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CONFLICT OF INTEREST IN THE PRIVATE SECTOR

I. Introduction

Romania has passed in recent years through an extensive process of legislative amendments, resulting, among other things, in the adoption and entry into force of new Codes in the matter of civil, criminal, civil procedure and criminal procedure, which provided a new configuration for certain legal institutions that we could qualify as “traditional” in Romanian law. Certainly, the intention of the legislature was to modernize the legal system and to adapt it to the recent developments in the European Union environment. The implementation of the new rules revealed itself the inconsistencies of the legislation, the lack of clarity and predictability of the law, issues of unconstitutionality that were sanctioned by the Constitutional Court of Romania, when this Court was notified in this regard. Therefore, as an example, we shall mention that half of the admission decisions of the exceptions of unconstitutionality delivered by the Constitutional Court of Romania in 2016 concern the provisions contained in the Code of criminal procedure, in the Criminal Code, respectively, in the Code of civil procedure¹.

¹ See the statistics data published on the webpage of the Constitutional Court, <https://www.ccr.ro/uploads/Publicatii%20si%20statistici/Implementarea%20>

In this study, we will refer to a decision which, although pronounced in criminal matters, had a significant impact on business law relations, namely on the freedom of action of persons, circumscribed in this case to labour rights and to economic freedom. This refers to the ascertainment of unconstitutionality regarding the criminalization of conflict of interest in the private sector.

II. Conflict of interest. Regulation and sanctioning.

As it was noted¹, the identification of the conflict of interest involves a difficult analysis which involves detection of certain situations, persons and professions to which the rules concerning an imposed conduct and the consequences of its non-compliance shall apply. Such an approach creates numerous uncertainties, for example, if any transaction or situation, only some of them, or the accumulation of certain transactions, professions, skills, represents a conflict of interest or if any person, professional or not in the sense of the new Civil Code, or only civil servants can be in a conflict of interest, or whether, the profession (occupation or craft) is crucial and higher than the quality of professional of the citizen and / or public function, for the existence of the conflict of interest.

In Romania, the regulation by Article 253-1 of the Criminal Code of 1969², of the offence of conflict of interest, and then the takeover, with slight amendments thereof, in the new Criminal Code, in Article 301 (1), has generated much debate within the meaning shown above. Thus, according to the original regulation, the active subjects of the offence of conflict of interest could be public servants within the meaning of Article 147 (1) of the Criminal Code of 1969, respectively, any person exercising, permanently or temporarily, with any title, no matter how he/she was invested, a task of any kind, with or without remuneration, in the service of any unit referred to in Article 145 of the same code, or “official”, provided for by Article 147 (2) of the Criminal Code of 1969, respectively the person referred to in paragraph 1 of this article, as well as any employee who exercises a task within another legal entity than those referred to in that paragraph. The statement of reasons of the Law nr.278/2006 states, concerning the criminalisation of acts of a conflict of interest, that it was aimed at the prosecution of a public servant who, knowingly and intentionally, meets his personal interests through the

deciziilor/situatie%20dec%20vs%20legi%202016%20final.pdf

1 Andreea Corina TÂRȘIA, The relation among profession, professional, public office and conflict of interest, Pandectele Române no.5/2013 <http://search.proquest.com/openview/fb15f3a1b3fc497e06b98bd1fd483772/1.pdf?pq-origsite=gscholar>

2 introduced by Article 1(61) of Law no. 278/2006 amending and supplementing the Criminal Code, as well as amending and supplementing other laws, published in the Official Gazette of Romania, Part I, no. 601 of 12 July 2006

fulfilment of public tasks and removing any doubts as to the conduct of civil servants.

The new Criminal Code established in Article 301 (1) that “*The act of a public servant who has performed, within the exercise of its tasks, an act or participated in a decision by which it was obtained, directly or indirectly, a benefit, for himself/herself, for his/her spouse, a relative or for an in-law up to second degree inclusive or for another person or with whom he/she has established trading relationships or employment relations in the last 5 years or from which he/she benefited or is still benefiting from favours of any kind, shall be punished with imprisonment of one to five years and deprivation of the right to hold public term of office*”. According to Article 308 (1) of the Criminal Code, “*the provisions of Articles 289-292, 295, 297-301 and 304 concerning public servants shall also apply accordingly to the facts committed by or in relation to persons exercising, permanently or temporarily, with or without remuneration, a task of any task within a legal entity among those provided for by Article 175 (2) or within any legal entity*”. Thus, according to the new regulations, the quality of active subject of the offence of conflict of interest provided for in Article 301 of the Criminal Code, in addition to civil servants, as defined in article 175 of the Criminal Code, could be also acquired by the persons referred to in Article 308 (1) of this code (therefore, the rest of persons who operate in the private sector), with the difference of the sanction regime set forth in Article 308 (2) of the criminal Code¹.

III. Conflict of interest in the private sector. Aspects of unconstitutionality.

In the context of the referral regarding the provisions of to Article 301 (1) of the Criminal Code and ascertaining the unconstitutionality of the term “trading relationships” which it includes, on the grounds that it violates the requirements of clarity and predictability of the law², the Court has also

1 As concerns the conflict of interest of an administrative nature, it is regulated by Law no.161 / 2003 on certain measures to ensure transparency in the exercise of public dignities, public offices and in business, the prevention and punishment of corruption. According to Article 70 of the abovementioned normative act, „the conflict of interest means the situation in which the person exercising a public dignity or a public office has a personal benefit that could influence the fulfilment objectively of his/her tasks under the Constitution and other normative acts”.

2 because the concept of trading relationship is not anymore expressly defined by the law in force, following the repeal, by the provisions of Article 230 c) and i) of the Law no.71 / 2011 for the implementation of Law nr.287 / 2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no.409 of 10 June 2011, of the Trade Codex of 1887 and the Commercial Code Carol II, and nor can be deduced

extended the exception of unconstitutionality on the provisions laid down in Article 308 (1) of the Criminal Code.

Having noted that under article 175 (2) of the Criminal Code the persons providing a service in the public interest entrusted to them by the public authorities or persons who are subject to control over or supervision of the fulfilment of the public service are assimilated to civil servants in terms of criminal treatment¹, the Court found that it subsists, regarding the persons exercising, permanently or temporarily, with or without remuneration, a task of any kind within their job, the interest of the criminalisation of conflict of interest, set forth in Article 301 (1) of Criminal Code. The situation is however different, according to those held by the Constitutional Court, as regards the criminalisation of the same acts committed by persons exercising, permanently or temporarily, with or without remuneration, a task of any kind within any legal entity, phrase provided for by Article 308 (1) of the Criminal Code. In practice, this last category includes, for example, any form of company defined by the Civil Code, the Companies Law no. 31/1990, republished in the Official Gazette of Romania, Part I, no. 1.066 of 17 November 2004, and Law no. 1/2005 on the organisation and functioning of cooperatives, republished in the Official Gazette of Romania, Part I, no. 368 of 20 May 2014.

The Court held that that the inclusion, under the provisions of Article 308 of the Criminal Code, of private persons as active subjects of the criminal offence of conflict of interests is excessive, since State coercion is unduly extended, using criminal means against the freedom of action of the persons concerned, as part of the economic freedom and the right to work, without any criminological justification in this respect. Achieving from this perspective, an examination of proportionality, the Court has held that the legislature does not have the constitutional competence to regulate offences in such a way as to enshrine a manifest disproportion between the importance of the social value that needs to be protected and the one that needs to be limited, as otherwise the latter would be ignored. In this case, the social value that needs to be protected is one that refers expressly to the private sector, and therefore the State has no interest to criminalise the conflict of interest, whereas the value that is sought to be protected in this case is not public. Criminally sanctioning acts

through the interpretation of the civil provisions in force as it is used in another context and in isolation, for example, in the provisions of Article 2557 of the Civil Code on private international law relations.

¹ for example, professions such as notaries public and official receivers fall into this category as they were sworn by a public authority in order to exercise a public service or subject to control over or supervision by a public authority on the fulfilment of that public service

which contravene solely private interests, the legislature has qualified them as having a public character, resulting in a disproportionate limitation of the right to work and economic freedom of persons operating in the private sector. For these reasons, the Court held that the term “*or within any legal entity*” in the provisions of Article 308 (1) of the Criminal Code, with reference to Article 301 of the Criminal Code, is unconstitutional¹.

IV. The effects of the Constitutional Court’s decision. Considerations on the legal security

Firstly, it is worth mentioning noted that the Basic Law of Romania enshrines the *erga omnes* binding nature of the decisions of the Constitutional Court, which causes them to be complied with by all subjects of law, just as a normative act, unlike the judgments of the courts of law which take effect *inter partes litigants* effects². The *erga omnes* binding nature concerns both the recitals and the operative part of the decisions. In an established case-law, starting with the Decision of the Plenum no. 1/1995³, the Court held that *res judicata* which accompanies the jurisdictional acts, and therefore the Constitutional Court’s decisions, is attached not only to the operative part, but also to the recitals on which it is based. Accordingly – the Court has noted that – both Parliament and the Government, respectively public authorities and bodies shall fully comply with both the recitals and the operative part of the decisions pronounced by the Constitutional Court. For the particular situation of ascertaining the unconstitutionality of provisions of laws and ordinances in force, as well as those of the regulations, Article 147 (1) of the Constitution establishes that they “*shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court where Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right*”⁴.

In relation to the cited constitutional provisions, it results that, as of the publication of the Constitutional Court’s Decision no. 603/2015 in the Official Gazette of Romania, the term “*or within any legal entity*” in the provisions

1 Decision no. 603 of 6 October 2015, published in the Official Gazette of Romania no. 845 of 13. November 2015

2 The decisions of the High Court of Cassation and Justice, delivered following the settlement of appeals on points of law, having a distinct legal regime, do not fall into this category

3 Official Gazette of Romania no. 16 of 26 January 1995.

4 For details, M. Safta, Constitutional law. Political institutions, Hamangiu Publishing House, 2015, p. 222-223

of Article 308 (1) of the Criminal Code, with reference to Article 301 of the Criminal Code has ceased its applicability, thus the conflict of interest in the private sector is decriminalized. The decision shall take effect only for the future, and, in order to give effectiveness to the constitutional review, the persons who determined this review, prior to the publication of the decisions, as provided by law, shall have the opportunity to benefit from the effects of the admission decision delivered by the Court.

That fact that the range of the beneficiaries of the decision is circumscribed as shown is determined by the need to ensure both a stability of legal relations and a good management of justice. A decision finding the unconstitutionality of a legal provision must benefit, in the wording of the appeal of the review, only that category of persons who raised the exception of unconstitutionality in cases definitively settled until the publication in the Official Gazette of the decision whereby the unconstitutionality is found, as well as the authors of the same exception invoked prior to the publication of the decision of the Court, in other cases, settled definitively. This fact is required by the need for legal order and stability. This is because the principle of *res judicata* has a fundamental importance both within the national legal order and the Community legal order, as well as within the European Court of Human Rights. The Court notes that the its interference with the national legislation must be limited and this principle shall have a derogation only if substantial and compelling reasons requires it (Judgment of 7 July 2009, delivered in the Case *Stanca Popescu v. Romania*, paragraph 99, and Judgment of 24 July 2003, delivered in the Case *Ryabykh v. Russia*, paragraph 52).

As a result, at present, if the acts of persons in the private sector of the kind of those described above are causing damage, civil liability of labour law or other form of accountability that does not involve the coercive force of the State, by means of criminal law, may be invoked against such persons.

1. *Constitutional Justice. Functions and relationship with the other public authorities. Comparative constitutional law. Universul Juridic Publishing House, Bucharest, 2012.*
2. *Camelia Florentina STOICA: The case-law of the Constitutional Court – source of business law, Curierul Judiciar (Judicial Courier), no.10/2012, p.593*
3. *Andreea Corina TÂRȘIA, The relation among profession, professional, public office and conflict of interest, Pandectele Române no.5/2013*
4. *Tudorel Toader, coordinator, New Criminal Code. Comments on articles. Hamangiu Publishing House, 2014.*

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5. *Marieta Safta, Constitutional law. Political institutions, Hamangiu Publishing House, 2015*
 6. *www.ccr.ro;*
 7. *www.venice.coe.int.*

Stoica C., Marieta S. Conflict of interest in the private sector

This article is devoted to conflict of interest in the private sector. In this study, the authors referred to a decision which, although pronounced in criminal matters, had a significant impact on business law relations, namely on the freedom of action of persons, circumscribed in this case to labour rights and to economic freedom. This refers to the ascertainment of unconstitutionality regarding the criminalization of conflict of interest in the private sector.

The analysis of the legislation and the decisions of the Court is provided. The author concludes that as a result, at present, if the acts of persons in the private sector of the kind of those described in this article are causing damage, civil liability of labour law or other form of accountability that does not involve the coercive force of the State, by means of criminal law, may be invoked against such persons.

Keywords: conflict of interest, private sector, Romanian law, regulation and sanctioning.