

THE INTEGRITY OF LOCAL ELECTED OFFICIALS FROM THE PERSPECTIVE OF THE NATIONAL INTEGRITY AGENCY

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Abstract: *The need for a public life dominated by integrity has determined the Romanian legislator to take a series of normative acts that have established the defense instruments for the integrity standards and the institutions responsible for using these tools. As a part of the Romanian public sector, local public administration must be characterized by a high level of integrity, a prerequisite for quality administration, leading to increased public confidence in the local administration act. The local elected officials must strictly comply with the legal regime governing conflicts of interest and incompatibilities, otherwise they risk being declared incompatible or in conflict of interest. In Romania, the administrative authority ensuring the compliance of local elected officials with the legal provisions on incompatibilities and conflicts of interest is the National Integrity Agency. The article deals with the issue of the integrity of the local elected officials from the perspective of the autonomous administrative authority.*

Keywords: *integrity, local elected official, National Integrity Agency, local public administration, administrative procedure.*

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PREAMBLE

Integrity in public life not represents not only a condition for the proper functioning of the administrative mechanism, but also a necessity claimed by the citizens and the European institutions. The higher the level of integrity in the public spheres in general, and in public administration in particular, the higher the confidence of citizens in public institutions and authorities, the easier public decisions are applied. A low level of integrity leads to institutional corruption and, automatically, to deviation from the mission of public authorities and institutions to serve public interest, the rule of law, as well as to decreasing public confidence in the institutions that represent the pillars of the state and of constitutional democracy. Corruption is the phenomenon that erodes the confidence of Romanians and Europeans in the whole Romanian institutional system (Hosu, Deac and Morosanu, 2012, 81).

The need to increase the level of integrity in local public administration has determined public decision makers to adopt a normative framework that establishes a series of standards of integrity, as well as institutions and instruments meant to ensure the compliance with these standards. Integrity and public accountability must be encountered

on all levels of public administration. As argued in the literature (Nicholls, Daniel, Bacarese, and Hatchard, 2014, 48), one of the key factors in developing public integrity standards and the reduction of corruption is the combat against conflicts of interest and incompatibilities. In our country, the authority supervising the compliance with the legal regime of incompatibilities and conflicts of interest, including for local elected officials, is the National Integrity Agency (ANI). This authority was established by Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency and aims to ensure integrity in the exercise of public positions and dignities and to prevent institutionalized corruption. The normative act mentioned is completed by Law no. 176/2010 on integrity in the exercise of public office and dignities, amending and supplementing Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency and amending and supplementing other normative acts, as well as Law no.161/2003 regarding certain measures to ensure transparency in the exercise of public dignities, public positions and the business environment, to prevent and sanction corruption.

THE LEGAL NATURE OF THE NATIONAL INTEGRITY AGENCY, ITS ROLE AND DISPOSED SOLUTIONS

The National Integrity Agency is an autonomous administrative authority with legal personality, which operates nationally as a unique structure and acts in accordance with the principle of operational independence (Article 13 of Law no.144/2007). Therefore, the National Integrity Agency is not a jurisdictional institution, but an independent administrative authority that performs an evaluation of the declarations of assets, data, information and economic changes occurred, of the interests and incompatibilities for those persons specifically provided by law.

This category also includes local elected officials. Local elected officials, as stated in Law no.393/2004 on the status of local elected officials, are local councilors, county councilors, mayor, mayor of Bucharest, deputy mayors, president of county council, vice presidents of county council and the village delegate. With regard to the village delegate, the literature (Apostolache, 2015, 70) held that its legal status is similar to that of other elected officials, but with some specific features conferring an atypical character.

Even if the legislator has defined it as an administrative authority, the National Integrity Agency has been often viewed as a judicial body. In this respect there are many exceptions of unconstitutionality against various articles of Law no.144/2007 or Law no.176/2010. The authors of the exceptions of unconstitutionality have argued that ANI is an institution that “states the law”; therefore, it is a jurisdictional body, which leads to a breach of the principle of separation of powers. Despite these considerations, the Constitutional Court has developed an extensive case law (See in this respect Decision of the Constitutional Court no. 495/2014; Decision of the Constitutional Court no. 663 of 26 June 2012; Decision of the Constitutional Court no. 415 of 14 April 2010; Decision of the Constitutional Court no. 1606 of 15 December 2011; Decision of the Constitutional Court no. 1042 of 11 December 2012) which held that the National Integrity Agency does not

carry out jurisdiction activity, it is an administrative body undergoing evaluation activity for declarations of assets, data, information and economic changes occurred, interests and incompatibilities of the persons covered by the law, without conducting a trial activity. To substantiate this conclusion, the Court states that the judicial function is characterized by establishing the power of the jurisdictional body to resolve, through an authoritative decision *res judicata*, a conflict on the extent of individual rights and to dispose, under the law, restrictive measures. The judicial activity is exercised only upon request in a formal procedure prescribed by the law. Whereas the Agency is responsible for checking, *ex officio* or at the request of a natural or legal person concerned, and does not rule invested decisions *res judicata*, but provides reports that are reflected in the evaluations of facts or situations with legal significance and whose purpose entitles a referral to courts of law or, where appropriate, to other competent institutions and authorities to order the measures provided by the law.

In exercising its attributions, the National Integrity Agency may dispose the following legal solutions: to notify the competent court and request confiscation of a part of the acquired wealth or a certain asset, if the integrity inspector finds that there are obvious differences between the wealth gained while in office and the revenues achieved in the same period, or the acquisition of a share in wealth or of certain specific assets is unjustified (Article 46); to notify the criminal prosecution institution if there is evidence or reasonable grounds for committing an offense under criminal law, or the competent fiscal authority to determine the respective tax obligations, according to the law (Article 46); to notify the competent authorities if the integrity inspector finds a conflict or a situation of incompatibility (Article 46); to classify the work (Article 5 paragraph 7); to find and punish offenses under Law no.144/2007 (Article 56).

THE ADMINISTRATIVE PROCEDURE TO VERIFY INCOMPATIBILITIES AND CONFLICTS OF INTEREST FOR LOCAL ELECTED OFFICIALS, THE NATURE AND CONTENT OF THE EVALUATION REPORT

Law no.176/2010 establishes procedural rules regarding the evaluation of incompatibilities and conflicts of interest, these rules implying the existence of an integrity inspector (a public servant with a special status) who is randomly assigned a case and who has several procedural instruments to determine whether or not a person is in a state of incompatibility or conflict of interest. The evaluation activity is performed during the exercise of the public positions or dignities and within 3 years after their termination.

The evaluation work is performed based on the following principles (Article 8 paragraph 3 of Law no.176/2010): legality, confidentiality, impartiality, operational independence, timeliness, good administration, the right to defense, and the presumption of lawful acquisition of wealth.

The category of the persons evaluated by the integrity inspector includes local elected officials. Law no.215/2001, Law no.393/2004 and Law no.161/2003 establish the positions and activities incompatible with the quality of local elected official, as well as the situations where a local elected would be in a conflict of interest. Starting from the

provisions of these normative acts, the integrity inspector checks whether the local elected official held a position or a quality considered by the law to be incompatible, or whether by their conduct, the local elected official violated the provisions regarding the conflict of interest. Following this examination, the integrity inspector prepares an evaluation report, which has the legal nature of an administrative act and which may be appealed before the administrative court. If a local elected official is found in a situation of incompatibility or conflict of interest, the evaluation report includes this finding; otherwise the integrity inspector makes a report stating that the person concerned, following the evaluation, has not violated the regime of incompatibility and conflict of interest. In the evaluation report we find the following elements (Article 21 paragraph 3 of Law no.176/2010): the descriptive part of the facts; the point of view of the person assessed, if expressed; the evaluation of the elements of conflict of interest or incompatibility; conclusions.

After having completed the evaluation report showing that the local elected official assessed is or has been in a state of incompatibility or conflict of interest, the integrity inspector shall submit this report within 5 days after completion to the local elected official subject to evaluation, and, depending on the findings, to the prosecuting and disciplinary authorities. From the analysis of the legal text, we observe that the legislator has set the 5-day period only for the report stating the incompatibility or conflict of interest. If the report certifies the absence of the incompatibility state or conflict of interest of the local elected official, the legislator has not provided such a period, stating only that it will be forwarded to the person who was subject to the evaluation.

Article 22 of Law no.176/2010 provides for the right of the person subject to evaluation to challenge the evaluation report of the conflict of interest or incompatibility before the administrative court within 15 days from its reception. If the local elected official does not challenge the evaluation report, the National Integrity Agency notifies, for the evaluation report of the conflict of interest, within 6 months, the Prefect, in case a mayor or a president of county council is concerned, or the local council or county council, in case a county councilor or a local councilor is concerned. At the same time, administrative court can be notified with the purpose of annulling the documents issued, adopted or drafted by breaching the legal regime of the conflict of interest.

If the evaluation report of the incompatibility is not contested within the period provided by the law, the Agency shall notify the same institutions mentioned above to trigger the disciplinary proceedings, and it may notify, within 6 months, the administrative court to annul the documents issued, adopted or drafted by breaching the legal provisions regarding incompatibilities. As an example, we mention the Order of the prefect of Dâmbovița County on the confirmation for the termination of the mayor mandate from Gura Ocniței commune, Mr. Diaconu Gheorghe, or the Decision of Bacău County Council on the confirmation of rightful termination of the mandate as county councilor for Mr. Petru Marius Danciu (<http://www.integritate.eu/Files/Files/Acte%20de%20constatare/OrdinAlPrefectuluiJudDambovita.PDF>); http://www.integritate.eu/Files/Files/Acte%20de%20constatare/HotarareCJBacau_156_3

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According to Article 25 paragraph 3 of Law no.176/2010, the action of the local elected official that consisted in the incompatibility and conflict of interest represents the grounds for dismissal. Moreover, Law no.393/2004 regarding the status of local elected officials stipulates incompatibility as one of the ways to rightfully terminate the mandate of local elected officials (Article 9 paragraph 2 letter b) for local and county councilors, respectively Article 15 paragraph 2 letter b) for mayor and president of the county council). We consider it necessary that Law no.393 /2004 also include the conflict of interest as one of the rightful ways to terminate the mandate of local elected officials, in order to correlate the provisions of this legislation with those under Law no.176/2010. The action of the local elected official that violated the regime of incompatibility or conflict of interest constitutes misbehavior to the extent that it does not contain the elements of an offense. The penalty is the termination of mandate, to which is added the prohibition to hold any public position or office for a period of 3 years from the date the penalty is applied. The disciplinary sanction is also performed if the evaluation report of the National Integrity Agency was communicated to the prosecuting authorities. The penalty can be imposed within maximum 6 months from the date of the final evaluation report, according to the legal provisions. If the incompatibility cause has ceased before the notification of the Agency, the disciplinary sanction can be applied within 3 years from the termination of the incompatibility cause, unless the law provides otherwise.

In the case of local elected officials, the provision contained in Article 25 paragraph 2 is applied, according to which “the person who held an eligible position, can not occupy the same position for a period of 3 years after termination of mandate.” Regarding the meaning of the phrase “the same position”, in order to eliminate any political, doctrinal or jurisprudential interpretations and to meet the requirements (These requirements result from the case law of the European Court of Human Rights – case Rotaru vs. Romania (2000); case Sissanis vs. Romania (2007). relating clarity, precision and predictability in the law, the Constitutional Court stated in Decision no.418 (Published in the Official Gazette of Romania, Part I, issue 563 of 30 July 2014) of 3 July 2014 that it shall be interpreted by the will of the legislator to ensure integrity in the exercise of public positions, for which the respective phrase refers to any eligible position listed in Article 1 of Law no.176/2010, not only to the position held at that time by that local elected official. For example, a person who held the position of local or county councilor and who was found in a state of incompatibility or conflict of interest can no longer hold, for a period of 3 years from termination of mandate, any other eligible position (senator, deputy, mayor, president of county council etc.). According to the Court, another interpretation would allow local elected officials who have violated the regime of incompatibility or conflict of interest to circumvent the law and the penalty provided and to occupy another eligible position, which would be unthinkable in a state of law.

In relation to these issues, it should be noted that, at parliamentary level, there are attempts to change the legal framework of integrity in order to eliminate some positions or situations that generate incompatibility or conflict of interest for local elected officials

and to establish a new interpretation of the phrase “the same position” in Law no. 176/2010, which unfortunately, will undermine the integrity of the current framework of integrity.

Considering the above, it appears that the violation of the legal regime of incompatibility and conflict of interest leads to sanctions both on the persons and on the documents issued, adopted or drafted by them. Thus, local elected officials lose their mandate and are deprived of their right to occupy an eligible position for 3 years starting with the application of the sanction, and the legal or administrative acts concluded directly or through intermediaries, breaching the legal provisions regarding the conflict of interest, become null and void. The action of stating the nullity of the acts is introduced by the National Integrity Agency even if the person no longer holds that position. The court has the power to rightfully state the absolute nullity and to restore the parties in the former state.

CASES OF LACK OF INTEGRITY OF LOCAL ELECTED OFFICIALS NOTED BY THE NATIONAL INTEGRITY AGENCY

Since its establishment until today, the National Integrity Agency has found, either ex officio or upon notification, the violation of the legal regime of incompatibility and conflict of interest by a considerable number of local elected officials. From 2008 until the end of 2014 (The activity report of the National Integrity Agency for 2014, <http://194.1.169.9/A.N.I/Rapoarte-și-audit.aspx>- accessed on 23 May 2015) there have been assessed 1010 cases of incompatibilities and 451 cases of conflicts of interest (252 administrative conflicts of interest and 199 criminal conflicts of interest), a significant number being those of local elected officials. The normative framework of integrity was violated by local officials through acts affecting the regime of incompatibility, facts and deeds that take the form of administrative conflict of interest or, worse, criminal conflict of interest.

According to the 2014 activity report of the Agency, 238 (143 local councilors, 64 county councilors, 38 deputy mayors, 33 mayors, 2 general councilors – The General Council of Bucharest Municipality, 2 vice presidents of county councils, 1 president of county council) local elected officials were declared permanently incompatible, and for 52 (25 local councilors, 10 county councilors, 9 mayors, 2 deputy mayors, 6 presidents of county councils) the evaluation reports on conflict of interest of administrative nature remained final (following unappealed or irrevocable decisions courts), and for 4 (2 mayors, 1 deputy mayor, 1 local councilor) were prepared indictments following the indications of the National Integrity Agency concerning the perpetration of criminal acts.

To better understand how the evaluation of incompatibilities and conflicts of interest is completed by the Agency for local elected officials, we present some cases of local elected officials who were drafted reports of incompatibility or conflict of interest by the Agency inspectors.

In the Evaluation report no.5852 (<http://www.integritate.eu/A.N.I/Rapoarte-și-audit.aspx>, accessed on 23 May 2015) of 12 February 2014, the National Integrity Agency has determined that Mayor Andrei, mayor of Crișeni commune, Sălaj County, did

not comply with the legal provisions regarding the judicial regime of conflicts of interest. The conflict of interest has been generated by signing and approving, as the mayor of Crișeni, several administrative acts, namely certain provisions of employment and individual labor contracts for his son who worked as councilor of the mayor of Crișeni. Also, from the evaluation activity there resulted indications about the possible abuse of mayor Maior Andrei of the provisions of Article 301 of the Criminal Code of Romania.

Through the Evaluation report no.6988 (<http://www.integritate.eu/A.N.I/Rapoarte-și-audit.aspx>, accessed on 23 May 2015) of 20 February 2014, the National Integrity Agency established that Țărdea Fănică, local councilor in the local council Tulnici, Vrancea County, violated the legal regime of incompatibilities and conflicts of interest because, during his office as local councilor, the company he administered and where he was the only shareholder, signed contracts of services with the Commune hall of Tulnici, thus violating the provisions of Article 90 of Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignities, public positions and the business environment, to prevent and sanction corruption.

By the Evaluation report no.9269 (<http://www.integritate.eu/A.N.I/Rapoarte-și-audit.aspx>, accessed on 23 May 2015) dated 07 March 2014, the National Integrity Agency has determined that Lazăr Constantin, mayor of Poiana Sibiului commune, Sibiu County, violated the legal regime of conflicts of interest because he signed, during his mayor mandate, a lease contract with his son and a concession contract with his daughter. Thus, Lazăr Constantin did not respect the legal regime of conflicts of interest because the Local Council of Poiana Sibiului commune, Sibiu County, represented by the mayor, has entered into a lease with the mayor's son and a concession contract with a company where the mayor's daughter was the administrator, and mayor's son the sole shareholder, violating the provisions of Article 70, 71 and 76 of Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignities, public positions and in the business environment, to prevent and sanction corruption, in conjunction with Article 75 of Law no.393/2004 on the status of local elected officials. However, the contracts mentioned and the patrimonial benefit realized by the mayor for his son and daughter by signing the two contracts are indications of a possible breach of Article 301 paragraph 1 of Law no. 286/2009 on the Criminal Code.

According to the Evaluation report no. 12029 (<http://www.integritate.eu/A.N.I/Rapoarte-și-audit.aspx>, accessed on 23 May 2015) of 20 March 2014 prepared by the National Integrity Agency, Nechifor Ioan, county councilor within Vaslui County Council, violated the law regarding the incompatibility regime because, after the validation of the county councilor mandate, he did not resign within the period prescribed in Article 91 paragraph 1 sentence I of Law no. 161/2003, and did not terminate the contract of works between Vaslui County Council and the company he managed and where his son was the sole shareholder. Through his action, the person assessed did not comply with Article 91 paragraph 3 sentence I of Law no. 161/2003 concerning certain measures to ensure transparency in the exercise of public dignities, public positions and in the business environment, to prevent and sanction corruption, in conjunction with Article 90 paragraph 1 of the same law.

By the Evaluation report no.12058 (<http://www.integritate.eu/A.N.I/Rapoarte-și-audit.aspx>, accessed on 23 May 2015) of 20 March 2014, the National Integrity Agency determined that Aurel Lesuc, mayor of Tudora commune, Botoșani County, violated the law regarding the regime of incompatibilities, as he concurrently exercised the position of mayor and the position of representative of the administrative-territorial unit Tudora in the General Meetings of Shareholders of the local interest company Nova Apaserv S.A. Botoșani. Through his act, the mayor of the commune Tudora violated the provisions of Article 87 paragraph 1 letter f) of Law no. 161/2003, as well as Article 91 paragraph sentence I 3 of the same law.

A final example is the Evaluation report no.12082 (<http://www.integritate.eu/A.N.I/Rapoarte-și-audit.aspx>, accessed on 23 May 2015) of 20 March 2014 prepared by the National Integrity Agency which results in the fact that Lina Cătălin Vasile, local councilor in the Local Council Aninoasa, Argeș County, violated the legal regime of incompatibility, simultaneously holding the position of local councilor and the quality of individual employee with labor contract in the body of the mayor of Aninoasa commune, Argeș County. Through his action, the local councilor violated the provisions of Article 88 paragraph 1 letter c) of Law no.161/2003.

CONCLUSIONS AND PROPOSALS

Even if integrity is essential to good administration, practice has shown numerous violations of the rules regarding incompatibilities and conflicts of interest by local officials. These cases are highlighted by the evaluation reports prepared by the National Integrity Agency in its role as guardian of the integrity criteria established by law. It is important that the integrity rules be known and followed by all local elected officials, otherwise we risk a local public life dominated by lack of integrity and numerous cases of lawful termination of mandates as a result of the violation of the legislation on incompatibilities and conflicts of interest. Even if the normative framework of integrity complies with the European legislation on the matter, we consider it necessary to rethink the legal provisions regarding the ownership, for example, by a mayor, of both the quality of mayor and that of member of the administration board of an educational institution, or both the quality of mayor and that of administrator of a private entity that has not carried out, during the mayor mandate, commercial acts, but which, by current regulation, generates a state of incompatibility. In our view, there should not be considered an incompatibility situation the case in which a person owns simultaneously an unpaid position in a management structure, such as the administration board of a pre-university educational institution or as an administrator in a company with no activity .

Finally, we believe that certain provisions of Law no.161/2003 should be related to regulations from the field of local public administration, with regard to the beginning of the incompatibility state, the lawful termination of the mandate of local elected official or the procedure of declaring the incompatibility.

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