

## **ELECTORAL OFFENCES AFTER THE ENTRANCE INTO FORCE OF THE NEW CRIMINAL CODE**

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### **Abstract**

*The entrance into force of the new Criminal Code – namely of the Law No 286/2009 – on the 1<sup>st</sup> of February 2014 has brought a series of modifications in the constitutive content of the offences stated by the old Criminal Code, also introducing some new ones. Also, this new legislative document took over a series of offences stated, until its entrance into force, by many special laws, grouping them in its content. Under this scope was registered the introduction in the new Criminal Code of the electoral offences – offences which until the 1<sup>st</sup> of February 2014 were stated by the special laws to which we shall refer in this paper.*

**Keywords: offence, criminal code, electorate, elections.**

### **Introduction**

The new Criminal Code (Law No 286/2009<sup>1</sup>) states in 7 articles of its Title 9 of the special part, the electoral offences. Due to the fact that the offences stated by the new Criminal Code were found, under the former legislation, in several special laws, the actual transposition complies with the conception of the Romanian legislator to, first of all, group them, institutionally, in the same legislative document, an organic law, and second of all, in his intent to remove the references to texts, which were by themselves offences, to others, also offences, but which contributed to the firsts' constitutive content, and third, to remove certain discrepancies emphasized by jurisprudence and literature (mentioning here the offence of corrupting the voters stated by Art 386 of the new Criminal Code - instant offence by definition, to which the previous legislation sanctioned the attempt). Grouping the electoral offences within the same title of the special part of the new Criminal Code was made considering their judicial object, given by the social relations protected by the law with the occasion of different elections or referendums, whose result must reflect the public trust in these procedures.

### **The analysis of electoral offences**

According to the existent legislation under the empire of the old Criminal Code<sup>2</sup>, the electoral offences were stated by special laws, namely the Law No 67/2004<sup>3</sup> for the election of

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<sup>1</sup> Published in the Official Gazette of Romania, Part 1, No 510/24 July 2009.

<sup>2</sup> Republished in the Official Gazette of Romania, Part 1, No 65/16 April 1997.

local public administration authorities, Law No 3/2000<sup>4</sup> concerning the Organization of the Referendum, Law No 35/2008<sup>5</sup> for the election of the Chamber of Deputies and the Senate and for the modification and amendment of the Law No 67/2004 for the election of local public administration authorities, of the Law No 215/2001<sup>6</sup> of local public administration and of the Law No 393/2004 on the Statute of local elected officials, which repealed the Law No 373/2004 for the election of the Chamber of Deputies and the Senate (Art 76 of the Law No 35/2008), Law No 370/3004<sup>7</sup> for the election of the Romanian President.

Though it was intended the removal of all parallelisms existent within the legislation, as mentioned by the Explanatory Memorandum to the draft of the New Criminal Code<sup>8</sup>, this was not completely achieved, while, as an example, Art. 57-62 of the Law No 370/2004 on the election of the President of Romania, state the actions considered by the legislator as offences to this normative document. Prior to the entrance into force of the new Criminal Code, Art. 27 of the Law No 370/2004, in its older form, made references to the incriminatory texts of the law for the election of the Chamber of Deputies and the Senate, as the latter one existed in 2004<sup>9</sup>.

In fact, a simple analysis of the texts reveal that these offences are exactly the ones stated by Art. 385-391 of the new Criminal Code, except the offence stated by Art. 388, namely the electronic vote fraud. From this point of view, by the fact that the updated text of the Law No. 370/2004 is in force starting with 13 February 2014, the non-inclusion in this normative act of the electronic vote fraud could lead to the conclusion that this offence could not be performed during the election of the Romanian President, which would be totally wrong. Anyway, this gap in the legislature, if we look at it this way, is supplied by the new Criminal Code's provision which incriminates as such the printing and use of false access data, the fraudulent access of the electronic vote system or for falsification by any means of the electronic ballots.

Taken together, the actions, alternative in some cases, that represent the material elements of different electoral offences, cover the large area of the offences which may occur during the electoral procedures. It is the mean by which the Romanian legislator aimed to ensure a higher stability of the texts inserted as offences in the organic law, represented here by the new Criminal Code, and a more appropriate systematization of them in this area, the authors of the Explanatory Memorandum to the draft of the New Criminal Code mentioning a restructuration of certain incriminations from the previous legislation, in order to achieve a fairer legal individualization.

Although it was subjected to a public debate since 2010, the draft of the Electoral Code formed by the Permanent Electoral Authority, to sketch a draft law in this meaning, did not succeed. Eventually, the model desired by the Ministry of Justice to create a unitary electoral legislation within the new Criminal Code, which stated the electoral offences prevailed.

Despite the fact that numerous critics in this area, starting from the realities ascertained and communicated to the media by the Electoral Authority, claimed the need for tougher sanctions for electoral offences by increasing the penalties, the actual regulation of the new Criminal Code respects the policy of the bearings of the punishment amounts for the purpose of providing easier penalties than the ones stated by the old regulations. Though the general bearing of sanctioning is from 6 month to 3 years, certain electoral offences are punished more severely, by increasing the special minimum to 1 year, but also by stating another bearing, that from 2 to 7 years, by the latter one the legislator aiming to inform the participants in different electoral

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<sup>3</sup> Republished in the Official Gazette of Romania, Part 1, No 333/17 May 2007, updated based on the modifying normative acts, published in the Official Gazette of Romania, Part 1, until 24 June 2011, by the substantial modification inserted by Law No 35/2008.

<sup>4</sup> Normative act updated based on the modifying normative acts published in the Official Gazette of Romania, Part 1, until 23 August 2012.

<sup>5</sup> Published in the Official Gazette of Romania, Part 1, No 196/13 March 2008.

<sup>6</sup> Republished in the Official Gazette of Romania, Part 1, No 123/20 February 2007.

<sup>7</sup> Republished in the Official Gazette of Romania, Part 1, No 650/12 February 2011.

<sup>8</sup> As it is displayed on the website [www.just.ro](http://www.just.ro).

<sup>9</sup> Law No 373/2004 repealed by Art 76 of the Law No 38/2008.

proceedings about how important the incriminated norm is for the social relations under protection.

*Exempli gratia*, the offences of hindering the right to perform the electoral rights and of falsifying electoral documents and recordings have aggravated forms punished by imprisonment from 2 to 7 years. So is the *assault, by any means, of the polling station and the introduction or usage of software altering the recording or summing up of the results from the polling stations or determines the allocation of mandates outside the law*.

Revealing the importance of the social relations protected by these offences, the Romanian legislator stated, for most of them, the accessory and complementary penalty of prohibition of certain rights. Thus, the offences of *hindering the right to perform the electoral rights*, stated by Art 385, of *corrupting the voters*, stated by Art. 386, of *vote fraud*, stated by Art. 387, of *violating the confidentiality of the vote*, stated by Art. 389, of *non-complying with the regime of the ballot box*, stated by Art. 390 and of *falsifying electoral documents and recordings*, stated by Art. 391, state in their simple form in different aggravated forms the penalty of the *prohibition of certain rights*, which must be ordered for the active subjects of these electoral offences.

Also, with references to the sanctioning regime, Title IX of the new Criminal Code states two situations which are punishable by fine, as the simple form of the offence of violating the confidentiality of the ballot box, or that of the alteration of the fine with imprisonment, as mentioned by Art. 387 of the new Criminal Code, the offence of vote fraud.

We were previously referring to the fact that the attempt to electoral offences is punishable. Title IX knows only one exception, a single offence, for which the legislator did not sanctioned the attempt. We are talking about the offence of corrupting the voters, stated by Art. 386 of the new Criminal Code. According to this, the material element of the offence is achieved by an alternative action of offering money, different goods or favors, with the well determined purpose of corrupting the voter to vote or not with a certain candidate, according to his inner will. In the initial form of the new Criminal Code's project, the text included, as material element, the action to promise money, goods or favors to those who voted according to the active subject's interest. This aspect was also found in Art. 109 Para 1 of the Law No. 67/2004, which, unlike the fact that it specifically referred to the "promise" it determined, in time, the period in which the offence was achievable, namely during the campaign, and, due to the fact that it was a special law, it also mentioned the positions ran.

The legislator preferred to remove from the constitutive content of the offence also the "promise" of the things mentioned, as well as it removed the period of time, being limited only to the action of offering. From this point of view it is noticed that the attempt to this offence becomes impossible, since the offence itself is instantaneous, with an anticipated consumption, not being susceptible of this form of the offence.

Also regarding the constitutive content of this offence, there have been and shall be pertinent analysis and comments, amended by the jurisprudence, concerning the second paragraph of the offence of *corrupting the voters*. This is because the judicial area has proved that the offence stated by Art. 386 of the new Criminal Code is widely spread during elections. We must mention here that the text states that are out of the category of goods listed by Art. 1 symbolic goods, emblazoned with the insignia of a political group. The authors of the new Criminal Code's project chose to maintain the same wording and not to simply enumerate such goods that shall exceed the enforcement of the criminal law on the ground that such process would be impossible, a possible list being unable to include all the symbolic goods.

Different political groups have requested the Central Electoral Office, in the time of the old Criminal Code, to interfere in the meaning of clarifying the wording stated by the judicial norm, to identify the goods to be offered for voters without considering them *electoral bribe*. This was possible due to the fact that Law No. 35/2008 for the election of the Chamber of Deputies and the Senate and for the modification of the Law No. 67/2004 for the election of local public administration authorities, of the Law No. 215/2001 on local public administration

and of the Law No. 393/2004 concerning the statute of the local elected officials did not “explicitly” defined the symbolic goods left outside the area of those considered to be electoral bribe.

Of course that at the request to specifically and exclusively enumerate these goods, as well as to point the maximum value that each of them must have, the Central Electoral Office considered that it could not proceed in this respect, being limited to make a specific reference to the law. Then, when faced with specific case files, it is the attribution of the judicial bodies to interpret the legislator’s will, and, depending on the case, to appreciate if the goods used by different candidates fall within the notion of symbolic goods or exceed it.

Equally true is the fact that, during campaigns, the Central Electoral Office has faced different requests to interpret the criminal law, submitted by the territorial electoral offices, but referred to certain categories of goods.

Also, a specific analysis, in a case which invests the judicial bodies in this regard, can be made by considering Art. 55 Para 4-5 of the Law No. 35/2008, as were stated prior to the entry into force of the new Criminal Code, inserted by a Government ordinance. Thus, Para 4 stated the fact that were not included in the category of goods stated by Para 1, which could fall under the incidence of the criminal law, *propaganda materials and objects, such as posters, flyers, postcards, calendars, writing books, clutch pencils, lighters, matches, insignias, badges, DVDs, pennants, flags, mugs, bags, t-shirts, caps, scarves, vests, fezzes, gloves, capes, jackets imprinted with the electoral insignia of political groups or candidates in elections*. Also, Para 5 mentioned that are excepted by Para 1 *other propaganda objects, imprinted with the electoral insignia of political groups or candidates in elections, whose value does not exceed 10 lei excluding VAT for each piece, without these goods to be food, alcoholic or non-alcoholic drinks or tobacco products*.

Relevant aspects were brought in by the new Criminal Code regarding the creation of different forms, with different sanctions, within the same judicial norm, with the purpose of revealing an obvious difference of danger. We are talking about the *violation of confidentiality of the vote*, widely spread during the voting process, stated by Art. 389 of the new Criminal Code. Thus, Para 1, which states only the fine as penalty, refers to the violation of the secrecy of voting by any person and by any means. Quite different is the case of Para 2, the aggravated form of the offence, where the active subject is qualified, being about a member of the electoral office of the polling station, for whom the legislator has stated the penalty by imprisonment from 6 months to 3 years, alternative by fine, but with the accessory or complementary penalty of prohibition of certain rights from those stated by Art. 66 of the new Criminal Code.

A special attention was offered to the offence of non-complying with the regime of the ballot box, considering its judicial regime, as well as its special importance during the voting process, because in many cases the use of the ballot box was made beyond the limits of the law. Though the penalties stated are a little bit diminished by the new Criminal Code, the legislator choose to incriminate in the same article the action of opening the ballot box during the electoral process, as it has considered that must be sanctioned both the entrusting of the custody of the special ballot box to persons other than the members of the electoral office of the polling station, as well as the transportation of the special ballot box by other persons than the ones authorized or in other conditions than the ones mentioned by the law. It is obvious that between the two paragraphs of Art. 390 of the new Criminal Code, the first one states a penalty whose limits are higher, however both of them referring to the prohibition of certain rights.

Also concerning the reduction of the duration of imprisonment we can mention Art. 388 of the new Criminal Code, stating the *electronic vote fraud*. Unlike the provisions of the old Criminal Code, the active subjects print and use false access data, fraudulent accessing the electronic vote system or falsify the electronic ballots risk imprisonment from 1 to 5 years, while until the entrance into force of the new Criminal Code, the penalty was from 2 to 7 years of imprisonment.

Novelty elements are brought in by Title IX of the new Criminal Code regarding certain offences which previously were not stated by the legislation. We are talking about Art. 391 stating the falsification of the electoral documents and recordings. After mentioning in Para 1 and 2 that are criminally sanctioned the falsification by any means of the electoral offices' recordings, as well as the false registration in the copy of the permanent or complementary electoral list of persons who are not present in the original document, the Romanian legislator inserts Para 3 incriminating the usage of software with different bugs to alter the recording or summing up of the results from the polling stations or influencing the allocation of mandates outside the law. To reveal the special importance of this norm, the new Criminal Code states for the active subject(s) the penalty of imprisonment from 2 to 7 years and the prohibition of certain rights. Together with Para 2 of Art. 385 which states the assault, by any means, of the polling station, this is the second legal text, within Title IX of the new Criminal Code, where the legislator's will was present as an incremented penalty, namely imprisonment from 2 to 7 years.

### **Conclusions**

Lastly, concluding the above statements, Art. 392 of the new Criminal Code refers to the fact that the legal texts stated by Art. 385-391 of the new Criminal Code are applicable, where appropriate, for the offences committed during a referendum. This latter aspect represents another attempt of the legislator to remove the legal parallelisms, with a greater or a lower success for each case.

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