

Explanation of Government Emergency Ordinance no. 13/1st February 2017

Judge Cristi Danileț, PhD, Romania

Adoption. On the night of January 31/1 Feb. 2017, a Government Emergency Ordinance (GEO) no. 13/2017 was published in the Official Gazette no. 92/2017 which amends the Criminal Code and the Criminal Procedure Code. On the same night, the Government adopted a bill on pardon, which has been sent to the Parliament to be approved following an emergency procedure, so this is not in force yet.

Why GEO? No valid explanation was given. According to the Romanian Constitution (art. 115, par. 4) in urgent situations where passing a law cannot be postponed and it cannot be expected from the Parliament to pass this law, the Government can do it in its place, by GEO. From the introductory part of the GEO it is not so clear which was the urgent situation that required for a change of these Codes. There are only some mentions about the need of not having different interpretations of the law, following a number of decisions adopted by the Constitutional Court (CCR) in the last years on unconstitutionality.

CSM opinion. The bills regarding the justice system and qualified law (Codes), need, according to the law, an opinion of the Superior Council of Magistracy (CSM). This opinion has only an advisory, not a mandatory value. On the first draft of the GEO from last week, CSM has given a negative opinion. But on Tuesday (31st of January) a new version appeared, so the Minister of Justice asked CSM for a new opinion. This new draft of the GEO arrived at CSM on Tuesday, January 31st, at 5.00 PM in the afternoon, before the government meeting where it was adopted. President of the CSM set a meeting for the next day, Wednesday, February 1st, at 9.00 am, and the minister of justice was announced of this meeting. But, at 9.30 pm on January 31st the GEO was approved by the Government, without the opinion of CSM.

Changes to the Criminal Code. The GEO amended the Criminal Code, which will come into force on the 11th of February, as follows:

1. Favoring the offender/perpetrator. If someone helps a person avoid prosecution, the trial or the execution, that person commits a crime. But there is no charge for those who help their family members (parents or grandparents or great grandparents, children or grandchildren or great-grandchildren, brothers or their grandchildren, husbands or members of civil partnership).

- GEO has now added a new category of people who will not be charged: *in-laws to the second degree*, meaning parents and grandparents of the spouse, children and grandchildren of the spouse, siblings of the husband. This means that all ongoing cases against these categories will be closed, if the emergency ordinance enters into force; ;

- GEO has a completely new provision, stating that the person who favors offenders/perpetrators *through issuance, approval and adoption of legislation will not be charged. This is a very important provision which needs to be looked at in the light of the adoption of this emergency ordinance.*

2. Abuse of office. The present provision is almost entirely changed, and this exceeds the requirements of CCR decision (no. 405/2016) which pointed to one single aspect. There are several issues here:

- Starting from now, abuse of office (abuse of powers) will be considered a criminal offence only when financial damages are of at least 200,000 RON (45,000 Euro). It means that starting from February 11, 2017 cases of abuse with less than 200,000 RON prejudice will not be criminal offences anymore. So, the pending criminal cases will be closed and the damages will be recovered from victims not in a criminal lawsuit, but only in a civil lawsuit (the plaintiff must pay taxes, to pay honorarium of experts or evaluators etc., which did not happen until now during the criminal trial). Persons sentenced for such offenses will clear their criminal records and the prisoners will be released. Another aspect: this limit, of 200,000 lei RON, has been chosen arbitrarily;

- The maximum sentence drops to less than half: from 2 to 7 years of imprisonment it goes to 6 months to 3 years or just a fine. So, the new law establishes less penalties. The effect is the decrease of terms of limitation for criminal liability too, which affects pending cases: now an offense of abuse of office should be prosecuted in maximum eight years; from now on this has to happen in 5 years. So, all cases that are pending at the prosecutor's office or at the court for more than 5 years should be closed;

- currently, in case of a conviction, the judges have the possibility to prohibit the exercise of public office for one to 5 years. In the new GEO this provision is eliminated;

- punishments for those who committed abuse of office by discrimination are drastically reduced: until now they were sentenced to 2 to 7 years of imprisonment and disqualification from public function, for restricting the rights of a person on grounds of race, nationality, religion, sex, disability etc. The new GEO changes it to one month to one year of imprisonment or a fine;

- the GEO eliminates criminal charges for those who commit the offence of abuse of office, including by discrimination, issuing, endorsement or adoption of normative acts. So there is a special category of state agents which cannot be held accountable no matter how big the damage produced or how important the injury or harm is. Moreover, it opens the possibility for racist legislation!

3. Negligence. Until now, if an official/public servant in the exercise of its duties was causing damage or injury unintentionally, but out of indifference or negligence, the act was a crime. In 10 days this provision will disappear completely from the Criminal Code, no matter how serious the damages are. This means that criminal cases pending will be closed and the damage can be recovered only by those interested, in a civil lawsuit. Persons sentenced for such offenses will have their criminal records cleared and will be released.

4. Conflict of Interests. A public servant taking a decision, in the exercise of her/his duties, for his own benefit, or for the benefit of a relative or in-laws up to the second degree was committing a crime, according to the old version of the Code. The Code also forbid that such decisions were taken for the benefit of those who, in the last 5 years, have developed any form of commercial or work relations with that public servant, or in favor of those who offered gifts or donations.

- CCR (Constitutional Court) warned that the use of the phrase "commercial relations" in the legal text is not clear (Decision no. 603/2015). But instead of clarifying this phrase, the GEO has completely removed any reference to it. Furthermore, references to work relationships, gifts and donations have been removed! Therefore, starting from 11th February if a public official takes a decision in favour of his former chief, former business partner or for the one who just paid his holidays, he does not commit a crime anymore;

- Conflict of interests in the private sector was correctly removed, according to CCR Decision no. 603/2015.

5. Drunk drivers.

- Change: now it is considered a crime if a person who drank has the alcohol level in their blood over the legal limit (0.8 gr / l of pure alcohol in the blood) in the moment of driving, not in the moment of the biological sampling. The change is correct, being required by the CCR decision no. 732/2014.

- A new offence is introduced: consuming alcohol or drugs following a traffic accident that led to the killing or injury of a person is punished with imprisonment from 1-5 years.

Changing the Criminal Procedure Code. The GEO brings several changes to the Criminal Procedure Code, which entered into force immediately after publication in the Official Gazette:

1. Acquittal in case of limitation rule. So far, if the offender was acquitted in case of limitation rule, the victim's claim for damages could not be considered. From now, even in this situation, the judge should resolve this issue (change in line with Decision no. 586/2016 of CCR), which is in favor of the victim, indeed.

2. Extend judicial control: In order to respect the CCR decision no. 614/2016, the GEO provides that in case of extension of the judicial control, the defendant must be summoned, heard and to have a lawyer.

3. Reporting/denouncing the crime. Currently, investigations on a crime can start if the prosecutor finds out about the crime him/herself, if the victim files a complaint or a witness reports the crime. Until 31th January 2017 reports/complaints could be filed at any time, sometimes several years after the offense was committed. The new GEO provides that starting from 1st February the report/denounce must be submitted within 6 months from the date of the offense. Two consequences are highlighted:

- Until 31st of January 2017 inclusive, all reports/denounces are valid. This is because the rules of criminal procedure are not retroactive, as it happens in matters of criminal law; after the 31st of January 2017, all reports/denounces have to be limited by this 6 months term. This drastically reduces the probability of having a denounce at all, since many cases of corruption, for example, come to the surface long after they have been committed. This is one of the changes with potentially serious consequences on discovering wrongdoings and new cases.

- Because there is no penalty for breach of this 6 months term, I suppose that even if someone reports the crime after the 6 months, the prosecutor may act *ex officio*. So, it is possible for the prosecutor to ignore time limit for reporting. But in absence of clear provisions interpretation could be different, only the practice remains to decide how severe are the consequences.

Legislative procedure: The GEO has been submitted to the Parliament on 31 January 2017. The Parliament can approve or reject the GEO, according to art. 115 para. 4 from Constitution. The procedure could be quick, but it will certainly take more than 10 days.

Emergency Ordinances are not the way to make changes to qualified law. According to art. 115 para.1 of the Constitution, the Government may adopt emergency ordinances under *extraordinary situations*, whose regulation cannot be postponed, and has the obligation to motivate this urgency in the content of the GEO. This GEO provides for **10 days** for entry into force of the amendments to the Criminal Code, without any motivation.

What can be done?

- The government could amend or withdraw the GEO 13/2017;
- According to art. 146 d) of the Constitution, the Ombudsman can raise the exception of unconstitutionality of the GEO. But it's at its sole discretion whether to attack GEO 13/2017 or not, which can be done at any time after the appearance in the Official Gazette;
- According to art. 146 d) of the Constitution, CCR decides on objections to constitutionality of laws and ordinances brought before courts. So if there is a lawsuit pending where the GEO 13/2017 is applicable, is possible for the judge to suspend the hearings and request the decision of CCR;
- According to art. 146 e) of the Constitution and art. 34-39 of Law74/1992, the CSM can invoke a constitutional conflict between state authorities - CSM, the courts and the Public Ministry on the one hand, and the Government on the other. On February 1, President of CSM has already announced this;

Entry into force of GEO:

- Amendments to the Criminal Procedure Code have entered into force on 1st February 2017;
- Amendments to the Criminal Code will enter into force on 11th February 2017. Even if the GEO will then be withdrawn by the Government, rejected by Parliament or declared unconstitutional by CCR, amendments to the Criminal Code it would still apply, after entry into force even for 5 minutes, because they are a law which is more favorable to defendant (see art. 5 para. 2 of the Criminal Code.)

Conclusions:

GEO was not urgent, since reconciling the Criminal Code with some Constitutional Court decisions, in some cases older than one year, cannot justify an extraordinary emergency situation. More than that, GEO itself provides that the main provision will be in force after 10 days from publication in Official Gazette.

Fixing this unprecedented situation so as to avoid severe consequences can only take place until 11th February 2017, 00.00 am.