

**THEORETICAL ASPECTS REGARDING THE NEW OFFENSE
COVERED BY ART. 246 OF THE CRIMINAL CODE
MISAPPROPRIATION OF PUBLIC AUCTIONS AND OFFENCES
COVERED BY ART. 65 OF LAW NO. 21/1996 REPUBLISHED.
COMPETITION LAW**

Rodica Aida POPA*

Abstract

The present study aims to bring to the attention of the legal law specialists the theoretical aspects related to a new incrimination as the one covered by art. 246 of the Penal Code, the misappropriation of public auctions, as well as aspects of yet another incrimination, that is the one covered by art. 65 of Law no. 21/1996 republished-competition law, trying thus to prevent certain different interpretations about the typicality of the two incriminations and encourage the possibility of highlighting other arguments that will lead to an application as accurate as possible of the two incriminations.

Presently there is no case law for the two incriminations therefore the theoretical analysis has to present interpretation arguments which will help the judicial bodies to easily classify the factual basis of the content of the two constitutive laws offering the possibility of a more detailed and contextual interpretation in relation to the reality.

The way the public auctions take place is a constant preoccupation not only for the participants who are involved in the procedure and directly interested in abiding the under law and ensuring a fair competitive climate but also for the public opinion which is as equally interested in ensuring fair social-economical relationships based on the market principles.

Simultaneously, the way the legal conditions of the second incriminations-that is the one from art.65 Law no.21/1996 republished - are interpreted in relation with the competition practices will lead to the clarification of the norm and its correct enforcement.

Keywords: *misappropriation of public auctions, anti-competitional practices, constitutive contents of the two incriminations, fair competitive climate.*

1. Introduction

The study of the two incriminations, that is the one referring to the misappropriation of public auctions covered by art. 246 of the Penal Code and the one covered by art.65 of Law no.21/1996 republished-the competition law, presents an interest from a broad perspective for the business environment since it deals with aspects regarding the compliance of some

special conditions regarding organizing auctions as well as ensuring the context of preventing illegal, anticompetitive practices.

Presently, in Romania the consolidation and diversification of the business environment is an important part not only of the economy but also of the rule of law; the relationships between partners of the private environment but also the public sector that can interfere under certain circumstances, being based of special laws

* Lecturer PhD, Judge at the High Court of Cassation and Justice, Offences Department (e-mail :aidap@scj.ro).

that can create breaches that will be solved in Court.

Thus, the two incriminations can be found –the first in the Penal Code , respectively the crime of misappropriation of public auctions¹, being regulated by Title II Crimes against property , in Chapter III Crimes against property by disregarding trust, while the offense covered by art. 65 of Law no. 21/1996 republished the competition law is included in the content of the special law mentioned; the common aspect of the two incrimination is the breach of trust of those working in the business environment.

From another perspective knowing how to interpret the content of the two incriminations allows the judicial bodies as well as the criminal prosecution bodies and the Courts to relate to coherent interpretation circumstances in general so that in particular cases to ensure procedural measures and the administration of evidence in order to establish the base for the legal classification of the incriminations

Thus the study will be useful in the jurisprudential area regarding the two incriminations with real consequences for the companies' prevention and emergency plans in creating a climate of trust for all business partners.

We also consider that the study is meaningful for the legislator from the point of view of the evolution of the case law as well as for the need to modify in relationship with the concrete situations that might generate such an approach in the future.

At the same time the study might be the object of further research by Company Law specialists as well as different approaches in international comparative law as well as Union Law with multiple consequences in the case law area as well as in the legislation area to the extent to which

the legislator might intent to modify the above mentioned incriminations.

In addressing the theoretical aspects of the two incriminations mentioned we will present the conditions imposed by the legislator about their constitutive content by approaching both their common and different elements. This is the contribution and novelty of this study which we hope to be interesting to many.

The examination of the legal conditions of the two incriminations means to underline from the perspective of our own arguments which was the legislator intent and what are the implications of the application of the presented considerations.

We will thus bring to your attention each incriminated legal condition from the point of view of its way of regulating and we will present arguments for their interpretation also showing the concrete ways for practitioners to apply them in order to effectively establish the contribution of those breaking the legal provisions.

One can easily follow the judgment and the modality in which it effectively find its application through the given explanations as well as the indication of possible adjectival law measures and the administration of certain evidence which will contribute to orienting the investigation and case law in the conditions under which, until this moment, as far as we are aware, there is no cause definitively judged or dealt with.

From this perspective we want to analyze the degree of predictability and the norms' quality aiming to achieve an as correct as possible application of the legal condition of the two incriminations.

So far, in the specialized literature the incrimination covered by art.246 from the Penal Code has been analyzed in many comments on the articles of the new Penal

¹ Adriana Almășan, The anti-competition agreements in public acquisitions: is criminal replacing contraventional or viceversa? in the Romanian Magazine for Public-Private Partnership nr. 13/2015, Presearch Center.

Code, came into force in 2014, under its constituent content, as well as in a study to which we have no judicial references since this new incrimination has been recently introduced in the Code.

As for the second incrimination from the competition law, that is art. 65, it was the object of some studies published in the specialized literature².

2. Theoretical aspects

2.1. Theoretical aspects regarding the misappropriation of public auctions covered by art.246 from Criminal Code – new incrimination added in the Criminal Code

The Romanian legislator structured the content of the special part of the Criminal Code in a different way from the old code, grouping the crimes in titles, reconsidering the protected social values which will lead to the regulation in title I in more chapters on the crime against person, in title II, crimes against property, in title III, crimes against authority and State border, in title IV, crimes against making justice, in title V crimes of corruption and malfeasance while in office, in title VI, crimes of forgery and fraud, in title VII, crimes against public safety, in title VIII, crimes against social relationships, in title IX, crimes related to elections and referendum, in title X, crimes against national security, in title XI, crimes against the fight potential of the armed forces, in title XII, against humanity and of war.

Title II, Chapter III from the Criminal Code regulates crimes against property, by trust infringement among which misappropriation of public auctions, in the content of art.246.

We notice two new things: first, the mentioning of the way the property of a

person is affected-through breaching the trust and good faith in relation with the goods that belong to a person and second, the introduction of a new incrimination –the misappropriation of public auctions.

The legislator has purposely incriminated concrete ways of misappropriation of public auctions, considering that it is necessary to regulate them through a special norm, granting thus special attention to the way procedures of public auctions take place, because abiding all legal conditions grants the trust of the participants, encourages the fair competition and strengthens the environments 'safety.

The way it is regulated, the norm also has a preventive character, discouraging those who might want to fraud a public auction.

In other words, the public auction procedure can be breached in the ways mentioned in the content of the norm, as we will further show, affecting the property through breaching trust, since breaching the legally enforced conditions of a procedure will affect the feeling that the law is abided, the good faith being breached in ways that endanger the business relationships.

The before mentioned incrimination is related to a particular condition, that is the existence of a public auction.

The public auction is carried out according with certain procedures regulated by the new Code of Civil Procedure, under legal seizure, be it judicial execution or foreclosure or during the process of granting public supply contracts, concession, according to the conditions expressly provided by two government emergency ordinances, that is Emergency Ordinance no.34/2006 on granting public supply contracts, concession contracts, and Emergency Ordinance no.54/2006 regarding

² Adina Vlăsceanu, Alina Barbu, The new Criminal code commented by comparison with the old one, Publishing House Hamangiu, 2014.

the concession agreements regime on public goods or under special regulated conditions.

We want to mention that further on we will specify some aspects we consider important related to the content of the crime, without however to present the elements that clearly define the crime of misappropriation of public auctions since these aspects can be found in the comments on the articles of the new Criminal Code.

It is interesting that this crime is related to the participants at the auction, those people who have a call, under the requirements of the law, in the case of specific auctions, that is when the auction announcement mentions in some ways the existence of certain conditions regarding the participants to the respective procedure.

We assess that the legislator has drawn on incriminating two clear ways, through the meaning of their content, regarding the action of removing a participant from the auction that is coercion and corruption

The two ways are alternatively estimated, so that under the aspect of assessing the evidence that will be administrated by the judicial bodies, there cannot be any doubts regarding the interpretation.

Of course, as far as relevance, the two ways can effectively generate specific differences in the process of establishing the actions of physical or moral coercion or corruption through offering a sum of money big enough to determine a participant to withdraw himself from the auction.

We assess that the judicial bodies that deal with such crimes have to know the way it took place, so that they proceed to specific search of the premises depending on the object of the auction, when the implicated people refuse to present the necessary documentation in order to establish the acquisition or concession conditions; the use

of special surveillance methods, formulating the precise requests to the competent judge of rights and liberties.

The means of coercion or corruption through withdrawing a participant from a public auction are practices that we can call anti-competition, regulated by the Criminal Code, in the case of the crime of misappropriation of public auctions that through their nature are supposed to take place underground, which offers the judicial bodies the possibility to use the searches and the special surveillance methods.

We also consider that any evidence can be used, such as documentary evidence when from the *modus operandi* clearly resulted the existence of documented evidence showing that a certain participant at the auction was targeted through physical or mental threats in order to convince him to withdraw or through money offers between participants to change the winning price.

Also, the administration of testimonial evidence through public hearing of witnesses to the public auction, people who might knew of certain illegal activities or the nature of coercion or corruption or the agreement to change the price, can clarify the context of the crime.

We agree to the opinion expressed in the specialized literature that the way the contents of the crime of misappropriation of public auction has been regulated, as far as the first modality is concerned, there constitutes a special norm of incrimination the deed of blackmail done during the auction procedure and as far as the second incrimination modality, there constitutes a special norm of incrimination the deed of bribe done during the procedure of public auction³.

Thus we consider that under the conditions in which the evidence, that might lead to clearly establish the way the crime of

³ Adina Vlăsceanu, Alina Barbu, The new Criminal code commented by comparison with the old one, Publishing House Hamangiu, 2014.

misappropriation of public auction took place, was appraised, the legal description of the deed is ensured.

As far as the second normative modality of incrimination regarding the agreement between participants, the judicial bodies are in charge with establishing objectively and subjectively the way the agreement has been initiated, which were the means of changing the price, how did the action take place effectively.

It is interesting to notice that the second modality of creating the constitutive content of the incrimination, the agreement between participants can affect just one concrete element of the auction and not the whole process-that is the final price, which

leads to the conclusion that if the agreement is done for a different element of the public auction, such as the object or the nature of the object of the auction, the constitutive content of the misappropriation of the auction does not take place, in this second modality.

2.2. Theoretical aspects regarding the incrimination regulated by art.65 of Law no. 21/1996 republished, competitive law⁴.

The incrimination regulated by art. 65 from the before mentioned law constitutes a more complex special norm, in which content besides the ways of committing a crime in paragraphs 2 and 3, there are

⁴ Art.65. (1) *The deed of any person that has a position of administrator or legal representative or any other leading position in a company to design and organize with intent either of the banned practices according to the provisions of art.5, paragraph (1) and that are not excepted according to the provisions of art.5 paragraph (2) constitutes crime and imposes a prison term from 6 months to 5 years or a fine and the disqualification from certain rights.*

(2) *Will not be punished the person that before the beginning of the prosecution makes a criminal complaint about his taking part in the crime mentioned in paragraph (1) allowing thus to identify and hold liable the other participants. (3) the person that committed the crime mentioned in paragraph (1) and that during the prosecution makes the complaint and thus helps to identify and hold liable the other persons can benefit from reduction in half of the penalty.(4) the Court orders the display or publication of the final criminal conviction.*

Art. 5 of Law no. 21/1996 republished (1) *There are banned any agreements between companies, decisions taken by companies' associates, concerted practices, that have as object or effect to prevent, restrict, or distortion of competition on the Romanian market, or on a part of it especially in those parts that: a) establish directly or indirectly buying or selling prices or other transaction conditions; b) limit or control the production, selling, technical development or investments; c) divide markets or supply sources; d) condition the closing of contracts on the acceptance from the partners of supplementary conditions in no way related the object of the contract 2) the prohibition regulated by paragraph (1) does not apply to the agreements between companies, or to the decisions taken by associations of companies when they cumulatively met the following conditions: a) contribute to the enhancement of production or distribution of goods or to the promotion of ethnic or economic progress ensuring at the same time for the consumer an advantage comparable to the one got by the agreement parties b) impose to the companies only those restrictions that are essential for attaining the goals set ; c) do not offer the companies the possibility of eliminating the competition (3) The categories of agreements, decisions and practices exempted from the provisions of paragraph (2) as well as the conditions and classification criteria are those established by the rules and regulations of European Union Council or European Commission regarding the application of the provisions of art.101 paragraph (3) from the Treat regarding the functioning of the European Union to certain categories of agreements decisions of associations or common practices, called regulations exemptions on categories which apply accordingly.*

(4) *Agreements, decisions and common practices regulated by paragraph (1) that meet the conditions covered by paragraph (2) or are part of the categories covered by paragraph (3) are considered legal, without the necessity of being notified by the parties and the decision of the Constitutional Court. (5) the responsibility of gathering evidence about a breach of the provisions of paragraph (1) lies with the Competition Council. The company or association that invoke the benefit of the provisions of paragraph (2) or (3) has the responsibility to prove that the conditions regulated by these paragraphs are met.*

(6) *every time the Competition Council applies the provisions of paragraph (1) to the agreements, decisions or practices to the extent that these can affect the commerce between the member states, these also apply the provisions of art.101 from the Treat regarding the functioning of the European Union.*

regulated also a clause of non-punishment as well as one of reducing the punishment under certain conditions.

Further on we will examine a couple of particularities of this incrimination without aiming to do an analysis of the constitutive content of this incrimination.

We have to underline the fact that from the perspective of the used legislative technique in paragraph 1, the legislator also used the cross referred rule, referring to the banned practices covered by art.5 paragraph (1) conditioned by their exemption under the conditions of paragraph (2), art.5.

The active subject of this incrimination is a qualified one, the administrator, legal representative or someone who has a leading position in the company, under this aspect the sphere or leading positions being much broader, leading us to the conclusion that supposing that the deed is committed by somebody else than the above mentioned people, the deed is only done by the actively indicated subject.

In other words, if the deed is committed by an employee with no leading position, he/she cannot be held liable for the deed since he/she does not have the quality regulated by the law.

We consider interested for the analysis of the constitutive content the concrete way of organizing with intent, the practices before mentioned, without being necessary to detail the two actions since their semantic meaning also covers the juridical one.

Of course then we have to establish the factual basis which will describe the legal incrimination model of art. 65 of Law no.21/1996. It is necessary to analyze which were the ways of organizing intently used of the banned practices.

Based on the evidence presented the judicial bodies have to establish the conditions in which such a crime has been committed.

We consider that the documentary evidence referring to the company formation can be run to the way the company's activities, which are the concrete activities, how they compare to the other companies with the same type of activities from the point of view of competition rules and regulations, how can it be proved that illegal practices were intently used.

Thus, the documentary evidence, the expertise related to the nature of the used practice, the testimonial evidence are meant to explain if a banned practice has been designed and organized, how was it put into practice, what consequences had on the private sector, did it affect or not the competition through imitating or controlling the production, selling, technical development, investments.

We consider that the incrimination from art. 65, competition law sanctions the illicit behavior of those doing it, its gravity being enhanced by the quality of the actively qualified subjects, their intent being clearly underlined by the creation of alternative contents and especially by the usage of banned practices.

In the specialized literature there have been performed analyses of the contravention and crime reaching interesting conclusions related to the nature and content of penalties and consequences under the aspect of its way of application as well as solving the civil action⁵.

⁵ Adriana Almășan, Doru Trăilă, *Does Criminal Law ensure effective deterrent measures against the deeds of malign competition ?* In AUB Law 2014 Supplement. Legal Law. Special Part; Adriana Almășan, *The anticompetitive agreements in the public acquisition procedures: criminal replacing contraventional and vice versa?* in Romanian Magazine of Public-Private Partnership no. 13/2015, Presearch Center.

2.3. The common and distinct aspects of the two incriminations covered by art. 246 of the Criminal Code and art. 65 of Law 21/1996 republished, competition law.

From presenting aspect of both incriminations, we reached the conclusion that they are both meant to ensure a prevention context aiming to prevent the committing of such deeds that breach the trust of the public and private sector.

Both incriminations sanction the breach of the rules regarding either public auctions or illicit activity.

Also, they both ban the anti competition practices that might affect the activity of the companies.

Both incriminations have alternate content in which they are made.

From the point of view of differences, the subject of the two incriminations are different; while when misappropriating the public auction the subjects are mere participants, in the incrimination from art.65, the active subject is qualified.

The alternating content in which the two incriminations take place has a specific character.

Also, while for the incrimination of misappropriation of public auctions there is no punishment or possibility for a punishment reduction, for the incrimination in art. 65 from competition law paragraph 2.3 there is such a clause.

Under the evidence aspect, both incriminations can be proved through different ways that help establish the detailed context of the deed, the methods

used, offering the possibility to a fair legal classification by the judicial bodies.

Conclusions

The study aimed to examine a series of theoretical aspects of the crime of misappropriation of public auctions, as covered by art. 246 of Criminal Code and the crime covered by art.65 of Law no.21/1996 republished, competition law, without examining the constitutive contents.

The presentation was centered on underlining theoretical aspects of the two incriminations, in the conditions in which there is no case law, and also on common elements that lay down the prevention character in combating the anticompetitive practices in the business area.

The study reached its purpose through examining some particularities of the two incriminations which favor the coherent application through ensuring a fair judicial classification of the factual basis.

We also have presented procedural aspects related to the administration of evidence in proving the two incriminations, which offer a note of pragmatism orienting the specialists in their activity of analyzing, interpreting and application of the two crimes.

Of course, other studies of the same incriminations will be able to base themselves on the case law that will be published and analyzed offering the possibility of finding particular aspects depending on the alternative contents of the two incriminations, ensuring the variety in their application.

References

- Adriana Almășan, Doru Trăilă, Does Criminal Law ensure effective deterrent measures against the deeds of malign competitor ? In AUB Law 2014 Supplement. Legal Law. Special Part.

- Adriana Almășan, The anti-competition agreements in public acquisitions: is criminal replacing contraventional or viceversa ? in the Romanian Magazine for Public-Private Partnership nr. 13/2015, Presearch Center.
- Adina Vlăsceanu, Alina Barbu, The new Criminal code commented by comparison with the old one, Publishing House Hamangiu, 2014.