



## **Infraction of Illicitly Exercising a Profession or Activity in the Regulation of the New Romanian Criminal Code**

### **Public Law**

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**Abstract:** According to the new Criminal Code, the infraction that we are to examine consists in the illicit exercising of a profession or activity for which the law requires an authorization or their exercising under other conditions than the legal ones, if the special law provides that the committing of such deeds is punished according to the criminal law. By comparing the incriminating text in the new Criminal Code to the corresponding text in the previous Criminal Code, we find two changes brought to the examined infraction. The first one refers to the completion of the marginal denomination by adding by the profession also the word activity. The second one points to the increase of the special limit of the punishment by imprisonment from one to 3 month.

**Keywords:** New Romanian Criminal Code; infraction; exercising of a profession or activity; special law; authorization

### **1. Introduction**

The infraction of illicitly exercising a profession or activity is stipulated by art. 348 in the new Criminal Code. In the structure of the incrimination, it is found a single infraction variant stipulated in a single normative modality. As a particularity of art. 348 in the Criminal Code, we note the one that this is a frame incrimination norm (or in blank) that is completed by reference norms in the normative documents that regulate the organizing and carrying out of some professions or activities. In general, it deals with the norms included in the organic laws or in the Government emergency ordinances.

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The new Criminal Code brings two changes to the examined infraction compared to its content reflected within art. 281 in the old Criminal Code<sup>1</sup>. The first occurred change refers to the completion of the marginal denomination by adding by the profession also the word activity. The second one points to the increase of the special limit of the punishment by imprisonment from one to 3 month. According to art. 348 in the new Criminal Code, the illicit exercising of a profession or activity for which the law requires their authorization or exercising under other conditions than the legal ones, if the special law provides that the committing of such deeds is punished according to the criminal law, is punished with imprisonment from 3 months to one year or by fine.

## 2. Text Analysis

### 2.1. Preexisting Conditions.

#### *A. Infraction Object*

a) Special juridical object. The juridical object consists in the social relations regarding the legal regime applicable to the exercising of the regulated professions and activities that sets the obligation of each person that exercises a profession or other regulated activity to observe the rules specific to the profession or activity in question. The incrimination or sanctioning of the deeds of illicit exercising some professions or activities for which it is required a certain training and, consequently, are subjected to the authorization, express the necessity of defending some social values of special importance, including the life and physical and psychic integrity of the person, as well as its property interests<sup>2</sup>. Indeed, the society cannot allow that certain professions, such as that of notary public, attorney at law, physician, pharmacist or dentist, to be performed by persons without qualification or legal liability in case of some illicit deeds<sup>3</sup>.

b) *Material object*. Usually, the infraction does not have a material object. Exceptionally, the infraction can have a material object in case the profession or the activity is performed on a person or some things. In such cases, the body of the natural person (for instance, the operated person) on which the activity or the

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<sup>1</sup> For the analysis of this infraction, according to the provisions of the Penal code in 1968, see: (Dobrinouiu, & Neagu, 2008, p. 642; Diaconescu, & Duvac, 2008, p. 683)

<sup>2</sup> See the Decision of the Constitutional Court no. 49/2001.

<sup>3</sup> *Ibid.*

things used in the carrying out of the activity are exercised (for instance, certain installations or instruments).

### ***B. Infraction Subjects***

a) Active subject. The direct active subject (doer) is not circumstantial. The penal participation is possible, except for the co- doer, because the infraction stipulated by art. 348 in the new Criminal Code is an infraction that belongs to the category of the *in persona propria* infractions (Diaconescu & Duvac, 2009, p. 682). In case more persons illicit exercise together a regulated activity the practice of which by breaking the law consists an infraction, will be reliable each in its turn in distinct ways, in capacity of doer for committing the infraction of illicitly exercising a profession or activity. If the conditions stipulated by law are met, the legal persons can also have the capacity of active subject of the infraction of illicit exercising a profession (Diaconescu & Duvac, 2009, p. 683)

b) Passive subject. The main passive subject of the examined infraction is the state. The infraction can have also a secondary passive subject if also the rights of another lawful subject (either natural person, or legal person) (Dobrinouiu & Neagu, 2008, p. 643) (Basarab et al., 2008, p. 750) are affected by exercising the profession or activity that is the material element of the infraction.

## **2.2. Constitutive Content**

### ***A. Objective Side***

a) Material element. The material element consists in the illicit exercising of a profession or activity for which the law requires authorization or their exercising under other conditions than the legal ones, if the special law provides that the committing of such deeds is punished according to the criminal law.

*The exercising of a profession or activity* is an activity that assumes the repeating (job, habit) of performing deeds specific to a profession or activity (Diaconescu, & Duvac, 2009, p. 683) (Basarab et al., 2008, p. 789)<sup>1</sup>. It results from here that, if the special law that makes references to the Criminal Code does not stipulates otherwise, that is, also a single act carries out the material element of the infraction,

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<sup>1</sup> For the references to the opinions expressed in doctrine and the solutions in the juridical practice according to which the number of the deeds specific to the profession or regulated activity has no relevance for the existing infraction, see Dobrinouiu & Neagu (2008, p. 645).

we deal with an infraction of illicitly exercising a profession or activity only when the deed was repeated 3 or more times. Through this particularity, the infraction is within the domain of the custom infractions. On the other hand, the deeds that belong to the content of the material element have to be deeds specific to the profession or regulated activity and not simple incidental deeds or deeds only partially connected to the profession or activity in question.

A person illicitly exercises a profession or activity if this person does not have the required authorization. The authorization is considered to be missing also when it was withdrawn, cancelled, annulled etc. The exercising of a profession or activity under other conditions than the legal ones consists in the carrying out or performing of some deeds specific to a profession or activity for which the law requires an authorization, by a person that has such an authorization, but by breaking the juridical regime where it has to perform the deeds in question. Besides the above- mentioned requirements, for the infraction to exist, it is necessary the condition that the special law, that is, the one that sets the juridical regime of the profession or activity, should stipulate that such deeds are punished according to the criminal law. For instance, as it stipulates art. 26 par. (1) of Law no. 51/1995<sup>1</sup>. What does the expression *special law* mean? We consider that, within the context of the infraction stipulated by art. 348 in the new Criminal Code, the syntagm of *special law* means any provisions contained in organic laws, emergency ordinances or other normative deeds that had the power of law when they were adopted. Other normative deeds, in our opinion, cannot be considered special laws, as the norms that make reference to the Penal code are penal norms, even if they are incomplete. Or, the juridical office of a - complete or incomplete – criminal norm cannot be other than the one set in art. 173 in the new Criminal Code<sup>2</sup>. In practice, it was examined different opinions regarding the juridical regime of performing the profession of attorney at law, legal adviser, notary public etc. One of the problems in the juridical practice was that of establishing if the profession of legal adviser is or not compatible to the profession of attorney at law. In this issue, delivered a verdict also the Reunited Sections of the High Court of Cassation and Justice that

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<sup>1</sup> According to art. 26 par. (1) Of Law no. 51/1995: „*The exercising of any activity of juridical assistance specific to the profession of attorney at law and stipulated by art. 3 by a natural or legal person that does not have the capacity of an attorney at law registered in a bar association and in the board of the attorneys at law of that bar association is an infraction and is punished according to the penal law*”.

<sup>2</sup> According to art. 173 in the new Penal code: „*Through penal law, it is understood any provision with penal character contained in organic laws, emergency ordinances or other normative deeds that had the power of law when they were adopted*”.

stated that: „According to art. 2 of Law no. 514/2003, "the legal adviser can be appointed and hired under the conditions of the law", and according to art. 3 of the same law, "the appointed legal adviser has the statute of clerk", while the hired one has the "stature of employee".

So, the profession of legal adviser is performed either based on a job report under the conditions stipulated by Law no. 188/1999 regarding the Statute of the public clerks, or based on a juridical report of employment after concluding the labor agreement according to the regulations of the Labor code"<sup>1</sup>. (...) So, it results that the profession of legal adviser, not being a free profession as that of attorney at law is, can be performed only within the legal frame of the job report or of the juridical report of employment. Furthermore, the profession of legal adviser is not compatible to that of trader in the sense of the provisions of art. 7 in the Trade code according to which "those that perform deeds of trade, having the trade as an ordinary profession and the trading companies are traders". The most vivid disputes are with regard to the possibility of performing the profession of attorney at law within the bar association parallel to the structures set out based on Law no. 51/1995 regarding the organizing and performing of the profession of attorney at law. With regard to this dispute, the supreme court stated: „(...) the granting of the legal personality to an association with non- patrimonial purpose that has as activity object the setting out of bar associations is against the provisions of Law no. 51/1995 regarding the organizing and performing of the profession of attorney at law"<sup>2</sup>.

According to art. 1 par. (2) of Law no. 51/1995, the profession of attorney at law is performed only by attorneys at law registered in the board of the bar association to which they belong, component bar association of the National Union of the Bar Associations in Romania, hereinafter called U.N.B.R. According to par. (3) of the same article, the setting out and the functioning of bar associations outside the U.N.B.R. are prohibited. Their deeds of setting out and registration are legally null. The nullity can be found also ex officio.

b) Immediate consequence. The immediate consequence consists in a state of jeopardy for the social relations that form the object of the penal protection, that is,

<sup>1</sup> ICCJ, S.U., Decision no. 22/2006.

<sup>2</sup> ICCJ, civil section, decision no. 6618/2004, www.scj.ro. In the case, the supreme court delivered the verdict within an appeal in the interest of the law against a sentence delivered by Deva Court of Law.

for the lawful order regarding the exercising of the regulated professions or other activities (Loghin & Filipaş, 1983, p. 282).

We consider that the immediate consequence – jeopardizing of the protected social relations – exists even if the exercising of the profession or activity was carried out under optimal conditions and the service beneficiary is satisfied, because the analyzed infraction is not one of result. The social jeopardy exists irrespective of the quality of the services delivered by the person that illicitly exercises a profession or activity because the legal requirements are set considering the fact that only the capable persons should carry out certain activities are authorized in this sense. The rules regarding the exercising of some professions and activities through which the conditions for those that want to apply them are set, are legal guarantees that the persons that appeal to those in question will benefit from quality services (Dobrinou & Neagu, 2008, p. 645). The circumstance that certain persons can exceptionally offer services of the same quality to those offered by competent persons can not affect the unity of the solution because the law does not make, nor it is opportune to make, any difference of such kind. On the other hand, in case that, by the illicit exercising of a profession or activity, considering the circumstances when it took place and its consequences, also the constitutive elements of another infractions are carried out (third degree murder, third degree body injury etc.), the juridical frame assumes multiple offences (Dobrinou & Neagu, 2008, p. 645).

c) Casualty report. The casualty report results *ex re* (Loghin & Filipaş, 1983, p. 282)

**B. Subjective side.** The infraction stipulated by art. 348 in the Criminal Code is committed only with intention that can be direct or indirect. In the incrimination norm, there are no requirements regarding the mobile of the deed or the purpose of the doer. The committing of the third degree deed or of the deed without guilt is not an infraction. If, the doer is wrong with regard to the necessity of existing the condition regarding the authorization or does not know the other conditions under which the profession or activity in question has to be exercised, although it cannot benefit from the effects of error – cause of non- imputability – this will not be held penal responsible as long as the direct or indirect – intention cannot be proved.

### 2.3. Forms. Punishment

**A. Forms.** The deeds of preparation and attempt are not incriminated; the law giver considers that they do not present a degree of social jeopardy enough to have a penal relevance. The infraction consumption takes place when the material element is entirely carried out, it is repeated (at least three times) respectively.

**B. Punishment.** The illicit exercising of a profession or activity is punished with imprisonment from 3 months to one year or a fine.

### 3. Conclusion

In conclusion, as a particularity of art. 348 in the Penal code, we note the one that this is a frame incrimination norm (or in blank) that is completed by reference norms in the normative documents that regulate the organizing and carrying out of some professions or activities. In general, it deals with the norms included in the organic laws or in the Government emergency ordinances. The new Criminal Code brings two changes to the examined infraction compared to its content reflected within art. 281 in the old Criminal Code. The first occurred change refers to the completion of the marginal denomination by adding by the profession also the word activity. The second one points to the increase of the special limit of the punishment by imprisonment from one to 3 month.

### 4. Acknowledgements

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