

# IMPLICATIONS OF THE CONSTITUTIONAL COURT DECISION No. 104/2018 ON LOCAL PUBLIC ADMINISTRATION

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## **Abstract:**

*The Constitutional Court of Romania, within the previous constitutional control, declared unconstitutional the Law amending Law no. 161/2003 on certain measures for ensuring transparency in the exercise of public dignities, public functions and in the business environment, prevention and sanctioning of corruption. The normative act declared unconstitutional, by the Constitutional Court Decision no. 104/2018[1] , removes from the scope of the incompatibilities of the members of parliament, members of the Government, prefects, sub-prefects, mayors, presidents of county councils, vice mayors and vice-presidents of the county councils, the quality of trader as a natural person. The article analyzes the reading and the device of the decision of the Constitutional Court of Romania and highlights the implications for the local public administration.*

**Key words:** *local elected, constitutional court decision, incompatibility, trader as natural person*

## **Preamble**

The regime of incompatibilities of local elected representatives was the subject of several legislative initiatives aimed at eliminating from the scope of incompatibilities certain functions or qualities that the legislator considers incompatible with the status of local elected. Such an initiative, which became a normative act after the parliamentary debate, is the Law amending Law no. 161/2003 on certain measures for ensuring transparency in the exercise of public dignities, public functions and the business environment, the prevention and sanctioning of corruption. Through this normative act, the legal provisions of the various articles of Law no. 161/2003 have been annulled. The annulled legal provisions have the following content:

- Article 82 paragraph (1) (e): “(1) The capacity of a deputy and senator is also incompatible with the exercise of the following functions or qualities: ... (e) the status of trader as a natural person”;

- Article 84 paragraph (1) (g): “(1) The capacity of a member of the Government is incompatible with the exercise of the following functions or qualities: ... (g) the status of trader natural person;

(1) The function of a member of the Government is incompatible with the exercise of the following functions or qualities: [...] (g) the status of trader as a natural person”;

- Article 85 paragraph (1) (i): “(1) The office of prefect and sub-prefect is incompatible with the exercise of the following functions or qualities: ... (i) the status of trader as a natural person”;

- Article 87 paragraph (1) (g): “(1) The office of mayor and vice mayor, general mayor and vice mayor of Bucharest, president and vice president of the county council is incompatible with the exercise of the following functions or qualities: ... (g) the status of trader as a natural person”;

The law restricts the legal framework of incompatibilities between mayors, presidents of county councils, vice mayors, vice presidents of county councils, and also of senators, deputies, members of the Government, prefects, sub-prefects by eliminating the quality of trader as a physical person from the incompatibilities of these categories of public dignities. In its jurisprudence[2], the Constitutional Court has ruled that the incompatibilities are intended to ensure the neutrality of the mandate by persons exercising a public office of authority, in full compliance with the principles of impartiality, integrity and transparency, representing a guarantee capable of conferring a moral authority that is indisputable to persons exercising certain mandates. At the same time, the Constitutional Court emphasizes[3] that the state has the obligation to impose ethical and professional standards, especially those called upon to perform activities or services of public interest and those who carry out acts of public authority. In turn, the doctrine[4] shows that incompatibility is a way of protecting the mandate of the elected, having an imperative character, being of public order and, thus, mandatory.

The normative act was attacked by the President of Romania before the Constitutional Court, invoking aspects of both extrinsic and intrinsic unconstitutionality, and the constitutional litigation court, following the previous constitutional control, as an adopted but still unprompted law, declared the law unconstitutional, by Decision no. 104/2018. Regarding the significance of constitutional control, the doctrine[5] appreciates

that this form of control is a fundamental factor in the process of constitutionalizing the law.

### **Decision of the Constitutional Court of Romania no. 104/2018 and its implications on the incompatibility regime of local elected representatives**

The Constitutional Court of Romania has been called upon to rule on the constitutionality of the provisions of the Law amending Law no. 161/2003 regarding certain measures to ensure transparency in the exercise of public dignities, public functions and business environment, prevention and sanctioning of corruption, a normative act that allowed senators, deputies, prefects, sub-prefects, mayors, vice mayors, presidents and vice-presidents of the county councils to hold, at the same time, the status of trader as a natural person. Practically, the law submitted before the Constitutional Court of Romania by the President of Romania eliminated the quality of trader as a natural person from among the incompatibilities of those dignitaries and local elected officials. If the law had entered into force in the form adopted by the Parliament, all the listed elected categories of persons could have held and exercised, at the same time with the dignity entrusted by citizens through vote, also the status of trader as a natural person. The Constitutional Court has held that the law amending the incompatibility regime of local and national elected officials violates the provisions of Article 1 paragraph 3 and 5 of the Constitution. The decision of the Constitutional Court is final and generally compulsory, and it also concerns the provisions and the operative part of the decision[6] .

It is not the first time that the members of the parliament are trying to eliminate certain inherent qualities or functions from the incompatibility scope of national or local elected officials, either in the desire to escape allegations of violation of the incompatibility regime, or, in the future, to exercise, in an unhindered manner, certain functions or qualities, which, according to the regulations in force, are considered incompatible with the public office or dignity held.

What is important to underline in the Constitutional Court Decision no. 104/2018 and which is relevant to the Romanian state practice, including the application of European law, is that the Constitutional Court has recognized the exclusive right of the

lawmaker to modify the normative framework of integrity, and implicitly, the legal regime of the incompatibilities of the local or national elected officials, stating that “The establishment of integrity standards is a matter of opportunity that falls within the discretion of the legislator, and a diminution of these standards is not automatically a violation of constitutional provisions”.

Even if the President, in his complaint, argued that the elimination of the incompatibility of certain public functions or dignities with the status of a trader as natural person by the law deducted from the constitutional control would have the following consequences: 1) diminishing the standards of integrity; 2) violation of the constitutional provisions of Article 11 paragraph (1), according to which the Romanian state undertakes to fulfill properly and in good faith its obligations under the treaties to which Romania is a party; 3) violation of the constitutional provisions of Article 147 paragraph (4) regarding the general and compulsory nature of the decisions of the Constitutional Court; 4) violation of the constitutional provisions of Article 148 paragraph (4), as they are contrary to those established by the Constitutional Court’s jurisprudence on incompatibilities; 5) violation of international treaties, namely the United Nations Convention Against Corruption, ratified by Romania; 6) breach of the obligations arising from the European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for the cooperation and verification of the progress made by Romania in order to achieve specific benchmarks in the field of judicial reform and fight against corruption, being likely to affect the activity concerning the verification of incompatibilities by the National Integrity Agency, and to relativize the legal framework of integrity, respectively to contradict the standards of the Constitutional Court on integrity; the Constitutional Court held that the legislature has the power to intervene in the matter of integrity standards, being a matter of opportunity that falls within the discretion of the legislator, it no longer affects the constitutional provisions or the commitments made by the Romanian state at the moment of accession to the European Union, nor the case-law of the Constitutional Court.

The Constitutional Court declared the unconstitutionality as a whole of the normative act under discussion on the grounds of deficient regulation, not on the grounds that the legislative solution itself, namely the restriction of the normative framework of integrity, by granting the possibility to mayors, vice mayors or other categories of local or

national elected dignitaries to hold simultaneously with the public office or dignity also the status of trader as a natural person would constitute a constitutionality issue. The Court considered that the normative act does not lead to the creation of a coherent and clear legislative framework on incompatibilities, which is detrimental to the constitutional requirements regarding the quality of the law. Therefore, the law is not clear, precise, predictable and accessible, conditions resulting from the provisions of Article 1 paragraph 5 of the Constitution, and violates the provisions of Article 1 paragraph 3 of the fundamental law. In its jurisprudence[8], the Constitutional Court has established that the requirement of clarity of the law refers to the unequivocal nature of the regulation object, the precision referring to the accuracy of the chosen legislative solution and the language used, while the predictability of the law concerns the purpose and the consequences it implies.

In the context, the Constitutional Court stresses that, on the basis of the principle of unity for the regulation in matter, the legislator has both the right and the constitutional obligation to regulate incompatibilities, but such regulation must be found either in the own statutes of each category of public functions and dignities, or in a single piece of legislation and covering all categories of functions and dignities that the legislator considers that should be circumscribed to these incompatibilities.

Therefore, the legislator may make changes to the incompatibility regime of local or national elected officials in the sense of extending or rejecting it, but they must comply with the requirements of legislative technique.

Declaring the unconstitutionality of the law as a whole leads to the banning of mayors, vice mayors, presidents and vice-presidents of county councils and of the other public functions and dignities covered by the normative act declared unconstitutional, to simultaneously hold public office or dignity and the status of trader as a natural person.

It is also worth mentioning that in its decision and with reference to the jurisprudence[8], the Constitutional Court qualifies the local elected as persons who do not represent a socio-professional category that pursues the development of a career as a local elected, but as someone who has been elected within the respective administrative-territorial unit to handle issues of the local community.

## Conclusions

The Constitutional Court of Romania, as the guardian of the Constitution's supremacy and as an essential body in the architecture of the rule of law[9] , exercising the constitutional control over the Law amending Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignities, in the business environment, the prevention and sanctioning of corruption, considered that the law under review violates the constitutional provisions.

The Constitutional Court of Appeal did not rule out the idea of amending the legislative framework of integrity by the Parliament, under the law, but found that the normative act suffers from the point of view of the quality of regulation, failing to fulfill the condition imposed by Article 1 paragraph 5 of the Constitution, which also leads to a violation of the provisions of Article 1 paragraph 3 of the fundamental act. In line with this idea, the Constitutional Court states that "the constitutional democracy, in a rule of law (...) is the reality of a system in which the supremacy of the Constitution limits the sovereignty of the legislator who, in the process of creating legal norms and adopting some normative acts, must take into account certain principles, such as the principle of legality, which is of constitutional rank".

Of course, the Parliament, as the sole legislative authority of the country, can intervene in the legislative sphere, regulating primarily the social relations, nevertheless the social values also have to be protected so that society evolves, and integrity represents one of them. Therefore, one aspect that must be taken into account is that citizens have less and less confidence in local or central public decision-makers, and a relaxation of the integrity framework, by removing certain qualities or functions from the sphere of incompatibility, will further reduce the level of trust with negative effects on state practice in our country. Even the Constitutional Court, before arguing that the standards of integrity are set by the legislator on the basis of its discretion, emphasizes that "the state is obliged to assure all premises, the legislative framework being one of them, for the exercise of its functions by professionals who meet professional criteria and those of moral probity".

## References:

- [1] Published in the Official Gazette of Romania, Part I, issue 446 of 29.05.2018.
- [2] Decision of the Constitutional Court of Romania no. 304 of 13 June 2013, published in the Official Gazette of Romania, Part I, issue 449 of 22.07.2013.
- [3] Decision of the Constitutional Court of Romania no. 104 of 6 March 2018, published in the Official Gazette of Romania, Part I, issue 446 of 29.05.2018.
- [4] Mihai Cristian Apostolache, Unele aspecte privitoare la momentul apariției stării de incompatibilitate a primarului și calculul termenului prevăzut de Legea nr. 161/2003, in Curierul Judiciar issue 4/2014, p.213.
- [5] Tudorel Toader, Marieta Safta, Curs de contencios constituțional, Hamangiu Publishing House, 2017, p. 61.
- [6] Idem, p. 313.
- [7] Decision of the Constitutional Court of Romania no. 183/2014, published in the Official Gazette of Romania, Part I, issue 381 of 22 May 2014.
- [8] Decision of the Constitutional Court no. 22 of 20 January 2016, published in the Official Gazette of Romania, Part I, issue 160 of 2 March 2016.
- [9] Marieta Safta, Uniformizarea dreptului prin controlul de constituționalitate, volume of the International Conference "Uniformizarea dreptului, efecte juridice și implicații sociale, politice și administrative", Hamangiu Publishing House, Bucharest, 2014, p. 384-390.