SECTION 3

“Public officials” according to criminal law and their relationship with the enhanced protection of public property

I. Public officials as guarantors of public property and their special-increased responsibility to protect it

The state apparatus employs staff with specific administrative, operational, and actual access to constituents of public property. This relationship binds them legally and operationally to preserve or even reasonably-soundly manage it, therefore granting their service a *warranty* role over the respective property.

So, when those institutionally responsible for the preservation of public property infringe it, apart from the property violation itself, an additional assault refers to: (i) the functional self-negation of the above protective-warranty role of the official, and (ii) the misuse of their official proximity to public property through the practical refutation of the confidence extended to them by the service. These add to the property assault a breach against the legally protected interest of public office, to the extent that they disrupt its orderly function and affect its ability to guarantee (inter alia) the preservation of public property as an essential requirement for the public service itself, and for the social orientation of the state apparatus in general. This “insider” infringement carries an extra demerit in both actus reus and mens rea, with the breach of public property still being the axiological priority.

This misuse of proximity to public (or even private) property and the resulting breach in the proper functioning of the state apparatus also occurs whenever *any* employee, even one who does not carry out specific official duties relevant to the contested assets (management, etc.), abuses their position within the state apparatus and *through it* (internally) infringes the property within reach (due to the position). In such a case, the extra demerit lies in disrupting the orderly operation of the office due to this abuse. The absence of the employee's functional self-negation as to the protective-warranty role for the inflicted public property justifies the conclusion that this additional demerit may be generally assessed according to the general provision of increased public official liability in Art. 262 GPC.

This special-increased responsibility may act as a deterrent at a general prevention level, as it provides the specific officials with *a culture of safeguarding public finances and stimulates the sense of duty to protect public property* and its ability to serve its functional purpose, i.e. to equitably see to society’s needs.
Furthermore, a distinct responsibility of public officials for the preservation of public property is important for the proper functioning of society, inasmuch as public property is co-formed by resources “entrusted” by citizens to the state (usually mandatorily, but nevertheless through their participation), which makes it essential for them to know that their contributions will receive the treatment they deserve.

In this sense, establishing a special-increased responsibility of public officials to safeguard public property is equitably legitimate and justified when they infringe it by taking advantage of their official proximity and association.

However, it is incorrect to assign a particularly aggravated (: felony) status to the respective offenses due to the special-increased accountability of public officials; a simply aggravated (: misdemeanor) form or the enforcement of the general rule of Art. 262 GPC would suffice. Nevertheless, particularly aggravated variants are not excluded when additional circumstances apply (i.e. apart from the employment status), such as the increased value of the inflicted property.

II. The tackling of corruption as a safety net against financial criminality

Impartiality, objectivity, and the uncorrupted functioning of the public service are fundamental conditions and existential elements of the proper operation of the public apparatus that promote public interests. At the same time, the impartial, objective, and uncorrupted activity of public officials-"guarantors" of public property is a condition-warranty of its prudent management on their behalf.

However, the above consideration allows for the following conclusion: at a second level, and regardless of the debate on the legal interest, anti-corruption provisions function as "safety nets" for financial criminality against public property.

III. National public officials under Greek criminal law

The concept of "public official" is not only linked to the protection of public property; it was primarily constructed to regulate a particular set of responsibilities for those employed in the state apparatus against the civil service itself (offenses committed by public officials), the latter not being necessarily the (principally) protected legal interest in all relevant provisions. Moreover, the same concept is found in provisions envisaging liability for acts that turn against the state apparatus (inter alia). No required legislative intervention should modify this orientation.

Therefore, it seems reasonable for this concept to be primarily connected with the *exercise of public service*, as is the case under current law (Art. 13 subpara. a GPC). Therein, a public official is anyone legally entrusted (even temporarily) with duties relevant to a public service, a local authority, or a legal person under public law. This is the so-called *instrumental* concept of public office, which utilizes a formal criterion that effectively describes the matter's essence, insofar as persons belonging to the state apparatus operate to serve society and carry increased obligations and responsibilities that justify their special-increased responsibility for the proper functioning of public service. Their official conduct cannot be equated to that of an employee of a legal person under private law, even if the latter has monopoly over a public interest service as a public limited company, mainly because its employee's activities primarily serve its interests and shareholders.

The above definition of "public official" correctly (de lege lata) includes all those staffing the state apparatus, whether subject to hierarchy or not, such as: members of the government, parliamentarians, elected local representatives, the judiciary, unsalaried public officials, as well as officials and individuals holding middle- or low-ranking positions in the administrative hierarchy.

Therefore, for all crimes to which a public official is a subject or object, there is no reason to diverge from the current definition (Art. 13 subpara. a GPC).

IV. Broadening the notion of "public official" to protect public property?

The necessity or expediency to broaden the notion of "public official" for certain relevant offenses remains an issue. The current Article 263A § 1 GPC introduces such an approach in adopting the so-called *functional* concept and in extending the public official status for a some legal persons under private law which –some less and others more– affect the community and manage property assets that current criminal law acknowledges (although too broadly) as public.

Article 263A § 1 GPC was historically and technically associated with the introduction of an increased protection for public property. This rationale of "communicating vessels" seems justifiable to the extent that the respective demarcation is sensible, realistic, and moderate.

Public property managed by a legal person under private law connects the latter with the community and entails –at least for criminal law– a request for it to function similarly to public services in terms of objectivity-impartiality and good governance, extending to all its employees and not only those guaranteeing public property.

The above considerations suggest it acceptable for the criminal law concepts of public property and public servant to be associated as "communicating vessels" and for the related legal interests (public property and service) to be defined not only under a formal (instrumental) criterion, but also under a functional one (rendering service to society regardless of legal form), provided the latter is defined realistically and with the necessary legislative restraint.

In conclusion, criminal law's definition of "public official" should include all persons employed –even temporarily– with any capacity or relationship in legal entities under private law to which the Public or a legal entity under public law participates as a majority or minority shareholder, *and* runs the administration. In such cases, the property handler and the State's administrative control gives the assets a public functional nature with direct reference to the community, and requires good management on behalf of employees and a generally proper internal operation towards accomplishing the legal entities' social purpose.

On the contrary, this expansion should not encompass most private law entities currently covered by Art. 263A § 1 GPC, such as public utility enterprises and banks that do not satisfy the above-mentioned criterion for public property (public

participation in corporate capital *and* administrative control), as well as private law entities simply founded or funded or subsidized by the State, legal entities under public law, or banks.

V. Establishing a special definition for Member-State or third-country public official as a vehicle for the protection of the EU financial interests?

Contrary to the First Protocol to PIF for the punishability of corruption associated with the breach of EU's financial interests, where EU or Member-State public officials are defined exactly as in the 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the EU, the Commission's proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law envisages a broader definition, especially for acts of corruption that may damage the EU financial interests.

In addition to EU, Member-State, and third country officials, the proposal encompasses *any other person exercising a public service function for the Union or in Member States or third countries, not holding such an office, participating in the management of or decisions concerning the Union's financial interests*. Thus, the definition of "public official" is expanded with respect to the operating criterion, and includes persons not only *managing* EU's financial interests, but *simply participating* in decisions affecting them. The wording's last part is overly broad and vague.

This provision expands the definition of "public official" to protect *EU property*, similarly to the Greek legislator's extremely broad approach in safeguarding national public property. At the same time, however, a very significant difference exists compared to the methodology so uncritically adopted by the Greek legislature: the proposal may broaden the definition of "public official" in a somewhat upsetting way, but this expansion undoubtedly exclusively protects EU property. Therefore, it only broadens the definition of "public official" and not of the "property" it aspires to protect. Consequently, its adoption by the Greek legal order would not be challenging, as the relevant expansion essentially follows the logic of a rationally corresponding expansion in the definition of "national public official" in relation to the safeguarding of Greek public property, as proposed herein.