

**Decision of the Constitutional Court of the Republic of Serbia,
Official Gazette no. 67/2013**

Pursuant to Article 167, paragraph 1, item 1 of the Constitution of the Republic of Serbia, the Constitutional Court, composed of: President of the Court Dragisa Slijepcevic, PhD, and judges Olivera Vucic, PhD, Marija Draskic, PhD, Bratislav Djokic, Vesna Ilic Prelic, Goran Ilic, PhD, Agnes Kartag Odri, PhD, Katarina Manojlovic Andric, Milan Markovic, LL.M., Bosa Nenadic, PhD, Milan Stanic, Dragan Stojanovic, PhD, Sabahudin Tahirovic, and Predrag Cetkovic, at a session held on July 4, 2013, passed the following

DECISION

(Official Gazette of RS no. 67/13)

Original text entered into force on July 31, 2013, implemented since July 31, 2013.

1. It was determined that provisions of Article 28, paragraph 9, Article 30, paragraph 6, and Article 3, paragraph 7 of the Law on the Anti-Corruption Agency (*Official Gazette of RS no. 97/08, 53/10 and 66/11 – Constitutional Court Decision*) are not in accordance with the Constitution.
2. The request to cease the execution of specific acts and operations undertaken pursuant to the contested provisions of item 1 of the Law is rejected.

Rationale

Resolution no. IUz-245/2011 of the Constitutional Court of March 20, 2013, upon a submitted request, initiated proceedings for determining the unconstitutionality of provisions of Article 28, paragraph 9, Article 30, paragraph 6, and Article 3, paragraph 7 of the Law on the Anti-Corruption Agency (*Official Gazette of RS no. 97/08, 53/10 and 66/11 – Constitutional Court Resolution*) and the request for the initiation of proceedings to assess the constitutionality of provisions of Article 28, paragraphs 3 and 5, Article 30, paragraph 2, and Article 82, paragraph 2 of the same law, was rejected.

The Constitutional Court passed the abovementioned resolution judging that there are grounds for instituting regulatory control proceedings regarding the contested act, and that the following constitutional issues need to be addressed:

- whether the legislature relegated the regulation of matters which are beyond the scope of bylaw regulation to the ACA director, who was intended to regulate such matters by a general act, considering the fact that Article 6, paragraph 2 of the Constitution establishes that conflict of interests and responsibility for its resolution is to be determined solely by the Constitution and the law;
- whether the prescribed powers of the ACA director to pass general acts from the contested provisions of the Law undermine the principle of separation of powers from Article 4, paragraph 2 of the Constitution, considering the fact that the regulation of conflict of interests is a matter which may only be regulated by the Constitution and the law, and not by subordinate legislation;
- whether the powers of the ACA director to pass general acts exempting certain categories of public officials from the regular procedure for resolving conflict of interests are contrary to the principle of prohibiting discrimination from Article 21,

paragraph 1 and 3 of the Constitution;

- whether the prescribed powers of the ACA director to pass general acts from the contested provisions of the Law exceed the public powers conferred by the state, in the sense of Article 137, paragraph 3 of the Constitution.

After passing the abovementioned resolution, the Constitutional Court submitted it to the National Assembly on April 23, 2013, in order to obtain its response, which was expected within 60 days upon submission. Due to the fact that the National Assembly failed to deliver the response to the Constitutional Court within the set deadline, and did not deliver it afterwards, the Constitutional Court, in accordance with Article 34, paragraph 3 of the Law on the Constitutional Court (*Official Gazette of RS*, no. 109/07, 99/11 and 18/13 – Constitutional Court Decision), continued the proceedings.

Upon the completion of the proceedings, the Constitutional Court determined the following:

The Law on the Anti-Corruption Agency was passed by the National Assembly, at a sitting of the second regular session in 2008, on October 23, 2008, pursuant to Article 6 of the Constitution of the Republic of Serbia, stipulating that no person may hold a state or public office if such office is in conflict with his or her other offices, activities or private interests, as well as that the presence of conflict of interests and responsibility for its resolution is determined by the Constitution and the law. The Law was published in the *Official Gazette of the Republic of Serbia*, no. 97, on October 27, 2008; it came into force on November 4, 2008, and has been implemented since January 1, 2010. Subsequently, the National Assembly passed the Law on Amendments to the Law on the Anti-Corruption Agency on July 28, 2010. It came into force on August 6, 2010. At a session held on July 7, 2011, the Constitutional Court passed Decision no. IUz- 1239/2010, which determined that the provision of Article 29, paragraph 3 of the Law on Amendments to the Law on the Anti-Corruption Agency (*Official Gazette of RS*, no. 53/10) is not in accordance with the Constitution and ratified international treaties. The Decision was published in the *Official Journal of the Republic of Serbia*, no. 66, on September 7, 2011, after which the said provision of the law ceased to have effect.

The contested provisions of the Law, and the provisions directly connected to them, prescribe that public officials who were selected, appointed, or designated to a second public office, and who intend to hold more than one office simultaneously, are required, within three days upon being elected, appointed or designated, to file a request for the approval of the ACA; that public officials shall also submit a positive opinion obtained from the authority that selected, appointed, or designated them to public office along with the request; that public officials who were elected to office directly by the citizens shall submit a positive opinion obtained from the competent working body where they hold public office; that the ACA is required to decide upon a complete and regular request from paragraph 4 of this article within 15 days upon receiving the request; that the ACA shall not give its approval for holding a second public office if holding such an office would be in a conflict of interests with the office already held by the public official, i.e., if the presence of conflict of interests is found, on which it shall pass a justified decision; that by a general act the ACA director may establish other public offices which public officials are allowed to hold without the approval of the ACA from paragraph 5 of this article (Article 28, paragraphs 4, 5 and the contested paragraph 9); that public officials may not undertake other activities or occupations during their term in office that require full-time work or permanent engagement; that notwithstanding paragraph 1 of this article, public officials may undertake scientific research, teaching, cultural, artistic,

humanitarian or sports activities, without obtaining the approval of the ACA, provided that such activities do not undermine the impartial execution of their public office, nor its reputation; that public officials are required to report their income from such activities or occupations to the ACA; that aside from the activities or occupations from paragraph 2 of this article, the ACA may, at the request of a public official, give its approval for undertaking other activities or occupation as well; that public officials shall submit a positive opinion obtained from the authority that selected, appointed, or designated them to public office alongside the request; that civil servants in service are required to submit the approval of their direct superior alongside the request; that the ACA shall decide on properly completed requests within 15 days upon receiving the requests; that the ACA director may by a general act establish activities or occupations which may be undertaken without the approval from paragraph 4 of this article (Article 30, paragraph 1, 2, 4 and the contested paragraph 6); that public officials who are carrying out other activities or occupations at the time of coming into office are required to notify the ACA on this matter within 15 days after coming into office; that the ACA director may prescribe by a general act that the submission of the notification mentioned in paragraph 1 of this article is not required (Article 31, paragraph 1 and the contested paragraph 7).

The Constitution of the Republic of Serbia established that the rule of law is achieved by means of free and direct elections, constitutional guarantees of human and minority rights, separation of powers, an independent judiciary, and authorities' observance of the Constitution and the Law (Article 3, paragraph 2); that the legal system is unique, that the government system shall be based on balance and mutual control (Article 4, paragraphs 1-3); that no person may hold a public office in conflict with their other offices, activities or private interests, that the presence of a conflict of interests and responsibility for its resolution shall be regulated by the Constitution and the law (Article 6); that all are equal before the Constitution and the law, that all direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religious, political or other belief, property status, culture, language, age, mental or physical ability shall be prohibited (Article 21, paragraphs 1 and 3); that the Republic of Serbia shall regulate and provide for the organization, competences and work of republic authorities (Article 97, item 16); and that public powers may also be delegated to a specific organization through which regulatory function in particular areas or affairs is performed (Article 137, paragraph 3).

Aside from the contested provisions of the Law on the Anti-Corruption Agency, what was also significant in the process of deciding on this Constitutional Court dispute were the provisions of this law defining the meaning of certain terms used in the law, the establishment of the ACA's status, its competences, and the activities carried out by its bodies – the ACA Board and Director; these provisions prescribe that, in the sense of this law, the term “conflict of interests” shall mean a situation where an official has a private interest that affects, may affect, or may be perceived to affect the actions of the official in the discharge of his or her public office or official duty, in a manner that compromises public interest (Article 2, sixth indent); that the ACA is an autonomous and independent state authority that is accountable to the National Assembly for the performance of duties from its purview (Article 3, paragraphs 1 and 2); that the ACA institutes proceedings and pronounces measures for violation of this law and rules on conflicts of interest (Article 5, second and third paragraph); that the bodies of the ACA are the Board and the Director (Article 6); that the ACA Board appoints and dismisses the ACA Director, decides on the salary increase of the Director, decides on appeals against decisions of the director pronouncing measures

in accordance with this law, adopts the annual report on ACA work which it submits to the National Assembly, oversees the work and assets of the Director, proposes budget funds for the work of the ACA, enacts the ACA Rules of Procedure, and carries out other activities set forth by this law (Article 7, paragraph 1); and that the Director shall represent the ACA, manage its activities, organize and ensure lawful and efficient execution of the ACA's activities, pass decisions on violations of this law and pronounce measures, issue opinions and instructions for the implementation of this law, draft the budget proposal for the ACA's work, pass general and specific acts, decide on the rights, obligations and responsibilities of the ACA staff, enforce the decisions of the ACA Board, and carry out other activities determined by law.

Hence, the prohibition against conflicts of interest is a constitutional principle establishing that no person may discharge a state or public office in conflict with his or her other office, activity, or private interest. This principle, therefore, implies a ban for the holders of all public offices on simultaneously holding other offices or performing activities the discharge of which, due to those activities' inherent interests, could objectively lead to a situation wherein the public office is discharged in such a manner as to subordinate public interest to the public officials' own or someone else's private interest, i.e., to discharge it in a manner which would compromise the attainment of public interest.

Following from the constitutional principle of prohibiting conflicts of interest from Article 6, paragraph 1 of the Constitution, is the fact that public officials may hold several public offices; however, the basis of the ban is that no public office may be in conflict of interests with other offices, activities, or private interests of the public officials. As long as there is no such conflict, public officials may continue to hold their public offices. The presence of a conflict of interests in the discharge of public offices may be determined in the Republic of Serbia only based on two acts, i.e., the Constitution and the law, in accordance with the provision of Article 6, paragraph 2 of the Constitution.

In accordance with the facts stated above, in order to preserve public interest in the discharge of state and public offices, the Constitution has already defined the incompatibility of specific public offices, such as that National Assembly MPs may not be MPs in the assembly of the autonomous province, nor public officials in state authorities or the judiciary, nor may they discharge other offices, activities or duties defined by law as causing a conflict of interests (Article 102, paragraph 3); that the President of the Republic may not hold other offices or carry out professional activities (Article 115); that members of the Government may not be MPs in the National Assembly, MPs in the assembly of the autonomous province, councilors in local self-government councils, or members of autonomous province executive boards or local self-government executive authorities (Article 126, paragraph 1); that presidents of courts may not be elected as members of the High Judicial Council (Article 153, paragraph 5); that judges of the Constitutional Court may not hold other public or professional offices, or undertake activities other than professorship at the Republic of Serbia faculties of law, in accordance with the law (Article 173, paragraph 1).

Aside from the abovementioned instances – determined directly by the Constitution – of incompatibility of public offices and activities concerning certain categories of public officials, the Constitution leaves it to individual laws to determine whether there is conflict of interests regarding specific categories of public officials; said laws regulate the status, competence, and organization of certain state and other authorities, taking into account all their particularities and different situations which

might lead to the violation of the principle prohibiting conflict of interests in the discharge of activities within said authorities' competences.

However, the law that lays down systemic rules regarding the prevention of conflict of interests in the discharge of public office is the Law on the Anti-Corruption Agency, considering the fact that preventing conflict of interests is one of the most significant anti-corruption aspects in any society. Consequently, the Anti-Corruption Agency has the competence to resolve conflicts of interest, among other things. In the process of resolving conflicts of interest, the ACA is authorized to decide in each particular case, according to the criteria set forth by the Constitution or the law, whether there is a conflict of interests in the simultaneous discharge of public offices or carrying out certain activities or occupations during a term in public office.

The general rule on the ban on holding a second public office is set forth by the provision of Article 28, paragraph 1 of the Law, establishing that public officials may only hold one public office, unless the law or other regulation requires them to hold more than one. An exception to this general rule is set forth by paragraph 2 of the same article of the Law, specifying that public officials may hold a second public office only with the approval of the ACA, which shall decide following the procedure prescribed by the law whether the holding of the second public office is in a conflict of interests with the public office already held by the public official in question. The provisions of Article 28, paragraphs 4-8 of this law determine the procedure for the resolution of conflict of interests regarding cases of public officials who submit a request for the ACA's approval to hold a second public office, beside the one already held. However, the contested provision of Article 28 of the Law, referring to this procedure, grants the power to the ACA Director to determine by way of a general act other public offices that may be held by certain categories of public officials without the approval of the ACA. The same power is granted to the ACA Director regarding the procedure of resolving conflicts of interest in holding a public office alongside another activity or occupation. Namely, the contested provision of Article 30, paragraph 6 of the Law stipulates that when it comes to certain categories of public officials, the ACA Director may determine the activities or occupations which may be undertaken without the ACA's approval by passing a general act, whereas a provision of Article 31, paragraph 7 of the Law stipulates that when it comes to certain categories of public officials or certain types of activities or occupations, the ACA Director may prescribe by way of a general act that there is no requirement to submit a notification to the ACA on the discharge of the other activity or occupation at the time of coming into public office.

Therefore, the ACA Director has the power to autonomously determine the public offices, activities, or occupations which may be discharged by certain categories of public officials without the ACA's approval, simultaneously with the public office to which they were selected, appointed, or designated. This further implies that subordinate legislation passed by the ACA Director shall regulate in which cases there is no conflict of interests for certain categories of public officials who hold several public offices, or discharge certain activities or occupations during their term in office, which means that in order to discharge them they are not required to ask for the ACA's approval, even though the obligation to do so is set for all other public officials (except for those who were directly elected by the citizens to public office, in accordance with Article 28, paragraph 3 of the Law); thus, they may discharge them based on the acts passed by the ACA Director. In view of these facts, the Constitutional Court took the position that the act passed by the ACA Director represents the legal basis for holding more than one public office, or performing other activities or occupation during the term in public office with regard to certain

categories of public officials and their exemption from the procedure for resolving conflict of interests conducted by the ACA.

With regard to the general act passed by the ACA Director from Article 31, paragraph 7 of the Law, at first sight it would seem that this is an act based on which certain categories of public officials are only exempted from one step of the procedure for resolving conflict of interests – namely, that they are not required to notify the ACA on the discharge of another activity or occupation at the time of coming into public office. However, this notification is important due to the fact that it represents the grounds for instituting proceedings before the ACA in order to determine whether the discharge of such activities or occupations undermines impartiality in the discharge of public office, i.e., whether their concurrent discharge represents a conflict of interests. At the same time, the act passed by the ACA Director establishes this exemption on two grounds. The first is establishing that certain categories of public officials shall be exempted from this requirement on the basis of being selected, appointed, or designated to a specific public office; the second is determining specific activities and occupations which, if discharged by public officials, preclude the obligation to notify the ACA on the matter. This results in the fact that the act passed by the ACA Director may exempt a certain number of public officials from the procedure for resolving conflicts of interest, even though they carry out other activities or occupations at the time of coming into office.

Accordingly, the legislature authorized the ACA Director to pass an act autonomously determining the cases in which there is no conflict of interests in the discharge of a second public office or another activity or occupation; by so doing, according to the opinion of the Constitutional Court, and contrary to Article 6, paragraph 2 of the Constitution, it was allowed to regulate matters in the area of conflict of interests by subordinate legislation. Namely, the aforementioned provision of the Constitution set forth that the presence of a conflict of interests and responsibility for its resolution shall be regulated exclusively by the Constitution and the law, which means that these issues may not be regulated by any other general legal act other than those referred to previously. All the rules on other public offices which may be discharged by public officials, i.e., on activities and occupations which may be carried out during their term in public office, are rules relating to conflict of interests, whether in the positive or negative sense, and as such may not be left to regulation by subordinate legislation.

Arising directly from the constitutional obligation to regulate conflicts of interest only by the Constitution and the law, is another violation of the Constitution, relating to the principle of separation of powers from Article 4, paragraph 2 of the Constitution. Namely, due to the fact that, in the opinion of the Constitutional Court referred to previously, the matters which were left to the ACA Director to regulate, are matters which may only be regulated by the Constitution and the law, and fall within the domain of legislative power, it is unconstitutional, according to the Constitutional Court's assessment, to have this matter regulated by the ACA Director, that is to say, the ACA Director cannot be authorized even by the contested Law to regulate a matter which falls within the exclusive competences of the National Assembly, as the constitutional and legislative authority of the Republic of Serbia.

With regard to the prohibition of discrimination from Article 21 of the Constitution, the Constitutional Court first of all concludes that the acts passed by the ACA Director refer only to certain categories of public officials. Namely, based on the contested powers, the ACA Director autonomously determines through his or her acts which categories of public officials shall be allowed to discharge particular public

offices, activities or occupations, in addition to the public office they already hold, without the approval of the ACA. Thus the act passed by the ACA Director, in effect, exempts some of the public officials from the ACA's procedure for resolving conflict of interests. In accordance with the aforesaid facts, the Law sets forth different manners of resolving conflicts of interest, depending on the category to which a public official pertains, and on the second public office, activity or occupation in question. Namely, as regards the categories of public officials referred to by the general legal act passed by the ACA Director, the act itself represents a legal basis for the discharge of another public office, activity or occupation, without submitting a request or initiating the procedure for resolving conflict of interests before the ACA. With regard to the rest of public officials not included by the ACA Director's acts referred to previously, regular procedure for resolving conflict of interests shall be carried out as prescribed by the Law on the Anti-Corruption Agency. According to the opinion of the Constitutional Court, this draws a difference between public officials regarding the resolution of conflict of interests, and is contrary to the constitutionally guaranteed right to equality of all before the Constitution and the law and the general prohibition of discrimination on all accounts, set forth in Article 21, paragraph 1 and 3 of the Constitution.

Based on everything mentioned above, the Constitutional Court has concluded that the contested provisions of Article 28, paragraph 9, Article 30, paragraph 6, and Article 31, paragraph 7 of the Law, granting powers to the ACA Director to autonomously pass certain general legal acts, are not in accordance with the provisions of Article 4, paragraph 2, Article 6, paragraph 2, and Article 21, paragraphs 1 and 3 of the Constitution, due to the fact that by adopting the contested provisions the legislature made it possible for a strictly constitutional and legal matter relating to the presence and resolution of conflict of interests to be regulated by subordinate legislation and by an authority that has no competence for such issues.

Bearing in mind that the Constitutional Court passed a final decision in this constitutional case, the request was rejected to cease the enforcement of individual acts and actions the undertaking of which was based on the contested provisions of the Law, in accordance with Article 56, paragraph 3 of the Law on the Constitutional Court.

In view of the facts referred to above, and pursuant to the provisions of Article 42a, paragraph 1, item 2, Article 45, item 1, and Article 46, item 3, of the Law on the Constitutional Court, and Article 84 of the Rules of Procedure of the Constitutional Court (*Official Gazette of RS*, no. 24/08, 27/08 and 76/11), the Constitutional Court has passed the Decision as follows below.

Based on Article 168, paragraph 3 of the Constitution, the provisions of Article 28, paragraph 9, Article 30, paragraph 6, and Article 31, paragraph 7 of the Law on the Anti-Corruption Agency, cited in item 1 of the Decision, shall cease to have effect upon the date of publishing the Constitutional Court's Decision in the *Official Gazette of the Republic of Serbia*.

No. IUz-245/2011

Dragisa B. Slijepcevic, PhD, sgd.