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Banking Alert

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Bank employees are, irrespective of their work rank, public officials: the implications of the of the Supreme Court's Decision

The High Court of Cassation and Justice (HCCJ) decided on 11th of July, 2017 that the employees of privately owned banks, authorized and under supervision of the National Bank of Romania, are public officials, according to the Criminal Code. We will analyze:

- The supporting arguments of the HCCJ's decision
- Previous legal practice
- The implications of this decision, such as: when and in which conditions the bank officers can be held liable for not notifying the criminal investigation bodies or if conflict of interest offense can be committed by a bank officer

Bank employees are, irrespective of their work rank, public officials: the implications of the of the Supreme Court's Decision

The Supreme Court's decision published on 11th July 2017, according to which the officers of the banks with privately owned capital, authorized and supervised by the National Bank of Romania ("NBR") are public officials in the meaning of the criminal law has the role of unifying the judicial practice.

In addition, the decision is relevant for the legal qualification of the alleged facts and for establishing the limits of the penalty. Thus, the breach of the criminal law by bank officers will attract higher sanctions, they being able to fall under the incidence of offenses related to work duties and corruption, but also other offenses having as active subject a public official.

Prior to this decision, in practice, there were difficulties regarding the qualification of the bank officers, when they were committing offenses related to work duties and corruption, as public officials or assimilated public officials in accordance with the Criminal code.

Supreme Court's arguments
Notified by the Bucharest Court of Appeal, the Supreme Court ruled that in the in accordance with the criminal law, according to Article 175 para. (2) of the Criminal code, a bank's officer is a public official.

This legal provision states that it is a public official, as concerns the criminal law implications, the person that fulfills both of the following two conditions: (i) he provides a public service and (ii) he was invested by public authorities or he is controlled or supervised by them in relation with rendering that respective public service.

For deciding whether the first condition is fulfilled, the definition of the public service in administrative law must be analyzed, correlated with the large definition of public service, which represents either a form of activity provided for the benefit of the public, either a subdivision of an institution of the internal administration divided in sections, services etc. The category of public interest services include those entities which, through the activity they carry out, are called to satisfy certain general interests of the members of the society.

The Supreme Court's Decision no. 26/2014 correlated the concept of "public function" with the "public interest". Thus, by summarizing the banking law doctrine and the provisions of previous normative acts, the Supreme Court concluded that a privately owned bank is a legal person empowered to exercise a public interest service.

The second condition of the aforementioned article is considered to be met, alternatively, if a public authority made the investment for the performance of the service or if the activity of the person is subject to the control or supervision of a public authority, regardless of the vesting manner.

The Supreme Court states that a bank officer, hired by a privately owned bank, does not fulfill the condition of being invested by public authorities with the exercise of a public service and does not exercise public authority powers, based on delegation through an act of state authority.

However, it notes that banks can only operate based on the authorization issued by the NBR and are subject to the regulations and orders issued by the NBR. Moreover, NBR controls and oversees their activity, and where irregularities are found, depending on their severity, penalties may be imposed which may end up with the withdrawal of the authorization.

At the same time, NBR is a public authority that exercises control or supervision over the performance of a public interest service, as provided by the article cited in the Criminal Code.

Based on these arguments, the Supreme Court concluded that for the purposes of the criminal law, a bank officer, hired by a privately owned bank, authorized

and supervised by the National Bank of Romania, is a public servant, in accordance with the provisions of Article 175 par. (2) of the Criminal Code. The officials referred to in Article 108 par. (1) of the Government Emergency Ordinance no. 99/2006, respectively the members of the board of directors and the directors, as well as the persons appointed to manage the branches of a privately owned bank shall also be considered public officials.

Practical implications of the Supreme Court's decision

The practical implications of the Supreme Court's decision are significant, given that lower ranking banking officers are no longer subscribed to the provisions of Article 308 of the Criminal Code, which provides that the provisions on offenses such as bribery, trafficking and buying influence, embezzlement, abuse of office and negligence related to work duties, as well as other offenses that may be committed by a public official are applicable to the acts committed by or in connection with the persons who exercise, permanently or temporarily, with or without remuneration, an assignment of any kind in the service of a natural person regulated by Article 175 par. (2) or within any legal person.

Therefore, in the case of the offenses mentioned above committed by this category of bank officers, the penalty limits will no longer be reduced.

Another consequence with potential increased impact in practice is the risk of committing offenses such as omission of notifying the criminal investigation bodies or conflict of interest.

After the Supreme Court decision, the bank officers are obliged to immediately notify the criminal investigation bodies if they are aware of a criminal act in connection with the work duties, in which they carry out their tasks.

Failure to fulfill this obligation may result in engaging the criminal liability of the bank officer. In this context, the obligations of bank officers are wider than the mere whistleblowing procedure internally regulated. Referring to criminal offenses shall not be made internally, but to criminal investigation bodies, in accordance with the substantive and formal conditions of the referral provided for by the Criminal Procedure Code.

Also, the impact is significant for lower-ranking bank officers in case of conflict of interest. If until now, at jurisprudential level, only senior management bank officers could be considered public officials, for the rest of the bank officers being applicable the effects of the Constitutional Court's Decision no. 603/2015 which ruled the unconstitutionality of the criminal sanction of the conflict of interest in the private environment, the situation changes following the decision of the Supreme Court. As a result, all bank officers, being considered public officials, may fall within the scope of the offense of conflict of interest.

For further questions, please contact us.

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