THE CONFLICT OF INTERESTS IN THE AREA OF THE CRIMINAL ILLICIT – RELEVANT JURISPRUDENCE

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Abstract
Insufficiently addressed by the doctrine and jurisprudence, the conflict of interests present, both in the public sector as well as in the private one, has become a major reason of concern not only in Romania, but also in the developed states which, even though have a high standard of life, are faced with an alarming rise in corruption at the level of the local and central public administration.
The criminalization of the act was generated by the emergence of new forms of relationships between the public and commercial sectors, which result in public partnerships, with a growth potential regarding new forms of conflict of interests which involve the personal interests and public obligations of the person in the public office.
The current study aims to present the jurisprudence of this type of criminality, nationally, starting with its juridical regime and the relevant legislation's evolution in the area, continuing with the actual analysis of the conflict of interests.
Keywords: public official, conflict of interest, corruption, crime

PRELIMINARY CONSIDERATIONS

A first theoretical approach of the current material started from the arguments expressed in the Romanian doctrine (Măgureanu 2007, 126-127; Paşca 2008; Puşcaşu 2014) regarding the labeling of the conflict of interests as a corruption crime. Also, even though the penal reform is intended to be, among other things, a more efficient systematization of the penal rules in conjunction with the non-penal ones, we can quite often notice "futile repetitions, … some inconsistency from the legislator" (Paşca 2008), regarding the inconsistencies, in our case, of the special laws with the provisions of the incriminating text, when the legislator's mission is to systematize, unify and coordinate the entire legislation in force.

Despite the fact that the No. 161 Law regarding certain measures for the insurance of the transparency in exercising offices and public offices in the business environment, the prevention and sanctioning of corruption[1] was

[1] The Law no. 161 of April 19th 2003, regarding certain measures for the insurance of the transparency in exercising offices and public offices in the business environment, the prevention and sanctioning of corruption, published in the Official Gazette no. 279 of April

established in 2003, the conflict of interest crime was not criminalized until the amendment of the old Criminal Code, via the Law no. 278 of 2006. The Law no. 161/2003 has had no less than 15 amendments throughout almost 11 years. They regulated, among other things, the conflict of interest of an administrative nature which should be closely related to the content of the crime of conflict of interest, provided by in art. 301 of the Criminal Code and with the provisions of the no. 144/2007 Law[2]. So far, they have proven inefficient, which was also confirmed by the almost insignificant number of criminal convictions for committing this act, given the large number of cases (for more details see A.N.I.'s National Activity Report (*A.N.I./N.I.A. – National Integrity Agency*))[3] submitted for resolution by the inspectors of the National Integrity Agency to the courts.

Until the criminalization of the conflict of interests as an offense in Chapter I, entitled "Work or work related crimes" – Title VI of the Penal Code, the special law[4] regulated the conflict of interests just as a disciplinary misconduct, given the

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21st 2003, amended via the Governmental Emergency Ordinance no. 40/2003, the Governmental Emergency Ordinance no. 77/2003, the Governmental Emergency Ordinance no. 92/2004, the no. 171/2004 Law, the no. 96/2006 Law, the Governmental Emergency Ordinance no. 31/2006, the no. 251/2006 Law, the no. 2/2006 Ordinance, the Governmental Emergency Ordinance no. 119/2006, the no. 144/2007 Law, the no. 359/2004 Law, the Governmental Emergency Ordinance no. 14/2005, the no. 330/2009 Law, the no. 284/2010 Law, the Governmental Emergency Ordinance no. 37/2011, published in the no. 285 of April 22nd, 2001, Official Gazette.

[2] The no. 144 of May 21st, 2007, Law on the establishment, organization and functioning of the National Integrity Agency, published in the Official Gazette no. 535 of r. 359, May 25th, 2007, was rectified in the Official Gazette no. 368 of May 30th, 2007, and was also amended via the Governmental Emergency Ordinance no. 49/2007, published in the Official Gazette no. 375 of June 1st, 2007, approved with amendments via the no. 94/2008 Law, published in the Official Gazette no. 305 of April 18th, 2008.

[3] Available on the institution's site, http://integritate.eu/UserFiles/File/Rapoarte/Raport_ActivitateaANI_Anul2013_CfLegii544_2001.pdf. According to this report, out of 138 conflict of interests of a criminal nature, identified by the NIA during April 2008 – December 2013 and settled by the competent judicial entities, 50 were resolved without the pursuance of criminal charges, 7 with the commencement of the prosecution; it is interesting to know how many of the latter were disposed as acquittals.

[4] Law No. 161/2003 regulates under Title IV the Conflict of interets and incompatibilities in exercising public jobs and offices, as well as the liability for those who violate these rules. The provisions of this law corroborate with the recent provisions of the No. 144/2007 Law regarding the establishment, organization and functioning of the National Integrity Agency, as well as of the Status of the public servants, which bestows upon the civil servants the obligation to respect, to the letter, the regime of the conflict of interests and incompatibilities. We can also find regulations in this area in the No. 7/2004 Law regarding the Conduct Code of the Civil Servant. These regulations are, in fact, the result of the adaptation to the communitary aquis in the area, namely the Reccomendation R 2000 (10) of the Council of Europe regarding the codes of conduct of the officials of the European Union.

fact that the act did not constitute a more serious offense, in the sense of work related abuse.

Even though the article is not intended to have any political connotation, we cannot overlook the relatively recent (December 2013) blunders of our legislator, through which the Chamber of Deputies adopted, in a thoroughly unprofessional, disinterest and treacherous manner, two controversial projects[5] of the former Penal Code, as well as the new one's[6] (entered into force at February 1st, 2014), which dealt, among other things, with the legal modification of the conflict of interests. From their contents, one could conclude that all the categories of persons exempted from art. 147 of the previous Penal Code and art. 175 of the new Penal Code are removed from the area of the active subject of the conflict of interest offense, are above the law and cannot be investigated or punished for committing work related or corruption offenses, which would be incompatible with the rule of law. Thus, the High Court of Cassation and Justice notified the Constitutional Court[7] about an exception regarding the objections on the unconstitutionality of the new provisions that define the concept of *public servant*.

The Constitutional Court admitted the objection's exception's objection and found the provisions as being unconstitutional, stating in the same ruling, among other things, that the meaning of public servant in the criminal law is not equivalent to the one in the administrative law, in the sense of criminal law, the concepts of *public servant* and *public official* have a broader meaning than that of the administrative law, both due to the nature of the social relations protected by the criminalization of socially dangerous acts, as well as due to the fact that the exigencies of defending ones goods and the promotion of the community's interests require a safeguarding, as best as possible, via the means offered by the criminal law. The doctrine has also shown that, in the criminal law, the public official is defined solely by the position which he holds or, in other words, if they exercise their activity in an entity subject to the criminal law, subject to a certain legal statute and regime. Given these, the criminal law refers to the notion of public authorities which, according to the provisions of the Romanian Constitution's title III encompasses, alongside the public administrative authorities (central and local),

[5] The legislative proposals are available on:
http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=12604
http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=12400

[6] Law No. 286 of July 17th 2009, regarding the Penal Code, published in the Official Gazette No. 510 of July 24th 2009, amended three times up to this date via the No. 27/20012 Law, the No. 63/2012 Law and the No. 187/2012 Law, for the implementation of the No. 286 Law regarding the Penal Code, published in the Official Gazette no. 757 of November 12th 2012 and rectified in the Official Gazette no. 117 of March 1st 2013.

[7] The Constitutional Court's no. 2/2014 decision, of January 15th, regarding the unconstitutionality objection of the provisions of art. 1, section 5 and art. 2, section 3 of the Law for the amendment and supplementation of certain laws and of the unique article of the Law regarding teh amendment of art. 251 of the Penal Code, published in the Official Gazette no. 71 of January 29th, 2014.

the Parliament, the President of Romania, the Government, as well as the judiciary authority (the courts, the Public Ministry and the Superior Council of Magistracy).

ADMINISTRATIVE CONFLICT OF INTERESTS – THE CONFLICT OF INTEREST OFFENSE

The conflict of interests of an administrative nature is defined in art. 70's provisions of the special law as being that circumstance in which the person holding a public dignity or office has an interest of a *personal or patrimonial nature*, which might influence the objective fulfillment of their attributions, under the Constitution and other laws.

The special law structures the legal regime of the conflict of interests according to the subjects it is addressed to via the mandatory rules, so that it may not be violated. Although this law separately regulates the juridical regime of the administrative conflict of interests in chapter II, for each category of authorities or their members, namely the conflict of interests in exercising the office of member of the Government and of other public offices of authority from the local and central public administration (art. 72-75); the conflict of interests regarding local elected officials (art. 76-78); the conflict of interests regarding public officials (art. 49), we can notice a few inconsistencies with the legislation in the area, and furthermore with the criminal law, which we will convey *infra*.

Therefore, *the person holding the office of member of the Government, secretary of state, under-secretary of state or similar positions, prefect or sub-prefect shall not issue administrative acts or sign-off legal documents, shall not take part or participate in decisions in exercising the public authority that produces a material benefit for their self, for their spouse or close relatives.* The conflict of interests for presidents and vice-presidents of local or county counsels, or of local or county counselors are set out in art. 47 of the Local Public Administration Law no. 215/2001[8], as amended and supplemented, in the sense that *they cannot take part in deliberations and the adoption of decisions of the counselor who, either directly or via their spouse, in-laws or relatives up to and also including the 4th degree, has a patrimonial interest in the issue under discussion by the local counsel*. This provision is supplemented by those of the no. 393/200 Law regarding the statute of the local elected officials[9], which in art. 75 provides that the local *elected officials have a personal interest in a certain issue, if they have the possibility of anticipating that a decision of the public authority they are part of might constitute a benefit or disadvantage for themselves or for*:

a) *spouse, relatives, in-laws up to and including the second degree*;
b) *any person or legal entity with which they have an arrangement, regardless of its nature;*
c) *a company in which they have the position of unique associate, the position of administrator of where they obtain an income from;*

[8] Republished in the O. G. no. 123/February 20th 2007.
[9] Published in the O. G. no. 912 of October 7th, 2004.

d) *another authority which they are part of;*
e) *any person or legal entity, other than the authority they are part of, which made a payment to them or made any expenditures thereof;*
f) *an association or foundation they are part of.*

According to art. 79 one is faced with a situation of conflict of interests if they are a public servant *called upon to resolve requests, make decisions or take part in the decision-making process* regarding the persons and legal entities with which they have relations of a patrimonial nature; the one who *participates in the same committee constituted according to the law, with public servants that have the statute of spouse or close relative* or *whose patrimonial interests of the state or close relatives may influence the decisions they must take in the exercise of their public office*.

The special law also establishes, in art. 105, the situations in which the magistrates might be in a conflict of interests, in the sense that *they are forbidden to participate in the trial of a case, as a judge or public prosecutor*:

a) if they are spouses or relatives up to the fourth degree, also between them;
b) if they, the spouses or their relatives, up to and including the fourth degree, have an interest in the case. These provisions also apply to the magistrate participating as a judge or public prosecutor, in the trial of a case in appeals, when the relative of the spouse or the relative, up to and including the fourth degree, of the magistrate as a participant, as a judge or public prosecutor, to the trial of that case.

The rendition of these provisions of the special law was necessary, given that they are inseparable from the content of the offense criminalized in art. 301 of the Penal Code, under which, the conflict of interests is constituted by *the act of the public servant who, in exercising their work related attributions, performed an act or participated ,either directly or indirectly, in the taking of a decision through which a patrimonial benefit was obtained for themselves, for a relative or in-law up to and including the second degree or for another person with whom they were in commercial or working relations with, over the past five years, or from whose part benefited or is still benefiting of any type of advantages.*

It is easy to notice that the special law is relatively inconsistent in terms of limiting the scope of people who would have an interest in the matter: *spouse or relatives up to and including the first degree, in the case of members of the Government, secretaries of state, under-secretaries of state, or similar positions, prefect or sub-prefect*; in the case of local councilors, the legal regime of the conflict of interests is found in two acts whose provisions have not been corroborated if, in the law of the local public administration, the scope of the people in whose favor the interest would be refers to *spouse, in-laws or relatives up to and including the fourth degree*; in the law regarding local elected officials, the scope of these people is much larger, i.e. *spouse, relatives or in-laws up to and including the second degree*; *any person or legal entity with which a commitment exists; a company where they are the single associate, the administrator or from which they obtain revenues; another authority which they are part of; any person*

or legal entity, other than the authority they are part of, who has made a payment to them or has made any expenditures thereof; an association or foundation which they are part of.

Even though the conflict of interests is not *ipso facto* corruption, if the emergence of certain conflicts between the interests of the people and the public obligations of the civil servants is not dealt with properly, it may lead to corruption. The doctrine (Diaconescu 2004, 7) has entertained several discussions on the concept of corruption as well as on the classification of corruption offenses, until the entry into force of the no. 78/2000 Law on the prevention, discovery and sanctioning of corruption acts, a law that criminalizes, for the first time, three categories of corruption acts: corruption offenses, the ones associated with corruption offenses and those directly related to them. The express provisions limited the corruption offenses to the category of those provided by the Criminal Code (the taking and offering of bribes, influence peddling, lobbying[10]), as well as those under special laws, as specific ways to them, depending on the status of the perpetrator or of the victims. Subsequently, the concept of corruption has been extended via the no. 161/2003 Law that amended the no. 78/2000 Law, including two other offenses, criminalized in art. 61^1 and 81^1.

One should note that the special law limits the scope of the people who might receive the material benefit only up to and including the first-degree relatives; the criminal law broadens this scope of people, including relatives or in-laws up to the second degree or other persons with whom commercial relations had been had over the last five years, or benefited from any kind of advantages due to them.

THE ACTUAL ANALYSIS OF THE OFFENSE

1 Preexisting conditions

a) The generic legal object is *the ensemble of social relations safeguarding the performance and the carrying out of an adequate and appropriate activity of the public authorities, institutions and services, as well as of other legal entities than those provided by art. 175 of the Criminal Code, without rising any suspicions related to the objectivity of their decision-making process,* and the special legal object consists of the *ensemble of social relations safeguarding the impartiality, integrity, transparency and the rule of public interest in the exercise of public functions.*

Typically, the offense lacks the material object; however, it can be considered as having a material object when the official or public servant "performs an act", either individually or collectively, and most of the times it materializes in a document. I appreciate that the material object of the two infractions may consist even of the material – technical operations, for instance a

[10] Please note that the current Criminal Code does no longer incriminate the offense of receiveing undue benefits separately (art. 256 of the former Criminal Code); it was included in the offense of bribery, according to art. 289 of the new Criminal Code.

notice, characterized by the mandatory nature of its request and confirmation from the issuing authority of the administrative act, with the opinion contained by the notice.

The active subject of the offense is a qualified one, it being the public servant in the sense of art. 175 of the Criminal Code, i. e. *the person who, permanently or temporarily, with or without remuneration*:

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

b) exercises a public dignity or a public office of any kind[11]*;*

c) exercises, individually or together with other people, within an autonomous administration, of another economic operator or of a legal entity with a state owned or majority state owned;

Within the criminal law, a person exercising a public service for which they were invested by the public authorities or who is subject to their control and supervision regarding the fulfillment of that specific public service, is also considered a public servant.

Another element similar to the corruption offenses is the prerequisite situation, as evidenced by the expressions *in the performance of duties* or *by the virtues of their office*. The active subject performs an act during the professional activity, carried out according to the job description, i. e. performs an activity that is encompassed by the job attributions. Therefore, the acts will be mandatory job requirements of the active subjects. Last but not least, the act must be lawful, since this is the only act that qualifies as a job attribute and it is the only mandatory one, to which they are bound via their position.

Participation is possible in all forms, but in the case of co-authorship it is required that all co-authors have the status of civil servants. The doctrine (Pașca, 2007, p. 237) appreciates that if the determination was performed when the act was committed, by offering money or other benefits, the offense of conflict of interest shall be registered to them, as incitement in coroboration with bribery, following the crime of conflict of interests by the civil servant, as an author, corroborated with accepting a bribe.

b) The public authority, public institution or legal entity prejudiced by an offense is a passive subject.

2. Constitutive content

a) The material element of the objective side is achieved by the carrying out of an act, or by the taking part in a decision, by the civil servant, in the exercise

[11] H.C.C.J., Criminal Division, ruling no. 286/2013, available on http://www.scj.ro/cautare_decizii.asp, where the defendant, as director of the Bucharest C.I.N. Theater (and member of the Chamber of Deputies), participated in the negociations of the contractual terms and then, on April 27th 2007, signed the copyright contract, having as main goal the directing of the R. show by his wife, which resulted in her obtaining directly a material benefit amounting to 6.620 RON, in two installments: on May 11th 2007 and November 12th 2007. He committed no less than 5 offenses of conflict of interest.

of their duties. Even though the legal text allows the possibility of commiting a conflict of interest offense, i think that under the aspect of the material element, the offense may even be committed simultaneously in the two forms, such as the official taking part in a decision making process, during the course of an auction, during which *they perform an act*.

There is the requirement that by the performance of an act or by participating in the taking of the decision, a material benefit be gained, either directly or indirectly, for themselves, their spouse, a relative or an in-law up to and including the 2nd degree, or for another person with whom the civil servant had commercial relations over the last 5 years, or from whose part benefited or still benefits from any kind of favors. For example, the following meets the constitutive elements of the conflict of interest crime, *in the manner of committing an act*[12] - it was noted that the act of the defendant, who, as mayor of a municipality, on May 18th 2007, representing city hall, signed the "services contract" with a company which was founded on March 7th 2007, knowing that the sole shareholder and administrator of the company was his son, to the extent of, directly or indirectly, achieving some sort of material benefits for the latter, amounting to 152.287,5 RON. This indeed meets the constitutive elements of the conflict of interest crime, in the manner of carrying out an act.

The offense was committed in the same fashion by the defendant who, as general secretary of District 1's City Hall, had control over the manner of execution of the contract with a company, by verifying the services rendered, i.e. waste collection and their payment and, at the same time, benefiting via a company, which he owned and administered, from the purchase of the same wastes, the money paid by the Citi Hall of District 1 therefore ending up in the defendant's pocket[13].

Regarding *the participation in making a decision*, it is achieved if the civil servant is part of the collective leadership of a legal entity (for example, a member in the board of directors of the institution they are part of), a status based on which, alongside other members, makes decisions detrimental to the institution and beneficial to them, their spouse, relative or in-law up to and including the 2nd degree, or for another person with whom they had commercial or work related relations over the last 5 years, or from whom they benefited or still benefit of services of any nature. Not all participations to the taking of such a decision constitute such an offense. For instance, the act of the magistrates of ruling certain civil sentences via which, starting with 2003, they established and increased the alimony payment of the petitioner as an injured party, does not constitute actions or

[12] H.C.C.J., Criminal Division, ruling no. 2142 of June 19th 2012, available on http://www.scj.ro/cautare_decizii.asp

[13] H.C.C.J., Criminal Division, ruling no. 939/2012, available on http://www.scj.ro/cautare_decizii.asp

inactions specific to the achievement of the objective side of the content of the conflict of interest denounced offense[14].

The public servant involved, during the exercise of his work related attributes, *in the taking of the decision* of issuing the notification or permit on fire safety, based on the documentation drawn up by the civil servant, in exchange for money[15], meets the constitutive elements of this offense, in the manner of participating in the taking of a decision. Also, not all participations to the taking of a decision meet the constitutive content of the offense, as the High Court of Cassation and Justice correctly established[16] in a case, in the sense that the act of the mayor of a city, to approve in the local council the activities and amounts of money used to buy food supplies from a company, if they have brought the slightest harm to the values protected by the law and via the circumstances in which it was committed, are manifestly devoid of significance and do not exhibit the degree of social danger of an offense, disposing their removal from the criminal prosecutorial process and the application of administrative penalties.

The defendant[17] – who, as chairman of the Animal Breeders and Forest Owners Association of Albestii de Muscel, initiated the draft resolution on the concession and signed (as a representative of City Hall) the concession contract of August 15th 2007 with the Animal Breeders and Forest Owners Association of Albestii de Muscel (also represented by him, as chairman), thus taking part in the decision, signing a document on the transmission of the right to use an area of 847,54 ha of alpine pastures by the association, through which a material benefit was achieved for the association whose chairman he was, as well as for himself, consisting of the right to capitalize these areas, to obtain the payments from The Payments and Intervention Agency for Agriculture (APIA) based on the usage of the land acquired via the concession contract, some of which was claimed by him as annual bonuses – committed the offense of conflict of interest.

The criminalization of the act involves not only the mere act of forbidding the private nature interests of the civil servant, but also the development of taking fair, administrative decisions, so that an unresolved conflict of interests does not lead to an abuse of authority.

There is no overlapping between the offense of abuse of authority at the work place and the conflict of interest, the former being criminalized by the special law as the act of board's members to prevent, in any way, the restoration of the property rights or the issuance of the property title to the rightful owners, whilst the conflict of interests implies the performance of an act or the participation in a

[14] H.C.C.J., Criminal Division, ruling no. 2103/2010, available on http://www.scj.ro/cautare_decizii.asp

[15] H.C.C.J., Criminal Divisin, ruling no. 249 of 26th January 2011, available on *http://www.scj.ro/SP%20rezumate%202011/SP%20dec%20r%20249%202011.htm*

[16] H.C.C.J., Criminal Division, ruling no. 107/2013, available on http://www.scj.ro/cautare_decizii.asp

[17] H.C.C.J., Criminal Division, ruling no. 492/2013, available on http://www.scj.ro/cautare_decizii.asp

decision making process, by a person who has a direct or indirect interest and is also a civil servant in the performance of their duties. In this case, said fact has been clearly established and the defendants did not deny that, on May 14th 2008, the defendant L. N., as deputy mayor of a municipality, participated in the meeting of the municipality's Land Fund Local Commission, even though he had a personal interest in the case, since he owned the land on which the site in question was located and, as deputy mayor, he signed the no. 869 address, of August 22nd 2008, through which the Local Commission notified the said J. T. that there are no available farmlands. The defendant T. D., as secretary of the municipality's Land Fund Local Commission, also participated in the commission's meeting of May 14th 2008, as a member of the committee, even though she had a personal interest in the case: her husband was the owner of the field, located on the site in question. Therefore, for the aforementioned reasons, The High Court of Cassation and Justice[18] (H.C.C.J.) found that, on the one hand, the constitutive elements of the conflict of interest offense had been met, that it existed independently of the offense of abuse of office – the objective and subjective sides being different.

It does not matter whether the material benefit is obtained directly or indirectly, both for the civil servant as well as for the other people listed in the legal content, but it must be obtained since otherwise we would not be faced with the acquirement of the material benefit required by the criminalizing law. For instance, the jurisprudence[19] rightly held that the dividends obtained by the defendants from a company represent revenues obtained as a result of urbanism works and cadastral surveys, and not material benefits deriving from the notification and receipt of technical work. The defendant – as an associate, was aware of the collaboration between SC R.E. SRL and SC G. SRL, as well as what her husband's involvement consisted of (the defendant S. G.). The only reasonable conclusion would be that she acted with direct intent in order to achieve the pursued goal, i.e. to obtain undue benefits, as a result of exercising her job attributions, even though she was certain that she was faced with a conflict of interests.

Under the provisions of art. 301, para. 2 of the Criminal Code, this offense cannot be held in the case of the issuance, approval or adopting of the normative acts.

b) The immediate result consists of the civil or other people listed in the legal text obtaining a material benefit, which also creates a threat for the good functioning of some public institutions, authorities or legal entities of public interest. The social danger is also expressed by the state of social unrest and insecurity generated by the act, via its violent, fraudulent and socially undisciplined nature. The threat created by the committing of the act provided by the criminal

[18] H.C.C.J., Criminal Division, ruling no. 1472/2012, available on http://www.scj.ro/cautare_decizii.asp

[19] H.C.C.J., Criminal Division, ruling no. 672/2012, available on http://www.scj.ro/cautare_decizii.asp

law is a social danger, which derives from the nature of prejudiced or endangered values. Thus, the High Court of Cassation and Justice held that, the act of the defendant who, as mayor, issued a provision in which he appoints his daughter, yet again, to exercise the activity of preventive financial control, during which she received 3947 lei, meets the constitutive elements of the conflict of interest offense. In its justification, the Court noted that this analysis is made by referring to criteria clearly established by the criminal law, i. e. the minimal prejudice against one of the values protected by the law as well as its actual content, which must be manifestly devoid of importance.

c) There must be a causal connection between the material element of the objective side and the socially dangerous consequence.

The doctrine (Boroi 2008, 340; Dobrinoiu 2012, 606) considers that the form of guilt is the direct or indirect intention. The offender has the representation that, by going through with the act or by participating or taking a decision which led to the obtainment of a direct or indirect material benefit for themselves or for the other people listed in the legal text, a state of danger is created for the institution where they fulfill their job attributions and therefore they seek or accept the outcome.

The jurisprudence considers that the offense is committed with direct intent, driven by the purpose of benefiting from any type of services or benefits; it is not necessary for them to be obtained, in order for the offense to exist. It suffices that the activity be committed to this end. In this case, such a benefit existed and consisted of the holding of some parts of the land which the injured party had to be repossessed with. By correlating the end-game aim via the criminalization of the conflict of interests with the manner and circumstances in which the defendant committed the act, the High Court of Cassation and Justice held that it met the degree of social threat of an offense, like the trial court noted, in the sense that the defendant – mayor of a municipality – even though he was aware that his son was the sole shareholder and administrator of a company, signed with said company a service contract, being fully aware that, by his illicit activity, he is facilitating his son to obtain ill-gotten gains on his behalf. By doing so, apart from the fact that his son obtained a material benefit – being the sole shareholder and administrator – the defendant ruled out the possibility of other companies participating, which could have offered lower prices for the execution of the metallic designs.

3.Ways, methods, sanctions

The offense of conflict of interests is susceptible to preparatory and tentative actions, but the law only sanctions the end-result. The consummation (end-result) occurs when the action was taken to its conclusion and the result prescribed by the law occurred.

The legal content of the offense exhibits two normative methods, namely: the performance of an act or the taking part in a decision by the civil servant, in exercising his job attributions.

The penalty provided by the law is imprisonment from 1 up to 5 years and the banning of the right to hold any public office.

INSTEAD OF CONCLUSIONS

Even though the penal reform is intended, among other things, to be a more efficient systematization of the criminal laws corroborated with the non-criminal ones, it is often that we notice, like in the case of the conflict of interest, the inconsistency of the legislator regarding the mismatches; in our case, of the special law with the provisions of the criminalizing text, given the fact that the legislator's goal is to organize, unify and coordinate the entire legislation.

The definition of the legal concept of conflict of interest is limited or incomplete, since it is limited to the material aspects taken into consideration by the official or civil servant, which might influence their decision.

There are, however, interests of a non-patrimonial nature that might influence the objectivity of his decision, which shall not fall under the category of conflict of interests. The law is also limited only to the immediate interests of the official or civil servant in question, overlooking the interests of their relatives. Therefore, the definition is limitative, both quantitatively and qualitatively. From a quantitative perspective, it does not cover the case in which relatives or other people close to the official would have interests linked to his public activity and, consequently, could determine an alteration of the public decisions, to meet their goals. From a qualitative perspective, the definition does not include the non-patrimonial nature interests of the official, which can also be decisive in taking administrative decisions.

For example, the special law limits the scope of people who would be able to benefit from the material gains, only up to the first degree relatives; the criminal law broadens this scope to include relatives or in-laws up to the second degree, or other people that have had commercial or work related relations, over the past five years, with the official or civil servant, or from whose part the former benefited of any kind of ill-gotten gains.

Unfortunately, all these legislative inconsistencies do nothing else but produce a number of unwanted effects, generating uncertainty in the legal environment and confusion in enforcing the law.

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