

*Decision No 504 of 18 September 2019
on the request for settlement of the legal dispute of a constitutional nature between the Prime
Minister, on the one hand, and the President of Romania, on the other hand,
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Summary

I. As grounds for the request for settlement of the dispute, the Prime Minister argued that the refusal of the President of Romania to appoint ministers, at his proposal, resulted in six ministries' activity being blocked.

As regards the refusal of the appointment of the interim ministers, the author of the referral indicated that the constitutional mechanism of the interim arrangement is very clearly regulated in Article 107 of the Constitution and leaves the President no margin of discretion over the proposal of the Prime Minister to designate an interim minister, since the proposal concerns one of the acting members of the Government, and the interim may not exceed 45 days. If the President were able to refuse the appointment of an interim minister, then this would inevitably create the premises of an institutional deadlock, which was certainly not the intention of the constituent legislator. The constitutional norm must also be interpreted in good faith and in the sense of producing legal effects, and not the contrary, of institutional deadlock. However, the present situation is the consequence of an abusive interpretation by the Head of State of the relevant constitutional rules, in this case the provisions of Article 85 (2) and (3).

Regarding the reason for the refusal, the President of Romania speculated the disagreements between the political parties in the PSD-ALDE governing coalition and rejected, through political statements and some at least inappropriate subjective appraisals, all of the Prime Minister's proposals.

It was argued that, in the case of the proposal for the position of Minister of Justice, the press release contains negative declarations about the alleged intentions of the person nominated for this position, in the sense that he will "disstructure the judiciary" and "totally baronise Romania". However, such declarations cannot constitute a statutory statement of reasons. Moreover, the terms used in the public statement are not proper given the role and importance of the office of President of the State, unsuitable in the context, and undermine the honour and dignity of a socio-occupational category enjoying constitutional protection.

The solution of the temporary delegation of duties of authorising officer of each Minister to the Secretary General of the Government, provided for by the legislation in force, does not resolve the deadlock situation of the Government as a whole, as the work of the ministries is much more complex, particularly during the holding of the presidential elections.

If the Government's political composition had changed, then other constitutional procedures would have been applied, without rendering partially inoperative the Government meanwhile. The President's constitutional role as a mediator would have required him to call political parties for consultations in order to find effective solutions, and not to perpetuate the political crisis through actions that have more of an electoral character.

In the situation at hand, a prompt reaction was required from the President, on the basis of the principle of loyal cooperation between the State authorities. However, until the date of the present request for settlement of the legal dispute of a constitutional nature, the President of Romania has not issued any document and, without submitting the Prime Minister's proposals to any legal analysis, has publicly stated that he refuses all proposals for reshuffle on the grounds that they are "just unacceptable" and said that "the current Government needs a new confirmation in Parliament, through a procedure that I ask them to initiate".

The tacit refusal of the President of Romania to designate, on the basis of the Prime Minister's proposal, three interim ministers from among the acting members of the

Government represents an infringement of Article 107 (3) of the Constitution. Although the constitutional text is imperative, the President took note, by decree, of the cessation of the position of member of the Government in the case of the three resignations presented, but did not issue the decrees for the appointment of interim ministers.

The author of the request argued that, despite the settled case-law on the matter, the practice shows a clear failure to apply the rules laid down by the Constitutional Court, so that it is necessary for the Court to continue to request compliance with Article 85 (2) of the Constitution by the President of Romania.

II. Having examined the request for settlement of the dispute, the Court found that it was formally compliant with the admissibility requirements, since it could be noted a certain conduct by the President that was tantamount to a refusal to perform some constitutional prerogatives.

The Court held that the remedy or disappearance of the situation which caused the dispute, following the referral to the Court, could not leave the application devoid of purpose, in the absence of any express provision to that effect. The referral may also not be withdrawn, since the proceedings before the Constitutional Court have all the characteristics of a judicial procedure governed by public law and are not compatible with the principle of availability pertaining to the rules of civil procedure.

By Decision No 875 of 19 December 2018, published in the Official Gazette of Romania, Part I, No 1093 of 21 December 2018, the Court held that the President could not challenge the decision of the Prime Minister to make certain changes in the composition of the Government. Although the President has a certain margin of appreciation in the act of appointment to the office as a member of the Government, as regards revocation, he does not benefit from the same discretion, since the Prime Minister alone is in a position, as the Head of Government, to assess the necessity and appropriateness of the revocation of a member of the government team. The fact that he or she proposes to the President to revoke a member of the Government cannot mean that the Head of State's consent is necessary.

The President of Romania has argued that the government reshuffle proposed by the Prime Minister does not fall under Article 85 (2) of the Basic Law, but under Article 85 (3) of the Basic Law, because there has been a change in the Government's political composition as compared to its composition upon investiture by Resolution No 1/2018 of the Parliament of Romania. Therefore, the Prime Minister should have addressed Parliament first, so that the latter can agree on this reshuffle, the President's decrees being issued only after the completion of this procedure.

The Court held that revocation is a measure which the Prime Minister proposes to the President of Romania solely for the observance of formalism and of the principle of symmetry governing the regime of legal acts of appointment to public offices. Without having a right of discretion, the President has to comply within a legal deadline of 15 days from the date of the Prime Minister's proposal, in accordance with Article 47 (1) of the Administrative Code.

In the present case, the President refused to comply with the proposal for revocation made by the Prime Minister in respect of which he has no right of option. In so doing, the President violated the constitutional provisions of Article 1 (5) on compliance with the laws, with reference to the rules of the Administrative Code as indicated above, and of Article 147 (4) of the Constitution, in the light of the case-law on the matter of the Constitutional Court (Decision No 875/2018.).

With regard to the appointment of ministers, the Court has established that, in the event of Government reshuffle, Article 85 (2) and Article (3) of the Constitution are applicable, but Article 85 (3) is applicable only in the event that the Government's structure or political composition is changed by means of a proposal for a reshuffle. In this case, the appointment of

ministers may no longer take place only by decree of the President, on a proposal from the Prime Minister, but also based on the prior approval of Parliament on that proposal.

In the present case, the Court noted that the Prime Minister had made proposals for appointing ministers on the same day that the ALDE President publicly announced the disengagement from the Government of this political formation. Although the breakdown of the governing coalition is supported at the level of public statements and is of a political nature, the Court has found that it is a factual situation that does not require legal justification and cannot be ignored. This new situation may lead to the restructuring of the Government or to the formation of another political composition.

Since Article 85 (3) of the Constitution was applicable in this case and there was no prior consent of the Parliament, the Court found that there was no constitutional dispute of a conflict of a constitutional nature between the Prime Minister on the one hand and the President of Romania on the other, arising from the President's refusal to accept the Prime Minister's proposal based on Article 85 (2) of the Constitution..

However, the Court noted that the President had not yet responded to the Prime Minister by means of a formal document, in writing, stating the reasons for the refusal to proceed with the proposals for appointment. However, according to settled case-law in the matter, the Constitutional Court held that the statement of reasons for refusal must be expressed immediately, clearly and unequivocally, in written form, at the same time as the announcement of the President's decision not to proceed with the proposal for appointment. The change of political composition of the Government does not justify a lack of statement of reasons for the refusal to proceed with the appointments. In Decision No 875/2018, the Court stated that the complete absence of a statement of reasons or an ambiguous, imprecise wording cannot be accepted in procedures carried out within the framework of purely constitutional law relationships, such as those between the President of Romania and the Prime Minister. Consequently, the Court found that the President of Romania had breached the provisions of Article 147 (4) of the Constitution with regard to the obligation to comply with Decision No 875/2018. He must reply, without delay, in writing and on the basis of the statement of reasons, on the refusal to implement the proposals for appointment to the position of minister.

The President's answer to justify the refusal must not have political connotations, but must indicate the legal conditions which are not fulfilled or why he considers that the proposed person is not fit for that position. The right to express political opinions is also guaranteed for the President of Romania by Article 84 (2) of the Constitution, but must be exercised in accordance with his constitutional prerogatives. The Constitution requires impartiality on the part of the President of Romania, bearing in mind both his mandatory political neutrality and his position as a mediator between the powers of the State.

With regard to the appointment of interim ministers, by Decision No 1559 of 18 November 2009, the Court established that the interim is not a government reshuffle, as it is always ensured by a member of the Government, and not by a person outside the list approved by Parliament upon granting the investiture vote. In addition, the interim minister shall be appointed for a limited period of time, under Article 107 (4) of the Constitution, — up to a maximum of 45 days. An interpretation to the effect that interim ministers should also be subject to Parliament's verification and approval would deprive of efficiency that concept and would lead to institutional bottlenecks, with negative consequences for the functioning of the entire Government. In addition, if Parliament considers that the Government is unable to carry out its constitutional functions or the political programme in its provisional composition, Parliament may, by adopting a no confidence motion, withdraw its vote of confidence.

Since deputising is carried out on the basis of Article 107 (3) and (4) of the Constitution and is not governed by Article 85, it follows that, in the procedure for appointing an interim minister, the President no longer has the same discretion as for the proposal to appoint a new

member of the Government. . Therefore, the proposal cannot be refused on the grounds that the person does not meet professional qualifications or that the legal conditions are not fulfilled. An interim minister must only ensure the continuity of the ministry's work by carrying out all specific routine activities for a maximum period of 45 days.

The absence of a text in the Basic Law laying down a mandatory deadline for the issuing of the decree of the President of Romania to designate a Prime Minister/interim Minister cannot be interpreted as sine die delaying the fulfilment of this constitutional requirement. The urgent appointment of interim ministers is justified by the public imperative of ensuring continuity in the functioning of the ministries. The change in the political composition of the Government requires a time of analysis and a specific procedure, and during this period the permanent functioning and normality of the Government must be ensured. Therefore, the change in the political composition of the Government cannot be a valid argument for the refusal by the President to appoint interim ministers.

The President's refusal to designate the proposed interim ministers is contrary both to loyal constitutional conduct, in line with Article 80 (2) of the Constitution, and to the provisions of Article 147 (4) of the Basic Law, which concerns the binding nature of the Constitutional Court's decisions. With this conduct, the President has created the premises for blocking of the activity of three ministries, thus affecting the proper functioning of the Government and of the entire public administration.

For the settlement of the present legal dispute of a constitutional nature, the President of Romania must, on the one hand, immediately issue the decrees to revoke the ministers, and the decrees appointing interim ministers proposed by the Prime Minister and, on the other hand, reply without delay, in writing and on the basis of the statement of reasons, on the refusal to implement the proposals for appointment to the position of minister.

III. For all these reasons, by a majority vote, the Court upheld the referral and found the existence of a legal dispute of a constitutional nature between the Prime Minister, on the one hand, and the President of Romania, on the other hand, prompted by the refusal to revoke some ministers, on the proposal of the Prime Minister, in accordance with Article 85 (2) of the Constitution, as well as by the tacit refusal of the President of Romania to appoint interim ministers, on the proposal of the Prime Minister, in accordance with Article 107 (3) of the Constitution. The Court has also decided, by majority vote, that the President of Romania must, on the one hand, immediately issue the decrees to revoke the ministers, and the decrees appointing interim ministers proposed by the Prime Minister and, on the other hand, reply without delay, in writing and on the basis of the statement of reasons, on the refusal to implement the proposals for appointment to the position of minister. Unanimously, the Court found that there was no legal dispute of a constitutional nature between the Prime Minister, on the one hand, and the President of Romania, on the other hand, generated by the President's refusal to appoint acting ministers proposed by the Prime Minister.