

PUBLIC INTEGRITY AND NEW RULES OF CONDUCT FOR ROMANIAN MPs: A ROMANIAN CASE STUDY

Cynthia Carmen CURT

Abstract

The article refers to the problem of incompatibilities and conflicts of interests of public officials in the Romanian society and its severe consequences upon the fulfillment of the conditions of the European Commission Verification and Cooperation Mechanism's benchmarks by Romania. The present study proposes a critical analysis of recent legislative changes of the rules of conduct for MPs in Romania, relatively to the regime of incompatibilities and conflicts of interests, emphasizing the manner in which the Parliament constantly tries to limit the prerogatives of the National Integrity Agency (NIA). Special attention is paid to the analysis of incompatibilities applicable to the MPs who are simultaneously Government members. The study follows several steps: an introduction, a critical analysis of the new legislation, focusing on the new rules of conduct for MPs, an analysis of the most important case studies and conclusions. The introduction describes the problem of incompatibilities and conflicts of interest of MPs and members of Government reflected in the recent CVM Report and the position of the National Integrity Agency. The analysis of the legislation presents a critical evaluation of the new rules of conduct for MPs, adopted in 2013 by the Romanian Parliament; then, analyzing the most important and recent case studies, general patterns in the field of procedures of incompatibilities and conflicts of interests emerge. Conclusions propose legislative solutions in terms of raising the standards of public integrity.

Keywords: incompatibility, conflict of interests, public integrity, National Integrity Agency, Romania.

Cynthia Carmen CURT

Assistant Professor, PhD, Political Sciences Department,
Faculty of Political, Administrative and Communication
Sciences, Babeş-Bolyai University, Cluj-Napoca, Romania
President of the National Council of Integrity, Bucharest,
Romania

Tel.: 004-0264-431.505, extension 6226

E-mail: curt@fspac.ro

1. Introduction

The effectiveness of anti-corruption reforms is directly related to the political will and political commitment to democratic reforms, in terms of good governance (Johnston and Doig, 1999; Grindle, 2007). The development of integrity standards in public life is one of the key instruments in ensuring trust in public institutions and good governance (Danileț, 2009; OECD, 2011). According to Lord Nolan's Seven Principles of Public Life (Committee on Standards in Public Life, 2005), 'holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance of their official duties'. One of the main steps in maintaining integrity in public life is managing conflicts of interest and incompatibilities; further on, establishing the asset and interests declarations for public officials is an important mechanism to prevent conflicts of interest (OECD, 2011). According to some authors (Nicholls *et al.*, 2011, p. 404) conflicts of interest can be an indicator of corruption or lack of integrity. In recent years, the Romanian National Integrity Agency (NIA) imposed itself as a model of good practice in strengthening public integrity standards and was well appreciated in European Commission's Cooperation and Verification Mechanism (CVM) Reports. In the last CVM Report (January 2013) worries were expressed related to the fact that 'NIA's reports against ministries and senior officials did not lead to their resignations' and the CVM Report mentions it is important that 'the Parliament should build on new rules to adopt clear and objective procedures to suspend MPs subject to negative integrity rulings or corruption convictions'. Also, the CVM Report emphasizes that it is important 'to clarify that NIA remains the sole authority tasked with the verification of potential incompatibilities of elected and appointed officials'. This article analyses the attempts of MPs to politically limit the attributions of the National Integrity Agency by establishing new rules of procedure regulating incompatibilities and conflicts of interest. In the same way, the study analyses the most important cases of MPs and members of Government in situations of incompatibilities and conflicts of interest, concluding upon the quality of the new MPs' rules of conduct, the Parliament and Government's response to the respect of the judicial decisions and the rules of law. In this respect, the study proposes *de lege ferenda* solutions.

The new provisions of the Law regarding the Statute of Deputies and Senators constituted a recent and controversial legislative procedure. New texts were adopted first on January 22, 2013 by the two Chambers of Parliament. However, the legislative procedure was a tedious and sinuous enactment: the new texts have represented, consecutively, the request for review made by the President, respectively the objections of unconstitutionality to the Constitutional Court. During these procedures the Parliament called into question the very concept of dissuasiveness of the sanctions deriving from the incompatibility regime for MPs and tried to introduce new texts supposed to make inapplicable certain procedures before the National Integrity Agency and, also, tried to restrict NIA's special competencies related to MPs' incompatibilities. After six

months of parliamentary procedure, after two Presidential requirements of revising the law and three Constitutional Court's decisions amending the texts adopted by the Parliament, the modification of Law no. 96/2006 is definitive, being re-published in the Official Journal of Romania on July 24, 2013.

2. Analysis of legislation

2.1. Incompatibilities regarding the parliamentary mandate

Incompatibilities are constitutional mechanisms to protect the independence of the parliamentary mandate and prohibit the overlapping of the MP mandate with another public position (Constantinescu *et al.*, 2004, p. 29), ensuring the protection of the Parliament against the influence of the Government or any private interest (Constantinescu and Muraru, 1999, p. 91). The MP is obliged to opt between the parliamentary mandate and the public or private position, rendered incompatible with the mandate (Deleanu, 2006, p. 598).

The institution of incompatibility is the public interest's response to the need of preventing conflict of interests occurring during the exercise of public offices and functions, in compliance with the principles of neutrality, integrity, decisional transparency and public interest supremacy (art. 71 of Law no. 161/2003; Decision of the Constitutional Court no. 876 of 28 June 2011).

The legislative nature of the incompatibilities of the parliamentary mandate is synthetically presented by the Constitutional Court in Decision no. 972 of 21 November 2012, which emphasizes that the 'incompatibility' has a 'relative nature as it circumscribes only to certain public offices or to the exercise of certain activities – articles 81 and 82 of Law no. 161/2003, and has an imperative nature due to the fact that it is 'public' and is therefore mandatory for all public authorities'.

General incompatibility, provided by the Constitution (art. 71), implies that 'no one can be simultaneously a deputy and a senator', being instituted a type of incompatibility that entails compliance with the principles of bicameralism (Deleanu, 2006, p. 598; art. 14 of Law no. 96/2006).

Other types of incompatibilities with elected offices refer to the incompatibility of exercising the mandate of MP in Romania and that of member of the European Parliament (art. 16, paragraph 2 of Law no. 96/2006) or with the office of President of Romania (art. 84, paragraph 1, Constitution of Romania). Moreover, the Senators and Deputies' Statute institutes the incompatibility of the parliamentary mandate with non-elected offices, more exactly 'with the positions and the activities of the persons who, according to their statute, cannot be members of political parties' (art. 16 paragraph 1 of Law no. 96/2006). The deputy or the senator mandate is incompatible with any public office granted by a foreign state, except those offices provided by the law through the agreements and conventions to which Romania is a party (art. 16 of Law no. 96/2006).

2.2.1. Members of Parliament who simultaneously function as members of the Government

Constitutional incompatibilities are the general incompatibilities of the parliamentary mandate that include the incompatibility between the parliamentary office and any other public office of authority, apart from that of member of the Government: 'the quality of Deputy and Senator is incompatible with any other public office of authority, except that of member of the Government'. As an exception to the general regime of incompatibilities, art. 71 of the Constitution specifies that 'the members of Parliament can also be members of the Government'. Criticised for being at odds with the principle of separation of powers (Giquel, 1995, p. 678), it is nonetheless a feature that characterises the parliamentary political regimes (Drăganu, 2000, p. 272; Alder, 2011, p. 325).

2.2.2. European Court of Human Rights jurisprudence

The European Court of Human Rights (ECHR) has established that the imposition of incompatibility for elective public office is not contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms (Case *Lykourazos vs. Greece*, 2006; Case *Hirst vs. the United Kingdom of Great Britain*, 2005). In the case of *Lykourazos vs. Greece* (2006, §21-§37), the Court classifies the incompatibilities of the parliamentary office starting from standards regarding compliance with the principle of separation of powers, the principle of the parliamentary mandate autonomy, the principles concerning prevention of the conflicts of interest, and the principle that a MP must commit himself or herself to the duty of meeting the terms of his or her parliamentary mandate, exercised in the general interest of the nation.

Characteristic of political regimes marked by a rigid separation of the executive from the legislative, in the presidential political regimes, and even in semi-presidential ones, the rule stipulates the incompatibility of the office of MP with any executive authority function (president of the state, Prime Minister or minister) (art. 23, Constitution of France; art. 50, Constitution of Belgium; art. 57, Constitution of Netherlands; art. 62, Constitution of Norway; art. 6, chapter IV, Constitution of Sweden). Despite having been criticized for the fact that it might represent an impediment to efficient collaboration between the executive and the legislative (Muraru and Tănăsescu, 2006, pp. 233-234), this system rests on arguments that refer to warranting the separation of the legislative from the executive, since members of the Government could be MPs too, this induces confusion between the two powers, namely the idea of subordination. France adopted it through the constitutional reform of 1958 with the firm specification that the members of the Government cannot be simultaneously 'controllers and controlled' (Giquel, 1995, pp. 628-629). It was stipulated that the members of the Government who are at the same time MPs belong simultaneously both to the legislative and the executive; in this respect, they are entitled to control and to oppose their parliamentary will to the Prime Minister's projects, which would be an act of interference of the legislative in the executive. Otherwise, they would sway Parliament's vote

in favor of the Government's projects (Tofan, 2008, p. 175). From another perspective (Muraru and Tănăsescu, 2006, pp. 233-234), the concentration of power into the hands of the executive would render parliamentary control inefficient and turn it into 'non-control'. Similar provisions are found in the Constitutions of Finland (art. 63), Austria (art. 56), Holland (art. 57), and Portugal (art. 154).

Instead, the parliamentary political regimes characterized by a flexible separation of powers and a functional cooperation between the executive and the legislative, rest on the compatibility between the office of MP and that of the member of the Government, following the British model, where the ministers are all members of the House of Commons, or (in fewer cases) of the House of Lords (Tofan, 2008, p. 175). Countries such as Germany, Spain, Italy, Poland, and Romania have adopted the British model and apply similar solutions (Case *Lykourazos vs. Greece*, 2006).

From this study's perspective, integrity standards seem to be different for a MP who is at the same time a member of the Government. The distinct constitutional nature of the two mandates – the representative, parliamentary mandate, and the appointed, ministerial mandate – is translated into different regimes of incompatibilities. In consequence we can witness situations when the minister declared incompatible resigns or is dismissed from the Government, but continues exercising the parliamentary mandate. The main cause of this juridical and political paradox resides in the impossibility of coordinating the constitutional provisions at the infraconstitutional level and also in the interpretability and incoherence of the Deputies and Senators' Statute, respectively of the Regulations regarding the organization and functioning of the two Chambers of Parliament. MPs' Statute does not provide a unitary system of regulations, consistent with the substance of the incompatibilities of the parliamentary mandate, but, quite the reverse, it generates a procedure that runs in parallel to the other organic regulations that refer to the substance of the field of incompatibilities¹.

The legal infraconstitutional incompatibilities are those incompatibilities that are regulated by the organic laws.

2.2.3. The Deputies and Senators' Statute regulates incompatibilities in economy²

The cases of incompatibility in economy are stipulated by the Deputies and Senators' Statute; the Statute mentions that other incompatibilities can be regulated by or-

1 The law of the enforcement of incompatibilities and conflicts of interest is regulated by arts. 20 – 26 of Law no. 176/2010 on the integrity in the performance of public offices, for amending and supplementing Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, as well as for amending and supplementing other regulations, Book I, Title IV, chap. III of Law no. 161/2003 on measures to ensure transparency in the exercise of public offices, public positions in the segment of business as well, corruption prevention and sanctioning.

2 'a) President, Vice President, Director, manager, administrator, board member or auditor of companies, including banks or other credit institutions, insurance companies, and financial and public institutions, b) President or secretary of general meetings of shareholders or

ganic law. The same incompatibilities are provided also by art. 82 of Law no. 161/2003, except of an additional reference made to the 'incompatibility of the parliamentary mandate with the offices of president, vice-president, secretary, and financial officer of trade union federation and confederation' (art. 82.2.h).

The Deputies and Senators' Statute also includes references to interdictions of advertising, showing in this respect that the use of a person's name together with the quality of deputy or senator is prohibited in any activity that has commercial, financial, industrial, or any similarly lucrative purposes (art. 16, Law no. 96/2006).

Even though incompatibilities refer principally to public authority offices, they are nonetheless compatible with the parliamentary mandate in the case of private positions. Law no. 161/2003, art. 82¹ stipulates that freelancing in the legal profession entails certain limitations³. Such cases of incompatibility seek to avoid the situations in which the exercise of the parliamentary mandate, could be in conflict with the elected member's professional or private interests (Ardant, 1996, p. 513). The office of Deputy and Senator is consistent with activities performed in didactic, literary and artistic domains, or in scientific research (art. 82.3, Law no. 161/2003).

The rules that refer to the incompatibilities of the parliamentary mandate also appear stipulated in the Rules of Organization and Functioning of the two Chambers of

members in companies referred to in point a), c) state representative of the general meetings of the companies referred to in point a), d) manager or member of the board of autonomous administrations, companies and national corporations, e) individual trader, f) member of a group of economic interest as defined by law'(art. 15, Deputies and Senators' Statute);

- 3 '(1) The deputy or senator who, while exercising the parliamentary mandate, intends to exercise the profession of lawyer cannot plead in cases which are judged by judges or courts nor can they offer legal aid in offices subordinated to these courts.
- (2) The deputy or senator in the situation referred to in paragraph (1) cannot provide legal advice to accused or defendants but may assist the court in criminal cases: a) corruption offenses, offenses assimilated to corruption offenses, offenses directly related to corruption offenses and offenses against the European Communities' financial interests under Law no. 78/2000 on preventing, discovering and sanctioning corruption, as amended and supplemented, b) offenses under Law no. 143/2000 on combating illicit drug trafficking and consumption, as amended and supplemented, c) offenses of trafficking in persons and offenses related to human trafficking, under Law no. 678/2001 on preventing and combating trafficking in persons, as amended and supplemented, d) money laundering offense provided for in Law no. 656/2002 on preventing and sanctioning money laundering, as amended, e) offenses against state security, provided in art. 155-173 of the Penal Code, f) that prevents justice offenses provided for in art. 259-272 of the Criminal Code, g) crimes against peace and humanity, set out in articles 356-361 of the Criminal Code.
- (3) The deputy or senator in the situation referred to in paragraph (1) cannot advocate civil or commercial cases against state authorities or public institutions, national companies or the national societies in which they are parties. Also, they cannot plead the Romanian state lawsuits in international courts.
- (4) The provisions of paragraphs (1) – (3) do not apply in cases where the lawyer is party to the proceedings or assisting or representing the spouse or relatives up to the fourth degree.'

Parliament⁴. Similar provisions of ‘economic incompatibilities’ are present in Austria, France, Greece, Italy, and Portugal (Venice Commission, 2012, pp. 19-21) also, in Poland (art. 107-108, Constitution), and Latvia (art. 32, Constitution).

Conform to the infraconstitutional legislation, the legal specialized competence of making decisions with respect to the incompatibility conditions that refer to the persons who fulfill public functions and hold public offices is rightfully specific to the National Integrity Agency (NIA), reason for which this institution was created (art. 8, Law no. 176/2010)⁵.

2.2. *The conflicts of interests*

Conflicts of interests are not regulated at constitutional level, but through infraconstitutional rules (Decision of the Constitutional Court no. 81/2013), although, the explanation of stipulating incompatibilities at constitutional level resides in the public interest’s need to prevent conflicts of interests in performing public functions and offices.

The conflict of interests in the administrative sphere, referring to MPs as well, is established by organic law, respectively by Law no. 161/2003 concerning transparency in public offices. ‘The conflict of interests refers to the situation in which the person who performs a public office or function has a private patrimonial interest, which could influence the carrying out in an objective way of his or her duties under the Constitution or of any other normative activities’ (art. 70). The attempt to regulate the conflict of interest as a disciplinary violation within the Deputies and Senators’ Statute has been pronounced non-constitutional, due to the nature of the penalty. The Constitutional Court interpreted the exclusion from the Chamber for a period not exceeding six months, as a sanction for conflict of interests, being in discordance with the nature of the parliamentary mandate, which must be exercised continuously: ‘participation in the sessions (...) represents a duty specific to the parliamentary mandate’.

In terms of the criminal law, the conflict of interests was regulated by Law no. 278/2006.⁶ As a result of the examinations carried out by NIA, a number of 22 Mem-

4 The Senate Regulation, published in the Official Journal of Romania no. 948 of 25 October 2005, regulates in articles 177 and 178: ‘Conflict of interests, determination of incompatibilities and other prohibitions’, resuming the provisions stipulated in Law no. 161/2003 on parliamentary incompatibilities. The Chamber of Deputies Regulation, published in the Official Journal of Romania no. 762 of 13 November 2012, at art. 198-200, Section 2 ‘Incompatibilities’, also regulates, by resuming the provisions stipulated in the Constitution, some legal incompatibilities with the Statute of Deputies and Senators, Law no. 96/2006.

5 ‘The Agency’s aim is to ensure integrity in the exercise of public functions and offices and to prevent institutional corruption by assigning responsibilities in the evaluation of the declarations of fortune, of the data and information about fortune as well as the patrimony modifications that have occurred, of potential incompatibilities and conflicts of interest that can affect the persons mentioned in art. 1 during their mandate in a public function and office’.

6 Art. 253: ‘The public official’s undertaking who, in the exercise of his/her duties, fulfills a function or participates in the making of a decision that has brought a direct or indirect mate-

bers of Parliament were found in conflicts of interest⁷ between the 2008-2013 legislatures. Furthermore, NIA completed a number of three evaluation reports against MPs who, at that time, held ministerial offices, too⁸. Moreover, one of the MPs with evaluation report for conflict of interests (and incompatibility) issued by NIA was appointed minister in 2012.

The parliamentary mandate of MPs found in conflicts of interest by NIA cannot be terminated according to actual constitutional provisions. It is recommendable to take into consideration the stipulation of the conflicts of interest at constitutional level, similarly to incompatibilities; practically, incompatibilities are stipulated in order to avoid conflicts of interest. We have seen that the regulation of conflicts of interest by the law establishing the legal status of Deputies and Senators failed. The constitutional texts should provide the framework for dissuasive sanctions for infringements of norms related to the conflict of interests of MPs. We can find similar provisions in the Constitution of Hungary (art. 4 (c), cap. 'The Parliament').

2.3. Incompatibilities regarding the members of the Government

Art. 105 of the Constitution stipulates: 'The function of member of the Government is incompatible with another public function of authority, except that of deputy or of senator. Additionally, it is incompatible with any function of professional representation paid by a trading organisation'. Hence, the incompatibilities regarding the ministerial office refer in principle to the public function of authority, as they appear in Law no. 161/2003 on transparency in public offices, but also incompatibilities with professional representation positions remunerated by a trading organisation⁹. The incom-

rial benefit to that person, to their spouse or to a close or remote relative of theirs up to the second degree or to another person with whom they have been in business or trade relationships over the last 5 years, or who has benefited them with services or assistance of any kind, shall be punished with imprisonment from 6 months to 5 years and with the prohibition to hold any public office on maximum duration. The provisions of paragraph 1 shall not apply to the issuance, approval, and adoption laws'.

- 7 For details see www.integritate.eu. From all 22 cases of MPs in conflicts of interests, the administrative conflicts of interest are still pending in courts, and the criminal conflicts of interest are pending prosecution.
- 8 In two of the cases, the Prosecutor's Office decided not to prosecute (but one is also an administrative conflict of interest and pending courts of law), and one is still pending prosecution.
- 9 Art. 85 of Law no. 161/2003, on some measures to ensure transparency in the exercise of public offices, of public functions in the segment of business as well, on corruption prevention and sanctioning provides: '(1) the Government membership is incompatible with: a) any other function of public authority, except that of deputy or senator or in the case of other circumstances stipulated by the Constitution; b) a function of professional representation paid by a trading organization; c) the offices of President, Vice President, director, manager, administrator, board member or auditor of trading companies, including banks and other credit institutions, insurance companies, and financial and public institutions; d) the function of president or secretary of general meetings of the shareholders or of the members of

patibility regime for the ministerial office is of a more restrictive nature and it refers to private positions inclusively. The Romanian legal regime of incompatibilities with the professional representation functions has been inspired by the French model¹⁰ and seeks to avoid putting either private or professional pressure on the office of member of the Government. The exceptions refer to didactic positions or activities, scientific research, and literary and artistic production. The Chamber of Deputies' Regulation introduces in art. 198.2 a number of specific incompatibilities with managerial and representational positions within the internal bodies of the Chamber of Deputies and the function of member of the Government: 'The members of the Government may not hold positions in the Standing Bureau, in the commission offices, in the European Affairs Committee, may not be members of parliamentary delegations, and may not be leaders of parliamentary groups'.

2.4. Financial transparency in the parliamentary mandate.

Declarations of assets and interests

The imperative conditions of integrity and transparency in exercising public functions and offices is conducive to necessity of financial transparency in exercising those public functions and offices. MPs and the members of Government are required to declare their assets and to submit statements of interest, at the beginning of their mandate, update these statements during their mandate, as well as at the end of the mandate. According to Law no. 96/2006, the MPs are required to submit declarations of assets and interests¹¹.

The control of the asset declarations aims at the identification of the situations in which the property has been acquired illegally, situation qualified by the legislation as incompatible with a public office or public function. Incompatibility can also be incidental as a result of the application of the legislative provisions on asset control, representing the confirmation of a significant difference, following the evaluation of the property declaration¹².

the companies referred to in point c); e) the function of state representative in the general meetings of the companies referred to in point c); f) the position of manager or of member of the board of autonomous administrations, companies, and national companies; g) the quality of individual trader; h) a member of an economic interest group; i) a public office entrusted by a foreign state, except those functions specified in the agreements and conventions to which Romania is a party.'

10 For this purpose, art. 23 of the Constitution of France.

11 Law no. 96/2006 on the Deputies and Senators' Statute: 'after the legal meeting of the Chambers and before the validation of the mandate, each deputy and each senator shall submit his or her wealth statement as provided by the law' (art. 4). Furthermore, art. 19 stipulates the provision relating to the mandatory submission of the interests statement. 'The deputies and senators are obliged within 15 days from validation to submit to the Secretary General of the Chamber whose members they are the *affidavit* of interests, in accordance with the law'.

12 Art. 17, Law no. 176/2010: 'The person whose declaration of assets has been assessed and, as a result, significant differences have been identified, is found incompatible in the line of art.

Moreover, the penalty of incompatibility applied to a person who occupied an eligible position represents the interdiction of the person in question to occupy that position for a period of three years after the termination of the mandate. If that person has been released or removed from his or her office as a consequence of determining the incompatibility, he or she is deprived of the right to fulfil any similar public function or office for a period of three years, with the exception of elective services. The sanctioning of the incompatibility also refers to the annulment of documents issued, adopted, or executed in violation of the law of incompatibilities. In consequence, the asset declaration control must be effective and independent of any pressure, political or of any other nature, or else it can 'become a fake form of 'morality' and, more seriously, a certification of credibility' (Deleanu, 2006, p. 251).

3. Case studies

3.1. *Incompatibility procedure for Members of Parliament*

The constitutional sanction for incompatibility of the parliamentary mandate is its termination. According to the new provisions of Law on the Legal Status of Deputies and Senators, termination of parliamentary mandate occurs as follows: '(a) on the date stated for incompatibility resignation, submitted to the Standing Bureau of the Chamber the member of which is the deputy or the senator; (b) on the date established for the resolution of the Chamber the member of which is the deputy or the senator, and which determines the incompatibility; (c) on the date of the final and irrevocable decision of the court through which the appeal to the National Integrity Agency report that established the incompatibility is rejected; (d) at the expiry of the 15 days period from the date of acknowledgement of the National Integrity Agency's evaluation report during which time the deputy or the senator may litigate in the administrative court. The acknowledgment is made by the deputy or the senator in question who addresses the report to the National Integrity Agency under signature of receipt or, if the receipt is declined, through plenary statement made by the chairman of the Chamber of which the senator or the deputy is member' (art. 7).

The MP in incompatibility will have to choose, by law, between the parliamentary mandate and the function that makes him or her incompatible. Otherwise, according to the Constitution, the *ex officio* mandate termination intervenes.

The parliamentary procedure of declaring the incompatibility of a MP is regulated by Law no. 96/2006 regarding the MPs Statute (art. 18) and the provisions of the Regulations of function and procedure of the two Chambers of Parliament. Thus, two premises are stipulated: the situation of MP who is in incompatibility at the beginning of the mandate, and the situation when incompatibility occurred during the parliamentary mandate.

18's provisions'. Further on, related to the significant difference of asset on the duration of the public functions and offices mandate, and the revenues obtained in the same period is, according to art. 18 of the same law, 'the difference that exceeds 10,000 EUR, or the equivalent in RON of the same amount'.

3.1.1. The Deputy or Senator, who at the beginning of their mandate is in one of the situations of incompatibility provided by law, shall notify within 15 days the Standing Bureau of the Chamber to which he or she belongs. After the expiry of this term, the deputy or senator will have to opt between the Deputy or Senator mandate and the function or functions which make him/her incompatible, within 30 days, resigning accordingly his or her option.

After the expiry of 30 days, if the deputy or the senator has not communicated his or her option, he or she 'remains in incompatibility'. The next step consists in a procedure made by the competent Standing committee, through which the cases of incompatibility are analyzed: the committee will prepare a report within 15 days after its notification, requesting NIA to state its position. The Agency will respond within five days. The committee's report is submitted to the Permanent Bureau, who will inform the deputy or the senator. Subsequently, the Chamber Bureau submits for approval a draft resolution establishing the state of incompatibility and termination of the parliamentary mandate, in the first plenary meeting.

So if the deputy's or senator's option for resignation is not expressed, according to this law, he or she will 'remain in incompatibility' until the Chamber decides, by vote, the termination of the parliamentary mandate. Because the decision is made by vote, the MP is not considered to have legally resigned *ex officio* at the end of the option term. The standing committee of the Chamber drafting the report will request NIA's point of view, but the Chamber decides upon the report by a convenience vote, which is, in the end, a political, an opportunity vote. The latency of the state of incompatibility is thus prolonged for a period of at least 60 days, if the vote quorum meets in the first plenary session, scheduled after the execution of the commission report.

The previous regulation of the Law of MPs' Statute seemed more efficient, because the MP was considered to have legally resigned when he or she had failed to express his or her decision of resignation, within 30 days after the notification of the state of incompatibility. In that case the Chamber only took act of the situation that entailed *ex officio* resignation and did not vote upon the existence of the state of incompatibility.

The modification of the current procedure, even if now it requires NIA's point of view, which can be eventually passed by the plenum by way of a convenience vote, can only lead to a possible extension of the state of incompatibility¹³.

13 Relevant in this respect is the case of senator Mircea Diaconu, who truthfully requested the Judiciary Committee of the Senate to clarify the situation of his incompatibilities prior to the validation of his parliamentary mandate; the judiciary committee 'considered' that he was not involved in any case of incompatibility, a solution subsequently invalidated by NIA and the court of law. The High Court stated: 'the Senate was in error and found the appellant to have been in a state of incompatibility during all this period, without, of course, there being any fault on his name. Mr. Diaconu requested in all honesty the Legal Committee to release the notice on the overlapping of functions and the latter found at that time that there is no incompatibility, consequently validating his senator mandate'.

3.1.2. Any incompatibility occurring during the exercise of parliamentary mandate must be notified to the Standing Bureau of the Chamber, in writing, no later than 15 days from the date of its occurrence. If within 30 days from the notification, the MP does not resign from the office that makes him or her incompatible, the procedure described above is applied.

The procedure is identical also when the MP addresses the Standing Bureau of the Chamber to clarify a possible incompatibility. This is a case of impermissible overlapping of the Chamber's competencies with the specific prerogatives of NIA (Stefan, 2013)¹⁴. The Statute does not specify what happens if the 'clarification' of the incompatibility involves different points of view expressed by NIA and the parliamentary commission in its report. Moreover, such a view may have adverse legal consequences to the holder of the parliamentary mandate, case in which NIA or any court of law would conclude otherwise.

The Chambers' Regulations¹⁵ establish that the procedure of declaring the state of incompatibility requires referral from the Judiciary, Discipline and Immunities Commission, who issues a report examining the case and making proposals to the Chamber. The Chamber will approve the report by a majority vote.

Thus, in the parliamentary procedure of stating the incompatibility, the acknowledgement of the *ex officio* dismissal (as sanction intervened by force of constitutional texts) is subject to voting decision, the new provisions' purpose being the Chambers substituting NIA's specific prerogatives. Thus, we are confronted with a form of 'self-control' which, mostly for political reasons, often turns into 'non-control', presumably intended to eliminate as much as possible NIA's legal competences.

The Statute of the MPs mentions: 'in case the National Integrity Agency has completed an evaluation report on a deputy's or a senator's incompatibility, the evaluation report shall be sent within five days after completion to the person concerned, as well as to the Chamber whose member he or she is, in accordance with art. 21.4, Law no. 176/2010. The Chambers' Standing Bureau promptly notifies its members, providing them with a copy of the report' (art. 18.6).

The new provisions of the Statute of MPs does not specify the legal solution for cases in which the procedure initiated by the Standing Bureau of the Chamber overlaps with the procedure of NIA (or when the two procedures have different results; or, the application of procedural terms; etc.). According to MPs' Statute, the termination of the parliamentary mandate occurs on expiry of 15 days from the date the MP was notified with NIA's report, if within this period he/she does not litigate it in a court of law¹⁶.

14 From CVM Report, January 2013: 'it is also important to clarify that NIA is the only authority in charge that can confirm the potential incompatibilities of elected and appointed officials'.

15 Art. 204 of the Chamber of Deputies Regulation and art. 183 of the Senate Regulation.

16 The initial 45 days term was declared unconstitutional by the Constitutional Court (Decision no. 81 of 27 February 2013), on account of its discriminatory nature, as it applied a differ-

The modified version of the MPs' Statute contains a new text regulating *expressis verbis* the principle of separation of powers and the rule of law fundament, by which definitive and irrevocable decisions of courts of law are mandatory. The new provision is a direct consequence of the Decision of the Constitutional Court no. 972 of 21 November 2012 (to resolve a constitutional legal conflict between the Legislature and the Judiciary). In this way, it is provided the *ex officio* termination of the parliamentary mandate at the time the final and irrevocable decision of a court of law decides consequently¹⁷. Under these new circumstances, the president of the Chamber acknowledges the termination of the MP mandate and the Chamber votes only upon the vacancy of the deputy or senator position.

As a preliminary conclusion, the new texts on parliamentary procedures in case of incompatibility, regarding ascertaining the termination of the parliamentary mandate overlap NIA's competences. Moreover, new attempts of regulating MPs' conflicts of interest, as well as of promoting a unified and coherent legislation, with effective dissuasive penalties, in the sense of ensuring the application of the principle of integrity of the parliamentary mandate failed.

As the CVM Report from June 2012 notes, the two Houses flagrantly breached the Constitution, failing to put into practice the statutory stipulations regarding the termination of the parliamentary mandate in case of incompatibilities: 'NIA's existence was called back into question by representatives of all main political parties in Parliament. In turn, the Parliament failed to enforce decisions on cases of incompatibility and conflict of interests.' The following examples are evocative. Senator M. Diaconu requested clarifications on his case of incompatibility from the Judiciary Committee of the Senate before the validation of his parliamentary mandate on November 30, 2008. The Judiciary Committee decided the Senator was not in a state of incompatibility and validated his mandate by Senate Decision no. 68/2008, of 19 December 2008. NIA's evaluation report (issued on January 26, 2011) found the Senator had been in incompatibility since December 19, 2008, due to his simultaneously office of Senator and director of Nottara theatre (the latter being a leading office of a public institution). NIA's evaluation report was challenged in the competent courts of law. The final and irrevocable decision of High Court of Cassation and Justice, rejecting M. Diaconu appeal upon NIA's report, was issued on June 19, 2012. It means that NIA's evaluation report was definitive, by the force of law. Having become minister of culture in the interim, the senator resigned from the ministerial position at the date of the final and irrevocable decision of the High Court of Cassation and Justice. But things have evolved in a different manner with regard to his parliamentary office. On October 29, 2012, the Senate debated the report of the Judiciary Committee, which proposed the

ent procedural treatment to other categories of occupants of 'public positions and offices', according to Law no. 176/2010 regarding the integrity in exercising public functions and offices.

¹⁷ In the litigations upon NIA's reports on stating incompatibilities of MPs.

termination of the mandate, but the vote in the Senate was postponed to the next day. With 23 votes 'for', 32 'against' and 10 'abstentions', the Judiciary Committee's report (which stated the *ex officio* termination of the mandate) was rejected. The Senate practically opposed the enforcement of a definitive and irrevocable court of law resolution, by means of a political vote, infringing in a preposterous manner the most elementary principles of the rule of law: the principle of separation and balance of powers in the state, the equality principle ('Nobody is above the law', art. 16.2 of the Constitution), the constitutional principles of justice administration. The President of the Superior Council of Magistracy notified the Constitutional Court with a juridical constitutional conflict, upon the negative vote expressed by Parliament. The Constitutional Court resolves the existence of a juridical constitutional conflict between the Judiciary and the Legislative, 'conflict generated by the Senate's refusal to acknowledge the termination of Mr. Mircea Diaconu's senator status, by enforcing a final and irrevocable decision that confirms the senator's incompatibility' (Decision no. 972 of 21 November, 2012, published on November 28, 2012). The termination of the parliamentary mandate occurred on December 13, 2012, when the Senate's resolution of making note of M. Diaconu's resignation was published in the Official Journal of Romania. The solution adopted by the Romanian Senate for the enforcement of the Constitutional Court's decision is at the limit of constitutionalism. Since at the implementation of the Court's decision, the Senate was obliged to take note of the *ex officio* termination of the mandate, the sanction for the *ex officio* termination was peremptorily regulated by the constitutional text. In this case, the resignation solution is, at the least, questionable.

In the case of Deputy S. Andon, the incompatibility of the deputy mandate exercised concomitantly with the lawyer's office in a case of corruption was presented by NIA Ascertaining Act of June 1, 2009. The Act remains definitive by the decision of the High Court of Cassation and Justice no. 1807 dated April 3, 2012, final and irrevocable. Through the Resolution of the Chamber of Deputies no. 30 of 2012, published in Official Journal of Romania no. 647 of 11 September 2012¹⁸, the Chamber of Deputies noted the *ex officio* termination of the deputy mandate of Mr. S. Andon and declared his seat vacant.

As for the case of Deputy F. Pâslaru, the assessment Report of NIA, dated November 7, 2011, notes that the deputy was in a situation of conflict of interests. NIA's report remained definitive by non-contestation. According to art. 25 of Law 176/2010 on integrity in public office, 'the person (...) who was established to be in conflict of interests or in incompatibility is deprived of the right to exercise any public function or office stipulated by the present law, except the electoral ones, for a period of three years from the date of release or dismissal from the office or public function or of the rightful termination of their mandate. If the person in question had an eligible office,

¹⁸ Five months after the final and irrevocable decision of the High Court of Cassation and Justice and as a consequence of CVM report of June 2012 mentioning the Parliament had failed to enforce judgments concerning the cases of incompatibility and conflict interests.

he or she cannot occupy the same position for a period of three years after the termination of their mandate'. The Chamber of Deputies endorsed the new deputy mandate of Mr. F. Pâslaru after December 2012's elections. As we have shown, the conflicts of interest regulation for the parliamentary mandate is not regulated at constitutional level. A future revision of the Constitution should take into account the express regulation of conflict of interests, as a case of parliamentary mandate termination. In the period 2008-2013, NIA found 25 cases of MPs in a state of incompatibility ([Online] www.integritate.eu). For five of these cases the evaluation reports or the ascertaining documents remained definitive; two cases were invalidated by the courts of law; as for the rest of the cases, they are pending in courts. In two of these cases, the persons in question fulfilled simultaneously the function of senator and that of minister. One's mandate was terminated after the interventions of courts of law and of the Constitutional Court (see above mentioned example of M. Diaconu). The second one was a Senator appointed in a ministry position, after the disclosure of the evaluation report of NIA for incompatibility; the appeal on the assessment report is still pending in court, but the senator is no longer occupying a ministry position.

3.2. Incompatibility in the case of members of the Government

Law no. 161/2003, regulating the incompatibility of members of Government functions, states that for the offices of Prime Minister, minister, and deputy minister special corresponding legal provisions of Law no. 90/2001 on the organization and functioning of the Romanian Government and ministries are applied.

According to article 5, Law no. 90/2001, 'a member of the Government office shall cease upon (...) a state of incompatibility (...)'. Thus, if termination of Government membership intervenes due to incompatibility, the President of Romania takes note of this and declares the position of member of the Government vacant, at the Prime Minister's proposal.

Further on, the law says that, for the members of the Government, once NIA's evaluation report is completed, the report regarding the Prime Minister will be submitted to Parliament, and those regarding other members of Government will be submitted to the Prime Minister who proposes the dismissal of the minister to the President of Romania (according to the Romanian Constitution and Law no. 90/2001 on the organization and functioning of the Romanian Government and ministries (art. 26 of Law no. 176/2010)).

In this respect, when an evaluation report of NIA finds one of the Government members to be in incompatibility, the decision on dismissal is made by the President at the proposal of the Prime Minister. Basically, the expression 'the Prime Minister's proposal' should refer to the conclusions of the assessment made by NIA. In accordance with the legal provisions, NIA's evaluation report may be appealed in the administrative contentious courts of law, within 15 days from the personal notification. Therefore, the legal obligation of determining the termination of a ministerial function intervenes at the moment when the evaluation report is declared definitive, by non-

contestation, or when the court's decision (on the rejection of the appeal regarding the evaluation report) is final and irrevocable. The subsequent question would be: should the Prime Minister request the dismissal of a minister at the moment of issuing NIA's evaluation report stating the incompatibility, or the conflict of interests of a member of the Government or the Prime Minister is entitled to permit the maintenance of a member of the Government, although his integrity is under ethical suspicion until the validation of NIA's solution by the court of law?

In practice, several solutions were adopted: the resignation solution – the minister subject to the evaluation procedure resigned (e.g. I.N. Botis, or B. Cepoi), the revocation solution – the Secretary General of the Government was dismissed simultaneously with the request for an opinion from NIA on the existence of certain premises in relation to the conflict of interests (e.g. D. Andreescu), the Adjunct Secretary General of the Government was revoked (e.g. D. Mihalache), or, on the other hand, there are ministers who continued their mandates (e.g. O. Silaghi, L. Pop, E. Hellvig), but were not appointed in the new government formula after the parliamentary elections in December 2012. They have become, however, members of Parliament after the elections in December 2012, because the incompatibility evaluation reports have not yet remained definitive in front of courts of law. Two MPs were appointed ministers, although being under suspicion of incompatibility and engaged in courts of law trials against NIA's evaluation report (e.g. Senator M. Diaconu, appointed Minister of Culture in May 2012, and the Minister of Education, E. Andronescu, in 2012). Between 2008 and 2013, NIA ascertained four cases of Government members in incompatibility ([Online] www.integritate.eu), in one of these cases the act of ascertainment of the incompatibility was annulled by a court of law, in another three cases files are currently pending before courts of law. In one particular case, the incompatibility resides in a significant discrepancy between the property acquired by a certain minister and his income. Two ministers were appointed in office although against them was issued a report for incompatibility and conflict of interests.

The European Commission Report on Progress of Romania under the Cooperation and Verification Mechanism of January 30, 2013 notes: 'The persons in public offices must demonstrate that they meet high standards of integrity.' (...) 'In November 2012, the reports submitted by NIA on some ministers and senior officials did not lead to their dismissal. The new Government has reiterated their objective of fighting corruption, yet three of the newly appointed ministers were investigated for corruption. In its recommendations formulated in July, the Commission expressed the hope that the ministers will set an example of integrity compliance: the same is expected in cases regarding the allegations of corruption. For a government to preserve its credibility, it is essential that the ministers enjoy public confidence, namely, they should present their resignation if a NIA report on integrity is emitted against them. The constitutional requirements, including suspension from the office of a minister on basis of court referral, will be applied in full.'

Regarding these standards of integrity relative to Government members, they seem to be highly dissimilar when the same person is in the meantime MP, as well. Although the member of Government resigns or is removed from the ministerial office, for reasons of incompatibility or conflicts of interest, he or she carries on their parliamentary mandate, without any legal or moral restraints. Thus, the 'parliamentary ministers' who are found either incompatible or in a state of conflict of interests, continue to exercise their parliamentary mandate until the date on which a final and irrevocable court of law decision will state their dismissal. Or more, until the Constitutional Court will require the Senate to respect the rule of law, and to respect the decisions of the courts of law. Although these situations have constitutional explanations related to the differences between the elected mandate and the appointed mandate, the consequences upon the low public trust in the Parliament will lead to questions about the legitimacy of the parliamentary mandate and of public decisions.

4. Conclusions

Firstly, the unification of legislation is needed for a coherent and unitary regulation of incompatibilities and conflicts of interest for MPs. It is an objective that can ensure the optimal application of the rule of law. Currently, the legal framework of the regime of incompatibilities and conflicts of interest of the parliamentary mandate is composed of Law no. 96/2006 on the Deputies and Senators' Statute, Law no. 176/2010 on integrity in the exercise of public functions and offices, amended by Law no. 144/2007 on the establishment, organization, and functioning of the National Integrity Agency, and for amendments and supplementations of other normative acts, Law no. 161/2003 on measures to ensure transparency in the exercise of public offices and of public functions in the segment of business as well, in corruption prevention and sanctioning, and also of the Regulations of the two Houses of Parliament.

It is recommendable that the procedure of revision of the Constitution takes into consideration a new regulation of the conflicts of interests for MPs. If the reason for instituting incompatibilities includes the prevention of the conflict of interests, for promoting and respecting the principles of impartiality, integrity, transparency of public decision, and the supremacy of public interest, the constitutional text could provide the general framework for sanctions for infringements of norms related to the conflict of interests (see GRECO 2005, 2007; also, see above sections 2.2 and 2.3).

Secondly, the parliamentary procedures must comply with the distinctive and specific prerogatives of the National Integrity Agency, without instituting a procedure to overlap with that of the Agency. Also, any ambiguous and ineffective regulations, lax deadlines meant as subterfuge, provisions lacking clarity and predictability should be abrogated from the Law regarding the legal status of Deputies and Senators. The new provisions of the Statute of MPs establish a procedure that overlaps with the NIA procedure, denying the very significance of this institution. Measures rendering the current procedure difficult to manage, requiring a NIA point of view, over which the

plenum can pass by voting, represent the prerequisites for a status of non-control (see CVM Report, January 2013; also, see above section 2.4 and section 3.1.1.).

Thirdly, clarification and transparency must characterize parliamentary procedures regarding the confirmation of the parliamentary mandate's termination for the case of incompatibility. The European Commission Report to the European Parliament and Council, on the progress in Romania under the CVM of January 31, 2013 notes: 'Parliament would enhance its credibility as a result of the application of clearer procedures for case management in the situation of MPs who are subject to decision making on integrity aspects'. CVM emphasizes further the inability of the Parliament to apply the principle of separation of powers and the constitutional principles relating to justice, and also, the inefficiency of the additional regulations on conflict of interests as a disciplinary offense for MPs (see above section 3.1.2).

Finally, integrity standards should provide not only credibility but also legitimacy to the two Chambers of the Parliament; they should be effectively implemented in the legislation on the Deputies and Senators' Statute.

For the same reasons, the compatibility of the Government office with parliamentary membership must find its expression in the consistent way in which incompatibilities are sanctioned. The consecrated exception, at the constitutional level, related to the compatibility between exercising a parliamentary mandate simultaneously with a governmental mandate must be correlated – on both constitutional and infra-constitutional level – with the provisions on sanctions applied to incompatibilities and mandate termination procedures (see above section 3.2).

The lack of transparency and consistency of parliamentary procedures on establishing the incompatibilities and conflicts of interest of the parliamentary mandate, in certain instances, is questioning the very existence and specialized competency of NIA, whereas on other occasions, it allows the application of certain parliamentary solutions that are situated at the very limit or even beyond constitutional limits.

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