

## THE INFRACTION OF RECEIVING UNDUE BENEFITS

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**Receiving undue benefits** is stipulated by the 256<sup>th</sup> art. of the Penal Code and it represents the servant's (or the other wage earner's) fact that, directly or indirectly, receives money or other benefits, after he performed an act under his function and to which he was obliged in its merit.

**The active subject** of the infraction of receiving undue benefits can't be but a servant or other employee (the 147<sup>th</sup> art. of the Penal Code). Therefore, the direct active subject is qualified.

**The special passive subject** is the public authority, the public institution or other public or private legal person where the servant liable for the fact's commitment is employed. The general passive subject is the state, as the protector and pledger of public interests.

**The infraction's constitutive content** is formed by the objective side and the subjective side. **The objective side:**

➤ **The material item** consists in the action of receiving an amount of money or other benefits by a servant or by "other employee".

➤ **The immediate result** is the fact that the servant obtains an illegal benefit after performing his service duty and, consequently, a dangerous situation is created for the good command of the activity of an authority, public institution or other public or private legal person under which the servant functions.

➤ **The causal link** results for the materiality itself of the activity proceeded by the author (*ex re*).

**The subjective side** - the culpability form of the infraction of receiving undue benefits is the direct intention.

**The forms of the infraction** - the preparatory acts and the attempt, although possibly, aren't punished.

As far as the consumption of the infraction is concerned, receiving undue benefits is an action, commitment, momentary infraction and it is consumed in the moment of the money or benefits' receipt, after the servant performed the act. Receiving undue benefits can also have the continued form.

**The main penalty** - the infraction of receiving undue benefits is punished with prison between 6 months and 5 years.

**The special impounding** - the provisions of the 256<sup>th</sup> art. the 2<sup>nd</sup> paragraph stipulate that money, values or other goods are impounded and if these aren't found, the convicted is obliged to the payment of their equivalent in money.

Key words: Receiving undue benefits, The active subject, The special passive subject, The subjective side, The forms of the infraction, The main penalti, The special impounding.

### 1. Introductory considerations

The infraction of receiving undue benefits is stipulated by the 256<sup>th</sup> art. of the Penal Code and it is part of the infractions' group rejoined in the VI<sup>th</sup> Title named: "Infractions

that bring prejudice to the activities of public interest or to other activities settled by law”, the 1<sup>st</sup> Chapter: “Infractions of employment or related to the employment.”

Receiving undue benefits is the servant’s (or the other wage earner’s) fact that, directly or indirectly, receives money or other benefits, after he performed an act under his function and to which he was obliged to its merit.

The normal working of the state’s authorities, institutions, bodies, public services, companies, legal persons of public or private interest, the prestige and their credibility can be seriously affected and imperiled by the servant’s dishonesty, after performing an act into his competence.<sup>1</sup>

The infraction of receiving undue benefits was considered a species’ variant of the infraction of making a bribe. The unfair remuneration – the name through the fact was incriminated by the 240<sup>th</sup> art. of the Penal Code from 1936 – is different from making a bribe, because at this last infraction, money or other benefits are received before and, in the first situation, after the servant accomplishes his service duties.

Nevertheless, the infraction of receiving undue benefits is less grave than making a bribe, aspect that reflects also to these two infractions’ degree of social danger and to the different limits of punishment stipulated by the law and that are lower at the receiving undue benefits. Special literature appreciated the followings: “The one who gives or receives money before performing the act does it in need, with a view to fulfilling the act as he wants. The one who gives money after performing the act does it by thanking, voluntarily. Before performing the act, there is coercion, after coercion, there is a total freedom.”<sup>2</sup>

Usually, the material object of the infraction of receiving undue benefits is missing. The received money, values or other goods represent products got by committing the infraction and they are submitted to the special impounding, according to the 256<sup>th</sup> art., the 2<sup>nd</sup> paragraph of the Penal Code. If these products aren’t found, the convicted is obliged to the payment of their equivalent in money. However, when the undue benefits consist in the provision of work (for example, repairing a building, painting some rooms), the object to which these services apply becomes the material object of the infraction.<sup>3</sup>

## ***2. The subjects of the infraction***

### **➤ a). The active subject**

The active subject of the infraction of receiving undue benefits can’t be but a servant or other employee (the 147<sup>th</sup> art. of the Penal Code). Therefore, the direct active subject is qualified.

The older case law considered that the lawyer could be active subject of this infraction, because he had the quality of “other employee” to which referred the 147<sup>th</sup> art. 2<sup>nd</sup> paragraph of the Penal Code. After December 1989, the trial courts, including our supreme court decided that the lawyer doesn’t belong to the category of the persons whom refers the 147<sup>th</sup> art. of the Penal Code, so he can’t be the active subject of the infraction of receiving undue benefits. Litigant lawyer has, inside the bar, an own legal and professional status, of liberal profession and it contains the rights and the obligations covered by law and by the deontology rules. But the persons that perform a function in the leadership body or in the bar’ structure are payed from the bar’s common funds, because they carry out “a task in its

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<sup>1</sup> Horia Diaconescu: “Corruption infractions and the ones assimilated to or related to them” - All Beck Publishing house, Buc. , 2004, p. 94

<sup>2</sup> Vasile Dobrinou: “Corruption infractions stipulated by the Penal Code ” - All Beck Publishing house, Buc., 2003, p. 257

<sup>3</sup> Vintila Dongoroz: “ Theoretical explanations of the Romanian Penal Code”- The IV<sup>rd</sup> Book ,the II<sup>nd</sup> edition – The Romanian Academy Publishing house, All Beck Publishing house, Buc., 2003,p. 129

service”, in the meaning of the provisions of the 147<sup>th</sup> article the 2<sup>nd</sup> paragraph of the Penal Code, so that they can become subjects of the infraction of receiving undue benefits.<sup>4</sup>

The fact can be committed by more authors that have directly, simultaneously (team) or successively concurred to the commitment of receiving undue benefits.

The person that directly cooperate to the fact’s commitment, without having the quality of servant or “other employee”, can’t be held liable for joint author, but only for complicity to the infraction’ s commitment. In the case of the personal infractions, whose existence is conditioned by a certain quality of the active subject, as in the present case, author or joint author can’t only be the one that, committing an act of direct execution, brings together, in its person, the quality required by the law.<sup>5</sup>

Taking into account that according to the 256<sup>th</sup> art. of the Penal Code, the reception of money or of the other benefits can be done directly or indirectly by the servant or by “other employee”, this means that, by derogation from the provisions of the 24<sup>th</sup> art. of the Penal Code, must be considered author also the one who commits the typical action by an intermediary. The intermediary’s activity constitutes complicity to the infraction of receiving undue benefits. There could be situations when the intermediary determines himself the servant to commit the fact, through his medium; in such cases, the intermediary will also cumulate the quality of instigator, being responsible only for instigation, because complicity is absorbed by instigation.

The person that gives the undue benefits isn’t participant and isn’t punished.

➤ **b).The passive subject**

The special passive subject is the public authority, the public institution or other public or private legal person where the servant liable for the fact’s commitment is employed. The general passive subject is the state, as the protector and pledger of the public interests.

**3. The infraction’s constitutive content**

➤ **A). The objective side**

◆ **The material item**

According to the 256<sup>th</sup> art. of the Penal Code, the material item of the infraction consists of the action of receiving an amount of money or other benefits by a servant or by “other employee”. Receiving means the action of taking possession of some goods or money that have been remanded directly or indirectly to the servant.

◆ **Essential requirements of the material item**

**The first condition** is that the receiving money or other benefits should take place after the servant performed the act under his function and to which he was obliged in its merit. The infraction doesn’t exist if, subsequently to the fulfillment of the service act, the servant just accepts the promise of some unfair benefits or he even pretends them.

The provisions of the 256<sup>th</sup> art. of the Penal Code will not be also applied to the situation when the money’s reception, after performing the service act, was preceded by an agreement in this regard, which is placed before the fulfillment of the respective act.

In this situation, the fact is making a bribe.<sup>6</sup>

The expression “(the servant) performed an act under his function” means performing every act that is included in the author’ service duties. The expression “(the act) to which

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<sup>4</sup> Vasile Dobrinoiu: quoted work, p. 258

<sup>5</sup> Alexandru Boroi, Gheorghe Nistoreanu: "Criminal Law – special part" - All Beck Publishing house, Buc., 2005, p. 363

<sup>6</sup> Costica Bulai, Avram Filipas, Constantin Mitrache: "Institutions of Criminal Law" – Trei Publishing house, Buc., 2006, p. 451

he was obliged in his function's merit" means that performing that act constitutes a service duty of the servant or of the other employee. Therefore, it is about performing always a legal act (unlike the infraction of making a bribe, where the performed act can be illegal) that is, at the same time, compulsory to be fulfilled by the servant.<sup>7</sup>

**The second requirement** of the material item of the infraction consists in the fact that the money, the goods or the other benefits received by the servant must be undue, respectively must have the character of retribution, of gratitude for performing a certain act. This requirement isn't stipulated in the 256<sup>th</sup> art. of the Penal Code, but it results from the marginal denomination of the infraction.

The benefits are considered undue both in the situation when a free act was performed, the servant receiving money or goods from the beneficiary and when the servant, according to the legal provisions, should have been paid (the payment of an amount in the unit's account for delivering an act – for example, the delivery of a bachelor's degree for which certain taxes are levied), but he received an amount of money over that was legally due.<sup>8</sup>

Money or other benefits can be received by the servant or other employee both directly and indirectly, through an interposed person (for example, a gift for the servant's wife which wasn't returned). The interposed person can be accomplice or instigator.

◆ **The immediate result**

The infraction of receiving undue benefits has as immediate result the fact that the servant obtains an illegal benefit after performing his service duty and, consequently, a dangerous situation is created for the good command of the activity of an authority, public institution or other public or private legal person under which the author functions.

◆ **The causal link**

This link results for the materiality itself of the activity proceeded by the author (ex re).

➤ ***B).The subjective side***

The culpability form unanimously admitted to the infraction of receiving undue benefits is the intention. But regarding its modality, in the speciality literature some disputed opinions have been formulated.

In a first opinion, it is considered that the infraction is committed with direct or indirect intention and in another opinion, to which we assent, it is claimed that the subjective side of receiving undue benefits consists in direct intention.

In the first opinion's argumentation it was revealed that the author was aware that he received undue benefits, but it wasn't compulsory that he sought for creating a dangerous situation for the prestige of the unit where he worked, being enough that he accepted the possibility of causing such results.<sup>9</sup>

On the other side, we appreciate that the difference between the direct and indirect intention is the circumstance if the author pursued or he accepted the result of the committed fact, so that it isn't decisive for the determination of the intention's modality the fact that the author pursued or he accepted the undue benefits, but if he pursued or accepted creating a situation of danger for the servants' good reputation - from the probity's point of

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<sup>7</sup> Vintila Dongoroz: " Theoretical explanations of the Romanian Penal Code"- The IV<sup>rd</sup> Book, the II<sup>nd</sup> edition – The Romanian Academy Publishing house, All Beck Publishing house, Buc., 2003, p. 130

<sup>8</sup> Alexandru Boroi, Gheorghe Nistoreanu: "Criminal Law – special part" - All Beck Publishing house, Buc., 2005, p. 364

<sup>9</sup> Alexandru Boroi, Gheorghe Nistoreanu: quoted work, p. 365

view - inclusively for the activity of the organizations protected by law, because this is the fact's result considered by the legislator.<sup>10</sup>

To conclude, in the case of the infraction of receiving undue benefits, the author acts with direct intention, willingly committing the typical action knowing that the benefits received after performing an act under his function and to which he was obliged in its merit aren't legally due.

If the undue benefit is given by error to the servant, his fact will represent an abuse in service and not receiving undue benefits. The law implicitly stipulates a fact's reason without which the guiltiness can't be conceived. The reason consists in the tendency of the one who receives the benefit of considering himself rewarded, in this illegal way, for having accomplished his service duties.<sup>11</sup>

#### ***4. The forms of the infraction***

At this infraction, the preparatory acts and the attempt, although possible, aren't punished. It is possible that pretending undue benefits constitutes an execution act of the infraction, but the law doesn't incriminate it.

As far as the consumption of the infraction is concerned, receiving undue benefits is an action, commitment, momentary infraction and it is consumed in the moment of the money or benefits' receipt, after the servant performed the act.

At this infraction, unlike making a bribe, the consumption must be reported to the benefit's achievement; a simple claim or acceptance of a promise made after performing the act – facts that are irrelevant from the penal point of view – isn't enough. It's needful that the beneficiary of the act performed by the servant has handed out to him the amount of money or other benefits and he has directly or indirectly received them.<sup>12</sup>

Receiving undue benefits can also have the continued form when the benefits, whatever the form, are given repeatedly to the author by the same person or by different persons. The condition is that the plural material acts are done on the basis of the same criminal resolution, forming not only a personal and juridical unity, but also psychological one.

In fact, it is possible that, after performing a service act, the beneficiary promises to the servant an amount of money that he pays by instalments. In this case, we talk about a continued infraction. In the situation of the infraction stipulated by the 256<sup>th</sup> art. of the Penal Code, unlike that of making a bribe, the benefits' promise hasn't any penal relevancy, the infraction being not consumed in this moment and the subsequent entirely realized or by instalments payment of the promised amount can't be naturally integrated (as at making a bribe) in an already existing infraction at the time of its commitment, being one with it. Every further instalment's receiving act independently achieves, through itself, all the items of the infraction of receiving undue benefits. If a single criminal resolution is on the basis of receiving all the amounts that represents the instalments, then the fact becomes a continued infraction.<sup>13</sup>

When the subjective condition isn't fulfilled, the multiple acts of receiving undue benefits represent a real infractions contest.

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<sup>10</sup> Vasile Dobrinou: "Corruption infractions stipulated by the Penal Code " - All Beck Publishing house, Buc., 2003, p. 264

<sup>11</sup> Costica Bulai, Avram Filipas, Constantin Mitrache: "Institutions of Criminal Law" – Trei Publishing house, Buc., 2006, p. 452

<sup>12</sup> Vasile Dobrinou, Corruption infractions stipulated by the Penal Code " - All Beck Publishing house, Buc., 2003, p. 265

<sup>13</sup> Vasile Dobrinou: quoted work, p. 265

## **5. Sanctions**

### ➤ **The main penalty**

According to the 256<sup>th</sup> art. of Penal Code, the infraction of receiving undue benefits is punished with prison between 6 months and 5 years.

### ➤ **The special impounding**

The provisions of the 256<sup>th</sup> art. the 2<sup>nd</sup> paragraph stipulate that money, values or other goods are impounded and if these aren't found, the convicted is obliged to the payment of their equivalent in money.

The goods and the values got by the accused as a result of committing the infraction are submitted to the impounding, even if they were returned to the persons from whom the author received them; if, after the restitution, the goods or the values were destroyed, consumed or alienated by these persons, themselves, and not the accused, would be obliged to the payment of their currency equivalent.

Supposing that the good submitted to the impounding isn't anymore in the accused's possession, the persons that hold it or that is to be obliged to the payment of currency equivalent must be introduced in trial in quality of good's holder.<sup>14</sup>

If the person that gave the benefit denounced the fact to the authorities before the notification of

the proceeding body, the good would be returned to that person and if meanwhile the accused returned it to the respective person, it wouldn't be impounded.<sup>15</sup>

In the situation when the activity related to the infraction was committed in participation and the given goods and values hadn't been found, the instance must establish which goods and values devolved to each participant and oblige apart each one to the payment of the equivalent in money of those profited goods and values.

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<sup>14</sup> Vasile Dobrinou, quoted work, p.267

<sup>15</sup> Alexandru Boroi, Gheorghe Nistoreanu: "Criminal Law – special part" - All Beck Publishing house, Buc., 2005, p. 366