

RELEVANCE OF THE POSITION AND/OR PROFESSION FOR THE CONFLICT OF INTERESTS

Lecturer **Andreea Corina TÂRȘIA**¹

Abstract

The absence of the clearly identification criteria of the public service or public interest service, conjugated with the ambiguity of the notions of public clerk, public position, profession and liberal profession can give rise to certain prejudicial situations for the individuals, especially because the Criminal Code extended sic et simpliciter the quality of public clerk to all the public positions at to the public service and based on these notions, it established the definition for the offence of conflict of interests, thus creating the potential to make out of any professional a public clerk and equally a subject of the illustrated offence.

Keywords: public position, public clerk, profession, conflict of interests

JEL Classification: K23

In Romania, the citizens became aware of the primordial interest of certain clerks, high clerks and public dignitaries to acquire gains or other material advantages resulted from the conflict of interests or incompatibilities based on which they act².

The problem is if and to what extent do the position and/or profession present relevance in the establishment of the situation of conflict of interests and if the measures for the avoidance of illegal connection to the European or national money funds are efficient.

The deficit of resources and the inaccuracy of the law should guide board public debate actions at the national and local level, founded on concrete issues and cases related to the enforcement of the law, with the training of specialists who would counsel the participants to public auctions about the risks to break the law within the absorption process of public funds. The enforcement of these measures would provide efficiency to the activity of prevention and identification of the situations where the usage of the “public position” or “profession” linked *parti pris* blocks the satisfaction of the general interest, and for the interest parties, the necessary safety in terms of the legality of the actions initiated to access the mentioned funds.

Nowadays, the interpretation of the law related to the conflict of interests and incompatibilities became the monopoly of the National Agency for Integrity. This institution does not prove itself capable to identify sophisticated forms through which the conflict of interests takes the shape of significant corruption and to apply in a corroborated manner the legal provisions applicable in the matter, related to the circumstances and status of the individual. The proof is the simplistic interpretation of the legal regulations on which NAI builds the incrimination formulated in many cases against certain individuals with public reputation in view of demonstrating efficiency and effectiveness. This practice becomes extremely pernicious for the duly order to the extent to which it is sustained by the lack of preoccupation of the legal courts to detect the legal provisions which exclude the status of certain individuals from the incidence of the conflict of interests and/or incompatibilities.

The objective of the study is to provide a panoramic vision on the situations in which the usage of the public position and/or profession displays or not the potential of a conflict of interests and to intensify the legislative decreases which do not rapidly respond to the exigencies

¹ Andreea Corina Târșia, ”Lucian Blaga” University, Faculty of Law, Sibiu, andreea.tarsia@gmail.com.

² This work was funded by contract POSDRU/89/1.5/S/61968, Strategic Project ID 61968 (2009), co-financed by the European Social Fund through the Sectorial Operational Programme Human Resources Development 2007-2013.

imposed by the increasingly competitive business world, or which prevent the interaction of the public position with the liberal profession.

Talking about a particular quality of the subjects in the legal reports arising from the conflict of interests, we refer to the positions hold which imply obligations whose consistency reflect the provision of a service of power and/or public interest and a conduit *of not acting, of refraining*, imposed as a consequence of the status of public clerks.

In some cases, the position does not grant the quality of clerk, in others the profession grants public power, but not the quality of clerk, and in others, the position is exercised with the concurrence of the profession.

All these situations correlate the *public position, public service, profession and quality of public clerk*, with relevance for the establishment of the situations with potential for the conflict of interests.

The analysis of these notions allows the identification of the legislative gaps and at the same time of the essential elements which provide coherence and accuracy to the regulation, necessary in order to prevent the conflict of interests and implicitly the corruption causes.

The *public position* is defined through the Law no. 188/1999 on the status of legal clerks as “*the overall tasks and responsibilities, established based on the law, in view of fulfilling the prerogatives of public power by the central public administration, local public administration and autonomous administrative authorities*” (article 2 paragraph 1)³. Due to unknown reasons, the Law no. 7/2004 on the *Conduit code of public clerks* did not take over this definition of the public position, explaining, in a narrow sense at the level of the contract of the career public clerk, that the public position is “*the overall tasks and responsibilities established by the public authority or institution, based on the law, in view of fulfilling its competences*”⁴. According to this law, the tasks and responsibilities are no longer the ones established “based on the law” and in view of “fulfilling the prerogatives of public power”, but the ones established by the “public authority or institution” and the purpose is to “fulfill its competences”.

The legislation of other states considers that the public position is the overall or the body of individuals called clerks who fulfill the services of public interest or general interest within the public administrations, the ministry of public position being included within their organizational structure.⁵

Obviously, the definition given by the Law no. 188/1999 corresponds to the science of law because it highlights the legal consistency of the public position which includes the *prerogatives of public power and activities specific to the administration of the public authority's mission*.

The dual nature of the public position, namely *public power and administration* of the public mission, imposes to the individuals herein employed activities specific for a service of public interest. In this profile, the *administration of the public position implies* activities of the public authority related to the status of public clerks (planning of human resources, remuneration, professional training and evaluation), and the *public power* implies the activities of the public clerks regarding the exercise of public power prerogatives (elaboration of the projects of legislative documents and other regulations specific to the public authority, enforcement of legislative and normative documents, control and internal and external public audit, planning, management and control of human resources and financial resources in the public service, fiscal

³ Law no. 188 from December 8, 1999 *on the Status of public clerks* was republished in the Official Journal Part I no. 365/May 29, 2007 and subsequently amended through the Government Emergency Ordinance no. on *certain improvement measures of public administration* published in the Official Journal Part I no.264 from April 22, 2009.

⁴ Article 4 letter b from the Law no. 7 on February 18, 2004 on the *Conduit code of public clerks* republished in the Official Journal no. 525/ August 2, 2007

⁵ In France is organized the Ministry for State Reform, Decentralization and the Civil Service

administration, representation of interests of the public authority within the reports with third parties, etc.).

Certain situations highlight the exercise of the public position by individuals which activate in fields of general interest, as education, arts and justice. In these hypotheses, the public position does not involve activities of the public authority connected to the status of public clerk and neither the prerogatives of the public power. On the other hand, the occupation of these positions at the level of an institution by the professor, actor, judge, does not grant the quality of career public clerk, as the tasks circumscribed to these position are basically of patrimony management, representation of the institution and management of a certain profession exercised by the body of professionals – employees of this institution.

Throughout the occupation of this position and exercise of the management, representation and administration activities, the essential obligation of the individual is to comply with the conduit provided in the deontological code of that respective profession, among which the main obligation is to refrain from actions which depreciate the profession and/or prejudice the image of the institution.

In comparison, the career public position implies the precise exercise of the specialized competences and services which represent the warranty of a stable administration and of the fulfillment of the state fundamental missions towards the citizens.

In other words, the activities specific to another field than the public administration configure the *management* tasks and the *position of manager of another profession* which makes the object of the public interest activity of a legal entity (i.e.: university, theatre, court, etc.) and the “*management is the oldest among trades and the newest among professions*” according to a valuable academic professor from the inter-war period⁶. It is necessary to make a distinction between the position of *manager of the profession* and the so-called “*public position of public manager*”, the later assuming a specialized training within a scholarship from the Government or an intensive program organized at the national level.⁷

Due to the fact that it is nor a public position in the acceptance of the Law no. 188/1999 and neither a position of public manager, the position of manager of the profession is not subject to the requirements of the law applicable to the public administration, nor to the ones provided by the Law no. 161/2003 and it has no relevance for the conflict of interests, only if the institution whose patrimony is managed is part of a public procurement procedure.⁸

The *career public position and the public positions* are enumerated in the annex to the Law no. 188/1999 as provided by article 2 paragraph 4 of the law, and their exercise is performed within an organizational structure or public authority body with the purpose to execute the public service.

The *public service or of general interest* is another element which forms the conflict of interests and a landmark in the assessment of the integrity and conduit of the individual holding a public position.

⁶ Abbott Lawrence Lowell (b. December 13 1856 – January 6, 1943) mathematician, sportsman, theater activist, attorney and president of Harvard University (USA) throughout 1909- 1933.

⁷ The specialized training as public manager is organized by the National Institute of Administration or by other continuous training institutions according to the Law no. 452/November 1, 2004 for the approval of the Government Emergency ordinance no. 56/2004 *on the creation of the special status of public clerk called public manager*, published in the Romanian Official Journal Part I no. 590 from July 1, 2004.

⁸ On these matters we will return infra study.

The notion of public service does not have a precise meaning due to its composite nature, but also to the various definitions which were formulated in order to respond to the interest pursued through the adoption of such normative act.

The Romanian law defined the public service in a varied manner, according to the reasoning or interest pursued through the adoption of such law and through report to the syntagms “provided to the public” or “supplied” by a public body or private body, but financed by the state.

In a generally valid conception⁹, the public service is “*the activity organized or, as applicable, authorized by a public authority, in view of satisfying a public legitimate interest*”.

In view of establishing the status of the public clerk, the Law no. 188/1999 is aimed on the service (labor) reports which arise throughout an unlimited duration and are exercised based on the appointment administrative document, issued within the conditions of the law, and the approval law of the Conduit code of public clerks¹⁰ considers that the *public service is the “insurance and observance by the public institutions and authorities of the rights, liberties and legitimate interests of the citizens, recognized by the Constitution, internal legislation and international treaties to which Romania is a part”*¹¹.

The doctrine did not have a unitary point of view about the notion of public service. Throughout the inter-war period, there was a preoccupation for the conceptualization of this notion, expressing the idea that the *public interest* is an *organism created by the state, county or commune*. The opinion was taken over by some contemporary authors who claimed that the public service (along with the public clerk) has the quality of *subject* of the administrative law reports and it acts through the empowerment of a public authority.

Relatively recent, the doctrine defined the public service as being an *activity organized* by the public authorities in view of satisfying certain social or collective needs, with the extremely important mention that any activity performed in order to satisfy certain necessities of the population is considered a provision of public services.¹²

At the level of the Member State as well, it was difficult to adopt a single definition of this notion, but the complex and multiform character, generated by the diversity of the public services, lead to its casuistic approach.

The method was adopted by the European Union which, in order to characterize as legal the provision of the state aid in the transportation field, used the syntagm of public service, both in the Treaty of the European Community (TEC)¹³ and in the Treaty on the Operation of the European Union (TOEU)¹⁴, and in order to exclude them from its incidence range, the Directive no. 2006/123/CE expressly enumerates the services¹⁵ which can be classified in *non-economic*

⁹Article 2 letter m of the Law no. 544/ 2004 regarding the administrative legal department, published in the Official Journal no. 1154 from December 7, 2004, in the variant from 2011.

¹⁰ Law no. 7 from February 18, 2004.

¹¹ Article 4 letter c from the Law no. 7 February 18, 2004 on the Conduit code of the public clerk published in the Official Journal no. 525/ August 2, 2007, republished in the Romanian Official Journal, Part I, no. 194 from March 21, 2007.

¹². For further information, read: Ioan Alexandru, *Drept administrativ european*, Universul juridic Publishing House, Buharest, 2008.

¹³ Based on article 73 (Ex. Art. 77) from the Treaty Establishing the European Community (TCE) “The aids which respond to the coordination necessities of transportations or which represent the compensation of certain obligations inherent to the notion of public service are compatible with this treaty” (m. i. A.C.T.).

¹⁴ “The aids which respond to the coordination necessities of transportations or which represent the compensation of certain obligations inherent to the notion of public service are compatible with the treaties” (art. 93 TFUE, ex. 73 TCE).

¹⁵ According to article 2 paragraphs 2 and 3 from the Directive no. 2006/123/CE of the European Parliament and Council from December 12, 2006 on the services within the internal market, the directive does **not** apply for the following activities: **non-economic services of general interests**; financial services (bank, credit, insurances and

services of general interest, services of general economic interest, social services, health, culture and art services, financial services and stock investment services, services provided by notaries and court enforcement officers.

Along with the social services of general interest *excluded* from the incidence of the directive, there also are the *police, justice, security, gendarme services*, as they also highlight the mandatory *social security and protection* of the citizens.

Through normative documents subsequent to the Direction 2006/123/CE it was established that certain services, as the transportations¹⁶ (and energy, postal and telecommunication services) present interest for all the Member State, thus they are included in the category of *services of general interest* and they are considered *joint values of the European Union*.¹⁷ Subsequently, the provisions which allow the award of state aid under the form of compensations of warranties necessary for transportations (energy, postal office, telecommunications), represent the applicable exception in the consideration of their quality to act as public services of general economic interest, namely to be a part of the joint EU values.

The activity of the Court of Justice of the European Union (CJEU)¹⁸, through casuist excellence, shaped types of public services arising from competition – restrictive actions. Thus, being reunited to decide if there is a potential conflict between the public service and the principle of free competition on the internal market, CJEU established that according to the 6th Directive no. 77/388 CEE¹⁹ *the public services of general interest* organized by the State or by the local collectivities²⁰ are exempted from the taxation point of view, and this category of services includes the *permanently provided service and with a determined quality in all the points from the territory of the states at accessible prices for all the users*.

In another cause (C- 41/90, *Klauss Höfner and Friz Elser vs. Macrotron GmbH, April 23, 1991*)²¹, the notion of public service (which represented the central syntagm around which the

reinsurances, occupational and personal pensions, real estate values, investment funds, payment and consultancy for investments); electronic communication services and networks, as well as the associated resources and services; services in the transportation field, including the harbor services; services of the agencies for the temporary employment of the labor force; health care services, either insured or not within some health care units and regardless of the manner in which they are organized and financed at the national level or if they are public or private; audiovisual, cinematographic services, regardless of their production, distribution and broadcast manner, as well as the radio services, gambling activities which imply bets with stake with pecuniary value in gambling, including lottery, casino gambling and transactions related to bets; activities associated with the exercise of public authority; social services related to the social dwellings, services related to child care and aid granted to families or individuals which are permanently or temporary in need, which are provided by the state, by the providers authorized by the state, or by charity organizations recognized by the state; private security services; services provided by notaries and court enforcement officers appointed by the public authorities; in the taxation field.

¹⁶ We are talking about the Regulation (CE) no. 1370/2007 of the European Parliament and Council from October 23, 2007 on the public railroad and passenger road transportation services and the abrogation of the CEE Regulations no. 1191/69 and no. 1107/70 of the Council, which was enforced on 3.12.2009; Communication of the Commission (2008/C 184/07), *Community Guidelines on the state aids granted to railroad companies*, Official Journal of the European Union C 184/13 din 22.7.2008, with enforcement on the publication date.

¹⁷ Article 16 from the Amsterdam Treaty (1997) and the Charter of fundamental rights adopted in Nice in December 2000 included the services of general economic interest among the joint EU values.

¹⁸ Currently, the Court of Justice of the European Union (C.J.E.U.) name adopted starting from December 1, 2009, when the Lisbon Treatment was enforced.

¹⁹ The 6th Directive 77/388 CEE of the Council from May 17, 1977 on the harmonization of the legislation of the Member States in terms of the fees on the turnover was amended many times.

²⁰ CJCE, C-357/07, *TNT Post UK Ltd vs. The Commissioners for Her Majesty's Revenue and Customs*, Hot. Second Chamber, from April 23, 2009.

²¹ According to the circumstances, the plaintiffs *Höfner and Elser*, recruitment consultants, presented to the company *Macrotron GmbH* a candidate for the position of director of sales service, German national, who, according to the

administrative law, and generally the public law were organized), was reanalyzed by the CJEU through report to the status of the service provider and to the exigency for the quality of this service. In this particular case, the Superior Regional Court (Oberlandesgericht) from Munich, Germany, invested with the request of the plaintiffs *K.Höfner* and *F.Elser* regarding the obligation of the defendant company *Macrotron GmbH* to pay the services provided, formulated the prejudicial case towards CJEU, requesting to decide if the specific recruitment activity and finding a job for company personnel and directors, exercised by the plaintiffs (acting as recruitment consultants and assistants of companies in the field of policy of the personnel based on recruitment contract), represents a service within the meaning of article 60 paragraph (1) from the CEE Treaty and if *finding a job for the personnel and directors contributes to the exercise of public authority* within the meaning of articles 66 and 55 from the CEE Treaty²². In the solution of the prejudicial case, CJEU gave the ruling that the activities of finding a job *do not necessarily have to be exercised by public entities*, and the circumstance that these activities are exercised by a public office does not affect the *economic nature of these activities*, and the entity exercising this type of activities is *qualified as company*, being subject to the competition rules.

Comparing the two types of activities provided by the public entity and by private individuals, CJEU circumscribed the *economic character* (lucrative purpose, gaining of profit) of the service exercised by a public body and, based on this character, recomposed the concept of public service, establishing with principle force the right of the citizens to the *quality of public services*.

Thus, at the level of 1997s, the provisions of the EC Treaty²³ and the jurisprudence of the Court of Justice from Luxembourg shaped the following principles: the service remains of public interest regardless if it has lucrative or non – lucrative purpose; the public services whose exercise is assigned to the private initiative can reveal the monopole regime, being subject to the regulations of the competition law; the provisions or *basic services* (transportations, energy, postal, telecommunication services) are services of general economic interest and *joint values of the European Union* and they usually do not enter under the incidence of the competition regulations; by way of exception, the *services of general economic interest* will be subject to the same rules within the limits where their application would not lead to the failure to fulfill the specific mission of the service.

It has to be mentioned that, *regardless if the public service is of local interest, general interest or general economic interest, the regulations related to the conflict of interests are incident in all the situations which reveal public procurements*, because in the procedure developed in view of concluding the commercial contract, at least one of the parties is an “authority” which implies the public service and public position.

The Romanian legislation does not clearly differentiate the two types of the public service. The first is the public service characterized through its economic or social nature, through the permanent provision and with the involvement of the career position and stability of the public clerk; the second is the service intended for the public which does not have economic or social nature, nor the prerogatives or the state power, which is continuously provided and it implies the profession management function which provides that service.

The delimitation of the two types of the public service is extremely important in order to establish the situations where the public position is temporary occupied, the public service does

consultants, fulfilled all the conditions to hold such position. However, Macrotron decided not to employ this candidate and refused to pay the fees stipulated in the contract.

²² The numbering of the articles is the one from the CE Treaty from 1991.

²³ We are talking about article 16 introduced through the Amsterdam Treaty (1997).

not have economic or social nature, it is provided by the liberal profession and it is aimed for the public, and the conflict of interests or the incompatibility do not exist.

Subsequently, we refer to the hypotheses where neither the public position and nor the service provided by the liberal profession do not reflect commercial activities, and the activities provided in the exercise of these positions and professions do not display the likelihood to distort the competition on the interior market and they do not reveal the prerogatives of the public power or activities specific to the administration of the mission exercised by the public authority.

The community law referred to these hypotheses even since 2006, inviting, for the establishment of the notion of service, to analyze each individual case according to the decisions of the Court of Justice from Luxembourg and thus establishing: *“According to the jurisprudence of the Court of Justice, in order to determine if certain activities, in particular the ones which are financed by the public authorities or which are provided by public bodies, represent a “service”, we have to evaluate each individual case, taking into account all the characteristics of the services, especially the manner in which they are provided, organized and financed in that respective Member State. The Court of Justice assessed that the essential characteristic element of remuneration consists in the fact that it represents the economic equivalent of those services and that this characteristic is absent for the activities which are performed without an economic equivalent by the state or on the behalf of the state, within its missions in the social, cultural, educational and judicial field, as the courses provided within the national education system or the management of the national social security regimes which are not involved in economic activities. The payment of a fee by the beneficiaries in order to contribute to the operating expenses of a system, for example a tuition fee or registration fee paid by the students do not represent itself a remuneration, because the service is essentially financed from public funds. Subsequently, these activities are not included in the definition of the service from article 50 of the treaty and thus, it does not enter in the application field of this directive”*²⁴.

The meaning of the term “services” was enounced through the Treaty on the Operation of the European Union (OEU Treaty) under the form published in 2012 in the following manner; *“Within the meaning of the treaties, services are considered to be the provisions usually provided in the exchange of a remuneration, to the extent where they are not regulated by the dispositions regarding the free circulation of goods, capitals and individuals. In particular, the services include : (a) activities with industrial character; (b) activities with commercial character; (c) artisan activities; (d) activities provided within the liberal professions”* (article 57, former article 50 TCE)²⁵.

In June 2012, the European Commission formulated a set of actions called “package of services” within the program *Partnership for a new development of services 2012-2015*, intended to stimulate the development of the service sector, the efforts following to be focused on the *sectors of services with economic weight*.

It results again that at the community level, interest is expressed for the *services with economic weight*, namely the ones which are different from the administration services of the mission of the public authority provided by the public clerk in public interest and by the managerial services of the liberal professions.

In addition, even since 2000, through the Recommendation of the Council of Europe²⁶ and of the Public Governance Committee of OECD (Organization for Economic Co-operation and

²⁴ Point 34 from the Directive 2006/123/CE of the European Parliament and Council from December 12, 2006 on the services within the internal market, J.O. L 376/December 27, 2006.

²⁵ F.U.E Treaty published on 30.3.2010 in n J.O. C 83/47.

²⁶ Recommendation no. R (2000) 10 on the *Conduit codes of public agents* adopted by the Committee of Ministers of the European Council on May 11, 2000

Development) the conflict of interests was identified in relation to the public power field and with the private field of public power, respectively with the activities developed by the trade companies or autonomous administrations established by the state, commune, city or county, or in which they hold participations, activities which within the legal meaning have commercial nature and are materialized in operations, contracts or transactions aiming the production, distribution of goods (including credit titles), services, works.

Thus, only in the presence of operations with commercial nature we can talk about the priority and protection of an interest with mixed nature, including the interest to satisfy a public necessity and at the same time the private economic interest of the state or of another local public entity and in the fulfillment of this public service, the *public clerk* is obliged to sacrifice his personal interest to the benefit of the public interest.

This is the hypothesis which sets in equation the quality of public clerk, along with the public position and the public service and it opens a new analysis of the notion of *public clerk* extremely useful to identify the conflict of interests and implicitly the corruption.

In the common Romanian law, the *public clerk* is qualified subject in the quality which includes the exigencies of integrity, objectivity, impartiality and probity *specific to the public status and position*. Although concise, the definition does not answer to the requirement to evoke the connection of the subject with the public field and with the exercise of the public position in order to shape the conflict of interests.

*The Recommendation no. R(2000)10*²⁷ represents an interpretative model, although it uses the term of *public agent*, which it defines as being any *individual employed by a public authority*, but also the individual who exercises public positions on a private basis (for example, the notaries, court enforcement officers, official receivers, etc.).

Subsequently, the public agent is the public clerk who is no longer associated to the *bureaucrat*, notion specific to the 18th century, but to the *public official*, who holds a *public position* whose exercise involves activities of *administration* of the public mission and/or management of the private economic interest of the state.

A similar definition was given to the public clerk by the Council on March 22, 2004 in the new Status of European Union clerks according to which: "*clerk of the Communities is any individual who was appointed within the conditions provided by the status into a permanent position in one of the institutions of the communities through a written document of the authority invested with the power to appoint in such institution*" (article 1).

The Romanian normative documents defined the *public clerk* by report to the career public position where the individual was appointed, thus acquiring the status of public clerk, in the following manner: "*the individual appointed in a public position within the conditions of the Law on the Status of public clerks*"²⁸, or "*the individual appointed, within the conditions of the law, in a public position*", or even "*the individual who was released from the public position and finds himself in the reserve body of public clerks*"²⁹.

²⁷ Article 1 from the Recommendation no. R (2000) 10 of the Committee of Ministers of Member States on the conduit code of public clerks, adopted by the Committee of Ministers on May 11, 2000 at its 106th session.

²⁸ Article 4 letter a from the Law no. 7/2004.

²⁹ Article 2 paragraph 2 from the Law no. 188/1999, republished and covering the subsequent amendments. The legal regime applicable to the status of public clerk and to the legal reports between the public clerks and the State or local public administration makes the regulation object of the Law no. 188/1999 republished. Through articles 7-14 the law classifies the public positions and it establishes the categories of public clerks.

Law no. 161/2003³⁰ defines the public clerk by instituting the incompatibility between two public positions.

Thus, the *career public clerk*, respectively the one who fulfills an executive position (specialized referent, competition inspector, expert, etc.) or a public direction position (director of the civil service from the city hall) cannot cumulate this position with high level public authority positions (government member, prefect, deputy prefect) or with *public dignity positions* (deputy, senator).

The *Criminal Code*³¹ defined the notion of public clerk in an extended sense to the *declared service of public utility* with which the individual was invested by the authorities and to any *public position*, regardless of its nature and of the frame in which it is exercised (parliament, government, court, prosecutor's office, legal entity whose capital is integrally or partially hold by the state, etc.).

In this conception, the public clerk is "*the individual who, with permanent or temporary title, with or without a remuneration: a) exercises tasks and responsibilities, established within the law, in view of fulfilling the prerogatives of the legislative, executive or legal power; b) exercises a position of public dignity or any kind of public position; c) exercises, on his own or along with other individuals, within an autonomous administration, another economic agent or a legal entity with integral or majority state capital or within a legal entity declared as being of public authority, tasks related to the fulfillment of its activity object*". (Article 175 paragraph 1); "...*exercises a service of public interest for which he was invested by the public authorities or which is subject to their control or supervision regarding the fulfillment of that public service*". (Article 175 paragraph 2 Criminal Code).

The definition is questionable because it is excessively based on the ambiguity of hypotheses and notions, at least the report to the syntagm "service of public interest for which he was invested by the public authorities" is likely to cause errors and abuses.

Towards this drawback, we strongly have to define the legal content of the public position, of the status of public clerk, of the public service and service of public interest, within the conditions where these notions were used *sic volo* by the Criminal Code to incriminate the conflict of interests.

Indeed, according to article 253¹ Criminal Code, "*The act of the public clerk who, in the exercise of his job tasks, executes an action or participates to the adoption of a decision through which a material benefit was directly or indirectly obtained for himself, his spouse, a relative or affinitive up to the 2nd degree include, or for another individual with whom he was under commercial or labor relations throughout the last 5 years or from whom he benefited or he benefits of services or any kind of benefits, is punished with imprisonment from 6 months to 5 years and the forbiddance of the right to hold a public position by maximum duration*"³².

It is obvious how the equivoque on the notions mentioned is used to extend the criminal range on all the positions, individuals, services and decisions, merely by reporting to the quality of public clerk and to the job tasks.

³⁰ Law no. 163/2003 *on certain measures to insure the transparency in the exercise of public dignities, public positions and in the business environment, prevention and punishment of corruption* was published in the Romanian Official Journal, Part I no. 279 from April 21, 2003 and it incurred several amendments .

³¹ The Romanian Criminal Code, published in the Official Journal, Part I no. 510 from 24/07/2009 was going to be enforced on July 24, 2012.

³² The offense of *conflict of interests* provided by article 253¹ was introduced in the Criminal Code through Law no. 278 from July 4, 2006 *for the amendment and supplement of the Criminal Code, as well as for the amendment and supplement of other laws*, published in the Romanian Official Journal Part I no.601 from July 12, 2006.

The certitude of the law and the scientific rigor impose the reformulation of the definitions of the Criminal Code in order to eliminate from the incidence of the criminal regulation the individual who *exercises a profession or a trade* cumulated with a *public position, of dignity or public authority*.

In practice, the exercise of this cumulus gave rise to certain contradictory debates related to its legal or illegal character and to the existence, in this hypothesis, of a potential conflict of interests.

In what we are concerned, we assess *sic et simpliciter* that *such a cumulus does not represent a form of the conflict of interest or legal incompatibility, as the individual legitimated in the profession or trade, does not become public clerk*, even if he was appointed in a public position occupied through competition and/or obtained following his election through universal suffrage.

In other words, for the occupation of the *position of manager of an institution* whose profile is connected to the exercise of the professional activity (legal court, theatre, opera, philharmonics, etc.), the individual does not exercise a career public position and the professional managed and provided service is not public, but intended for the public.

Under this aspect, we do not approve the solution of the supreme court which placed the status of actor – theatre director – in the category of career public clerks and it attached the incompatibility with the public dignitary position, within the conditions where, the cumulus of the two public positions, namely dignitary and manager of the liberal profession, was not forbidden and it does not represent *in se* an indicator of fraud or conflict of interest, and under no circumstances, of corruption³³. The solutions of the two courts are *extra legem* also because on the judgment date of the appeal against ANI report, the law suppressed the incompatibility³⁴. However, excepting the procedural matters, it is necessary to examine the legal issues resulting from this case in order to prevent the repetition of errors which prejudice the fundamental rights, as the right to image and public dignity, to the exercise of a liberal profession and to the public recognition and support of the companion (spouse, relative, colleague, friend) through favorable decisions in order to obtain all the advantages from the exercise of such public interest profession or through which the service intended for the public is provided.

Subsequently, the criminal law has to make distinction between the public position and the hierarchy of public positions as objective landmark of the administrative system where the career clerk activates, whose continuous training aims to progress in various levels and degrees along his administrative activity; to retain that the career public clerks provide stable public services according to the purpose of the no. 188/1999 in public institutions, and in the fulfillment of these services, they have the vocation to direction positions in the public institution where they usually formed the clerk career; that for the direct or indirect participation to the exercise of the power, the public positions have as object the conservation of the general interests of the State or of other public collectivities (local, regional, etc.).

³³ We are talking about the case of the actor M.D. who was declared by the High Court of Cassation and Justice in legal incompatibility, retaining as legal both the decision of the Court of Appeal Bucharest through which the appeal was rejected, and the notice of the National Agency for Integrity (object of the File. no. 84487/A.I.I./2010), according to which throughout 2008- 2011 M.D. simultaneously hold the position of senator and the position of director “Nottara” Theatre of Bucharest.

³⁴ Paragraph (1) of article 96 from the Law no. 161/2003 was amended by point 3 of article 40, Chapter IV of the Framework – Law no. 284 from December 28, 2010 published in the Official Journal no. 877 on December 28, 2010. Subsequently, on 14.01.2011 when ANI claimed it fulfilled the notification procedure of the notice and on 26.01.2011 when ANI elaborated the establishment of the incompatibility, *M.D. was entitled to cumulate the position of parliamentary with other positions or activities from the didactical field, scientific research, literary – artistic creation* thus the Sentence no. 5153 on September 16, 2011 of the Court of Appeal Bucharest and the Decision of HCCJ on June 19, 2012 are not founded on the law.

In other words, the public clerk and the public positions of public authority or public power are provided by article 81 paragraph 2 from the Law no. 161/2003 and they are localized in the central or local administration, some of them being endowed with public authority or power, and the legal status of the individuals exercising such positions is subject to the public law regulations.

It is necessary to correctly approach the cultural – artistic creation and the position of manager of liberal profession in order to be classified within the normal limit of the elements which circumscribe the conflict of interests.

In the particular case analyzed, the theater director fulfills a public position which lacks the prerogatives of public power, having an organizational character of management of an artistic service provided by professional actors. In other words, the position of theatre director is based, according to the law, on the artistic and administration competences regarding the exercise of the profession within the shows of the artists, the theatre director having an initial university training, not in the economic or legal field, but in the field of show art. The profession of theatre director results from the diploma achieved which grants him the right to belong to an artistic network and to declare himself an artist. The professional path of the theatre director is registered in the field of shows where he actually performs professional artistic activities.

Thus, in the activity of the theatre director, the main weight is not the administration of the building where the theatre – show takes place, but the artistic act itself. The theatre director is, on one hand, the holder of a contract on limited period whose object is to provide the profession of actor, and on the other hand, he is the agent (appointed by the administrator of the city) throughout a determined period. The status of theatre director, who also acts as an actor, is subject to the private law regulations.

In this particular case, M.D. was appointed in the position of agent – manager by the municipality council (administrator of the municipality) and he was authorized to manage the useful and professional service of the actors. The position of theatre director *does not reveal the prerogatives of public power*, being only the legal means which the director holds in order to fulfill the manager mandate, thus the elements of incompatibility and the conflict of interests are not shaped.

In the illustrated profile, the theatre director does not hold the career public position or the public authority position, as faultily interpreted by the inspector from the National Agency for Integrity and faultily retained by the two legal courts.

The same solution is also provided by the European legislation which ruled that certain positions are contradictorily through their character, that in certain hypotheses the exercise of the profession (as the profession of attorney or court enforcement officer) cannot coexist with the tasks of the public function and that certain administration positions of the profession are not related and thus they do not enter in contradiction with the public dignity positions.

In other words, it is reasonable that only in the cases where the law assesses that two public positions are not compatible or the profession with the public position would be applicable the provisions related to incompatibility, and in the cases where the law punishes the usage in a certain manner of the public position or of the professions, the provisions related to the conflict of interests would become applicable.

In terms on the above mentioned information, we can retain that the *incompatibility* between two public positions or between the public position and profession or trade *is a law matter, as it exists if it results from the law.*

We have to mention that the European Union law makes the distinction between the professions which provide the so-called “*services towards individuals*” which include the social services, health and educational services, art services and which, through their nature, are

provided in a specific context. These services broadly vary between the Member States due to the different cultural traditions, thus, implicitly, *the individuals who provide them* and who manage these professions in the public system, *do not hold a public position with relevance for incompatibilities or conflicts of interests.*

This means that in the hypotheses where the public manager position is conditioned by the legitimization in a certain profession regulated through specific regulations and professional deontology regulations, the provisions related to the public position and to the career public clerk do not apply. The same principle also results from the interpretation *per a contrario* of the legal provisions which forbade the cumulus between the career public positions or between the career public position and another public position of public dignity, in the following manner: “*The quality of public clerk is incompatible with any other public position than the one in which he was appointed, as well as with the positions of public dignity...*”(article 94 paragraph 1 and paragraph 2 from the Law no. 161/2003).

Subsequently, the judge who holds the position of president of the court or of the court of appeal or the professor who holds the position of university rector do not become career clerk because they mainly manage the profession.

The suppression of the interdiction of cumulus of certain public positions corresponds to the European law, according to which certain professions (as the ones from the cultural – artistic creation field) are not directly connected to the position and/or mission of public dignity, or likely to affect the independence of the service provider or the general interest, thus they do not represent a potential risk for the free competition on the internal market.

According to the new legislative orientation, the economic incompatibilities were also eliminated, the career public clerk and the public dignity and authority clerk being allowed to exercise other positions and/or activities with or without lucrative purpose in fields from the private sector, considering that this cumulus does not affect the transparency in the exercise of the public dignity, public position or business environment and it does not stop the prevention and punishment of corruption³⁵.

In conclusion, we retain that the administrative law provisions which forbade and punished the incompatibility were cancelled on December 28, 2010 when its effects were also extinguished, circumstances in which the continuation of the penalty procedure is no longer supported by the law, being applicable the principle enounced by article 15 paragraph 2 of the Constitution according to which if the new law provides that a behavior has to be punished in a less severe manner, the application of more severe penalty is not legitimate. This principle prevents the ultra-activity of the ancient, more severe law and provides retroactivity to the new law, more favorable in the matter of criminal and contravention repercussion whose broader meaning also includes the provisions of administrative penalty, as the ones applicable to incompatibilities.

We have to underline that once with the elimination of the incompatibility between the public position and other activities from the fields of private sector, the *Law no. 161/2003* suggests the significant weight of the management tasks of the profession compared to the tasks assigned to the public dignity position through the disposition according to which “*the documents which form the professional file of public clerks who perform the activities provided*

³⁵ The derogation is expressly presented: “*The public clerks, the parliamentary public clerks and the public clerks with special status can (s. n. A. C. Tarsia) exercise positions or activities in the didactical, scientific research, literary – artistic creation field. The public clerks, the parliamentary public clerks and the public clerks with special status can exercise positions in other activity fields from the private sector (s. n. A. C. T.), which are not directly or indirectly related to the tasks exercised as public clerk, parliamentary public clerk and the public clerk with special status, according to the job description*”. (article 96 paragraph 1 of the Law no. 161/2003).

under paragraph (1) are managed by the public authority or institution where they are appointed.” (article 96 paragraph 2).

In conclusion, the incompatibility exists only if it expressly results from the law.

Compared to the incompatibility, the *conflict of interests is a factual matter* because it exists only in the situations where for the adoption of a decision intended for the general interest, the public position is used in personal interest, raising fraud or corruption suspicions related to the decision taken.

The simple circumstance that the public clerk also exercises other activities for which he expresses personal interest, does not shape the existence of conflict of interests, because *volens-nolens* acts the presumption that the material or moral *personal interest* results from private legitimate activities consecutive to the normal reports with closed individuals, with public or private law legal entities, with affiliations to political parties, national or international non-profit associations or organizations and that this presumption is only overturned through the act of using the public position in personal interest and to the prejudice of the general interest.

Subsequently, in the current acceptance of the law, *the personal interest no longer has a major relevance*, its place being taken by the *public position* which becomes the *central element* of the conflict of interests if it is used in personal interest and in the prejudice of the public interest, being the proof of corruption.

In order to make distinction between the disciplinary deviation and the breach of the regulations regarding the conflict of interests and incompatibilities, the law defined them separately, the deviation from the labor discipline being “*The guiltily breach by the public clerks of the duties corresponding to the public position they hold and of the professional and civic conduit regulations provided by the law*” (article 77 paragraph 1), and the conflict of interests being the act of “*breaching the legal provisions related to duties, incompatibilities, conflicts of interests and interdictions established through the law for the public clerks*”. A specific and gradual³⁶ penalty regime was regulated, and for certain cases, also other forms of the liability (administrative, civil and even criminal, according to article 77 paragraph 6).

It results that, *de lege lata*, the conflict of interests is *attached to the status of career public clerk*, and his offense to use the public position and/or the public service in *is personal interest*, of financial or economic nature, is classified, according to its gravity and consequences, within the regulations of criminal law, civil law, labor law or administrative law.

The practice revealed that the most frequent cases with potential risk of conflict of interests are registered in the matter of public procurement procedure, with frequent actions to influence the public clerk of the *contracting authority* in the decisions related to the award of contracts³⁷, being registered even situations where the conflict of interests “is transferred” into another Member State or in a third state where natural or legal entities corrupt foreign clerks in order to obtain the award of public procurement, or where the clerks are corrupted by natural or legal entities from third states (Asian, African, Latin- American), in view of being awarded the public procurement contracts on the national markets.

Subsequently, the public procurements are likely to prejudice the competition environment and the adequate operation of the internal market, thus the objective of this matter aims the relation between the public position and the conflict of interests of the European legislation and legislation of the Member States. This explains the new approach of the conflict of interests by

³⁶ Written reproach, reduction of wage rights by 5-20% throughout a period of up to 3 months; suspension of the right to promote in waging degrees or to promote in the public position throughout a period of 1 -3 years; demotion in the public position throughout a period of up to one year or dismissal from the public position (article 77 paragraph 2 letter j and paragraph 3 from the Law no.188/1999).

³⁷ Romanian and foreign mass-media released many similar cases .

the European Commission, which in its notification from April 13, 2011 called “*Act on the sole market: Twelve levers to boost growth and strengthen the confidence*”, included among its twelve essential actions to be adopted by the EU institutions before the end of 2012, the revisal and modernization of the legislative framework applicable to public procurements necessary to increase the flexibility in the award of the contracts. The *Directive Proposal on the public procurement from December 2011* (COM/2011/0896 final - 2011/0438 (COD))³⁸ was formulated based on the same reasons, in which the main purpose established is the efficient usage of public funds by stopping the phenomenon represented by the usage of the public position in personal interest.

In order to respond to the European requirements, the Romanian legal order adopted the Government Emergency Ordinance no. 66 from June 29, 2011³⁹ which established rules and procedures intended to prevent deviations from the adequate management of the European funds and of the national public funds, afferent to the European funds and to report to the European Commission and to other international donors any inaccuracies related to these funds⁴⁰.

The new regulation is also related to the conflict of interests⁴¹ which can arise in the matter of public procurement, this time the legal regulations⁴² acting on two plans. On a first plan, the regulations apply for the reports of administrative law arising from the development of the award procedure of contracts between the *tenderer* participants and/or the *candidates* called “*economic agents*”- private law legal entities with lucrative purpose and “*public law bodies*” – and *contracting authorities*⁴³.

The *economic agents* (*tenderers or candidates*) are legal entities without lucrative purpose, created with the purpose to meet “the requirements of general interest, of other nature than industrial or commercial, and the “*contracting authorities*” are – the state, territorial collectivities, public law bodies and the associations which include one or more of these collectivities or one or several public law bodies.

On the second plan, the provisions of the Government Ordinance no. 34/2006 are applicable for the commercial law reports arising from the *commercial contract* concluded by the

³⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0896:FIN:RO:HTML>

³⁹ The Government Emergency Ordinance no. 66 from June 29, 2011 on the *prevention, establishment and punishment of non-conformities arising from the assignment and usage of the European funds and/or the associated national public funds* was published in the Romanian Official Journal, Part I, no. 461 from June 30, 2011.

⁴⁰ *The international donors are:* Norway along with Liechtenstein and Island, which grant a non-reimbursable aid of 306 million Euro for an environmental program throughout 2012-2014 through the programs of the Norwegian Financial Mechanism and of the European Economic Space (EES); Switzerland, through the Grant Scheme for NGOs, provided to the organizations o 2.000.000 Swiss francs for the Social Component and 600.000 CHF for the Environment Component, non-reimbursable financings at the disposal of the Foundation for the Development of Civil Society.

⁴¹ According to article 3 paragraph 2 and 2nd Section called: “*Rules in the matter of conflict of interests*” from the Government Emergency Ordinance no. 66/2011.

⁴² Law no. 337 from July 17, 2006 published in the Official Journal no. 625/July 20, 2006 for the approval of the Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, assignment contracts of public works and service assignment contracts

⁴³ The notions of “*public procurements*”, “*public law body*”, “*tenderer economic agents*”, “*candidate economic agents*”, “*contracting authorities*” are explained through article 1 of the Directive 2004/18/ CE on March 31, 2004 *on the coordination of the procedures for the award of the procurement contracts of public works, goods and services*, Official Journal L34 from April 30, 2004 and through article 1 of the Directive no. 2004/17/CE on March 31, 2004 *on the coordination of the procedures for the award of public procurement contracts of coordination of the award procedures of procurement contracts in the fields of water, energy, transportations and postal services*, Official Journal L134/1 from April 30, 2004.

contracting authority with the tenderer which was declared adjudicator of the auction and part of the procurement contract.

We can notice that the emergency ordinance identifies new parts in the reports arising from the public procurements, respectively the *authorities with competences in the management of the European funds* and the *beneficiaries of the non-reimbursable funds* along with the *contracting authorities (which are actually included in the first category)*⁴⁴. All the participants have to take measures in order to *prevent the occurrence of the situations of conflict of interests throughout the entire selection procedure of the projects to be financed*⁴⁵, to immediately notify the Department for Fight against Fraud (DFAF) if they establish signs of fraud or fraud attempt, to report from incipient stage the activities and non-conformities which imply the notification of the European Commission – European Office for Fight against Fraud (EOFF) or the international public donors.

In other words, the *authorities* act in order to prevent, investigate and dissuasively punish the conflict of interests and the *beneficiaries* have to take all the necessary measures in order to avoid the situations likely to determine the occurrence of a conflict of interests. In the profile mentioned, the “*authorities*” act as collective subjects of the reports arising from the award of the European or national funds and they *highlight* two types of tasks of the *public position*, some which related to the *obligation of monitoring, supervision* and notification within a public procurement procedure, and others are directly or indirectly related to the fraud systems and relevant fraud indices connected to the management of these funds, these tasks being relevant for the conflict of interests as they highlight the usage of the position in personal interest and to the detriment of the public interest.

In terms of the *beneficiaries of non-reimbursable funds*⁴⁶, the ordinance institutes the interdiction to employ natural or legal entities which were involved in the verification/evaluation process of the financing requests within the selection procedure throughout a period of at least 12 months upon the signature of the financing contract.

The disposition highlights for the first time the conflict between the personal interest of the *professional* and/or of the individuals close to him and the public interest which can be

⁴⁴ According to the ordinance, the *competent authorities for the management of European funds* – are the legal entities with management tasks (administration and coordination) within the programs financed from structural funds, cohesion funds, from the European fishing fund, from the funds afferent to the Instrument of assistance for pre-accession, authorities which insure the management of the European Neighborhood and Partnership ENPI, the Agency of Payments for Rural Development and Fishing, the Agency of Payments and intervention in Agriculture within the financing programs of the joint agricultural policy, the implementation agencies- including the PHARE Payment and Contracting Office- within PHARE programs, the PHARE Payment and Contracting Office within the Schengen Facility, Facilities of Transition and SEE Financial Mechanism, excepting the delegated projects, as well as the national authorities responsible with the participation of Romania to other programs financed from the European funds.

⁴⁵ The provisions of the Government Emergency Ordinance no. 66/2011 are applied not only for the European funds in the meaning of amounts resulting from the non-reimbursable financial assistance granted to Romania from the general budget of the European Union and/or from the budgets it administers or which are administered on its behalf, but also for the national public funds afferent to the European funds, namely the amounts resulting from the general consolidated budget, used to insure the co-financing, to pay the pre-financing, to replace the European funds if their payment is temporary unavailable/ceased, to supplement the European funds in view of finalizing the projects, as well as the ones which represent other categories of expenses duly regulated to this end.

⁴⁶ According to the jurisprudence of the CJEU, the beneficiary of the funds can also be a contracting authority. For further information, see: CJEU C-465/10 from December 21, 2011, *Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration vs. Chambre de commerce et d'industrie de l'Indre*.

prejudiced by the public clerk who was involved in the financing/evaluation process of the financing requests. However, the analysis has to be nuanced in this hypothesis as well because in the public procurement field, not all the professions are relevant for the existence of conflict of interests and/or incompatibility. Indeed, the professional (or the individuals close to him) does not exercise a career public position, but he may have hold the quality of founder, shareholder, associate, member of board of directors, member of the control or revision commission of a legal entity with or without lucrative purpose which may had been financed from public funds, or had acquired credits warranted by the state or by the authority of the local public administration, or had been a part of a public procurement contract.

In all these situations, the conflict of interests is presumed and it is imputable to the professional – beneficiary of the public funds or of the public procurement contract.

In summary, we underline that the commercial business set in equation the public position, the public service and the profession which are mainly used according to the law, and for the existence of the conflict of interests, only the public position is relevant because it can be used to fulfill the personal goal to the detriment of the public interest.

In other words, the *profession is not likely to cause a conflict of interests* even if the professional holds a public position. This because, from the legal point of view, the public position held by the career clerk does not imply the administration and management activity of the institution whose profile is identical to the profession.

Bibliography

- Ioan Alexandru, *Drept administrativ european*, Universul juridic Publishing House, Bucharest, 2008.
- Law no. 188 of 8 December 1999 on the Statute of Civil Servants, republished in the Official Gazette of Romania, Part I no. 365/29 May 2007, as amended;
- *Code of conduct for civil servants* republished in the Official Gazette of Romania no. 525 of August 2, 2007
- Law no. 452/2004 approving Government Emergency Ordinance no. 56/2004 on establishing the special status of civil servant called Public Manager, published in the Official Gazette of Romania, Part I, no. 590 of July 1, 2004
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/27 December 2006
- Recommendation no. R (2000) 10 on codes of conduct for public officials adopted by the Committee of Ministers of the Council of 11 May 2000
- Law no. 163/2003 on measures to ensure transparency in the exercise of public dignities, public functions and business environment, the prevention and punishment of corruption, published in the Official Gazette of Romania, Part I no. 279 of April 21, 2003, as amended.