

Several Matters on the Conflict of Interest in the Light of the Administrative Code

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ABSTRACT: Human activity, whether in the public or private sector, must be conducted in full compliance with the law. Persons temporarily holding a public office or a public function have this obligation to comply with the law. In this context, the subject is topical and important both for legal specialists and citizens, who may at some point find themselves performing work in the state apparatus and need to know their obligations to avoid legal sanctions. This paperwork aims to analyze the existing legal framework on the conflict of interest from an interdisciplinary perspective. In order to achieve the proposed scope, the topic is divided into three parts, organized in such a way that the information presented provides as detailed an insight as possible into the subject of conflict of interest. Part I will provide an introduction to the general theme of the topic. Part II will develop the legal regime of conflict of interest from a multidisciplinary, administrative law and criminal law perspective. Part III will briefly exemplify situations of conflicts of interest in the practice of public authorities in order to understand their dynamics, in which the work of the National Integrity Agency and the High Court of Cassation and Justice, Division of the contentious administrative and fiscal, was analyzed.

KEYWORDS: Administrative Code, conflict of interest, civil servant, National Integrity Agency, declaration of interests

1. Introduction

In a democratic society, all human activity is carried out in accordance with the principle of legality. Art. 1 para. (4) of the revised Constitution of Romania, according to which “In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory”, is conclusive in this respect. According to the doctrine, “The civil servant is considered to be the legal institution of public law in general and administrative law in particular” (Buzatu 2011, 182).

This paperwork discusses a current issue that concerns the knowledge of the requirements of the work carried out in public administration, so that no one has any suspicion that people, civil servants or public officials, have any personal interest that could divert them from the specifics of their work and affect their objective conduct.

Per a contrario, if people who temporarily hold a public office or a position of public dignity were to break the law, this would lead to anarchy, the rule of law would be in danger and that is why it is good that such an issue is constantly analyzed and debated by specialists, so as not to end up in the situation of believing, without justification, that any conduct is allowed in public administration, even if it breaks the law. In this respect, we note the concerns of the doctrine which has analyzed the significance of the violation of the law (Gorunescu 2017, 96-102).

Our doctrine has emphasized: "It is of the essence of any community to establish by normative means certain criteria of conduct, certain requirements which the community intends to formulate with regard to the conduct of people, in such a way that the community preserves itself, that its very existence is not called into question by arbitrary conduct" (Popa, 2008, 36). From this perspective, if a person working in the service of the State is called upon to resolve requests, make decisions or participate in decision-making process with regard to natural and legal persons with whom he or she has relations of a proprietary nature, he or she would create harm to society as a whole. Moreover, “the stakes for leaders at the highest level

in states today are huge and on the long-term, involving future generations, namely: identifying solutions and mechanisms to increase public confidence in state authorities” (Ștefan 2017, 96). This paperwork will present the legal regime of conflict of interest, precisely from the perspective of knowing the risk of violation of the law, from the administrative or even criminal point of view. By using law-specific research methods, we will provide answers to the following questions: *what is conflict of interest, which legislation is applicable* or *what penalty applies in case of conflict of interest?* to conclude that the law must be observed by all people, whether ordinary citizens, civil servants, public officials or local elected representatives.

2. The legal regime of conflict of interest from a multidisciplinary perspective - administrative law and criminal law

This section will briefly present the legislation on the conflict of interest, firstly from the perspective of administrative law and we will continue with criminal law as the two areas are intertwined, with multiple practical implications. From the documentation carried out, it appears that in our country, the National Integrity Agency is the public authority competent to verify conflict of interest, this being specifically established by Law no. 144/2007 (Ștefan 2015, 78).

The current legal framework on conflicts of interest is composed, on the one hand, of Law no. 161/2003 on measures to ensure transparency in the exercise of public office, public functions and in the business environment, and to prevent and punish corruption (published in Official Gazette no. 279 of 21 April 2003); Law no. 176/2010 on integrity in the exercise of public offices and functions (...) (published in Official Journal no. 621 of 2 September 2010); Administrative Code (published in Official Journal no. 555 of 5 July 2019) and on the other hand, of the Criminal Code (published in Official Journal no. 510 of 24 July 2009).

Two of the principles applicable to public administration laid down in the Administrative Code are closely related to the conflict of interest regime, namely: *the principle of legality* (public administration authorities and institutions and their personnel shall be bound to act in compliance with the legal provisions in force and the international treaties and conventions to which Romania is a party - art. 6) and *the principle of satisfying public interest* (public administration authorities and institutions and their personnel shall be bound to pursue the public interest before the individual or group interest - art. 10).

According to Law no. 161/2003, art. 70 - conflict of interest shall mean “*the situation in which the person exercising a public office or a public function has a personal interest of a pecuniary nature, which could influence the objective performance of his/her duties under the Constitution and other normative acts*”. At the same time, the law lays down the principles underlying the prevention of conflict of interest in the exercise of public offices and functions, namely: “impartiality, integrity, transparency of decision and supremacy of public interest” (art. 71, Law no. 161/2003).

From the perspective of administrative law doctrine, conflict of interest is the situation in which a public official finds himself when, by virtue of the public office he holds, he is to make a decision or participate in the making of a decision in respect of which he has a personal interest (Vedinaș 2020, 346).

Law no. 161/2003 establishes conflict of interest in relation to a number of categories of subjects, namely: *conflict of interest in relation to the exercise of the office of member of the Government and other positions of public authority in central and local public administration* (art.72-73); *conflict of interest concerning local elected officials* (art.76); *conflict of interest concerning civil servants* (art.79).

The legislation requires that “*persons exercising public office and public functions shall submit a declaration of interests, on their own responsibility, regarding the functions and activities they perform except those related to the mandate or public function they hold*” (art. 111,

Law no. 161/2003). The declaration of assets and declarations of interests shall be submitted to the National Integrity Agency “exclusively through the online platform for declaration of assets and interests, called e-DAI, managed by the Agency” (Guide for filling in declarations of interests, page 2). In what concerns sanctions, Law no. 161/2003 provides that “*the breach of the obligations laid down in Art. 72 para. (1) shall be deemed administrative misconduct, unless it is a more serious act, according to the law and the administrative acts issued or legal acts concluded in breach of the obligations referred to in Article 72 para. (1) shall be absolutely null and void*” (art. 73).

The Administrative Code refers in this matter, on the one hand, to Law no. 161/2003 as well as to Law no. 176/2010 and, on the other hand, establishes disciplinary sanctions such as in the case of local and county councilors although “it does not establish a list of administrative-disciplinary sanctions” (Apostol Tofan, 2020, 303). For example: “*for violation performed by local councilors or county councilors of (...) the conflict of interest provisions, the local council or county council may impose the following disciplinary sanctions: warning; call to order; withdrawal of the floor; exclusion from the meeting room, etc.*” [art. 233 para. (1)].

According to the Administrative Code, civil servants shall be bound to comply with the conflict of interest regime (art. 445 para. 1), they “*shall be subject to the conflict of interest regime in the exercise of public office established by the special legislation on some measures to ensure transparency in the exercise of public function and public office*” (art.463). Furthermore, “Law no. 184/2016 provides for the establishment of a mechanism to prevent conflict of interest in the award of public procurement contracts” (Ștefan 2017, 592).

From the criminal perspective, conflict of interest is regulated in the Criminal Code in Title V - Corruption and malfeasance, Chapter II - Malfeasance by means of two articles: art. 301 - *Use of office to favor certain individuals* and art. 308 *Corruption and malfeasance committed by other individuals*.

Therefore, art. 301 para. (1) of the Criminal Code provides as follows: “*The offence of a public official who, in the exercise of his or her official duties, has carried out an act which has resulted in a pecuniary gain for himself or herself, for his or her spouse, for a relative or a relative up to and including the second degree, shall be punishable by imprisonment for 1 to 5 years and disqualification from holding public office for three-year term*”. Criminal Code provides an exception in para. (2), “*para. (1) shall not be applicable in case the act or decision relates to two situations: the issue, approval or adoption of legal acts and the exercise of a right recognized by law or the performance of an obligation imposed by law, subject to the conditions and limits laid down by law*”.

According to the doctrine, “the State intervenes against those who commit offences, through its specialized bodies, to punish, re-educate and restore them to society” (Neagu and Damaschin, 2020, 36) and “the criminal trial has, as a rule, a typical and progressive structure, consisting of criminal prosecution, preliminary chamber, trial and enforcement of the judgment. During prosecution, evidence necessary for the prosecutor to decide whether or not to refer the defendant for trial is gathered” (Micu 2022, 9).

3. Selective examination regarding the conflict of interest from National Integrity Agency and court cases

In this section, after presenting the legal framework, the focus was to know the dynamics of conflict of interest cases at the level of public authorities. In this regard, an analysis was conducted, on the one hand, the work of the National Integrity Agency and, on the other hand, the work of the High Court of Cassation and Justice, Division of contentious administrative and fiscal.

From the Annual Activity Report of the National Integrity Agency, we have chosen years 2020 and 2021, in order to check the situations this institution faced in the midst of the Covid 19 pandemic.

Therefore, the *2020 Activity Report* shows that: “at the end of December 2020, the situation of the findings of the National Integrity Agency that have become final, in case of unjustified assets, conflicts of interest and incompatibilities, is the following:

- 511 administrative conflicts of interest which are final (by not submitting objections against the evaluation report or by irrevocable court decisions) of which 57 central authority public officials, 369 local elected officials, 34 senior officials within public institutions, 1 magistrate, 2 civil servants with special status and 48 civil servants;

- 12 cases in which indictments were issued - following indications of criminal offences found by the National Integrity Agency;

- 47 decisions in which the court ordered imprisonment” (page 6-7 of the Report).

The *2021 Activity Report* shows that: “at the end of December 2021, the situation of the findings of the National Integrity Agency that have become final, in case of unjustified assets, conflicts of interest and incompatibilities, is the following:

- 568 administrative conflicts of interest which are final (by not submitting objections against the evaluation report or by irrevocable court decisions) of which 58 central authority public officials, 418 local elected officials, 37 senior officials within public institutions, 1 magistrate, 2 civil servants with special status, 51 civil servants and 1 other categories provided by Law no. 176/2010;

- 12 cases in which indictments were issued - following indications of criminal offences found by the National Integrity Agency;

- 47 decisions in which the court ordered imprisonment” (page 6-7 of the Report).

For period 2008 – December 2021, the same 2021 Report shows that: “The total number of conflicts of interest April 2008 - December 2021 was of 1107, of which 760 conflicts of administrative interest and 347 criminal conflicts of interest” (page 11 of the Report). Therefore, comparing the two reports, we note that in 2021 the number of cases of administrative conflicts of interest that remained final increased compared to 2020.

Further on, in order to know the dynamics of the litigations on the conflict of interest, we will present selectively from the case-law of the High Court of Cassation and Justice, Contentious Administrative and Fiscal Division for 2014, the situations in which a conflict of interest has or has not been decided on the basis of public document - *Index of case law on control of assets, conflict of interest and incompatibilities regime*:

- “*There is a conflict of interest* (...) in the situation in which the county councilor voted in favor of the adoption of a decision of the County Council approving the list of the winning operators of an electronic tender, including the company in which he was a shareholder and censor – Decision no. 598/2013” (page 14).

- “*There is not a conflict of interest* (...) concerning the situation of a shareholder and director of a company. He concluded a service agreement (pasture cleaning and fertilizer spreading) with the commune's town hall. The signing of the delivery-acceptance protocol for the work by the checked persons (local councilor) was performed in the capacity of director of the contractor (the company in which he was a shareholder) and not in the capacity of a member of the acceptance committee set up by the town hall. The evaluation report did not allege that the local councilor participated in the deliberation and adoption of any local council resolution in which he had a personal interest – Decision no.7286/2013” (page 15).

- “*There is a conflict of interest* (...) with regard to a proposal for the employment of the spouse, son, daughter, brother or parents in the office of the Member of Parliament and approval of the employment contract – Decision no. 6874/2013” (page 15).

- “*There is a conflict of interest* (...) concerning the Executive Director of the Directorate-General for Public Finance for the purpose of concluding contracts with a

company in which his son is a shareholder. It is irrelevant that the conclusion of procurement and service contracts with that company was required by the objective situation that that unit is the only specialized unit – Decision no. 708/2014” (page 15-16).

4. Conclusions

The analysis of the proposed topic was carried out from a threefold perspective: legislation, doctrine and case law and it emerged that the legal regime of conflicts of interest is regulated both in administrative law and in criminal law. By means of the selected cases from administrative practice, we were able to note actual situations where conflicts of interest are present, as well as situations where conflicts of interest are absent.

The paperwork also presented the rate of cases of administrative conflicts of interest compared to criminal ones, in order to know whether there are more violations of the law in terms of conflicts of interest and from which area, administrative or criminal. It has been noted that there are more situations of conflict of interest that involve the administrative area than those involving the criminal area. In terms of the persons involved, the case law of the High Court of Cassation and Justice has shown that there are conflicts of interest with regard to civil servants, public officials or local elected representatives.

With regard to their obligations, the analysis of the legislation revealed that persons exercising public office and public functions are bound to submit a declaration of interests, on their own risk, on the functions and activities they carry out, which is submitted exclusively online, through the e-DAI platform managed by the National Anti-Corruption Agency. We therefore consider that compliance with this obligation is both legally and ethically necessary.

Furthermore, sanctions differ according to the type of conflict of interest, administrative or criminal. Unlike administrative law, the most serious sanction for conflict of interest is that of the criminal law, namely imprisonment from 1 to 5 years and disqualification from holding public office for 3 years. The final conclusion of the paperwork is that violations of the law on conflicts of interest lead to sanctions, as compliance with the law is required for everybody.

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