

CONSTITUTIONAL PERSPECTIVE ON THE CASE OF CONFLICT OF INTEREST

Monica BUZEA¹

e-mail: mbuzea@yahoo.com

Abstract

The provisions of the new Criminal Code offense in terms of conflict of interest provided for in art. 301 do not change the substance from those of the article 253 ind.1 of the previous Criminal Code, the most important being to increase sanctions and extending the scope of the active subjects.

The Constitutional Court was seized with exceptions that aimed contents of this crime, especially in terms of quality of an active subject or lack of justification for the criminalization of the offense of conflict of interests in the private and unconstitutional wording commercial relations, admission decisions having important consequences how to set the provisions of the new Criminal Code.

Key words: corruption, service offenses, public employee

Within corruption and service offenses regulated under Title V of Special Part of the Criminal Code offenses, classified in sub-category of service offense is included the conflict of interest offence, namely art. 301 para. (1) sanctions: "The act of a public employee in the line of duty, which performed an act or participated in a decision through which obtained, directly or indirectly, a patrimony, for himself, for his wife, for a relative or for laws up to second degree inclusive or another person with who was in commercial relations or work in the last 5 years, or from which the public employee received or receives advantages of any nature, shall be punished with imprisonment from one to 5 years and deprivation of the right to hold a public office."

MATERIAL AND METHOD

For the elaboration of this article, the author has studied the specific criminal legislation, namely the old Penal Code of 1969 and the current Criminal Code which entered into force in 2013, with its subsequent amendments arising from the decisions of the Constitutional Court of Romania and of the High Court of Cassation and Justice.

RESULTS AND DISCUSSION

Initially, art. 1 pt. 61 from Law no. 278/2006 (published in the Official Journal of Romania, Part I, no. 601 of 12 July 2006) to amend and supplement the Criminal Code, also for amending and supplementing other laws, was introduced, in

the content of the Criminal Code from 1969, the art. 253 ind. 1. In the explanatory memorandum of Law no. 278/2006 was showed, concerning the criminalization of acts of conflict of interest, that this aimed to criminalize the civil servant which, consciously and deliberately, satisfies his personal interests through fulfillment of public duties and to remove any suspicions with regard the conduct of public servants.

The new Penal Code has not brought major changes, only focused mainly on the replacement of material benefit to that of patrimony, increasing the minimum penalty from 6 months to 1 year imprisonment, eliminating the period for which it can be applied the additional punishment and broadening the active subjects field, who can be both civil servants, according to art. 175 of the Criminal Code and the persons referred to in art. 308 from the Criminal Code (G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *The Criminal Code. Comments on Articles*, CH Beck Publishing House, Bucharest, 2014, p. 672).

Compared to these new provisions and the existing case law, the main issues on which there have been discussions with reflection to the practice of the Constitutional Court, are:

a) The active subject of crime

Based on the independent nature of public servant concept, in criminal law, with a broader sense, due to both social relations appliances and general interests of the protected community (G. Bodoroncea, V. Cioclei, I. Kuglay, L.V.

¹ The Prosecutor's Office attached to the Galati Court of Appeal

Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *The Criminal Code. Comments on Articles*, CH Beck Publishing House, Bucharest, 2014, pp. 366-367), it was noticed the importance of establishing a body of professional and apolitical civil servants, opened to the citizens (C.M.Mihalache, *State Policies on Reforming the Deontology of the Civil Servant*, in the volume of the Conference Uniforming law, legal effects and social, political and administrative implications, Hamangiu Publishing House, 2014, pp. 711-716).

In the context of the new Criminal Code amendments to the concept of public servant, by giving up the notion of official and introducing of a category similar to civil servants, in the special part of the Criminal Code, namely art. 293 of the Criminal Code, art. 294 of the Criminal Code, art. 308 of the Criminal Code, while maintaining the distinction to administrative law, the legislature manifested his orientation related to one of the major shortcomings consisting of lack of harmonization at European level with regard to the concept of "official public function" to include the elected officials (A. Popescu, *Corruption in the Public Sector in Romania - Overview*, in the volume of the Conference Uniforming law, legal effects and social, political and administrative implications, Hamangiu Publishing House, 2014, pp.711-716).

Under the provisions of art. 301 of the Criminal Code offense the active subject of the offense could be the public servant, as defined in art. 175 of the Criminal Code, with the application and the art. 308 of the Criminal Code.

In this regard, there was also an alternative to amending the relevant legal provisions, in order to eliminate from the category of "public servant" and official of the following categories: Romanian president, deputies, senators and the people who work in a liberal profession, under a special law and whom are not funded by the state budget, and for the offense of conflict of interest, restricting the scope of persons who may be active subject to those who commit offenders carrying out their duty "resulting from an employment contract and a job description signed with an institution as stipulated in Art. 145 of the Criminal Code" (Art. I point 5 and Art. II point 3 of the Law on the amending and supplementing of laws and of the sole Article in the Law for amending Art. 2531 of the Criminal Code).

Notified by the High Court of Cassation and Justice with the exception of unconstitutionality, based on decision no. 2 of 01.15.2014 (published in the Official Journal of Romania no. 71 of

29.01.2014), The Constitutional Court ruled its admission, considering that the proposed amendment contravenes the principle of equal rights of citizens enshrined in art. 16 para. (1) of the Constitution and the provisions of Art. 11 para. (1) of the Constitution, according to which "The Romanian State pledges to fulfill in good faith its obligations as deriving from the treaties to which it is party.", including those who aim to criminalize active and passive corruption of people which fall under the categories of "public servant" / "official".

Discussions about the quality of active subject continued to generate discussion in the doctrine and an opinion of restrictive appreciation for art. 308 of the Criminal Code was expressed to limit only the quality of the employee (G. Bodoroncea, V. Cioclei, I. Kuglay, L.V. Lefterache, T. Manea, I. Nedelcu, F.M. Vasile, *The Criminal Code. Comments on Articles*, CH Beck Publishing House, Bucharest, 2014, p. 672; S. Bogdan, D.A.Șerban, G. Zlati, *The New Criminal Code*, 2014, p. 463).

Recently, in response to a further exception of unconstitutionality in terms of regulation as an active subject of the crime of conflict of interests for private persons, in accordance with art. 308 of the Criminal Code, by decision no. 603 from 06.10.2015 (published in the Official Journal of Romania no. 845 of 13.11.2015), The Constitutional Court upheld the objection and found that the regulation is excessive, since there is an increase impermissible coercive force of the state, by using public prosecution on the freedom of action of individuals, by disproportionate limiting of labor rights and economic freedom, referred to in the art. 41 para. (1) and Art. 45 of the Constitution, without any criminological justification in this respect. Against persons from private sector who commit acts of causing harm, can be employed another form of liability that does not involve coercive force of the state by means of criminal law.

CONCLUSIONS

The effects of this admission decision for the exception of unconstitutionality, were felt in judicial practice, being arranged payment solutions for the defendants that were investigated for the offense in the private sector, given the inaction of the legislature within 45 days (Criminal Decision no. 1378 of 07.12.2015, ruled in case no. 318/196/2015 of the Court of Appeal of Galați).

b) The objective side of crime

Both provisions of the new Criminal Code and the Criminal Code of 1969 provide as means

of committing the crime, the offender's performance of the listed activities for persons with whom he had commercial relations in the last 5 years. In this regard, by the decision no. 603 from 06.10.2015 of the Constitutional Court (published in the Official Journal of Romania no. 845 of 13.11.2015), the exception of unconstitutionality was admitted and was found that the term "commercial relations" of the provisions of art. 301 para. (1) of the Criminal Code is unconstitutional and, as noted above, the term "or under any legal person" from the provisions of art. 308 para. (1) of the Criminal Code, with reference to art. 301 of the Criminal Code, is unconstitutional.

Thus, it was considered that the concept of commercial relationship is no longer expressly defined by the law in force, following the repeal, by the provisions of art. 230 lit. c) and i) of Law no. 71/2011 (published in the Official Journal of Romania no. 409 of 10 June 2011) for the implementation of Law no. 287/2009 on the Civil Code, the Codex Trade from 1887 and Carol II Commercial Code, nor can be deduced through interpretation of civil provisions in force, as it is used in another context and in isolation, having lack of clarity, precision and predictability and contravenes to the principle of legality for criminal offenses provided in art. 1 of the Criminal Code and Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and therefore the provisions of art. 1 para. (5) of the Constitution, which refers to the quality of the law.

Given these considerations, it appears that, although the provisions of the new Criminal Code bring some minor changes regarding the crime for conflict of interest, essential changes were

determined as a result of the pronounced solutions of the Constitutional Court, with binding effects for judicial practice, too.

REFERENCES

- Bodoroncea, G., Cioclei, V., Kuglay, I., Lefterache, L.V., Manea, T., Nedelcu, I., Vasile, F.M., 2014** - *The Criminal Code. Comments on Articles*, CH Beck Publishing House, Bucharest.
- Diaconu, C.M., 2015** - *Criminal liability of public servants and law standardization at European level*, Ion Ionescu de la Brad Publishing House, Iasi.
- Gavrilescu, C., 2013** - *The enforcement of foreign decisions on international bankruptcy*, AGORA International Journal of Juridical Sciences, no. 1/2013, Agora University Publishing House.
- Mihalache, C.M., 2014** - *State Policies on Reforming the Deontology of the Civil Servant*, in the volume of the Conference Uniforming law, legal effects and social, political and administrative implications, Hamangiu Publishing House.
- Popescu, A., 2005** - *Requirements for the practical utility of the European Constitution*, Performantica Publishing House, Iasi, pp.406-413.
- Popescu, A., 2005** - *The professional deontology of the civil servant and the improved use of human resources*, Performantica Publishing House, Iasi, pp.327-334.
- Popescu, A., 2010** - *Human trafficking. Criminal-legal implications*, Publishing House of "Al.I.Cuza" University, Iasi.
- Popescu, A., 2014** - *Corruption in the Public Sector in Romania - Overview*, in the volume of the Conference Uniforming law, legal effects and social, political and administrative implications, Hamangiu Publishing House, Bucharest.
- ***, 2015** - *Criminal Decision no. 1378 of 07.12.2015*, ruled in case no. 318/196/2015 of the Court of Appeal of Galați.