

***Decision No 88 of 2 March 2023 on the objection of unconstitutionality of the phrase ‘is not be subject to disciplinary investigation’ in Article 27<sup>45</sup> (b) of Law No 360/2002 on the statute of the police officer,***

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**Summary**

**I. As grounds for the exception of unconstitutionality**, it was argued, in essence, that the provisions of Article 27<sup>45</sup> (b) of Law No 360/2002 on the statute of police officers discriminately and unjustifiably restricted the free choice of profession or employment by participating in a competition, since the condition not to be subject to disciplinary investigation did not apply to all candidates and the initiation of a prior disciplinary investigation did not amount to establishing the guilt of the person under investigation.

**II. Having examined the exception of unconstitutionality**, the Court held that the provisions of Article 27<sup>45</sup> (b) of Law No 360/2002 establish one of the mandatory conditions for the participation of the police officer in the competition for a vacant non-managerial position, according to which the candidate ‘is not subject to disciplinary investigation’ or ‘is not be subject to a disciplinary penalty’.

As regards the phrase ‘is not subject to disciplinary investigation’ – criticised in the present case – the Court found that the same phrase, but contained in Article 27<sup>46</sup> (1) (b) of that law, which governs the conditions for the participation of the police officer in the competition for a vacant managerial position, was found to be unconstitutional by Decision No 789 of 23 November 2021.

In that decision, the Court held that the requirement that the candidate police officer should not be subject to a disciplinary investigation was essential for his or her access to the competition for a vacant managerial position for which he or she was applying, while representing an issue relating to the performance of the police officer’s service relationship, which is covered by the protection of the combined provisions of Article 16 (3) and Article 41 of the Constitution.

The Court carried out the proportionality test in order to examine whether the phrase ‘is not subject to disciplinary investigation’ infringed the combined provisions of Article 16 (3) and Article 41 of the Constitution.

Thus, the Court held that the objective pursued by the legislator was legitimate and consisted of limiting participation in the competition for managing positions in such a way as to select those candidates who were not subject to disciplinary investigation, that is to say, on whom there was no uncertainty as to the professional, ethical and integrity standards required for the position.

As regards the appropriateness of the condition imposed by the phrase criticised, the Court observed that it is objectively capable of achieving its purpose, namely the filling of managerial positions by persons meeting those standards.

However, the Court held that the measure adopted did not satisfy the condition that it must be necessary or indispensable for the attainment of the objective pursued or proportionate, that is to say, that it must strike a fair balance between competing interests. This is because the legislator has at its disposal less restrictive measures to achieve the intended legitimate aim, ensuring standards of professionalism, ethics, integrity and ethics of the police officer as a public servant with special status, such as, for example, the regulation of the second condition laid down in Article 27<sup>46</sup> (1) (b) of Law No 360/2002, according to which the competition for a vacant managerial position is open for police officer who are not subject to a disciplinary penalty. The conditions which compete to prevent participation in

the competition for a managerial position must be objective, quantifiable and have a legally significant justification for achieving the intended purpose. The contested phrase does not meet those criteria. The Court therefore found that the phrase complained of did not satisfy the requirement of minimum interference, namely the adoption of legislation which fulfils the objective pursued with the same efficiency, without adversely affecting the fundamental rights and freedoms already recognised.

Since the purpose of the preliminary investigation, as a first step in attracting disciplinary liability, is to establish the existence/non-existence of disciplinary misconduct and guilt, it follows that the disciplinary investigation may establish that there is no misconduct or guilt on the part of the police officer wishing to participate in the competition for a vacant managerial position. In this situation, the latter's rights enshrined in Articles 16 (3) and 41 of the Constitution are limited by interference by the legislator, which is neither minimal nor graduated.

The Court also found that the condition under consideration was not proportionate to the situation which determines it, in the sense that it does not strike a fair balance between the competing public and individual interests. Thus, it is in the interest of the State that managing positions are occupied by persons who undoubtedly meet the necessary ethical and professional standards and, on the other hand, the individual interest is to be able to obtain a managing position, which is a stage in the development of the police officer's career, which is part of his or her aspiration for further professional development and new responsibilities in order to carry out duties relating to the managing functions corresponding to the performance of his or her employment relationship, which falls under the protection of Articles 16 (3) and 41 of the Constitution. In that context, it was for the legislator to find the best possible balance between the two competing interests, so that they, together and each of them, be achieved to a satisfactory and reasonable extent for both parties. The Court held that that constitutional obligation had not been complied with since the legislator had adopted the solution according to which any opening of disciplinary proceedings, irrespective of the fact that they culminate in a finding of the existence or non-existence of misconduct and guilt of the police officer, prevents the latter from gaining access to the competition for a managing position. Moreover, according to Article 6 of Government Decision No 725/2015 laying down rules for the implementation of the chapter IV of Law No 360/2002 on the statute of the police officer, relating to the granting of rewards and disciplinary liability of police officers, the submission of any written notification/request with regard to the commission of a disciplinary offence obliges the entitled person to initiate disciplinary proceedings. Neither Government Decision No 725/2015 nor Law No 360/2002 provides for sanctions for the situation in which vexatious requests would be submitted, i.e. made solely with the aim of preventing the police officer from gaining access to the competition. This means that the police officer's professional development, as part of the exercise of his or her civil service and right to work, could be permanently blocked by persons acting in bad faith who could submit written complaints about alleged disciplinary misconduct each time a new competition is organised. The legislator thus lets hazard determine an essential aspect of the right to exercise public office and the right to work, which is not permissible.

In conclusion, the Court held that the phrase 'is not subject to disciplinary investigation' in Article 27<sup>46</sup> (1) (b) of Law No 360/2002 prevented the police officer, who is a civil servant with special status, from gaining access to the competition for a managing position, which relates to the performance of his/her service relationship, thereby infringing the combined provisions of Article 16 (3) and Article 41 of the Constitution.

With regard to the alleged breach of the principle of equality before the law and non-discrimination laid down in Article 16 (1) of the Constitution, the Court held, by the same decision, that civil servants are not subject to the same condition as that laid down in Article

27<sup>46</sup> (1) (b) of Law No 360/2002, since police officers are civil servants with special status, that is to say, a socio-professional category distinct from that of civil servants whose general status is governed by Law No 188/1999 on the statute of civil servants, so that their situation, as regards the conditions for access to competitions for managing positions, may differ from that of civil servants.

In the light of the above, the Court found that the legal requirement consisting of the absence of ongoing disciplinary investigations is common both for registration in the competition for a vacant non-managerial position and for a vacant managerial position as an officer, as is apparent from Articles 27<sup>45</sup> (b) and 27<sup>46</sup> (1) (b) of Law No 360/2002.

Consequently, the Court found that, for identity of reasoning, the arguments supporting the admission solution pronounced by the Decision No 789 of 23 November 2021, summarised above, were fully applicable *mutatis mutandis*, with the result that, also in the present case, the exception of unconstitutionality of the phrase ‘is not subject to disciplinary proceedings’ in Article 27<sup>45</sup> (b) of Law No 360/2002 was upheld.

**III. For all those reasons,** the Court unanimously upheld the exception of unconstitutionality and found that the phrase ‘is not subject to disciplinary investigation’ in Article 27<sup>45</sup> (b) of Law No 360/2002 on the statute of the police officer was unconstitutional.