CONFLICT OF INTEREST – A COMPARATIVE ANALYSIS*

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1. Concept and definition

The offence of conflict of interest was introduced in Title VI (“Offences pertaining to activities of public interest or relating to other activities regulated by the law”), chapter I (“Malfeasance in office or offences related to office”) of the Special Part of the Romanian Criminal Code of 1969 (hereinafter referred to as C. Code 1969), in order to bring the Romanian criminal law in line with European standards regarding the protection of public servants’ integrity, of the competitive environment, of quality of services, preventing the conflicts of interest, guaranteeing the independence and impartiality of additional service providers. Moreover, the member states committed themselves to take the necessary measures so as to prevent, identify and remedy offences that would occur in the course of the procurement procedures, thus ensuring equal treatment for all economic actors.1

As such, Romania completed the general normative framework to protect the work relations as a social value, by criminalizing in Art. 253 C. Code 1969 the conduct of the public servant who would find himself in a situation of conflict of interest. After the Criminal Code came into effect on February 1,

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* A part of the final court decisions in the matter of the offence of conflict of interest that were examined and serve as examples throughout this study have been sent to the data bases regarding the case law of the Prosecutor’s Office attached to the High Court of Cassation and Justice by the prosecutor’s offices.


2 Law No. 278/2006 amending and supplementing the Criminal Code, as well as amending and supplementing other laws, published in the Official Gazette of Romania, Part I, No. 601, dated July 12, 2006. In the explanatory statements, this law mentions: “In order to make more efficient the prevention and the punishment of acts of corruption, the bill amending the Criminal Code also proposes to criminalize the “conflict of interest” in Article 253. This is intended to enforce criminal penalty for the deed of a public official who, deliberately and fully aware of the consequences of his actions, pursues his personal interests by way of exercising public duties. [...] the provisions of the Criminal Code regarding malfeasance in office does not cover such a situation [...]. By criminalizing conflict of interest, we attempt to remove any doubt regarding the conduct of a public official who is called upon to carry out an act or to participate in making a decision under his public duties, and by doing so he secures a personal gain, either directly or indirectly, for himself, or his spouse, or kin or relative up to the 2nd degree or any person with whom he has been in a business or work relationship in the past 5 years or from whom he received or still receives any type of services or benefits. At present, there is a reasonable suspicion that a public official will not do his best in order to satisfy the public interest but will try to satisfy his own interest or that of one of the abovementioned persons.” (available at www.cdep.ro/proiecte/2006/000/20/4/em24.pdf, accessed on July 5, 2016)
2014, the offence of conflict of interest became criminalized by Art. 301 C. Code, Chapter II, “Malfeasance in Office”.

In recent doctrine, it is mentioned that the criminalization of conflict of interest is a response to “increasingly frequent signals from civil society, but also from international bodies and institutions regarding the impact produced by crimes committed in violation of the deontological ethics. Regulations regarding conflict of interest can also be found in the legislation of other European Union member states (Austria, Belgium, Cyprus, Finland, France, Lithuania, Poland, Spain and Hungary). Romanian legislation, too, contained such laws regarding the conflict of interest prior to 2006 [...], however such laws proved the existence of a fundamental confusion between incompatibility and conflict of interest.

[...]. Conflict of interest generates a state of incompatibility *lato sensu*, however conflict of interest is to be differentiated in terms of the causes that lead to this incompatibility by the fact that the determining factor is not necessarily a legal situation or an activity that is incompatible with the activity conducted within office duties, but a personal interest of a patrimonial nature that might influence the execution of the duties in an objective manner (by the public servant, our own remark – A.L.) according to the Constitution and to other normative acts. There have been further regulations regarding the conflict of interest in relation to certain categories of public servants or dignitaries (by means of special statute or even by internal regulation policy), however until Law No. 161/2003 [...] there was no unitary regulation of conflict of interest.”

We also note that, for a conflict of interest to exist, there must be a decision made in the interest of such persons as specifically required by the law and incompatibility must exist, as an illegal situation, whenever there are several positions held concurrently while forbidden by the legislator, since such a situation may be potentially generating a conflict of interest.

With regard to the criminalization of such fact, the High Court of Cassation and Justice underlined the fact that “it was generated by the occurrence of new types of relationships between the public sector and the business sectors which in turn give rise to public partnerships and hence to a potential growth of new forms of conflicts of interest which would involve personal interests and public obligations (i.m. – A.L.) of the person holding a public office.[...] Although a conflict of interest does not mean corruption *ipso facto*, the occurrence of conflicts between the public servants’ personal interests and public duties may lead to corruption, unless appropriately dealt with. Criminalizing the offence implies not only the interdiction of a public servant’s private interests but also prompting fairness in the administrative decision making, so that any unresolved conflict of interest may not lead to an abuse of office. By definition and content, the offence of conflict of interest has taken over some of the constituent elements of the offence of corruption, in whose proximity it was placed.”

*Private interest* is assessed as a mere vocation or possibility which is not listed within the legal categories of law. Law defines the legitimate private interest as a “possibility to claim a certain conduct while considering to achieve a subjective, future, predictable right that is envisaged” [Art. 2 paragraph (1) letter p) of the Administrative Litigation Law No. 554/2004].

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4 High Court of Cassation and Justice, Sentence No. 666/2014, final by Criminal Judgment No. 12/2015 of the High Court of Cassation and Justice, panel of 5 judges (made available at [www.scj.ro](http://www.scj.ro), accessed July 6, 2016).
5 Published in the Official Gazette of Romania, Part I, No. 1154 dated December 7 2004, with subsequent amendments.
Legitimate public interest is defined as an “interest that is aimed at the rule of law and constitutional democracy, the guarantee of the citizens’ fundamental rights, liberties and duties, satisfying the community needs and the fulfilment of the duties of public institutions” [Art. 2 paragraph (1) line r) of Law No. 554/2004]. Private patrimonial interests enter into conflict with public interests.

Conflict of interest is understood as a situation in which a person that holds a public rank or a public office has a personal patrimonial interest that might influence the objective fulfilment of his/her constitutional duties and of other normative acts (Art. 70 of Law No. 161/2003). 6

Conflicts of interest, particularly in the public sector and also in the private sector, have lately generated much reasons of concern on international level, being targeted by specific strategies. Criminal and administrative regulations have been put in effect in order to support the public servants’ integrity and objective decision making in both public and governmental institutions. 7

As an example, we mention that in Art. 13 of the Model code of conduct for public officials, annexed to Recommendation No. 10/2000 of the Council of Europe Committee of Ministers 8, a public official’s conflict of interest is considered to arise when such public official has a private interest which is such as to influence or appear to influence the impartial and objective performance of his or her official duties. The public official’s private interest includes any advantage to himself or herself, to his or her family, friends and persons or organizations with whom he or she has had business or political relations. It includes also any liability, whether financial or civil, relating thereto.

Title IV of law No. 161/2003 as subsequently amended and supplemented regulates the conflict of interest and conditions of incompatibility that might occur in the exercise of public offices or functions. 9 According to Art. 1 paragraph (1) of Law No. 176/2010 10 regarding the integrity in the performance of public functions and offices, amending and supplementing Law No. 144/2007 regarding the establishment, the organization and the functioning of the National Integrity Agency as well as amending and supplementing other normative acts, the following public officials must provide declarations concerning their wealth and interests: the President of Romania; presidential councillors, state councillors of the Presidential Administration; the speakers of the Chambers of Parliament, the deputies and the senators; the Romanian members of the European Parliament and the Romanian members of the European Commission; the prime-minister, the members of Government, the state secretaries, the state sub-secretaries, other similar positions, as well as the state councillors of the

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6 Law No. 161/2003 regarding some measures taken in order to ensure transparency in carrying out public duties, of public positions and in the business field, preventing and punishing corruption, published in the Romanian Official Gazette, Part I, No. 279 dated April 21, 2003, with subsequent amendments.
7 With regard to the progress of the criminal and administrative regulations regarding the conflict of interest, see also A. Chirila, Conflict of interest. Legal Criminal and Administrative Implications, in “Revista Transilvana de Stiinte Administrative” No. 27/2010, p.17.
10 Published in the Official Gazette of Romania, Part I, No. 621 dated September 2, 2010 with subsequent amendments.
prime-minister’s working team; the members of the Superior Council of Magistracy; judges, prosecutors, assistant magistrates, other similar positions, as well as judicial assistants and so forth.

The Constitutional Court\(^\text{11}\) as notified by the High Court of Cassation and Justice prior to enacting the provisions stipulated in Art. I (5) and Art. II (3) of the Law amending and supplementing normative acts and the sole article of the Law for the amendment of Art. 253\(^\text{1}\) Criminal Code 1969 ruled that the said provisions were unconstitutional due to the fact that the terms of “public servant”/“official” as defined by Art. 175 Criminal Code 1969, respectively that of “public official” referred to in Art. 75 C. Code did not include the President of Romania, the deputies and the senators who were thus exonerated from criminal liability for all and any offences in which the active subject is a public servant or official. The Constitutional Court noticed that by replacing the term “public servant” with the wording “persons who, while carrying out such office duties as resulted from an employment contract and a job description signed with an institution listed under Art. 145”, exoneration from criminal liability for the offence of conflict of interest ensues to all the persons who, although covered by the term of “public servant” for criminal law purposes, as defined by Art. 147 of the Criminal Code of 1969, take the relevant office by election or appointment. Moreover, it showed that by eliminating acts such as issuing, adopting, approving and signing of administrative documents or decisions regarding the creation and the artistic, literary, scientific and professional development from the category of facts that might be conflicts of interest, the offence itself would remain void of content. The constitutional litigation Court also underlined the fact that the amendments made by the legislator affected the criminal protection given to some particularly important social values. It was stated that due to the fact that the presidential and parliamentary mandates are defined as public office positions, as stipulated in Art. 16 paragraph (3) of the Romanian Constitution, republished (Constitution or Fundamental Law), the persons holding these positions exercise such duties and responsibilities as established by the Constitution and the law in force, in order to achieve the powers with which they are vested at the highest level within the Romanian state. Therefore, considering the scope of the duties falling to the elected offices that are excepted from the provisions of Art.147 Criminal Code 1969 and of Art. 175 Criminal Code, since these offices are par excellence understood as public power, the vocation of individuals holding such offices to be active subjects was considered justified with regard to malfeasance in office and corruption offences. That being said, the way in which the legislator excluded from the scope of criminal liability the very persons who occupy representative positions in state and who exercise real powers, while any criminal acts that might be committed by such persons would lead to serious consequences on the proper functioning of the public authorities, on the decision-making process that affects the society’s general interest and, not least, on the citizens’ trust in the authority and reputation of the state institutions was considered paradoxical. The Constitutional Court decided that a legal statute that is different and privileged in terms of criminal liability is contrary to the principle of citizens’ equal rights stipulated by Art. 16 paragraph (1) of the Constitution, according to which “Citizens are equal before law and before the public authorities, without any privilege or discrimination”. In addition to that, the abovementioned status was deemed to disregard the provisions of Art. 16 paragraph (2) of the Constitution, which stipulates the constitutional principle “Nobody is above the law”. Moreover, such a status was deemed to violated the provisions of Art. 11 paragraph (1) of the fundamental Law, according to which “The Romanian state undertakes to fulfil precisely and in good

faith the obligations derived from the treaties it has entered into.” Therefore, by ratifying or adhering to international conventions, the Romanian state undertook to observe and strictly transpose the international provisions into its internal law, namely to criminalize active and passive corruption of the people falling under such categories as: “public agent, member of public national meetings, national official/ public official”, concepts that correspond, in the Romanian criminal law, to those of “public servant/official”.

Mutatis mutandis, the Constitutional Court has maintained the same arguments regarding the impunity clause for those persons that hold public functions or offices obtained either by appointment or election within public institutions, public authorities, institutions or other legal persons of public interest, with regard to the offence of conflict of interest. Moreover, as far as the amendments of Art. 253 Criminal Code 1969 are concerned, the same court showed that according to Art. 1 paragraph (5) of the Fundamental Law, the observance of the Constitution is mandatory, and the Romanian Parliament (Parliament) may only exercise its powers of criminalizing and decriminalizing antisocial acts, subject to the observance of the norms and the principles established by the Constitution. In the same manner, the Parliament cannot proceed to eliminate the criminal legal protection of constitutional values. The regulatory freedom of the Parliament is exercised in such cases by regulating the conditions in which antisocial acts that prejudice the values stipulated and guaranteed by the Constitution are criminalized.

The legislator proceeded to a delimitation between the conflict of interest in the exercise of a governmental office and of other public authority positions within the national and local administrations, the conflict of interest regarding the local elected representatives and the conflict of interest regarding public servants. A person that holds a Government position, a state secretary or sub-secretary or other similar positions, prefect or sub-prefect is required to not issue an administrative act or conclude a legal act or participate in decision making in his or her public authority capacity if that would result in a material gain for himself/herself, for his/her spouse or 1st degree relatives (Art. 72 of Law No. 161/2003). The said limitations apply also to mayors, vice-mayors, general mayors and vice-mayors of Bucharest (Art. 76 of Law No. 161/2003).

A public servant is in a situation of conflict of interest if (s)he is called upon to settle claims, make decisions or to participate in decision making regarding natural or legal persons with whom (s)he has patrimonial relationships; or if (s)he participates in committees assembled pursuant to the law together with other public officials that are spouses or 1st degree relatives; or if his/her own, his spouse’s or his 1st degree relatives’ patrimonial interests can influence the decisions (s)he must take in the exercise of his/her public position (Art. 79 of Law No. 161/2003).

The conflict of interest was originally criminalized by Art. 253 paragraph (1) of the former Criminal Code (Law No. 278/2006)\textsuperscript{12}. The regulation was also included in Art. 301 of the new Criminal Law.\textsuperscript{12}

\begin{footnote}
\textsuperscript{12} Conflict of interest was, in accordance with Art. 253\textsuperscript{1} paragraph (1) Criminal Code 1969, “The deed of the public servant who, while exercising his public duties, carries out an act or participates in decision making by means of which, either directly or indirectly, a patrimonial benefit resulted for himself, his spouse, kin or relative to the 2\textsuperscript{nd} degree, or for any other person with whom he had business or work relationships in the past 5 years or from whom he received or still receives services or other benefits.”
\end{footnote}
According to Art. 301 of the new Criminal Code (hereinafter referred to as C.C.), the offence of conflict of interest is understood as: “The act of a public servant who, in the exercise of his office duties, has committed an act or participated in a decision making by means of which he secured, directly or indirectly, a patrimonial advantage for himself, for his spouse, his kins or relatives up to the 2nd degree included or for any other person with whom he had business* or work relationships in the past 5 years or from whom he received or still receives advantages of any type”.

As far as the criminalization of the offence of conflict of interest is concerned, the Romanian case law holds that it is only an appearance that “a situation of inequity occurs towards a certain category of people, as in fact the criminalization of this offence is specifically aimed at ensuring the impartiality and independence of those who hold public offices and who could be influenced in such circumstances by certain categories of people with whom the public institution might enter into agreements. It is due to this protection of the public position that the persons who hold such office have been restricted, but all such restrictions were accepted at the moment when they run for the public office, as it is obvious that by accepting such office the respective official undertakes not only the rights deriving from but also the obligations imposed by such position, as well as particular interdictions and limitations”.

As a first conclusion, considering the abovementioned, it is to be noticed that, in terms of content, the two texts criminalizing the conflict of interest (Art. 2531 Criminal Code 1969 and Art. 301 C.C.) are similar. Some distinction appears only in relation to wording. Thus, the new Criminal Code uses more rigorous and comprehensive terms: “obtained” replaced “was achieved”; “patrimonial benefit” replaced “material benefit” and “benefits of any type” replaced “services and benefits of any type”.

In the French legislation, the act is recognized as an offence in paragraph No. 3, “Conflict of interest”, within Section III (Title III, Book IV), “Lack of public probity” of the French Criminal Code (hereinafter referred to as F.C.C.), structured in 2 articles: 432-12 and 432-13.

As such, Art. 434-12 F.C.C. forbids the taking, receiving or keeping of any interest in a business or business operation, either directly or indirectly, by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate who at the time in question has the duty of ensuring, in whole or in part, its supervision, management, liquidation or payment” under the penalty of five years’ imprisonment and a fine of EUR 75,000.

According to Art. 432-13 of the F.C.C., “If a member of the Government or holder of a local executive office, official or agent of a public authority acting effectively who has been directly responsible for ensuring the control or monitoring of a private enterprise, for concluding contracts of any kind with a private enterprise or for expressing opinions on operations carried out by a private enterprise of for proposing directly to the relevant authority decisions on the operations carried out by a

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Code, is unconstitutional. See also V. Mirisan, “Conflict of interest. An offence due to result or to danger? Unconstitutional aspects”, “Universul Juridic” magazine, No. 1/2016, last accessed July 15, 2016.

13 Appeals Court Bucharest, Sentence No. 69/2014, final by Criminal Judgment No. 200/2014 of the High Court of Cassation and Justice.
The same sanctions shall be applicable for any involvement, through work, consultancy or capital, in a private company that holds at least 30% of the joint capital or for entering into a contract subject to de jure or de facto exclusivity with one of the companies mentioned in the foregoing paragraph.

Within the meaning of the former two paragraphs, any public corporation operating in a competitive sector pursuant to the private law rules is deemed similar to a private company.

These provisions are applicable to the staff of public establishments, of public enterprises or mixed companies in which the state or public enterprises hold directly or indirectly over 50% of the capital and to the public operators provided for in Law no. 90-568 of 2 July 1990 on the organisation of the public post service and of France Télécom.

Mere shareholding in companies quoted on the stock exchange or the devolution of an estate consisting in shares is not considered wrongdoing."

The two articles forbid to both public servants and to local elected representatives the right to perform duties or hold shares in various enterprises, to have any interests in business operations or to preserve said position or share portfolio after being elected or appointed in the public office. The above mentioned legal norms have a preventive role in the occurrence of an effective conflict of interest. The relevant case law defines conflict of interest in certain conditions, as a continued offence. However the legal texts do not punish a person who, prior to being elected or appointed to a public office, supervised a company or a particular business operation whereas during his/her incumbency as a public servant (s)he ceased any further involvement in the said company or business operation.

Similarly, in the Romanian legal system, a public office, either elected or appointed, is incompatible with the capacity of a shareholder or corporate director, regardless of the entity organization.

1. The Legal Scope

The main legal scope consists in the social relationships in terms of the integrity of a public servant’s (or similar persons’) conduct in carrying out office duties, such relationships implying an abstention from making any decisions that might create a material benefit, directly or indirectly, to himself or to a third party. Any favours to kins, relatives of forbidden degree or to persons with whom work relationships were maintained in the past 5 years are thus excluded, as well as to any other persons from whom (s)he received or still receives any benefits whatsoever.
The secondary legal scope consists in the social relationships concerning the protection of the competitive environment, of the quality of services, the prevention of conflicts of interest, guaranteeing the service providers’ independence and impartiality.\textsuperscript{14}

Similarly, in the French criminal system, the protected legal scope consists in the social relationships regarding “the moralization of public life by creating a clear distinction between power, business and capital, protecting the persons that might fall prey to temptation, as well as regulating the passage from a public position to a private activity.”\textsuperscript{15}

The Romanian High Court of Cassation and Justice in Romania holds that the legislator – by criminalizing conflict of interest – “intended to protect social relationships regarding the proper development of a public servant’s activities, which entails a fair behaviour by those who carry out their duties as part of public authorities. This implies the public servant’s fairness in carrying out his duties and also abstaining from making decisions that might secure to himself directly, indirectly or by means of a third party, any material advantage, being excluded any favours to relatives or to any persons with whom (s)he had business relations. Moreover, the criminalization of the act aims at protecting the social relationships in terms of protecting a natural or legal person’s lawful interests against any illegitimate interests of a public servant.”\textsuperscript{16}

The French legislator understood to “moralize” the public servants’ passage to the private sector so that their future employers may not make use of the former public servants’ social network that they might have developed during their time in public office.\textsuperscript{17}

3. The offence does not have a material object. The incriminated act concerns a public servant’s conduct in exercising his/her duties, any potential goods obtained as a patrimonial benefit consisting in the product of the offence. The specialty literature iterates possible ways of committing the offences, which would allow the existence of a material object, such as a document drafted by the perpetrator while exercising office duties (carrying out of an act) to influence the obtaining of material benefits by such persons as stipulated by the law.\textsuperscript{18}

The French legislator made use of such criteria as the result of the offence, in order to establish the maximum fine applicable to the offence of conflict of interest, as provided in Art. 432-13 F.C.C. (a fine of EUR 200,000 Euros that may be increased up to double the result of the offence).

4. The active subject of the offence in the simple form qualifies by his capacity as a public official within the meaning of Art. 175 C.C.

\textsuperscript{14} Administrative acts or legal acts entered into in violation of impartiality and integrity are considered null and void [Art. 73 paragraph (2), Art. 76 paragraph (2) of Law No. 161/2003].

\textsuperscript{15} M. Veron, Droit penal special, Dalloz Editions, 2012, p. 395. It should be mentioned that all aspects regarding the F.C.C. within this study are based on this work.

\textsuperscript{16} See also footnote no. 3.

\textsuperscript{17} A public official’s act of leaving public office and entering into the private sector is usually called by the French literature as “pantouflage” (from “pantoufles” – house slippers). See also: J. Dufrau, “Le Pantouflage et le droit”, Pal Gazette 1997, Doctr. 1563; J.L Capdeville, Le délit de “pantouflage”. Maitre de conferences, University of Strasbourg, AJCT 2011, page 395.

As such, according to above mentioned article, “(1) A public servant, within the meaning of the criminal law, is a person who, temporarily or permanently, with or without a remuneration:

a) exercises the duties and responsibilities set by the law in order to implement the prerogatives of the legislative, executive or judiciary power;
b) exercises a function of public office or a public office irrespective of its nature;
c) exercises, alone or together with other persons, within a public utility company, or another economic operator or a legal entity with full or majority state-owned capital, the responsibilities needed for the performance of the activity thereof.

(2) At the same time, for the purposes of the criminal law, a person who performs a public-interest service for which (s)he was appointed by the public authorities or who is subject to the latter's control or supervision with respect to performance of such public service shall be deemed a public servant.”

The offence of conflict of interest, in the mitigated form, according to Art. 301 C.C., in relation to Art. 308 C.C., may be committed by a person who, temporarily or permanently, with or without a remuneration, performs a task of any nature to the benefit of a natural person similar to the public servants or within any legal entity.19

From the provisions of Art. 175 paragraph (1) line c), one may infer that this enlarged category of public officials further includes, for instance, the persons who carry out their activity in banking institutions with capital, entirely or partially owned by the state, excluding those who work in private banking institutions or in which the Romanian state is either a minor investor or holds no interest at all.

According to case law on the matter, the freelancers carrying out their duties under the control of an authority, such as the physicians in state hospitals20, bailiffs, liquidators and notaries public21, judicial technical experts22 (under no circumstance the lawyers) are deemed similar to public servants.

Under the Criminal Code of 1969, the Romanian case law held as public servants and active subjects of the offence of conflict of interest any persons who carried out deeds or participated in decision making – by means of which they procured a material advantage – while acting as: mayor of a commune or municipality23; specialty inspector in the town hall department of public procurement24;

19 Constitutional Court, by Decision No. 603/2015, concluded that the wording “or within any legal entity” of the provisions of Art. 308 paragraph (1) C.C. in relation to Art. 301 C.C. is unconstitutional.
20 See also the High Court of Cassation and Justice, Committee for clarifying legal matters in criminal law, Decision No. 26/2014, published in the Romanian Official Gazette, Part I, No. 24 dated January 13, 2015 [“(…) the physician employed through an employment contract in a hospital unit of the public healthcare system has the quality of a public servant according to the provisions of Art. 175 paragraph (1) letter b) 2nd Sentence of the Criminal Code].
21 Constitutional Court, in Decision No. 603/2015, point 28, stated that: “Article 175 paragraph (2) of the Criminal Code in the matter of criminal treatment assimilates to public servants any persons who are in the exercise of a public duty for which public authorities have been created and who under the control or supervision of said authorities in carrying out the public service. As an example, professions such as notaries public and judicial liquidators are included in this category”.
22 See also the High Court of Cassation and Justice, Committee for clarifying legal matters in criminal law, Decision No. 20/2014, published in the Official Gazette of Romania, Part I, No. 766 dated October 24, 2014 [“(…) the judicial technical expert is a public servant in accordance to the provisions of Art. 175 paragraph (2) of the 1st Sentence of the Criminal Code”].
23 Appeals Court Alba Iulia, Sentence No. 1172012 (unpublished).
24 Ibidem.
specialist officer of the Inspectorate for Emergency Operations with permit/designing duties\(^{25}\); president and members of the Evaluation Committee for disabled persons within the General Directorate of Social Welfare and Child Protection\(^ {26}\); manager of a public cultural institution holding the position of manager and director or artist at the same time\(^ {27}\).

Criminal participation is possible under all forms: co-authorship, instigation and complicity. The existence of co-authorship requires that each participant should have the special capacity as public servant, as well as that the active subjects should have the power to commit the act or to make the decision resulting in patrimonial benefits. As such, the following situations have been understood as co-authorship: the mayor of a commune and the accountant of a forestry district, a public service within the town hall, who in their capacity as members of the preselection and tendering committees participated in making the decision of the timber bid admission and awarding to a business entity in which the director and sole shareholder was a 2\(^{nd}\) degree relative of them\(^ {28}\); the persons who in their capacity as vice mayor and respectively secretary of the town hall and members of the local committee for the implementation of the of land law, participated in the proceedings and in the decision-making process denying a request of reinstating ownership on the former location, due to the fact that each of them owned a plot on the respective land, having thus contrary patrimonial interests\(^ {29}\).

The capacity of instigator or accomplice may be held by any person. The case law held, for instance, that the mayor and the vice mayor of a municipality became accomplices since they helped the specialty inspector of the public procurement department through signing orders and contracts, evidence notes etc., for the latter to carry out acts and make decisions resulting in public procurement from the company the latter owned, by means of which patrimonial benefits were secured for the employee, his spouse and his 2\(^{nd}\) degree relatives\(^ {30}\).

The French Criminal Code, Article 432-12, forbids the performance of certain acts by a person holding public authority or discharging a public service mission or holding a public electoral mandate. The French jurisprudence sometimes makes subtle distinctions between persons discharging a public service mission, since it recognizes this position for some persons, while denying it for others\(^ {31}\). As such, the Court of Cassation ruled that the following persons were discharging an official mission of administration or supervision of particular business on behalf of the public power: the President of a Chamber of Commerce and Industry\(^ {32}\); Secretary General of a Chamber of Crafts\(^ {33}\); a SAFER General

\(^{25}\) High Court of Cassation and Justice, Sentence, Decision No. 249/2011.
\(^{26}\) Appeals Court Ploiesti, Sentence No. 111/2013 (unpublished), final by Criminal Judgment no. 68/A/2014 of the High Court of Cassation and Justice.
\(^{27}\) High Court of Cassation and Justice, Sentence, Decision No. 3626/2012; the situation is similar for all directors and managers of public institutions of culture, health, education who hold both positions of managers and artists, doctors or other specialists in their respective fields.
\(^{28}\) Appeals Court Cluj, Sentence 17/2012 (unpublished).
\(^{29}\) High Court of Cassation and Justice, Sentence, Decision No. 1472/2012.
\(^{30}\) Appeals Court Alba Iulia, Sentence No. 117.2012 (unpublished).
\(^{31}\) M. Veron, op. cit..
\(^{32}\) Crimm, November 20, 1980; Decision 1982.246, as noted by W. Jeandidier; RSC 1981, obs. A. Vitu.
Manager \(^{34}\); the directors and judiciary attorneys for corporate liquidation\(^ {35}\); members of an Autonomous Port Board of Directors, a public establishment with industrial and commercial activity to whom a mission of general interest was committed\(^ {36}\) or an engineer in the Commissioner Office for Atomic Energy made available to ANVAR\(^ {37}\); a President of a Regional Council of notaries instructed with the professional training of trainee notaries\(^ {38}\).

However, the heads of the technical departments of the French Electricity Company do not fall under this category due to the fact that they are not instructed with any official mission in the name of the public powers\(^ {39}\).

The case law rules that the interdiction regards not only the agents of authorities, but also the agents that receive benefits from businesses that they supervise under the authority of their line managers\(^ {40}\), as well as those whose duties are limited to issuing opinions or to making proposals to persons who are authorized to make decisions\(^ {41}\): the architect that makes proposals regarding the subordination to an HLM public office\(^ {42}\); a hospital manager who prepares the decisions of the establishment Administrative Board\(^ {43}\).

Often enough, the challenged decision results from a peer decision, made especially by way of a vote within the Municipal Council. The French case law does not hesitate, however, to hold liable the mayor who chaired the meeting that adopted the decision in which he had a direct personal interest\(^ {44}\) or the mayor, the deputies or a councilman who participated in proceedings and voted, granting subsidies to municipal and communal associations chaired by the same\(^ {45}\).

The Romanian case law held that the act of the perpetrator who, while carrying out official duties, as a county councilman, participated in making a decision through voting with regard to funding from the institution’s own budget for the performance of works by a company whose manager he was in fact, decision by means of which he secured a patrimonial benefit both to himself and to the said company was an conflict of interest\(^ {46}\).

5. The passive subject of the offence of conflict of interest is the state, as holder of the protected social values, represented by the authority, the public institution, by other public legal person or other legal person (in the case of the mitigated form).

\(^{34}\) Company for Land Planning and Rural Stability; Crimm. November 21, 1985; JCP 1987. II.20782, as noted by Ourliac and Juglart, RSC 1986.607, obs. Delmas-Saint-Hilaire.

\(^{35}\) Crimm, June 14, 2000; Bulletin No. 183.

\(^{36}\) Crimm, November 21, 2001; Bulletin No. 243.

\(^{37}\) National Association for Valuating Research, Crimm, September 27, 2001, Bulletin No. 48.

\(^{38}\) Crimm, September 21, 2005, Bulletin No. 233.

\(^{39}\) Crimm, February 10, 1988, Bulletin No. 69; RSC 1988.772, as noted by Delmas-Saint-Hilaire; against Rennes, December 13, 1994; Decision 1995.361, noted by J. Benoit.

\(^{40}\) Crimm, March 11, 1976; JCP 1976.II.18460, as noted by A. Vitu.

\(^{41}\) Crimm, June 14, 2000; Bulletin No. 221; Criminal law.2001, Cam. 5.

\(^{42}\) Apartment building, December 14, 2005; Bulletin No. 333; Criminal law 2006. Com. 59.

\(^{43}\) See also: February 9, 2005; Bulletin No. 48; RSC 2005.560, obs Delmas-Saint-Hilaire; March 9 2005; Bulletin No. 81; Criminal Code 2005, Com 45).

\(^{44}\) Crimm, March 19, 2008; RSC 2008.592, obs. C. Mascala.

\(^{45}\) Crimm, October 22, 2008; Criminal code 2009, Com. 13.

\(^{46}\) Appeals court Alba Iulia, Sentence, Criminal Judgment No. 412/2015 (unpublished)
6. The objective side

The material component of the objective side of the offence is given by two alternative actions: “carried out an act” or “participated in decision-making”\(^{47}\). Regarding these components of the material side of the offence which is the subject matter of this study, our Supreme Court stated that: “The word act is used to criminalize the offence of conflict of interest and is meant as an operation that a public servant should carry out, in accordance with his duties, and may result in drafting a document or legal documents, in making findings of legal effects and other operations falling under the duties of a public legal entity. Making a decision should be understood as a decision that has been made upon considering a condition, situation or needs, aiming at causing certain consequences or achieving certain goals. In addition to that, participating in decision making requires that the perpetrator contributed to that decision while performing office duties\(^{48}\).

Carrying out an act means carrying out an official duty, similar to other offences stipulated under chapter II, Title V of the new Criminal Code. The Romanian case law made held the material component of the offence objective side, in case of the following acts: a mayor’s entering into service agreements with a company whose sole shareholder and director was his son resulting in a material gain for the latter\(^{49}\); the direct award of a contract by the executive manager of the County Employment Agency (AJOFM) to a company of his son-in-law, namely a 1\(^{st}\) degree relative who was also the company director and shareholder, which lead to a material gain for the defendant’s son-in-law\(^{50}\); drafting of reports, evidence notes and orders by the inspector of the town hall specialized department for proceeding to public procurement from a company held by himself, by means of which he secured monetary gains for himself, his spouse and 2\(^{nd}\) degree relatives\(^{51}\); the conclusion of a contract by the manager of a public cultural institution with himself, having as subject matter the direction of a show\(^{52}\).

Participation in decision making occurs when the public servant has duties to put forward proposals or opinions or, while a member of the collective management of the legal entity or of a collective decision-making body (for instance, the tendering board, the local board for implementation of the land law, the board evaluating disabled people etc.), therefore in a situation of incompatibility, failed to refrain himself, contributing thus to a decision-making by means of which he secured, directly or indirectly, a material benefit for himself or for such persons as specifically indicated by the law.

\(^{47}\) See also I. Pascu, op. cit., p.560 (the author notes that the material element of the analyzed offence may only be achieved by one of the criminalized acts or by both criminalized acts without losing the unity of the offence); O. Predescu, A. Harastasanu, Criminal Law. Special Part. Comparative view of the Criminal Code – New Criminal Code, Universul Juridic Publishing house, Bucharest, 2012, p. 270 (albeit the text suggests only the act, in both situations the authors consider that the material element may be achieved both through action and inaction when the public servant fails to do something that he must do, according to his duties).

\(^{48}\) High Court of Cassation and justice, Sentence No. 88/2015, final by Criminal Judgment No. 42/2016 of the High Court of Cassation and Justice, Panel of 5 judges.

\(^{49}\) See also: Appeals Court Alba Iulia, Sentence No. 203/2013 (unpublished), final by Decision no. 181/2013 of the High Court of Cassation and Justice, Sentence; Aug. Lazar, Al. Pastiu, Theoretical synthesis of jurisprudence for the Appeals Court of Alba Iulia in criminal matters (2014 – 1\(^{st}\) semester 2015), in “Dreptul” No. 10/2015, p. 148-152.

\(^{50}\) Deva County, Sentence No. 2247/2014, final by failure to appeal on January 6, 2015 (unpublished).

\(^{51}\) Appeals Court Alba Iulia, Sentence No. 201/2013 (unpublished), final by Criminal Judgment No. 163/2015 of the High Court of Cassation and Justice.

As such, the judicial practice held the existence of the material element of the offence objective side, in *taking part in decision-making*, in the following situations: the specialist officer of the Inspectorate for Emergency Situations, who as a public servant with permits/planning duties participated in making a decision for the issuing of a fire safety permit based on the documentation drafted by himself, for a private business agent, in exchange of a sum of money; the chairperson and the members of an evaluation committee for disabled persons within the General Directorate of Social Welfare and Child Protection, who participated in the file assessing for their own family members; the vice mayor and the secretary of the town hall who, in their capacity as members in the local committee for applying the land law, participated in the proceedings and the decision-making to deny a request of reinstatement of ownership on the former location, due to the fact that each of them owned a plot on the said land, having contrary patrimonial interests; the mayor of a commune and the accountant for a forestry district, a public service within the town hall, who in their capacity as members of the preselection and tendering committees participated in the decision making for the tender admission and award to a company in which the director and sole shareholder was a 2nd degree relative thereof; a county councilman who participated in making a decision through voting with regard to funding from the institution’s own budget for the works to be carried out by a company whose manager he was in fact, decision by means of which he secured a patrimonial benefit both to himself and to the said company whose employee he was in the past 5 years. The defendant’s case, namely that his vote was not decisive in the decision-making, is irrelevant in terms of criminal liability, due to the fact that the act itself violated the social relationships of protection of the public trust in the activity of public servants who, during their incumbency must prove impartiality and pursue the public well-being.

The French Criminal Code, in Article 432-12, forbids the “*the taking, receiving or keeping of any interest* in a business or business operation, either directly or indirectly, by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate who at the time in question has the duty of ensuring, in whole or in part, its supervision, management, liquidation or payment.”

This wording of forbidden acts is different from that of the former Art. 175 F.C.C. which only stated the “*taking*” or “*receiving* of an interest. By adding “*keeping an interest*” in Art. 432-12, the area of criminalization was widened, but also put into question whether the crime of interference, to that point considered a momentary offence, would lead itself to a continued offence. In the French case law a question was put forward regarding a mayor who purchases or rents an apartment from a company that he is supposed to supervise, namely whether the offence of conflict of interest occurs by signing the contract or the conflict of interest continues throughout the duration of the contract or as long as the mayor is in possession of the apartment?

53 High Court of Cassation and Justice, Criminal Section, Decision No. 249/2011.
54 Appeals Court Ploiești, Sentence No. 111/2013 (unpublished), final by Criminal Judgment no. 68/A/2014 of the High Court of Cassation and Justice.
55 High Court of Cassation and Justice, Sentence 17/2012 (unpublished).
56 Appeals Court Cluj, Sentence 17/2012 (unpublished).
57 Appeals Court Alba Iulia, Sentence, Decision No. 412/2015 (unpublished).
58 French case law decided that mandating has the significance of liquidating payments operated by a third party. (Crimm, December 14, 2005.)
The Court of Cassation decided that subsequent acts that are a direct consequence of a contract that is already in illegality should not be taken into consideration.  

In all cases, French judicial practice stated that the legal definition of the offence is very broad due to the fact that receiving a benefit does not necessitate a prolonged activity and may be limited to a single act: the labour or the supplies market, water ducts or any other contract that may be concluded between a mayor and his commune, the selling of municipal land, the retrocession by SAFER of a previously acquired lot. Another condition that is necessary requires that the benefit should be taken into a company which the public servant has the duty to supervise or to manage at the time of the act.

In the same way the case law considers the case of a mayor who hires personnel integrated in town hall positions, but allocated exclusively to his own personal service or that of an agent of the state who hires companies for purposes of continuous training which he is supposed to oversee, in which he is a shareholder and for whose benefit he rendered remunerated services himself.

Similarly to the former wording (Art. 253 C. Code 1969), Art. 310 C.C. allows the criminalization of conflict of interest committed through an agent. Under the C. Code of 1969, the case law held the “settings” worked by defendants in order to hide the conflict of interest and to achieve patrimonial benefits for persons specifically excluded by the law: the mayor of a commune who in such position concluded a services contract with a company based on a prior deal according to which the works would be assigned later on to a company in which he was sole shareholder, a county councilman who takes part in decision-making with regard to funding from the institution’s budget for works to be performed by a construction company whose manager he was in fact, while somebody else appeared to be the manager.

The French legislation allows the criminalization of taking benefits through an agent or through companies managed by a family member or by a fake manager, in which the public servant remains actually the controlling person. The French judicial practice quotes judicial affairs that contain rather complex settings designed to conceal the real facts.

In its case law, the French Court of Cassation underlines that the illegal use is not a component of the offence. The offence occurs by the mere fact of knowingly securing a benefit in an illegal transaction and punishes less an unlawful act or the lack of “diligence of probity” than an interference in

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60 Crimm, February 13, Bulletin No. 80.
61 Crimm, November 2, 1961, Bulletin No. 438.
62 Crimm, February 23, 1966, Bulletin No. 64.
63 Crimm, November 21, 1985, prec.
66 Appeals Court Cluj, Criminal and Minors Sentence, Sentence No. 41/2012 (unpublished).
67 Appeals Court Alba Iulia, Sentence, Decision No. 412/2015.
68 Crimm, June 14, 1988, Bulletin no. 272; JCP 1989.II.21218, as noted by W. Jeandidier: mayor’s brother-in-law.
71 See also: M. Veron, op. cit., p. 397; Crimm, November 27 2002, Bulletin No. 212; Pal. Gazette 2003.2413, as noted by Y. Monnet; D 2003.2406 as noted by M. Sweonds.
“businesses that are incompatible with the position held”. This jurisprudence is often challenged – especially by those judged on its grounds – and shows that the “moral” benefit that the perpetrator may find suffices for determining the criminal element of the incriminated act, which is also quite frequent in the case of a family benefit: a notary who made sure that his son was employed and remunerated as trainee in exchange of no due service\textsuperscript{73}; a chairperson of a Public Procurement Board who procured a market for a company run by his sons\textsuperscript{74}; the chairperson of the Red Cross departmental council who hired a company – that was managed in fact by his wife, and in law by his son – for organizing internships whose performance was assessed by the Red Cross\textsuperscript{75}. In these situations, the French specialty literature considered that the crime has consumed, even if the operation could not be completed due to reasons independent of the public servant’s will\textsuperscript{76}.

Article 432-13 F.C.C. forbids to public servants to take or to receive shares through work, counselling or shareholding in any of the companies that they are instructed to control or supervise, as well as in private enterprises holding at least 30\% of joint capital or to enter into a contract with exclusive rights in fact or in law with any of such companies. The legislator broadened the scope of these interdictions by assimilating to a private enterprise any public enterprise that carries out its activity in a competitive environment and in accordance with the private law regulations. It was considered necessary to avoid the situation in which a public servant may freely leave a public office in order to join a public company of the competitive sector which might make use of his former relationships to the detriment of competing private companies. The French specialty literature has noted that the double requirement of the wording – the functioning according to private law and the competitive sector – would exclude some French enterprises such as the gas and the electricity providers from prohibited activities, since these companies hold a monopoly in distribution\textsuperscript{77}.

We need to address the fact that Art. 432-13 defines the material element of the offence by shareholding, which entails a prolonged collaboration not an isolated act. This shareholding may be rendered by the conclusion of a work contract, by a freelance counselling or professional training. A case is mentioned regarding a former tax inspector in charge with verifying insurance companies, who entered into a training agreement and maintained permanent work relationships with some of these companies\textsuperscript{78} or by a capital supply. It is considered however in this last example, that, according to Art. 432-13, final paragraph, the shareholding in stock exchange listed companies or the acquisition of capital from devolution of estate are not deemed offences.

The interdiction to hold shares is limited not only in space but also in time, due to the fact that throughout the years, the risk of conflict of interest declines, memories fade away, influences dwindle and people change. As such, holding shares is only punishable if it occurs prior to the lapse of a period of 3 years from the termination of the public servant’s office, regardless of cause: be it resignation, retirement or dismissal from office.

\textsuperscript{73} Crimm, September 21, 2005, prec.
\textsuperscript{75} April 3, 2007, Bulletin No. 100; Criminal Law, Comm. 127.
\textsuperscript{76} See also: M. Veron, op. cit., p. 397; Crimm February 21, 2001; Bulletin No. 46; D. 20012353, obs. M. Seconds.
\textsuperscript{77} M. Veron, op. cit., p. 400.
\textsuperscript{78} Crimm, July 18, 1984, Bulletin No. 262 and RSC 1985, 291, obs. Delmas-Saint-Hilaire.
In addition to the perpetration of the act or the participation in the decision-making while carrying out of office duties, the cumulative conditions that must be met for proving the material element of the offence are as follows: the achievement, be it directly or indirectly, of a patrimonial benefit; the said benefit should be belong to the perpetrator, the perpetrator’s spouse or kin or relative up to the 2nd degree or to another person with whom (s)he was in work relationships for the past 5 years or from whom (s)he received or receives benefits of any nature.

The High Court of Cassation and Justice ruled that “material benefit” should be understood as any patrimonial benefits (for example goods, loans, prizes, the supply of free services, work promotions). The criminalizing rule does not require that the benefit should be unjust (for instance, when the employee does not exist or the employee provided no remunerated work), but only that it could be achieved actually through a biased procedure.

For the offence of conflict of interest to exist suffice that the perpetrator’s actions result in a material benefit coming from public funds to his/her close relatives. Due to the fact that the regulatory wording does not require the gain to be unjust, it was deemed that the income resulting from salary, accounting for a remuneration for work rendered, does meet the inherent condition of the material element, that of obtaining unjust material benefit for a relative.

The Court held that by participating in the employment procedure of persons that were the defendant’s relatives, the former tried to secure a material benefit derived from the budget of the Chamber of Deputies for his relatives, which made his conduct fall under criminalization for being a conflict of interest. Since the criminalizing rule regulates both the nature of the benefit, which should be exclusively patrimonial (material), as well as the recipient of the said benefit, who should be one of the persons stipulated by the law, the first court decided that by committing the crime no harm needs to be done to the legal person’s or public authority’s interests, but it suffices that the material act may render a benefit to the person on behalf of whom action is taken – namely the persons specified in the criminalizing text.

Finally, it is worth showing that, in order to prevent such an offence, a public servant has the obligation to abstain.

The provisions of paragraph (1) of Art. 253 C. Code 1969 were not applicable in the case of issuing, approving or adopting of normative acts, situation that can be found also with paragraph (2) or Art. 301 C.C. The exception is justified by the fact that the normative acts address a wide array of subjects which may inevitably concern and lead to material gains including to some persons who have close relationships, be it family or office related, with the public servants vested with powers regarding such acts.

The immediate consequence of perpetrating the offence of conflict of interest is the damage brought to the work relations and endangering the objective performance of official duties public authorities, public institutions or other legal persons of public interest. The danger is created by the public servant’s perpetration of deeds that facilitate a material gain from himself or for other person.

79 Ibidem.
80 High Court of Cassation and Justice, Sentence No. 88/2015, final by Criminal Judgment No. 42/2016 of the High Court of Cassation and Justice, panel of 5 judges.
81 See also O. Predescu, A. Harastasanu, op. cit., p. 270.
with whom the perpetrator shares a specific relationship specified by the law\textsuperscript{82}. Therefore, the above mentioned offence is not one of result, but one of danger, due to the fact that the perpetration of such offence gives rise to lack of trust in the public servant’s objectiveness and impartiality due to suspicion of fraud, the institution, which should be trusted by the average citizen, loses credit due to its inability to rigorously select appropriate candidates to serve as public officials\textsuperscript{83}.

According to the cited case law, for the material element of the conflict of interest to exist, there is no need for a damage to exist, only a material gain needs to be achieved for the public servant, his spouse and so forth.

The causality relationship between the objective material element (the public servant’s illegal activity) and the immediate consequence (the impaired reputation for the decision-making entity or body to which the perpetrator belongs) is an ex re outcome, namely it results from the materials facts actually perpetrated and needs to be ascertained as such.

7. Subjective side. The form of guilt (the subjective element) required by the rule criminalizing the conflict of interest is either direct or indirect intent. Therefore, the perpetrator must be aware of the fact that by committing the act or by participating in the decision making process, he or the persons considered by law as being close to him (his/her spouse, kin or relatives up to the 2\textsuperscript{nd} degree or any other person with (s)he maintained work relations in the past 5 years or from whom he received or still receives benefits of any type) secures, directly or indirectly, a material gain and seeks or accepts this result.

For the offence to exist, the perpetrator must be aware that the recipient of the material gain falls under one of the abovementioned categories about which he has the duty to refrain from taking any of the criminalized actions. Moreover, the law does not specify the existence of any cause or special purpose that would drive the perpetration of the forbidden activities, however these may contribute to a customization of the sentence applicable to the perpetrator\textsuperscript{84}.

The case law holds that, in terms of the subjective side, the conflict of interest is perpetrated with direct intent when the community’s interests are deliberately abandoned in favour of personal interests, including by establishing a family company in order to drain the local budget\textsuperscript{85}.

In one such case, the Supreme Court shows that, from the subjective side of the offence, contrary to what the defendant claimed, the judicial court held that the conflict of interest is perpetrated with direct or indirect intent, as the perpetrator foresaw that his deed would achieve a material gain for one of the persons specified in the law’s provisions, affecting the work relationships and the proper activities of the public institution while pursuing or accepting such an outcome. Moreover, “the defendant’s claims that he verbally asked the advice of other MPs and that others

\textsuperscript{82} See also I. Pascu, op. cit., p. 560; O. Predescu, A. Harastasanu, op. cit., p. 270.

\textsuperscript{83} See also: Appeals Court Alba Iulia, Sentence No. 201/2013 (unpublished), final by Criminal Judgment No. 163\textsuperscript{1} of the High Court of Cassation and Justice, Sentence; Aug. Lazar, Al. Pastiu, op. cit., p. 163-168.

\textsuperscript{84} See also: G. Paraschiv, op. cit., p. 353; I. Pascu, op. cit., p. 561 (in this author’s opinion, both cause and purpose are relevant aspects in the process of sentence customization).

\textsuperscript{85} See also: Appeals Court Alba Iulia, Sentence No. 201/2013 (unpublished), final by Criminal Judgment No. 163\textsuperscript{1} of the High Court of Cassation and Justice, Sentence; Aug. Lazar, Al. Pastiu, op. cit., p. 163-168.
proceeded in the same manner” were deemed not to lead to the conclusion that there was no subjective component of the offence, but only that it was committed with indirect intent; in this case, most certainly it was the private interest that prevailed. With regard to the decision of October 18, 2011 of the Standing Commission of the Chamber of Deputies and Senate regarding the Statute of Deputies and Senators, as convened in order to reach a unitary analysis and interpretation of the provisions of Art. 38 paragraph (11) of Law No. 96/2006 regarding the Statute of Deputies and Senators, the Criminal Section of the High Court of Cassation and Justice found that the legislative or an interpretation or an enforcement body in criminal matters. Moreover, the said commission “cannot substitute the legislator or the judicial power and cannot put forward principles or guidelines as to the existence of an offence, of the content of said offence and/or the scope of the criminalization rules; regardless of their nature, the acts issued by the Commission cannot be sources of penal law”. Therefore, the Supreme Court ruled the following: “the defendant’s arguments that he was unaware that facilitating his daughter’s employment was an offence could not be deemed valid and exonerating of liability; according to the principle nemo censetur ignorare legem and to the provisions of Art. 51 paragraph (4) of the Criminal Code (C. Code of 1969, our mention), the error in criminal law, namely the lack of knowledge or wrong knowledge of the criminal law does not exonerate from criminal liability”. In another case where the active subject of the offence was another MP, with regard to the circumstance that the criminalization rule required an intention as a form of guilt, the High Court of Cassation and Justice deemed “that the defendant acted with direct intent. Considering that the right to make proposals for employment and to enter into contracts regarding the Parliamentary Office, both being determinant deeds in this case, fell solely to the MP, it was found that by proceeding to employing his wife, the defendant’s particular interest prevailed, as the MP chose to ignore a criminalizing rule for a pecuniary reason by considering to uphold a family interest. In essence, the defendant acted in a coordinated manner in direct interest of his family, to which he facilitated a material gain from the budget of the Chamber of Deputies, namely from public funding”.

86 The High Court of Justice and Cassation, Sentence No. 88/2015, final by Criminal Judgment No. 42/2016 of the High Court of Cassation and Justice, Sentence in another case, The High Court of Cassation and Justice, panel of 5 judges (Criminal Judgment No. 84/2015) had to decide who can establish if an act constitutes the offence of conflict of interest, maintaining the idea that another authority presents opinions on the criminal characteristics of the offence. As such, the High Court did not retain the appellant defendant’s defence regarding the conclusions of the decision of October 21, 2015 of the Standing Commission of the Chamber of Deputies and Senate on the unitary interpretation of the provisions of Art. 38 paragraph (11) of Law No. 96/2006 republished, by which it was established that the provisions of Art. 38 paragraph (1) regarding the interdiction of employing a Deputy’s or a Senator’s family members or other relatives up to the third degree at the parliamentary office would produce effects only as from August 21, 2013 and would not be applicable retroactively. The abovementioned commission – as the Court mentions in the decision – does not have any lawmakering, interpretation or enforcement authority in criminal matters, cannot substitute the legislator or the judicial power and cannot render conclusions that would qualify as principles or guidelines as to the existence of an offence, of the content of said offence and/or the scope of criminalization rules, so that the decision of October 21, 2015 is cannot prevent or limit the provisions of Art. 253 C.C. of 1969 and due to the same reasoning it cannot be claimed to uphold an alleged state of confusion or lack of predictability of the legal provisions. In conclusion, the High Court of Cassation and Justice, panel of 5 judges, ruled that, regardless of their nature, the acts of the Commission could not constitute sources of law.

87 High Court of Cassation and Justice, Sentence No. 1071/2014, final by Criminal Judgment No. 113/2015 of the High Court of Cassation and Justice, panel of 5 judges.
Another defendant claimed that the rule criminalizing the conflict of interest would not be applicable in the absence of an express interdiction provided by Law No. 96/2006 (prior to its amendment and supplementation by Law No. 219/2013) regarding the employment of 2nd degree relatives within a parliamentary office, which would be equal to a justificative cause within the meaning of Art.21 C.C. and Art. 16 paragraph (1) letter d) Criminal Procedure Code.

The High Court of Cassation and Justice ruled that the lack of an specific interdiction concerning the employment of spouses or relatives in the Law No. 96/2006 is irrelevant to the matter, due to the fact that the conduct required to a public servant by the criminal law is not conditional on such interdiction and the internal rules of the Romanian Parliament have a different legal status, entailing a different type of liability than the criminal law.

In order to assess the criminal nature of the deeds committed by the appellant defendant, *in principle* only the provisions of Art. 253 C. Code of 1969 are relevant, since their infringement entails criminal liability.

Moreover, the final paragraph of Art. 253 C. Code of 1969 excludes any lawmaking actions from the application of the criminalizing provisions, resulting, *per a contrario*, that any other activities of a public servant committed while carrying out official duties by which (s)he participated in concluding a deed or in making a decision facilitating thereby, directly or indirectly, a material benefit for any of the categories of persons specifically listed by the law with limitations fall under the provisions of aforementioned article.

In its case law regarding conflict of interest, the High Court of Cassation and Justice while referring to the *principle of law predictability*, ruled that the infringement of a criminal rule should be analyzed differently, according to the quality of the defendant, as the *degree of predictability increases in the case of professionals*, who are held to different predictability obligations in the field in which they operate. In the abovementioned case, the defendant’s particular situation (holder of a degree, a member of the Romanian Parliament, the legislative authority, initiator of 109 bills, out of which 34 were passed as laws and so forth) makes the understanding of the legal meanings a daily activity for him, therefore the claim that his background is technical, not legal was found irrelevant by the first court and . no lack of predictability of the law may be claimed in this case.

Regarding another defendant’s claims – in a different case – according to which a sentence rendered against him would be contrary to the principle *ne bis in idem*, due to the fact that he had already been punished for entering into a work contract in the same case, based on a report of the National Integrity Agency, the High Court held the following: the National Integrity Agency finding of a

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88 Published in the Official Gazette of Romania, Part I, No. 411 dated July 8 2013.
89 The High Court of Cassation and Justice, Sentence No 586/2014, final by Sentence No. 18/2016 of the High Court of Cassation and Justice, panel of 5 judges.
90 The High Court of Cassation and Justice, Sentence No. 198/2015, final by Criminal Judgment No. 175/2015 of the High Court of Cassation and Justice, panel of 5 judges.
91 In order to be able to claim the principle of *res judicata* the following conditions must be met cumulatively: the existence of a final ruling; a new criminal trial should press charges against the same defendant (the *bis* element); the new trial must regard identical facts or facts that are that are substantially the same (the *idem* element).
92 The High Court of Cassation and Justice, Sentence No. 88/2015, final by Criminal Judgment No. 42/2016, panel of 5 judges.
conflict of interest existing for MPs followed by a disciplinary action taken by the standing bureau of the relevant Chamber does not remove criminal liability. In accord with the findings of the First Court, the judicial control court found that the disciplinary action, namely the reduction of salary by 10% for a maximum term of 3 months applied to the defendant pursuant to the provisions of Art. 19 paragraph (1) of Law No. 96/2006 is not equal to a final ruling, as the condition of a previous criminal trial could not be deemed met, therefore, the principle of *res judicata* did not apply.

Adding disciplinary liability to any other form of legal liability, namely criminal liability, is possible without infringing upon the principle *non bis in idem*, given that each of the legal norms that were taken into consideration protected different societal values. As a matter of fact, the principle forbids only the enforcement of two or more penalties of the same type for the same illegal act.

8. **Forms. Modalities. Penalties.**

   a) **Forms of the offence of conflict of interest.**

   1. Due to the fact that the analyzed offence is intentional, *preparatory acts* are possible but are not punished.

   2. Also, *attempt* is possible, however the legislator has not criminalized it, therefore it is not punished.

   3. The offence of conflict of interest is *consummated* at the time one of the persons specified by law obtains a material benefit, subsequently to the active subject having committed one of the criminalized actions.

   Furthermore it is worth mentioning, that should the public servant commit several acts, there may be a case of homogeneous concurring offences or *a continued offence* (when the perpetrator acted according to the same criminal intent). In this latter case, there is a time of *depletion* which coincides with the perpetration and the consequence of the final act\(^93\).

   Pursuant to the doctrine on the matter, the High Court of Cassation and Justice noted the continued form of the conflict of interest due to the fact that by means of the two successive acts, the same actual result was sought after thus revealing a unitary resolution, the conflicting situations existing in relation to each act being identical\(^94\).

   Finally, when the perpetrator, while exercising his office duties, committed both acts that are being criminalized, namely carried out an official duty and participated in decision making, activities which led to achieving the same material gain, there is one offence of conflict of interest\(^95\).

   b) **Modalities** of the offence of conflict of interest. Both the standard version and the mitigated version [Art. 308 paragraph (1) C.C.] can be perpetrated by means of two simple modalities, namely: the performance of an act under his/her office duties or the participation in making a decision that resulted in a material gain for the persons stipulated by the criminalizing law. Moreover, as shown in the

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\(^{94}\) The High Court of Cassation and Justice, Sentence No. 101/2015, final by Criminal Judgment No. 84/2015 of the High Court of Cassation and Justice, panel of 5 judges.

\(^{95}\) G. Paraschiv, *op. cit.*, p. 353.
abovementioned examples from the judicial practice, the analyzed offence may be committed through a variety of facts, particularly by the performance of an act, as described by the law.  

**c) Penalties.** In its standard form, as provided in Art. 301 paragraph (1) C.C., regardless of the modality in which it is committed, the offence of conflict of interest is punishable by 1 to 5 years of imprisonment and the interdiction of exercising the right to hold a public office. In it mitigated form, provided under Art. 308 paragraph (1) C.C., the offence is punishable according basic form, the special limits thereof being reduced by a third.

Moreover, due to the fact that by committing the offence of conflict of interest, the perpetrator achieves a material gain, in accordance with Art. 62 C.C., the punishment of a fine is applicable complementary to that of incarceration.

9. **Aspects regarding criminal procedural law.** In the case of conflict of interest, criminal action is taken *ex officio* and the prosecution is conducted by the criminal prosecution body under the prosecutor’s supervision in accordance with common criminal procedural rules.

The High Court of Cassation and Justice ruled that, according to the provisions of Art. 253 C.C. of 1969 and Art. 301 C.C. in relation to the wording of the procedural rules of both successive criminal procedural regulations, neither the former criminal and procedure rules nor the current ones place conflict of interest under the category of the crimes for which the commencement of criminal prosecution or the progress of a criminal action would be conditional on a prior complaint submitted by the victim or on any other special notification.

As such, the fact that the Evaluation Report (Report) submitted to the Prosecutor’s Office attached to the High Court of Cassation and Justice by means of which the National Integrity Agency was notifying the perpetration of conflict of interest by the defendant MP for having facilitated the employment of his wife within his parliamentary office was cancelled by an Administrative Litigation Court ruling had no effect with regard to the criminal case, as the two branches of law deal with different types of liability. In fact the criminal investigation was commenced *ex officio* by the criminal prosecution body, as shown by the content of the resolution whereby the Report was submitted to the Chief Prosecutor of the Criminal Prosecution and Criminology Division in order to consider the *ex officio* notification”.

As a direct consequence, due to the fact that the offence of conflict of interest is not under the category of offences for which the commencement of the criminal investigation requires a preliminary complaint or notification, the Judicial Control Court ruled that the first court proceeded correctly in establishing that the cancellation of the Report by the Administrative Litigation Court is not equal to lack of notification to the criminal prosecution body, within the meaning of Art. 221 paragraph (2) of the former Criminal Procedure Code and of Art. 288 paragraph (2) of the Criminal Code in force.

As a result, the reasons claimed by the appellant regarding the abovementioned considerations were dismissed by the court.

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97 The High Court of Cassation and Justice, Criminal Judgment No. 113/2015, panel of 5 judges  
98 The High Court of Cassation and Justice, Criminal Judgment No. 113/2015, panel of 5 judges.
It must be mentioned within this chapter, that Art. 301 paragraph (2) C.C. regulates a situation where the criminalization of conflict on interests does not apply, in which case it would trigger no criminal liability.

10. Transitional situations. The doctrine rightfully showed that, since conflict of interest is an offence in both the C.C. of 1969 and in the C.C. in force, the former regulation appears to be more favourable, as it provided more limited penalties (prison from 6 months to 5 years and a ban on exercising the right to hold public office for the maximum term) unlike the current law, which establishes penalty limits between 1 and 5 years of prison as well as a ban on the right to hold public office\(^9\).

With regard to establishing the more favorable criminal law, in its case law, the High Court of Cassation and Justice considered that by applying the in concreto principle for determining the more favorable criminal law, the following aspects were taken into consideration: the change of the criminalizing conditions; the change of the criminal liability conditions; the change of the categories of penalties. Specifically, the content of provisions of Art. 253\(^3\) C. C. of 1969 was taken over by the new regulation, namely by Article 301 C. C. with particular terminological differences and a difference in the penalty conditions.

The first aspects, regarding terminology, are just formal changes and do not affect the criminalization substance, in that the wording “was obtained” replaced “was gained”, “patrimonial gain” turned into “material gain” and a simplification of the immediate alternative consequence, namely the elimination of “services”, used as to the “gains” that the active subject might receive from the person that was favored by the public servant’s acts taken in the decision-making process.

The categories of penalties were changed for an increase of the special minimum penalty from 6 months to one year in the new regulation of Art. 301 paragraph (1) C.C.. As such, in this respect the Supreme Court ruled that the more favorable criminal law is the former regulation under Art. 253\(^1\) C.C. of 1969.

Also, the provisions of Art. 41 paragraph (2) C.C. of 1969 were considered more favorable in the matter of the continued offence compared to the provisions of the Art. 35 paragraph (1) C.C., since it specified the conditions for the existence of a continued offence, namely the unity of the passive subject. As such, finding that the provisions of the former criminal regulation were more favorable in general terms regarding the more favorable criminal law, the Supreme Court ruled that the former criminal law will be applied, with all its relevant provisions\(^10\).

In another case dealing with the offence of conflict of interest, in order to determine the more favorable criminal law, our Supreme Court verified the existence of the continued criminalization (whether the new law suppresses criminalization or reduces the applicable scope of a certain regulation so that the actual offence might no longer meet the conditions required by that), the conditions for triggering criminal liability and the conditions of penalties.

\(^9\) G. Paraschiv, op. cit., p. 354.
\(^10\) The High Court of Cassation and Justice, Sentence No. 577/2014, final by Criminal Judgment No. 101/2016 of the High Court of Cassation and Justice, panel of 5 judges.
The court has proven that customization of punishments precedes the operation of determining the more favorable criminal law, the actual punishment that might be applied by customization of the sentence being decisive. As a result, the applicable criminal norms of successive laws were evaluated, also taking into consideration the fact that by Decision No. 265 of May 6 2014, published in the Official Gazette of Romania, Part I, No. 372 of May 20 2014, ruling on the challenge of unconstitutionality of the provisions of Art. 5 C.C., the Constitutional Court ruled for the global implementation of the more favorable criminal law.

As a result of the operation to customize punishment, regarding the limits imposed by the law, the degree of societal danger presented by the committed acts, the perpetrator’s person and circumstances that might aggravate or mitigate criminal liability, the High Court stated that the punishment to be determined in accordance with the provisions of the new law would have been more severe than the punishment that might have been applied to the perpetrator under the former law, therefore the former law was determined to be more favorable for the perpetrator\footnote{\textit{The High Court of Cassation and Justice, Sentence No. 586/2014, final by Criminal Judgment No. 18/2016 of the High Court of Cassation and Justice, panel of 5 judges.}}.

11. Conclusions and lex ferenda proposals.

The offence of conflict of interest was regulated in order to harmonize the Romanian criminal legislation with the European standards regarding the protection of the public servants’ integrity, of the competitive environment, of quality of services, the prevention of conflicts of interest, guaranteeing the independency and impartiality of additional service providers as well as the fair development of the public procurement procedures, thus ensuring equal treatment for all economic actors.

In terms of content, the two laws criminalizing conflict of interest are similar (Art. 253\textsuperscript{1} C.C. of 1969 and Art. 301 C.C.). Some distinctions can be noted only with regard to each wording: the new Criminal Code uses a more rigorous and comprehensive wording: “obtained” replaced “was gained”, “material gain” turned into “patrimonial gain” and “services or benefits of any kind” into “benefits of any kind”.

The offence of conflict of interest originally criminalized under Art. 253\textsuperscript{1} paragraph (1) of the former Criminal code, then regulated under Art. 301 of the new Criminal Code, is clearly drawn upon Art. 432-12 of the French Criminal code of 1992, “Unlawful taking of interest”. Similarly, Art. 432-12 of the French Criminal Code forbade certain acts to be carried out by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate. In both legal systems the protected legal scope consists in social relationships and regards a “moralization” of public life by creating a clear distinction between power, business and capital, protecting the public servants that might fall prey to temptation, as well as regulating the passage from public position to a private activity.

Both French and Romanian case law clarified numerous legal issues that arose in criminal courts: criminal law is applicable both to public servants and to those holding an electoral mandate; the offence of conflict of interest is one of danger and not of result; the active subjects who are assimilated: freelancers instructed with an official duty of management or supervision of certain businesses on
behalf of public authorities (the president of a Chamber of Commerce and Industry; the secretary general of a Chamber Crafts; the official receivers and judicial trustees; notaries public).

In both legal systems the *illegal use* is not understood as a component of the offence. The content of the offence consists in knowingly taking a benefit in an illegal business; the law punishes less an unfair act or lack of the diligence of probity and more an interference in "businesses not compatible with status". The French case law holds that the "moral" use which the perpetrator may find here suffices in order to establish the criminal nature of the act. The "moral" benefit is often identified in the case of a family interest: a *notary* who employed his son as a trainee; the *chairman of a public procurement committee* who secured a market for the business operated by his sons; the *chairman of the Red Cross Departmental Council* who hired a company managed by his wife for organizing trainings and so forth.

Both jurisprudences decided that the interdiction concerns both the agents of authority (public servants) and the agents who receive benefits from businesses they *supervise under the authority of their line managers*, as well as those whose duties are to issue *permits* or to make *proposals* to persons authorized to make decisions: an architect that submits proposals to a public office; a hospital manager who prepares the decisions of the entity’s administrative board and so forth.

The conflict of interest was also noticed when the *decision was made by peers*, such as the case of a vote in the municipal or county council (the *mayor* who chaired the meeting in which a decision was passed in which he had a personal interest; the *vice mayor or councilman* who participated in the proceedings debates and voted to grant subsidies to municipal and intercommunal associations which they had chaired or voting for funding from the county budget the performance the works of the company whose actual managers they were).

The Constitutional Court of Romania having been notified by the High Court of Cassation and Justice prior to the promulgation of provisions under Art. I paragraph 5 and Art. II paragraph 3 of the Law amending and supplementing normative acts and the sole article of the Law for the amendment of Art. 253 C.C. of 1969, held that the provisions of abovementioned regulations were unconstitutional due to the fact that of the notions of "public servant"/"official" as defined by law did not include the President of Romania, the deputies and the senators, who were thus exonerated from criminal liability for conflicts of interest and for any offences in which the active subject is a public servant or official.\(^\text{102}\)

In addition, with regard to the application of the more favorable criminal law, the High Court of Cassation and Justice ruled that the former regulation, namely Art. 253 C.C. of 1969, was more favorable.\(^\text{103}\)

\(^{102}\) At the same time, the Constitutional Court of Romania pointed out the fact that by eliminating the acts consisting in the issuing, the adoption, approval and signing of administrative documents or decisions regarding the scientific, artistic, literary and professional development from those that would otherwise constitute the offence of conflict of interest, said offence would in fact remain void of content.

The Constitutional Court, by decision No. 603/2915, found that the wording “business relationships” of Art. 301 paragraph (1) C.C. is unconstitutional. By the same decision, the Constitutional Court ruled that the wording “within a legal entity” in the provisions of Art. 308 paragraph (1) C.C. correlated to Art. 301 C.C. is unconstitutional.

Considering the grounds held in the decisions of the Romanian Constitutional Court, as well as the criminal doctrine in this matter, the following lex ferenda proposals are hereby submitted:

1. With regard to the wording “relationships between professionals”, it should be pointed out that it is included in Art. 3 of the Civil Code. With regard to the notion of “professional”, due to the fact that the legislator did not regulate it within the Civil Code, they did so in Art. 8 of Law No. 71/2011 for the implementation of Law No. 287/2009 regarding the Civil Code. Moreover, regarding the relationships between professionals, the considerations stipulated under paragraph 16 of Decision No. 603/2015 of the Constitutional Court should be taken into account too. As a result, we propose that after Art. 187 C.C., a new article, Art. 187 should be added, with the title of “Relationships between professionals” and the following content: “Relationships between professionals are considered to be relationships between one or more natural or legal persons who operate an activity organized in an enterprise in accordance with the law, consisting in the production, management or selling of goods or the provision of services, regardless of whether it has profit purposes or not”.

2. Art. 301 paragraph (1) C.C. will be amended and supplemented as follows:

“The conduct of a public servant who, while carrying out his/her professional duties, committed an act or participated in making a decision that resulted, directly or indirectly, in a material gain for himself/herself, his/her spouse, for a kin or relative up to the 2nd degree included, or for another person

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104 “Art. 3 General application of the Civil Code. (1) The provisions of this code are also applicable to the relationships between professionals (u.m. – A.L.), as well as the relationships between them and any other subjects of civil law. (2) All persons who operate an enterprise are considered professionals. (3) It is considered an exploitation of an enterprise the systematic and organized activity conducted by one or several persons for the production, management or selling of goods or the provision of services, regardless of whether it is for profit purpose or not.”

105 Published in the Official Gazette of Romania, Part I, No. 409 dated June 10 2011, with subsequent amendments. Art. 8 of the same law states as follows:“(1) The notion of “professional” included in Art. 3 of the Civil code includes the categories of trader, entrepreneur, business operator, as well as authorized persons that would undertake business or professional activities as these are stipulated by law, at the date of entry into effect of the Civil Code. (2) In all normative acts in force, the terms “acts of commerce” and “deeds of commerce” respectively are replaced with the terms “production, commerce or service activities.”

106 Paragraph 16: “Regarding the critics of unconstitutionality with reference to Art.1 paragraph (5) of the Constitution, in which the quality of the law is put into question, the Court rules that in accordance with the provisions of Art. 37 paragraph (2) of Law No. 24/2000 regarding the norms for legislative techniques for the issuing of normative documents, republished in the Official Gazette of Romania, Part I, No. 260 dated April 21 2010, if a notion or wording are not sufficiently established or are prone to different interpretation, their meaning within the context is established by the normative act that institutes them, within the general provisions or in a glossary appendix and as such they become mandatory for the normative documents in the same matter of law. To the same effect, by Decision No. 390 dated July 2 2014, published in the Official Gazette of Romania, Part I, No. 532 dated July 17 2014, paragraph 13, the Constitutional Court ruled that a legal notion may have content and a meaning that are different from one law to the next, under the condition that the law utilizing said notion also defines it within its text”.
with whom (s)he had relationships between professionals or work relationships for the past 5 years or from whom (s)he received or receives benefits of any nature, shall be punishable by 1 to 5 years of imprisonment and the ban on exercising the right to hold a public office.”

3. Pursuant to the decision of the Constitutional Court No. 603/2015\(^\text{107}\), as well as to recent specialty literature, we propose that Art. 308 paragraph (1) C.C. should be amended as follows: “The provisions of Art. 289-292, 295, 297-300 and 304 regarding public servants are correspondingly applicable for those acts perpetrated by or in connection to persons that carry out, on a permanent or temporary basis, with or without remuneration, a task of any kind as part of their duties in the service of a natural person as mentioned in Art. 175 paragraph (2) or of any legal person”.

We would also propose that a new paragraph, paragraph (1\(^1\)), should be added after paragraph (1) of Art. 308 C.C., as follows: “(1\(^1\)) The provisions of Art. 301, regarding public servants, are correspondingly applicable for those acts perpetrated by or in connection to persons that carry out, on a permanent or temporary basis, with or without remuneration, a task of any kind as part of their duties, in accordance with Art. 301 paragraph (1) of C.C.. The situation is however different regarding the criminalizing of the same acts perpetrated by the persons who carry out, on a permanent or temporary basis, with or without remuneration, a task of any kind within a legal entity. As an example, professionals such as notaries public and judicial liquidators are included in this category. Since they were appointed by a public authority in order to carry out a public duty or are under the supervision or control of the latter for the purpose of carrying out the said public service, the Court ruled that there is an interest to criminalize offences of conflict of interest regarding the persons who carry out, on a permanent or temporary basis, with or without remuneration, a task of any kind as part of their duties, in accordance with Art. 301 paragraph (1) of C.C.. The situation is however different regarding the criminalizing of the same acts perpetrated by the persons who carry out, on a permanent or temporary basis, with or without remuneration, a task of any kind within a legal entity. Actually, this category includes any company type as defined by the Civil Code, the Companies Law No. 31/1990, republished in the Official Gazette of Romania, Part I, No. 1066, dated November 17 2004 or Law No. 1/2005 regarding the organization and functioning of cooperatives, republished in the Romanian Official Gazette, Part I, No. 368 of May 20 2014. (…) 32. In the context of the normative acts in force, the Court held that regulating a private person as an active subject of the offence of conflict of interest by way of the provisions of Art. 308 C.C. is excessive, due to the fact that an unacceptable enlargement of the state’s coercive force would occur by making use of criminal proceedings on the persons’ freedom of action, which falls under the right to work and the economic freedom, without any criminological justification to that end. 33. The Court ruled that, pursuant to art. 61 par. 91) and to art. 73 par. (3) (h) of the Constitution, the legislator does not have the constitutional capacity to regulate offences in a way that would instate obvious disproportion between the importance of the social value that needs to be protected and of the social value that needs to be limited since otherwise the latter might end in being disregarded. Moreover, the social value to be protected specifically concerns the private sector, in which case the state has to interest in criminalizing the conflict of interest, due to the fact that the social value that is meant to be protected is not of public nature[...] 35. The court acknowledges that, if the acts of persons in the private sector cause damages, civil liability or liability under labour law or any other liability may be claimed against them without involving the state criminal law coercive force. In conclusion, the Court establishes that a social value that needs protection in the case of conflict of interest in the private sector is hard to identify, mainly due to the fact that the eventual incompatibilities maybe efficiently settled as stated previously by means of civil regulation, labor regulation or by other regulations that do not involve criminal liability. 36. As a result, the Court hereby decides that criminalizing conflict of interest in the private sector represents an unjustified infringement on the economical and labor rights of the persons that carry out, on a permanent or temporary basis, with or without remuneration, a task of any kind in the service of a legal person, fundamental rights guaranteed by the provisions of Art. 41 paragraph (1) and Art. 45 of the Constitution”.

\(^{107}\) Constitutional Court, Decision No. 603/2015: “...28. Art. 175 paragraph (2) of the Criminal code holds similar to public servants, in terms of penal treatment, any persons who carry out a service of public interest for which they have appointed by public authorities or who are under the supervision or control of the latter for the purpose of carrying out the said public service. As an example, professionals such as notaries public and judicial liquidators are included in this category. Since they were appointed by a public authority in order to carry out a public duty or are under the supervision or control of the latter for the purpose of carrying out the said public service, the Court ruled that there is an interest to criminalize offences of conflict of interest regarding the persons who carry out, on a permanent or temporary basis, with or without remuneration, a task of any kind as part of their duties, in accordance with Art. 301 paragraph (1) of C.C.. The situation is however different regarding the criminalizing of the same acts perpetrated by the persons who carry out, on a permanent or temporary basis, with or without remuneration, a task of any kind within a legal entity. Actually, this category includes any company type as defined by the Civil Code, the Companies Law No. 31/1990, republished in the Official Gazette of Romania, Part I, No. 1066, dated November 17 2004 or Law No. 1/2005 regarding the organization and functioning of cooperatives, republished in the Romanian Official Gazette, Part I, No. 368 of May 20 2014. (…) 32. In the context of the normative acts in force, the Court held that regulating a private person as an active subject of the offence of conflict of interest by way of the provisions of Art. 308 C.C. is excessive, due to the fact that an unacceptable enlargement of the state’s coercive force would occur by making use of criminal proceedings on the persons’ freedom of action, which falls under the right to work and the economic freedom, without any criminological justification to that end. 33. The Court ruled that, pursuant to art. 61 par. 91) and to art. 73 par. (3) (h) of the Constitution, the legislator does not have the constitutional capacity to regulate offences in a way that would instate obvious disproportion between the importance of the social value that needs to be protected and of the social value that needs to be limited since otherwise the latter might end in being disregarded. Moreover, the social value to be protected specifically concerns the private sector, in which case the state has to interest in criminalizing the conflict of interest, due to the fact that the social value that is meant to be protected is not of public nature[...] 35. The court acknowledges that, if the acts of persons in the private sector cause damages, civil liability or liability under labour law or any other liability may be claimed against them without involving the state criminal law coercive force. In conclusion, the Court establishes that a social value that needs protection in the case of conflict of interest in the private sector is hard to identify, mainly due to the fact that the eventual incompatibilities maybe efficiently settled as stated previously by means of civil regulation, labor regulation or by other regulations that do not involve criminal liability. 36. As a result, the Court hereby decides that criminalizing conflict of interest in the private sector represents an unjustified infringement on the economical and labor rights of the persons that carry out, on a permanent or temporary basis, with or without remuneration, a task of any kind in the service of a legal person, fundamental rights guaranteed by the provisions of Art. 41 paragraph (1) and Art. 45 of the Constitution”.

permanent or temporary basis, with or without remuneration, a task of any kind as part of their duties in the service of a natural person as mentioned in Art. 175 paragraph (2)". 