

THE CONFLICT OF INTEREST IN ROMANIAN PUBLIC ADMINISTRATION – A DECENIAL OVERVIEW

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Abstract: *Over the past decade, Romanian public administration reform has addressed various institutional and legal infrastructure issues. These actions naturally followed from Romania's anti-corruption efforts, as fighting corruption has become one of Romania's long-term means for achieving and maintaining its economic and social goals. This article considers the conflicts of interest that arise in the public administration by first describing how these conflicts arise and then by describing Romania's legislative responses to them. It concludes by considering the results of enforcing the new legislation.*

Keywords *public corruption, conflict of interests, anti-corruption, public administration.*

1. INTRODUCTION

The European Union (EU) development strategy, Europe 2020, focuses on employment, productivity and social cohesion. These goals cannot be reached without comprehensive and holistic anti-corruption legislation and effective enforcement. The European Commission in its "Communication for an European Industrial Renaissance" of January 2014 underlines once more the importance of quality public administration as one of the factors to sustain EU growth.

Romania's public administration reform process has encompassed different legislative and infrastructural transformations during the last decade. Mainly triggered by the fight against corruption that was necessary before Romania could be a potential candidate for accession in the European Union, this process can be portrayed as an evolution in conflict of interest management. This evolution was shaped by new laws and improved law enforcement. In telling this story, this article focuses on certain theoretical and practical problems and their solutions.

Because Romania has experienced a difficult transition from authoritarian rule to democratic governance, its administrative and criminal laws have been constantly adapting to new legal and practical needs. A priority was gaining the people's trust. Thus, transparency, impartiality and independence were essential ingredients in the new ways in which public officials exercised their duties.

After a decade the goal has remained much the same: to promote integrity, transparency, accountability, professionalism. This goal translates to clear and transparent procedural rules, codes of conduct, anti-corruption training, clear and proportionate sanctions, measures to detect corruption and to assess and identify risks in public office.

2. DEFINING CONFLICT OF INTEREST

The Romanian legal doctrine after 1990 did not make a clear distinction between incompatibility and conflict of interest, even though this was necessary because of the different ways the public administration principles are infringed in both situations. The two concepts and the difference between the conflict of interest and legal obligations had to be clearly defined in legal terms. The latter is necessary since a conflict of interest implies also an obligation to choose between different activities that otherwise are not prohibited by the constitutional provisions. The solution is a single, unitary set of provisions defining the conflict of interest.

Administrative and criminal legal provisions relating to conflicts of interest have been repeatedly adopted, modified, replaced by the Romanian legislature during the last decade. The lack of political will and institutional framework has prevented meaningful results in practice, but, nevertheless, steps in the right direction have been taken.

In 2003, Law no.161 containing administrative provisions was adopted. The legal text contained certain measures that were meant to ensure transparency in exercising public political duties, public duties and transparency in business environment, the prevention and the sanction of corruption. In spite of the existing clear provisions of Romanian Criminal Code and of Public Administration Law (Law no.215/2001), both referring to conflicts of interest, the new provisions were meant to boost the anti-corruption campaign as urged with many occasions by the European Union officials. At that time, due to the tight political context and the urgency of the situation the Government was determined to assume its responsibility for the new provisions. As a result, Law no.161 has been quickly adopted, containing legal imprecision that shortly determined numerous interpretations and modifications.

However, even after its modification, the legal text was often vague and as a result it was permissive and exposed to more interpretations that ultimately made these anti-corruption provisions inefficient. A closer look at the legal provisions in tandem with the other legal texts of that time reveals a lot of lacunas.

Chapter II from Title IV, Book I of Law no.161/2003 contained provisions referring to the conflict of interest. The legislator preferred to address the conflict of interest separately for different categories of public servants working in central and local public administration structures (art. 69).

Law defines the conflict of interest in the second chapter as the situation in which a person being in the political office or having a public administration position manifests a personal material interest that might influence the objectivity with which that person fulfils her/his professional obligations according to the Constitution and other legal provisions (art.70).

The Romanian legal doctrine advanced different opinions referring to the definition of the conflict of interest. The main issue was to delimit the meaning of the term "interest" from the term "legal right" and to prove that they are not synonyms. The main argument is that the interest *per se* is seen as a potential cause for action and not a legal right. Nobody can have vested and present rights that are generated by potential legal relationships, but only by real ones that are generated by legal interaction. However,

if we consider the interest as being synonym to legal right, we add confusion to the delimitation between incompatibility and conflict of interest.

Even though, it was intended to be a straight forward definition, it was intensively criticized as being too broad and vague. In practice, it would have been difficult to identify and to prove that a public servant or a politician in office manifests a particular material interest that *might* influence the performance of his legal duties (Gorun, 2004).

Also, the separate definitions of the two terms, incompatibility and conflict of interest, prove that the legislator does not consider the conflict of interest to be generated by a situation of incompatibility. However, in theory and in practice, in case of incompatibility, the public servant or the politician in office has to abstain himself from exercising certain duties or from simultaneously exercising two or more public functions.

A year later, Law no.7/2004 regarding the Public Servants' Code of Conduct was adopted. It also contained provisions that defined the term conflict of interest. Though similar with previous ones, the definition was considered by specialists more adequate. Thus, the conflict of interest was defined as being the situation, in which the public servant's personal, direct or indirect interest contravenes the public interest, and thus, affecting or possibly affecting the independence and the impartiality of the process of decision making or generating a delay or lack of objectivity in performing his public duties. The law also defines the term "personal interest" as any material advantage, directly or indirectly pursued or obtained by the public servant for himself or for other people, making use of his reputation, influence, relationships or information he has access to *ex officio*.

The administrative law provisions regarding the conflict of interest were always doubled by the criminal law ones. Thus, Romanian Criminal Code from 1968 incriminated the conflict of interest. The new Criminal Code that entered into force in 2014 kept the previous conflict of interest provisions almost intact, except for the minimum sanction that was increased. Presently, the conflict of interests is incriminated in art. 301 of the Code and it is defined as the situation in which a public servant in office has made a decision or executed his professional duties generating directly or indirectly material gains for himself, his spouse, a relative or somebody else from his family, up to second degree near relatives, or a person with whom the public servant was engaged in a commercial or professional relationship during the last 5 years, or a person that provides or has provided material gains for the public servant. The provisions do not apply to public servants that release, approve or adopt a legislative measure.

The definition of the conflict of interest in the Criminal Code is also similar with the one given by the administrative law provisions but the details, of course, are specific to a criminal law definition that needs perfect precision. However, in 2015, Romanian Constitutional Court has decided against it. It was decided by the court that the criminal provision lacks precision, since there is no legal criminal definition of the expression "commercial relationship", thus, infringing the criminal law principles and the human rights and implicitly art.1(5) and art. 23 of the Romanian Constitution (CCD, 2015). Basically this decision states that a conflict of interest situation as defined by the Criminal Code cannot exist in the private sector, where people can choose to whom they enter a business relationship with, according to the freedom of commerce principle. The

court argued that the provisions of art.301 of the Criminal Code are meant to sanction only the illegal conduct of public servants in exercising their public duties and also to prevent any suspicions regarding conduct of public sector employees.

However, during the past decade, the trend has been to implement a new type of public administrative management based mostly on projects coordinated through public-private partnerships. Its purpose is to improve the delivery of public services by working closely with private companies to meet the public's needs. Yet, this close working relationship can also increase the opportunities for corruption. One of its manifestations remains the conflict of interest. It is often discovered in Romania that public servants or political leaders divert public funds towards their families or their friends' businesses under the pretence of satisfying public needs. Illegal public procurement contracts and bidding procedures cases are proof of that.

3. LEGAL FRAMEWORK AND LAW ENFORCEMENT

The administrative and criminal provisions generated mixed effects in time. Thus, Law no.161 in art.76(2) stated that administrative decisions were null if issued under the circumstances of a conflict of interest. However, this had little effect since under the provisions of the Law no.215/2001 governing the public administration sector, in order to avoid being sanctioned a public servant would delegate his duties to another public servant, preferably to one of his colleagues, managing to still nurture his personal interest.

The pressure of the European Union to urge the fight against corruption has determined legal and institutional changes. Over the years, the Co-operation and Verification Mechanism (CVM) reports for Romania pointed out many weaknesses that slowed down the anti-corruption war.

After too many years, in 2007, art.76 of Law no.161 was entirely abated by the new provisions of Law no.144 dedicated to the National Agency for Integrity (ANI), the first of its kind in Romania, after 1990.

Law no.144/2007 establishes the prerogatives of Romanian National Integrity Agency (ANI). Its mission is to monitor and control the integrity of public servants in exercising their public duties, preventing in this way the spread of corruption at institutional level. In fact, the agency receives and verifies the asset declarations of public officials, their incompatibilities and potential conflicts of interest. Since its creation, ANI has shown some good results. Following its decisions, more than 1 million euro representing unjustified personal wealth was confiscated by final court decisions. However, often, the Parliament refused to implement ANI's decisions. This attitude determined European Union officials to conclude in the EU 2014 Anti-corruption Report that "the political will to support the independence, stability and capacity of the anti-corruption institutions and the judiciary in Romanian has not been constant" (EU Report, 2014, p.11).

The latest CVM Report for Romania proves that ANI has improved its anti-corruption results during the last couple of years. Thus, ANI continued to initiate a substantial number of cases on conflicts of interest and incompatibility issues, many of

them concerning local politicians. In 2015, 84% of the incompatibility cases, 66% of the administrative conflicts of interest cases and 66% of the criminal conflicts of interest cases concerning mayors, deputy mayors, local councillors or county councillors have been registered. These numbers are disturbing, proving the low acceptance and even resistance to integrity rules within a substantial number of local authorities, particularly when it comes to public procurement (CVM Report, 2016).

Public procurement corruption cases fall under the newly improved Criminal Code provisions that are sanctioning bribing in general, traffic of influence, conflict of interest and other related corruption crimes that are usually committed by public servants while performing their duties.

The confirmation rate of ANI decisions in court is above 80% today. In order to expedite cases, the administrative law section of the Romanian High Court of Cassation and Justice has made efforts to speed up the treatment of ANI files, cutting by half the deadlines for final court rulings. Also, ANI has developed the cooperation with the prosecution to help streamline investigations and exchange information in the cases of criminal conflict of interest (CVM Report, 2016).

ANI investigations are also facilitated by the existence of whistleblower protection provisions. Law no.571/2004 on the protection of employees of public authorities, public institutions and other public entities who report violations of the law provides the legal framework for whistleblower protection, alongside with the provisions of the Criminal Code and Criminal Procedural Code dealing with witness protection. Thus, employees that are reporting corruption activities have to be protected against retaliation.

It is certain that Romanian public administration integrity system has improved during the last decade. Still, its main challenge remains not the lack of adequate legislation but its enforcement. The European Commission monitors the correct implementation and enforcement of EU legislation in Romania, often noting the lack of transparency, professionalism and accountability in performing public administration duties.

Since 2014, the European Union has started to use its monitoring anti-corruption mechanism. The first ever European Commission anti-corruption report shows that in some member states, such as Romania, public sector corruption is widespread and frequent and most conflicts of interest occur in public procurement cases.

The 2016 CVM Report for Romania states that ANI has taken forward the "Prevent" IT system for ex-ante check of conflicts of interest in public procurement. The system is designed to automatically detect the conflicts of interest in public procurement before the selection and contract award procedure. However, the efficiency of such an IT system in Romania is still to be seen since it is in its incipient phase.

CONCLUSION

Romania had to intensify its anti-corruption fight during the last decade since, too often, public servants and politicians were acting on behalf of the citizens on false

pretences, spending public money to serve their own interest and living the community with the false impression of progress.

The conflict of interest is one of the most frequent manifestations of corruption in Romanian public administration system and public sector in general. Administrative and criminal law provisions have been adopted and refined during the last ten years in order to prevent and discourage the illegal behaviour of public servants and political leaders.

The improved Romanian legislation and its enforcement generated some positive results but only slightly curbing the frequency with which the conflict of interest occurs. However, the success of such actions is to be seen in the long run, since corruption is endemic and systemic in Romania and it takes time to have meaningful and sustainable results.

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