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The Regime of Incompatibilities of Local Elected Officials and the Application of the Law in Time, from a Jurisprudential Perspective

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ABSTRACT: The special legislation on incompatibilities and conflicts of interest aims to ensure the transparency in the exercise of the stateliness and public functions and in the business environment, the prevention and sanctioning of corruption, also establishing, among the specific rules and conditions for exercising the mandate, certain incompatibilities taking into account the need to ensure the neutral fulfilment, by the persons exercising a public function of authority, of the attributions incumbent on them, in full accordance with the principles of impartiality, integrity, transparency of the decision and supremacy of the public interest. Therefore, the establishment of the case of incompatibility does not constitute, in reality, a restriction of the exercise of certain rights or freedoms, but a guarantee likely to confer an indisputable moral authority to the persons exercising the functions of mayor, president and vice-president of the county council, by ensuring impartiality, protecting the social interest and avoiding conflict of interest. From the perspective of the ethical nature of the sanction, the jurisprudential controversy concerns the possibility of disposing the sanction provided by law that would affect their current mandate, if in this mandate the acts that would attract such a sanction were not committed, the state of incompatibility not existing in this mandate.

KEYWORDS: incompatibilities, conflict of interest, mandate, public function of authority, principle of transparency of the decision, principle of impartiality, ethical nature of the sanction

Introductory considerations

The importance and necessity of regulations in the fight against corruption and the promotion of integrity in the public sector, within the national normative system, are known and accepted, these regulations representing the answer to a real requirement of Romanian society and a basic component of Romania's dialogue with its European partners in the process of assessing the fulfillment of its obligations as a Member State of the European Union. For reasons of preventing acts of corruption by certain categories of staff, namely individualized, the legislator is free to impose on that staff additional obligations, precisely in view of the activity it carries out, an activity of a certain nature and importance. As noted by the Constitutional Court of Romania in Decision no. 104/2018 published in the Official Monitor of Romania no. 446/29 May 2018, among the recommendations made by the European Commission in the reports verifying the progress made by Romania in the Cooperation and Verification Mechanism were mentioned the following: "(…) to ensure that there are no exceptions to the applicability of legislative acts on incompatibility, conflicts of interest and unjustified wealth" (Report of January 2014), "(…) explore ways to improve public acceptance and effectively implement incompatibility rules and measures to prevent situations of incompatibility" (January 2015 Report), "(…) integrity should be the guiding principle in public life and the legal framework and institutions in the field of integrity should be designed to promote this goal. It is important to improve public acceptance and effective implementation of incompatibility rules and to focus on the upstream prevention of incompatibility and conflict of interest." (Report of January 2016) or the fact that "(…) Parliament should be transparent in its decision-making process regarding actions taken following final and irrevocable decisions concerning incompatibilities, conflicts of interest

and unlawful property against its members" (Report of January 2017). Moreover, in order to combat the phenomenon of corruption, Romania ratified, by Law no. 365/2004, United Nations Convention against Corruption, adopted in New York on 31 October 2003, which provides that each State Party shall develop and implement or implement, in accordance with the fundamental principles of its legal system, effective and coordinated policies to prevent corruption favors the participation of society and which reflects the principles of the rule of law, good management of political issues and public goods, integrity, transparency and accountability (art. 5 paragraph 1). Thus, "each State Party shall in particular encourage the integrity, honesty and accountability of public officials, in accordance with the fundamental principles of its legal system, meaning that it shall apply, within its own institutional and legal systems, codes or rules of conduct for the proper exercise, honorable and appropriate of public office" (art. 8 paragraphs 1 and 2). Therefore, the 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 domestic law, to ensure the fulfillment of the obligations assumed under this Convention; each State Party may take the necessary measures which are more stringent or severe than those provided for in this Convention in order to prevent and combat corruption. However, taking into account the jurisprudence of the Constitutional Court of Romania, in terms of incompatibilities, the establishment of integrity standards is a matter of opportunity that falls within the discretion of the legislator. The constitutional provisions regarding incompatibilities have been taken over and developed in several organic laws, meaning that the provisions of art. 14-16 of Law no. 96/2006 on the Statute of Deputies and Senators, as republished in the Official Monitor of Romania, Part I, no. 763 of November 12, 2008, and art. 81-83 of Law no. 161/2003 on some measures to ensure transparency in the exercise of public dignity, public office and in the business environment, prevention and sanctioning of corruption, published in the Official Monitor of Romania, Part I, no. 279 of April 21, 2003. The provisions of Law no. 176/2010 on integrity in the exercise of public functions and dignities, for amending and supplementing Law no. 144/2007 regarding the establishment, organization and functioning of the National Integrity Agency, as well as for the modification and completion of other normative acts, published in the Official Monitor of Romania, Part I, no. 621 of September 2, 2010, which regulates in Title II procedures to ensure integrity and transparency in the exercise of public functions and dignities, section 3 of ch. I of that title being dedicated to the procedure for assessing conflicts of interest and incompatibilities (see Decision of the Constitutional Court no. 81 of 27 February 2013, published in the Official Monitor of Romania, Part I, no. 136 of 14 March 2013).

Conflict of interest and incompatibilities

The provisions of Law no. 161/2003 define the conflict of interests in the sense that the person exercising a public dignity or a public office has a personal interest of a patrimonial nature, which could influence the objective fulfillment of the attributions incumbent on him according to the Constitution and others legislation. The principles underlying the prevention of conflict of interest in the exercise of public dignity and public office are: impartiality, integrity, transparency of decision and the supremacy of the public interest. In its simplest formulation, "conflict of interest" is defined as a competition between the public interest that the official (a public official or a civil servant) has a duty to preserve and his private interests (Iorgovan 2005, 446; Stan 2005, 10).

According to the provisions of art. 80 of Law no. 161/2003 the incompatibilities regarding the public dignities and the public functions are those regulated by the Constitution, by the law applicable to the public authority or institution in which the persons exercising a public dignity or a public function carry out their activity, as well as by the provisions of this

title. Therefore, the only condition imposed by the legislator for retaining the state of incompatibility is the simultaneous possession of the functions or qualities declared by law as incompatible. Unlike the “conflict of interests”, situations of “incompatibility” in the exercise of public dignities and functions are determined not generically, but nominally. Thus, each position of public official or civil servant is specifically regulated, for each case being established all the other functions and qualities that the official cannot hold at the same time as the civil service in question. The situation of incompatibility is, in fact, a continuing situation of conflict of interest. If in the case of “conflicts of interest” officials are mainly obliged to refrain from making an act or taking (participating in) a decision, in the case of "incompatibilities" the law establishes an unconditional prohibition on holding a certain public position at the same time as another, public or private (Stan, 2005, 10).

The finality pursued by the legislator by adopting Law no. 161/2003 consists in ensuring the integrity in the exercise of public dignities and functions, as well as in the prevention of corruption, as expressly provided in art. 8 para. (1) of Law no. 176/2010. Therefore, the object that circumscribes the sphere of incidence of the incompatibilities covered by Law no. 161/2003 is the protection of the integrity of persons holding a position or public dignity from possible interference caused by personal interest arising from the parallel conduct of related private activities (Chirilă 2010, 82; Nicolae 2004, 26). Equally, according to the legislator, the protection of integrity is necessarily correlated with the avoidance of corruption that could be committed as a result of combining the exercise of public functions with the development of economic activities. The High Court considers that ensuring this integrity and preventing corruption is achieved only if there are real premises of the nature of effectively threatening the social value defended, respectively when there is an overlap of the effective exercise of two functions covered by the legislator, situation in which there are generations of conflicting personal interests with the exercise of a public function or dignity. Only such an interpretation makes sense for legal regulations on the regime of incompatibilities and is likely to justify the limitation of the exercise of certain rights. A dignity, a public or private position are characterized not only by the act of election, appointment, designation or investment, but also by all the attributions, prerogatives, rights and competencies provided by law that fall into their content, and by whose concomitant and concurrent exercise In social life, by the same subject, the situations of conflict that the legislator tends to avoid by establishing incompatibilities are potentiated (Chiuariu 2016, 67; Lazăr 2016, 79; Riedel 2020, 98).

Therefore, the purpose of Law no. 161/2003, which establishes certain incompatibilities for public positions and dignities, is to ensure impartiality, protection of the social interest and avoidance of conflict of interest in their exercise. In order to achieve this goal, the sanction was instituted for the person in a state of incompatibility, respectively that of forfeiture of the right to hold any other eligible position for a period of 3 years from the end of the term - art. 1 of Law no. 176/2010 on integrity in the exercise of public functions and dignities, for amending and supplementing Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, as well as for the amendment and completion of other normative acts (see Decision no. 418 of July 3, 2014). Thus, Law no. 161/2003 is a complex regulation which, in addition to the provisions whose main purpose is the prevention, detection and sanctioning of acts of corruption, also includes provisions from other related matters, absolutely indispensable for achieving the intended purpose. The situation is in accordance with the provisions of art. 14 para. (1) of Law no. 24/2000 on the norms of legislative technique for the elaboration of normative acts, republished, with the subsequent modifications and completions, according to which “Regulations of the same level and having the same object are included, as a rule, in a single normative act”.

With regard to local elected officials, the incompatibilities regime has been repeatedly subject to constitutional review. Thus, the Court, by Decision no. 225 of February 15, 2011,

Decision no. 1484 of November 10, 2011 and Decision no. 396 of October 1, 2013, ruled, in principle, that the regulation is a necessary measure to ensure transparency in the exercise of public functions and in the business environment, as well as to prevent and combat corruption, a measure aimed at ensuring the impartiality of the exercise of public office. The establishment of such a regulation is imposed by the need to ensure the objective fulfillment by persons exercising a public dignity or a public office of authority of their duties according to the Constitution, in full accordance with the principles of impartiality, integrity, transparency of decision and supremacy. At the same time, by Decision no. 739 of December 16, 2014 and Decision no. 683 of October 20, 2015, the Constitutional Court held that it is not possible to perform a public function that requires transparency in the use and administration of public funds, if, at the same time, a person is engaged in the business environment, as the cumulation of two functions could affect the general interests of the community and the principles underlying the rule of law, and this incompatibility establishes a guarantee of the exercise of public office in conditions of impartiality and decision-making transparency, which aims to protect the public interest by defending the rights and freedoms of citizens. Also, by Decision no. 93 of 3 March 2015, the Court also emphasized that a combination of public and private functions could lead to the detriment of the public interest and the trust of citizens in public administration authorities.

Sanctioning the incompatibility of local elected officials. Controversial case law on the application of the law over time

Recent judicial practice has found that at national level, the jurisprudence of administrative litigation courts is non-uniform in terms of how to resolve appeals seeking the annulment of the order issued by the prefect which establishes the premature termination of the mayor's term., pursuant to art. 160 para. 1 lit. b of OUG no. 57/2019 (art. 15 paragraph 2 letter b) of Law no. 393/2004), as a result of the finding and sanctioning, in the conditions of the law regarding the integrity in the exercise of public functions and dignities, of a state of incompatibility. Specifically, it is the situation in which a local elected mayor was in a state of incompatibility during the exercise of the previous term and this was found in an evaluation report prepared by the National Integrity Agency, whose legality was challenged. The court decision confirming the legality of the evaluation report remains final in the next term of the same mayor, in which the order of the prefect is issued, the annulment of which is requested by the mayor. In other words, the question arises as to the extent to which the sanction of legal termination of the mandate of a local elected official due to the incompatibility in which he was, may intervene and interrupt the next term, unaffected by incompatibility and obtained in the electoral process.

The legal framework incident to the legal issue consists of the provisions of OUG no. 57/2019 of July 3, 2019 on the Administrative Code - Art. 160 – "Legal termination of the mayor's mandate (1) The mayor's mandate terminates, by law, in the following cases: (…) b) finding and sanctioning, under the law on integrity in the exercise of public functions and dignities, of a state of incompatibility; (…) (3) The date of legal termination of the mandate in the case provided in par. (1) lit. b), in case the legality of the evaluation report by which the state of incompatibility was found has not been contested, is the expiration date of the period in which the mayor has the right to contest the evaluation report, under the law on integrity in exercising public functions and dignities. (4) In the situation in which the legality of the act provided in par. (3), the date of legal termination of the mandate is the date of the finality of the court decision. (…) (7) In all cases of premature termination of the term of office of the mayor, the prefect shall issue an order establishing the termination of the term of office of the mayor. At the same time, art. 15 para. 2 lit. b) of Law no. 393/2004 on the Statute of local elected officials (repealed by art. 597 paragraph 2 letter h) of GEO no. 57/2019 of July 3,

2019, on the Administrative Code) provides: (…) (2) The quality of mayor and, respectively, of president of the county council ceases, by right, before the expiration of the normal term of office in the following cases: (…) b) incompatibility" (Stan 2005, 10; Cojanu 2019, 56; Ștefan 2013, 29).

Also, the provisions of art. 25 para. (2) of Law no. 176/2010 establishes the sanction of forfeiture of the right of the person released or dismissed from office as a result of committing the disciplinary violation provided by law or against which the existence of conflict of interest or state of incompatibility to exercise a public function or dignity the provisions of Law no. 176/2010 for a period of 3 years from the date of issuance, dismissal from the respective public position or dignity or of legal termination of the mandate. This 3-year ban concerns the public positions or dignities provided by Law no. 176/2010, except for the electoral ones. And Law no. 59 of April 8, 2019, for the amendment and completion of Law no. 161/2003 regarding some measures for ensuring transparency in the exercise of public dignities, public positions and in the business environment, prevention and sanctioning of corruption, published in Official Monitor of Romania no. 268 of April 9, 2019, in point 2 provides that: "In Article 91, after paragraph 1, a new paragraph is inserted, paragraph 1 ind 1), with the following content: "(1 ind. 1) incompatibility lasts until the date of termination of the term in which the local elected official exercised a function or quality incompatible with it or until the date on which the function or quality that determined the state of incompatibility ceased".

In a jurisprudential opinion it was shown that, interpreting the provisions of art. 25 and art. 26 para. 3 of Law no. 176/2010 on integrity in the exercise of public functions and dignities, for the amendment and completion of Law no. 144/2007 regarding the establishment, organization and functioning of the National Integrity Agency, as well as for the modification and completion of other normative acts, the court finds that the state of incompatibility of a person constitutes a disciplinary violation and is sanctioned according to the specific regulation of dignity the state of incompatibility was definitively established, the derogations provided in Law no. 176/2010, being those provided by par. 4 in art. 25 and para. 3 in art. 26 of the same normative act regarding the sanctions applicable in case of these disciplinary violations (which are more serious than the reprimand or warning) respectively those regarding the beginning of the prescription term for finding the disciplinary violation and applying the corresponding sanction. (…) If the person has held an eligible position, he/she can no longer hold according to the Decision of the Constitutional Court no. 418/ 03.07.2014, another eligible function provided by art. 1 of Law no. 176/2010 for a period of three years from the termination of the mandate, and in case the person no longer holds a public position or dignity at the date of finding the state of incompatibility or conflict of interests, the 3-year ban operates according to law, by on the date of the finality of the evaluation report, respectively of the final and irrevocable of the court decision confirming the existence of a conflict of interests or a state of incompatibility. (...)

It is true that, according to art. 15 para. 2 of Law no. 393/2004 on the Statute of Local Elected Representatives, the state of incompatibility entails the legal termination of the mayor's mandate, but in this case the state of incompatibility of the plaintiff found in the evaluation report of the National Integrity Agency does not concern this function but that fulfilled it as mayor, in the term of office 2012-2016. This circumstance was not noticed or motivated by the defendant who, starting from the final finding of the incompatibility of the applicant for the position of mayor, considered that this incompatibility reflects on the second term in an eligible position. The court considers that the provisions of art. 9 para. 1 index 1 of Law 161/2003, which clearly establishes the duration of the state of incompatibility, had to be taken into account when issuing the contested order, and, compared to the fact that the report of the National Integrity Agency found that the state of incompatibility took place between 19.06.2012 - 10.12.2014, the Prefect had to state, in relation to this legal provision, that at the

time of issuing the order the state of incompatibility no longer existed and can no longer affect the mandate of mayor 2016-2020.

Thus, the court concludes that from the perspective of not applying the provisions of art. 91 index 1 para. 1 of Law 161/2003, as amended by Law no. 59/2019, the contested order is illegally issued. It is obvious that by applying par. 1 index 1 of art. 91 of Law no. 161/2003, the plaintiff was not in a state of incompatibility at the date of issuing the order, it ceasing according to the text mentioned "on the date of legal termination of the mandate in which the local elected official exercised a function or quality incompatible with it" on the date of legal termination of the mayor's mandate, which occurred in 2016. Therefore, the condition provided by art. 15 para. 2 letter b of Law no. 393/2004 (no incompatibility), the Prefect illegally issued Order no. 281/11.07.2019, finding unjustifiably the premature termination of the mandate of the Mayor of the Municipality of R. (sentence no. 404/2019 pronounced on August 14, 2019 in the file no. 1384/102/2019 by the Mureş Tribunal - Contentious Section Administrative and Fiscal).

The second jurisprudential solution, the court considers as unfounded the reason invoked by the plaintiff regarding the fact that he ended his term as mayor in which he was found incompatible in 2016, when validating the result of local elections that had place on June 5, 2016, and the sanction can only be related to an employment relationship in force and not to a completed one, only the incompatibility committed in the exercise of the current mandate, is the cause of legal termination of the mayor's office. The court shows that art. 160 of the Administrative Code does not distinguish regarding the mandate regarding which the state of incompatibility has been identified, but stipulates that the mayor's mandate terminates, by right, in case of finding and sanctioning, under the law on integrity in the exercise of public functions and dignities, a incompatibility states, the date of legal termination of the mandate being the date of finality of the court decision, in case the legality of the evaluation report has been ascertained. On the other hand, it is true that based on art. 91 para. 1 ind. 1 of Law 161/2003, the state of incompatibility lasts until the date of legal termination of the mandate in which the local elected official exercised a function or quality incompatible with it or until the date from which he ceased the function or quality that determined the state of incompatibility, but these legal provisions cannot remove the application of the provisions of art. 160 of the Administrative Code, in the context in which the mayor. From our point of view, although both opinions are judiciously motivated, we understand that we agree with the first jurisprudential solution. Beyond the arguments already set out in the considerations of the courts that have adopted this solution, we also take into account the fact that According to art. 91 paragraph 1 ind 1 of Law 161/2003 "The state of incompatibility lasts until the date of legal termination of the mandate in which the local elected official exercised a function or quality incompatible with it or until the date on which he ceased the function or quality that determined the state of incompatibility. "The considerations for which the initiators of this amendment requested its introduction in Law 161/2003 were those that "it would not be ethical to impose a sanction that affects the current mandate if in this mandate no acts were committed that would attract such a sanction, the state of incompatibility not existing in this mandate", as it results from the statement of reasons. This provision was verified in terms of legality by the Constitutional Court, which by Decision 456/2018 validates the legality and the need to regulate the duration of the state of incompatibility, holding in point 65 that the provision of art. 91 paragraph 1 ind 1 was necessary because the duration of the state of incompatibility was not concretely legislated. Therefore, the prefect had to ascertain at the issuance of the order the existence of a state of incompatibility that would lead to the termination of the mandate prematurely. Provided that the mayor was no longer in a state of incompatibility on the date on which the order should have been issued in order to verify that the condition of the existence of the incompatibility was fulfilled at that time. It follows from these legal provisions that, in the event that the

mandate of the local elected official or the position exercised by him who determined the state of incompatibility has ceased by law, the sanctions provided by law for incompatibility no longer apply. the period of forfeiture of 3 years provided by art. 25 para. 2 of Law 176/2010 could not be applied to him at that time. From the point of view of the court, if within that term the person obtained, as a result of the elections, "the same position" and the state of incompatibility regarding the eligible position previously held, the capacity to be elected must cease, ending his term of office before the deadline." (in this sense: the civil sentence no. 291/2020 pronounced on March 19, 2020 by the Dolj Tribunal - Administrative and Fiscal Litigation Section in file No. 215/63/2020).

Conclusion

From our point of view, although both opinions are judiciously motivated, we understand that we agree with the first jurisprudential solution. Beyond the arguments already set out in the considerations of the courts that have adopted this solution, we also take into account the fact that According to art. 91 paragraph 1 ind 1 of Law 161/2003 "The state of incompatibility lasts until the date of legal termination of the mandate in which the local elected official exercised a function or quality incompatible with it or until the date on which he ceased the function or quality that determined the state of incompatibility." The considerations for which the initiators of this amendment requested its introduction in Law 161/2003 were those that "it would not be ethical to impose a sanction that affects the current mandate if in this mandate no acts were committed that would attract such a sanction, the state of incompatibility not existing in this mandate", as it results from the statement of reasons. This provision was verified in terms of legality by the Constitutional Court, which by Decision 456/2018 validates the legality and the need to regulate the duration of the state of incompatibility, holding in point 65 that the provision of art. 91 paragraph 1 ind 1 was necessary because the duration of the state of incompatibility was not concretely legislated. Therefore, the prefect had to ascertain at the issuance of the order the existence of a state of incompatibility that would lead to the termination of the mandate prematurely. Provided that the mayor was no longer in a state of incompatibility on the date on which the order should have been issued in order to verify that the condition of the existence of the incompatibility was fulfilled at that time. It follows from these legal provisions that, in the event that the mandate of the local elected official or the position exercised by him who determined the state of incompatibility has ceased by law, the sanctions provided by law for incompatibility no longer apply.

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