

GENERAL PARTICULARS REGARDING THE CONFLICT OF INTEREST

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SUMMARY: Theme conflicts of interest is one of the major reasons for concern local government, regional and central administrative and criminal legal implications aiming to uphold the integrity and decisions objectively. Also, most obviously, conflicts of interest occur at the national level where political stakes are usually highest, one of the determining factors of this segment being the changing role of the state itself, which creates opportunities for individual gain through its transformations.

Keywords: conflict of interest, influence, corruption, integrity.

1. Introduction

A particular problem concerning the local elected official or civil servant, during the exercise of his attributions, refers to the appearance of the conflict of interests of criminal or administrative nature. The issue of conflict of interest situations is a touchstone for central and local government.

Citizens' expectations regarding the correct conduct that the public official must have, in the context of the examined issue, are very high.

The conflict of interests generates a state of incompatibility *lato sensu* [7], but, in terms of the causes that determine this incompatibility, the conflict of interests is characterized by the fact that the determining factor is not necessarily a legal situation or an activity incompatible with the activity that is performed within the service, but a personal interest of a patrimonial nature, which could influence the objective fulfillment of the attributions incumbent on the civil servant or the local elected according to the Romanian Constitution, republished, and other normative acts [2].

In the specialized system, the conflict of interests was also approached from a socio-behavioral perspective, so that it is perceived as a form of maladaptation to the corporate culture of the institution and which generates a general imbalance in the collective.

It creates the general perception that the process of decentralization and regionalization of public entities is not so important compared to political affiliation and relations with the political elite.

From this moment on, all issues related to conflicts of interest begin, such as the distribution or acquisition of certain material goods, in which local leaders take into account the interests of the party or the relations of friendship and kinship.

Thus, the lack of decentralization and regionalization makes local elected officials and civil servants accountable, first and foremost, to the party and party leaders who promote the candidacy and less to the citizen.

A conflict of interest may refer to an activity that might otherwise be legitimate as a private individual, to personal affiliations and associations, and to family interests if these interests can be plausibly

considered to be improperly influencing the manner in which the official performs his duties tasks [3].

In the legal literature, the notion of interest has been interpreted differently: on the one hand, it is considered that the interest is limited to a simple vocation, possibility, which can not be included in the legal category of law, and, on the other hand, considers that the interest would include not only the right itself, but also its potential, the vocation.

As such, in 2003 the Organization for Economic Co-operation and Development (hereinafter referred to as the OECD) emphasized from the outset the major risk of conflicts of interest in both public and private administration, emphasizing the importance of preventing conflicts of interest.

The Organization for Economic Co-operation and Development defines conflict of interest as “a conflict between duty to the public and the personal interests of a civil servant, in which the civil servant has interests, in his capacity as a private person, which could unduly influence the fulfillment of obligations and official responsibilities”[3].

The definition shows that we may be dealing with an apparent conflict of interest when the interests of a civil servant could improperly influence the performance of tasks but in reality he exercises his duties in a transparent and equidistant manner and a potential conflict of interest. when the civil servant has a personal interest in obtaining an advantage, regardless of his nature, although the position he holds and the duties he performs does not confer official duties on him at that time[3].

In an extended form we can have the situation in which the function confers those attributions to him, thus we have to deal with a current conflict of interests, in these conditions the civil servant is obliged to refrain from making any decisions, informing his hierarchical superior about the situation arose.

If he does not refrain from making a decision in the form of the current conflict of interest, we can speak of a consumed conflict of interest, this situation will automatically attract the finding and legal sanction of the deed [3].

Although a conflict of interest does not ipso facto mean corruption, there is a growing recognition that conflicts between personal interests and public obligations of civil servants or local elected officials, if not treated properly, can lead to corruption.

The aim of an appropriate conflict of interest policy is not to simply ban all private interests of civil servants, even if such a method would be possible[3].

This objective can generally be achieved if public bodies have at their disposal and put in place appropriate policy standards to promote fairness, effective methods for identifying risks and resolving conflicts of interest, adequate internal and external accountability mechanisms and administrative methods. - including sanctions - to ensure that civil servants or local elected officials are personally responsible for complying with the letter and spirit of these standards [3].

For an effective regulation of these issues, the Romanian legislation must be, first of all, coherent, not to leave room for interpretations and exceptions but also to take into account the European regulations in the field, especially in the context in which there are definitions in the EU. conflict of interest complexes.

At the same time, a political will is required to reach the results necessary for the authentic reform of the functioning of the administrative act, including at local level.

The Council of Europe defines a conflict of interest as “a situation in which the civil servant has a private interest which is likely to influence or appear to influence the performance of his official duties impartially and objectively.”

The private interest includes any advantage for himself / herself. for his family, close relatives, friends and persons or

organizations with which he / she has or has had business or political relations, which also includes any financial obligation or duty of any kind towards them. the source of conflicts of interest, three categories can be identified, namely: simultaneous employment in the public and private sector, public-private partnerships and ownership of shares in companies that have contractual or regulatory relations with central or local public administration authorities. they can solve by refraining from making decisions or appearing Conflicts of interest also include circumstances in which the existence of obligations of an official towards third parties could affect the impartiality of his decisions.

Conflicts of interest and favoritism appear to be among the recurring issues related to the allocation and spending of public funds (including EU funds) at both central and local level, while current prevention and control mechanisms are difficult to implement. or are insufficiently dissuasive. The rate of detection and notification of conflicts of interest by the responsible authorities seems to be quite low compared to the magnitude of the real risks associated with this issue.

Attempting to control the exercise of personal interests too strictly may conflict with other rights or may be impossible or counterproductive in practice or may cause some people to no longer wish to hold public office at all.

Regulated by the provisions of Law no. 286/2009, the conflict of interests consists, according to art. 301 para. (1) of the Criminal Code, in “The act of the civil servant who, in the exercise of his duties, performed an act or participated in taking a decision by which he obtained, directly or indirectly, a patrimonial benefit, for himself, for his husband , for a relative or for a relative up to and including the second degree or for another person with whom he has been in employment relations for the last 5 years or from whom he has benefited or is benefiting

from benefits of any kind, shall be punished by imprisonment from one every 5 years and the prohibition of exercising the right to hold a public office” [1].

The new Criminal Code was amended by Law no. 193/28 July 2017, which reformed not only the concept of “conflict of interest”, the deed being entitled “Using the function to favor certain people” but also the content of the crime, by considerably reducing the scope of persons who may fall under this crime.

The new regulation taken over by the same art. 301, establishes in paragraph (1) that: “the deed of the civil servant who, in the exercise of his duties, fulfilled an act by which a patrimonial benefit was obtained for himself, for his husband, for a relative or a relative up to and including the second degree is punished with imprisonment from one to 5 years and the prohibition of exercising the right to hold a public office for a period of 3 years ", and in paragraph (2):" the provisions of paragraph (1) does not apply in cases where the act or decision refers to the following situations[1]:

- a) the issuance, approval or adoption of normative acts;
- b) the exercise of a right recognized by law or in fulfillment of an obligation imposed by law, in compliance with the conditions and limits provided by it ”.

Conflicts of interest generally involve two categories of interests: material (pecuniary) and moral (non-pecuniary) interests. Monetary interests involve actual or potential financial gain. These can result from a staff member, or family member, owner of property, shares, or a position in a company that is bidding to obtain a contract with a government institution, accepting gifts, or collecting income from a place. secondary work.

Non-pecuniary interests do not have a financial component. These can arise from personal or family relationships, involvement in sports, social or cultural activities.

According to the constant judicial practice of the courts regarding the crimes of conflict of interest, for the realization of the material element of the crime of conflict of interest it is not necessary to produce a damage, but only to achieve a material benefit, for oneself, husband / wife. etc., a benefit which should not even be unjust.

2. Conflict of interest prevention

The expansion of public-sector cooperation with the private sector in recent years has made the whole issue much more complex, multiplying opportunities for conflict of interest, such as:

- a public official with private business interests in the form of partnerships, shareholdings, board member, investments, government contracts, etc.;
- a public official with affiliations with other organizations (for example, a high-ranking public official is on the board of a non-profit organization that receives funding from the official's agency);
- a public official leaving to work for a regulated private company or an executive director obtaining a key position in a government agency with the commercial relations of the former company [5].

Starting from the basic truth that the illegal use by civil servants or local elected officials of their professions or positions in their personal interest is the main cause of corruption, the vast majority of world states and important international institutions have paid and pay special attention to the approach. comprehensive conflict of interest, as well as the adoption of legislative and institutional measures to prevent cases of conflicts of interest.

Actions to prevent conflicts of interest are binding on the public and private sectors alike, as they affect both areas. For the public sector, the UN Convention against Corruption provides for the establishment and strengthening of systems to promote transparency and prevent conflicts of interest.

The document also provides for the adoption of measures requiring dignitaries to declare, activities, employment relationships, investments, substantial goods or gifts or benefits.

Regarding the private environment, the Convention lists the prevention of conflicts of interest among the essential measures that, once implemented, contribute to reducing corruption, increasing accountability and auditing standards in business, but also to avoiding sanctions associated with non-compliance [6].

Therefore, a balance is needed to identify the risks related to the fairness of public entities and civil servants, to ban unacceptable forms of conflict of interest, to properly deal with such situations, to inform public organizations and officials about the occurrence of such conflicts of interest. ensuring the introduction of effective procedures for identifying, declaring, resolving and promoting the appropriate solution for situations of conflict of interest [3].

Prevention must be based on fundamental principles in dealing with conflicts of interest, in order to promote the correct performance of official tasks and responsibilities, namely [3]:

- supporting the public interest (civil servants and local elected officials must: make decisions and make recommendations based on legislation and policy without taking into account personal gain, ie to be “disinterested”, to give up or restrict personal interests that could compromise the official decisions in which they participate[3]. If this is not possible, they must not become involved in decision-making. officials who may be affected by their personal interests and relationships);
- serving the transparency and control exercised by the public (local elected officials and civil servants must declare their personal interests and affiliations that could compromise the selfless fulfillment of their public duties, in order to allow adequate control and finding a solution) [3];

- developing individual responsibility and personal example (demonstrating a commitment to ensure fairness and professionalism by applying an effective conflict of interest policy and practice);
- advancing a severe organizational culture of conflict of interest (public organizations must ensure and implement appropriate management policies, procedures and practices in the workplace to encourage effective control and resolution of conflict of interest situations), to create and sustain a culture of communication and open dialogue on fairness and its promotion) [3].

In the context of conflict of interest prevention, the role of management agencies is also underlined, which must take effective measures so that the partners involved in the preparation of calls for proposals/evaluation are in such situations. Also, a modern policy on conflict of interest must seek to strike a balance, by identifying the risks related to the fairness of public organizations and civil servants or local elected officials, banning unacceptable forms of conflict of interest, properly dealing with situations of conflict. such, informing public organizations and officials about the occurrence of such conflicts of interest, ensuring the introduction of effective procedures for identifying, declaring, resolving and promoting the appropriate solution for situations of conflict of interest[3].

3. Conclusions

Poor regulation of potential conflict of interest is related to the use of official information for personal gain, the involvement of central, regional or local government employees in partisan activities, and their unreserved loyalty to political superiors. The unlimited political loyalty of civil servants or local elected officials, coupled with the strong influence that political parties and their political interests usually have on the decision-making process in local public administrations, regularly undermines the overall local government process. .

Abuses of political and administrative power in one's own interest, whether it involves an individual, group or party interest, are detrimental to public and private sector organizations, the general public and society at large.

They also destroy future opportunities for sustainable socio-economic development.

Therefore, raising public awareness among local, national and international communities, in order to identify joint efforts to prevent and protect society from the negative effects arising from conflicts of interest, is a necessity for Romania.

On the other hand, under the legislative report, a correlation of the regulation of the conflict of interests from the point of view of the administrative and criminal law must be considered, in order to clarify the situations in which it has an administrative or criminal character.

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