Supplement of Law Review - Year 2019, pp. 51-61

THE DISCIPLINARY OFFENCES OF INCOMPATIBILITY AND CONFLICT OF INTERESTS REGARDING PUBLIC OFFICIALS, AS PROVIDED FOR BY THE LEGISLATION OF ROMANIA, ARE OF AN CRIMINAL NATURE UNDER ARTICLE 6, PARAGRAPH 1 ECHR

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Abstract

The article analyses the disciplinary offences of incompatibility and conflict of interests through the lenses of the EHCR standards on criminal matters, giving a critical account of the latest case-law evolutions in the field and is structured in three parts: firstly, the offences are analysed according to the national legislation of Romania; secondly, the development of the autonomous concept of "criminal offence", according to Article 6 of the Convention, based on the relevant case-law of the Court, is summarized; thirdly, the latest developments on the matter from the Strasbourg Court' jurisprudence are identified and critically assessed in context of its former case law and standards.

Keywords: *incompatibility, conflict of interests, criminal limb of Article 6 ECHR, ECHR Cătăniciu Decision, ECHR Manta Decision*

1. The disciplinary offences of incompatibility and conflict of interests of public officials

The proper implementation of a coherent system regarding the incompatibilities and the conflicts of interests of public officials was one of the benchmarks to be fulfilled and followed up within the process of accession of Romania to the European Union (EU). The matter was therefore part of a Cooperation and Verification Mechanism (hereinafter "CVM"), established together with the European Commission (EC), on the brink of Romania's accession to the European Union, in December 2006 (European Commission Decision 2006/928/EC). The mechanism was seen as an appropriate safeguard for keeping the pace with the country efforts in reforming the judiciary and fighting corruption.

The relatively newly-regulated regime of incompatibilities and conflicts of interest (the first domestic comprehensive regulation being adopted in 2003[1]) was

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[1] Law no. 161/2003 regarding certain measures for ensuring transparency of public dignitaries, public positions and within the business environment, corruption prevention and its sanction, published in Official Journal - Monitorul Oficial, Partea I nr. 279 din 21 aprilie 2003.

placed at the heart of CVM. One of the four benchmarks that Romania had to achieve, comprised in the Annex to the CVM Decision, referred at point 2 to: "Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing *mandatory decisions* on the basis of which *dissuasive sanctions* can be taken" (emphasis added, T.C.). The solution of establishing an agency with enforcement powers was seen at that time as a revolutionary step forward, one step forward from the international standards.

Incompatibility is the interdiction to exercise another office, dignity, profession or activity, as expressly forbidden by the law, at the same time with a public office or dignity.

Conflict of interests consists is the interdiction for the public official or state dignitary, as defined by the Article 1, par. 1 of Law no 176/2010[2], to issue an

[2] "Article 1 (1) The provisions of the present Law are applied to the following categories of persons, that have the obligation to declare their assets and interest:

1. The President of Romania;

2. Presidential Advisors and State Counselors;

3. The Presidents of the Chambers of Parliament, Deputies and Senators;

4. The Members from Romania in the European Parliament and Members in the European Commission on behalf of Romania;

5. The Prime-Minister, Members of the Government, State Secretaries, Deputy State Secretaries, the public dignities asimilated to the previous, as well as the State Counselors from the office of the Prime-Minister;

6. The Members of the Superior Council of Magistracy;

7. The Judges, Prosecutors, Deputy-Magistrates, their comparables, as well as Judicial Assistants;

8. The Specialized support staff in Courts and Prosecutor's Office;

9. The Judges from the Constitutional Court of Romania

10. The Members of the Romanian Court of Accounts and the personnel holding management and control positions in this institution;

11. The President of the Legislative Council and Section Presidents;

12. The Romanian Ombudsman and its deputies;

13. The President and Vice-President of the National Authority for the Supervision of Personal Data Processing;

14. The Members of the Competition Council;

15. The Members of the National Council College for Studying the Former Communist Intelligence Service Archives;

16. The Members of the National Securities Commission

17. The Members of the Economic and Social Council

18. The Members of Insurance Supervision Commission

19. The Members of the Supervisory Commission of Private Pension System

20. The Members of the National Council for Discrimination Combat

21. The Members of the National Audiovisual Council;

22. The Members of the Boards of Administration and Board of Directors of the Romanian Public Radio and National Public Television Channel;

23. The President and Vice-President of the National Integrity Agency as well as the members of the National Integrity Council;

administrative act or to conclude a legal act or to take a decision or participate in the making of a decision in the exercise of the public function of authority, which produces a material benefit for himself, for his spouse or his relatives of first degree.

Article 25 from the Law no 176/2010[3] regulates the components of the disciplinary lialibility on incompatibility and conflict of interests.

Par. (1) of the said article states that the deed of an public official issue an administrative act or to conclude a legal act or to take or participate in making a decision in breach of the legal requirements conflict of interests and the deed of incompatibility are disciplinary offences and therefore are sanctioned according to applicable rules of public dignity, office or activity in question, insofar as the Law no 176/2010 does not derogate from it and if the deed does not meet the elements of a criminal offense. This is *the first principal sanction* to be applied.

According to the par. (2) of the same article, the person removed from office under the provisions of par. (1) or towards which it was found the existence of an

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24. The General Manager and members of the Board of Directors of the National Press Agency AGERPRESS;

25. The Manager of the Romanian Intelligence Service, Prime-Deputy and its deputies;

26. The Manager of the Foreign Intelligence Service and its deputies;

27. The Diplomatic and Consular personnel;

28. The Manager of the Security And Protection Service, Prime-Deputy and its Deputy;

29. The Manager of the Special Telecommunication Service, Prime-Deputy and its deputies;

30. The elected members of local authority;

31. The persons holding management and control positions as well as the public officials, inclusively those with special status that run their activity in all central government or local authorities or, where appropriate, in all public institutions;

32. The persons holding management and control positions the state education system units and units of state public health system;

33. The personnel assigned to central government officials in the public administration and the personnel assigned to the prefect's office;

34. The Board Members, Board of Management or Board of Supervisors, and persons holding management positions in the national or autonomous local companies, or other companies in which the State or a local governmental authority is a significant shareholder;

35. The Governor, First Vice-Governor, Vice-Governors, the Members of the Board Administration, employees responsible for the management of National Bank of Romania as well as the bank management personnel where the state is a significant shareholder;

36. The personnel of public institutions, including employees with individual employment contract, involved in carrying out the privatization process as well as the personnel government institutions, including employees with individual employment contract, that manage or implement programs or projects funded from external or budgetary funds;

37. The Presidents, Vice-Presidents, Secretaries, Financial Directors in the trade union' federations and confederations;

38. The Prefects and Deputy-Prefects;

39. The candidates running to be elected for the President of Romania, Deputy, Senator, Local Counselor, Chairman Of The County Council and Mayors."

[3] The law is to be found translated in English (although not very accurate) at https://www.integritate.eu/A.N.I/Legisla%C8%9Bie.aspx

incompatibility losses its right to exercise a public office or dignity from those listed in Article 1 of the Law no 176/2010, except for the elected offices, for a period of three years after removal from office or that public dignity or from the date of the mandate termination. If the person held an elected office, he/she is under an interdiction to hold the same office for a period of three years from the date when his/her mandate was terminated. This is *the second principal sanction* to be applied.

The Constitutional Court of Romania (CCR), through Decision no. 418/2014[4], interpreted the above mentioned interdiction, stating that the provision is constitutional as far as the phrase "*same* office" covers "all appointed positions", if the person concerned was in an appointed position, respectively "*all elected* positions", if the person concerned was in an elected position[5]. The list of all positions in question is contained by the Article 1 of the Law no 176/2010.

If the person no longer holds a public office or dignity at the time when the state of incompatibility was ascertain, the three-year interdiction operates from the date when the evaluation report issued by the National Integrity Agency – ANI becomes final, respectively from the date of the final court decision confirming the existence of an incompatibility/conflict of interests.

Under the par. (3) of the same article, the incompatibility/conflict of interests represents a ground for dismissal or a disciplinary offence and it is punishable under applicable rules for dignity, public office or respective activity.

Par. (4) referrs to the disciplinary sanctions, stating that, by derogation from the provisions of special laws governing disciplinary liability, disciplinary sanctions that may be imposed as a result of having committed the offense of the present law cannot consist in a reprimand or warning.

Based on the above mentioned legal provisions, we can conclude the following:

The incompatibility/conflict of interests represents a disciplinary offence which is sanctioned according with the general rules applicable to the public dignity, office or activity in question, if the special rules contained by the Law no 176/2010 doesn't derogate from.

The special law – Law no 176/2010 – provides for a sanction which is principal, not complementary, as I previously considered[6] – the three-year

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[4] Published in Official Journal - Monitorul Oficial, Partea I, nr. 563 din 30 iulie 2014.

[5] The CCR decision was discussed in detail in T. Chiuariu, *Controlul averilor, incompatibilităților şi conflictelor de interese. Legislație, doctrină şi jurisprudență*, Ed. Hamangiu, Bucureşti, 2016, pp. 25-30. The doctrine highly criticised the decision as being an ultra vires act, outside the constitutional powers of the court and a manipulative decision, which transforms the meaning of the legal provision in question – see B. Selejan-Guțan, Considerații despre Decizia nr. 418/2014 a Curții Constituționale, in "Pandectele Române", nr. 12/2014, pp. 46-7. Ironically (or not) the applicant in the case that ended with the said decision was the same as in ECHR Cătăniciu Case discussed below.

[6] T. Chiuariu, *op.cit.*, p. 75.

interdiction – that can be added to the first principal sanction provided by the general statute on the public dignity/public office/activity or can be applied autonomously.

The administrative autonomous body with investigative powers – National Integrity Agency (ANI) has the aim to ensure integrity regarding public office and to prevent institutional corruption, by performing evaluations of wealth, incompatibilities and conflicts of interests regarding public officials. On the basis of article 20 ref to article 15 of Law no 176/2010, while evaluating the wealth and assets, the integrity inspector may request all public institutions and authorities, other public or private law legal entities, as well as natural persons, documents and information required to performing the activity of evaluation, subject to the obligation of confidentiality. At the end of the evaluation, the integrity inspector issues a report, which ascertains the incompatibility/conflict of interests or closes the investigation. The report can be contested by the concerned persons in front of administrative courts. The civil procedure applies and the burden of proof is on the claimant, the person concerned by the report.

2. The criminal offence, according to Article 6 ECHR

The concept of a "criminal charge" has an "autonomous" meaning, independent of the categorisations employed by the national legal systems of the member States (*Blokhin v. Russia [GC], § 179; Adolf v. Austria, § 30*).

As regards the autonomous notion of "criminal", the Convention is not opposed to the moves towards "decriminalisation" among the Contracting States. However, offences classified as "regulatory" following decriminalisation may come under the autonomous notion of a "criminal" offence. Leaving States the discretion to exclude these offences might lead to results incompatible with the object and purpose of the Convention (*Öztürk v. Germany, § 49*)[7].

The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in *Engel and Others v. the Netherlands (§§ 82-83)*:

1. classification in domestic law;
2. nature of the offence;
3. severity of the penalty that the person concerned risks incurring.

The *first criterion* is of relative weight and serves only as a starting-point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examine the substantive reality of the procedure in question.

[7] Council of Europe/European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb). Updated on 31 August 2019, consulted online at 1.11.2019 at the following link https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

In evaluating *the second criterion*, which is considered more important (*Jussila v. Finland [GC], § 38*), the following factors can be taken into consideration:

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character (Bendenoun v. France, § 47);
- whether the proceedings are instituted by a public body with statutory powers of enforcement (Benham v. the United Kingdom, § 56);
- whether the legal rule has a punitive or deterrent purpose (Öztürk v. Germany, § 53; Bendenoun v. France, § 47);
- whether the legal rule seeks to protect the general interests of society usually protected by criminal law (Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, § 42);
- whether the imposition of any penalty is dependent upon a finding of guilt (Benham v. the United Kingdom, § 56);
- how comparable procedures are classified in other Council of Europe member States (Öztürk v. Germany, § 53).

The *third criterion* is determined by reference to the maximum potential penalty for which the relevant law provides (Campbell and Fell v. the United Kingdom, § 72; Demicoli v. Malta, § 34).

The *second and third criteria* laid down in *Engel* are alternative and not necessarily cumulative; for Article 6 to be held to be applicable, it suffices that the offence in question should by its nature be regarded as "criminal" from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere (Lutz v. Germany, § 55; Öztürk v. Germany, § 54). The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (*ibid.*, § 53; Nicoleta Gheorghe v. Romania, § 26).

A cumulative approach may, however, be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (Bendenoun v. France, § 47).

If one proceeds to apply these criteria to the incompatibility/conflict of interest as analysed above, should observe the following.

Regarding *the severity of the applicable sanctions*, the first sanction to be applied is the release from office (Article 25, par. 3 of Law no. 176/2010). The release from office is the most serious disciplinary sanction applicable under domestic law.

The law provides a second sanction – the interdiction to hold public offices, respectively elected public dignity for a pre-determined period of 3 years (Article 25, paragraph 2 of Law no. 176/2010), which is not complementary, but principal, because it is applied *ope legis* when the ANI final report becomes final and therefore doesn't depend on the first principal sanction.

Also with reference to the incident sanctions, one must note that Article 27, par. (3) Law no. 176/2010 provides for the administrative court to dispose, in

addition to declaring the absolute nullity of the acts concluded in conflict of interest, also the reinstatement of the parties in the previous situation, i.e. the return of the benefits received based on acting in conflict of interest. This administrative sanction is identical to the measure of special confiscation provided by Article 112 par. 1, lit. a) Criminal Code.

The two principal sanctions obviously have an *exclusively punitive and deterrent scope*, while the third has a reparation one. The dissuasive scope was expressly provided for by the EC Decision on MCV (see *supra*), therefore it is beyond doubt that was the original intent of the legislator, to have deterrent sanctions.

As outlined above, the proceedings are instituted by a public body with statutory powers of enforcement, the National Agency for Integrity – ANI. The legal rule seeks to protect the general interests of society usually protected by criminal law – the integrity of public office. Whether the imposition of any penalty is dependent upon a finding of guilt is not very clear, although I previously expressed the opinion that guilt should be considered by the court when assessing to maintain or to annul the ANI report and this opinion was confirmed by the case-law of domestic courts[8].

Moreover, regarding *the stigmatizing effect* (see *Jussila,* par. 43), it is worth mentioning the measures regarding the publicity of the sanctions imposed. Interdictions following a conflict of interest are made public by being posted on the ANI website[9], one might say, a sort of virtual pillar of infamy borrowed from the Middle Ages and adapted to contemporary times.

The criminal record, according to Law no. 290/2004[10], can only be accessed by the person concerned and by the public authorities in the system of public order, national security and justice, so it cannot be accessed by any person, as is the case with the prohibitions imposed as a result of a conflict of interest published on an internet site to which anyone has access. The element of the mention of the deed in the criminal record was taken into account by the Court in other cases when it analysed the criminal nature of the offense (Öztürk v. Germany, par. 52).

Consequently, even in this regard, of *the publicity of the sanction*, the consequence of the administrative offence is harsher than the criminal one: while the information on the criminal offences can be accessed only by law enforcement agencies and the person concerned, the personal data on the administrative misconduct is (was) available to virtually everyone.

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[8] T. Chiuariu, *op.cit.* , pp. 62 *sqq*.

[9] https://www.integritate.eu/INCOMPATIBILITIES-DEFINITIVE/INTERDICTION-3-ANI.aspx. Following complaints on the breach of the personal data regulations, the content with references to all the persons sanctioned was removed, but the section can still be found on the internet site of the Agency, at the address mentioned above, it looks disabled and cannot be accessed for the moment, on 30.11.2019.

[10] Published in Official Journal – Monitorul Oficial, Partea I, nr. 777/13.11.2009.

3. ECHR *Cătăniciu* and *Manta* Cases

The first factor to be taken into account for determining the second criterion, the degree of generality of the rule in question was applied in Case *Cătăniciu v. Romania* (dec., application nr. 22717/17) where at stake was a conflict of interests regarding a local elected office. The local councillor was ascertain to be in a conflict of interest, she contested the ANI report and until the contestation reached a final judgment, she was elected member of Parliament. Consequently, she was sanctioned based on the parliamentary regulation on conflict of interest with a reduction in the parliamentary allowance of 10% for a period of 3 months.

Cătăniciu was the first case to be decided by ECHR in which the system of repression regarding the incompatibilities and conflicts of interests according to laws of Romania was under scrutiny.

The Decision of the Court can be summarized as follows:

The offence in question is of a disciplinary nature, according to the national law (par. 38 ref. to par. 19), so the first criterion isn't met.

Then the Court passed to the second criterion, the nature of the offence, and took note that, according to the national law, the provisions forbidding the conflict of interests refers exclusively to the persons who exercises a position of civil servants (*fonction publique*, in French) or a public dignity (*charge publique*, in French). It therefore concludes that the provisions in question are not applicable than to a determined group of persons having a particular statute, situation *which raises serious doubts on the criminal character of the deeds in the referring case* (par. 39).

In addition to these doubts, the Court passed to the third criterion and noted that the sanction imposed on the applicant was a reduction of her parliamentary allowance of 10% for a period of 3 months (par. 40 ref par. 24). Therefore, it concluded that this sanction doesn't have *the degree of severity* which justifies to qualify it as a criminal sanction in the sense of the Article 6 of the Convention and therefore *the criminal limb of the said article doesn't apply to the case at hand*.

Following the above quoted reasons, one can conclude that the decisive argument regarding the non-applicability of the criminal limb of Article 6 was the applied sanction' degree of severity. Anyhow, in this point, this reasoning looks like a departure from the previous jurisprudence, namely the *Öztürk jurisprudence*, where the Court ascertained that the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (*Öztürk v. Germany, § 53; Nicoleta Gheorghe v. Romania, § 26*).

The *Cătăniciu Decision* was followed by *Manta Decision* (Manta contre la Roumanie, Décision de 3 septembre 2019, Requête no 32354/17 et 7 autres requêtes), by which the Court declared inadmissible 8 applications from Romania regarding incompatibilities and conflicts of interests.

With regard to the criminal aspect of article 6 of Convention, the Court recalled that in the *Cătăniciu Case*, cited above, it found that the sanction applied to the applicant, which had consisted of a 10% reduction, for a period of three months

maximum, of her parliamentary allowance, was not of a nature and a degree of severity justifying calling it a penalty within the meaning of Article 6 of the Convention (ibid., § 40). In the present applications, however, *the applicants have not indicated that they have been disciplinary sanctioned* (emphasis added, T.C.). As to the argument of the applicants 70254/17 and 1363/18 that the prohibition on holding a public office for three years imposed by the Law no 176/2010 (ref par. 25) constitutes a "criminal sanction" within the meaning of the Convention, the Court declared that *it cannot be received* (emphasis added, T.C.). In the light of these circumstances, the Court considers that Article 6 of the Convention is not applicable under its criminal aspect.

One cannot admit that the above constitutes a convincing reasoning. The prohibition of holding an elected public office for 3 years is a restriction to the right to be elected which usually constitutes a criminal sanction, as it is in the Criminal Code of Romania, art. 66, par. (1), lit. a) and b).

In which way the argument that `a sanction which is provided for by the *Criminal Code* should be considered *criminal*` cannot be received as a valid argument? Only by asking the right question and the answer is self-evident. The applicants have at least a *prima facie* solid argument and the minimum was to receive a counter-argument. But it cannot be rejected *de plano*, as the Court did.

Actually, if we dig deeper in the background of this argument, we observe that the so called "disciplinary" sanction contained by Article 25 par. (2) Law no 176/2010 perfectly coincides with the complementary criminal sanctions provided for by the Criminal Code.

Art. 301, par. 1 of the Criminal Code which incriminates the "*use of the function of favouring persons*" (conflict of interest), provides for a *special complementary punishment* consisting in "*the prohibition of exercising the right to hold a public office for a period of 3 years*".

Virtually the same interdiction is provided for as a *general complementary punishment*, to be applied by the judge for a period at his/her discretion, between 1 and 5 years, when he/she finds it appropriate in the consideration of the concrete offence committed, additionally to the main punishment (life detention, imprisonment or fine) in art. 66, par. (1), lit. a) "*prohibition to be elected in the public authorities or another public office*" and lit. b) "*prohibition to hold an office which implies the exercise of the state authority*" from the same Criminal Code of Romania.

The only difference identified uncovers a harsher regime of the disciplinary offence, since the criminal sanction can be applied in a proportionate manner, the judge has to power to decide the concrete duration of the sanction in order to be proportional with the deed of the defendant, meanwhile the administrative sanction is set for a fixed, predetermined duration by law (*ope legis*) and the judge

cannot intervene in order to apply it proportionally. Consequently, the three-year ban raises a question regarding its conformity to the principle of proportionality.

One more remarck on the degree of generality of the sanctions, based on the sphere of the persons to whom the sanctions analyzed above can be applied and which can be subject to the evaluation procedures performed by ANI. In *Cătăniciu* Case the Court held that the only persons concerned by the provisions governing the conflict of interests are the persons who exercise a public function or dignity (par. 39), which represents a certain group, which is why the character cannot be retained of criminal deed in the sense of art. 6 of the Convention.

As it can be ascertain only by reading the personal scope (*ratione personae*) covered by Law no 176/2010 (please see above, footnote no. 2), these provisions apply to a very wide range of persons, which includes practically *all the persons working in the public sector*, regardless of the nature of the employment relationship, based on a contract of employment, respectively appointed under a public power regime (civil servants in public office and public dignitaries). According to the statistical data published in 2018, in Romania their number rises to 1.2 million people, which represents approx. 25% of all employees in the economy, which are in total 4.9 million[11]. Therefore, at least if a public appointee or employee is concerned (which is different from *Cătăniciu Case*, where the applicant was an elected official), the scope of the legal rule' factor cannot apply.

4. Conclusions

The domain of criminal offences disguised in administrative clothes have already raised complex legal issues which the Court dealt with in an admirable way, safeguarding the effective protection of fundamental rights, as it was shown in the summary of the case-law on the matter (supra, section 2). A new hurdle – the incompatibilities and the conflicts of interests as regulated by the laws of Romania – has occurred in this race (as described in section 1) and the first attempts to overcome it are not so encouraging (as detailed in section 3). While some of the arguments underlying the inadmissibility decisions delivered so far are pertinent, as the generality of the rule or the degree of severity of the sanction, the real challenge ahead will consist in making an in-depth analysis of the three-year interdiction on holding public office, which is a serious restriction to fundamental rights and therefore cannot be just overlooked like a traffic fine.

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