

## POLICIES REGULATING LIABILITY CIVIL SERVANT IN THE EUROPEAN UNION SOCIO-POLITICAL CONSEQUENCES

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### Abstract

We appreciate that between the legislative desire and the real functioning of the Romanian National Administrative Body, the servant is only apparently protected, fact which enables a system malfunction, the great majority of abuses of office with the moral author, the head of the public administration, usually elected, the mayor of the local administrative unit or the president of the County Council, holder of some public positions, elected by popular vote, which politically manipulate the system.

**Key words:** european criminal jurisdictions, corruption, Public Service Tribunal

This study is a part of postdoctoral research entitled "Criminal liability of the civil servant and the need for regulation at EU level of a European criminal code and a European criminal jurisdictions in the matter" has the following objectives:

a) In a first step we wanted to identify the European institutions that could play a critical role both in developing a project of creating a Criminal Code European juxtaposed strictly public functions and public offices and in the implementation of such a project.

b) As a subsequent step we identified that despite the progress made by the Lisbon Treaty justice at this time is only possible inter institutional cooperation.

c) The role currently legal institution source of law and unifying the interpretation and application of European legislation remains the European Court of Justice.

d) Given the earlier conclusion in a number of articles have analyzed how the European Court of Justice can be a unifying factor for criminal law on liability related to civil servant and public official.

e) At the same time we have analyzed to what extent the national administrative system and therefore public servants are ready to implement European legislation and openness to citizen

### MATERIAL AND METHOD

Gyven the topic analyzed, material and method consist in the study of the law such as the Lisbon

Treaty, Maastricht Treaty, Council Decision no. 752 of 02.11.2004, etc, the judicial practice and the policies set by the European Union.

### RESULTS AND DISCUSSIONS

#### I. Practical, socio-political implications of the research results

##### a) Socio-political implications

At this moment the national legal systems in terms of criminal law and criminal liability are not willing to delegate this attribute of the report of criminal coercion toward the European Union. This fact is connected with the history of European states, which fought for independence and autonomy. In this context, it is hard to believe that in the near future there will be change. Further evidence of this is linked even with the current form of the Lisbon Treaty which represents the disappearance of Pillar III.

The solution is still for cooperation across institutions in which the principal conductor of the Justice and Internal Affairs remains the European Court of Justice. Therefore in Romania despite the entry into force of a new Penal Code which seeks alignment of the corruption offenses and of service under the umbrella of Title V with legal systems from Europe we will not have as consequence a unification of the way corruption is defined.

If we look at other systems of law in the European Union, even if they are partisans of conventions that have proposed that not only combating corruption but finding a common definition, each specific national element prevails.

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Consequently, the solution identified by postdoctoral research is to develop a regulation proceedings in criminal matters for the European Court of Justice that would be the only court competent to judge officials and public figures after their national criminal law.

#### **a) Practical implications**

The proposed solution that the European Court of Justice be the only court competent to judge European corruption acts committed by public officials and national officials representing Member States of the Union could be implemented in two phases:

**b.1).** in a first step the legal competence of the Court will target the corruption cases which undermine the financial interests of the European Union, with the Public Service Tribunal as the lower court and the European Court of Justice as judicial control authority.

This preliminary phase would have as implications at national level only to modify the rules of criminal procedure regarding the competence of national legal authorities.

It would not require the modification of the national penal codes, based on the fact that the European Union would establish as *lex fori* the national penal law according to the nationality of the civil servant and high official.

**b.2).** A second step would bear upon the extension of the penal competence of the Court to cover all corruption acts, which would eliminate the frequent criticism addressed to East European countries by members of the Union for having a party-oriented legal system.

If implemented this proposal would have as a consequence the growth of the business environment and the fact that public funds will be used more sensibly and more efficient, especially with regard to the increase of public investment meant to attract other investments without public fund share.

#### **II. Effects and results of the research on the administration system**

Currently the administration system, though subject to numerous state reforms generated by the mandatory terms of both pre-accession and accession to the European Union, has undergone a modification in form but not in substance.

We consider that currently the central and local administration bodies are not protected against political instability, despite a charter of the public servant being passed in the Law no. 188/1999 republished in the Official Gazette, the issue 365/29.05.2007.

Also the state policies pertaining to the remuneration of public clerks are not protecting the latter from criminal acts which can be subscribed

to petty corruption, since their small wages render them receptive to bribe and other incentives of a material order.

Even when they are well paid, we are witnessing serious corruption cases with release on probation where the offenders return to an undeserved financial status, and that is because the Romanian judicial system does not make provisions for a complementary punishment such as the forfeiture of a retirement plan.

From this point of view we endorse the implementation of the complementary penalty of forfeiting the pension plan granted on behalf of the position that he made use of when perpetrating corruption acts.. This is the anglo-saxon model which applies to all prosecuted public servants, based on the principle that they are part of the Queen's reserve body of clerks and their acts represent a violation of the British state's interests, a prejudice to the Crown and a deed of *lese majesty* implicitly.

Also as a result of the research we assert that there is a need for implementing good practices that aim at changing the behavior of the public servant in his relationship with the citizen, since the administrative mentality regards the individual who is supposed to be served by the public system as an „enemy”.

These courses should be delivered at local administration level by trainers specializing in government policies and communication strategies. It is also necessary to improve relationships between the Prefect's Office and the other local authorities with the purpose of engaging the Government's representative in organizing consultative meetings at different institutional and technical levels, aiming to explain to the public employees the way in which are implemented the recent laws that they come in contact with. We consider that the current Romanian judicial policy, manifested by the enactment of the new Penal Code and the new Criminal Procedure Act but also by the ongoing practices, is focusing on restoring the independence of the national administration system by creating an effective procedural frame in which the public servant can objectively express their point of view in keeping with their job description and befitting the local and national interest.

As it is, for the time being there is no correlation between the dispositions in the Criminal Procedure Act pertaining to the enforcement of certain procedural measures such as the interdiction of acting in the position the offender made use of in perpetrating the penal act (we have in view the provisions in the art. 66 letter b in the Penal Code – applicable for a final

sentence, as well as the dispositions of art.215 letter e) in the Criminal Procedure Act, which correlate the judiciary control measure releasing the defendant from the duties that he was performing when committing the crime, and the act of impeaching a public official as laid down by the Law no. 215/2001 concerning the local public administration.

In the judicial situation described in art. 215 letter e) from the Criminal Procedure Act, the holder of a public position as that of the Chairman of County Council is not suspended from his duties according to art. 71 paragraph 1, in conjunction with art. 108 paragraph 2 from the article of Law 251/2001.

Therefore in such a situation both the Chairman of County Council or the mayor have the right to put their signature on documents issued by the institution they represent and their delegates can continue to use the signature on their behalf.

In a situation like this it is necessary to impose as intended law the modification both of the art. 71 and the art. 108 from the Law 215/2001 in a sense in which the suspension of rights occurs for any of the preventive measures regulated by Title V in the Criminal Procedure Act (art.202-art.256), in order to avoid a situation in which, in its legal respects, the public institution is seen as a corrupt one by being assimilated with the person in a leading position.

In legal practice there have been cases of incongruities between the civil sentences passed by the administrative and penal courts respectively, in relation to the way in which certain European funds were accessed and implemented.

Such legal contexts were triggered by inspections of institutions such as The Payment Agency for Rural Development and Fisheries, conducted at local administrative units which had accessed European subsidies for infrastructure (water adductions, road repairs, etc) which resulted in inspection certificates recording misconducts either regarding the conditions of granting the funds or the way in which the subsidized public project was being implemented.

For the situations in which these malpractices also spanned illegal acts falling under the provisions of the Law no. 78/2000 regarding corruption deeds, the legal authorities would initiate criminal proceedings and send the offenders to Court for activities undermining the financial security of the European Union, directly related to general budgetary funds and budgets administered by these or on their behalf.

The inconsistency of the administrative and penal rulings was generated by the fact that the local administration units, based on the

administrative trial proceedings, appealed against the inspection certificates at the competent Appeal Courts, in order not to be compelled to repay from their own funds the money received in European fund frauds.

Motivated by the fact that the caveat of the administrative trial is an optional procedural right that the claimer can make use of upon request, the solutions were not similar.

Consequently, although the penal court rejected the claims of the civil party represented by the Payment Agency for Rural Development and Fisheries, some of the offenders were compelled to pay the prejudice, based on sentences given in the wake of court summons initiated by Local Administration Units, based on the laws of tort and claiming final and irrevocable decisions of the Administrative Court in which the Local Administration Units were compelled to pay back sums of money from accessed European funds, although the projects had been implemented.

Therefore it is mandatory from our point of view that such situations come under rightful suspension. It does not suffice to assimilate such situations with the legal scenarios generically considered within the provisions of art. 412 pt. 8 Criminal Procedure Act with the purpose of ensuring unitary legal practices as well as an equity of the legal system of assessing responsibilities irrespective of the right claimed by the prejudiced legal actor.

## CONCLUSIONS

In conclusion we acknowledge that the governmental policies regarding the responsibility of the public servant, from the perspective of an European penal code on the subject, has not made great progress, in spite of the fact that the Lisbon Treatie has created an environment of justice and security that is likely to evolve at a cross-institutional level, the European Court of Justice being the main guiding institution in this sense. Consequently we consider practical for the purpose the appointment of a penal procedural body for the European Court of Justice from Luxemburg.

This competent body shall target, as protected social value, the financial and legal security of the European Union, and the individuals under the scrutiny of the Court shall preliminarily be the public servants and officials all over the country, who come into contact either as consequence of their job description or official position with European funds or national subsidies destined for implementing European policies. Lex fori will be given by the criminal law of the national space whose citizens are the officials or

public figures. Procedural rules in matters of criminal liability should be determined by the Court in Luxembourg, Public Function Court operating as first instance and the Court for judicial review.

It is also required that state policies to be reformed regarding the public servant starting with ethics reform of the civil servant and with the introduction of the loss of pension as punishment for the situation in which the official will be sentenced for an act of corruption or service even after his retirement.

## REFERENCES

- Bărbulescu I.G.**, 2005 - *European Union – from national to federal*, Tritonic Publishing House, Bucharest
- Fabian G.**, 2014 - *Procedural Law of the European Union*, Ed. Hamangiu, Bucharest
- Pașca V., Mancaș R.**, 2002 - *Criminal Law*, General part, Publishing House Universitatis Timisensis, Timișoara
- Sbârnă G.**, 2002 - *Federal European projects from interwar period*, Sylvi Publishing House, Bucharest
- Vătăman D.**, 2011 – *Institutional law of the European Union*, Universul Publishing House, Bucharest
- \*\*\* - Merger Treaty in Brussels Single European Act, [http://www.cvce.eu/content/publication/1999/1/1/972ccc77-f4b8-4b24-85b8-e43ce3e754bf/publishable\\_fr.pdf](http://www.cvce.eu/content/publication/1999/1/1/972ccc77-f4b8-4b24-85b8-e43ce3e754bf/publishable_fr.pdf)
- \*\*\* - The Maastricht Treaty, [http://www.cvce.eu/content/publication/1997/10/13/5a6bfc79-757f-4d53-9379-ad23cc2cc911/publishable\\_fr.pdf](http://www.cvce.eu/content/publication/1997/10/13/5a6bfc79-757f-4d53-9379-ad23cc2cc911/publishable_fr.pdf)
- \*\*\* - The Treaty of Amsterdam, [http://europa.eu/eu-law/decision-making/treaties/pdf/treaty\\_of\\_amsterdam/treaty\\_of\\_amsterdam\\_fr.pdf](http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_fr.pdf)
- \*\*\* - Treaty of Nice, [https://www.ecb.europa.eu/ecb/legal/pdf/fr\\_nice.pdf](https://www.ecb.europa.eu/ecb/legal/pdf/fr_nice.pdf)
- \*\*\* - Lisbon Treaty-<http://www.diplomatie.gouv.fr/fr/IMG/pdf/traite.pdf>,
- \*\*\* - Decizia nr. 712/26.05.2015 a Curții de Apel Iași, dosar nr. 12450/99/2013.