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THE PROBLEMATIC OF LEGITIMATE INTEREST IN THE VISION OF THE PUBLIC MINISTRY AS WELL AS THE PRACTICE OF THE HIGH COURT OF CASSATION AND JUSTICE, AS ”LEGAL BASIS” FOR THE CREATION OF DISCRIMINATORY CONDITIONS ON THE ACTIVITY OF ENTERPRISES. ADDING TO THE LAW REGARDING THE APPLICATION OF ART. 339 – 340 CRIMINAL PROCEDURE CODE. THE NEED TO CEASE THE SRL TYPE BEHAVIOUR WITH SOLE ASSOCIATE FROM THE PUBLIC MINISTRY

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Abstract: *This Article concerns the restriction of access to justice for persons who refer criminal investigation bodies to offences against property or service.*

If these whistle-blowers cannot justify a legitimate interest of their own, concrete and current, they do not have the right to subject the acts and measures of the prosecutor to censure the court, in case the beginning of the criminal investigation or the prosecution was not ordered.

Although these issues formed the subject of Decision no. 13/2011 of the High Court of Cassation and Justice (recourse for the interest of the law), the effects of this decision lead to the encouragement of the lack of the criminal investigation, with the consequence of creating discriminatory effects on the activity of enterprises.

In addition to these aspects, there is a prejudice to the state budget regarding the amounts of money not recovered due to the lack of criminal

investigation, as well as an activity favoring the perpetrator according to art. 269 of the Criminal Code.

Keywords: *legitimate interest; lack of access to justice; discriminatory conditions regarding the activity of enterprises.*

The legal regulation of the notion of interest in civil procedural law

Interest is one of the conditions for the exercise of civil action according to Article 32 (1) letter d) of the New Code of civil procedure.

Provisions art. 32 The NCPC describes the 4 conditions for the exercise of civil action, as follows:

- the procedural capacity;
- the procedural quality;
- -formulating a claim;
-justification of interest.

These requirements must be met cumulatively both in case of formulation and support of legal claims, as well as in case of invocation and support of substantive or procedural defenses (Gabriel & co, 2016).

The person bringing the civil action must justify a determined, legitimate, personal, born and actual interest according to art. 33 Civil procedure code.

The definition of the notion of interest refers to the practical, material or moral benefit pursued by the subject of law that introduced civil action, regardless of the concrete form of its manifestation (application for justice or defence of procedural funds).

The judge of a civil case must appreciate; foreshadow the actual benefit that the author of the civil action could obtain in the situation of admitting this action.

Interest must exist both at the time of filing the application for a summons and during the course of the dispute until the final settlement of the case.

In the national judicial practice there was no unitary point of view regarding the application of the provisions of Article 2781 of the Old Code of criminal procedure, a norm that has as its correspondent under

the provisions of art. 339 (Plea against the acts of the prosecutor) and art. 340 (Plea against non-removal or non-sending solutions).

Contradictory interpretations, the unitary practice referred to the fact that the legal subject who filed a denouncement has or does not have the procedural quality of the person whose legitimate interests are injured, with the consequence of the existence of the possibility, of the right to attack the solutions of non-sending to trial.

The contradictory interpretations, the unitary practice referred to the fact that the legal subject who filed a denouncement has or does not have the procedural quality of the person whose legitimate interests are injured, with the consequence of the existence of the possibility, of the right to attack the non-sending solutions.

As a result of this situation, at the referral of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, Decision no. 13/2011 – Appeal in the interest of the Law in the file no. 15/2011 of the ICCJ, a decision that established the following:

"In order to establish whether the whistle-blower may be a „person whose legitimate interests are harmed", the notion of „legitimate interests" must be delimited, by reference to the conduct of the whistle-blower, who is acting, either because the law obliges him to such an action (for example, in the case of offences whose failure to notify or not the judicial bodies constitutes itself a crime), either because the ethical or civic spirit leads him to such an action.

In these cases, one cannot speak of a legitimate self-interest, concrete and current, which the whistle-blower would have to overcome the initial process of informing the prosecution bodies about the alleged commission of a crime, regardless of the cause that led him to act (a legal obligation or his own conscience).

If the law recognizes any person the right to refer the matter to the criminal investigation bodies, when it considers that an offence has been committed, the same cannot be said regarding the possibility of challenging the act by which the prosecutor has assessed, with reference to the matters raised, that it is not necessary to start the

criminal investigation or, as the case may be, to initiate the prosecution order the suing of the person (s) being investigated.
This is because the procedure established in Article 2781 of the Criminal Procedure Code is essentially private, inferred from the requirement of an injury suffered by the person who is addressing the court, in his legitimate rights or interests.
By informing the judicial bodies of an alleged crime, the whistle-blower acts by virtue of a public interest as a representative of the company, thus helping these bodies to investigate facts provided for by the criminal law of which they were not otherwise aware (complaint or referral ex officio).
However, this public interest is limited to referral to the criminal investigation bodies and does not give the whistle-blower the right to subject the case to censorship to the court, when it was not ordered to start the criminal investigation or to sue."

As is clear from this reasoning, the ICCJ stipulates the necessity of the existence of its own legitimate interest for the whistle-blower, as a condition of the possibility to challenge in court the acts or ordinances of the prosecutor for failure to sue.

In this respect, it is recognized for the whistle-blower the existence of a legitimate interest that has, however, an abstract – character that gives him the right/obligation to notify the criminal investigation bodies, especially in the case of crimes whose non-denunciation or non-obsession would constitute a violation of the criminal law. This general and abstract interest is, in reality, assimilated to the ethical or civic spirit, being practically confused with them.

The lack of regulation of the notion of interest in criminal procedural law

The notion of interest does not have a legal correspondent within the criminal procedural law, the only approach being within the provisions of art. 32-33 Code of civil procedure.

In this context, the so-called ”transplant” of the notion of interest in criminal procedural law presents aspects of non-meaning and illegality, aspects that we will develop in the following.

As we have previously shown, within the definition of the notion of interest in doctrine, it can also look at the moral benefit that the whistle-blower might obtain from a solution for the referral from the Public Ministry (corroborated with the application of the appropriate sanctions or penalties by the criminal court).

It is noted that the RIL decision of the above-mentioned ICCJ abusively establishes that the interest regulated by art. 32-33. The Civil procedure code produces legal effects on the right to censure in court the solutions of non-sending by the whistle-blower.

Basically, the ICCJ even overlaps the notion of interest on the condition of injury caused by a crime, excluding that such injury could be moral.

As regards the complaint against non-delivery or non-sending solutions, according to Article 340 pct. (4) Cpp, find their impact on these issues including the provisions of Article 289 (3)-(5) of the same code.

These paragraphs regulate the situations in which the complaint is made, in writing, personally or through the trustee, as well as the situation in which it is made in electronic form under the conditions of certification by e-mail with electronic signature.

In fact, the legislator had to provide that the provisions of par. (1) art are applicable. 289 Cpp (complaint), a rule that states that **”***The complaint is the acknowledgement made by a natural or legal person of an injury caused to him by the crime***”.**

In this context, it should be noted that Art. 289 corroborated with art.339 and art. 340 Cpp do not provide anywhere the condition of interest that the plaintiff must justify in order to challenge in court the solutions of non-removal or non-sending in court.

The requirement of injury, as regulated by Article 289 pct. (1) Cpp, refers to both forms of material and moral injury.

ICCJ RIL Decision no. 13/2011, as well as the related practice of the Public Ministry adds to the law, in the sense that they imply the need for interest in the perspective of the person who made the complaint so that the latter can appeal in court the solutions of non-delivery or non-sending.

In this context, if the plaintiff invokes a moral injury, a moral prejudice, this matter is not qualified in practice as sufficient to justify the interest.

This interest – in the opinion of the ICCJ and the Public Ministry - should be strictly material, financial, aspect totally erroneous.

In the case of a complaint aimed at prejudicing public money, the state budget, according to the ICCJ Decision 13/2011 and the practice in the field of parquet, there may be only 2 situations:

1. The situation in which the Public Ministry, by all forms of organization, wants to complete the criminal investigation initiated on the basis of the complaint, to ascertain the guilt of the perpetrators of the damage, with the consequence of issuing an indictment in which the defendants – on the civil side should fully pay the damage caused by the crime, damage composed of the main debit and accessories.

With regard to this situation, the criminal investigation bodies have an active role, and no criticism is made in this regard.

2. In the second situation, the Public Ministry does not want to carry out the investigation, does not administer evidence, proceeding to administer solutions of non-removal or non-sending to court that can no longer be challenged by to the author of the complaint, because this person – as we have shown – does not justify an interest (a requirement that is not required in criminal procedural law).

The author of the complaint may justify the moral injury according to Article 289. (1) Criminal procedure code, but this issue is not considered to be sufficient for the admissibility of a complaint against non-delivery or non-sending solutions.

Basically, it is worth noting that the prosecutor has a much higher power than that of the judge, because he can decide on his own whether or not he completes the criminal investigation, whether he leaves -

wilfully or not – as in question the rules governing the prescription of criminal liability.

It should also be noted that a ranking order motivated on the intervention of the prescription of criminal liability can also lead to the limitation of civil liability, according to the provisions of art. 1394 Civil code[1].

Including the issue of the intervention in question of the civil prescription is – as we showed – only at the discretion of the prosecutor.

These aspects, mentioned above, are specific to a behaviour manifested within a SRL with a sole associate, in which the sole associate/administrator does what he wants in terms of business decisions, without being censored in any way or another.

This behaviour must cease in the practice of the Public Ministry, behaviour which is practically encouraged by the emergence of the RIL Decision of ICCJ no. 13/2011.

In this situation, the intention of the prosecutor not to complete a file or to leave – even with good conscience – that the criminal liability to be prescribed, can no longer be censored by anyone, since the author of the complaint can no longer have access to justice precisely because by the RIL decision above-mentioned ICCJ added to the law, rather, to the provisions of art. 339-340 Cpp, by inventing this condition of interest.

[1] Art. 1394 Civil code:" In all cases where compensation derives from a fact subject to criminal law longer than civil prescriptions, the limitation period of criminal liability also applies to the right to action in civil liability.

The consequence of the false problem of interest in competition law. Ensuring discriminatory conditions regarding the activity of enterprises

If the perpetrator of a criminal complaint against economic agents alleged to have committed economic crimes (tax evasion in particular, money laundering, etc.) cannot justify this false condition of interest, the Public Ministry may investigate some of these economic agents with the consequence of the referral, and towards others – as I have specified - can register a phenomenon of ”oblivion”, abusive lack of investigation cannot be censored.

In this context, there is a risk of creating discriminatory conditions for the activity of enterprises, consisting in the fact that un-invested economic agents (for which the entire damage - debt and accessories are not collected to the budget) accumulate, under illicit conditions, capital related to the exact amounts of money they should have paid to ANAF.

This type of illicit “capitalization” can create, for economic operators against which the Public Ministry has registered the phenomenon of oblivion, obtaining economic advantages that could not be acquired under normal market conditions, including the emergence of monopolistic practices.

This matter is subject to Article 8 (1) letter a) and b) of Law no. 21/1996, republished: ”*Any actions or inactions of central or local public administration authorities and institutions and entities to which they delegate their powers, restricting, preventing or distorting competition, such as:*

a).;

b) the establishment of discriminatory conditions for the activity of enterprises.”

Between the provisions of Article 8 (1) and the provisions of Article 2 (1) there is an essential difference. If the provisions of Article 2 (1) apply to acts and acts which, as actions, hinder or distort competition, the provisions of Article 8 (1) sanction both the action in this respect of

the authorities and the institution of public administration and the inaction.

Practically, most of the times, the acts restricting or distorting the competition are carried out by these institutions as a result of inaction, when fiscal control or criminal age are completely missing (Journal Curierul Judiciar, 2018, p. 398).

In other news, the failure of the criminal investigation by the prosecutor produces effects including in the field of public procurement, apart from the anticompetitive and discriminatory consequences specified above: the economic operator against whom the Public Ministry does not wish to carry out the investigation cannot be excluded from the award procedure by the contracting authority, according to the provisions of 167 item (1) letter c) of Law no. 98/2016.

According to this rule of law, the economic operator who has committed a serious professional misconduct evoked by the contracting authority may be excluded from the award procedure, including with a conviction decision from a criminal court.

Another issue to be debated in question relates to the fact that Competition Law No 21/1996 regulates in Article 2, in a totally flawed, insufficient way, what kind of entities may hinder or distort competition: enterprises or associations of enterprises, as well as central or local public administration authorities and institutions, to the extent that they, by decisions issued or by the regulations adopted directly or indirectly influence competition.

The Public Ministry does not represent an authority or institution of central or local public administration and, at first glance, the provisions of Article 2 of Law no. 21/1996 of competition are not applicable to it.

In this context, the public prosecutor's office may exhibit the unique associated SRL behaviour of which I have spoken, omit from the investigation the preferred economic operators (usually the multinationals operating in Romania) and create discriminatory conditions regarding the activity of enterprises, including the RIL Decision of ICCJ no. 13/2011.

In reality, not only the author of a criminal complaint cannot defend himself, does not have access to justice, precisely because of the invocation of this false and abusive condition of interest, as well as disadvantaged economic operators in a competitive market, precisely because of the lack of criminal investigation against competitors.

The legislator should have included in Article 2 of Law no. 21/1996 all public institutions of the Romanian state, without proceeding to a ”discrimination against them in relation to the institutions of the central or local public administration, which ” as I have shown – through the decisions taken, may prevent or distort competition.

The action of the Public Ministry, with the consequence of the intervention of the prescription of criminal liability, has already been the subject of actions for claims to civil courts, as a result of incurring tort liability and proving the existence of moral damage.

By Decision no. 744/A/2016, the Mehedinti Tribunal admitted in part the claims of a claimant - a natural person at odds with the Ministry of Public Finance as a result of the damage caused by the inaction of the Public Ministry - The Prosecutor's Office attached to ICCJ, an institution which – through the absence of the – investigation led to the prescription of criminal liability in a case having as its object of culpable murder.

Although in the field of tort liability corroborated with the provisions of art. 3 ECHR the inaction of the prosecutor's office may be the basis for the delivery of court decisions to oblige the Romanian state (through the Ministry of Finance) to pay damages, this aspect is impossible in the field of repairing the damages in the field of competition law, because the Public Ministry – on the one hand is not regulated as the author of the violation of Law no. 21/1996 art. 2 and on the other hand, this latter institution can invoke at any time against the author of the complaint the RIL decision of the above-mentioned ICCJ, motivated on the false problem of interest.

In other news, the illegal capitalization of unplanned economic operators, bleached by the Public Ministry precisely as a result of the RIL decision of the ICCJ, takes the form of illegal state aid granting, according to the provisions of OUG no. 77/2014.

This normative act also regulates both the legal state aid and the state aid granted under illegal conditions[1].
The Court of Justice of the European Commission and the European Commission define more broadly the notion of state aid than the domestic legislator in Romania.

European institutions shall make the provisions of Article 107 para. 1 TFEU which regulates "*aid granted by States or through state resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the procedure of certain goods, in so far as they affect trade between Member States*".

Thus, illegal State aid is not limited to positive benefits (subsidies or subsidies), but also includes all forms of aid that lead to a reduction in burdens or obligations incumbent on an undertaking, such as taxes and duties (Maican; Ungureanu).

By invoking the false problem of interest and RIL Decision no. 13/2011 "as legal basis" for the inadmissibility of complaints made by persons who do not justify this interest, the Public Ministry can investigate only who it wants, with the consequence of illegal granting of state aid to economic operators against whom the criminal investigation does not take place.

The recent practice of the Public Ministry and the criminal courts, synonymous with illegal state aid provision and inaccessibility to justice, following the emergence of RIL Decision no. 13/2011 of ICCJ

Within the Ordinance no. 309/II-2/2024 of 26 September 2024, a criminal complaint filed by C.D. against the perpetrators T.C.C. – general manager of the Agency for Payments and Intervention in Agriculture, as well as of R.N.S. – executive director within APIA Dolj, for the crime of abuse of office according to Article 132 of Law no. 78/2000, because

[1] According to art. 2 letter f) of GEO no. 77/2014," the aid granted without respecting the national and European Union procedures in the field of state aid."

they, as they, the on the basis of their functions, they unduly prevented enforcement of an enforceable title –Payment decision No 15096114/19.11.2021 issued against B.L. PFA, having as object the obligation to pay of this economic operator over 500,000 euros main debit, as well as accessories in the amount of 100,000 euros.

During the B.L. PFA paid only the main debit, but not the accessories.

The ranking ordinance presented a profound non-meaning and illegality both on the grounds of the non-existence of the criminal act (because the debt would have been paid) and on the intentional omission of the Public Ministry – DNA, to recover the accessories, penalties amounting to 100,000 euros.

The Public Ministry had to ascertain the existence of the act with the consequence of partial recovery of the damage, in the context in which the perpetrators refused to submit the enforceable title – Payment decision no. 15096114/19.11.2021 of APIA to ANAF for the initiation of enforcement proceedings and not to classify the case with the motivation of the non-existence of the act.

As regards the accessories in the amount of 100,000 euros, the prosecutor's office takes the decision of RIL no. 13/2011 of ICCJ, motivating the classification of the case on the so-called lack of interest of the complainant.

In this situation we are dealing with the crime of favouring the perpetrator according to art. 269 Criminal Code from the criminal investigation bodies, favoured by the RIL decision of the ICCJ.

On the other hand, the Public Ministry illegally grants state aid 100,000 euros to B.L. PFA, with the consequence of ensuring discriminatory conditions regarding the activity of enterprises towards other economic operators with the same activity in the field of agriculture.

The decision of the court in case no. 7404/63/2024 was the reconfirmation of this ranking order, confirming practically the same discriminatory effects, of denial of access to justice and anticompetitive, as the ranking order no. 309/II-2/2024.

The need to remove from application the non-compliance with RIL Decision no. 13/2011 of ICCJ

Although the theoretical possibility of questioning the mandatory application of an ICCJ RIL decision has not been considered so far, we consider that – in the context of the – expositions there may be situations where a RIL decision has a profound non-grounded and illegal character.

By lege ferenda, we consider necessary in a future regulation the possibility that the internal judge not to take into account, to remove from the application a decision of appeal in the interests of the law that violates the right of defence of a litigant, context in which the applicability of the provisions of art. ECHR 6.

Moreover, if the ECHR has established the principle of removing from the application of the internal law in force in numerous cases against Romania (the Sandor case c. Romania, Dumitru Popescu c. Romania, Tacea c. Romania, SC PROD COMEXIM no. 1 and no. 2 c. Romania, Abramiuc c. Romania, Negulescu c. Romania and others), we do not see why it would not be possible to remove a decision from enforcement - appeal in the interest of the law, such as ICCJ Decision no. 13/2011.

A RIL decision does not impose binding rules and is not a law in the true meaning of the word.

Although RIL decisions are binding, aimed at unifying the non-unitary practice in national law, the question must be asked, what should be done if the possible non-unitary practice must be uniformed in the wrong direction?

RIL decisions are final and cannot be abolished by another decision given by a court of judicial review.

In this context, we consider – de lege ferenda – including the need to legally regulate an appeal against ICCJ RIL decisions that violate the rights of the defence, are discriminatory or cause strong anti-competitive consequences in the sense of Law no. 21/1996 and TFEU.

If, so far, – cannot be denied – the fact that the European rule of law applies as a priority over the domestic rule of law when the latter

contains provisions contrary to European law, the same cannot be said about the occurrence of situations in which the RIL decisions of the ICCJ are contradictory to European Union law, in the sense of those set out in this article.

Conclusions

RIL Decision no. 13/2011 of ICCJ which presupposes the condition of the interest of the author of a criminal complaint in order to be able to censure at the court the solutions of non-disclosure or non-sending on the part of the Public Ministry produces effects of restricting access to justice[1], discriminatory and anti-competitive.

By adding to the law (art. 339-340 Cpp) of the condition of interest creates the possibility for the Public Ministry, the case prosecutor to decide at will whether or not to carry out the criminal investigation in the file.

This issue represents a behaviour of type SRL with sole associate, favouring the perpetrator from the Public Ministry, behaviour that cannot cease only by removing from the application of RIL Decision 13/2011 of ICCJ.

In this context, there is a need to regulate – de lege ferenda – both of legal remedies against RIL decisions that are inconsistent with European law and the possibility that the magistrate invested with the resolution of criminal cases in which the Public Ministry invokes the applicability of the RIL decision mentioned above, may proceed to the removal from application, to the non-compliance with these decisions – appeal in the interest of the law.

At the same time, there is the need – de lege ferenda – that within the provisions of Law no. 21/1996 of competition to be regulated the

[1] ECHR, Airey vs. Irlanda (1979); Golder vs. Regatul Unit al Marii Britanii și Irlandei de Nord (1975); Vasilescu vs. România (1998); etc.

situation in which all public institutions (including the Public Ministry) to refrain from issuing anti-competitive acts or decisions.

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