

INCRIMINATING THE CONFLICT OF INTERESTS IN ROMANIA: RECENT LEGAL DEVELOPMENTS

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Abstract

The present paper aims at outlining the evolution of the Romanian criminal law provisions incriminating the conflict of interests, starting from its insertion, as of 2006, into the Criminal Code of 1968, until the up-to-date version of the offence as per the Criminal Code in force, renamed as use of the position for favouring persons, as amended by Law no. 193/2017. In this context, the approaches of the legal text in the well-established case-law of the judicial bodies as well as of the Constitutional Court and legal literature are highly relevant in order to explain the rationale behind the shaping of the legal content of the offence. The diachronic delineation shall be supplemented by elements of comparative law. Where appropriate, reference shall also be made to the administrative type of liability that may be incurred in a conflict of interest case and the relationship thereof with the proceedings in criminal matters or to distinctions between the analysed offence and other offences falling into the category of malfeasance in office or corruption offences. The conclusions of this examination emphasise the need for predictability and proper understanding of the criminological layer in tackling the conflict of interest phenomenon.

Keywords: malfeasance in office, conflict of interests, favouring, public servant, economic benefit.

1. Introduction

1.1. Introduction

The conflict of interests offence is placed by the lawmaker in the category of malfeasances in office although part of the jurisprudence considers it appropriate to have placed it in the category of corruption offences as both categories of offences violate the public interests¹.

One of the affirmed values of the 2016-2020 *National Anti-Corruption Strategy*, approved by Government Decision no. 583/2016, is *integrity* (under item 2.1 of Chapter 2), which means that the representatives of public institutions and authorities have the obligation to declare any personal interests that may conflict with the objective performance of their work duties as well as to make all necessary endeavours to avoid conflicts of interests and incompatibilities.

As rightly pointed out in the literature², the present-day incrimination of the conflict of interests under Romanian criminal law takes into consideration the provisions set out under Article 8 of the 2003 *UN Convention against Corruption*, referring to codes of conduct for public officials, specifically the ones stating that “each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions” and that “Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary

or other measures against public officials who violate the codes or standards established in accordance with this article”.

2. Incriminating the Conflict of Interests under the Romanian Criminal Code of 1968

The incrimination of the conflict of interests in the Romanian criminal law was brought about pursuant to Article I item 61 of Law no. 278/2006 for amending and supplementing the Criminal Code as well as for amending and supplementing other laws³ under Article 253¹ of the Criminal Code of 1968.

The Explanatory Memoranda to the draft law that became Law no. 278/2006 explicitly stated the necessity to incriminate such act, that is, to improve the actions of preventing and countering corruption acts, by sanctioning, through criminal law means, the public official who, knowingly and deliberately, achieves personal interests by carrying out public duties. It was noted that, at the time, the provisions incriminating corruption acts under the Criminal Code of 1968 did not cover such a situation, criminal liability being triggered only in cases of bribe-taking, receiving undue benefits or trafficking in influence⁴.

The legal content of the offence under this legal text referred to the act committed by a public servant that, in the exercise of his duties, fulfills an act or participates in taking a decision whereby a material benefit was achieved, directly or indirectly, for himself, his spouse, a relative or kin up to the second degree

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¹ Sergiu Bogdan (coord.), Doris Alina Șerban and George Zlati, *Noul Cod penal – Partea specială – Analize, explicații, comentarii* (Bucharest: Universul Juridic, 2014): 461.

² Georgina Bodoroncea et. al., *Codul penal – Comentariu pe articole* (Bucharest: C.H. Beck, 2014): 671-672.

³ Published in the Official Journal of Romania no. 601 of July 21, 2006.

⁴ Explanatory Memoranda – Law no. 278/2006 for amending and supplementing the Criminal Code as well as for amending and supplementing other laws, available at: <http://www.cdep.ro/proiecte/2006/000/20/4/em24.pdf>.

included or for other persons with whom he has had commercial or working relations up to 5 years before or from whom he has benefitted or benefits in terms of services or advantages of any nature.

The punishment provided by law was imprisonment of between 6 months and 5 years and the interdiction of the right to hold public office for the maximum duration.

It was also provided that the incrimination provisions did not apply in cases of issuing, approving or adopting legislation.

3. Incriminating the Conflict of Interests under the Criminal Code in Force

There is continuity in incriminating the conflict of interests offence, under Article 301 of the new Criminal Code⁵.

It has been noted⁶, at the onset of the application of the new law, that the legal content of the conflict of interests offence was almost identical to the one under the previous law, the differences mainly aiming at improving the wording of the incrimination text.

However, since the entering into force of the current legislation, the offence has been substantially reconfigured, as shall be further shown.

As noted in the literature⁷, the current legal text incriminating the conflict of interests has been inspired by the French Criminal Code (Articles 432-12 and 432-13), providing the offence of illegally acquiring benefits, but which is significantly more elaborate than the Romanian legal transplant (*see Section 3 below*).

3.1. The Initial Forms of the Texts of Incrimination

The initial legal content of the offence, as per the first paragraph of Article 301 was the following: the act committed by a public servant who, in the exercise of his work duties, has fulfilled an act or participated in taking a decision whereby an economic benefit has been obtained for himself, his spouse, a relative or kin up to the second degree included or for another person with whom he has had commercial or working relations up to 5 years before or from whom he has benefitted or benefits in terms of advantages of any nature, punishable by law by imprisonment of between 1 year and 5 years and the interdiction of exercising the right to hold public office.

In a similar manner to the previous text of incrimination under the old Criminal Code, the initial form of Article 301 para. (2) of the current Code provided that the first paragraph shall not apply in cases of issuing, approving or adopting legislation.

Pursuant to Article 308 of the Criminal Code, a *mitigated version* of the conflict of interests offence has been inserted into the legislation. This implied the application of the incrimination text to so-called “*private officials*”, in which case the legal limits of the punishment would be reduced by a third.

Thus, as per this mitigated version, the provisions under Article 301 of the Criminal Code regarding public officials applied accordingly to the acts committed by or relating to the persons exercising, permanently or temporarily, with or without compensation, a task of any kind (i) in the service of a natural person among those mentioned under Article 175 para. (2) of the same code (i.e. persons assimilated to a public official, namely those exercising a service of public interest invested as such by the public authorities or subject to the control or supervision thereof with respect to the performance of the said public service) or (ii) within any legal person.

The emerging legal jurisprudence criticized this legislative intervention as an “error” as no justification, either from the point of view of criminology or comparative law, could be identified for the Romanian lawmaker’s option to significantly widen the scope of the conflict of interests offence⁸.

It was not until the Constitutional Court of Romania intervened, settling an exception of unconstitutionality of paramount importance in this matter and causing the amendment of the article providing the offence in question so as to comply with the fundamental law provisions.

Thus, by Decision no. 603/2015⁹, the Constitutional Court of Romania upheld an exception of unconstitutionality, ruling that the phrase “commercial relations” within Article 301 para. (1) of the Criminal Code was unconstitutional. By the same decision, the Court found that the phrase “or within any legal person” within Article 308 para. (1) of the Criminal Code with reference to art. 301 of the same Code was also unconstitutional.

This ruling was based on the reasoning that the phrase “commercial relations” lack clarity, precision, and predictability, which is not permitted when restricting individual liberty. Furthermore, the recipients of the rule cannot properly direct their conduct. Consequently, the constitutional provisions relating to the quality of the law and individual liberty, set forth under Article 1 para. 5 and Article 23, were disregarded¹⁰.

At the same time, according to the Constitutional Court, providing that the perpetrator of conflict of interests can also be a private person as per the mitigated version of the offence is excessive as the constraining force of the State by criminal means is

⁵ Law no. 286/2009, published in the Official Journal of Romania no. 510 of July 24, 2009, in force as of February 1, 2014.

⁶ Tudorel Toader et al., *Noul Cod penal. Comentarii pe articole* (Bucharest: Hamangiu, 2014): 485.

⁷ Gavril Paraschiv in George Antoniu and Tudorel Toader (coord.), *Explicațiile Noului Cod penal* (Bucharest: Universul Juridic, 2016): 350.

⁸ Sergiu Bogdan (coord.), Doris Alina Șerban and George Zlati, *Noul Cod penal – Partea specială – Analize, explicații, comentarii*, 459.

⁹ Published in the Official Journal of Romania no. 845 of November 13, 2015.

¹⁰ See para. 23-25 of Constitutional Court Decision no. 603/2015.

extended in a disproportionate manner over the right to engage in work and economic freedom, without there being any criminological justification in this respect. Consequently, purely private interests are qualified by the lawmaker as public¹¹.

3.2. The Current Configuration of the Conflict of Interests Offence

Law no. 193/2017 amending the Law no. 286/2009 on the Criminal Code has brought significant changes to the conflict of interests offence¹²:

1. The well-established name of the offence (“the conflict of interests”) has been replaced by “using the position for favouring certain persons”.
2. The conditions of incrimination have been narrowed down by eliminating the following legal elements from the content of the offence: the public official’s participation in taking a decision; the obtaining of the benefit for another person with whom the public official has been in commercial or work relations up to five years before or from whom he benefitted or benefits in terms of advantages of any nature; the manner of obtaining the advantage (directly or indirectly).
3. The interdiction to occupy a public office has been limited to a three-year period.
4. A new hypothesis excluding the application of the first paragraph of Article 301 has been inserted, namely exercising a right acknowledged by law or fulfilling an obligation imposed by law, by observing the conditions and limits provided thereby.

Consequently, the current legal content of the offence, as per the first paragraph of Article 301 is the following: the act committed by a public servant who, in the exercise of his work duties, has fulfilled an act whereby an economic benefit has been obtained for himself, his spouse, a relative or kin up to the second degree included.

As shown in the relevant case-law, although the legal modality consisting in the public official’s participation in taking a decision has been eliminated, among the *prima facie* elements, the fulfillment by the public official of an act in the exercise of his work duties has been maintained. Consequently, the latest legislative amendments did not amount to the decriminalisation of the act held against the defendant¹³.

The current form of Article 301 para. (2) of the Criminal Code provides that the first paragraph shall not apply when the act or decision refers to (i) issuing, approving or adopting legislation or (ii) exercising a

right acknowledged by law or fulfilling an obligation imposed by law, by observing the conditions and limits provided thereby. This is an essential element to be considered when analysing the objective limb of the offence.

Moreover, the law requires two additional elements to meet the constitutive elements of the conflict of interests offence, namely that the act fulfilled by the public official should fall within the remit of his work duties and that this act should actually determine the obtaining of an economic benefit for himself, his spouse, a relative or kin up to the second degree included¹⁴.

The case-law of the Romanian supreme court shows, by making reference to the Constitutional Court Decision no. 2 of January 15, 2014, that the conflict of interests offence does not imply solely the obtaining of undue advantages, but any type of advantage, as what the lawmaker had in view by incriminating this act was to protect the social values whenever the impartial exercise of the public official’s work duties could be affected¹⁵.

The offence is punishable by imprisonment of between 1 year to 5 years and the interdiction of exercising the right to hold public office for a three-year period.

By the same amending law, the mitigated version of the conflict of interests offences under Article 308, referring to the commission of the offence by or with respect to “private” officials, has been eliminated.

Before its being adopted, the conformity of the law that eventually became Law no. 193/2017 with the provisions of the Romanian Constitution was verified and the objection of unconstitutionality was dismissed as unfounded. It follows that, in the Court’s view, the provisions amending the Criminal Code are in line with the fundamental law provisions, including the ones relating to the relation between international and domestic provisions.

Be that as it may, there are still legal challenges ahead in properly interpreting the text of incrimination relating to the offence of using the position for favouring certain persons.

For instance, the breach of the *ne bis in idem* principle may occur when other, non-criminal, forms of liability are activated for the same act, such as finding a conflict of interests when concluding an agreement, as it has been invoked in a case tried by the High Court of Cassation and Justice¹⁶. In this particular case, the National Integrity Agency found a conflict of interests concerning an MP and a disciplinary action and sanction followed, namely the reduction of the salary

¹¹ See para. 32 and 34 of Constitutional Court Decision no. 603/2015.

¹² Mihai Mareș, “Conflictul de interese. Modificarea conținutului legal al infracțiunii. Consecințe”, *Pandectele Române* 5 (2017): 169.

¹³ The Cluj Court of Appeal, the Criminal Division, decision no. 1101/A/2017 of September 6, 2017, www.rolii.ro apud sintact.ro, in Mihai Mareș, “Conflictul de interese. Modificarea conținutului legal al infracțiunii. Consecințe”, 165.

¹⁴ Ilie Pascu in Vasile Dobrinoiu (coord), *Noul Cod penal comentat. Partea specială*, 3rd Ed. (Bucharest, Universul Juridic, 2016): 586-587.

¹⁵ The High Court of Cassation and Justice, the Criminal Division, decision no. 77/RC/2017 of February 22, 2017, www.scj.ro, in Mihai Mareș, “Conflictul de interese. Elemente de tipicitate a infracțiunii. Cerințe esențiale” *Pandectele Române* 5 (2017): 170.

¹⁶ The High Court of Cassation and Justice, sentence no. 88/2015, final by criminal judgment no. 42/2016, Panel of 5 Judges, in Augustin Lazăr, *Conflictul de interese – Teorie și jurisprudență. Studii de drept comparat* (Bucharest, Universul Juridic, 2016): 78.

for a three-month period. The judicial control court considered that this disciplinary ruling did not represent a final ruling so as to hold the *res judicata* principle applicable.

However, when dealing with parallel procedures, it is mandatory to take into consideration the standards developed by the ECHR conventional system when construing the *ne bis in idem* principle¹⁷, which are more nuanced than the Romanian *res judicata* principle. And so, based on the wider European standard, the *ne bis in idem* principle could, in my opinion, be successfully argued in a criminal case when there is a prior final administrative ruling punishing the said conflict of interests. The analysis is to be made *in concreto*.

4. Elements of Comparative Law

As already mentioned, Articles 432-12 and 432-13 of the French Criminal Code (*De la prise illégale d'intérêts*) serve as the source of inspiration for the Romanian text of incrimination¹⁸.

According to the first paragraph of Article 432-12 of the French Criminal Code, the act committed by a person holding public authority or performing a public service mission or by a person holding a public office, to take, receive or keep, directly or indirectly, any interest in a company or in an operation of which, at the time of the act, he has, in whole or in part, the duty of supervising, administering, liquidating or paying, shall be punishable by five years' imprisonment and a fine of € 500,000, the amount of which may be doubled to the amount of the proceeds of the offence.

As per Article 432-13 of the French Criminal Code:

It is punishable by three years' imprisonment and a fine of € 200,000, the amount of which may be doubled to the amount of the proceeds of the offence, the act committed by a person who has been charged, as a member of the Government member, of an independent administrative authority or of an independent public authority holding a local executive function, a civil servant, a military official or a public official within the framework of the duties actually performed by him or supervise or control a private enterprise, either to conclude contracts of any kind with a private enterprise or to formulate an opinion on such contracts, or to propose directly to the competent authority decisions relating to operations carried out by a private enterprise or to formulate an opinion on such decisions, to take or receive a participation by work,

advice or capital in one of these companies before expiring a period of three years following the cessation of these functions. The same penalties apply to any participation by work, advice or capital in a private company which owns at least 30% of common capital or has entered into an exclusive or *de jure* agreement with one of the companies previously referred to.

For the purposes of these legal texts, a public enterprise operating in a competitive sector and in accordance with the rules of private law is considered to be a private enterprise.

These provisions are applicable to employees of public institutions, public enterprises, mixed companies in which the State or public authorities directly or indirectly hold more than 50% of the capital and public operators provided for by Law No. 90-568 of July 2, 1990 on the organization of the public service of the post office and France Telecom.

The offence is not constituted by the sole participation in the capital of companies listed on the stock exchange or when the capital is received by devolution succession.

Article 323 of the Italian Criminal Code incriminates the conflict of interests under a different name, namely abuse of office (which is a distinct offence under Romanian criminal law), whereas in other jurisdictions, such as Germany, the act is not incriminated at all¹⁹.

As far as the common law legal systems are concerned, the American legislation is a noteworthy example as it comprises an extensive set of provisions under Chapter 11, Part I, Title 18 of the *US Code*, which is entitled "Bribery, Graft, and Conflicts of Interest"²⁰.

5. Conclusions

From a cultural perspective, in accordance with a scholarly opinion²¹, I am also of the view that the incrimination of the conflict of interests in Romania also possesses a symbolic dimension, by encouraging a change in the Romanian cultural paradigm to shift from a traditional clan-like view on human relationships to duly observing the primacy of pursuing integrity in achieving the public interest over such purely personal connections.

Nevertheless, when it comes to overly restricting the private dimension through law, as the Romanian Constitutional Court has already shown, the lawmaker must adopt a balanced view so as to comply with the standards ensuring the exercise of fundamental rights.

¹⁷ Mihai Mareş and Mihaela Mazilu-Babel, "CEDO. Cauza A. și B. împotriva Norvegiei. Sancțiuni fiscale și penale. *Ne bis in idem*. Proceduri paralele. Implicații în procesul penal român" *Pandectele Române* 1 (2017): 123 and the following.

¹⁸ The text of the French Criminal Code, updated as of December 16, 2017, is available at: www.legifrance.gouv.fr.

¹⁹ Sergiu Bogdan (coord.), Doris Alina Șerban and George Zlati, *Noul Cod penal – Partea specială – Analize, explicații, comentarii*, 460-461.

²⁰ The US Code is available at: <https://www.law.cornell.edu/>. Section 208 on acts affecting a personal financial interest, under Chapter 11, had been invoked in the context of discussing President Donald Trump's handling his financial and business entities following taking office (see Lauren Carroll, "Giuliani: President Trump will be exempt from conflict-of-interest laws", November 16, 2016, <http://www.politifact.com/truth-o-meter/statements/2016/nov/16/rudy-giuliani/giuliani-president-trump-will-be-exempt-conflict-i/>).

²¹ Sergiu Bogdan (coord.), Doris Alina Șerban and George Zlati, *Noul Cod penal – Partea specială – Analize, explicații, comentarii*, 461.

Following the recent legislative developments, the solutions proposed by the participants to the proceedings and ordered upon by the judicial bodies shall be a barometre as to the degree of clarity of the current text of incrimination.

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