CONFLICT OF INTEREST OFFENCE

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Abstract

The following study aims to analyse the conflict ot interest provisions offence stipulated under Article 301 of the special part of the new Criminal Code. This adjustment aims criminal liability of public officials who, in the exercise of his duty, acquires an unjust material benefit for himself or for some people with whom he shares certain interests. Through this study we want to set a clear limit between this offence and the other service offences, as well as to highlight the need for such legislation.

Keywords: *conflict of interest, public servant, service offence, corruption offences, the Criminal Code.*

1. Introduction

Through the regulation of the conflict of interest offence, the legislator intended to incriminate those situations in which private interests of public servant improperly influence his official duties.

The Conflict of interest offence was regulated for de first time in art. 241 of Carol Code II, Title III „Crime and delicts against public administration", Chapter I "Delicts committed by public officials", Section II" Unfair takings"[1]. With the coming into force of the 1968 Criminal Code, this offence was repealed because it was considered that this was not consistent with the communist system. Subsequently, by Law no 278/2006, the legislator considered it necessary to reintroduce the conflict of interest offence in the Criminal Code.

Provisions relating to conflict of interest are to be found in certain special laws such as Law no. 78/2000, Law no. 161/2003 and Law no. 144/2007.

In the following we are going to perform an analysis of the contents of this crime from the perspective of the current and former Criminal Code. We will examine, among other things, whether the conflict of interest offence is a service offence or a corruption offence, whether this is a crime of public danger or one of outcome and whether the scope of active and passive subjects has undergone changes in the provisions of the new Ciminal Code. We will also try to capture some comparative aspects between the provisions of Article 301 of the Criminal Code and the regulations applicable to conflicts of interest in the criminal law of other countries.

Although the conflict offence was introduced in the Criminal Code by Law no. 278/2006, and we find its detailed analysis in the legal doctrine, we consider that, through the provisions of the new Criminal Code, some substantial changes are made which require a new examination of this crime.

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[1] Carol Code II promulgated by the high royal decree no. 471 from 17.03.1936, published in Official Gazette No. 65, part I, 18.03.1936.

2. Paper Content

2.1. Design and characterization

The conflict of interest offence was introduced by Law 278/2006 from the previous Criminal Code, art.253[1], Chapter I „Service Crimes or related service crimes”, Title VI „Offences affecting public activities or other activities regulated by law” and it represented the consecration of criminal responsibility of public officials who meet their personal interests to the detriment of the public ones.

In the explanatory statement of Law 278/2006 it is mentioned that the purpose of incriminating the conflict of interest offence is to make more effective the actions regarding corruption prevention and punishment.

We believe that the legislator has provided this motivation because the provisions of Art.11 of Law no.78/2000 on preventing, discovering and sanctioning corruption, which regulate a particular form of conflict of interest offence are seen as assimilated to corruption offences.

Also, in the legal literature[2] it has been emphasized that the conflict of interest offence is one of corruption because it has some similarities with the crime of bribery.

Other authors[3] have considered the conflict of interest offence is a service offence and that it actually represents a particular form of service abuse as it prejudices the legitimate interests of natural or legal persons by performing duties in a defective way.

The Italian legislature is in agreement with this latter view since Art. 323 of the Criminal Code which regulates the offence of office abuse contains specific provisions for the conflict of interest offence: „the public official or the one responsible for a public function who, as part of these functions or service, by violating the legal rules or regulations, or by failing to refrain when faced with a personal interest or with that of a close relative, or in other cases provided, intentionally procures for himself or for others an undue patrimony or unjustly causes damages to others”.

The French criminal legislature also considers that this offence is one of service. Art 432-12 of the Criminal Code incriminates the offence of unlawful acquisition of benefits, an offence which is similar in terms of the legal nature, with the one of the conflict of interest of the Romanian criminal law, in its Book IV- „Crimes and delicts against nation, the state and the public order”, Title III – „Crimes of state authority”, Chapter II „Interference into government by persons exercising a public function”.

Foreign legal literature[4] stated that, although there is a strong relationship between conflict of interest and corruption, in reality, the conflict of interest is a condition in which there is a public official and not an action.

We consider that the conflict of interest offence is a crime of service since it regulates the incompatibility of the public official’s private interests with the exercise of public probity duties. In support of this allegation we bring the argument that a public official may find himself in a situation of conflict of interest without acting corruptly.

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[2] Măgureanu llie, *Conflictul de interese* R.D.P 2/2007 p. 127 in the same sense Usvat Claudia-Florina *Infracțiunile de corupție in contextul reglementărilor europene*, Tome 6 BDPenal, Universul juridic, Bucharest, 2010 p. 202.

[3] Tudoran Mihai Viorel, *Conflictul de interese din legea penală română și luarea nelegală de interese din legea penală franceză* R.D.P. no. 3/2008 p. 230.

[4] Ömer Faruk GENÇKAYA, *Conflict of interest*, http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/tyec/1062-TYEC%20Research%20-%20Conflict%20of%20Interest.pdf

The legislature of the new Criminal Code has considered that this offence is a crime of service. The crime of conflict of interest provisions are found in article 301 of Chapter II „Crimes of service”, Title V „Crimes of corruption and service”.

According to art. 301 para. (1) Criminal Code, it represents a crime of conflict of interest the „public official’s deed, who, in the exercise of his duty, has performed an act or participated in a decision which was made, through which he obtained, directly or indirectly, a patrimony for himself, his spouse, a relative or a marriage up to the second degree included, or for another person with whom he was in commercial relationships at work in the last 5 years or from whom he benefited or received services or benefits of any kind”. Paragraph (2) provides that „The conditions of paragraph (1) do not apply to the issuance, approval or adoption of normative acts.”

2.2. Pre-existing Conditions

The legal object of the crime of conflict of interest is represented by the social values related to the performance of duties by respecting the principles of impartiality, integrity, transparency of the decision and the supremacy of public interest in exercising the high positions and public functions provided for article 70 of Law no.161/2003.

As far as the material object is concerned, we consider that the crime of conflict of interest is a formal offence because by these provisions the deficient performance of duties of a public official is incriminated.

The active subject of this offence is particular as it is represented by the quality of a public servant in the sense of the article 175 of the Criminal Code.

Thus, under this article, the term “public servant” will refer to the person who, permanently or temporarily, with or without remuneration:

a) exercises the powers and responsibilities established by law in order to achieve the prerogatives of the legislative, executive or judicial power;

b) exercises a function or a high position or a public function of any kind;

c) exercises, alone or together with others, inside an autonomous administration, or of another economic operator or of a corporate owned or majority state, tasks related to achieving the object of his activity.

Also, the new Penal Code (article 175, paragraph 2) opted for the assimilation as a civil servant of the person exercising a service of public interest for which he has been vested by the public authorities or who is subject the control or supervision of the fulfilment of that public service.

According to this latter provision, the active subject of the crime of conflict of interest can be represented by the person holding for example, one of the following public services: chartered accountant, legal executor, private detective, pharmacist.

Thus, it can be seen that, unlike the old regulation, the meaning of the term „public servant” has been expanded by assimilating these people.

We consider well founded the views[5] according to which this notion also introduces in its content, the people who, in relation to the positive criminal law hold the position of simple official.

The scope of active subjects was broadened under the provisions of art. 308 Criminal Code, regulating an attenuated form of the crime of conflict of interest. Under these provisions, the crime of conflict of interest can also be committed by the

[5] Antoniu George, *Explicații preliminare ale Noului Cod penal*, Ed. Universul Juridic, 2010, p. 532.

individuals exercising permanently or temporary with or without remuneration, a commission of any kind to the service of an individual as provided in art. 175 paragraph. 2 or in any corporate.

In order to be subject to criminal liability it necessary for these people to have the power to perform any act or to participate in decision making.

Under these provisions the director of a private company who takes the decision to hire his son on a particular position or who acquires a land that belongs to her husband commits the crime of conflict of interest.

We believe that these provisions are beyond the scope of the crime of conflict of interest rules, namely "to create legal preconditions for the conduct of service activities within a framework of integrity and impartiality of exercising public functions and dignities[6]".

These provisions have no equivalent in the previous criminal law because the crime of conflict of interest could be committed only by a public official.

It is true that in other conflict of interest legislations is incriminated committed in private but unlike Romanian regulations, these ones establish more restrictive conditions of application and enforcement. For example, the Italian Civil Code which regulates and sanctions the conflict of interest in the private sector in art. 2391 as well as in art. 2634 exhaustively sets out the categories of persons who violate these provisions.

Lack of the public official quality in art. 301 of the person exercising permanently or temporarily, with or without remuneration a commission of any kind to persons referred to in art.308 leads to the lack of the criminal act from a legal point of view.

The passive subject of the crime of conflict of interest is the public authority, the public institution, or another public legal entity in which public officials operate.

Criminal participation is possible in all forms: accomplice, instigation and complicity.

For the accomplice existence is necessary that all offenders who meet the immediate act or participate in making a decision to obtain a patrimony for themselves or for the persons referred to in the text of the indictment, to be a public servant.

In the legal doctrine[7] it is considered that when a decision is entrusted to the collective body, all the members of this body who knew of the existence of conflict of interest and did not ask the person found in such a situation to refrain from participating in taking this decision or made the decision at the request of incompatible officials, are co-authors of the crime of conflict of interest, even if they have not achieved any material benefit from that act, or that decision.

We express our reservations about this view because that the provisions which incriminate the conflict of interest set the requirement to obtain, directly or indirectly, a patrimony for themselves or for the persons referred to in the Rule of incrimination. Therefore, we consider that in the hypothetical situation described above, the public official who receives economic benefits will be held responsible co-author to the offense of conflict of interest, and the other participants in the decision will be liable for complicity material.

[6] C.C.R. – Decision no.2, 15.01.2013.

[7] Basarab Matei, et. al., *Codul penal comentat vol. II., partea specială*, Ed. Hamangiu, 2008, p.607.

2.3. The constitutive content of crime

2.3.1.The objective side

The material element of the crime of conflict of interest is consists in the in fact of an official who performed an act or a decision in the exercise of duties through which, directly or indirectly, patrimony was obtained.

The conflict of interest is a committed crime with an alternative content that is either in the performance of an act or in the participation in decision making.

By using the phrase “the performance of”, we believe that the legislature intended to take into account the performance by a public official of any job responsibilities that yields a patrimony for themselves or for the persons referred to in the incrimination Rule.

Also, we consider that “the participation in decision making” requires the public official's opinion on an issue to be solved by more people in a single decision.

For the existence typicity of the public official deed it is necessary for this one to perform that act or take part in making a decision in the exercise of his duties. If this was not entitled to take these actions, we consider that his act will not constitute the crime of conflict of interest.

Some authors[8] claim that the act also remains typical when the performance of an act or the participation in a decision was not made in compliance with the rules of procedure, which subsequently led to the invalidity of the act. To the extent that the benefit of the public officials or the persons provided by the incrimination rule is obtained a patrimony, even for a short period of time, we also consider that the conditions of incriminating the crime of conflict of interest are met.

By committing the offending actions it is necessary to obtain, directly or indirectly, a patrimony.

We can consider that direct benefit is obtained, for example, if the public official assesses his own brother for employment as a civil servant working in the unit. The benefit is achieved indirectly, for example, where an agreement advantageous is concluded or to a company, legal person, whose director is the wife of the civil servant, in this case the advantage being directly realized in the assets of the legal person and indirectly in that of close relative[9].

As for the condition of obtaining a patrimony, we see that similar provisions are found in art. 323 of the Italian Criminal Code which provides the condition of getting a patrimony for himself or for others to achieve deed typicity scene.

Unlike criminal Romanian and Italian regulations, which limit the benefit obtained only to the patrimony, the French criminal law establishes that the benefit can be of any kind.

Former Criminal Code stipulated as a requirement that the benefit obtained should be only material. Regarding this aspect, the doctrine[10] held that there was a legislative gap as it was considered necessary to distinguish between a rather imprecise material and the immaterial benefit.

We believe that these discussions are no longer current regarding new regulations as well because clear distinction can be made between the patrimony and the non-patrimony and the patrimonial heritage with civil law.

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[8] Bogdan Sergiu, *Drept penal:parte speciala* Ed. a 2-a rev.si adaug. Ed. Sfera Juridica, Cluj Napoca, 2007, vol. I p. 293.

[9] Dobrinoiu Vasile and Norel Neagu, *Drept penal: partea specială (teorie si practică judiciară,)* Bucuresti Wolters Kluwer, 2008, p. 449.

[10] Bogdan Sergiu, *op. cit.,* p. 293.

Article 301 of the Penal Code stipulates that the patrimony must be obtained by the public officer, his spouse, a relative or a marriage up to second degree including or by another person who was in commercial relationships or work in the last 5 years or benefited from or received services or benefits of any kind.

By person who was in commercial relationships must understand, a person with whom the active subject of the offence had relationships that typically form between a natural person and a legal entity as a result of the provision of a specific work by the former in favour of the second, who in turn commits to any remuneration and create the conditions necessary for performing that work[11].

To determine the persons with whom the official was in “commercial relations” we appreciate the need to consider “the relationship between professionals as well as the relationships between them and any other subjects of civil law.” (Article 3 Civil Procedure Code)

Another category is represented by the person from whom the official has received or is receiving services or benefits of any kind. Receiving services or benefits of any kind means that these ones were offered for free or at preferential prices. Benefit of any kind, unlike the patrimony one required by the legislator in the same rule can be moral, as well[12].

According to art. 301 paragraph (2) of the Penal Code, “The provisions of paragraph (1) do not apply to the issuance, approval or adoption of normative acts”. This means, with reference to the text, that the public official’s act who in the exercise of duties issue, approve, or adopt a law by which directly or indirectly a patrimony benefit is made for himself, his spouse, a relative or a marriage up to grade II including or for another person with whom was be in commercial relations or employment in the past five years or from whom has he received or receives services or benefits of any kind is not a crime. The legislature chose to establish this exception because a law is impersonal and therefore it can benefit a number of countless people.

The doctrine[13] held that the result is socially dangerous, as shown in the drawing of the incrimination rule, a patrimony benefit was made, directly or indirectly.

Also, we can find in legal practice[14] as well, decisions which consider that the offence is one of result. Thus, the sentence no. 24 of 1 March 2012 the Court of Appeal from Bacau stated that, from the way in which the conflict of interest is settled, it appears that this one is a crime of material result.

Along with other authors[15], we consider that the crime of conflict of interest is a crime hazard because its consumption is affecting the smooth running of the activity of some of the public legal persons by performing acts that yield economic benefits for the public official or a person with whom he has a special relationship as indicated by art. 301 of the Penal Code.

The causal link between the adoption of the act or the decision to which the public officials participate and the material achievement must be conducted and it must result from the materiality of the concrete fact committed by public officials (ex re).

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[11] Ţiclea Alexandru, *Tratat de dreptul muncii,* ediţia a 4-a, Ed. Universul Juridic, Bucuresti 2010 p.17.
[12] Basarab Matei et all, *op. cit*., p. 611.
[13] Paşca Viorel *Conflictul de interese* R.D.P. 8/2008 p. 169.
[14] http://legeaz.net/spete-penal/infractiunea-de-conflict-de-interese-24-1-2012.
[15] Dobrinoiu Vasile and Norel Neagu, *op. cit*., p. 450.

2.3.2. The subjective side

To constitute the crime of conflict of interests it is required that actions stipulated under the rule of criminality should be committed with direct or indirect intention.

2.3.3. Forms / ways

We believe that the crime of conflict of interest is committed when the act or the decision by which the material benefit is achieved takes place.

The attempt is possible because this offence is intended and of slow execution, but the legislature chose not to punish it.

The conflict of interest has two legal ways, more precisely, to achieve an act or the participation in decision making in the service that the active subject fulfils.

As to the enforcement regime, the conflict of interest crime, provided by art. 301 of the Penal Code, is punished with imprisonment from one to five years and disqualification to hold public function.

3. Conclusions

We believe that the provisions governing the crime of conflict of interest are intended to ensure the impartiality of the public official for him to fulfil his duties objectively.

In this paper, we consider that we have been able to argue that the crime of conflict of interest is a crime of service, although it has some similarities with corruption offences. We have also showed that the scope of active subjects was extended both by modifying the notion of public official and the provisions of art.308 Criminal Code.

We propose that the ferend bill should extend the application of these provisions to cases in which the public official gets a non-patrimonial benefit by performing an act or participation in decision making. We also consider that the attenuated form of the offence of conflict of interest provided by art.308 Criminal Code should be repealed.

References

- Antoniu George, *Explicații preliminare ale Noului Cod penal*, Ed. Universul Juridic, 2010
- Basarab Matei, et. al., *Codul penal comentat vol. II., partea specială*, Ed. Hamangiu, 2008
- Bogdan Sergiu, *Drept penal:parte speciala* Ed. a 2-a rev.si adaug. Ed. Sfera Juridica, Cluj Napoca, 2007, vol. I
- Diaconescu Gheorghe and Constantin Duvac, *Tratat de drept penal: Parte Speciala*, Ed. C.H. Beck,București, 2009
- Dobrinoiu Vasile and Norel Neagu, *Drept penal: partea specială (teorie si practică judiciară,)* Bucuresti Wolters Kluwer, 2008
- Pascu Ilie et al, *Noul Cod penal comentat*, vol.I, Ed. Universul Juridic, Bucureşti, 2012
- Pascu Ilie et al, *Noul Cod penal comentat*, vol.II, Ed. Universul Juridic, Bucureşti, 2012
- Măgureanu llie, *Conflictul de interese* R.D.P 2/2007
- Ömer Faruk GENÇKAYA, *Conflict of interest*
- Pașca Viorel *Conflictul de interese* R.D.P. 8/2008
- Tudoran Mihai Viorel, *Conflictul de interese din legea penală română și luarea nelegală de interese din legea penală franceză* R.D.P. no. 3/2008
- Toader Tudorel*, Drept penal român. Partea specială*, ediţia a 5-a, rev. și actualizată, Ed. Hamangiu, București, 2011
- Ţiclea Alexandru*, Tratat de dreptul muncii*, ediţia a 4-a, Ed. Universul Juridic, Bucuresti 2010
- Usvat Claudia-Florina *Infracțiunile de corupție in contextul reglementărilor europene*, Tome 6 BDPenal, Universul juridic, Bucharest, 2010