and this circumstance leads to the removal of criminal liability of the person in question.

It should be noted that in the new regulation the withdrawal of prior complaint removes criminal liability only in relation with the person for whom the complaint was

⁸ G. Antoniu, *Observations regarding the first draft of a second new Criminal Code (II)*, cit. supra, p. 18.

withdrawn (*in personam* effect), and it has not effects as to all the perpetrators of the offence (*in rem*)⁹.

4. By Art. 239 an *incriminatio ex novo* was introduced, namely **breach of trust to the fraud upon creditors** that may be committed in two variants, either by the act of the debtor to transfer, conceal, mutilate or destroy, either in full or in part, assets or parts of his property or to claim fictitious acts or debts with a view to defrauding his creditors, either by purchasing goods or services, with the debtor knowing, when engaging in a trade, that he could not pay and thus prejudicing his creditor. Both variants of this offence perpetration were indicated by the case law of the past years, yet the judiciary bodies did not have an explicit legal text to enable the repression of such activities. Similar criminalization norms are to be found in Art. 150 and Art. 164 of the Swiss Criminal Code, Art. 313-5 and 314-7 of the French Criminal Code, Art. 227 of the Portuguese Criminal Code, Art. 257-258 of the Spanish Criminal Code, § 282 of the Norwegian Criminal Code etc.

As to the offence set out in para. (1), one has upheld that the perpetrator must objectively be unable to pay, being irrelevant “what he had known”. He might consider himself solvent, although objectively he is not. His criminal liability shall be drawn by the objective situation and not by his mental representation. The offender may not be excused by error of fact since an economic operator who keeps his business records lawfully knows at any moment his financial situation¹⁰.

The purpose set out in the type variant of the offence signifies finality, delineating the intention that the perpetrator must have. As such, the typical offence, although it is an offence against property, from the viewpoint of the immediate consequence, it is an offence of danger and not an offence of result.

In para. (2), offences causing damage to a creditor are criminalized. In this case the offence is one of result, yet without aggravated intention¹¹.

5. The text of Art. 240 para. (1) of the new Criminal Code, criminalizing **simple fraudulent insolvency**¹² has the same content with the one of Art. 143 para. (1) of Law no. 85 of 2006 on insolvency procedure¹³, yet in a different systematization. If the

⁹ For a detailed analysis of this institution, please see Viorel Pașca, *Lack of prior complaint, withdrawal of prior complaint and reconciliation of parties in the new Criminal Code*, in the collective volume “The new codes of Romania” edited on the occasion of the National Conference of Timișoara, 27-28 May 2011, Ed. Universul Juridic, Bucharest, 2011, pp. 502-509; Vasile Teodorescu, *Lack of prior complaint and withdrawal of prior complaint* (Exemptions from criminal liability), Comments, in “Preliminary explanations of the new Criminal Code (Art. 53-187), vol. II, by George Antoniu (coordinator and co-author), Bogdan-Nicolae Bulai, Constantin Bulai, Ștefan Daneș, Constantin Duvac, Mioara-Ketty Guiu, Constantin Mitache, Cristian Mitache, Ioan Molnar, Ion Ristea, Constantin Sima, Vasile Teodorescu, Ioana Vasiliu, Adina Vlăscianu, Ed. Universul Juridic, Bucharest, 2011, pp. 447-454.

¹⁰ G. Antoniu, *Observations regarding the first draft of a second new Criminal Code (II)*, *cit. supra*, p. 18.

¹¹ *Ibidem*, p. 18. In the author’s opinion, one could use the phrase “to claim services”, as services are not purchased, whilst the phrase “fictitious acts or other acts” should be introduced in the text.

¹² For details, please see C. Duvac, *Simple fraudulent insolvency in the new Criminal Code*, “Criminal Law Review”, no. 4, 2011, pp. 67-81.

¹³ Published in Romania’s Official Gazette, Part I, no. 359 of 21 April 2006. The declared purpose of this law is to establish a collective procedure (that is a procedure in which secured creditors participate

special law first sets forth the penalty and afterwards the description of the offence¹⁴, in the new Criminal Code there is a reversed order: the offence is described first and afterwards the penalty is set out.

Simple fraudulent insolvency consists in the failure to file insolvency or filing insolvency out of the time limit allowed by law, by a debtor who is either a natural person or the legal representative of the debtor legal person, within a term exceeding by 6 months the statutory term, as of the date when insolvency occurred [or 35 days as of the date when insolvency occurred, under the conditions and in the cases laid down in Art. 27 para. (1)¹ and (1)² of the law – our added comment] or filing insolvency after the expiry of the time limit allowed by law.

The *pre-requisite* of simple fraudulent insolvency consists in the existence of a situation of insolvency of a natural or a legal person of private law who also carries out economic activities, of those referred to in Art. 1 of Law no. 85/2006 and who becomes therefore a debtor for the purpose of the same legal instrument.

At the same time, from the viewpoint of the criminal law only the *manifest* insolvency is relevant, as opposed to the imminent one, as only for the first one filing insolvency is mandatory.

The provisions of Art. 240 have the feature of an incomplete norm because a part of the content description of the criminalized offence is to be found in Art. 27 of Law no. 86/2006, which establishes that the legal term referred to in Art. 240 para. (1) is maximum 30 days as of the date when the state of insolvency has occurred.

In absence of an explanatory legal provision of the phrase “fraudulent insolvency”, the legal content of the offences of simple and aggravated fraudulent insolvency could be analysed only by taking into consideration the legal provisions that regulate the insolvency procedure¹⁵, laid down in Law no. 86/2006, a special procedure which shall take precedence over ordinary law procedure set out in the Civil Procedure Code.

In the criminal doctrine¹⁶, under the influence of the regulation that existed *ab initio* in Art. 876-877 of the Romanian Commercial Code, one expressed the view that

jointly in monitoring and recovering their credits, in the modalities set out by this law) in order to cover the liabilities of the debtor who is under insolvency.

¹⁴ By virtue of Art. 143 para. (1) of Law no. 85/2006: “A person shall be guilty of an offence of simple fraudulent insolvency and shall be liable to imprisonment from three months to one year, or a fine if: the debtor, a natural person, or the legal representative of the debtor legal person fails to file insolvency or files insolvency out of the time allowed by law, 6 months after the term provided in Art. 27”.

¹⁵ Even if the insolvency procedure has a collective character, as opposed to the foreclosure procedure that has an individual character, it does not exclude the possibility for a creditor to request the commencement of the procedure.

¹⁶ Ioan I. Tanoviceanu, *Criminal law textbook*, vol. I, Atelierele Grafice “Socec & Co”, Societatea Anonimă, Bucharest, 1912, p. 677. For the same purpose, please see: M. Pașcanu, *Romanian insolvency law*, Ed. Cugetarea, 1926, pp. 660-661; Vasile Bercheșan, Nicolae Grofu, *Tax evasion and aggravated fraudulent insolvency (Forensic science – theory and practice)*, Ed. Little Star, Bucharest, 2004, p. 192. The authors present aggravated fraudulent insolvency, provided in the Commercial Code, as an aggravated form of simple fraudulent insolvency. In a wrong way, Romanian authors in the ‘90s attribute to Professor Vintilă Dongoroz this hypothesis of the absorption of simple fraudulent insolvency into the aggravated fraudulent insolvency, although in the comments he had made on the manual of his professor, he did not make any reference as to this matter, simply reproducing the idea expressed by Tanoviceanu. Please see, for this purpose, Vintilă Dongoroz, in Ioan I. Tanoviceanu, *Criminal law and criminal procedure law*

aggravated fraudulent insolvency absorbs in its content simple fraudulent insolvency (it had a different legal content than the one provided for under the new Criminal Code), being its aggravated type. Most of the authors, who have examined the legal content of the two offences, did not express any view thereto.

In our view, if the offences laid down in Art. 240 and in Art. 241 of the Criminal Code are committed by the same debtor, rules regarding real concurrence of offences shall apply and not the ones regarding the absorption of simple fraudulent insolvency into aggravated fraudulent insolvency. When describing the forbidden act, the text of Art. 241 of the Criminal Code employs neither any of the terms representing *verbum regens* of simple fraudulent insolvency nor its marginal title to lead to the conclusion that aggravated fraudulent insolvency is a complex offence absorbing simple fraudulent insolvency.

The legislator, by criminalising distinct activities within a sole complex activity, should have named (in a perfect drafting technique) the absorbed offence in a way that leaves no doubt as to this absorption [either by utilizing the terms expressing the material element of the absorbed offence (for instance, aggravated fraudulent insolvency represents, *inter alia*, “the act committed by a person who, to the fraud upon his creditors *falsifies*... the records of the debtor”, which means that as long as the forged document belongs to the debtor’s records, the offence set out in Art. 241 of the Criminal Code is a complex offence that absorbs the offence set out in Art. 322 of the Criminal Code), either by incorporating into the content of the absorbing offence the name of the absorbed offence (e.g. aggravated theft – Art. 229 of the Criminal Code represents “*thetheft* committed under such circumstances:...”, meaning that it absorbs the theft offence, set out in Art. 228 of the Criminal Code)]. Nonetheless, it follows from the content of the criminalization norm laid down in Art. 241 of the Criminal Code that the legislator did not employ any of the drafting techniques unequivocally showing his intention to absorb into the content of the aggravated fraudulent insolvency the simple fraudulent insolvency, both *explicitly*, and *implicitly* (by utilizing terms that are similar to the ones employed for expressing the material element of simple fraudulent insolvency).

Moreover, one could argue that this was also the reason why the legislator of 2009, when incorporating fraudulent insolvency offences from the special legislation (where they were laid down in a sole text), criminalized them in two autonomous distinct texts.

manual, vol. II, 2nd edn., as revised and supplemented by Vintilă Dongoroz (doctrine), Corneliu Chiseliță, Ștefan Laday (references to the constituencies of Bucovina and Ardeal), Eugen Decusară (case law), Tipografia “Curierul Judiciar”, Bucharest, 1925, p. 300. In a contrary sense (the existence of concurrence of offences): Cas. II no. 852/1901; Cas. II no. 572/1904 and Cas. II no. 423/1905, cited by Paul I. Pastion, Mihail I. Papadopolu, in *The commented Criminal Code*, Ed. Librăriei Socec Comp., Societate Anonimă, Bucharest, 1922, p. 67 and by Constantin Rătescu, H. Asnavorian, I. Ionescu-Dolj, Traian Pop, I. Gr. Periețeanu, Mihail I. Papadopolu, Vintilă Dongoroz, N. Pavelescu, in „*Regele Carol II*” *Criminal Code, commented, general part*, vol. I, Ed. Librăriei Socec & Co., Bucharest, 1937, p. 252. Our former supreme court decided that “when a bankrupt is tried, both for simple fraudulent insolvency, and for aggravated fraudulent insolvency, provisions of Art. 40 of the Criminal Code shall apply, since the elements of both misdemeanours are different and therefore they should be deemed as distinct misdemeanours”.

Criminal action for simple fraudulent insolvency is initiated upon prior complaint from the injured person.

6. The provisions of Art. 241, by which **aggravated fraudulent insolvency** was criminalized¹⁷, reproduce in essence the provisions of Art. 143 para. (2) of Law no. 85/2006 on the insolvency procedure¹⁸, yet phrased with certain amendments. When drafting this text, the legislator of 2009, as opposed to the phrasing utilized when drafting Law no. 85/2006, adopted a different legal drafting technique, first describing the subject-matter of the norm (forbidden actions), and afterwards the related penalty.

Another amendment brought to the legal content of aggravated fraudulent insolvency consists in adding the pre-requisite of “to the fraud upon creditors” to all normative modalities in which this criminal offence may occur, whilst in the regulation that is currently in force, the afore-mentioned requirement was set out only within the last criminalization norm hypothesis [Art. 143 para. (2) letter (c)].

At the same time, the new Criminal Code, as opposed to Law no. 85/2006, establishes the condition of the prior complaint from the injured person in order to initiate criminal action.

Aggravated fraudulent insolvency represents the offence of a person who, aiming at defrauding creditors: falsifies, steals or destroys the records of the debtor or conceals a part of his assets or who claims fictitious debts or presents in any books, papers or other records relating to the debtor’s affairs fictitious debts, or who transfers a part of the assets, in cases of debtor’s insolvency.

It follows from the analysis of Art. 241 that aggravated fraudulent insolvency, in certain normative modalities, is a *complex* offence, as its content incorporates, as a constitutive element, both actions or omissions that represent, by themselves, offences laid down by criminal law, such as theft, material forgery of official documents, intellectual forgery, forgery of private documents and destruction. When the content of the criminalization norm of the aggravated fraudulent insolvency is not achieved, the offences shall be punished, if the conditions set out in the criminalization norms of the absorbed offence as theft, forgery or destruction offences are met.

At the same time, if damage was caused to the creditor as a consequence of the transfer of a part of the assets made by the debtor, in case of insolvency, aggravated fraudulent insolvency may be concurrent with the fraud offence, set out in Art. 244.

Under the influence of previous regulations, ample debates are found both in doctrine and case law, as to whether in the legal content of the offence of aggravated fraudulent insolvency, the insolvency represents *de jure* situation (*ens iuris*), and therefore a final court decision stating the insolvency being needed, or *de facto*

¹⁷ For details, please see C. Duvac, *Aggravated fraudulent insolvency in the new Criminal Code*, "Criminal Law Review", no. 1, 2012, pp. 42-70.

¹⁸ Pursuant to Art. 143 para. (2) of Law no. 85/2006: „*Aggravated fraudulent insolvency* shall be punished by imprisonment from 6 months to 5 years and it represents the offence of the person who: a) falsifies, steals or destroys the records of the debtor or conceals a part of his assets; b) claims fictitious debts or presents in any books, papers or other records relating to the debtor’s affairs fictitious, any of these acts being perpetrated to the fraud upon creditors; c) transfers a part of the assets, to the fraud upon creditors, in cases of debtor’s insolvency.

situation (*ens facti*), by admitting that criminal action for fraudulent insolvency may be initiated even if the insolvency of the trader was or was not officially declared, the default situation being sufficient.

In our opinion, criminal law being of strict interpretation, the pre-requisite consisting in the existence of insolvency (*ens facti*) is needed only in the normative modality of a aggravated fraudulent insolvency set out in Art. 241 para. (1) (c) of the new Criminal Code. As for the other normative modalities of aggravated fraudulent insolvency, whilst not being a constitutive requirement of the offence, it must be deemed as a circumstance having no relevance as to the existence of the offence.

The subjective element for any of the normative modalities of aggravated fraudulent insolvency is the *direct intention aggravated by purpose* – “to the fraud upon creditors”.

The inclusion of fraudulent insolvency (simple or aggravated) in Chapter III of Title II (Offences against property) of the special part is a fair solution and in agreement with the nature and importance of the values and social relations protected by means of these criminalization norms. In this way, these types of offences will be better known by law enforcement authorities (the judiciary bodies being currently rather reserved in detecting and solving this type of offences criminalized in the special laws having criminal provisions even if they are perpetrated quite frequently in reality).

The text would be even more effective in rendering criminal policy of the current legislator if the wording of the criminalization norm were clearer and put the emphasis on the debtor’s fraudulent acts as opposed to other persons who, if assisting the debtor to perpetrate the offence under review shall be liable to penalty as accomplices. In this fashion, the legal content of this offence would meet more properly the needs to defend patrimonial social relations, which are built, developed and conducted provided there is a certain trust that must be stimulated and observed by natural and legal persons, in their civil legal relations, in order to safeguard the interests of the associates, shareholders and bond-holders, of the third-parties that are creditors to the Romanian trade companies and the Romanian state.

Apart from rephrasing the text, it would be necessary *de lege ferenda* to replace the phrase “to the fraud upon creditors” with the phrase “with a view to defrauding creditors”, in order to remove any ambiguity as to the significance of this phrase and consequently to the type of guilt that may exist when committing the criminal offence under review, to the immediate consequence and its accomplishment.

7. Fraudulent management (Art. 242), in its type variant, was incorporated into the wording of the law in force, from which the phrase “in bad faith” was rightly removed.

To this variant, an aggravating element was introduced, namely the circumstance in which the typical offence is committed by the administrator, by the liquidator of the debtor’s assets or by their representative or agent.

One should reflect whether in the variant set forth under para. (3), the term “patrimonial” would rather be replaced by the term “material”, currently employed by the law in force.

Criminal action for this type of offence is initiated upon prior complaint from the injured person.

8. Appropriation of the found property or of the property which came by error into the perpetrator's possession (Art. 243) is provided in a form that is similar to the one that exists in the Criminal Code of 1968.

The offence set out in 243 para. (1) has the same content with the one set out in 216 para. (1) of the Criminal Code in force.

As for the species variant of para. (2), the phrase "accidentally" was added, as an alternative normative modality of perpetration, consisting in the omission to give the property back within 10 days as of the date when the perpetrator knows that the property does not belong to him.

In comparison with the provisions of Art. 16 para. (6) of the new Criminal Code, the offences laid down in Art. 243, also in the omissive modality, may only be committed with direct or indirect intent in order to engender the application of the text under review.

The special penalty limits are identical with the ones set forth in Art. 216 of the Criminal Code in force.

9. Fraud¹⁹ is criminalized under Art. 244 under two variants, simple and aggravated. The text does not reproduce paras. (3), (4) and (5) of Art. 215 of the Criminal Code in force, apparently decriminalizing the offence of fraud in agreements, cheque fraud or fraud that resulted in particularly serious consequences, yet these will represent, subject to the provisions of Art. 244, *factual* modalities for the perpetration of the offence of simple or aggravated fraud, as the case may be.

The drafters of the new criminal law may have not deemed necessary to take over these paragraphs, from the desire to streamline the text of Art. 215 and considering that, by significantly reducing the special limits of penalty established for fraud, it would be difficult to make their legal diversification circumscribed to certain unequivocal aggravating circumstances.

Thus, the legislator left to the judge's discretion to take into account these circumstantial elements when establishing the penalty to be enforced. We consider that in matters related to the offences against property, dropping the circumstance about the particularly serious consequences caused by its perpetration from the aggravated content of fraud is a contemptuous issue, in particular given the increase in the value threshold from 200.000 lei to 2.000.000 lei.

Mention must be made that in the view of the drafters²⁰ of the first new Criminal Code of 2004²¹, fraud had a legal content that was similar to the one in Art. 215 of the Criminal Code of 1968, to which new normative modalities had been added²².

¹⁹ For details, please see C. Duvac, *Fraud in the new Criminal Code*, "Law" Review no. 1, 2012, pp. 104-134 and in the collective paper "Justice, rule of law and legal culture", Ed. Universul Juridic, Bucharest, 2011, pp. 800-814; Idem, *Similarities and differences between fraud and other criminalization norms under the new Criminal Code*, "Law" Review no. 2, 2012, pp. 74-103.

²⁰ Please see G. Antoniu, *The new Criminal Code. The previous Criminal Code. Comparative research*, cit. *supra*, p. 104-106.

The legal content of fraud is well defined by the new criminal legislation, the removal of certain normative modalities from its aggravated content representing a matter of criminal policy and legal drafting, yet without signifying a decriminalization of this particular type of misconduct. However, the repeal of para. (4) of Art. 215 of the Criminal Code of 1968 may revive the controversy whether in such a situation only the provisions of Art. 244 or Art. 311 are to be retained (counterfeiting debt securities or payment instruments), or both of them, under concurrence of offences.

One should consider whether such a dramatic decrease in the special penalty limits established for fraud would contribute to a reduction of these offences. In our opinion, the only answer is a negative one. The promptitude of criminal repression and a firmer response in relation to the causes determining the perpetration of fraud could contribute to the decrease of the number of this category of inconvenient acts or, as the case may be, to the removal of the damages caused thereof.

De lege ferenda, we consider that one should reintroduce as an aggravating circumstantial element the circumstance in which, by the perpetration of the fraud offence, particularly serious consequences have been produced, for the purpose of Art. 183.

²¹ Published in “Romania’s Official Gazette”, Part I, no. 575 of 29 June 2004. Nonetheless, its entry into force was postponed successively by: the Government Emergency Ordinance no. 58/2005, published in “Romania’s Official Gazette”, Part I, no. 552 of 28 June 2005; the Government Emergency Ordinance no. 50/2006, published in “Romania’s Official Gazette”, Part I, no. 566 of 30 June 2006 and the Government Emergency Ordinance no. 73/2008, published in “Romania’s Official Gazette”, Part I, no. 440 of 12 June 2008), by 1 September 2009. Pursuant to Art. 446 paras. (1) and (2) of Law no. 286/2009 on the Criminal Code, published in “Romania’s Official Gazette”, Part I, no. 510 of 24 July 2009, Law no. 301/2004 was repealed.

²² Art. 260 – *Fraud*: (1) The act of deceiving a person, by presenting a false fact as being true or a true fact as being false, in order to obtain for oneself or for another unjust material benefit and if damage was caused, shall be punished by strict imprisonment from 1 to 7 years. (2) Deceit committed by using untruthful names or capacities or other fraudulent means, shall be punished by strict imprisonment from 3 to 10 years. (3) The act of deceiving or maintaining the deceit of a person, when concluding or executing a contract, if without this deceit the person would not have concluded or executed the contract in the conditions stipulated, shall be sanctioned by the penalty provided in the para. (1) and (2), according to the distinctions shown therein. (4) The act of issuing a cheque or another payment instrument with regard to a credit institution or a person, while being aware that the supply or cover necessary for its realisation does not exist or shall not exist by the term agreed by the parties, as well as the act of withdrawing the supply, wholly or in part, after the issuing, or of prohibiting the acceptor from paying before expiry of the presentation term, for the purpose in para. (1), if damage was caused against the owner of the cheque or another payment instrument, shall be sanctioned by the penalty provided in para.(2). (5) The act of using fraudulent means in order to eliminate from a public tender a person or to limit tenders or the number of participants shall be punished by strict imprisonment from 1 to 5 years.(6) The penalty provided in para. (1) shall apply to the exploitation of the ignorance or lack of experience of a minor or of the weakness of vulnerable persons due to the age, illness or pregnancy, to determine them to conclude acts that are detrimental to them. (7) The act of deceiving or maintaining the deceit of a person regarding the living conditions from the country of emigration, committed in the conditions of para. (1), in order to determine a person to emigrate, shall be punished according to para. (1). (8) Deceit that resulted in particularly serious consequences shall be punished by severe imprisonment from 15 to 20 years and the prohibition of certain rights. (9) If the fraudulent means represent an offence, the rules for concurrence of offences shall apply.

10. Insurance fraud²³ (Art. 245) was not regulated under the Criminal Code currently in force in this form, yet certain factual modalities were found in the wider criminalization of fraud in contracts, set out under Art. 215 para. (3) of the Criminal Code of 1968.

By criminalising the insurance fraud as an *assimilated* offence (from the viewpoint of the criminalization) and as an *aggravated* offence (from the viewpoint of the penalty arrangements) of the fraud offence, having a autonomous existence, the legislator of 2009 comes back to the traditional solution enshrined by the Criminal Code of 1936, which set out this offence under Art. 554, text which was reproduced from Art. 642 of the Italian Criminal Code of 1930.

Within Art. 245 of the new Criminal Code, two different offences are criminalized (one dealing with property insurance, another one dealing with person insurance) as distinct offences under a sole marginal title (*nomen iuris*), each of them having therefore its own legal content.

The new criminalization on insurance fraud is grounded on the social reality, sanctioning offences whose number has been ever-growing in the past years. Considering the constant development of the insurance market, the rise of the number and the weight of compulsory insurances²⁴, the temptation of certain persons to defraud insurers with a view to obtaining unlawful patrimonial benefits has also increased.

On the other hand, the reasons behind the special criminalization of this type of offences reside in the specific criminalization conditions of the insurance fraud, as opposed to the ones of the fraud, with which it establishes a relation of specialty, whilst by being enshrined in the Criminal Code as an obstacle offence (offence of danger), one aimed at preventing the perpetration of the fraud offence set out under Art. 244 of the new Criminal Code.

In order to fully clarify the meaning of Art. 245 of the new Criminal Code, civil law provisions are relevant.

The legal arrangements regarding insurance²⁵ and reinsurance²⁶ are enshrined by Art. 2199-2241 of the Civil Code, as adopted by Law no. 287/2009, recast,²⁷ and Law no. 136/1995 on insurances and reinsurances in Romania²⁸.

²³For details, please see C. Duvac, *Insurance fraud in the new Criminal Code*, "Law" Review no. 6, 2012, pp. 72-91.

²⁴Natural or legal persons who own vehicles that are subject to registration in Romania, as well as tramways, are compelled to conclude an insurance policy for civil liability for damages produced by accidents with vehicles within the covered territorial limits and to ensure the validity of the insurance contract by paying the insurance premiums, as well as to apply the vignette on the windscreen or in any other external spot in such a way that is visible.

²⁵*Insurance* signifies the operation through which an insurer constitutes, on the principle of mutuality, an insurance fund, by the contribution of a number of insured persons, exposed to the occurrence of certain risks and compensates the damaged persons on the basis of the fund constituted from the cashed insurance premiums, as well as from other types of the income stemming from this activity.

²⁶*Reinsurance* signifies the operation that consists in taking over the risks ceded by an insurer/reinsurer.

²⁷"Official Gazette of Romania", Part I, no. 409 of 10 June 2011.

²⁸Published in "Official Gazette of Romania", Part I, no. 303 of 30 December 1995, as further amended and supplemented.

One should think about a possible correlation of the penalty established by law for this offence with the one established for fraud, as it is difficult to admit that an offence of danger and an obstacle offence were punished more severely than a subsequent offence and a result offence, considering that they are kindred (they fall under the same sub-group of offences characterised by the breach of trust).

Moreover, *de lege ferenda* one could introduce as a circumstantial element of aggravation the hypothesis in which the purpose set out under the incrimination norm is achieved. In this vein, one could remove potential controversies that may occur in relation with the two incriminations, provided under Art. 244 and Art. 245 of the new Criminal Code and a fairer punishment of the perpetrator would be ensured in relation to all relevant consequences of the respective act.

11. Public tender rigging²⁹ (Art. 246) was not previously regulated in the Criminal Code of 1968, and this text reproduces in essence the provisions of Art. 260 para. (5)³⁰ (variant of type³¹ within the fraud offence) and it is also influenced by certain provisions of Art. 329³², both of them from the first new Criminal Code of 2004, adopted by Law no. 301/2004³³.

The practice of the past years has proved that in certain cases, the participants to a public tender employed various fraudulent manoeuvres, with a view to removing

²⁹ For details, please see C. Duvac, *Public tender rigging in the new Criminal Code*, “Law” Review no. 8, 2012, pp. 84-105.

³⁰ Art. 260 para. 5 – *Fraud* – “The act of using fraudulent means in order to eliminate from a public tender a person or to limit tenders or the number of participants shall be punished by strict imprisonment from 1 to 5 years”.

³¹ George Antoniu, *The new Criminal Code. The previous Criminal Code. Comparative research*, Ed. All Beck, Bucharest, 2004, p. 105. Professor Antoniu suggested on that occasion that this text should be introduced as a distinct paragraph within Art. 329 since the fraudulent means used by the offender and referred to by Art. 260 para. (5) had as a purpose the prevention or distortion of competition in public tenders; only incidentally the legal object would be patrimonial relations.

³² Art. 329 – *Preventing competition in public tenders*– “(1) Preventing or distorting free competition in public tenders, for the purpose of eliminating competitors thereof, shall be punished by imprisonment from 2 months to 1 year or by days-fine. (2) The same penalty shall apply to the act of the bidder or competitor who claims or receives directly or indirectly money, promises or any other profit in order to refrain from participating in the tender.(3) If the offence provided in para. (1) or (2) is committed by several persons who have colluded for this purpose, the penalty shall be strict imprisonment from 1 to 3 year or days-fine”. This criminalisation norm had been introduced in Chapter III (Crimes and misdemeanours against public interests committed by any person) of Title VI – Crimes and misdemeanours against public interests of the special Part of the new Criminal Code din 2004. For a detailed analysis of this criminalisation norm, please see Constantin Duvac, *Preventing competition in public tenders* (Crimes and misdemeanours against public interests committed by any person), in “Criminal law. Special part. The new Criminal Code”, university course, vol. I, by Gheorghe Diaconescu, Constantin Duvac, Ed. Fundației România de Măine, Bucharest, 2006, pp. 547-552.

³³ Published in “Romania’s Official Gazette”, Part I, no. 575 of 29 June 2004. Its entry into force was postponed successively by: Government Emergency Ordinance no. 58/2005, published in “Romania’s Official Gazette”, Part I, no. 552 of 28 June 2005; Government Emergency Ordinance no. 50/2006, published in “Romania’s Official Gazette”, Part I, no. 566 of 30 June 2006 and Government Emergency Ordinance no. 73/2008, published in “Romania’s Official Gazette”, Part I, no. 440 of 12 June 2008), by 1 September 2009. Pursuant to Art. 446 para. (1) and (2) of Law no. 286/2009, Law no. 301/2004 was repealed without having been entered into force.

certain potential participants, and therefore aiming at influencing the adjudication price.

Until the introduction of this criminalization norm, such offences were included, as the case may be, in the provisions of regarding: fraud, abuse of office, passive corruption, intellectual forgery or material forgery of official documents.

For instance, the case law has decided that the act committed by the defendant who, in his capacity as a bailiff, in the exercise of his duties, during a tender for selling an apartment that was to be conducted in his office, scheduled for 21 July 2003, drew up false minutes of the tender and the related award document (both of them dated 21 July 2003, 9.00 hrs.) - although in his office there was no tender whatsoever - meets the constitutive elements of the offence of intellectual forgery³⁴.

In another case, one upheld that the defendant who, in her capacity as president of A.T.C.O.M. Gorj, claimed from the denouncer, who was the administrator of a trade company, the amount of 25.000 lei and received 10.000 lei, according to the sting operation, in order to facilitate for the denouncer the purchase of a point of sale placed in Rovinari, sold by tender procedure by A.T.C.O.M. Gorj in February – March and, at the same time, in order to favour the same denouncer, following the award, on the 2nd of March 2005, as the defendant failed to apply the clause laid down at point 4 of the sale contract, regarding the termination of contract in case of failure of the purchaser to pay in full the price by 1 May 2005, committed passive corruption³⁵.

At the same time, the act of participating, upon prior agreement, to the tender of certain goods on discount, so that another bidder may obtain them at a price that is close to the upset price, with detrimental consequences for the person who organises the tender procedure, consequences that were not produced given the intervention of criminal prosecution bodies, was considered an attempt to the offence of fraud upon the owner of the tendered goods³⁶.

With respect to these contradictions, the introduction in the Criminal Code of a new criminalization norm was needed, to correspond to the necessity to safeguard this social value and namely to ensure fair competition in public tenders or procurement.

Consequently, public tender rigging was conceived as an offence meant to eliminate a participant from a tender procedure by way of coercion or corruption or as a collusion among participants in order to distort the award price.

³⁴ High Court of Cassation and Justice, Criminal Section, Dec. no. 1363/2009, available at www.iccj.ro.

³⁵ High Court of Cassation and Justice, Criminal Section, Dec. no. 4206/2007, unpublished.

³⁶ Supreme Court of Justice, Criminal Section, Dec. no. 2708/2002, www.juristprudenta.org. In this case, the court held that from March to April 2000 the defendants, in order to receive undue benefits from S. M., decided to formally bid and to behave at the tender in a convenient way insofar as S. M. is concerned, so that the prices of the tendered goods may not increase to a significant difference as to the upset price. Consequently, one found that a collusion between the defendants and the witness had existed, so that the owner-seller of the goods, E. M. Cavnice, could obtain the lowest price for S. M. In this way, there was an alleged rigged tender, that was likely to divert it from its normal purpose and to maintain at a low level the price of the goods sold by the owner, to his prejudice. Such acts represent the execution of the resolution to mislead E. M. Cavnice, for the purpose to obtain for the defendants and S. M. unlawful material benefits, having detrimental consequences for the organiser of the tender, consequences that were not produced due to the intervention of the criminal prosecution bodies.

In order to get a grasp and to understand this criminalization norm, one should take into account provisions of Art. 747-848 of the new Civil Procedure Code, adopted by Law no. 134/2010³⁷; Art. 162-167 of the Fiscal Procedure Code³⁸ (Government Ordinance no. 92/2003, recast) and Law no. 188/2000 on bailiffs, recast³⁹.

As a consequence, public tenders are conducted in accordance with civil proceeding regulations, whilst the ones in which the Romanian state is a creditor are subjected to the arrangements set forth in the special legislation (Fiscal Procedure Code) that are to be supplemented with the ordinary law.

In our view, the text of Art. 246 shall apply to the public tenders organized by bailiffs or by other persons established by the legislation (for instance, fiscal enforcement bodies), yet it will not apply to public procurement conducted by contracting authorities pursuant to the Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works and services concession contracts⁴⁰ and of the Government Decision no. 925/2006⁴¹ for approving the Rules for the implementation of the provisions regarding the award of public procurement contracts of the Government Emergency Ordinance no. 34/2006.

Unequivocally, the criminalization norm set out in Art. 246 is needed for a complete protection of free competition in cases of public tenders; one should consider the introduction in its content as an assimilated variant the hypothesis in which the bidder or the competitor claims, either directly or indirectly, money or other undue benefits in order to refrain from participating into the tender.

At the same time, the commission of these offences by several persons who had colluded for this purpose should represent an aggravating circumstantial element of the simple criminalization variant.

In order to avoid any confusions and the lack of unitary application of the text by criminal judiciary bodies, as regards the provisions of the Government Emergency Ordinance no. 34/2006 and Government Decision no. 925/2006, a new paragraph should be added in the content of the text, establishing that this rule also applies to public procurement procedures (open tender, restricted tender, competitive dialogue, negotiation and call for tenders), hence ensuring for the economic agents a free competition and public procurement that for economic operators (applicant⁴²,

³⁷ Published in "Romania's Official Gazette", Part I, no. 485 of 15 July 2010.

³⁸ For a detailed analysis of these distinctive note, please see Ioan Leș, *Civil Procedure Code. Comments on each article*, 2nd edn., Ed. All Beck, Bucharest, 2005, pp. 1146-1148; Evelina Oprina, *Foreclosure in the civil lawsuit*, 3rd edn., as revised and supplemented, Ed. Universul Juridic, Bucharest, 2009, pp. 417-428.

³⁹ "Romania's Official Gazette", Part I, no. 738 of 20 October 2011.

⁴⁰ Published in "Romania's Official Gazette", Part I, no. 418 of 15 May 2006, as further amended and supplemented.

⁴¹ Published in "Romania's Official Gazette", Part I, no. 625 of 20 July 2006, as further amended and supplemented.

⁴² *Anapplicant* is any economic agent who applied in a restricted tender, negotiation or competitive dialogue procedure – Art. 3 para. (1) (c).

competitor⁴³ or bidder⁴⁴) by penal protection means, as well as an assurance of an effective use of public funds. An extension of this criminalization in this regard is more necessary considering that the number of the breaches of law has increased. Thus, it follows from the public Report for 2010 of Romania's Court of Auditors, approved by the Decision of the Plenary no. 168/2011⁴⁵, that in 2010, the state budget was prejudiced with 756.02 million lei (179.58 MEUR) by public institutions, and the main causes of this damage being: failure to observe legal regulations on spending (4.584 cases – the damage: 490,48 million lei – 65% of the total); unlawful use of the funds allocated from the budget (159 cases – damage: 69,12 million lei – 9% of the total); irregularities in public procurement contract management (94 cases – damage 10,57 million lei – 1% of the total).

At the same time, for a more effective criminal protection of public propriety, it would be preferable to expand the criminalization to the contracts of concession of public property goods, that are regulated by the Government Emergency Ordinance no. 54/2006⁴⁶ and by the Government Decision no. 168/2007⁴⁷ for the approval of the Methodological Norms for the implementation of the Government Emergency Ordinance no. 54/2006.

Correlatively, the marginal name of the criminalization norm should be “public tender or procurement rigging”.

12. Patrimonial exploitation of a vulnerable person (Art. 247) was not regulated in the Criminal Code in force (*incriminatio ex novo*). Consequently, it would seem to be a new criminalization norm. However, the solution is not entirely new for the Romanian criminal law, as in Art. 542 of the Criminal Code of 1936, a similar offence was set out, namely the offence of exploiting weaknesses or vices, which came under the group of patrimonial damage offences.

Patrimonial exploitation of a vulnerable person resides in the offence of the creditor who, when lending money or goods, by taking advantage of the manifest vulnerability of the debtor, considering his age, health condition, disability or the

⁴³ *Acompetitor* represents any economic agent who presented a project solution bid – Art. 3 para. (1) (e).

⁴⁴ *A bidder* is any agent economic who submitted a bid within the submission deadline indicated in the call for proposal – Art. 3 para. (1) (p); *A bid* is the legal act by which the economic agent expresses the desire to enter into a public procurement contract; the bid contains the financial and technical proposal – Art. 3 para. (1) (q); *The economic agent* is any supplier of goods, services or works – natural/legal persons, of public or private law, or a group of such persons, carrying out their activity in the field that offers in a licit way products, services and/or works – Art. 3 para. (1) (r). The bidder is a participant to a public tender procedure until he becomes a *contractor* (the bidder who became, under the conditions of the law, a party in a public procurement contract).

⁴⁵ Available at <http://www.curteadeconturi.ro/sites/ccr/RO/Publicatii/Documente%20publice/Raportul%20public%20pe%20anul%202010.pdf>

⁴⁶ Published in “Romania's Official Gazette“, Part I, no. 569 din 30 June 2006, as further amended and supplemented.

⁴⁷ Published in “Romania's Official Gazette“, Part I, no. 146 din 28 February 2007, as further amended and supplemented.

debtor's relation of dependency on the creditor makes him constitute or transmit, for himself or for another, a right in rem or a credit having a manifestly disproportionate value in comparison with the benefit.

In the aggravated variant, the offence resides in rendering a person in a manifestly vulnerable condition by provoking an alcohol or psychoactive substances intoxication with the purpose to make him agree to constitute or transmit a right in rem or a credit or to waive a right, in case damage has been produced.

The offence set out in Art. 247 was received with reservations in the Romanian doctrine, being upheld that such offences do not occur in our society and that criminalizing them would be an excess⁴⁸.

Nevertheless, in the view of the new criminal law, by criminalizing the patrimonial exploitation of a vulnerable person, one aimed at repressing certain offences that have expanded in recent years and that have produced sometimes serious consequences for the persons who were their victims, the media covering almost on a daily basis cases of old persons in a bad health condition who ended up losing their houses following such disproportionate patrimonial deals. Moreover, this type of offences are criminalized in most European legislations.

In our opinion, this criminalization norm, along with the one set out in Art. 351 (usury), was needed in order to repress this type of inconvenient acts following which numerous naïve persons or persons in need have been left without the houses that were in their legal ownership.

De lege ferenda, the replacement of the phrase "lending money or goods" with the phrase "conclusion or execution of an act that would produce for himself or for another person a detrimental legal effect" would be preferable.

At the same time, after the term "disability" the phrase "or other causes" could be introduced, as the essence of the criminalization is not the manifest vulnerability of the debtor, but taking the advantage of this vulnerability by the creditor.

At the same time, for the same reasons (protecting the property of the vulnerable person) it would be preferable to introduce in the legal content of the basis offence, following the word "benefit" the phrase "or to waive a right".

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⁴⁸ George Antoniu, *Observations regarding the first draft of a second new Criminal Code(II)*, *cit. supra*, p. 19. He recommends the reproduction of the text of Art. 260 para. (6) of the Criminal Code 2004, this criminalisation being deemed as having a more proper content. Art. 260 of the Criminal Code of 2004 – *Fraud*“(6) The penalty provided in para. (1) (strict imprisonment from 1 to 7 years – our added comment) shall apply to the exploitation of the ignorance or lack of experience of a minor or of the weakness of vulnerable persons due to the age, illness or pregnancy, to determine them to conclude acts that are detrimental to them”.

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