



## ORIGINAL PAPER

# The integrity incident such as incompatibility of certain categories of public office with the status of individual trader - the role of the National Integrity Agency (I)

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### Abstract:

*The National Agency for Integrity was established in Romania in 2007 as an autonomous administrative authority, with legal personality, operating at national level. Based on and within the limits of the incidental legal framework, this authority exercises a number of responsibilities regarding unjustified assets, conflicts of administrative interests, conflicts of criminal interests or incompatibilities. Among them, the finding and sanctioning of the violation of the legal regime of incompatibilities provides the analysis context for the incompatibility between certain categories of public functions and the status of individual trader. The levels of discussion concern technical, procedural aspects, driven by the role of the status institutions that may intervene in case of such an incident of integrity, as well as conceptual aspects, determined by a normative evolution of the notion of individual trader.*

**Keywords:** *National Integrity Agency, integrity incident, incompatibility, public office, individual trader.*

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### **Incidental regulatory framework and rationale for the existence of the National Integrity Agency (A.N.I.)**

Since 2007, the legal framework in Romania has ensured the establishment and functioning of the National Integrity Agency (Agency) at national level as an administrative means to fight corruption. The drafting of the legal regime of this stand-alone authority in legislative terms, with legal personality, arose from and was driven by the process of Romania's accession to the European Union, in the context of the Cooperation and Verification Mechanism established by the European Commission. At the time of its establishment, its specialized mission made it the only institution of its kind in the EU and non-EU area.

In the national legal order, at the time of the adoption of the Law no. 144/2007 on the establishment, organisation and functioning of the National Integrity Agency, there were already normative acts governing the legal institutions that became the "raw material" necessary for the performance of the National Integrity Agency's activity and fulfilment of the purpose. Therefore, examples are the Law no. 115/1996 on the declaration and control of the assets of dignitaries, magistrates, certain persons with managerial and control functions and public servants, the Law no. 78/2000 on the prevention, detection and punishment of corruption and Law no. 161/2003 on some measures to ensure transparency in the exercise of the public office, public functions and in the business environment, prevention and punishment of corruption,

The text of the Law no. 144/2007, faced with the declaration of unconstitutionality for a large number of articles by the Decision of the Romanian Constitutional Court no. 415/2010 (for an analysis of the legal implications of this Decision, Putinei, 2010: 83-88), was succeeded by the promulgation of the Law no. 176/2010 on integrity in the exercise of public functions and dignities, for the amendment and completion of the 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. Thus, together with the Law no. 176/2010 (in its current form), the Law no. 184/2016 on the establishment of a mechanism to prevent the conflict of interest in the procedure of awarding public procurement contracts and the Law no. 129/2019 on preventing and fighting against money laundering and terrorist financing, have completed the category of normative instruments essential in establishing the legal regime of the National Integrity Agency. Last but not least, the exercise of its powers is also impacted by other relevant laws in the administrative field such as the Administrative Code (approved by GEO no. 57/2019), the Law no. 393/2004 on the status of local elected officials or the Law no. 96/2006 on the status of deputies and senators.

The purpose for which the Agency was established, adopted by the legislature in article 8 paragraph 1 of the Law no. 176/2010, is to ensure the integrity in the exercise of public office and functions and to prevent institutional corruption. In order to achieve this goal, the Agency has an adequate institutional framework and exercises the numerous powers provided for by the applicable legislation.

Qualified as the main component for administrative investigation of corruption in Romania (Ghinea, Moilat, 2015:238 et seq.), the Agency exercises responsibilities in the assessment of asset declarations, data and information on assets, as well as changes in assets, incompatibilities and potential conflicts of interest in which the persons exhaustively mentioned in the law may find themselves (article 1 paragraphs 1 and 2 of Law 176/2010), during the period of holding public offices and public dignities.

As an operationally independent institution, the National Integrity Agency exercises its specialised administrative control in compliance with the principles with which it has been vested by the legislature, namely legality, confidentiality, impartiality, operational independence, expeditiousness, good administration, the right of defence, as well as the presumption of lawful acquisition of assets,

**General considerations on the core mission of the National Integrity Agency**

In Romania, the Agency continues to be the only institution with exclusive competence in managing the system of declarations of assets and interests, as well as in identifying, preventing and fighting against integrity incidents, but not in sanctioning them, the coercive power in this matter being the prerogative of several entities. In carrying out its activity, the Agency follows the legal procedures for ensuring the integrity and transparency in the exercise of public functions and dignities, collaborates with domestic and foreign entities and the results of the steps taken are subject to judicial control under the law.

In relation to the national regulatory framework, the Agency's core mission is to assess integrity incidents such as conflicts of interest, incompatibilities or unjustified assets identified at the level of public administration. Clearly, the common element in all three situations is the alteration of integrity as a basic principle of professional conduct.

In the synthetic view of the National Integrity Agency, implemented in one of the guides it has developed and published on its official website, a public official is deemed in *conflict of interest when*, by virtue of the public office he or she holds, he or she takes a decision or participates in the taking of a decision in which he or she also has a personal interest, while a public official is in *incompatibility* if he or she holds more than one office at the same time, although prohibited by law (see *Guide on incompatibilities and conflicts of interest*, 2019 : 4, 10).

A complex legal institution, *the conflict of interest* is the subject of nuanced approaches in European and national legislation, but also in the case law of Romanian courts or the Court of Justice of the European Union. In practice, the conflicts of interest criminalised by law have legal implications mainly in the administrative and criminal fields.

*Administrative conflict of interest*, regulated by the Law no. 161/2003 (articles 70-79, articles 99-100), designates the case in which the person exercising a public dignity or a public function has a personal interest of a financial nature, which could influence the objective performance of the duties incumbent upon him/her according to the Constitution and other relevant normative acts. The Agency's competence includes conflicts of interest (with the nuances imposed by the legislature for each category of public function/dignity concerned) concerning parliamentarians, members of the Government and those exercising other public functions in the central and local public administration (e.g. prefect, sub-prefect, secretary of state), all the categories of local elected officials (e.g. mayors, deputy mayors, local councillors, presidents and vice-presidents of county councils, county councillors), civil servants, persons exercising public dignity and public functions within the authorities and institutions under exclusive parliamentary control (e.g. members of the Court of Auditors, the Ombudsman), the President of Romania, presidential advisors and state advisors in the Presidential Administration, as well as magistrates.

*The conflict of interest related to public procurement*, regulated by the provisions of the article 59 from the Law no. 98/2016 on public procurement, refers to any situation in

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which the members of the staff within the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the performance of the award procedure or who can influence its outcome, have, directly or indirectly, a financial, economic or other personal interest, which could be perceived as compromising their impartiality or independence in the context of the award procedure. Within the meaning of the article 72 from the Law no. 99/2016 on sectoral procurement, a conflict of interest is any situation in which the staff of the contracting entity or of a procurement service provider acting on behalf of the contracting entity who are involved in the award procedure or who may influence its outcome have, directly or indirectly, a financial, economic or other personal interest which could be perceived as compromising their impartiality or independence in the context of the award procedure.

In both cases, therefore, the mere perception or appearance of a conflict of interest in a public procurement or sectoral procurement procedure must be addressed and remedied in accordance with the law. In this regard, the Integrated Information System for the Prevention and Identification of Potential Conflicts of Interest, set up within the A.N. I. pursuant to the Law no. 184/2016, operates on the basis of the data entered in the integrity forms drawn up and registered during the procedures for the award of public contracts or sectoral procurement contracts. The analysis of the information contained in these forms is carried out by integrity inspectors, who form a separate structure within the A. N. I., according to their duties, tasks and responsibilities. The exercise of their duties shall be carried out exclusively by reference to the persons referred to in the article 1 of the Law no. 176/2010, as holders of the obligation of integrity and transparency in the exercise of public functions and dignities.

*Criminal conflict of interest* has been criminalised by the current Romanian Criminal Code (article 301), in the chapter allocated to service offences, under the heading "use of office to favour certain persons". According to the normative text invoked, such an offence is committed by a public official who, in the exercise of his or her duties, has performed an act by which a financial benefit was obtained for himself or herself, for his or her spouse, for a relative or a relative up to and including the second degree, and is punishable by imprisonment from 1 to 5 years and prohibition to hold public office for a period of 3 years (for an analysis of the offence, Lazăr, 2016: 6-23, Diaconescu, Răducanu, 2017: 175-182). Unlike the Law no. 161/2003, applicable only to certain categories of persons exercising public dignity or functions, the criminal legislation refers as the active subject of the offence of conflict of interest only the public official, within the meaning of the provisions of the article 147 para. (1) of the Criminal Code. In view of the applicable national legal framework, the doctrine considers that any person may be a public official if he or she performs a task in the service of a public authority, public institution, institution or other legal person of public interest, as well as in services of public interest (Chirilă, 2010 :21). The moment from which the limitation period for criminal liability begins to run, which is practically identical to the moment when the offence is committed, is deemed to be the moment when a material benefit has been obtained (Rotaru-Radu, 2018:50).

As far as *incompatibilities are* concerned, although we do not have a legal definition of the notion, the Law no. 161/2003 regulates the regime of *incompatibilities* in the exercise of public office and public functions. In this respect, the legislature has taken into account both the incompatibilities established by this normative act (articles 81-107) and those established by the Romanian Constitution, by the law applicable to the authority or public institution in which the persons exercising a public dignity or public

function carry out their activity, by the Law no. 161/2003 or other special laws (e.g. Law no. 96/2006). With regard to the categories of persons likely to be identified as being in a situation of incompatibility, we underline the existence of an identity with the same category detailed above for the incident of integrity of the type of administrative conflict of interest.

The discussion on the institution of *unjustified wealth* has as its normative starting point the enshrinement in the text of the article 44 para. (8) of the Romanian Constitution regarding the presumption of lawful acquisition of wealth. Its status as a relative legal presumption allows to fight it by evidence to the contrary and does not prevent, de plano, the confiscation of an illicitly acquired wealth (Safta, 2012:120-121). The Romanian Constitutional Court has consistently ruled that the constitutional norms mentioned do not prevent the investigation and confiscation of illicitly acquired wealth (for an approach under the aspect of constitutional relevance, Drăghici, 2018:23). Thus, in the case of an integrity incident of the type of unjustified wealth, the National Integrity Agency has the power to ascertain the existence of "unjustified differences" (for the Constitutional Court's view on the fluid character under the legal aspect of this phrase Gîrleşteanu, 2011:141-142) between the wealth acquired and the income realized by persons subject to assessment procedures according to the law (the categories of persons nominated by article 1 of the Law no. 176/2010). The value threshold for assessing a significant difference, established by the Law no. 144/2007, is represented by a difference of more than 10,000 euros or the equivalent of this amount in lei, between the changes occurred in the wealth during the exercise of public office and the income achieved during the same period.

In its areas of competence, the stand-alone authority under review may or may be referred to it ex officio by any natural or legal person by means of a request, in accordance with the law. Assessments of incompatibilities, administrative conflicts of interest and unjustified assets are carried out by the Agency's integrity inspectors, who are randomly assigned by electronic system, with the redistribution of assigned work being possible only in the cases established by the Law no. 176/2010.

According to the framework legislation, the assessment of the declaration of assets, data and information on existing assets, as well as changes in assets during the period of holding public office or public dignity, and the assessment of conflicts of interest and incompatibilities shall be carried out both during the period of holding public office or public dignity and within 3 years after the end of such office or public dignity, and may only cover the period of holding such office or public dignity (established by article 12 from the Law no. 173/2010).

From a procedural point of view, in the *case of the assessment of assets*, which is occasioned by the analysis of asset declarations, data, information and existing changes in assets, the integrity inspector initially carries out administrative procedures, exclusively by reference to public information, and subsequently, after informing the person who is the subject of the assessment and inviting him/her to present a point of view, he/she also requests from natural or legal persons data or information that is not public. If necessary, in order to clarify all aspects, an extra-judicial expertise may be carried out, in accordance with the law, with the consent of the person whose assets are subject to assessment, in the absence of his consent, the ANI inspector may request the court in whose district the person under investigation is domiciled to allow an extra-judicial expertise to be carried out, at the Agency's expense. In the cases and under the conditions of the law, the integrity inspector shall draw up an assessment report which

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shall be communicated, within 5 days of its completion, to the person who has been the subject of the assessment activity and, where appropriate, to the tax, criminal prosecution and disciplinary bodies, as well as to the commission for the investigation of assets provided for in the Law no. 115/1996 or to other institutions provided for by law, for the purpose of assessment and taking the necessary measures (articles 11-19 of Law no. 176/2010).

If, following the *assessment of the declaration of interests and other data and information*, the integrity inspector identifies evidence of a conflict of interest or incompatibility, he shall inform the person concerned and shall invite him to submit a point of view. If, after the invited person's point of view has been expressed orally or in writing or, failing that, after 15 days following the acknowledgement of receipt of the information by the person subject to the assessment, the integrity inspector still considers that there are indications of a conflict of interest or incompatibility, he/she shall draw up an assessment report (failing confirmation, the assessment report shall be drawn up after a new communication procedure has been completed). The assessment report shall be communicated within 5 days of its completion to the person who has been the subject of the assessment and, where appropriate, to the criminal prosecution and disciplinary bodies. If the conflict of interest assessment report or the incompatibility assessment report has not been contested by the person subject to the assessment within 15 days of its receipt in the administrative court, the Agency shall, within 6 months, refer the matter to the competent bodies for the initiation of disciplinary proceedings and, if necessary, to the administrative court for the annulment of the acts issued, adopted or drawn up in violation of the legal provisions on conflict of interest or incompatibilities (articles 20-26 of the Law no. 176/2010).

The status of files drawn up by ANI inspectors. may be closed files - when the complaints submitted for assessment did not meet the conditions provided for by law, fell within the competence of other institutions, the facts referred to were not confirmed or were affected by the limitation periods provided for by law -, or files in which significant differences were found between the wealth acquired and the income earned, violation of the legal regime of incompatibilities, conflict of interest in administrative matters, strong indications of criminal offences (conflict of interest, false statements, offences similar to corruption offences, etc.). For the latter, the national legislation allows the Agency to decide, where appropriate, to apply direct sanctions, refer cases to the competent institutions, prosecution bodies or courts.

### **Identification of incompatibilities, as an incident of integrity, in relation to status of trader**

In Romania, the legal regime of incompatibilities is regulated by the Law no. 161/2003 on measures to ensure transparency in the exercise of public office, public functions and in the business environment, and to prevent and punish corruption, as well as by other legal acts applicable to the categories of public office or dignity concerned (e.g. the Romanian Constitution, the Law no. 303/2004 on the Status of Magistrates, the Law no. 269/2003 on the Status of the Romanian Diplomatic and Consular Corps, the Law no. 94/1992 on the organisation and functioning of the Court of Auditors). The interpretation of the legislation on the regime of incompatibilities still generates discussions among specialists, as the abundance of legislation on the subject inevitably leads to misunderstandings between legal texts.

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As an incident of integrity, subject to the assessment of the National Integrity Agency, incompatibility consists in holding or exercising a public office/position/capacity simultaneously with holding or exercising another office/position/capacity in the public or private domain, the accumulation of which is prohibited by law.

In practice, in the case of incompatibility, the rights resulting from the legal relationship outside a service relationship are legal, even if the activity thus carried out is incompatible, the legislature applying in this situation a sanction of a professional nature for the lack of a decision to renounce the accumulation generating incompatibility.

The national legislation in force establishes situations of incompatibility for several categories of persons exercising public functions/duties or public authority. Of these, in the sphere of commercial law we are interested in incompatibilities with the status of trader as a natural person, which is specific to the private sector. The categories of such incompatibilities are explicitly or implicitly established by the legislature, in the latter case being inferred from general formulations.

The text of the Romanian Constitution, of general applicability in the national legal order, reveals a series of incompatibilities. Thus, during his term of office, the President of Romania "may not hold any other public or private office", and the office of member within the Government "is incompatible with the exercise of a paid professional representation function in commercial organisations". In turn, the functions of magistrates (prosecutor, judge, judge at the Constitutional Court), as well as those of audit advisors, appointed by Parliament, are incompatible with any other public or private function, with the exception of teaching functions in higher education.

In contrast to the existing constitutional approach, the Law no. 161/2003 details and nuances the cases of incompatibility for the various public offices or dignities, i.e. it explicitly establishes the incompatibility with the status of a natural person trader.

Thus, the office of Member of Parliament (Deputy and Senator), the office of member within the Government, the office of Secretary of State, the office of Undersecretary of State and similar offices, as well as the office of Prefect and Sub-Prefect are incompatible with the exercise of office as a natural person trader (according to the provisions of article 82 paragraph 1 letter e, article 84 paragraph 1 letter g and paragraph 2, article 85 paragraph 1 letter i of the Law no. 161/2003).

The same regime of incompatibilities provided for ministers and secretaries of state respectively, as well as incompatibilities provided for in special laws, shall also apply to the categories of persons exercising the following public dignities and public offices within the authorities and institutions under exclusive parliamentary control: a) the members of the Court of Auditors; b) the President of the Legislative Council and the Presidents of its Departments; c) the Ombudsman and his deputies; d) the members of the Competition Council; e) the members of the National Securities Commission; f) the Governor, the First Deputy Governor, the Deputy Governors, the members of the Board of Directors and the employees with managerial functions of the Romanian National Bank; g) the Director of the Romanian Intelligence Service, the First Deputy and his deputies; h) the Director of the Foreign Intelligence Service and his deputies; i) the members of the Council of the Insurance Supervisory Commission; j) the members of the National Audio-visual Council; k) the members of the boards of directors and of the steering committees of the Romanian Broadcasting Company and the Romanian Television Company; l) the members of the College of the National Council for the Study of Security Archives; m) the General Manager and the members of the board of

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directors of the National Press Agency ROMPRES (according to article 99 paragraph 1 of the Law no. 161/2003).

For their part, presidential advisors and state advisors within the Presidential Administration are subject to the regime of incompatibilities provided for ministers and secretaries of state, respectively, including the incompatibility of exercising the capacity of natural person trader (article 100 paragraph 1 of the Law no. 161/2003).

For judges and prosecutors, the Law no. 161/2003 maintains the constitutional approach of establishing their incompatibility with any other public or private office, with the exception of teaching positions in higher education, but completes it with an express prohibition for magistrates to carry out commercial activities, directly or through intermediaries (article 101 and article 102 letter c).

In the case of civil servants, the regulatory treatment is integrative. For this category, the Law no. 161/2003 establishes the incompatibility of this capacity with the exercise of any other public office or capacity other than that in which the civil servant was appointed, as well as with offices of public dignity, while stating that these persons may not hold other offices or engage in other activities, whether paid or unpaid. Moreover, even the Administrative Code (article 460) expressly refers to the above-mentioned legal regime, established by the special legislation on certain measures to ensure transparency in the exercise of public office and public functions. Certain incompatibilities are the exclusive object of some special laws. For example, members of the Diplomatic and Consular Corps are, as a rule, career diplomats and have a specific socio-professional status, conferred by their duties and responsibilities for the implementation of Romania's foreign policy, according to the provisions of the Law no. 269/2003 on the Status of the Romanian Diplomatic and Consular Corps. According to this normative act, such a capacity is incompatible with any other public or private function, with the exception of teaching positions in accredited higher education institutions. In particular, members of the Romanian Diplomatic and Consular Corps are expressly prohibited from engaging in commercial activities during their mission abroad, directly, through family members or through intermediaries (article 50 paragraph 1 letter d). Incompatibility with the status of a natural person trader is thus understood, since the prohibited activity is a central component of the object of activity of such a person.

Among the incompatibilities with the status of natural person trader, which cannot be qualified as an incident of integrity within the competence of the National Integrity Agency, we mention those arising from the exercise of liberal professions. Thus, the profession of lawyer is incompatible with the direct exercise of material acts of commerce, i.e. personal acts of commerce exercised with or without authorisation, unless otherwise provided by special laws (article 29 paragraph 1 letter a of the Statute of the Legal Profession). The profession of notary is incompatible with the direct performance of production, commercial or other service activities (article 68 letter e of the Law no. 36/1995 on notaries public and notarial activity). The function of bailiff is incompatible with carrying out commercial activities, directly or through intermediaries (article 42 letter c of the Law no. 188/2000 on bailiffs). The profession of doctor is incompatible with the capacity of employee or collaborator of production or distribution units of pharmaceutical products or sanitary materials (article 383 paragraph 1 letter a of the Law no. 95/2006 on health reform).

The liberal professions are expressly excluded from the scope of GEO no. 44/2008 on the performance of economic activities by authorised natural persons, sole proprietorships and family businesses (article 1 paragraph 2), as a regulatory act



establishing the main legal forms accessible to the natural person trader. The National Integrity Agency has no competence in the field of incompatibilities arising from the exercise of liberal professions, as natural persons or legal forms carrying out these professions are not included in the categories of legal subjects concerned by the activity of this administrative authority. In these cases, according to the special legislation in this field, the identification of the various incompatibilities is the responsibility of professional institutions/bodies which also apply legal sanctions, exclusively or in conjunction with the intervention of the courts, as appropriate.

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