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The Unlawfulness of the Criminal Investigation Acts Drawn up by the Employees of the General Anticorruption Directorate with the Violation of the Competence Ratione Personae

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Abstract: The violation of the provisions regarding the competence of the criminal investigation bodies entails the absolute nullity of the acts performed by an authority that lacks jurisdiction. The General Anticorruption Directorate is a structure with specialized competence, strictly determined by law, only in terms of preventing and combating corruption among the own staff of the Ministry of Internal Affairs and Administrative Reform. In the recent judicial practice, situations were reported in which the workers from the General Anticorruption Directorate carried out criminal investigation acts regarding persons who did not have the quality of member of the personnel of the Ministry of Internal Affairs. Notwithstanding the fact that the provisions of the Code of Criminal Procedure require the sanctioning of criminal investigation acts performed by an authority that lacks jurisdiction, the jurisprudence of national courts is not a unitary one. Nationwide, diametrical solutions of different courts can be observed: some have ruled the plea of nullity of criminal prosecution acts drawn up by workers of the General Anticorruption Directorate with violation of their jurisdiction *ratione personae* is grounded, others concluded in the sense of rejection. In the same time, the present paperwork submits to examination the possibility of the prosecutor to assign the carrying out of criminal prosecution acts to workers within the General Anticorruption Directorate, regarding individuals who are not part of the staff of the Ministry of Internal Affairs. The practical significance of this paper is also highlighted by the fact that the Decision no. 21 from 2020 of the High Court of Cassation and Justice does not puzzle out the invoked issue, given that the solution was to reject the complaint as inadmissible.

Keywords: General Anticorruption Directorate; nullity of criminal procedures; *ratione personae* competence

JEL Classification: K14; K38; K42

1. The Issue under Discussion is related to the Competence of the General Anticorruption Directorate to Carry out Criminal Investigation Acts Against its Own Staff and / or Against Persons Who are Not Part of the Ministry of Internal Affairs

The officers of the General Anticorruption Directorate (hereinafter DGA) carried out criminal prosecution acts in criminal cases in violation of personal competence.

Thus, the D.G.A. officers were delegated by orders of the case prosecutors to draw up minutes of intercepted conversations in criminal cases, were delegated for the hearing of witnesses and for the purpose of carrying out house or computer searches on persons who are part of the staff of the Ministry of Internal Affairs.

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All these criminal prosecution acts could be struck by absolute nullity for violating the competence of the person.

The General Anticorruption Directorate is a structure with a specialized competence, determined strictly by law, only in preventing and combating corruption among the own staff of the Ministry of Interior and Administrative Reform.

The General Anticorruption Directorate has no competence to carry out criminal investigation acts regarding persons who are not part of the Ministry of Internal Affairs.

According to art. 10 para. (4) of the Government Emergency Ordinance no. 30/2007, the General Anticorruption Directorate is the specialized structure of the Ministry of Administration and Interior for preventing and combating corruption among its own staff.

According to the Regulation on the organization and functioning of the General Anticorruption Directorate (hereinafter DGA), dated December 19, 2017 issued by the Ministry of Internal Affairs, DGA has special material competence regarding corruption offenses provided by Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption, with subsequent amendments and additions, committed by the staff of the Ministry of Internal Affairs.

The Constitutional Court, in the considerations of Decision no. 674 of 17 November 2016, in paragraph 24, ruled on the attributions that the General Anticorruption Directorate fulfills, in the sense that *“it carries out a strictly specialized activity, which is subsumed by the attribution of the Ministry of Internal Affairs to organize and carry out, through specialized structures, according to competence, activities for preventing and combating terrorism, organized crime, trafficking and illicit drug use, trafficking in human beings, illegal migration, cybercrime, as well as other criminal phenomena and antisocial acts”*.

At the same time, in paragraph 31 of the same decision, the Constitutional Court ruled that *“From the analysis of the regulations in force, the Court notes, as previously indicated, that the General Anticorruption Directorate is a structure specialized in preventing and combating corruption among the ministry's own staff and administrative reform, thus having the competence to carry out criminal investigation acts only in respect of a certain category of acts, committed exclusively by persons from this ministry”*.

This conclusion also follows from the considerations of the Decision of the Constitutional Court no. 302 of May 4, 2017, where in paragraphs 50 and 51 established that the importance of criminal prosecution as a distinct phase of the criminal process led to the establishment of criminal investigation bodies with special powers, and the establishment of specialized structures requires a certain specialized competence, strictly determined by law, so that carrying out or supervising the criminal investigation in cases that exceed this competence determines a diversion of the purpose of the legal norms that were the basis for the establishment of these specialized structures.

The purpose of the legal norms that formed the basis of the establishment of the General Anticorruption Directorate is to take measures to prevent and combat corruption within the Ministry of Administration and Interior, as is clear from the marginal name of Law no. 161/2005, but also from the explanatory memorandum of OUG no. 120/2005, the latter normative act establishing the following: *“in order to fulfill the commitments assumed by our country within the European Union integration process, in the context of the strict monitoring applied by the European Commission, it is necessary to take immediate, extraordinary measures to the judicial police officers within the General Anti-Corruption Directorate to be empowered to carry out activities to uncover corruption offenses committed by the staff of the Ministry of Administration and Interior ...”*

Particularly relevant is the explanatory memorandum of Law no. 324/2013, for the approval of the Government Emergency Ordinance no. 120/2005 on the operationalization of the General Anticorruption Directorate within the Ministry of Administration and Interior: *“The General Anticorruption Directorate is the only specialized police structure at national level for preventing and combating corruption, having competence only regarding the staff of the Ministry of Internal Affairs.*

During the mentioned period, through the means of notification made available to the public, the anti-corruption helpline 0800.806.806, petitions sent in writing or by e-mail, it could be found that many complaints concerned possible acts of corruption committed by the staff of ministries, local councils, and county councils, educational institutions, so on.

In such cases, as the facts exceed the competence of the general anti-corruption directorate, the notifications were sent to the public institutions competent to investigate them, according to the law”.

In view of the above mentioned decisions of the Romanian Constitutional Court and the explanatory memorandum of Law no. 324/2013, we appreciate the fact that the delegation of workers within the DGA by the prosecutor to carry out criminal prosecution acts does not cover the lack of personal competence of this structure.

In order to be able to delegate an act of criminal prosecution, it is necessary that the body invested with carrying out the act has in turn the competence to carry out the act of criminal prosecution requested.

Or, in the case of D.G.A. officers who have received a delegation order from the case prosecutor to carry out criminal investigation acts on persons who are not part of the staff of the Ministry of Internal Affairs, the documents drawn up by DGA officers are null and void for violating the competence of the person.

2. Jurisprudence to the Contrary

Next, we will present the decisions of the national courts that have ordered the admission of the exception of the nullity of the criminal investigation documents drawn up by DGA officers regarding persons who are not part of the MAI staff.

The Gorj Court, in a case in which the exception of incompetence after the person of the DGA officers was invoked, appreciated the fact that *“the court finds that the exception of personal incompetence invoked by the defendants is grounded, because the criminal prosecution acts General Anticorruption, in file no. 449 / P / 2013 of the Prosecutor's Office attached to the High Court of Cassation and Justice, targeted persons who are not part of the staff of the Ministry of Affairs and Interior, the criminal investigation being carried out in violation of the personal competence rules expressly provided by law”* (Criminal sentence no. 252 of 20.11.2019 of the Gorj Court).

Another court in Romania that ordered in the sense of the incompetence of the DGA officers to carry out criminal prosecution acts regarding persons who are not part of the MAI staff was the Braila Tribunal, which by the conclusion of 08.02.2021 decided *“admission except for the absolute nullity of the means of proof administered in the criminal investigation phase carried out by the workers within the DGA. It orders the removal from the case file of the means of evidence administered in the criminal investigation phase and of the criminal investigation acts performed by the workers within the D.G.A. (...)”*.

In this sense, the Bucharest Court of Appeal - Criminal Section I, Decision no. 779 of 07.10.2014 *“It is true that the provisions of art. 324 para. (3) NCPP does not distinguish between criminal investigation bodies (in cases where the prosecutor carries out the criminal investigation, he may delegate, by*

ordinance, to the criminal investigation bodies the performance of criminal investigation acts). But this does not exclude the obligation provided by law, including the code, for any of the criminal investigation bodies that the prosecutor could delegate to have the competence to carry out the requested criminal investigation acts. Or, the D.G.A. officers have, by law, the limited competence to carry out acts ordered by the prosecutor, only with regard to the commission of acts of corruption by the staff of the M.A.I.”

Even if it is not an opinion of a court panel, we cannot fail to mention the Minutes of the meeting of the chief prosecutors of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate, the Organized Crime Investigation Directorate and Terrorism and the prosecutor's offices attached to the courts of appeal Bucharest, March 9-10, 2020: *“The General Anticorruption Directorate does not have the competence to carry out criminal investigation acts regarding crimes provided by Law 78/2000, these being within the competence to criminal prosecution of the prosecutor. In support of this opinion comes an important argument regarding the succession of laws in time, namely the fact that the O.U.G. no. 59/2013, which eliminates the competence criterion according to the quality of the person, allowing the Directorate to carry out criminal investigation acts regarding any person, was rejected by Law no. 324/2013”.*

3. Jurisprudence to the Contrary

The preliminary chamber judge of the Mures Court of Appeal adopted a solution contrary to those previously mentioned by Conclusion no. 73 / CP / 19.05.2017 pronounced in the file no. 500/102/2017 / a1: *“it was appreciated, in essence, that the judicial police officer who is part of the structure of the D.G.A. may be delegated by the case prosecutor to carry out criminal investigation acts in cases within the category of those provided by Law 78/2000 regarding persons who are not part of the M.A.I. without this aspect being equivalent to a transfer of competence.*

Therefore, in the case of criminal prosecution acts performed by the judicial police officer within the D.G.A. as a result of the delegation received from the prosecutor, even if it refers to persons other than those who are part of the M.A.I. there can be no discussion of any absolute or relative nullity”.

Another panel of judges from the Timisoara Court of Appeal ruled by Conclusion no. 152 of 20.12.2019, pronounced in the file no. 4253/30/2019 / a1 the fact that: *“the norms that establish the competence of the DGA exclusively regarding the M.A.I. employees concern only the hypothesis in which this structure performs criminal investigation acts as criminal investigation bodies, therefore when exercising its own criminal investigation competence, no and in the situation where the competence of criminal investigation belongs to the prosecutor, being only delegated to the employees of the Directorate”.*

4. Decision no. 21/2020 of the High Court of Cassation and Justice regarding the settlement of the legal issue invoked by the Iasi Court of Appeal regarding the competence of D.G.A.

The Iasi Court of Appeal notified the High Court of Cassation and Justice regarding the resolution of the following legal issue: *“If the workers of the judicial police within the General Anticorruption Directorate can perform, according to art. 324 para. (3) of the Code of Criminal Procedure, acts of criminal investigation by delegation and in other criminal cases than those provided in art. 1 para. (2) of the Government Emergency Ordinance no. 120/2005 on the operationalization of the General Anticorruption Directorate within the Ministry of Administration and Interior.”*

By Decision no. 21/2020, of July 7, 2020, pronounced in the file no. 1,144 / 1/2020, published in the Official Gazette no. 118 of February 4, 2021, the High Court of Cassation and Justice rejected as inadmissible the notification of the Iasi Court of Appeal.

Although the High Court of Cassation and Justice rejected the notification of the Iasi Court of Appeal, because it did not meet the admissibility criteria, from the perspective of the fact that an issue related to the settlement of the preliminary chamber was invoked before the court of first instance 21/2020, the supreme court ruled on the competence of the criminal investigation bodies, the legislator provided that the criminal investigation bodies of the judicial police carry out the criminal investigation for any crime that is not given, by law, in the competence of the prosecutor.

The Code of Criminal Procedure also provides that the attributions of the criminal investigation bodies of the judicial police are fulfilled by specialized workers from the Ministry of Administration and Interior designated under the special law, who received the assent of the Prosecutor General of the High Court of Cassation and Justice or the opinion of the prosecutor appointed for this purpose.

Interpretation that the criminal investigation bodies of the judicial police operating within the Directorate-General for Anti-Corruption have exclusive competence, in the procedural sense, would mean denying the competence assigned exclusively to the prosecutor to investigate corruption crimes committed by any person.

Carrying out the criminal investigation by the prosecutor is an additional guarantee of legality and soundness, through the direct involvement of the prosecutor in carrying out the criminal investigation activities. The prosecutor may take over any file, within the limits established by the competence norms or may delegate, by ordinance, the performance of certain acts of criminal investigation to the criminal investigation bodies of the judicial police.

5. The Effects of Decision no. 21/2020 of the High Court of Cassation and Justice Regarding the Rejection as Inadmissible of the Notification of the Iasi Court of Appeal Which on the Pending Cases, as Well as on the Future Cases

Apparently, the issue of delegating DGA officers seems to have already been resolved by the High Court of Cassation and Justice through the considerations of the mentioned Decision.

It should be noted that Decision no. 21/2020 is not compulsory for national courts, the rulings on the grounds of this decision having a more consultative role for national courts, provided that it was rejected as inadmissible.

We appreciate the fact that a new notification of the High Court of Cassation and Justice formulated by a national court, starting with a case in the preliminary chamber procedure, respectively in the appeal phase would allow the supreme court to rule again on this issue.

At the same time, the High Court of Cassation and Justice returned over time to its own jurisprudence.

Moreover, Romania was condemned by the European Court of Human Rights because the supreme court returned to its own jurisprudence, finding a violation of the security of legal relations.

According to the Beian case against Romania (no. 30658/05 of 06.12.2007), by which the ECHR found the violation of art. 6 of the ECHR as a result of a contradictory jurisprudence of the High Court of Cassation and Justice, which creates a state of legal insecurity, holding that:

“In another series of decisions handed down during the same period, the High Court of Cassation developed a contrary jurisprudence, since it rejected, as in the case of the applicant, the actions of recruits who had performed forced labor outside the D.G.M.”

The European Court of Justice considered that in the absence of a mechanism capable of ensuring the coherence of the practice even in the highest domestic court, the latter came to pronounce, sometimes on the same day, diametrically opposed decisions regarding the scope of Law no. 309/2002.

At the same time, the European Court of Justice also appreciated the fact that *“In this case, it must be stated that the High Court of Cassation is at the origin of these deep and persistent divergences in time.*

This practice, which has developed within the highest judicial authority of the country, is in itself contrary to the principle of legal certainty, which is implicit in all articles of the Convention and which is one of the fundamental elements of the rule of law (...). Instead of fulfilling its role of establishing an interpretation to be followed, the High Court of Cassation has itself become a source of legal insecurity, thus reducing public confidence in the judiciary (...).”

In such conditions, we appreciate that the Decision of the High Court of Cassation and Justice no. 21/2020 did not clarify the issue of the competence of the DGA workers to carry out a criminal investigation report regarding persons who are not part of the MIA staff.

An additional proof of those mentioned above, is the fact that after the publication of Decision no. 21/2020 of the High Court of Cassation and Justice, solutions were pronounced to exclude the documents drawn up by DGA officers in violation of the competence (Conclusion of 08.02.2021 of the Braila Tribunal, pronounced in file no. 9987/3/2016).

6. Conclusions

We appreciate that the interpretation given by the High Court of Cassation and Justice by Decision no. 21/2020 to the delegation institution is susceptible to criticisms of unconstitutionality.

Although delegation implies per se an investment of competence, this transfer of attributes cannot operate in respect of any person.

According to the provisions of art. 324 para. 4 C.pr.pen. in the cases in which the prosecutor carries out the criminal investigation, he may delegate, by ordinance, to the criminal investigation bodies the performance of some criminal investigation acts.

The interpretation conferred by the High Court of Cassation and Justice regarding the possibility of delegating a structure that does not constitute a criminal investigation body in order to carry out criminal investigation acts contravenes art. 131 of the Constitution, which establishes the fact that the Public Ministry represents the general interests of society and defends the rule of law, as well as the rights and freedoms of citizens and exercises its powers through prosecutors constituted in prosecutor's offices, under the law.

The constitutional norms have invested the Public Ministry with the judicial activity. The exercise of the attributions of the Public Ministry is carried out by prosecutors constituted in prosecutor's offices.

The delegation of a judicial activity can be done by the prosecutor only in accordance with the law.

At the same time, in order to be able to delegate the execution of a criminal investigation act, it is necessary for the body invested with the execution of the act to have in its turn the competence to carry out the requested criminal investigation act.

How the interpretation conferred by the High Court of Cassation and Justice by Decision no. 21 of July 7, 2020 reveals the possibility of the prosecutor to delegate the judicial activity to any person (either incompetent criminal investigation body or even a person who does not constitute a criminal investigation body) on the grounds that the legality of an act is assessed according to the prosecutor's competence, we appreciate that the constitutional norms provided by art. 131 of the Romanian Constitution.

The unconstitutionality of the provisions by which the competence to order or carry out a criminal investigation act is transferred to an incompetent body was established by paragraph 165 of the Decision of the Constitutional Court no. 26/2019, where it was appreciated that the Public Ministry does not have the competence to delegate its powers resulting from the constitutional text of art. 131.

Similar to the Decision of the Constitutional Court no. 26/2019, the delegation made by ordinance of the prosecutor of an incompetent body, is equivalent to the performance of judicial activity by a structure that does not constitute a criminal investigation body, therefore in violation of art. 131 of the Constitution.

In summary, we appreciate that the criminal investigation acts performed by the officers belonging to the DGA regarding persons who are not part of the MIA staff are struck by absolute nullity, pursuant to art. 281 para. 1 lit. b) C.pr.pen.

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