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OFFENSE VERSUS CONTRAVENTION IN NATIONAL FORESTRY LAW

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Abstract: *According to a recent legislative amendment, unauthorized felling of trees, including when wood damage is up to five times the average price of one cubic meter of wood, per foot, constitutes a criminal offense. At the same time, a contraventional law is in force and is applying to a similar act. Thus, the question is whether the new rule is sufficiently clear to achieve the purpose of criminal proceedings.*

Key words: *felling of trees, offense, contravention, clear rule, E.C.H.R*

1. Legal basis

The question of law arose as a result of the entry into force of the provisions of Law No 197/2020 amending and supplementing some provisions of Law No 46/2008 on the Forestry Code.

Thus, by Article I, point 35 of Law No 197/2020 for amending and supplementing Law No 46/2008, published in the Official Gazette of Romania No 823/08.09.2020, the content of Article 107 of Law No 46/2008, after paragraph 1, has been amended by inserting a new paragraph 1^1 as follows:

> *"Unauthorized felling of trees from the national forestry fund, irrespective of the form of ownership, constitutes a forest offense and is punishable as follows: (a) by imprisonment from six months to one year, or fine if the amount of damage caused is up to five times the average price of one cubic meter of wood, per foot, at the time of discovery."*

Furthermore, the provisions of Article 1, point 39 of Law No 197/2020 amended the content of Article 109 of Law No 46/2008, after paragraph 1, by inserting a new paragraph 1^1 as follows: *„theft of trees felled or broken by natural phenomena, or of trees cut or removed from forest roots, protective forest curtains, from degraded land which has been improved by afforestation and forest vegetation outside the national forestry fund as well as any other specific products of the national forestry fund, constitutes a criminal offense and is punishable as follows: (a) by imprisonment from six*

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months to one year or a fine if the amount of the damage caused is up to 5 times the average price of one cubic meter of wood, per foot, at the time of finding.

According to the provisions of Article 8 paragraph 1 letter (a) and (b) of Law 171/2010 on the determination and sanctioning of forestry offenses:

„the following shall constitute forestry offenses:

*a) unauthorized **felling**, tearing or removal from the roots of trees without right as well as the destruction or injury of trees, young trees, Christmas trees or bines from national forestry fund or unauthorized **felling**, breaking or removal of tree roots as well as the destruction or injury of trees on forest vegetation fields outside national forestry if the amount of damage determined in accordance with the law is up to five times the average price of one cubic meter of wood, per foot;*

*b) **the theft or appropriation of rightfully or unauthorizedly felled** young trees, Christmas trees or bines of national forestry fund or of Christmas trees from specialized crops or **the theft or appropriation of trees rightfully or unauthorizedly cut off** from land with forest vegetation outside the national forestry fund if **the amount of damage determined in accordance with the law is up to five times the average price of one cubic meter of wood, per foot".***

Paragraph 2 of Article 8 of Law 171/2010 also sets out the applicable penalties, namely the fine from 1000 to 8000 lei in various thresholds depending on the amount of the damage between 0 and 5 cubic meters.

It was therefore found that the provisions of Law No 197/2020 do not contain any specific disposition concerning the provisions of Article 8 of Law No 171/2010, to the extent that they are repealed.

So that, as regards the acts of unauthorized felling of trees and theft, if the amount of damage is up to five times the value of a cubic meter of wood, there are currently two conflicting regulations which raise problems about the qualification of the facts and the enforcement of the criminal or contraventional liability of the perpetrators.

2. Opinions

In practice, two divergent views have emerged.

In a first opinion, the prosecutors assessed that, once the new law came into force, it tacitly repealed the previous legal provisions, even contained in another law, with the legal consequence that the committing of any of the analysed deeds would trigger the criminal liability of the author.

In support of this view, both normative and logical legal arguments were put forward:

"Article 67 paragraph 1 of Law No 24/2000, concerning the legislative technical standards for the drafting of normative acts, stipulates that in special cases where it was not possible to identify all the divergent rules when drafting and adopting a regulation, it can be presumed that they were subject to implicit amendment, completion or repeal."

Relative to the content of the above-mentioned text, the impossibility of identifying contradictory rules should not be absolute, but should relate to the actual situation.

But following the legislative process of the bill that became Law No 197/2020, it was considered that, in the context of the need for rapid legislative intervention to improve the efficiency of the fight against illegal felling of trees, it was not possible to identify all rules contrary to the newly adopted ones and to immediately repeal them, giving priority to the urgent adopting of the law, particularly since, for a substantial period of time from taking up the law, the chambers of Parliament were either under the effect of an emergency or on parliamentary holiday.

As such, the provisions of Article 67 paragraph (1) of Law No 24/2000 are fully applicable, the legislator being in the specific situation in which the implicit repeal is permitted.

On the other hand, the way in which the legislator has understood to penalize the felling/theft of trees following the new Regulation shows, beyond any doubt, its intention to bring into the criminal area the conduct that had previously escaped this scope by being only contraventional.

It is obvious that a certain behavior cannot be simultaneously repressed as a contravention or offense. In this case the interpreter must examine the will of the legislator, or the way in which the legislator positions itself on a particular matter according to the content of the adopted legislation.

By Law No 197/2020 the legislator has incriminated the conducts recently sanctioned as contraventions and this undoubtedly indicates that the action of the law-maker in this respect was determined by the conviction that, considering the actual social realities, the incrimination of the acts in question serves to a more effective protection of social values related to the forestry scope rather than contraventional repression.

Finally, it is admitted in the doctrine, with reference to the tacit repeal of a criminal rule, that, exceptionally, such repeal may take place, provided that the following conditions are met:

"a) the two rules cover the same subject matter;

b) the two rules have the same recipients (to cover the same category of subjects);

c) there is a contradiction or incompatibility between the scopes of the two norms".

It is noted that all three conditions are also met in the present situation, and if such a conclusion can be drawn as to the tacit repeal of a criminal rule, a fortiori it is also applicable to the tacit repeal of an infringement rule."

In the second opinion, it was argued that the provisions of Article 8 of Law No 171/2010 on the establishment and punishment of forest offenses were not expressly repealed by the provisions of Law 197/2020, so that the co-existence of criminal and contraventional liability for the same acts was reached. Therefore, the situation of legislative conflict has been eventually interpreted in favor of the authors and it was retained in the form entailing a less serious liability, i.e. contraventional liability.

In support of this opinion, the need for legal analysis has been invoked in the light of the principle of incrimination legality, that is stipulated by Article 1 of the Penal Code and by Article 7 of the European Convention on Human Rights. According to this priciple, the criminal law provides the conduct to be considered as offense and no individual may be convicted of an act or an omission which, at the time when it was committed, did not

constitute a criminal offense under national or international law (“nullum crimen sine lege” and “nulla poena sine lege”).

The constant case-law of the European Court of Human Rights has ruled that the principle of crime and penalties’ legality requires not only the provision of offenses and penalties in some legislative texts on incrimination, but it is also necessary that the law itself fulfills certain qualities, especially those of accessibility and predictability.

Thus, the offenses and penalties sanctioned by the law must be clearly defined, the lack of "quality of the law" concerning the definition of the offense or the applicable penalty, leading to an infringement of the provisions of Article 7 ECHR (Kafkaris against Cyprus).

From the perspective of law predictability, it is necessary that the judge knows what facts and omissions carry out criminal liability and what is the right punishment, starting from the wording of the relevant law provision and, where appropriate, with the help of court interpretation or legal aid.

From the perspective of the ECHR, a particularly important aspect of predictability is judicial interpretation and the clarification of the rules of law.

In any legal system, however clearly a legislative provision is stated, including a criminal law provision, inevitably an element of judicial interpretation would occur, the decision-making function of the courts serving precisely to remove any doubts that may exist regarding the interpretation of the rules.

Thus, in its case-law, the Court has sanctioned, in terms of predictability, any extended interpretation of the criminal law to the detriment of the defendant (in malam parem) and the conviction resulted from the application of an unclear provision of national law which may be subject to divergent interpretations (Zaja against Croatia)."

It is thus argued that although the opinion on tacit repeal appears to prevail, it cannot be ignored that the Law No 197/2020 does not even contain a generally applicable provision of principle to harmonize the amended legal stipulations with the other provisions of Law No 46/2008 which were not subject to the amendments (e.g. from the date of entry into force of this act any contradictory provisions should be revoked).

In this respect, it is also required to analyze from the perspective of the previous resolution of similar legal situations (the offense of tax evasion/tax contraventions) when both the High Court of Cassation and Justice and the Constitutional Court of Romania ruled that, irrespective of the legal possibilities of interpreting a law provision, in situations of conflict of interpretation arising from the quality of the law (including predictability), it is up to the legislator to clarify by means of explicit legislative intervention.

3. Doctrine and judicial practice

The intention of the legislator is obvious in the sense that those facts should be incriminated as criminal offences, but the situation of identical overlapping with facts that attract criminal liability, does not satisfy the requirements of law clarity and predictability as reflected in the case-law of the European Court of Human Rights article 7 from the Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, paragraph 153-155 of the Court decision in the Vasilauskas vs Lithuania case, repeated in the Zaja vs. Croatia case (paragraph 90), contains the essence of the interpretation given in this regard by the European Court of Human Rights. According to this, a crime must be clearly defined by law, whether it is national or international.

This requirement is satisfied when the subject can know from the wording of the relevant provision - and, if necessary, through the interpretation of the courts and with the relevant legal assistance - which actions or inactions will make him/her liable from a criminal point of view.

By Decision No 1358 of 2010, 21th October, concerning the exception of non-constitutionality of the provisions of Article 5 paragraph (1) letter (a) of Law No 221/2009 concerning convictions of political nature and related administrative measures, issued from 6th of March 1945 to 22nd of December 1989, the Constitutional Court stated that the criticized regulation was also in breach of the legislative standards, creating situations of inconsistency and instability, contrary to the provisions of the republished Law No 24/2000.

Thus, according to Article 2 paragraph (1) of this legislative act, the legislative technique ensures the systematization, unification and coordination of the legislation, as well as the appropriate content and legal form for each legislative act. Article 14 - "uniqueness of the legislation in this scope" provides that rules of the same level and having the same object shall be included in a single legislative act.

In the same way, article 16, having the marginal name "avoiding parallelism", stipulates that in the lawmaking process the same regulations are forbidden in two or more normative acts, and if there are parallelisms they will be removed either by repealing or by concentrating matters into single regulations.

In theory, it has been noted that the tacit or implicit abrogation occurs when, although the new legal act does not provide for anything in relation to the action of the old legal rules, the new regulation is different from the old one, the implementing body implicitly understanding that tacitly, the legislator wanted to decommission the old regulation.

In article 67 of Law No 24/2000, the ordinary legislature itself refers to implicit legislative events.

Thus, according to this provision, in particular cases where it was not possible to identify all the contrary rules when drafting and adopting a regulation, it can be presumed that they were the subject of their implicit amendment, addition or repeal. It is the responsibility of the legislative Council, while performing its duties, to identify all the legal provisions that have undergone implicit legislative events and to propose to Parliament and the Government, respectively, the necessary measures to amend, supplement or expressly repeal them.

Therefore, even if implicit legislative events have occurred, explicit regulatory acts amending, supplementing or repealing certain acts are required to avoid contradictory application of certain legislation. The text also states that implicit legislative events are not recognized in the case of special legislation whose provisions cannot be considered amended, supplemented or repealed either by the general regulation of the matter, unless expressly stated. The special principle of generalibus derogant applies in this case.

Then, as in the case of express indirect repeal, the body that applies the law must resolve the situation of contradiction between two normative acts by applying the principles of *Lex posterior derogat prior* and *Lex superior derogat inferior*.

According to these principles, where there are two conflicting legislative texts issued at different dates or levels, the most recent or more legally binding text is in force and the previous text or norm with a lower law-abiding force is considered to be repealed. In such cases, the ultimate will of the legislator is presumed to remain valid, including the intention to repeal the contrary provisions.

The *Lex posterior derogat prior* principle also applies to express indirect repeal, which is different from the tacit one, simply because, in the first case, the legislator feels obliged to draw the attention of the law enforcement officer to the existence of legal regulations which are in contradiction with the new regulation.

4. Conclusions

Law No 171/2010 for establishing and sanctioning forestry offenses has the character of a special law (compared to the general law represented by Government Ordinance No 2/2001, see in this respect article 41).

In accordance with the provisions of article 67 paragraph (3) of Law No 24/2000, "implicit legislative events are not recognized as special normative acts whose provisions cannot be considered amended, supplemented or repealed by the general regulations, unless expressly stated." In these circumstances an implicit repeal took place.

As compared with the above, it is clear that the two newly introduced offenses, namely those referred to in article 107 paragraph (1) letter (a) and article 109 paragraph (1) letter (a) of Law No 46/2008, do not meet the requirements of clarity and predictability arising from the case-law of the European Court of Human Rights.

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*** E.C.H.R decision*, Vasilauskas vs. Lituania*