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THEORETICAL AND PRACTICAL ANALYSIS ON THE QUALITY OF ACTIVE SUBJECT OF THE CORRUPTION OFFENSES OF THE BANK CLERK IN THE SENSE OF HIS ASSIMILATION TO THE CIVIL SERVANT

Gheorghe Moise*
Police Academy "Alexandru Ioan Cuza" of Bucharest, Romania, E-mail: george_moise03@yahoo.com

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Abstract: The quality of the active subject of the bribery offense that can be retained to the bank clerk is based on the logical-legal argument that the duties he performs are subject to the control of a public authority, which recognizes that at least in terms of the importance of this activity. type of official we place ourselves in an area of authority and public interest. If at the beginning the legislator placed the bank clerk among the private persons who in terms of activities were likely to acquire the status of active subject of the crime of bribery, then he returned and placed him among the category of employees assimilated to civil servants. This much stronger link between the activity of this official, the purpose of his duties and the subordination of his own activity to a public authority, was the new argument underlying the current criminal regulations, which recognizes the quality of active subject of the offense of bribing the bank clerk.

Keywords: bank clerk; corruption offenses; civil servant; public authority.

1. Introduction

In a state governed by the rule of law, it is essential the protection of social values through normative acts that incriminate citizens' deviations from the norms of law correspond to current social realities, so as to guarantee the rule of law.

Among the social values protected by the legislator are found, and of particular importance, those values that protect the authority and strength of state institutions in guaranteeing a constitutional order, in which the citizen feels protected in relation to the state.

The erosion of the authority of the state institutions, its discredit, and the minimization of the role of these institutions, certainly lead to the weakening of the

* Corresponding author: Gheorghe Moise. *E-mail: george_moise03@yahoo.com*

citizens' trust in the state, as a protectionist entity, and allow the appearance of randomness and imbalance in daily social life.

This situation of harassment and distrust of citizens in state institutions, as well as the diminution of guarantees regarding the observance of fundamental rights and freedoms in connection with the activities of state institutions are most often based on the phenomenon of corruption encountered among employees of these institutions. two other major phenomena encountered in everyday reality: the lack of staff and the deprofessionalization, for the most part, of staff in public institutions.

If the lack of staff can be seen as a somewhat objective phenomenon, generated by disinterest in certain professions and/or public institutions, coupled with unattractive pay, the other two phenomena, namely corruption and deprofessionalization of staff are predominantly subjective and exacerbated by those many times. Not infrequently, the loading of the apparatus of public institutions with unqualified personnel is due to their employment as a result of committing corruption offenses.

This, then, is one of the mediated effects of corruption offenses, which ultimately lead to a weakening of state institutions, a lack of public confidence in them, and a lack of protection for citizens by the state.

In our study, we aim to present the theoretical and practical aspects of corruption offenses encountered in an essential area of the market economy, an undeniable topicality, namely the banking system.

2. Theoretical analysis

The theoretical analysis highlights the concern of the Romanian legislator to criminalize the behavior of employees within banking institutions, those who hold the status of a bank clerk in relation to beneficiaries of banking services, individuals, or legal entities. The need for a new regulation in this field, by assimilating the corruption offenses of the bank clerk with those of the civil servant and, implicitly, the acquisition of the former as an active subject of corruption offenses, arose from the innumerable damages created to the banking system by its own workers. which sought to cover personal interests. In almost all cases, the damage could not be recovered or, in one form or another, was borne by all citizens, either by the emergence of more rigid and expensive banking policies or by the state covering the damages as a result of the fact that the disruption of these social relations through the "earthquake" brought about by the disappearance of some banking institutions generated both social movements and real economic "tsunamis", exemplifying in this sense the disappearance of BANCOREX or ALBINA banks.

From a theoretical point of view, it is observed that in the new conception of the Criminal Code [1], the legislator reconfigured the notion of civil servant, being attached to the civil servant himself a special category, respectively that of

assimilated officials. In this sense, art. 175 para. 2 C. Code stipulates that "is considered a civil servant, within the meaning of the criminal law, the person who exercises a service of public interest for which he has been invested by public authorities or who is subject to their control or supervision regarding the performance of that public service".

Given the specificity of the activities carried out by persons included in this category, the explanatory memorandum [2] of the Criminal Code states that only those situations aimed at non-fulfillment, delay in fulfilling an act regarding its legal duties, or performing an act contrary to them are incriminated duties in order to gain personal benefits directly or indirectly.

From the economy of the above-mentioned text of the law, it was concluded that a private sector worker is assimilated into civil servant if 3 conditions are met cumulatively, two common and one alternative [3], as follows: the person to perform a service of public interest; the performance of that public service to be subject to control or supervision over the duties performed by the worker; control/supervision to be exercised by a public authority with responsibilities in the field of activity of the official subject to control or supervision.

We appreciate that the legislator has found and justified his new approach, in the sense that, although these persons do not have the quality of civil servants themselves, they exercise specific attributes of public authority, delegated by state authorities by an act, for which they submit. its control.

Relating to the daily reality, the Romanian legislator, through the new amendments, wanted to exclude certain categories of freelancers, such as notaries public and bailiffs, from the sphere of potential active subjects of the crime of bribery.

Within the criminal legal relations within the meaning of art. 175 para. 2 of C. Code a number of legal issues have been raised regarding the assimilation of certain categories of private-sector workers to civil servants when their qualification as active subjects of corruption offenses has been questioned.

In this situation is the bank worker, who carries out his activity on the basis of an individual employment contract concluded as a result, on the one hand, of the manifestation of will of the two contracting parties, respectively employee and employee, and on the other hand of the fulfillment of the legal conditions for employment by the candidate for the position of bank clerk. This legal situation is clearly regulated by the Labor Code [4] and is not subject to the specific regulations of civil servants as defined by them, as well as their employment relationships by the Administrative Code [5].

A theoretical explanation is therefore needed to argue why these workers, although not having a concrete capacity as civil servants, are nevertheless assimilated to this

category. The previous statement showed that the exercise by these officials of specific tasks to public authorities, following delegations of tasks of state authorities to banking institutions, and the right of state authorities to control banking are essential and sufficient elements to achieve this. assimilation between the two professional categories of employees. The details of the two conditions will be the subject of this study in the later part of it.

Relevant for understanding this category of civil servants is Decision no. 20/2014 of the HCCJ - Panel for resolving legal issues in criminal matters [6], which stipulated that individuals receiving a national or local public service, economic or sociocultural, in management, acquire the character of public utility, being included in the scope of assimilated civil servants, if the performance of the service seeks to meet the needs of general interest and if it reveals, directly or indirectly, a public authority.

It is noted that the judges of the Supreme Court interpreted the term "public service" in a broader sense than the provisions of the Administrative Code, coming, in a justified and beneficial way to understand this phrase, with details on the area of service to be public (at least locally, if not nationally), but also of the content of these services of economic, social, cultural nature, which serve general needs, ie they present a public utility. These clarifications, in our opinion, have clarified from a legal point of view the connection between the two professional categories, bank clerk and civil servant, which, performing services of a certain importance, allowed the criminal legislator to assimilate them and at the same time recognize the quality of the subject. corruption offenses, when the constituent elements of one of these types of offenses charged to the bank official are met.

Regarding the persons who practice liberal professions, the HCCJ specified that, starting from the special regulatory provisions, the analysis of the achievement of the conditions provided by art. 175 para. 2 of C. Code it will be done for each professional category separately.

Also, Decisions no. 790/2016 [7] and no. 489/2016 [8] of the Constitutional Court of Romania reveals that if a person carries out his activity for a legal person that provides a service of public interest and is subject to the control and supervision of a public authority, he becomes a civil servant, within the meaning of art. 175 para. 2 C. Code.

In the sense of those retained in the aforementioned decisions, which, analyzing the legislative and constitutional accuracy of art. 175 para. 2 of the C. Code, the quality of civil servant of the bank clerk was established as a certainty, being necessary and sufficient the state of fact attesting that his activity carried out within a legal person is subject to public control and supervision, not being necessary and nor is it appropriate for each of these persons (bank officials) to be subordinated, controlled

and supervised by the National Bank of Romania as a precisely determined natural person. We agree with the decision of the Constitutional Court of Romania and appreciate that the bank clerk employed by a privately held banking company that was authorized by the National Bank of Romania and whose activities are subject to monitoring and control by the National Bank of Romania is a civil servant in the sense established by the criminal legislator. 175 para. 2 of C. Code.

Due to the specifics of certain liberal professions, a distinction must be made between authorization and investment, in the sense that we agree with the doctrine [9] that "authorization" derives from the right to exercise a profession, given by the competent body, and "investment" comes from a public authority, which has granted it for the purpose of exercising a service of public interest.

In order to establish whether a certain person has the quality of civil servant, in the sense established by art. 175 para. 2 C. Code, three criteria can be applied [10]. The first criterion relates to the express mention in the Constitution of the public authority of investment, control, or supervision of the performance of the service of public interest, the second concerns the distinction between investment, control, or supervision, which must exclusively concern the exercise of that public service and granting the right to practice of the profession in the field of competence required for the performance of that public service, and the last criterion requires that there be no service relations between the public authority and the person authorized to perform the public service, established on the basis of an individual or collective employment contract. If there are such reports, the person will be included either in the category of civil servants provided by art. 175 para. 1 C. Code, or in the category of private officials, provided by art. 308 C. Code.

Compared to the theoretical aspects found in the provisions of the new criminal regulations or in the opinions of specialists in the field, as well as in the interpretation given by the HCCJ judges, we notice that the judicial practice was characterized by a sinusoidal aspect in the approach. art. 175 C. Code.

In this sense, after the entry into force of the Criminal Code, it was noted that only the officials of a bank with state capital can be included in the category of civil servants provided by art. 175 para. 1 lit. c from C. Code [11], and those of privately held banks were included in the sphere of private ones [12]. Only later, in the new interpretation we referred to, were the officials from the banks with private capital assimilated, like the officials from the public banks, to the professional category of the civil servants.

Thus, in order to support the first approach, regarding the private character of the bank officials, the provisions of GEO no. 37/2011 [13], by which the banks were recognized as public interest entities, an insufficient feature from the point of view

of criminal law for their inclusion in the category of assimilated civil servants. At the same time, an essential element was the non-inclusion of the National Bank of Romania (NBR) in the category of public authorities, even if the NBR exercises supervision over banking, which is also insufficient to qualify the bank's employees as assimilated civil servants.

With regard to the need for the person to be invested with the performance of the public service or to exercise the service of public interest under the control or supervision of a public authority, it was assessed that the employee of a bank with fully private capital does not meet the condition service of public interest, it carrying out its activity on the basis of an employment contract concluded with the bank with fully private capital, a situation which does not amount to an investment for the exercise of a service of public interest.

3. Practical aspects

Following the pronouncement of these decisions, the HCCJ - Panel for resolving legal issues in criminal matters, by Decision no. 18/2017 [14], established that the bank clerk who carries out his activity in a bank whose capital is entirely private, but which is authorized by the NBR and is under the supervision of this institution, acquires the quality of civil servant, in a criminal sense, in accordance with the provisions of art. 175 para. 2 of C. Code.

Regarding the condition of exercising a service of public interest, the panel highlighted that the activities carried out by credit institutions require special attention paid by the state, which is manifested by the regime of authorization, regulation and jurisprudential supervision of institutions, activities carried out by the NBR. a public institution, independent, but also by the imperative character of the provisions of the normative acts in the banking field, where there is an established monopoly regarding the development of these specific activities.

Also, the Panel for resolving legal issues also assessed that the banking activity carried out by a bank with fully private capital is one of public interest, being defined in the provisions of art. 7 para. 1 point 1 of GEO no. 99/2006 [15] and which involves, on the one hand, attracting deposits or other repayable funds from the population, and on the other hand, granting loans on own account. Thus, banks with fully private capital carry out activities that go beyond the sphere of private interest and are in the sphere of public interest, which is why they are included in the legal entities that exercise a service of public interest.

From the provisions of Law no. 58/1998 [16] regarding the banking activity, corroborated with those of GEO no. 99/2006, it results that the NBR exercises the control or supervision of banks and credit institutions, Romanian legal entities.

Thus, they can operate only on the basis of the authorization issued by the NBR, are subject to regulations and orders issued by the NBR, which control and supervise their activity through reports submitted by credit institutions and checks performed by NBR staff, authorized in this regard.

Moreover, credit institutions, Romanian legal entities, have the obligation to allow the NBR staff or independent auditors who perform the inspection access to records, accounts and operations, but also to provide all documents and information related to the administration, internal control and operations of the bank, and if irregularities are found, depending on their severity, the NBR may apply sanctions, up to the withdrawal of the bank's authorization.

Also, from the provisions of Law no. 312/2004 [17] on the status of the NBR shows that it is empowered to issue regulations, to take measures to comply, and in case of non-compliance to apply legal sanctions, to control and verify, based on the information received during the on-site inspections, registers, accounts or any other documents they deem necessary for the performance of their supervisory duties.

In the reasoning of the Decision, the court explained the reasoning on which the decision was based by which the bank clerk, an employee of a bank that is subject to the control of a public authority, can be considered, in a criminal sense, an assimilated civil servant.

Thus, it was considered that, although these provisions concern the way in which the supervision or control of the credit institution is carried out, a legal entity cannot be dissociated between the service provided by the bank official and the activity of the credit institution, in the sense of excluding it from control or supervision of a public authority regarding the performance of a service of public interest, on the grounds that the legal provisions refer only to the legal person or its governing bodies, provided that through the activity carried out by the civil servant the operation of the bank is ensured and achieving the purpose for which it was established.

We find that in the case of the bank clerk the nature of his duties was analyzed in complexity, both in terms of the degree of interest for the company, but also who controls and supervises it to ensure the stability and legality of economic and financial relations protected by applicable regulations. the provisions of the Criminal Code, especially of art. 175 para. 2. Undoubtedly, this issue is important not only in terms of a theoretical qualification but especially in terms of a practical qualification, which helps both the prosecuting authorities and the court to prosecute those who would infringe certain values. protected by criminal law and which would be limited to acts of corruption.

From our point of view, there are two working hypotheses, namely the public nature of the activity of the bank clerk that allows its assimilation into the civil servant and

the qualification of the private banking institution as an institution that serves to satisfy a general interest need of society members. the bank provides a service of public interest within a public interest entity.

Referring to the public character of the activity of the bank clerk, as it is conditioned by the legislator through the provisions of art. 175 para. 2 of the Criminal Code, a detailed analysis of the three legal conditions is required.

The first condition refers to the fact that the bank clerk must be regarded as a person performing a service of public interest. The attributions of this person will be analyzed at least from a theoretical point of view by the report given by the legislator through the provisions of art. 2 lit. m of the Law on Administrative Litigation no. 554/20024 to the phrase "public service". In the spirit of the provisions mentioned by public service, that activity is considered, on the one hand, organized by a public authority, and on the other hand, it is aimed at that activity authorized by the same type of public authority, both situations pursuing a purpose. precisely determined, namely to cover the needs and legitimate public interests of members of society at large. It is observed that the public service is conditioned by the way of organizing and authorizing the state through competent public authorities with a precise determined purpose that responds to public interest as we consider that the banking services respond to the legitimate interests and needs of the general public. Undoubtedly, banking law has a certain public character derived from the interest shown by any state for the organization and conduct of any banking activity provided by the relevant institutions, to cover the general and legitimate needs of the general public. The interest in this field in our country is highlighted by a rigorous legitimate system of authorization, regulation and supervision of this activity by an institution independent of the autonomous public authorities, created by an organic law, namely the NBR.

All the legal norms that make up the legal framework applicable to the banking field are of an imperative character, being of strict interpretation and application, presenting even a "monopoly" character for the National Bank regarding the insurance, supervision, control and regulation of the banking activities carried out by the banking units. credit, regardless of their capital, public, private, or mixed.

The rigor of the legislative system in the financial-banking sector has its origin in the general need of a company and implicitly of the members of this company to guarantee the safety and quality of services provided to customers by those banking institutions that have confidence in operating permits obtained by the NBR.

The need of the banking financial services company is a general one, and the state allows this need to be covered by private or mixed public institutions, but only after a prior approval by the NBR. If we refer to the nature of this need for financial services for a company, we clearly see that the services provided by financial-

banking institutions are of general interest to the members of the company, so clearly of public interest, which leads us to the irrefutable conclusion that the worker a bank clerk provides a service of public interest.

The public character of the activity of the bank clerk emerges from the analysis of the provisions of art. 175 para. 2 of C. Code corroborated with Law no. 312/2004 on the Statute of the NBR, Law no. 58/1998 regarding the banking activity, Government Ordinance no. 99/2006 on credit institutions and capital adequacy, Law no. 312/2015 on the recovery of credit intuitions and investment firms, art. 116 of the Romanian Constitution, normative acts in force at the date of pronouncing the decision mentioned by the HCCJ, but also of the European normative acts, such as Directive 59/2014, Directive 82/891, Directive 2001/24 / EC, 2002/47 / EC, 2004/25 / EC, 2005/56 / EC, 2012/30 / EU, 2013/36 / EU, Regulation 1093/2010 and Regulation 648/2012, etc.

The second condition imposed by the criminal legislator in order to find us in the scope of applicability of art. 175 para. 2 of C. Code refers to the fact that the financial-banking institution must be subject to control or supervision over the provision of the public service.

Compared to this provision, it is easy to see that the financial-banking institutions (banks) are entities that carry out their activity only on the basis of the authorization issued by the NBR. This operating license is subject to compliance with NBR regulations and orders regarding the conduct of banking by credit institutions that have a permanent obligation to allow access to NBR officials or independent auditors to perform controls and inspections on banking services and operations. in order to achieve financial stability in a sector of activity so important for all members of society and society as a whole. At the same time, these banking institutions have the obligation to present in the controls and inspections all the documentation regarding the accounts and operations performed and to provide any data requested by the NBR control bodies or independent auditors to guarantee the values protected by law in this field. It should be noted that only the NBR, on the basis of its statute and its internal regulations and acts, can apply any kind of legal sanctions following the controls and monitoring performed at the banking institutions. Banca Națională, as an independent public authority, is the only national forum that imposes through the attributions recognized by the Romanian state the conditions of accreditation, monitoring, sanctioning of credit units that thus become controlled or supervised entities in the spirit of art. 175 para. 2 C. Code as subordinate and public interest entities.

Regarding the third condition regarding the quality of public authority of the body of control or supervision of the banking activity, we find that art. 240 of Law no.

187/2012 implementing C. Code - Interpretative provisions state that "in application of the provisions of art. 135 of the Criminal Code by public authorities means the authorities expressly provided in Title III, as well as in art. 140 and 142 of the Romanian Constitution, republished".

The Constitution stipulates in Title III, entitled "Public Authorities", that the Parliament, the President of Romania, the Government, the Public Administration and the Judicial Authority are components of the public authorities.

With regard to public administration, it is envisaged that it is composed of the specialized central public administration, legislated in Section 1, which includes the autonomous administrative authorities and the local public administration, legislated in Section 2.

Interpretation of art. 116 of the Romanian Constitution [18] shows us that the specialized central administration consists of subordinated specialized central bodies, which include ministries and other central bodies, and autonomous central specialized bodies, which are not subordinated to other public authorities.

Thus, it is found that in Romania there are two categories of autonomous central authorities, respectively, some mentioned in the Constitution, having constitutional status, which include the People's Advocate (art. 58 - 60), the Supreme Council of National Defense (art. 119), The Court of Accounts (art. 140), the Economic and Social Council (art. 141), and others whose birth was carried out by organic law, which includes the Competition Council [19], the National Audiovisual Council [20], the Authority for Financial Supervision [21] or The National Bank of Romania [22].

4. Conclusions

Corroborating the internal provisions with the relevant European provisions, the certainty results that the NBR is the only public authority in Romania for credit institutions. Or, if we analyze the phrase authority of resolution, we notice that from the economy of the provisions of Law no. 312/2015 this authority is defined as a public administrative authority vested with public administrative powers in the field of banking. At the same time, the organic character of the laws on banking activities carried out under the authority and administrative competence of the NBR strengthens the attribute of autonomous public authority of the NBR which allows it not only the regulation of banking and financial activities but also the control and supervision of all units. credit, which allowed the Romanian legislator to qualify the persons who carry out their activity in the structure of banking institutions, regardless of their capital, public or private, that they are civil servants within the meaning of art. 175 para. 2 of the C. Code, a conclusion to which we also agree and which we support.

In conclusion, it is noted that the legislator happily adapts the legislation on corruption to everyday reality by overcoming the "purely theoretical barriers" imposed by the legal instrument under which the work is performed by the bank clerk, respectively the civil servant.

Limiting to a purely theoretical projection of the form of the legal employment relationship compared to the employment relationship an impossibility to acquire the quality of active subject of corruption offenses for the first category of workers (bank officials) would be lacking in content or limited in excessively and unjustifiably, the correct qualification given by the criminal prosecution bodies when certain values protected by the criminal law were disregarded or violated by the non-fulfillment, delay or unjustified delay of the acts that they had to perform according to the attributions of service.

The result of the activity of the bank clerk under the aspect of economic, social and cultural importance, but also the area of applicability of this result at a local or national level, represented the main logical-legal hypothesis that was the basis of the new legal configuration of art. 175 para. 2 of the Criminal Code, based on which a person employed as a result of concluding an individual employment contract, who has acquired the quality of a bank clerk is assimilated to a civil servant as defined by the Administrative Code.

Judicial activity in the fight against corruption offenses is greatly facilitated by the new legislation which allows the identification in private of persons who have committed acts of corruption and who, although not having a "pure civil servant" status, acquire the status of active subject of corruption offenses under the conditions of the offenses established by the Criminal Code.

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