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THE OFFENSE OF VIOLATING THE LEGAL PROVISIONS REGARDING THE CONFLICT OF INTERESTS IN THE CASE OF COMPANIES WITH LEGAL PERSONALITY

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Abstract

At the conflict of interests designates, in the general sense, that situation in which, when making a decision or participating in the deliberation process for making a decision, a person has a personal patrimonial interest that may have influence regarding the objective fulfillment of the duties assigned to him according to the legislation in force.

Both in European and domestic legislation, when the conflict of interests is regulated, a distinction is made between persons exercising public dignities and offices and persons exercising their duties within companies with legal personality in the private sector. Of course, in the case of persons who exercise certain dignities or public offices, the principle of the supremacy of the public interest must be respected, which is why, in the case of these persons, the legal regime of the conflict of interests is much more restrictive, unlike the case of persons who carry out their activity in the private sector, in which case they receive the interest of the legal entity within which they exercise their duties. In other words, a distinction must be made between conflict of interests in the public domain and conflict of interests in the private domain.

Considering the particularities and special importance of the legal regime regarding the conflict of interests in the private field, this paper proposes a detailed analysis of the way in which criminal protection is provided to the legal regime regarding the conflict of interests in the case of companies with legal personality. A clarification is made of the notions of incompatibility, indignity and conflict of interests, by highlighting the common characteristics and aspects that differentiate these notions, highlighting the particularities of the way of criminalizing the conflict of interests in the domestic legislation.

Keywords: *conflict of interests, company with legal personality, administrator, favoring certain persons.*

INTRODUCTION

INTRODUCTORY NOTIONS ON THE CONFLICT OF INTEREST

In order to better understand the notion of conflict of interests, we believe that this notion must be delimited from the notions of incompatibility and indignity. According to DEX (The Explicative Dictionary of the Romanian Language), the incompatibility represents “that state of incompatibility between two offices, professions or tasks, which makes a person unable to exercise or occupy them at the same time” (*Dicționarul explicativ al limbii române*, 2012, p. 499).

In the Companies Law no. 31/1990 we do not find a definition of incompatibility, but from the analysis of the provisions of this normative act we could define incompatibility as the general situation in which a member of the management bodies of the company with legal personality, the partner or the shareholder of such a company finds himself to hold and/or exercise simultaneously several offices of the same nature or of a different nature, when such situations are prohibited by law.

Regarding the conflict of interests within the company with legal personality, it could be defined as the situation where a person who holds a position within such a company has a personal patrimonial interest that may have influence regarding the objective fulfillment of the duties that fall to him according to the legislation in force.

We can conclude that incompatibility refers to the occupation by a person of an office that is not compatible with another office that is already occupied by him. Incompatibility is an institution that aims to avoid situations of conflict of interests by prohibiting the simultaneous occupation by a person of several positions that would put that person in a situation of conflict of interests, it being impossible that when the person in question makes decisions he can adequately represent the interests of all companies with legal personality. Thus, according to Article 15316 of Law no. 31/1990, “a natural person can simultaneously exercise at most 5 mandates of administrator and/or member of the Board of Supervisors in joint-stock companies whose headquarters are located on the territory of Romania. This provision applies to the same extent to the natural person administrator or member of the Board of Supervisors, as well as to the natural person permanent representative of a legal person administrator or member of the Board of Supervisors”. According to Article 277 (3) of Law no. 31/1990, the act of the founder, administrator, director, executive director or censor exercising their duties or assignments, in violation of the provisions of Law no. 31/1990 regarding incompatibility, constitutes an offense.

As for indignity, it should not be confused with the state of incompatibility, because indignity refers to the qualities that a person who is going to occupy a certain position within a company with legal personality has qualities that do not

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allow him to occupy that position. Thus, according to Article 6 (2) of Law no. 31/1990, „the following persons cannot be founders: persons who, according to the law, are incapable or who have been forbidden by a final court decision the right to exercise the capacity of founder as a complementary punishment of conviction for offenses against patrimony through breach of trust, corruption offenses, embezzlement, offenses of forgery in documents, tax evasion, offenses provided by Law no. 129/2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the amendment and completion of some normative acts, with subsequent amendments and additions, or for the offenses provided for by this law”. At the same time, according to Article 731 of Law no. 31/1990, „the persons who, according to Article 6 (2), cannot be founders, nor can they be administrators, directors, members of the Board of Supervisors and the Board of Directors, censors or financial auditors, and if they are elected, their rights shall be terminated”.

I. BRIEF HISTORY REGARDING THE CRIMINALIZATION OF CONFLICT OF INTERESTS IN THE CRIMINAL CODE

In 2003, the Organization for Economic Co-operation and Development (OECD) published a Guideline for Managing Conflict of Interest in the Public Sector (<https://www.oecd.org/gov/ethics/2957377.pdf>), where the particularly high risk that situations of conflict of interests raise both in the public and in the private domain is emphasized. This guideline shows that complex forms of relationships between the public and private sectors have developed that have generated increasingly close collaborations between the two sectors, such as public/private partnerships (*Remus Jurj-Tudoran*, accessed on: 28.10.2023, <http://revistaprolege.ro/infractiunea-de-conflict-de-interese-teorie-si-practica-judiciara/>).

Also in 2003, Law no. 161/2003 regarding some measures to ensure transparency in the exercise of public dignities, public offices and in the business environment, prevention and sanctioning of corruption. This normative act defines in Article 70 the conflict of interests as being “the situation in which the person who exercises a public dignity or a public office has a personal interest of a patrimonial nature, which could influence the objective fulfillment of his/her duties, according to the Constitution and other normative acts”. We note that in this normative act the conflict of interests is defined by reference to the exercise of public dignities and public offices, so it considers situations of conflict of interests that arise in the public sector.

As for the offense of conflict of interests, it was introduced for the first time in Romanian law by Article 1 point 61 of Law no. 278/2006 for the amendment and completion of the Criminal Code, as well as for the amendment and completion of other laws. Thus, by this normative act it is introduced into the old Criminal Code, Article 2531, with the marginal name Conflict of interests, which incriminates “The conduct of the public servant who, while carrying out their professional duties, committed an act or participated in making a decision that

resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed, or for another person with whom they were in business or labor relations for the past 5 years or from whom they benefited of services or gains of any nature”. According to this indictment rule, the provisions that criminalize the conflict of interests „shall not apply to the cases which refer to issuing, endorsing or adopting regulatory documents”. In the understanding of the old Criminal Code, public servant meant any person who exercises permanently or temporarily, with any title, regardless of how he was invested, an assignment of any nature, remunerated or not, in the service of a public unit, public institutions, institutions or legal entities of public interest, or of another person who administers, uses or exploits public property goods, public interest services, as well as the goods of any kind that, according to the law, are of public interest. Article 258 of the old Criminal Code regulates, in a similar way to Article 308 of the current Criminal Code, "Acts committed by other officials", in respect of which it provided for the same reduction by one third of the maximum penalty provided by law for the committed deed, without including, among the offenses committed while in office, or in connection with the office that could be committed by "other officials", the conflict of interests offense. Thus, active subjects of the offense of conflict of interests could be public servants, in the sense of Article 147 (1) of the Criminal Code from 1969, respectively, any person who exercises permanently or temporarily, with any title, regardless of how it was vested, an assignment of any nature, remunerated or not, in the service of a unit among those referred to in Article 145, from the same code, or "official", provided by Article 147 (2) of the Criminal Code from 1969, respectively the person mentioned in paragraph (1) of this article, as well as any employee who performs an assignment in the service of a legal entity other than those provided in that paragraph.

Therefore, the old Criminal Code protected, by Article 2531, only the legal regime regarding the conflict of interests in the public sector, without the acts of conflict of interests, committed by persons exercising a task in the service of legal persons other than those of public interest, public authorities, public institutions or institutions or legal persons of public interest falling under this indictment rule.

The new Criminal Code provided for the offense of conflict of interests in Article 301 with the following content:

(1) „The conduct of the public servant who, while carrying out their professional duties, committed an act or participated in making a decision that resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed, or for another person with whom they were in business or labor relations for the past 5 years or from whom they had or have benefits of any nature, shall be punishable by no less than 1 and no more than 5 years of imprisonment and the ban from exercising the right to hold a public office.

(2) (2) Par. (1) shall not apply to issuing, endorsing or adopting regulatory documents.”.

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At the same time, within the contents of Article 308 of the Criminal Code it was provided that the provisions of Article 301 regarding public servants shall also apply accordingly to acts committed by or in relation to persons who exercise, permanently or temporarily, with or without remuneration, an assignment of any nature in the service of an assimilated public official or within any legal entity. Article 308 basically regulated a mitigated version of the offense of conflict of interests, which had as a circumstantial, mitigating factor the fact that the act of conflict of interests was committed in private relationships, including within a private legal entity. Thus, Article 308 of the Criminal Code extended the scope of the offense of conflict of interests to any company with legal personality.

However, by Decision no. 603/2015 the Constitutional Court declared unconstitutional the phrases "commercial relations" from the content of the indictment rule the offense of conflict of interests, as well as "or within any legal entity" from the content of the provisions of Article 308 (1) of the Criminal Code.

Regarding the phrase commercial relations used in the content of Article 301 of the Criminal Code, the Constitutional Court considers that this phrase gives a lack of clarity, precision and predictability to the legal object of the offense of conflict of interests. However, the addressee of the criminal law cannot order his conduct in relation to an incriminating law that does not comply with the quality conditions of the law, which is why the provisions of Article 301 (1) of the Criminal Code violate the provisions of Article 1 (5) and Article 23 of the Constitution regarding the quality of the law and individual freedom, respectively.

With reference to the phrase or within any legal entity, used by Article 308 (1) of the Criminal Code, the Constitutional Court finds that this category includes any form of company defined in the Civil Code, Companies Law no. 31/1990 or Law no. 1/2005 regarding the organization and operation of the cooperation. However, the Constitutional Review Court shows that in the statement of reasons of Law no. 278/2006 by which the offense of conflict of interests was regulated for the first time, it is expressly mentioned that the criminalization of acts of conflict of interests was aimed at penalizing the public official who, consciously and deliberately, satisfies his personal interests by fulfilling public duties, the rest of the people, who carry out their activity in the private system, due to the fact that they do not fulfill public duties in carrying out their activities, being clearly excluded from this approach of criminalizing acts of conflict of interests. It is thus concluded that the regulation as an active subject of the offense of conflict of interests of some private persons is excessive, because there is an impermissible expansion of the coercive force of the state through the use of criminal means, on the freedom of action of people in terms of the right to work and economic freedom, without there being a criminological justification in this regard. Article 61 (1) and Article 73 (3) h) of the Constitution do not allow the legislator to regulate offenses in a way that generates an exaggerated discrepancy between the importance of the social value that must be protected and the social value that must

be limited, because between such a situation it would lead to the violation of the latter social value. However, in the present case, the social value that is criminally protected targets the private environment, so it does not have a public character, which is why the state has no interest in criminalizing the conflict of interests in such a way. This is all the more so if the acts of conflict of interests in a private environment cause damage, they can be remedied with the help of civil law, labor law or other legal mechanisms, which do not incur criminal liability.

II. USING THE PUBLIC OFFICE TO FAVOR SOME PEOPLE

Considering Decision no. 603/2015 pronounced by the Constitutional Court, by Law no. 193/2017 for the amendment of Law no. 286/2009 on the Criminal Code, Article 301 and Article 308 of the Criminal Code were amended, as follows:

Article 301 of the Criminal Code has undergone a name change, so that at the moment the marginal name of this offense is the use of public office to favor certain persons, the legal content of the offense being the following:

“(1) The conduct of the public servant who, while carrying out their professional duties, committed an act or participated in making a decision that resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed, shall be punishable by no less than 1 and no more than 5 years of imprisonment and the ban from exercising the right to hold a public office for a period of 3 years.

(2) Par. (1) shall not apply to the cases in which the act or the decision refer to one of the following:

- a) issuing, endorsing or adopting regulatory documents;
- b) the exercise of a right recognized by law or in the fulfillment of an obligation imposed by law, in compliance with the conditions and limits provided by it.”

From the analysis of the indictment rule, it results that the active subject of this offense can only be a public servant under the understanding of Article 175 of the Criminal Code. Thus, according to Article 175 (1) of the Criminal Code, a public servant „is the person who, on a permanent or temporary basis, with or without remuneration:

- a) shall exercise the duties and responsibilities, set under the law, to implement the prerogatives of the legislative, executive or judiciary branches;
- b) shall exercise an office of public dignity or a public office irrespective of its nature;
- c) shall exercise, alone or jointly with other persons, within a public utility company, or another economic operator or a legal entity owned by the state alone or whose majority shareholder the state is, responsibilities needed to carry out the activity of the entity”.

At the same time, according to Article 175 (2) of the Criminal Code, „the following shall be deemed a public servant: the person who supplies a public-interest service, which they have been vested with by the public authorities or who

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shall be subject to the latter's control or supervision with respect to carrying out such public service.”

As stated in the specialized literature, Article 175 (1) of the Criminal Code regulates the genuine public servant, while Article 175 (2) of the Criminal Code regulates the assimilated public servant (*Cioclei, 2016, p. 210*).

We conclude that this offense can only be committed in connection with the exercise of powers in order to achieve the prerogatives of the legislative, executive or judicial power, by persons who exercise a position of public dignity or a public position of any nature, or by persons who exercise duties related to the achievement of the object of activity within an autonomous company of another economic operator or of a legal entity with full or majority state capital.

We note that in the current content, the incrimination norm from Article 301 of the Criminal Code restricts the scope of criminal protection of the legal regime regarding the conflict of interests only to situations in which the public servant performed an act by which he obtained a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed. At the same time, criminal protection is incidental only to persons who carry out their activity within public authorities, public institutions, autonomous companies, an economic operator or a legal entity with full or majority state capital. It follows that as far as companies with legal personality are concerned, this indictment rule only considers the acts committed within economic operators or companies with full or majority state capital. The acts committed within companies with legal personality with full or majority private capital do not fall under the scope of the law.

We can say that Article 301 of the Criminal Code represents the general norm regarding the criminal protection of conflict of interests within companies with legal personality. We will see, however, that in the Companies Law no. 31/1990 we find several offenses specifically regarding the conflict of interests, which grant criminal protection to certain concrete acts by which the interests of companies with legal personality may be harmed, regardless of whether we are talking about companies with state or private capital.

III. CRIMINAL PROTECTION OF THE LEGAL REGIME REGARDING CONFLICT OF INTERESTS UNDER COMPANIES LAW NO. 31/1990

As the name suggests, in order for there to be an offense of conflict of interests, there must be certain interests involved. From the analysis of the provisions of the Companies Law no. 31/1990 it results that this normative act operates with three distinct interpretations of the notion of interest, more precisely, it takes into account the interest of the company with legal personality, personal interest and the interest of a third party.

There is a conflict of interests in the situation where the members of the governing bodies or associations issue decisions or participate in the deliberation process in order to pursue their own interest or that of a third party. Thus, we will further present the criminalization rules from the Companies Law no. 31/1990

which protects the legal regime regarding the conflict of interests in the case of companies with legal personality.

III.1 The offense provided by Article 275 (1) a) of Law no. 31/1990

According to this indictment rule, it is an offense for the administrator, the general manager, the director, the member of the Board of Supervisors or of Directors who violates, even through persons interposed or through simulated acts, the provisions of Article 1443 of Law no. 31/1990. The social value protected by this offense consists in the correctness, probity, honesty and loyalty of the people who have the right to decide and regulate within a company with legal personality, persons who must strictly respect the interests of the company they represent when participating in decision-making for these legal entities (*Schiau, Prescure, 2007, p. 823*).

According to Article 144³ (1), „the administrator who, in a certain operation, directly or indirectly, has interests contrary to the interests of the company, must notify the other administrators and the censors or internal auditors and not take part in any deliberation regarding this operation”. „The administrator has the same obligation if, in a certain operation, he knows that his husband or wife, relatives or relatives inclusively up to the fourth degree are interested” [Article 144³ (2)]. „If the provisions of the articles of incorporation do not provide otherwise, the prohibitions established in Article 144³ (1) and (2), regarding the participation, deliberation and voting of administrators, are not applicable if the object of the vote is: a) offering for subscription, to an administrator or to the persons mentioned in Article 144³ (2), regarding the shares or bonds of the company; b) granted by the administrator or by the persons mentioned in the Article 144³ (2) of a loan or setting up a guarantee in favor of the company” [art. 144³ (3)].

Through these legal provisions, the legislator instituted certain special obligations of information and abstention from voting for administrators, in the situation where they or their husbands/wives or their relatives or next of kin up to the fourth degree, inclusively, are interested in a certain operation that must be submitted to deliberation in the bodies established under the statutes of the company with legal personality (*Boroi, Gorunescu, Barbu, Vîrjan, Nistor, 2023, p 88*).

Although the prohibitions of Article 1443 refers only to the administrator, from the content of the incrimination rule it follows that the active subject of the offense provided for by Article 275 (1) a) of Law no. 31/1990 can also be the general manager, director, member of the Board of Supervisors or of Directors.

We are in the presence of an offense of danger; therefore, the deed is consummated at the time of the realization of the material element of the objective side. Regarding the subjective side, the offense is committed with direct or indirect intent. The attempt is possible, but it is not criminalized.

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III.2 The offense provided for by Article 275 (1) b) thesis II of Law no. 31/1990

According to this indictment rule, it is an offense for the administrator, the general manager, the director, the member of the Board of Supervisors or of Directors who violates the provisions of Article 193 (2) of Law no. 31/1990.

According to Article 193 (2), „the associate cannot exercise his right to vote in the deliberations of the Assemblies of Associates regarding his contributions in kind” (for example, there is some uncertainty regarding the contribution of land or movable property within the company) „or to the legal acts concluded between him and the company” (for example, a sales contract where the associate is the seller and the company is the buyer) (*Boroi, Gorunescu, Barbu, Virjan, Nistor, 2023 p. 90*).

The act constitutes an offense when these legal provisions are violated, both in the situation where the violation of the provisions of Article 193 (2) is carried out by the interested partner himself, and in the case that another partner exercises his voting rights, knowing that the decisions are taken in violation of the provisions of Article 193 (2) of Law no. 31/1990 and allows this as an administrator, general manager, director or member of the Board of Supervisors or the Board of Directors.

We are in the presence of an offense of danger, therefore the act is committed at the time of the realization of the material element of the objective side. Regarding the subjective side, the act is committed with direct or indirect intention. The attempt is possible but not punishable.

III.3 The offense provided for by Article 275 (2) of Law no. 31/1990

According to this law, it is an offense for the partner to violate the provisions of Article 127 or Article 193 (2) of Law no. 31/1990. The offense is similar from the point of view of the material element of the objective side to the offenses provided for in paragraph (1) let. a) and b) of Article 275, the essential difference regarding the special quality of the active subject, who must be an associate who does not also have the capacity of administrator, general manager, director or member of the Board of Supervisors or the Board of Directors (*Boroi, Gorunescu, Barbu, Virjan, Nistor, 2023 p. 90*).

According to Article 127 of Law no. 31/1990, „the shareholder who, in a certain operation, has, either personally or as a representative of another person, an interest contrary to that of the company, will have to abstain from the deliberations regarding that operation”. The shareholder who contravenes this provision is liable for the damages caused to the company, if, without his vote, the required majority would not have been obtained.

According to Article 193 (2) of Law no. 31/1990, „an associate cannot exercise his right to vote in the deliberations of the Assembly of Associates regarding his contributions in kind or the legal acts concluded between him and the company”.

And in the case of this offense, the immediate consequence consists in creating a state of danger for the company with legal personality. The offense is committed with direct or indirect intent. The attempt is possible but not punishable.

CONCLUSIONS

As can be seen, the legal regime regarding the conflict of interests in the case of companies with legal personality benefits from criminal protection both in Article 301 of the Criminal Code with the marginal title the use of the public office to favor some persons, which represents the general indictment rule in this field, as well as in the Companies Law no. 31/1990, within which we find some specific offenses of Article 301 of the Criminal Code, which criminalize some concrete ways by which the legal regime of the conflict of interests is violated within the company with legal personality.

The general criminal norm in the Criminal Code criminalizes only the conflict of interests in the public environment, while the provisions of Law no. 31/1990 criminalizes certain situations of conflict of interests that may arise within companies with legal personality, regardless of whether they are companies with majority or wholly private capital or companies with majority or wholly state capital.

BIBLIOGRAPHY

1. *Dicționarul explicativ al limbii române*, The Romanian Academy, Universul Juridic Publishing House, Bucharest, 2012;
2. The guide can be accessed at: <https://www.oecd.org/gov/ethics/2957377.pdf>;
3. Remus Jurj-Tudoran, “*Infrațiunea de conflict de interes – teorie și practică judiciară*”, in „*Revista Pro Lege*” Magazine, accessed on: 28.10.2023 at: <http://revistaprolege.ro/infrațiunea-de-conflict-de-interese-teorie-si-practica-judiciara/>;
4. By decision no. 1/2015 The High Court of Cassation and Justice – The judicial panel for the settlement of legal issues in civil matters established that the provisions of Article 308 of the Criminal Code represent a mitigated version of the offense of embezzlement. However, among the offenses referred to in Article 308 at the time of the pronouncement of this decision, there was also Article 301 of the Criminal Code, which regulated the offense of conflict of interests;
5. Valerian Cioclei, *Drept penal. Partea specială II. Curs tematic*, C.H. Beck Publishing House, Bucharest, 2016;
6. I. Schiau, T. Prescure, *Legea companiilor comerciale. Analize și comentarii pe articole*. Hamangiu Publishing House, Bucharest, 2007;
7. Alexandru Boroș (coord.), Mirela Gorunescu, Ionuț Andrei Barbu, Bogdan Vîrjan, Iulia-Elena Nistor, *Dreptul penal al afacerilor*, 8th Ed., CH Beck Publishing House, Bucharest, 2023.

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