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NEWS REPORT

Country:	Romania
Title:	Emergency Ordinance diluting standards of protection against discriminatory official misconduct
Date:	7 February 2017
Expert:	Iordache, Romanița
<u>Context</u>	
Issue at stake:	Provisions of the Criminal Code on official misconduct with discriminatory connotations diluted
Ground of discrimination:	Race/ethnic origin, religion/belief, age, disability, sexual orientation, all grounds
Source:	Legislation – Emergency Ordinance 13/2017 for amending the Criminal Code and the Code of Criminal Procedure and Emergency Ordinance 14/2017 abrogating Emergency Ordinance 13/2017
Field:	Employment, social protection, social advantages, access to goods and services, education, housing, other
Applicable law:	Criminal Code Art. 297 on abuse in service

Content

Legal development: In the context of the attempt of the newly elected Government to provide pardon to thousands of prisoners and to amend criminal legislation, on 1 February 2017 the Government adopted Emergency Ordinance 13/2017 which among others decriminalizes “official misconduct” which can be defined as abusive conduct, by a public servant in the exercise of his/her mandate, which infringes rights and liberties on discriminatory grounds. The Emergency Ordinance was adopted in spite of protests from the Superior Council of Magistracy, professional groups and civic protests.

While decriminalizing official misconduct in which the financial damage is less than RON 200,000 (approx. € 40,000) and introducing other procedural limitations which are described by the magistrates as *de facto* blocking anti-corruption measures,¹ the Emergency Ordinance 13/2017 also amends provisions related to the criminal provisions meant to combat racism, xenophobia, misconduct based on discriminatory grounds.

Currently, the Criminal Code sanctions under Article 297 (relating to abuse in the exercise of authority) the action of a civil servant who during the course of work-related duties, limits the exercise of a right of a person or creates a situation of inferiority for that person on grounds of age, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political membership, beliefs, wealth, social origin, age, handicap (disability), non-contagious chronic disease or HIV/AIDS, which is punishable with a term of imprisonment of from two to seven years and exclusion from holding a public position. The Emergency Ordinance reduces the quantum of the criminal sanction to imprisonment from one month to one year or payment of a fine.

¹ Position of judge Cristi Danileț available at: <http://cursdeguvernare.ro/cristi-danilet-ordonanta-de-marti-noapte-pe-intelesul-tutoror.html>.

More worrying is an addition to this provision, Article 297(3) which states that the provisions on official misconduct do not apply in cases of issuing, approving or adopting normative provisions.

The President, the Superior Council of Magistracy as well as the institution of Ombudsman asked the Constitutional Court to review this emergency ordinance. The Prime Minister and the Minister of Justice stated that they will not withdraw the ordinance in spite of street protests throughout the entire country. The Emergency Ordinance enters into force on 11 February if it is not withdrawn by the Government prior to this date. The Constitutional Court seized by the Ombudsman with a challenge as to the constitutionality of the text has no legal procedure allowing for a fast track, emergency review of the Emergency ordinance before it enters into force. On Sunday 5 February, the Government responded to the generalized protests in the country by issuing another Emergency Ordinance no. 14 abrogating the Emergency Ordinance no. 13. The Parliament still has to ratify this second Emergency Ordinance however. The Government provided conflicting messages with the Minister of Justice announcing that a draft law on the same topic was prepared in order to initiate the legislative process in the Parliament, the Ministry denying the intention to submit such a bill to the Parliament and the various political leaders announcing their interest in carrying on with their work on this topic and maintain their approach to decriminalizing official misconduct. Given that key political leaders were convicted or are currently investigated for various forms of official misconduct and corruption related offences, it is unlikely that the push to adopt diluted standards will cease.

Key points of analysis: The amendments contradict and undermine all efforts undertaken under the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. The significant reduction of the quantum of the criminal sentence for cases of discriminatory official misconduct not only affects the effectiveness and proportionality or dissuasiveness of discriminatory official misconduct but also has an impact on procedural aspects by reducing the statutory term for such crimes. As for Article 297(3) it creates impunity for legislators or decision-makers adopting discriminatory norms.

Internet link source: Text of the Emergency Ordinance available at http://www.dreptonline.ro/legislatie/oug_13_2017_modificare_lege_286_2009_codul_penal_lege_135_2010_codul_procedura_penala.php (accessed 2 February 2017).