CONFLICT OF INTERESTS' REGULATION ON ELECTED OFFICIALS

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Abstract

This article sheds an overview of the different perspectives that judicial courts grant regarding the same concept, namely the conflict of interest in relation to the elected officials. We will also analyze the ambiguous and contradictory interpretations that the Romanian legislation has to offer on the issue.

Keywords: *conflict of interests, elected officials, local council, personal interests, patrimonial interests.*

1. Introduction

This study aims a short analysis of the concept of conflict of interest in what concerns local elected officials. We will take into account the types of conflicts and the expression of the interest, according to its personal or patrimonial nature.

Furthermore, we will refer including to the relevant case law of the courts, in order to show the ways in which one can interpret the law applicable to the concept of conflict of interest.

The legislation applicable to local elected officials who find themselves in the situation of a conflict of interest is the following: Law no. 215/2001[1] of the local public administration, Law no. 161/2003[2] and Law no. 393/2004[3].

The aforementioned normative acts were adopted in order to establish the general framework for corruption preventing and combating, by establishing special measures, of substantive and procedural law, both in terms of incompatibility and in terms of the concept of conflict of interest[4].

It is indisputable that persons who may be in conflict of interest or incompatibility situation will have either to avoid such a situation or to undergo legal sanctions[5]. Public interest shall always prevail, therefore private interest of a person shall

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[1] Published in Official Journal no. 123 of February 20th, 2007, as further amended and supplemented.

[2] 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 of April 21st, 2003, as further amended and supplemented.

[3] on the Status of local elected officials, published in Official Journal no. 912 of October 7th, 2004, as further amended and supplemented.

[4] Aspects which result not only from the content of the legislation, but also from the related recitals, material available on the following internet address, in pdf format:
http://www.cdep.ro/proiecte/2004/400/80/4/em484.pdf, site consulted on March 10th, 2017.

[5] See Verginia Vedinas, "*Drept administrativ*", edition IX, revised and updated, Universul Juridic Publishing House, Bucharest, 2015, p. 481 and the following: there are several types of liability of the local officials, namely: administrative –disciplinary liability, administrative – patrimonial liability and criminal liability. Furthermore, several disciplinary sanctions for councilors were introduced by Law no. 393/2004, such as warning, removal from the meeting, temporary exclusion from the works of the council and of the specialized commission, as well as the withdrawal of the meeting allowance for a term between 1-2 months.

suffer a „censorship" at least psychologically and morally.

The purpose is to ensure the exercise of public functions and publicly appointed offices by using impartiality, integrity and transparency, while observing the primacy of public interest[6].

Therefore, the lawmaker sought the protection of social relationships in what concerns the good performance of the activities of local elected officials, activity which requires a fair and transparent conduct.

Notwithstanding, we cannot accept broader interpretations of the legislation even in situations where the existence of personal and/or patrimonial interest cannot be proved, in the end, the targeted person undergoing the penalties provided by the law.

2.1. The concept of conflict of interest.

Unlike the state of incompatibility, which is more clearly defined and explained by the lawmaker, the conflict of interest requires a special attention from the National Integrity Agency, and especially from the courts of law.

Therefore, according to the legislation in force[7], the *conflict of interest* represents the situation where the person exercising a publicly appointed office or a public function has a personal interest of patrimonial nature, which could influence the objective fulfillment of the duties incumbent on him/her, according to the Constitution and to other normative acts.

Furthermore, Recommendation 10/2000[8] of the Committee of Ministers of the Council of Europe includes a similar definition of the conflict of interest in what concerns public officials: *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*[9].

This notion was required to be included in the legislation, in order to sanction private interests, which is usually contrary to the public interest. Private interest varies, so that it can include a benefit for himself/herself, family, close relatives, friends, persons or organizations with whom he or she has business or political relations. In what concerns personal interest, this one can refer to any obligations against the aforementioned persons.

Therefore, following the assessment of art. 70 of Law no. 161/2003, two conditions have to be fulfilled in order to have a conflict of interest:

1. the participation in the making of a decision
2. the existence of a personal interest or a patrimonial interest[10].

We believe that these conditions should be met cumulatively, so that the mere participation in the adoption of a resolution does not lead to the sanction provided by the law, if personal and/or patrimonial interest did not exist, was not expressed and could not be proved.

[6] These are the principles underlying the prevention of conflict of interest, according to art. 71 of Law no. 161/2003.

[7] *Idem*, art. 70.

[8] Recommendation no. 10/2000 of the Committee of Ministers of the Council of Europe, document available on the Council of Europe site: https://wcd.coe.int/wcd/ViewDoc.jsp?id=353945&Site=CM, site accessed on March 1st, 2017.

[9] According to art. 13 of Recommendation no. 10/2000.

[10] The legislation provides a variant at least interpretable, by cumulating two notions, namely, personal interest, respectively patrimonial interest, the following expression resulting: „*personal interest of patrimonial nature*". We believe that the two types of interest should be treated separately, because there is no reason to require such an overlap.

2.2. Types of conflict of interest.

The legislation in force does not provide a classification of the conflicts of interest, but they can be of different types, namely: *potential, actual and real*, according to the National Integrity Agency[11].

Therefore, if a local official has interests likely to cause a conflict of interest, if a public decision would have to be made, it could be deemed as a potential conflict of interest.

The actual conflict of interest can occur if the local official finds himself in the situation to make a decision that would create advantages either for himself or for another person, regardless if we talk about a business partner or a close person of the official.

The third type of conflict of interest is the real one, highlighted by the situation where the local official participate in the making of a decision on which he/she has a personal interest, thus violating the legal provisions.

Similarly, even if concerning public officials and not local elected officials, Recommendation no. 10/2000 of the Committee of Ministers of the Council of Europe provides a similar classification in what concerns the concept of conflict of interest. Therefore, art. 8 reveals these types of conflicts as being actual, potential or apparent.

We believe that the category of persons for which the conflict of interest is regulated is not relevant, due to the fact, from the conceptual point of view, this notion has the same defining features, regardless of where it is expressed, either in local public administration, or at central level.

For example, although the provisions of art. 87 – 91 of Law no. 161/2003 take into account the incompatibilities on local elected officials, since they fall in the section on incompatibilities, these provisions are also applicable in case of public functions[12].

Notwithstanding, we believe that the differences between the modalities of expression of the conflict of interest should be based only on the social danger level, depending on the position conferred to the concerned person. It is obviously more serious the existence of a conflict of interest at the level of a minister or parliamentary, than at the level of a local councilor or mayor.

Therefore, in the assessment of the de facto situation and the reality of the existence or inexistence of an expression of the conflict of interest, the elements of mitigating circumstances shall not be omitted, so that an improper application of the legislation in the field is not reached.

Given the aforementioned classifications, we believed that they should be developed and assessed by the lawmaker, and included in the legislation *de lege ferenda*, in order to avoid abuses. On the contrary, an uneven and inconsistent interpretation of the purpose of the law can be reached, both from the National Integrity Agency[13], and from the courts of law called to rule on the lawfulness of the assessment reports of NIA, due to the fact they have so great discretion that it can become subjective.

[11] According to „*Guide on incompatibilities and conflict of interest*", edition 2016, issued by the National Integrity Agency. The document is available in pdf. format on the following internet address: https://www.integritate.eu/Files/Files/Ghiduri%20utile%20alegeri%202016/GhidIncompatibilitatile &Conflicte%2010.10.2016.pdf, site accessed on March 1st, 2017.

[12] Ovidiu Podaru, „*Drept administrativ. Practică judiciară comentată. Vol. I. Actul administrativ (II) Un secol de jurisprudență (1909-2009)*", Hamangiu Publishing House, Bucharest, 2010, p. 203 and the following.

[13] Hereinafter referred to as „*NIA*".

2.2. Personal interest and patrimonial interest, related to the relevant case law.

After reading the legal incident texts, it can be noted that there is a mismatch, two notions being included in the relevant legislation, namely: patrimonial interest, respectively personal interest.

In this respect, on the one hand, Law no. 215/2001 of the local public administration uses the term of „*patrimonial interest*", while, on the other hand, Law no. 161/2003 uses the expression of „*personal interest of patrimonial nature*". Furthermore, Law no. 393/2004 uses the term „*personal interest*".

Therefore, we want to show that the lawmaker is not constant in defining, respectively in using these notions. Therefore, they end to be capable of various interpretations.

Therefore, if we were to place related laws in chronological order, the first regulation of this kind was Law no. 215/2001, the concept of "*patrimonial interest"* being found for the first time in its content.

Notwithstanding, although the concept of patrimonial interest was initially used, about 2 years later a second regulation emerges, the latter enshrining the concept of „*personal interest of patrimonial nature*", namely Law no. 161/2003.

Subsequently, the notion is restricted again to the formulation of personal interest in Law no. 393/2004, the lawmaker giving up the notion of „*personal interest of patrimonial nature*".

In what concerns the local elected officials, they have a personal interest in a certain matter, if they have the possibility to anticipate that a decision of the public authority they are part of could represent a benefit or an advantage for themselves or for other categories of persons, according to the law[14].

As it can be noted, due to the fact they have to anticipate and not to effectively participate in the making of a decision, the legislation is rather related to a potential conflict of interest.

Notwithstanding, this interpretation modality can also be used against persons to whom the existence of a personal / patrimonial interest cannot be proved, for the mere reason that a potential benefit / advantage could have been anticipated by them.

Furthermore, the case law showed that, in certain situations, the simple presence of a local elected official is sufficient in order for the court to consider that the person in question finds himself/herself in a conflict of interest, even if there is no personal and/or patrimonial interest proved by ANI.

It is true that the incidence of the conflict of interest is obvious, therefore there is no other way to interpret correctly the legislation and the de facto situation.

For example, the High Court of Cassation and Justice[15] showed that, in what concerns the provisions of art. 70 of Law no. 161/2003 and of art. 75 of Law no. 393/2004, the appellant, in the capacity of local councilor, found himself in a conflict of interest, provided that he participated in the approval of certain decisions of the local council whereby the lease, by public tender, of certain assets belonging to public and private domain of the city by a company in which he is shareholder, was decided.

The High Court of Cassation and Justice noted that, in this case, the party had a personal interest of patrimonial nature which could have

[14] See the list of art. 75 of Law no. 393/2004: „a) husband, wife, relatives or up to second degree relatives including; b) any natural person or legal entity they have engagement relation with, regardless of the nature; c) a trading company where they have the capacity of sole shareholder, director or they derive income from; d) another authority they belong to; e) any natural person or legal entity, other than the authority they belong to, which performed a payment to them or which incurred any expenses of them; f) an association or foundation they are members of".

[15] Hereinafter referred to as „HCCJ".

influenced the objective fulfillment of the duties incumbent on him as local councilor, the claims of the plaintiff having no legal relevance, namely that the specialized department within the city hall established the rent for the disputed space and that a public tender was organized for the award of the use of this commercial space[16].

Furthermore, HCCJ also develops the concept of conflict of interest in relation to patrimonial interest. Therefore, the case law[17] of the Supreme Court notes that there have to be reasons that can be taken into account when establishing not only the existence, but also the possibility to influence the decisions of a person.

Art. 72 of Law no. 161/2003, provides that „the person exercising the function of member of the Government, secretary of state, deputy secretary of state or functions assimilated to them, shall be bound not to participate in the making of a decision in the exercise of the authority public function which cause a material benefit for himself/herself, for his/her spouse or first degree relatives".

Following the corroboration of the aforementioned provision with art. 70 of the same normative act, in order to have a conflict of interest, the condition on „*personal interest of patrimonial nature*" or „*material benefit*" for himself/herself, for his/her spouse or first degree relatives has to be fulfilled. This interpretation is the vision of the HCCJ, substantiated by Decision no. 5036 of April 18th, 2013.

Notwithstanding, the legislation grants the courts of law the possibility to appreciate that there is a conflict of interest if the targeted person physically takes part in the meetings where certain decisions/resolutions are adopted.

Although it could be argued that by means of the mere presence, even if the person abstained from voting, the person could influence the decision of the other members of the collegial body, it is required to make a distinction.

Therefore, there are cases where the existence of a personal or patrimonial interest or of other benefits which could result following the adoption of a resolution cannot be proved.

Therefore, we believe that we cannot equate such a circumstance (*physical participation followed by voting abstention*) and the situation where the existence of a conflict of interest is clear, the benefits being obvious.

Therefore, on the one hand, we take into account aforementioned decision no. 451/2014 of the HCCJ, where the allegations of NIA and the deductions of the courts are fully justified. On the other hand, Civil sentence no. 152/F of June 26th, 2014 pronounced by the Court of Appeal of Galați shows different interpretation of the conflict of interest in what concerns local elected officials.

In the aforementioned case, the existence of a conflict of interest of a local councilor could not be proved by reliable and credible evidence, as regulated by art. 70 – 71 and art. 77 of Law no. 161/2003.

Furthermore, there are no elements which fall under the scope of the legal definition of the conflict of interest, which refers to a personal interest of material nature or personal material benefit.

Notwithstanding, the court did not take into account the de facto actual situation or the personal circumstances of the case, noting the applicability of art. 75 letter f) of Law no. 393/2004: „*Local elected officials have a personal interest in a certain matter, if they*

[16] Decision no. 451 of January 31st, 2014 pronounced in second appeal by the Division of contentious administrative and fiscal of the High Court of Cassation and Justice.

[17] Decision no. 5036 of April 18th, 2013 pronounced in second appeal by the Division of contentious administrative and fiscal of the High Court of Cassation and Justice.

have the possibility to anticipate that a decision of the public authority they belong to could represent a benefit or an advantage for themselves or for: (...) lit. f) – an association or foundation they are members of".

In what concern the incident legal text, we would like to show the following:

We cannot equate the capacity of representative of the Local Council in a non-profit foundation, and a situation where a local elected official is a shareholder in a company, by benefiting directly or indirectly, by representatives, from the decisions he took part in.

The court of merits noted the participation of the local councilor in the meetings of the Local Council where two decisions on the increase of public contribution to the foundation budget were discussed and approved unanimously.

Notwithstanding, one of the founding members of the foundation is the Local Council, the function of vice-president being honorary, without any impact on the actual activity of the foundation. If he had been a member on own behalf and not by means of the capacity of local councilor, we would have accepted the thesis on the existence of the conflict of interest.

We hereby mention that, according to art. 75 of Law no. 393/2004, the conflict of interest exists if the local councilor votes in favor / against a foundation he is a member of in own behalf and not in the capacity of the representative of an entity, such as the Local Council.

A plurality of capacities results from the recitals of the resolution, namely the one of local councilor, respectively the one of vice-president of the foundation. However, this capacity is held under the office of local councilor and ends with the completion of the term of office.

The scope of the respective foundation is to support young talented, special skills people, inclined towards one of the following areas: education, culture, arts and sports.

Furthermore, art. 35 of the foundation by-laws provides the following: „The capacity of representative within the Foundation is lost with the de jure termination of the elected official's term of office".

It is interesting that the conflict of interest was not noted in connection with a potential capacity of member of the foundation, but only in relation to the function of vice-president, a function held in the capacity of representative of the Local Council[18], as a founding member[19] within the respective foundation.

This assumption does not meet the legal requirements, as the noted conflict of interest concerns the plurality between the function of local councilor and vice-president of the foundation, in which respect the local councilor would have participated in the adoption of certain decisions.

As we have already mentioned, the finding of the participation in the adoption of a decision is not sufficient, as long as the expression of personal and/or patrimonial interest is not proved, all the more so as the

[18] See **Anton Trăilescu**, "*Drept administrativ*", edition 4, C.H. Beck Publishing House, Bucharest, 2010, p. 42: "Local councils are deliberative authorities of public administration through which local autonomy is achieved, having the role of managing public affairs in communes and cities, under the terms of the law". We believe that the appointment of a representative within a philanthropic foundation fits to the idea of managing "public affairs", aiming to develop and help talented people from the respective commune and not to raise a conflict of interest.

[19] See **Ioan Alexandru**, "*Drept administrativ*", Lumina Lex Publishing House, Bucharest, 2005, p. 253: "*The Local Council has the initiative and decides in all matters of local interest*", unless otherwise provided by law. Besides that the foundation has a philanthropic nature, it does not perform economic activities, the Local Council is one of the founding members, therefore it is natural to have decision power on the allocated budget. The fact that one of the councilors is the representative of the Local Council in the respective foundation, in our opinion, cannot fall under the scope of the concept of conflict of interest, regardless we speak about potential, actual or real conflict of interest.

existence of any type of interest had not be proved in any way.

In case of incompatibilities, the existence of a plurality of capacity is sufficient. Therefore, an important aspect in what concerns the statute of councilor is the concept of incompatibility itself[20]. In this regard, the legislation21 is certainly clearer compared to the regulation of the conflict of interest.

Incompatibilities affect the principle of transparency and integrity of public authorities and institutions, there being a high risk that decision-making powers are exercised under non-impartiality, bias, under the violation of equal and non-discriminatory treatment principle. They represent obvious, serious situations, which cannot be said in case of conflict of interest.

If in case of incompatibilities the mere plurality of capacities is sufficient to apply legal penalties, conflict of interest requires special attention, meaning that the existence and expression of personal and/or patrimonial interest are required to be proved, by noting the elements of mitigating circumstances of a situation which corresponds to reality.

Given the aforementioned, we consider that there are no preconditions likely to threaten social values in the case where it was noted that a local council would have been in conflict, due to the fact it held the function of vice-president of a foundation, in the capacity of representative of the Local Council, the latter being one of the founding members of the respective foundation.

Another matter which will have to be subject to a short analysis is the penalty provided by the law for the ascertainment of the conflict of interest in what concerns the person in question. Art. 25¹ of Law no. 176/2010[22] provides that the person who was found in conflict of interest or incompatibility shall be deprived of the right to perform a public function or a publicly appointed office which is subject to the provisions of this law, except the electoral ones, for a term of 3 years as of the removal from the respective function or publicly appointed office or as of the de jure termination of the term of office.

There were different opinions and interpretations in what concerns this sanction, leading ultimately to their „*cutting*" by means of Decision no. 418 of July 3rd, 2014[23], pronounced by the Constitutional Court of Romania[24].

Phrase „*same function*" of art. 25 para. (2) thesis II of Law no. 176/2010 raised totally different interpretations. Therefore, on the one hand, it could be considered that the phrase concerned only the function on which the conflict of interest was ascertained, respectively the state of incompatibility. On the other hand, according to another opinion, if things had been so, the respective sanction would have been meaningless. Therefore, the limitation of the exercise of the right to be elected, both in case of the conflict of interest, and

[20] See Verginia Vedinaș, *op. cit*., p. 477.

[21] Section IV, Chapter III, Title IV, Book I of Law no. 161/2003.

[22] on the integrity in the exercise of public functions and publicly appointed offices, for the amendment and supplementation of Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency and for the amendment and supplementation of other normative acts, published in Official Journal no. 621 of September 2nd 2010, as further amended and supplemented.

[23] Published in Official Journal no. 563 of July 30th, 2014, available on: https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx., site accessed on March 12th, 2017.

[24] Hereinafter referred to as „*CCR*".

especially in case of incompatibilities, would consider all electable functions[25].

The reasoning of CCR consist in the following: „in the interpretation according to which a person on whom the state of incompatibility or conflict of interest was found can held another electable function than the one which generated the state of incompatibility or conflict of interest, the legal text is obviously contrary to the meaning contemplated by the lawmaker, who, by means of Law no. 176/2010, aimed to ensure the integrity and transparency in the exercise of all functions and publicly appointed offices and the scope of whom is to sanction the person in question by establishing the prohibition to hold any other electable functions[26]".

Notwithstanding, we consider that the interpretation according to which by means of phrase „same function", the lawmaker would have considered any electable function is contrary to the will of the lawmaker. Therefore, not only that the right of a person to be elected is unduly restricted, but it is added to the law.

In conclusion, these provisions should not have benefited from an extensive interpretation, therefore, we consider that a genuine constitutional control was not performed[27].

3. Conclusions

Although a conflict of interest does not mean *ipso facto* corruption, there is an increasingly acknowledgment of the fact that the occurrence of certain conflicts between personal interests and public obligations can lead to corruption[28].

Notwithstanding, given all the aforementioned, one of the most important consequences of the conflict of interest acknowledgment is the sanction itself, namely the limitation of the exercise of the right to be elected for three-year term.

Given the severity of the restriction for the violation of the conflict of interest regime, we consider that the applicable legislation consists in the interpretation of the facts.

Therefore, there are several approach possibilities. On the one hand, the theory on the existence of personal and / or patrimonial interest can be applied, in order to establish whether a person was in a conflict of interests. Therefore, it might be possible to resort to the analysis of the case subject to judgment by means of the existence of actual premises which effectively threaten the defended social values.

On the other side, the lawmaker could provide a clarification or development of the criteria based on which the persons in question are punished, in order not to exist cases where the persons in question are punished, but cases are significantly different.

Therefore, as an intermediate way, both the courts of law and the National Integrity Agency shall refrain from the unduly extension of legal text interpretation.

It would neither be appropriate to apply them mechanically, therefore it is required that the actual circumstances of the case subject to judgment are taken into account.

In this way, the pronunciation of contrary rulings, which do not take into account the

[25] For a detailed perspective on the restrictive, and extensive interpretation, see Elena Mădălina Nica, "*Considerații despre efectul constatării incompatibilității instituit de art. 25 alin. (2) teza a II-a din Legea nr. 176/2010 asupra exercitării dreptului de a fi ales*", article published on site www.universuljuridic.ro on March 8th, 2017, site accessed on March 12th, 2017.

[26] Paragraph no. 39 of Decision no. 418 of July 3rd, 2014.

[27] See Elena Mădălina Nica, *op. cit.*, last but one paragraph.

[28] OECD Guide for the settlement of conflict of interest in public administration, drawn up by the Organization for Economic Co-operation and Development, in June 2003, material available in pdf format on internet address https://www.oecd.org/gov/ethics/2957377.pdf, site accessed on March 5th, 2017.

actual facts of the case, the elements of mitigating circumstances, thus causing damage to the persons in question by means of the prohibition to exercise a public function or a publicly appointed office for three-year term, will be avoided.

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