

# CONFLICT OF INTEREST IN ADMINISTRATIVE LAW

Elena Emilia ȘTEFAN\*

## Abstract

We are currently witnessing, on the one hand, new forms of relationships between public and private sector, such as public-private partnership agreements, concession agreements, etc. and on the other hand, the expectations of citizens towards public authorities are increasingly higher in what concerns the lawfulness and transparency of their activities in terms of protecting citizen's interest.

Therefore, in this study, we aim to analyze how the conflict of interest is regulated within the area of the administrative law and to present the new conception of the lawmaker in what concerns this topic, taking into account the European tendencies.

**Keywords:** conflict of interest, public procurement, integrity warning, the National Integrity Agency, SEAP (Electronic System for Public Procurement)

## 1. Introduction

In administrative law, public interest takes precedence over particular interest and the subjects of the administrative relationships<sup>1</sup> are in a position of legal inequality. The law should be constantly changing, adjusted to the economic realities and should protect the citizen. Legislative inconsistency weakens citizen's confidence in public authorities.

The conflict of interest, as provided by the legislation in force has a double regulation, oscillating between criminal law and administrative law. This study mainly aims to present the status of the legislation on the conflict of interest. Since the law is meant to reconcile the aspirations of the justice with the demands of the society, the presence of the judge in the area of the law is absolutely required<sup>2</sup>.

According to Decision no. 390 of July 3<sup>rd</sup>, 2014<sup>3</sup> of the Constitutional Court, a legal concept can have a content and autonomous meaning, different from one law to another, provided that the law using the respective term defines it. Therefore, in our opinion, this is a potential explanation of the fact that the concept of conflict of interest from the criminal law is different from the concept of conflict of interest from the administrative law.

As recently stated in a paper, the doctrine and the judicial practice<sup>4</sup> played an important role<sup>5</sup> in the activity of the European Communities and of the European Union itself. In connection with the aforementioned, this study mainly aims to present the status of the legislation on the conflict of interest and then to add the point of view of the doctrine and the case law on this topic.

## 2. Content

### 2.1. The concept of conflict of interest in the criminal law

The offense of conflict of interest was provided by Criminal Code of 1969 by Law no. 278/2006 for the amendment and supplementation of the Criminal Code<sup>6</sup> (...) in art. 253<sup>1</sup> Criminal Code and currently<sup>7</sup> it is provided by art. 301 of the Criminal Code<sup>8</sup> in force.

Art. 301 of the Criminal Code defines in para.(1) the conflict of interest as being „the conduct of the public officials who, while carrying out their professional duties, committed an act or participated in making a decision that resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative including second level relatives, or for another person with whom they were in trading or labor relationships for the past 5 years or

\* Lecturer PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: [stefanelena@gmail.com](mailto:stefanelena@gmail.com)).

<sup>1</sup> For other details on the administrative law relationships, see M.C.Cliza, *Drept administrativ Partea I*, Prouniversitaria Publishing House, Bucharest, 2010, p.53, [stefanelena@univnt.ro](mailto:stefanelena@univnt.ro).

<sup>2</sup> Elena Anghel, *The reconfiguration of the judge's role in the romano-germanic law system*, in LESIJ.JS XX – 1/2013, Pro Universitaria Publishing House, Bucharest, 2013, pp. 65-72.

<sup>3</sup> Decision no. 390/2014 of the Constitutional Court, published in the Official Journal no. 532/2014.

<sup>4</sup> In what concerns the practice of the European Union Courts, see Roxana-Mariana Popescu, *Influența jurisprudenței Curții de Justiție de la Luxemburg asupra dreptului Uniunii Europene – case study: the concept of „charge having equivalent effect to customs duties*, *Revista de Drept Public*, no.4/2013, Universul Juridic, București Publishing House, indexed SSRD, pag. 73-81 and Roxana-Mariana Popescu, *Features of the unwritten sources of European Union law*, *Lex et Scientia, International Journal*, no.2/2013, Pro Universitaria Publishing House, pg. 100-108.

<sup>5</sup> Laura Cristiana Spătaru Negură, *Dreptul Uniunii Europene- o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p. 167.

<sup>6</sup> Law no. 278/2006 for the amendment and supplementation of the Criminal Code (...), published in the Official Journal no. 601/2006.

<sup>7</sup> For further details, see Mihai Adrian Hotca, *Noul Cod penal și Codul penal anterior, Aspecte diferențiate și situații tranzitorii*, Hamangiu Publishing House, Bucharest, 2009, p.297-298.

<sup>8</sup> Law no.286/2009 on the Criminal Code, published in the Official Journal no. 510 /2009.

from whom they had or have benefits of any nature and shall be punishable by no less than 1 year and no more than 5 years of imprisonment and the ban from exercising the right to hold a public office”.

In this context, we reiterate a fact which has already been stated in a paper, according to which, the principle of lawfulness in the activity of the justice concerns two important aspects: the lawfulness of the courts and the lawfulness of criminal offenses and penalties<sup>9</sup>. The mandatory nature of the rule of law is ensured, if required, by the coercive force of the state<sup>10</sup>.

The Constitutional Court, by means of Decision no. 603/2015<sup>11</sup> admitted the motion to dismiss on grounds of lack of constitutionality and noted that expression “trading relationships” of art. 301 para.(1) is not constitutional. On this occasion, the Court established that the constitutional standard on the protection of individual freedom requires its limitation to be performed within a normative framework which, on the one hand, establishes explicitly the cases of limitation of this constitutional value, and, on the other hand, provides clearly, precisely and predictably these cases<sup>12</sup>.

Given this, the Court notes that the lack of clarity, precision and predictability of expression “trading relationships” of the criticized text makes unclear and unpredictable the conditions of individual freedom restriction, a fundamental right provided by art. 23 of the Constitution.

Furthermore, the discretion of the lawmaker when questioning art. 23 of the Constitution, undergoes a strict control of the Constitutional Court, being therefore a limited one<sup>13</sup>. Taking into account the definition given to the public official for the purpose of the Criminal Code, the public official provided by law no. 188/1999 is always identified with the active subject of the offense of conflict of interest, the concept of public official for the purpose of criminal law being more comprehensive<sup>14</sup>, according to Decision no. 603/2015 of the Constitutional Court, previously cited.

## 2.2. The concept of conflict of interest in the administrative law

In the administrative law, the regulation of the conflict of interest is performed from a different perspective. At the European level, the Organization for Economic Cooperation and Development issued in

2013 the Guidelines for Managing of Conflict of Interest in the Public Service<sup>15</sup>. It is interesting that the guidelines distinguish between three concepts: actual conflict of interest, apparent conflict of interest, potential conflict de of interest.

Therefore, a *conflict of interest* involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of the official duties and responsibilities. This definition, according to the Guidelines, has the same meaning as the *actual conflict of interest*, the Guidelines note that a conflict of interest situation can thus be current or it may be found to have existed at some time in the past.

An *apparent* conflict of interest can be said to exist when it *appears* that a public official’s private interests could improperly influence the performance of the duties *but this is not in fact the case*.

A *potential* conflict arises where a public official has private interests which are such that a conflict of interest would arise if the public official were to become involved in relevant (conflicting) official responsibilities in the future.

Furthermore, we also mention Recommendation no. 10 (2000) of the Committee of Ministers to Member States on Codes of conduct for public officials which refers in art. 10 to the conflict of interest and takes into account only public officials<sup>16</sup>.

Paragraph (1) of art. 10 of the Recommendation provides the following: “Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence or appear to influence the impartial and objective nature of his or her official duties”, and paragraph (2): „The public official’s private interest includes any advantages to himself or herself, to his or her family, parents, friends or persons or organizations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto.”

From this point of view, we consider that it would be interesting to analyze the evolution of the conflict of interest by comparing the legislations with strong legal tradition in Europe, as we are aware of the fact that nowadays most legislative changes are transplanted from other legal systems<sup>17</sup>.

At national level, the conflict of interest was regulated in terms of administrative law by Law no.

<sup>9</sup> Mihai Bădescu, *Drept constituțional și instituții politice*, second edition revised and supplemented, V.I.S.Print, Bucharest, 2002, p. 449.

<sup>10</sup> Roxana Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p.12.

<sup>11</sup> Decision no. 603/2015 of the Constitutional Court of Romania, published in the Official Journal no. 854/2015.

<sup>12</sup> For a detailed analysis of the values expressed by means of the law principles, see Elena Anghel, *Values and valorization*, in LESIJ XXII, no. 2/2015, pag. 103-113.

<sup>13</sup> Decision no. 317/2016 of the Constitutional Court of Romania, published in the Official Journal no.566/2016.

<sup>14</sup> Decision no. 603/2015, of the Constitutional Court of Romania, published in the Official Journal no. 854 /2015.

<sup>15</sup> <https://www.oecd.org/gov/ethics/2957377.pdf>., accessed on February 10<sup>th</sup>, 2017.

<sup>16</sup> Recommendation no. 10 (2000) of the Committee of Ministers to Member States of the Council of Europe on the codes of conduct for public officials, adopted by the Committee of Ministers on May 11<sup>th</sup>, 2000, during the 106<sup>th</sup> session, published on: [http://cna.md/public/files/legislatie/rec\\_2000\\_10\\_cod\\_conduita\\_func\\_t\\_public.pdf](http://cna.md/public/files/legislatie/rec_2000_10_cod_conduita_func_t_public.pdf), accessed on February 10<sup>th</sup>, 2017.

<sup>17</sup> Laura-Cristiana Spătaru-Negură, *Exporting Law or the Use of Legal Transplants*, in proceedings-ul CKS-eBook 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 814.

161/2003 on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption<sup>18</sup>. Title IV of this law is expressly entitled: “Conflict of interest and incompatibilities regime in the exercise of publicly appointed offices and public functions”.

Law no. 161/2003 on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption defines the conflict of interest in art. 70 as follows: “the conflict of interest means the situation where a person exercising a publicly appointed office or a public function has a financial interest or an interest which can influence the objective fulfillment of the duties incumbent on him or her according to the Constitution or to other normative acts”. At the same time, as shown on another occasion, the framework law provides expressly the situations involving conflict of interest for public officials in art. 79<sup>19</sup>.

The conflict of interest for presidents and vice-presidents of the county councils or local and county councilors is provided by Law no. 215/2001 on public administration in art. 47 and for mayors, deputy mayors, general mayor, deputy mayors of Bucharest the legislation provides that they are not entitled to issue an administrative act or to conclude a legal act, or to issue an order, in the exercise of the function, which produces a material benefit for themselves, spouses or first level relatives. In case of a conflict of interest, if they are related to the conflict of interest situation, all legal or administrative acts concluded directly or indirectly by intermediaries, under the violation of the legal provisions on the conflict of interest shall be deemed void<sup>20</sup>.

The public authority which is competent to check the conflicts of interest was especially established by Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency<sup>21</sup>. The action for the annulment of the legal or administrative acts concluded under the violation of the legal provisions on the conflict of interest can be taken by the Agency even if the person in question no longer holds the respective function<sup>22</sup>.

On a regular basis, reports are published on the official web page<sup>23</sup> of the National Integrity Agency, on the status of the procedure relating to incompatibilities, conflicts of interest, confiscation of

assets, legal liability proceedings, and in this respect court decisions, etc. are published, as well as statements of assets and interests. It is interesting that the National Integrity Agency publishes on the web page the cases of potential conflicts of interest, for example in case of local elected officials specifying the following: criminal and administrative conflict of interest.

### 2.3. The conflict of interest in the field of public procurement, according to the latest legislative amendments

Throughout 2016 a package of laws was adopted on public procurement and concession. Law no. 100/2016 on the concession of works and services<sup>24</sup> provides expressly the *conflict of interest* in Chapter III - called: *Rules for participation in the award procedure*, art. 42-46. The conflict of interest is defined in art. 43 as follows: “any situation where the members of the staff of the contracting entity who are involved in the performance of the award procedure or who can influence the result thereof have, directly or indirectly, a financial or economic interest or other personal interest which could be construed as an element which compromises their impartiality or independence in the award procedure”.

Five situations likely to generate conflict of interest are detailed in this law. Furthermore, an interdiction is provided for 12 month term as of the conclusion of the agreement for the winning tenderer the contracting entity concluded the concession agreement with, namely the tenderer shall not be entitled to conclude any other agreements on service provision, directly or indirectly, for the performance of the concession agreement, with natural persons or legal entities which were involved in the process of control/evaluation of participation requests / tender offers submitted within an award procedure or employees/former employees of the contracting entities the contractual relations of whom ceased after the award of the concession agreement. The penalty for the breach of this prohibition is the rescission or de jure termination of the concession agreement, according to art. 45 of the law. Legal liability enables lawfulness, as the simple confirmation of sanction measures would not be effective if the application thereof did not pursue the restoration of the rights established by law<sup>25</sup>.

<sup>18</sup> Law no. 161/2003 on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption, published in the Official Journal no. 279/2003.

<sup>19</sup> Elena Ștefan, *Practica judiciară privind incompatibilitățile publice*, Revista de Drept Public no. 1/2015, p.77-78.

<sup>20</sup> Cristian Clipa, *Drept administrativ. Teoria funcției publice. (I) Raportul juridic de serviciu- noțiune, natură, părți, obiect și conținut*, Hamangiu Publishing House, Bucharest, 2011, p. 352.

<sup>21</sup> Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, published in the Official Journal no. 359/2007, apud Elena Ștefan, *op.cit.*, p.78.

<sup>22</sup> Cristian Clipa, *op.cit.*, p. p. 352.

<sup>23</sup> <https://www.integritate.eu/Home.aspx>, accessed on February 10<sup>th</sup>, 2017.

<sup>24</sup> Law no. 100/2016 on the concession of works and services, published in the Official Journal no. 392/2016.

<sup>25</sup> Elena Anghel, *The responsibility principle*, în Proceedings of the Challenges of the Knowledge Society Conference (CKS) no. 5/2015, p. 364-370.

### 2.3.1. The procedure in case a potential conflict of interest is identified.

The contracting entity shall be bound to provide in the concession documents the name of the persons holding decision making functions within the contracting authority.

If the contracting entity finds a situation which is likely to cause conflict of interest, it shall perform the required procedures in order to establish if the respective situation represents a conflict of interest situation and shall describe to the candidate /tenderer who finds himself in the respective situation, the reasons which, in the opinion of the contracting entity, are likely to cause a conflict of interest.

Furthermore, the contracting entity shall be bound to submit a point a view to the candidate/tenderer.

The measures ordered by the contracting entity, when establishing the existence of a conflict of interest, for the removal of the circumstances causing the respective conflict of interest are the following:

- The replacement of the persons in charge with the evaluation / control of the tender offers / participation requests, when their impartiality is affected and when possible;
- The rejection of the tenderer / candidate who has relations with decision-making function persons within the contracting entity.

### 2.3.2. The integrity warning

Law no. 184/2016 establishing a mechanism for preventing conflicts of interest regarding the award of the public procurement agreements<sup>26</sup> is a recent normative act in connection with the subject analyzed by us. The content of the law provides that it shall become effective within 6 month as of the publishing in the Official Journal of Romania and shall be exclusively applicable to the procedures for the award of public procurement agreements initiated after the enforcement of the law.

Law no. 184/2016 establishes the *ex ante* check mechanism in terms of the situations which can generate conflict of interest within the procedures initiated by the electronic public procurement system, so that they are removed without the respective procedures being affected. A *Prevention System* – an integrated computer system for the prevention and identification of potential conflict of interest is established within the National Integrity Agency. The system operates based on the data recorded in the integrity forms registered with SEAP at the time of the performance of the procedures for the award of public procurement agreements and processed by the integrity inspectors, according to the law.

The law introduces a new concept, respectively: *the integrity warning*. Art. 7 of the law details the meaning of the integrity warning. More precisely, in the event the integrity inspectors within N.I.A., following the performed checks, detect the prerequisites of a potential conflict of interest, they shall be bound to deliver the integrity warning issued by the *Prevention System*, within no more than 3 business days as of the receipt of the filled in form, Section II.

The lack of an integrity warning or the lack of measures ordered by the head of the contracting authority, as a consequence of the integrity warning, shall not preclude the performance of identification, evaluation and investigation procedures or the civil, disciplinary, administrative, contraventional or criminal liability of the persons who violated the legal provisions.

Upon the receipt of the integrity warning, the head of the contracting authority shall be bound to take all the necessary measures to overcome the conflict of interest. Such measures might consist in: replacing the member of the evaluation committee, excluding the tenderers / candidates / associated tenderers /subcontractors / third parties who find themselves in a potential conflict of interest, according to specific regulation.

The failure to take measures following the receipt of an integrity warning or the failure to fill in the integrity form triggers *ex officio* the conflict of interest evaluation procedure, following the completion of the award procedure, exclusively with the persons who are subject to the provisions of Law no. 176/2010. The National Integrity Agency shall check if the measures required for the removal of the conflict of interest situation were implemented, according to its specific duties.

## 3. Conclusions

As the title of this study is called, we hereby analyzed the specific legislation of the conflict of interest in order to identify the modality it is regulated. The conflict of interest, on the one hand, is provided as an offense, and on the other hand, is provided by the administrative law. Currently, we note that the legislation is not unified yet, despite the new package of laws and this thing shall be reflected by the litigations to be submitted before the courts of law and in what concerns the mechanism of *ex ante* prevention of the conflict of interest in the public procurement procedure, we will see how effective it is after this legislation enters into force.

<sup>26</sup> Law no. 184/2016 establishing a mechanism for preventing conflicts of interest regarding the award of the public procurement agreements, published in the Official Journal no. 831/2016.

**References:**

- Elena Anghel, *The responsibility principle*, in Proceedings of the Challenges of the Knowledge Society Conference (CKS ) no. 5/2015;
- Elena Anghel, *Values and valorization*, in LESIJ XXII, no. 2/2015;
- Elena Anghel, *The reconfiguration of the judge's role in the romano-germanic law system*, in LESIJ.JS XX – 1/2013, Pro Universitaria Publishing House, Bucharest, 2013;
- Mihai Bădescu, *Drept constituțional și instituții politice*, second edition revised and supplemented, V.I.S.Print, Bucharest, 2002;
- Cristian Clipa, *Drept administrativ. Teoria funcției publice. (I) Raportul juridic de serviciu- noțiune, natură, părți, obiect și conținut*, Hamangiu Publishing House, Bucharest, 2011;
- M.C.Cliza, *Drept administrativ Partea I*, Prouniversitaria Publishing House, Bucharest, 2010;
- Mihai Adrian Hotca, *Noul Cod penal și Codul penal anterior, Aspecte diferențiate și situații tranzitorii*, Hamangiu Publishing House, Bucharest, 2009;
- Roxana Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011;
- Laura Cristiana Spătaru Negură, *Dreptul Uniunii Europene- o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016;
- Laura-Cristiana Spătaru-Negură, *Exporting Law or the Use of Legal Transplants*, în proceedings-ul CKS-eBook 2012, Pro Universitaria Publishing House, Bucharest, 2012;
- Elena Ștefan, *Practica judiciară privind incompatibilitățile publice*, Revista de Drept Public no. 1/2015;
- Law no. 161/2003 on certain measures to ensure transparency in the exercise of publicly appointed offices, public functions and in business environment, to prevent and sanction corruption, published in Official Journal no.279/2003;
- Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, published in Official Journal no.359/2007;
- Law no. 100/2016 on the concession of works and services, published in Official Journal no.392/2016;
- Law no. 184/2016 establishing a mechanism for preventing conflicts of interest regarding the award of the public procurement agreements, published in the Official Journal no.831/2016;
- Law no. 278/2006 for the amendment and supplementation of the Criminal Code, as well as for the amendment and supplementation of other laws, published in the Official Journal no. 601/2006;
- Law no. 286/2009 on the Criminal Code, published in the Official Journal no. 510/2009;
- Decision no. 603/2015 of the Constitutional Court, published in the Official Journal no.854/2015;
- Decision no. 317/2016 of the Constitutional Court, published in the Official Journal no.566 /2016;
- Decision no. 603/2015 of the Constitutional Court, published in the Official Journal no.854/2015;
- Decision no. 390 / 2014 of the Constitutional Court, published in the Official Journal no. 532 /2014;
- Recommendation no. 10 (2000) of the Committee of Ministers to Member States on Codes of conduct for public officials, adopted by the Committee of Ministers on May 11<sup>th</sup>, 2000, during the 106<sup>th</sup> session, published on: [http://cna.md/public/files/legislatie/rec\\_2000\\_10\\_cod\\_conduita\\_func\\_public.pdf](http://cna.md/public/files/legislatie/rec_2000_10_cod_conduita_func_public.pdf)., accessed on February 10<sup>th</sup>, 2017;
- <https://www.oecd.org/gov/ethics/2957377.pdf>, accessed on February 10<sup>th</sup>, 2017;
- <https://www.integritate.eu/Home.aspx>., accessed on February 10<sup>th</sup>, 2017.