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## DISCUSSION ON CORRUPTION OFFENCES COMMITTED BY POLICE OFFICERS BY CONDUCTING FINANCIAL TRANSACTIONS AS COMMERCIAL ACTS, INCOMPATIBLE WITH POLICE OFFICER’S ROLE, ATTRIBUTION, OR TASK

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**Abstract:** *THE RECENT REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT ACKNOWLEDGED ROMANIA'S PROGRESS IN REFORMING ITS JUDICIARY SYSTEM AND PREVENTING AND COMBATTING CORRUPTION. WE CAN ALSO CONCLUDE THAT THE FIGHT AGAINST CORRUPTION MUST BE INTENSIFIED, PARTICULARLY WITHIN THE NATIONAL SECURITY SYSTEM AND POLICE FORCES. WE ARE EXPLAINING SOME SPECIFIC ASPECTS REGARDING THE INVESTIGATION OF CRIMES ASSIMILATED TO CORRUPTION COMMITTED BY POLICE OFFICERS - OFFICIALS WITH A SPECIAL STATUS, AS SANCTIONED BY ARTICLE 12, PARAGRAPH 1, LETTER A, FIRST THESIS OF LAW NO. 78 OF MAY 8, 2000 FOR THE PREVENTION, DISCOVERY AND SANCTIONING OF CORRUPTION OFFENCES. WE ARE ANALYZING FINANCIAL OPERATIONS, AS COMMERCIAL ACTS, INCOMPATIBLE WITH POLICE OFFICER'S ROLE, ATTRIBUTION, OR TASK, BASED ON COURTS DECISIONS ON THE MATTER. WE ARE TRYING TO OUTLINE THE ELEMENTS WHICH LED TO DIFFERENT SOLUTIONS FOR THE SAME ACTIONS AND THE IMPORTANCE OF A UNITARY JUDICIAL PRACTICE REGARDING THIS OFFENCES.*

**Keywords:** CORRUPTION OFFENCES. POLICE OFFICERS. COMMERCIAL ACTS. FINANCIAL OPERATIONS. INCOMPATIBILITIES.

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### 1. INTRODUCTION

The Cooperation and Verification Mechanism (CVM) was established as a temporary appraisal during Romania's accession to the EU in 2007 to support Romania's ongoing efforts to reform its

judiciary system and to prevent and combat corruption. The recent Report From the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism considers that “the progress made by Romania under the CVM is sufficient to meet Romania’s commitments made at the time of its accession to the EU” (Report From the Commission to the European Parliament and the Council on Progress in Romania Under The Cooperation And Verification Mechanism, 2022). The quality standards for Romania address the judicial performance of this system and transparency, key stake holders in areas such as integrity and the fight against systemic corruption, and corruption prevention. As the mentioned report states, Romania has so far demonstrated a significant determination to work within the framework of the annual Rule of Law Report process, and it shall continue to collaborate constructively within that framework (Report From the Commission to the European Parliament and the Council on Progress in Romania Under The Cooperation And Verification Mechanism, 2022). In parallel, Romania's Recovery and Resilience Plan has enabled the establishment of specific progress benchmarks.

In this regard, the fight against corruption must be intensified, particularly within the national security system and within police forces. Therefore, it is necessary to clarify some specific aspects regarding the investigation of crimes assimilated to corruption committed by police officers - officials with a special status, as sanctioned by article 12, paragraph 1, letter a, first thesis of Law no. 78 of May 8, 2000 for the prevention, discovery and sanctioning of corruption offences.

## **2. CONSIDERATIONS ON THE OFFENSE SANCTIONED BY ARTICLE 12, PARAGRAPH 1, LETTER A, FIRST THESIS OF LAW NO. 78 /2000 FOR THE PREVENTION, IDENTIFICATION AND SANCTIONING OF CORRUPTION OFFENSES, WITH THE ACTIVE SUBJECT BEING A POLICE OFFICER - PUBLIC SERVANT WITH SPECIAL STATUS**

The offences sanctioned by Article 12 of Law no. 78/2000 are punishable by imprisonment from 1 to 5 years, if they are committed for the purpose of obtaining money, goods or other improper benefits for oneself or for another (Article 12, paragraph 1). There are two thesis within the text of letter a): the first one refers to carrying out financial operations, as trade acts, that are incompatible with a person's function, attribution, or task, and the second one is concluding financial transactions using information obtained as a result of his function, attribution, or assignment.

We are going to analyse the deed criminalized in art. 12, paragraph 1, letter a), first thesis, of Law No. 78/2000 in light of doctrine interpretations and jurisprudential solutions formulated in such cases, and to discuss how these facts materialize if the active subject of the crime is a police officer.

The essential component of the offences constitutive content, the perpetrator's illegal action, is investigated in doctrine from two perspectives: objective and subjective.

The objective aspect or objective side of the constitutive content of the crime includes all of the behaviours required by the criminalization norm for the act of conduct, in order for the crime to exist. As a component of the crime, the essence of the constitutive content is the material element that designates the prohibited act of conduct itself, whether embodied in an action or inaction, or in several alternative variants.

As a result, the material element of the objective side of the offense specified in art. 12 paragraph 1, letter a) can only consist of an action that can be carried out in two ways: by carrying out financial operations, as commercial acts, or by concluding financial transactions. The material element of the objective side in the first variant consists in carrying out financial operations as commercial acts. On the subjective side, the crime can only be committed with a clear intention to achieve a specific goal. As a result, the act is committed with the intent of obtaining money, goods, or other improper benefits for oneself or another.

Since the first sentence of the text of art. 12 paragraph 1, letter a) refers to "the performance of financial operations, as commercial acts, incompatible with the function, attribution or assignment that a person fulfills", we consider it is necessary to outline the content of the notion of "financial operations as acts of commerce" and the regime of incompatibilities applicable to police officers.

We are going to discuss first the regime of incompatibilities applicable to police officers and then we are going to analyse financial operations as acts of commerce, based on the regulations dynamic evolution and on different court decisions.

## 2.1. INCOMPATIBILITIES APPLICABLE TO POLICEMEN

Regarding the regime of incompatibilities applicable to policemen as civil servants with the special statute, the provisions of Law 360/2002 on the Statute of Policemen are supplemented with the provisions of Administrative Code (Emergency Ordinance No. 57/2019 of July 3, 2019) and of other normative acts in force applicable to civil servants, if the respective fields are not regulated in the special legislation regarding police officers (article 78 paragraph 1, Administrative Code, 2019).

The provisions of Law no. 161/2003 regarding some measures to ensure transparency in the exercise of public dignities, public functions and in the business environment, preventing and sanctioning corruption are also relevant in this field. Law no.161/2003 (title IV) regulates "Conflict of interests and the regime of incompatibilities in the exercise of public dignities and public functions", section 5, art.94-98, referring to incompatibilities regarding public officials. The quality of civil servant is incompatible with the exercise of any other public office or capacity than the one in which the person was appointed, as well as with the positions of public dignity. Article 96 of Law no. 161/2003 states that "civil servants, parliamentary civil servants, and civil servants with special status may work effectively in the fields of education, scientific research, and literary-artistic creation; according to the job description, civil servants, parliamentary civil servants, and civil servants with special status can perform functions in the private sector that are not directly or indirectly related to the duties performed as a civil servant, parliamentary civil servant, or civil servant with special status". The special interdictions for police force members are mentioned in article 45 paragraph 1 of Law no. 360/2002 on the Statute of Policemen, as the special regulation on this field. After prohibiting the political activities the law specifically prohibits the police officer to "engage in commercial activities directly or through intermediaries, or to participate in the administration or management of some commercial companies, except as a shareholder; engage in profit-making activities that are likely to harm the honor and dignity of the police officer or the institution of which he is a member; or violate the legal regime of conflict of interests and incompatibilities established by Law no. 161/2003" ( article 45 paragraph 1 letter g-I, Law no. 360/2002). Because the law does not expressly call these provisions "incompatibilities," it is important to clarify whether the activities prohibited by the law can be considered "incompatibilities," because the outline of the offense provided for in art. 12, paragraph 1, letter a), first thesis, depends on their assimilation or non-assimilation to this concept from Law 78/2000, which refers to "financial operations (...) *incompatible* with the function (...)."

Article 70 of Law no. 161/2003 defines conflict of interests but not the concept of incompatibility, with article 80 indicating the normative acts that regulate incompatibilities but not defining the term: "incompatibilities concerning public dignities and public positions are those governed by the Constitution, the applicable law, the public authority or institution in which the persons exercising a public dignity or a public function carry out their work or activity, and the provisions of this title" (article 80 Law no. 161/2003).

In the absence of a legal definition, we will accept the term's common meaning according to the Explanatory Dictionary of the Romanian Language: "1. the fact of being incompatible; mismatch, incompatibility", "2. legal prohibition on combining two functions, two attributions that are inherently

contradictory ". As a result, we believe that the interdictions established by the special statute for police officers can be included in the content of the concept of incompatibility.

The Administrative Code, by Article 460, is also sending us to the special legislation: civil servants are subject to the regime of incompatibilities established by special legislation regarding some measures to ensure transparency in the performance of public responsibilities.

Therefore, in order to determine whether an activity is compatible or not with a police officer's status, it is necessary to first refer to the special legislation, verifying the inclusion of the analysed action in the provisions of art. 45 of Law no. 360/2002 on the Statute of the Policeman, then verifying the provisions Law no. 161/2003, based on the regulations of Administrative Code.

We considered it necessary to discuss the legal concept of "incompatibilities" in relation to police forces' status, taking into account the decisions of the High Court of Cassation and Justice which concluded in sentence no. 90 of January 29, 2007 that "the simple performance of financial operations, as commercial acts, does not constitute the offense provided for in art. 12 lit. a) from Law no. 78/2000, but only the performance of financial operations, as commercial acts, incompatible with the function, attribution, or assignment that a person performs, if such incompatibility is provided for by law." Commercial acts must be incompatible with the function, attributions, or assignment that a person performs in order to constitute a material element of the crime, according to the law. The court determined that simply performing financial operations as acts of commerce does not achieve the objective side of the offense specified in art. 12 lit. a) of Law no. 78/2000. The law requires that these acts should be incompatible with the function, attribution or assignment that the active subject fulfills. The incompatibility must result from the law, because only in this way it conditions and also determines the existence of the material element of the objective side of the crime.

Regarding the incompatibilities applicable to the policeman, as we argued above and based on the provisions of art. 45 of Law no. 360/2002 on the Statute of the policeman, we expressly state that it is prohibited "to hold any other public or private position for which he is remunerated, with the exception of teaching positions within educational institutions, scientific research activities and literary-artistic creation", and according to art. 96 paragraph.1 of Law 161/2003 "civil servants, parliamentary civil servants and civil servants with special status can exercise positions or *activities* (*a.n.*) in the field of teaching, scientific research, literary-artistic creation", *per a contrario* all other activities are incompatible with the function exercised. However, in order to fall within the regulation of the first thesis of art. 12 paragraph 1 lit. a from Law no. 78/2000, incompatible activities must consist of financial transactions, such as commercial acts.

The text of the first thesis of art. 12 paragraph 1 lit. a from Law no. 78/2000 does not criminalize all activities "incompatible with the function, attribution or assignment that a person fulfills", but among them, only "performing financial operations, as commercial acts ", if the acts are committed for the purpose of obtaining money, goods or other improper benefits for oneself or for another.

The meaning of the concept of "improper benefits" is the common law meaning of the phrase, in the sense of Romanian criminal law; these benefits can be direct or indirect, both of them having the character of payment for the civil servant or police benefit (Ciuncan, D., 2004, p.55). According to researchers (Ciuncan, D., 2013), the term "indirect" benefit refers to interposed persons, but it also refers to the idea of paying the perpetrator's act in different ways, such as a gift given to the official's wife by a third party and not returned (Kahane, S.,1972, p.149). The benefit may take the form of some repairs, painting, carrying out works in favour of the perpetrator or his accomplices, who may be a relative, a friend or even a legal entity. The perpetrator of his will is the one who directs the undue benefit towards them, not the payer of the favour, who must always be someone other than the beneficiary of the undue payment. In turn, this person will always benefit from the other benefits obtained in exchange (Ciuncan, D., 2004, p.88).

## 2.2. DISCUSSIONS ON FINANCIAL OPERATIONS, AS COMMERCIAL ACTS, INCOMPATIBLE WITH POLICE OFFICER'S FUNCTION

We have to outline that from 2000 to 2019 the notion of “financial operations, as commercial acts” was not defined by criminal law. Fortunately, this issue was solved by Law no. 160 of July 26, 2019 regarding the completion of art. 12 of Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption which introduced a second paragraph defining financial operations as being “operations involving the circulation of capital, banking, foreign exchange or credit operations, investment operations, in stock exchanges, in insurance, in mutual investment or regarding bank accounts and those assimilated to them, domestic and international commercial transactions” (art. 12, paragraph 2, Law no. 78/2000). Moreover, in order to be carried out as acts of commerce, the law states that financial operations must constitute an intermediary action in the circulation of goods done *in an organized and systematic manner (a.n)*, with the aim of obtaining profit. Before the adoption of Law no. 160 of July 26, 2019, according to the literature reviewed (Ciuncan, D., 2013), for the delimitation of technical aspects, "reference have been always be made to capital market legislation", in this case Law no. 297 of June 28, 2004 regarding the capital market.

In that context, before 2019, the jurisprudence in the matter offered contradictory solutions regarding the qualification of some facts as "financial operations, as commercial acts", argued under the conditions of the previous regulations - the Commercial Code (partially repealed), the courts of justice solutions revealed the difficulty of fitting into the content of the article in discussion the complex economic situations.

For instance, analysing the operations held in charge of a defendant by the prosecutors, as involvement in the activity of a commercial company (and which could be briefly summarized in the establishment of a commercial company, the non-renewal of the lease contract for a commercial space, the rental of a commercial space, advancing the rent for a commercial space, involvement in obtaining an authorization to start the activity of a commercial company, intervention in the purchase by other persons of some shares in the capital of a commercial company, providing support and advice for other persons to obtain authorizations of moving the headquarters of a commercial company, "active involvement" in the administration of a commercial company, the negotiation of a leasing contract) the court consider that these actions do not fall into the category of "financial operations" (Criminal sentence no. 406 of June 4, 2007, Suceava Court). Based on the same regulations, before the clarifications brought by Law no. 160 of July 26, 2019, another court assessed differently the content of the notion of “financial operations as acts of commerce”. Thus, the Iasi Military Court, in File no. 23/739/2008, by criminal sentence no. 39 pronounced in the public session of November 19, 2008, convicted the defendant 1 (one) year in prison for committing the crime which we are analysing above. The court determined that the defendant as a Ministry of Defence officer authorized by the commander of the military unit to deal with the purchase of furniture components, carried out financial operations as commercial documents (also in the name of a commercial company he was mandated to represent), incompatible with his status, consisting in issuing fiscal invoices, the collection of money in order to obtain undue benefits of 1,674.15 RON, from the commercial activities carried out under such conditions, using, in this sense, also the information obtained by virtue of his job regarding the goods that had to be purchased by military unit and the amounts of money allocated for them.

Following the enactment of Law no. 160 of July 26, 2019 regarding the completion of art. 12 of Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption which introduced a second paragraph which defines financial operations, the provisions of art. 12 lit. a) were contested at Constitutional Court. Subsequently, the Constitutional Court issued Decision no. 402/2019 regarding the rejection of the exception of unconstitutionality of the provisions of art. 12 lit. a) from Law no. 78/2000 for the prevention, detection and sanctioning of acts of corruption. The

Constitutional Court explained the reasons why these provisions are constitutional. It was decided that, in accordance with the provisions of art. 1 paragraph (5) of the Constitution, the provisions of art. 12 lit. a) the first sentence of Law no. 78/2000 are clear and unequivocal, since the addressee of the criminal norm of incrimination has the possibility to foresee the consequences arising from its non-compliance, in which sense he can adapt his conduct accordingly. Concerning the meaning of the phrase "financial operations as acts of commerce," the Court determined that, on the contrary, the wording, while generic, does not contain any dose of unpredictability, encompassing all the elements required to identify the existence of the crime in one case or another, and the recipient of the norm of incrimination has the possibility to foresee the consequences arising from its non-compliance and can adapt his conduct accordingly. The Court also states that the fact that there are different interpretations and applications of the meaning of a rule does not automatically lead to its inconsistency with the Constitution, but constitutes *eo ipso* elements that justify the promotion of an appeal in the interest of the law (Decision no. 402/2019 regarding the rejection of the exception of unconstitutionality of the provisions of art. 12 lit. a) from Law no. 78/2000). The prohibition of financial operations, as commercial acts, has the purpose of both ensuring compliance with the principles of the market economy and economic freedom, as well as protecting the dignity of persons occupying certain public positions. Furthermore, the law requires that the financial operation be carried out as an act of commerce, so that it constitutes an act of speculation or an organized act of intermediation in the flow of goods. As a consequence, even though cash withdrawals and payment order issuance are financial operations, they do not constitute commercial documents. Constitutional Court also states that commercial acts, or commercial activity, are comprised of operations related to production, trade, or service provision, according to the legislator's current understanding. The simple performance of financial operations as commercial acts does not establish the existence of the material element of the offence; the with financial operations have relevance and constitute the material element of the offence only if they are carried out as a commercial act, if the financial operations are incompatible with the role, assignment, or assignment that a person performs, and if they are performed for the benefit of another person.

### **2.3. ELEMENTS OF JURISPRUDENCE REGARDING THE FINANCIAL OPERATIONS, AS COMMERCIAL ACTS, INCOMPATIBLE WITH POLICE OFFICER'S FUNCTION**

In order to clearly understand the meaning of the acts sanctioned by the text of law in discussion, we consider useful to discuss the cases of policemen investigated after the adoption of Law no. 160 of July 26, 2019 which defines financial operations and acts of commerce - financial operations must constitute an intermediary action in the circulation of goods done in an organized and systematic manner, with the aim of obtaining profit.

In November 2020, a police officer was charged for the offence sanctioned by art. 12 paragraph 1 lit. a from Law no. 78/2000; the defendant would have controlled as a true administrator the SC company, established in the name of his mother, and would have carried out financial operations as commercial acts within the meaning of the law, incompatible with the position held, respectively with the status of a police officer (National Anticorruption Directorate Press Release no. 750/VIII/3, 5th November 2020). To achieve the company's goal, the defendant would have engaged in the following activities: service/equipment rental contract negotiation, conclusion, and follow-up; participation in the name and on behalf of the company in public procurement procedures carried out by contracting authorities; representation of the company before the Regional Development Agency. As a result of this behaviour, the police officer would have obtained money, goods, undue benefits from the company's receipts and dividends (the total declared profit obtained for the period 2013-2019 being

601,629 lei), as well as other similar benefits (settlement from the company's income for the fuel) (National Anticorruption Directorate Press Release no. 750/VIII/3, 5th November 2020).

In May 2021, a police officer was charged with committing the crime of carrying out financial operations, as commercial acts, incompatible with the function, attribution or assignment that a person performs or concluding financial transactions, in order to obtain for himself or for another of money, goods or other improper benefits. Prosecutors claim that the officer was directly involved in the economic activity of two companies, acting on their behalf as a *de facto* administrator, thus carrying out commercial acts. These activities were incompatible with the position held, respectively with the status of a police officer. In particular, the defendant represented commercial companies in contract negotiations, handled purchases of goods and services, honoured customer orders, set purchase prices, negotiated supply and purchase contracts, paid tax invoices, kept track of rooms rented and reserved through the booking application, orders and payments made to economic agents and negotiated their prices, ordered the payment of salary rights due to employees, and so on. In addition to these duties, the officer was in charge of the social media promotion of the businesses he managed (National Anticorruption Directorate Press Release no. 456/VIII/3, 21st May 2022).

In July 2022, the police officer mentioned above signed an agreement of admission of the fact that he have carried out financial operations, as commercial acts, consisting of operations that would have involved payments or the circulation of money, in the context in which he would have been administered in fact two commercial companies providing services, activities incompatible with the position held, respectively with the status of the police officer (National Anticorruption Directorate Press Release no. 598/VIII/3, 4th July 2022). The defendant expressly declared that he acknowledges the commission of the deed he was charged with, accepts the legal framework for which the criminal action was initiated and agrees with the type and amount of the punishment applied, as well as with the form of its execution, 1 year imprisonment, with the postponement of the application of the penalty for a period of supervision of 2 years (National Anticorruption Directorate Press Release no. 598/VIII/3, 4th July 2022).

Another case law, but with different views from prosecutors compared to courts decision is the following case. In September 2016, a police officer, former chief of the city police, was charged by the prosecutors for the offence sanctioned by art. 12 paragraph 1 lit. a from Law no. 78/2000 (National Anticorruption Directorate Press Release no. 1158/VIII/3, 5th September 2016) and was acquitted latter (January 2022) by court on the grounds that the actions cannot be considered offences, as described by law. At the time of prosecution, the police officer was accused of carrying out financial operations, as commercial acts. The defendant, through an intermediary, built a real estate complex in the one resort and was directly involved in the activity of selling the respective apartments, in the sense that he took particular actions to obtain the approvals and authorizations required for building construction and he advertised on specialized websites with the following information: the properties for sale, the property category, the price set for the property category (apartment with 2, 3, or 4 rooms), and contact information. In January 2022, the Court of Appeal ordered the acquittal of the defendant, police officer, former chief of the city police, for the offenses charged against them, as the facts are not provided for by the criminal law. In our opinion, the acquittal provides another view on the specific meaning of financial operations, as commercial acts, and possibly on the meaning of “organized and systematic manner”, as the law states that financial operations, in order to be carried out as acts of commerce, must constitute an intermediary action in the circulation of goods done in an organized and systematic manner, with the aim of obtaining profit.

Recently, a new case was investigated by National Anticorruption Directorate, concerning two police agents accused of performing financial operations, such as commercial acts, incompatible with the public position, sanctioned by art. 12 paragraph 1 lit. a from Law no. 78/2000. They built several

real estates in Satu-Mare county between 2020 and 2022 and received undue patrimonial benefits, actions which are incompatible with the position, attribution, or assignment that they performed. Moreover, during the reference period, they actually administered commercial companies and performed activities on their behalf, such as purchasing construction materials, hiring and coordinating employees, and concluding contracts with various companies whose object is the commercialization and sale of construction materials in order to build and sell real estate ( Press release of The prosecutor's office attached to the Satu Mare District Court, 2022). It remains to be seen if the courts will agree with the prosecutors and what will be their decision, since we pointed out some different interpretations of the objective element - financial operations, as commercial acts - of this offence assimilated to corruption offences.

### 3. CONCLUSION

In order to conclude on the concept of commercial acts, it is necessary to refer to art. 3 of the Civil Code (Law no. 287/2009) which provides that "1) the provisions of this code also apply to relationships between professionals, as well as relationships between them and any other subjects of civil law; 2) all those who operate an enterprise are considered professionals; (3) the exploitation of an enterprise is the systematic exercise, by one or more persons, of an organized activity consisting in the production, administration or disposal of goods or in the provision of services, regardless of whether it is for profit or not." Going further with the analysis, we find that art. 8 of Law 71/2011 for the implementation of the Civil Code stipulates: "(1) the notion of professional provided for in art. 3 of the Civil Code includes the categories of trader, entrepreneur, economic operator, as well as any other persons authorized to carry out economic or professional activities, as these notions are provided by law, on the date of entry into force of the Civil Code. (2) In all the normative acts in force, the expressions "acts of trade", respectively "acts of trade" are replaced by the expression "production activities, trade or provision of services".

Therefore, the legislative changes in civil matters correlated with the capital market legislation brought clarifications regarding the content of the crime sanctioned by the first sentence of art. 12, paragraph 1, letter. a from Law no. 78/2000, but it was not totally efficient to simplify the activity of ascertaining the commission of these criminal acts by public officials with the state special police.

Since the courts decisions we discussed above provide different solution for the same actions, acts committed by police officers and sanctioned by art. 12 paragraph 1 lit. a from Law no. 78/2000, remains to be seen what the courts will decide in the recent cases and then to analyse if there is need for more clarification or if there are elements that justify the promotion of an appeal in the interest of the law.



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