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THE OFFENSE PROVIDED BY ARTICLE 12, PARAGRAPH 1, LETTER A, CLAUSE I OF ROMANIAN LAW NO. 78 OF MAY 8, 2000, FOR THE PREVENTION, DISCOVERY, AND SANCTIONING OF ACTS OF CORRUPTION

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Abstract: *The article aims to analyze the offense provided by Article 12, paragraph 1, letter a, clause I of Law no. 78 of May 8, 2000, in light of the clarifications made by the legislator through Law no. 160/2019. This endeavor focuses on aspects related to the constitutive elements of the offense, the case law of the Romanian Constitutional Court, and the High Court of Cassation and Justice, all reflected in the case law of national courts.*

Key words: *incompatibility, corruption, commercial operations, financial operations*

1. Introduction

The defense of social relations concerning the honesty, integrity, and fairness of individuals who, due to their position, duties, or assignments, must refrain from engaging in financial operations as acts of commerce, is achieved through the offense provided by Article 12, paragraph 1, letter a, clause I of Law no. 78 of May 8, 2000, for the prevention, discovery, and sanctioning of acts of corruption. However, despite the long-standing existence of this incriminating norm, there have been divergences in national case law over time regarding the interpretation of the notion of "financial operations as acts of commerce." This issue was clarified by Law no. 160/2019, the impact of which we will detail in the following sections.

2. The structure and constitutive elements of the offense.

The offense provided by article 12, paragraph 1, letter a, clause I of Law no. 78 of May 8, 2000le 12 letter a) of Law no. 78/2000 consists of carrying out financial operations, as acts of commerce, incompatible with the function, duty, or assignment that a person

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holds, or entering into financial transactions using information obtained by virtue of their function, duty, or assignment, if committed with the purpose of obtaining for oneself or for another money, goods, or other undue benefits.

Through Law no. 160/2019, published in the Official Gazette, Part I, no. 629 on July 29, 2019, paragraph (2) was added to Article 12 of Law no. 78/2000, which stipulates that "For the purposes of this law, financial operations consist of operations that involve the circulation of capital, banking operations, foreign exchange or credit operations, investment operations in stock markets, insurance, mutual funds, or regarding bank accounts and those equivalent to them, as well as domestic and international commercial transactions. To be carried out as acts of commerce, financial operations must constitute an action of intermediation in the circulation of goods conducted in an organized and systematic manner, with the aim of obtaining a profit."

The active subject of the offense provided by Article 12, paragraph (1), letter a) of Law no. 78/2000 is a qualified one, being only a person who holds a position or exercises a duty or assignment incompatible with conducting financial operations as acts of commerce. The passive subject will be the state or the public authority institution associated with the position held by the person performing the financial operations, in violation of the incompatibility regime (Bodoroncea, 2022).

The material element consists of conducting financial operations as acts of commerce that are incompatible with the position, duty, or assignment fulfilled by a person (clause I of the incriminating norm) or entering into financial transactions using information obtained by virtue of their position, duty, or assignment (clause II).

Financial operations have been defined by paragraph (2) of Article 12 of Law no. 78/2000, introduced by Law no. 160/2019, as:

- operations that involve the circulation of capital,
- banking operations, foreign exchange or credit operations,
- investment operations in stock markets, insurance, mutual funds, or concerning bank accounts and those equivalent to them,
- domestic and international commercial transactions.

A similar enumeration can also be found in Article 1, letter e) of Law no. 78/2000, referring to the qualification of the active subject of the offense.

According to the common meaning of the terms, an operation represents a component part of an activity, of which it is a part, and financial refers to something related to money or credit. Consequently, a financial operation constitutes a component part of an activity that involves the circulation of money, regardless of the form in which it appears (liquidity, capital, credit, etc.).

Not every economic activity will simultaneously constitute a financial operation, but only those that have the aforementioned component. Thus, entering into a sale-purchase contract that involves payment of a price will contain at least one financial operation, while not every act of managing a commercial company meets these conditions (Bodoroncea, 2022).

Relevant in this regard is the content of Article 12, paragraph (2) of Law no. 78/2000, which enumerates financial operations in an almost exhaustive manner, each of which involves the circulation of money in one form or another.

In this sense, the decisions of the Constitutional Court, no. 700/2017 and no. 243/2017, have been taken into account, with the Court stating that conducting financial operations means carrying out transactions related to money and credit and involves any activity that entails a payment, the circulation of money, or credit. However, only those that fall within the activities and areas explicitly listed in Article 1, letter e) of Law no. 78/2000 can be considered financial operations as envisaged by the legislator in the incrimination of the acts provided for in Article 12, letter a) of the same law (published in the Official Gazette, no. 42 of January 17, 2018, paragraphs 23, 24; published in the Official Gazette, no. 527 of July 6, 2017, paragraphs 29, 30).

Furthermore, from the content of Article 12, paragraph (1), letter a) of Law no. 78/2000, it results that the material element of the offense requires the fulfillment of two essential conditions:

- the incompatibility between the public position/duty/assignment and the conducting of financial operations as acts of commerce must be explicitly stated in the law governing the activity or the status of the respective position (Decision of the Constitutional Court no. 243/2017, published in the Official Gazette no. 527 of July 6, 2017, paragraph 38). Since the rationale for establishing an incompatibility is to ensure the honesty, integrity, or impartiality of the person exercising the public function or duty, the legal provision targets the performance of the prohibited activity confined to an incompatible position, regardless of whether the latter is exercised in law or in fact.
- the financial operations must be carried out as acts of commerce.

Regarding the phrase “acts of commerce”, the prevailing opinion holds that after 2011, any analysis of acts or facts of commerce can no longer be related to the provisions of Article 3 of the previous Commercial Code, but only to the provisions of the currently applicable Civil Code.

Thus, according to Article 3 of the Civil Code (Law no. 287/2009), the provisions of the code also apply to relationships between professionals, as well as to relationships between them and any other legal entities. Professionals are defined as those who exploit a business, specifically those who systematically engage in an organized activity consisting of the production, administration, or disposal of goods or the provision of services, regardless of whether they have a profit motive.

Through Article 8 of Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, the notion of "professional" was clarified, indicating that it includes categories such as merchant, entrepreneur, economic operator, and any other persons authorized to carry out economic or professional activities. Furthermore, paragraph (2) stipulates that “In all normative acts in force, the expressions 'acts of commerce' and 'facts of commerce' are replaced by the expression 'production, commerce, or service activities.'”

Consequently, in the context of Article 12, paragraph (1), letter a) of Law no. 78/2000, the material element of the offense must be understood as the conducting of financial operations as activities of production, commerce, or provision of services.

By Decision no. 700/2017, the Constitutional Court noted that the replacement of the classic expressions "acts of commerce" and "facts of commerce" serves the purpose of establishing the current legal content of the new concepts that pertain to the economic

meaning of commerce, specifically referring to the interposition in the exchange and circulation of goods. This means that, in the current understanding of the legislator, acts of commerce, or commercial activity, consist of operations related to production, commerce, or the provision of services (published in the Official Gazette no. 42 on January 17, 2018, paragraph 28).

Furthermore, through the amendment introduced by Law no. 160/2019 to Article 12 of Law no. 78/2000, it was explicitly provided that "for financial operations to be conducted as acts of commerce, they must constitute an organized and systematic intermediation in the circulation of goods for the purpose of obtaining profit."

Thus, the conducting of financial operations as acts of commerce includes any payment/collection, investment/loan/grant of a sum of money or credit, carried out within the framework of production activities or intermediation in the circulation of goods or provision of services, performed in an organized and systematic manner with the aim of obtaining profit. As previously stated, a financial operation within the meaning of the incriminating norm can exist independently (such as organized and systematic foreign exchange operations) or can be a component of an activity (such as buying and selling, renting, or other transactions).

For an individual to acquire the status of a merchant, it is sufficient to demonstrate a specific factual situation characterized by systematic, rather than accidental or isolated, engagement in commercial activities.

In this regard, Article 3 of the Civil Code states that all those who operate a business are considered professionals, and that "(3) The operation of a business is defined as the systematic engagement by one or more persons in an organized activity consisting of producing, managing, or transferring goods or providing services, regardless of whether it is for profit."

Moreover, over time, both legislation and case law have recognized the status of "clandestine" merchant. Thus, under Article 7 of the Commercial Code, both commercial companies and individuals who engaged in "acts of commerce as a regular profession" were considered merchants. For the latter, the legal forms in which they could conduct their commercial activities and the professional obligation to register in the trade register to access those forms were imposed by special legislation.

If individuals conducted their activities exclusively under the conditions of Article 7 of the Commercial Code (engaging in objective acts of commerce as a profession in their own name), but did not comply with the legal formalities regarding authorization and registration in the trade register as authorized individuals, holders of a sole proprietorship, or members of a family business, they acquired the status of a physical merchant. The illicit activities of the merchant, stemming from the disregard for legal formalities, justified the designation of "clandestine" merchant.

Failing to take the necessary legal steps to obtain authorization for conducting commercial activities and to register in the trade register did not affect the recognition of the status of a merchant; however, it was relevant from the perspective of the legal illicitness sanctioned by the legislator.

Currently, the provisions of Article 3, paragraph (2) of the Civil Code, correlated with provisions of special laws, allow for the identification of the „clandestine" professional

as the person or entity that operates a business as defined in Article 3, paragraph (3) of the Civil Code, without being registered in a special public registry and/or authorized for operating a business, despite having this normative obligation to be legally established and to access their activity. The provisions of the Civil Code condition the status of a professional directly and exclusively on the „operation of a business" as stated in Article 3, paragraph (3); the cited legal text is essentially devoid of any conditions regarding the fulfillment of legal formalities or the legality of the activity conducted.

Thus, the "clandestine" professional is a professional in the sense of the Civil Code, characterized by operating a business under illegal conditions, a direct consequence of an omission of the requirements regarding establishment in a legally prescribed form and/or ensuring legal access to conducting their activity.

The choice for "clandestinity," regardless of its practical manifestation, is supported by the will of the business holder who seeks, as applicable, to evade regulations, typically fiscal and/or criminal, as well as to circumvent incompatibilities, conflicts of interest, or prohibitions imposed by certain special laws.

The immediate consequence of the offense consists of the danger created to social values that pertain to the special legal object, namely the social relationships regarding the integrity and honesty of individuals who, due to their position, duty, or assignment, must refrain from engaging in financial operations as acts of commerce.

The causal link, being a danger offense, arises from the materiality of the act.

The subjective aspect entails that in all cases, the offense is committed with direct intent, qualified by purpose, according to Article 16, paragraph (3), letter a) of the Penal Code. According to the incriminating norm, one condition for the existence of the offense provided by Article 12, paragraph (1), letter a), thesis I of Law No. 78/2000 is the purpose for which financial operations are conducted as acts of commerce, incompatible with the position, duty, or assignment held by an individual, namely to obtain for oneself or for another money, goods, or other undue benefits, regardless of whether the purpose was achieved (Constitutional Court Decision No. 700/2017, paragraph 32).

3. Jurisprudence

In a recent decision, the Brașov Court of Appeal found that a police officer committed the offense described in Article 12 paragraph 1 letter a) of Law no. 78/2000, during the period from March 2022 until the issuance of the indictment. The officer effectively managed a company, whose legal administrator is another person and whose associate is his son, conducting financial operations as business activities (current management of the company: negotiating contracts, accounting tasks, and paying employee salaries), which are incompatible with the role of a police officer, as stipulated by Article 45 paragraph 1 letter g) of Law no. 360/2002 on the status of police officers, with the aim of obtaining money, goods, or other undue benefits for himself or others. (Decision no. 178, 2024)

Similarly, the Cluj Court of Appeal ruled on the actions of a police officer who, from 2012 to June 2015, served as the head of a Police Station and, in violation of the

provisions of Article 45 paragraph I letters g and h of the Police Officer's Statute concerning the incompatibilities of police personnel engaging in commercial activities, conducted business transactions involving timber to pay off debts to various individuals for his own benefit, as well as facilitating three timber deliveries for a commercial company to obtain benefits for both the recipient of the timber and another defendant. (Decision no. 1378,2023)

In another case, the Brașov Court of Appeal confirmed the commission of the analyzed offense by a defendant who engaged in activities managing a legal entity authorized in the field of cadastre, even though the shares held in that company had been transferred. He utilized information obtained in his capacity as director of the OCPI, both regarding the cadastre issues faced by individuals approaching OCPI Brașov and concerning the processing of registered cadastre works within the institution's records and by the cadastre inspectors assigned to those tasks, specifically identifying individuals with cadastre problems who sought assistance from OCPI Brașov and directing them to the aforementioned company. He was involved in hiring staff for the company, managing issues arising between the company's employees and its clients, overseeing the company's premises and assets used for personal purposes, and conducting financial transactions on behalf of the company, with assistance from his wife and the complicity of a third party who agreed to fictitiously transfer the company's shares and to serve as an administrator only in name, while holding the status of a mere employee within the company without decision-making power. (Decision no. 50/AP, 2021)

4. Conclusion

The clarifications provided by the legislator through Law no. 160/2019 succeed in placing the offense described in Article 12 paragraph 1 letter a) first thesis of Law no. 78 of May 8, 2000 within a predictable, clear, and coherent framework. The evident effect is the shaping of a unified jurisprudence that meets the deterrent requirements of the incriminating norm, while simultaneously addressing the penal repression of acts prohibited by law.

References

Bodoroncea, G. (2022). *Corruption offenses. Offenses analogous to corruption offenses.* București: C.H. Beck Publishing House, pp. 313-336.

Decision of the Romanian Constitutional Court no. 243/2017, (2017) published in the Official Gazette no. 527 of July 6.

Decision of the Romanian Constitutional Court no. 700/2017, (2017) published in the Official Gazette no. 42 on January 17, 2018

Decision no. 50/AP from 02 februarie 2021 of the Brasov Court of Appeal, unpublished

Decision no. 1378/2023 dated September 15, 2023, issued by the Cluj Court of Appeal, cod RJ g8e89d4d5 (https://www.rejust.ro/juris/g8e89d4d5)

Decision no. 178/2024 dated February 29, 2024, issued by the Brașov Court of Appeal, code RJ ee7828297 (https://www.rejust.ro/juris/ee7828297)