

Decision no. 104 of 6 March 2018
concerning the objection of unconstitutionality of the provisions of the Law amending Law
no.161/2003 on certain measures to ensure transparency in the
exercise of public office, public functions and in the business environment,
and the prevention and punishment of corruption
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Summary

I. As grounds for the objection of unconstitutionality, it was argued, inter alia, that by eliminating the incompatibility between certain public functions or offices with the capacity of individual trader, the Law amending Law no.161/2003 on certain measures to ensure transparency in the exercise of public office, public functions and in the business environment, the prevention and sanctioning of corruption diminishes integrity standards. Thus, the Law subject to constitutional review affects Romania's international commitments on integrity, in breach of Articles 11 (1) and 148 (4) of the Constitution. In accordance with Article 148 (4) of the Constitution, Parliament, the President of Romania, the Government and the judicial authority shall ensure that the obligations arising out of the act of accession to the European Union and other binding Community rules are fulfilled. By European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, Romania "is under an obligation to apply this mechanism and to act on the recommendations set out in that framework in accordance with Article 148 (4) of the Constitution". Of the four objectives set, the second aims at establishing an integrity agency with powers to verify assets, incompatibilities and potential conflicts of interest, and to issue binding decisions on the basis of which dissuasive sanctions can be taken. Restricting the scope of incompatibilities between the public offices and functions of Deputy, Senator, Member of Government, Prefect, Deputy Prefect, Mayor, Deputy Mayor, General Mayor, Deputy Mayor of Bucharest Municipality, President or Vice-President of the County Council and the capacity of individual trader is liable to affect A.N.I.'s activity consisting in the verification of incompatibilities, as well as to relativise the legislative framework for integrity, i.e. to come in contradiction with the standards of the Constitutional Court in the field of integrity.

Furthermore, in order to combat the phenomenon of corruption, Romania ratified, by Law no.365/2004, the United Nations Convention against Corruption, adopted in New York on 31 October 2003, which states that each State Party shall develop and implement or envisage, in accordance with the fundamental principles of its legal system, effective and coordinated corruption prevention policies which promote the participation of society and which reflect the principles of the rule of law, sound management of political affairs and public goods, integrity, transparency and accountability.

II. Having examined the objection of unconstitutionality the Court held as follows:

Parliament may lay down by organic law any further incompatibilities with the mandate of MP, other than those laid down by the constitutional text, but, also according to the constitutional text, not with public authority functions, but with any other public functions and in particular private functions. The general principle in this respect is the compatibility of the MP mandate with private activities, but, having regard to the provisions of Article 71 (3) of the Basic Law, it could be accepted that some incompatibilities in this area can be provided for in an organic law (see Decision no. 876 of 28 June 2011, published in the Official Gazette of Romania, Part I, no. 632 of 5 September 2011). As such, the constitutional text leaves the

possibility for the legislator to establish further incompatibilities, which has resulted in the infra-constitutional rules governing the matter.

With regard to the incompatibility of members of the Government, the Court observed that the law subject to the *a priori* constitutional review did not establish incompatibilities additional to those laid down in the constitutional text of Article 105, but repealed some of which were set out by the infra-constitutional procedure, thus tending to preserve those of a constitutional nature. As such, the procedure invoked by the author of the objection of unconstitutionality has to be followed in a situation where the list of incompatibilities is increased and not as regards the return to the original text reflected in the Constitution, so that the alleged infringement of the constitutional provisions of Article 75 (1) and (5) and Article 105 of the Constitution cannot be sustained.

With regard to the rule of law, the Constitutional Court has held that, with regard to the concept of “rule of law” enshrined in Article 1 (3) of the Constitution, it presupposes, on the one hand, the State’s capacity to provide citizens with high-quality public services and to create the means to increase their confidence in public institutions and authorities. This requires the State to impose ethical and professional standards, in particular to those called upon to carry out activities or services of public interest, and, even more so, to those who undertake acts of public authority, that is to say, to those public or private agents which are vested in, and have the power to invoke the authority of the State in carrying out certain acts or tasks. The State is responsible for creating all the conditions — and the legislative framework is one of them — for the exercise of its functions by professionals meeting professional and moral probity criteria, and the setting standards of integrity is a question of opportunity within the discretion of the legislator, the sole decision-making authority in creating the legal framework appropriate to the protection of this social value, and a reduction in those standards does not automatically represent a breach of the constitutional provisions.

The Court held that the legal status of local elected representatives could not be compared to that of magistrates who, in view of their work, receive a service pension. It cannot be argued that a person who has the capacity of local elected representative forms a professional career in that function; therefore, local elected representatives are not a socio-professional category aiming the development of a career as local elected, but they are elected to the local administrative division in order to manage the problems of the local community. The choice is an option for the electorate and not for the candidate, meaning that the choice does not fall under the subjective responsibility of the latter. A professional career is formed and develops distinctly from the choices made by the electoral body at a given time.

As regards the Prefects, their status is regulated both constitutional level under Article 123 of the Constitution and at infra-constitutional level. Compared to the above, as well as to the evaluation of the existing legislative framework on incompatibilities and conflicts of interest of some categories of public offices and functions, the Court notes that matter subject to constitutional review is found in several disparate legislative acts or there are even parallel legislative acts.

The system of Romanian law consists of all the legal rules adopted by the Romanian state and must be consistent with the principle of the primacy of the Constitution and the principle of legality, which are at the core of the rule of law, principles enshrined in Article 1 (5) of the Constitution, according to which “*in Romania, respect for the Constitution, its supremacy and the laws shall be compulsory*”, the sole legislative authority of the country being the Parliament, since the State is organised in accordance with the principle of the separation and balance of powers — legislative, executive and judicial — within the framework of constitutional democracy.

In the framework of the review of constitutionality, the principle of legality has been analysed also by incorporating the rules on legislative technique for the drafting of normative

acts. The constitutional basis for pursuing the rules of legislative technical in the review of constitutionality has therefore been identified in Article 1 (3) “*Romania is a State based on the rule of law [...]*”, as well as of Article 1 (5), “*In Romania, respect for the Constitution, its supremacy and the laws shall be compulsory*”.

The correlation between the two components — the rule of law and the principle of legality — contained in Article 1 of the Constitution is done by the Constitutional Court in that the principle of legality is of constitutional rank (see Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009), so that the infringement of the law has the immediate consequence of breaching Article 1 (5) of the Constitution, which states that compliance with the law shall be compulsory. The breach of this constitutional obligation leads implicitly to the disregard to the principle of the rule of law enshrined in Article 1 (3) of the Constitution (see Decision no. 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012).

As a result, in the light of the above considerations, the provisions of the law subject to constitutional review, taken as a whole, do not fulfil the requirement of quality of law laid down in Article 1 (5) of the Constitution, and thus are in breach the provisions of Article 1 (3) of the Basic Law, as there is a clear regulatory mismatch in the legal treatment of incompatibilities and not only incompatibilities.

According to the settled case-law of the Constitutional Court, the law must meet the three quality requirements resulting from Article 1 (5) of the Constitution — clarity, precision and foreseeability. The Court has held that compliance with the laws is mandatory, but a subject of law cannot be asked to respect a law that is not clear, precise and predictable, as he/she cannot adapt his/her conduct in the light of the regulatory assumption of the law. The legislator must refer to regulations which represent a benchmark of clarity, precision and foreseeability, and errors of assessment in the drafting of regulatory acts do not need to be perpetuated in order to become themselves a precedent in the lawmaking process; on the contrary, these errors need to be corrected for regulatory acts to help achieve greater legal certainty. At the same time, the legislator has the attribute and, at the same time, the constitutional obligation, to the extent that it deems it necessary to increase the incompatibilities established by the constitutional text or, on the contrary, to repeal the ones existing in the infra-constitutional rules, to adopt legislation governing incompatibilities in compliance with the principle of the uniqueness of the law, in accordance with Article 14 of Law no.24/2000, in particular that the same level regulations and having the same subject matter must be included, as a rule, in a single legislative act.

On the referral to Article 148 (4) of the Constitution, with reference to the European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, published in the Official Journal of the European Union L 354 of 14 December 2006, the Court noted that pursuant to Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, as part of the Accession Treaty, as ratified by Law no.157/2005, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005, “*as from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and by the European Central Bank prior to accession, are binding on Bulgaria and Romania and apply in those States under the conditions laid down in those Treaties and in this Act*”. Thus, by adhering to the European Union legal order, Romania has accepted that, in areas where exclusive competence lies with the European Union, regardless of the international treaties it has concluded, the implementation of obligations resulting from them should be subject to the rules of the European Union. If this is not the case, the Member State may, by way of binding international bilateral or multilateral obligations, seriously disturb the competence of the Union and, in practical terms, replace it in those areas.

Therefore, in applying Article 148 (2) and (4) of the Constitution, Romania applies, in good faith, the obligations resulting from the act of accession, without interfering with the exclusive competence of the European Union, and, as established by its case-law, by virtue of the compliance clause contained in Article 148 of the Constitution, Romania may not adopt a legislative act contrary to the obligations which it has undertaken as a Member State (see Decision no. 887 of 15 December 2015, published in the Official Gazette of Romania, Part I, no. 191 of 15 March 2016, paragraph 75). All the above are of course subject to a constitutional limit, expressed in terms of what the Court has qualified “national constitutional identity” (see Decision no. 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision no. 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015).

Moreover, the use of a rule of European law in the framework of constitutional review as an international rule interposed to the reference rule implies, on the basis of Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unequivocal by itself or its meaning must have been established in a clear, precise and unambiguous manner by the Court of Justice of the European Union and, on the other hand, the rule must be subject to a certain level of constitutional relevance, so that its normative content would support a possible violation by the national law of the Constitution — the only direct rule of reference for the review of constitutionality. In such a case, the Constitutional Court’s approach is distinct from the mere application and interpretation of the law, which lies with the courts and administrative authorities, or any legislative policy matters promoted by Parliament or the Government, as the case may be.

In the light of the above cumulative conditionality, it remains at the discretion of the Constitutional Court to apply within the constitutional review the decisions of the Court of Justice of the European Union or to formulate itself preliminary questions in order to establish the content of the European standard. This is a matter of cooperation between the national constitutional court and the European court and the judicial dialogue between them, without calling into question aspects related to the establishment of hierarchies between these courts (see Decision no. 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 2011).

In this context, the Court has noted that, as it appears from the preamble to Decision 2006/928/EC, a decision which was relied upon in the context of the review of constitutionality, in the light of Article 148 (2) of the Constitution, pursuant to Articles 37 and 38 of the Treaty of Accession, as ratified by Law no.157/2005, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005, before the accession of Romania to the European Union, Decision 2006/928/EC was adopted, which stipulates in Article 1 that each year by 31 March at the latest and, in the first year on 31 March 2007, Romania shall submit to the Commission a report on the progress made towards achieving each of the benchmarks listed in the Annex, which are four, respectively: 1. ensure a more transparent and efficient judicial process, in particular by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and assess the impact of the new civil and administrative procedure codes; 2. establishment, as foreseen, of an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for making binding decisions which may lead to the application of dissuasive sanctions; 3. continue, on the basis of progress already made, to conduct professional, non-partisan investigations into allegations of high-level corruption; 4. to take further measures to prevent and combat corruption, in particular within the local administration.

The Court has therefore noted that Decision 2006/928/EC provides for the establishment of an agency for integrity and does not oblige the legislator to establish incompatibilities, which aspects were laid down before accession, although the provisions

contained in the Protocol of 31 March 2005 concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union state that these decisions will be taken, in so far as they are necessary, after accession. Moreover, this decision mentions that it shall enter into force “only subject to and on the date of the entry into force of the Treaty of Accession” (Article 3 of Decision 2006/928/EC).

The meaning of the European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, adopted before the accession of Romania to the European Union, has not been established by the Court of Justice of the European Union in terms of its content, its character and its temporal scope and as to whether these are circumscribed to those provided in the Accession Treaty, implicitly in Law no.157/2005, which forms part of the internal legal order, so that Decision 2006/928/EC cannot serve as a reference rule in the framework of constitutional review in the light of Article 148 of the Constitution.

Moreover, even if it were accepted that Decision 2006/928/EC could be an indicator of the assessment of the constitutionality of the rule, it would have no relevance in the present case, as it merely recommended the establishment of an integrity agency with the administrative capacity to conduct an investigation into incompatibilities and potential conflicts of interest, as well as the capacity to adopt binding decisions which may lead to the imposition of penalties.

It falls within the exclusive competence of the Member State to establish incompatibilities, other than those provided for in the Basic Law of that State, since, as the Court held by Decision no. 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no.246 of 7 April 2014, paragraph 456, the Basic Law of the State — the Constitution is an expression of the will of the people, meaning that it cannot lose its binding force only due the existence of an inconsistency between its provisions and those of the European Union. Also, accession to the European Union cannot affect the supremacy of the Constitution over the whole legal order (see, in the same sense, also judgement of 11 May 2005, K 18/04 of the Constitutional Court of the Republic of Poland). The Constitution provides that the provisions of the constituent treaties of the European Union and other binding Community rules shall take precedence over provisions to the contrary in national laws, in compliance with the provisions of the Act of Accession. However, in connection with the concept of “national law”, by Decision no. 148 of 16 April 2003 on the constitutionality of the legislative proposal to revise the Romanian Constitution, the Court distinguished between the Constitution and the other laws (see Decision no. 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014, paragraph 452). The same distinction is also made at the level of the Basic Law in Article 20 (2) final sentence, which provides for international rules to be applied as a matter of priority, unless the Constitution or national laws contain more favourable provisions and Article 11 (3) states that if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, ratification can take place only after revision of the Constitution.

Regarding the reliance upon the provisions of Law no.365/2004 for the ratification of the United Nations Convention against Corruption, adopted in New York on 31 October 2003, in the light of Article 11 (1), the Court notes that Article 65: *Application of the Convention* provides that each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of its national law, to ensure the execution of its obligations under this Convention; each State Party may take the necessary measures which are more stringent than those laid down in the Convention in order to prevent and combat corruption. However, in the light of the case-law of the Constitutional Court on incompatibilities, and of the fact that setting standards of integrity is a question of

opportunity within the scope of discretion of the legislator, the alleged breach of Article 11 of the Constitution in terms of a possible breach of international rules cannot be accepted.

Given the above, in the light of the case-law of the Constitutional Court on incompatibilities and of the fact that the establishment of integrity standards is a question of opportunity within the scope of discretion of the legislator and, in the light of Article 148 of the Constitution, in this context the legislator is one of the subjects which guarantees that the obligations arising from the act of accession are met, the Court has found that legislating on this matter falls within that discretion, of course with the constitutional limits with respect to the constitutional identity, in conjunction with national sovereignty and the constitutional obligations arising from Articles 11 and 148.

III. For some of the above considerations, the Court upheld the objection of unconstitutionality and found that the provisions of the Law amending Law no.161/2003 on certain measures to ensure transparency in the exercise of public office, public functions and in the business environment, the prevention and sanctioning of corruption are unconstitutional.