

**Case C-230/22****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

29 March 2022

**Referring court:**

Judecătoria Lehliu-Gară (Romania)

**Date of the decision to refer:**

6 December 2021

**Accused persons:**

KN

LY

OC

DW

**Subject matter of the main proceedings**

Criminal prosecution of the accused persons KN, LY, OC and DW, who are charged with a number of offences.

**Subject matter and legal basis of the request for a preliminary ruling**

Pursuant to Article 267 TFEU, an interpretation is sought of Article 2 TEU, in conjunction with Articles 48(2) and 49 of the Charter of Fundamental Rights of the European Union ('the Charter').

**Question referred for a preliminary ruling**

Does Article 2 of the Treaty on European Union (concerning respect for the principles of the rule of law and respect for human rights), in conjunction with Article 48(2) of the Charter of Fundamental Rights of the European Union,

concerning the rights of the defence, and Article 49 of the Charter of Fundamental Rights of the European Union, concerning the principle of the legality of criminal offences and penalties, preclude national legislation which makes it a criminal offence to perform an act in breach of any law whatsoever, without expressly specifying the laws or legal provisions the breach of which gives rise to criminal liability?

### **Provisions of EU law relied on**

Article 2 TEU

Article 48(2) and Article 49 of the Charter

### **Provisions of national law relied on**

Article 248 of the *vechiul Cod penal* (former Romanian Criminal Code, ‘the VCP’), which specified the criminal offence of ‘abuse of office against the public interest’ and pursuant to which a public official who, in the exercise of his or her duties, intentionally omits to perform an act or intentionally performs an act incorrectly and thereby occasions significant disruption to the proper functioning of, or material loss to, a State body or entity or other institution as referred to in Article 145 is liable to punishment by a term of imprisonment of between six months and five years.

*Legea nr. 215/2001 privind administrația publică locală* (Law No 215/2001 on local government: Article 63(4)(a), pursuant to which a mayor acts as Chief Authorising Officer (*ordonator principal de credite*).

*Legea nr. 500/2002 privind finanțele publice* (Law No 500/2002 on public finances)

Article 22 – Responsibilities of authorising officers

1. Authorising officers shall be under an obligation to commit expenditure within the limits of commitment appropriations and to use financial appropriations only within the limits of the approved provisions and purposes, for expenditure relating strictly to the activities of the public entities concerned and in accordance with the law.

2. Authorising officers shall be responsible by law for:

(a) the commitment, validation and authorisation of expenditure within the limits of commitment appropriations and financial appropriations allocated and approved in accordance with Article 21; ...

(c) the commitment and use of expenditure within the limits of commitment appropriations and financial appropriations in accordance with sound financial management; ...

(f) the organisation of the system for the supervision of the public procurement programme and the public investment works programme; ...’.

#### Article 24 – Internal preventive financial supervision

‘1. The commitment, validation and authorisation of expenditure from public funds shall be approved by the authorising officer and the relevant payments shall be made by the head of the financial accounting department or the person responsible for making such payments.

2. The commitment and authorisation of expenditure shall take place only with the prior approval of internal preventive financial supervision and delegated preventive financial supervision, depending on the case, in accordance with the law.’

#### Article 44 – Supervision of investment projects by Chief Authorising Officers

‘1. Throughout the duration of budget implementation, Chief Authorising Officers shall supervise the implementation of the investment process, in accordance with the provisions of the present Law, and shall draw up quarterly monitoring reports ...

2. If, in the course of the investment process, problems arise in the attainment of an objective, the Chief Authorising Officer shall mention in the monitoring report the cause thereof and the measures required to remedy the problem. ...

6. Chief Authorising Officers shall be responsible for the attainment of the ... investment objectives included in public investment programmes.’

*Legea nr. 273/2006 privind finanțele publice locale* (Law No 273/2006 on local public finances)

#### ‘Article 54 – Budget implementation

1. In the process of budget implementation, budgetary expenditure shall pass through the following stages: commitment, validation, authorisation and payment.

...

3. The specific steps of commitment, validation and authorisation of expenditure shall be the responsibility of authorising officers and shall be carried out on the basis of the opinions of the specialised departments of public entities.

...

5. Payment instruments shall be accompanied by supporting documents. Such documents shall certify the accuracy of the sums to be paid, the receipt of the goods, the performance of the services and other such relevant matters, in accordance with the legal commitments entered into. Payment instruments shall be signed by the accounting officer and by the head of the financial accounting department.

6. Payments shall be made, within the limits of the approved financial appropriations, only on the basis of the supporting documents, drawn up in accordance with the law, and only after they have been committed, validated and authorised.

...

8. For certain categories of expenditure, advance payments of up to 30% may be made, subject to the applicable legal provisions.

9. Sums representing advance payments, made in accordance with paragraph 8, but not justified by the delivery of goods or the carrying out of works or the provision of services by the end of the year in accordance with the terms of the contract shall be recovered by the public entities which made the advance payment and shall be paid back into the budget from which they were drawn. ...

10. Where an advance payment has been made in respect of goods, works or services which are then not delivered, carried out or provided, the recovery of the sums advanced by the public entity shall include additional charges for arrears at the rate applicable to budgetary revenue, calculated for the period between the grant of the advance payment and its recovery.'

*Ordinul ministrului finanțelor publice nr. 1 792 din 24 decembrie 2002 pentru aprobarea Normelor metodologice privind angajarea, lichidarea, ordonanțarea și plata cheltuielilor instituțiilor publice, precum și organizarea, evidența și raportarea angajamentelor bugetare și legale* (Order No 1 792 of 24 December 2002 of the Minister for Public Finances approving the methodological rules governing the commitment, validation, authorisation and payment of expenditure by public entities and for the organisation, documentation and reporting of budgetary and legal commitments).

Point 2 of the methodological rules reads as follows:

‘2. Validation of expenditure

This is the stage of the budget implementation process in which the existence of the commitment is verified, the sums due are determined or verified, and the conditions of enforceability of the legal commitment are verified on the basis of the supporting documents which attest to the transaction concerned.

The existence of the payment obligation shall be verified by checking the supporting documents which show the creditor's claim and the reality of the "service carried out" (the goods delivered, the works carried out or the services provided or, where appropriate, the existence of a document justifying the payment: an enforceable title, a loan agreement, a grant agreement, etc.) ...

The determination or verification of the sums due to the creditor shall be carried out by the individual mandated by the authorising officer, on the basis of the information contained in the invoice and the documents drawn up by the acceptance committee established in accordance with the law ...

Documents which attest to the goods delivered, the works carried out or the services provided, or which evidence a definite payment obligation, shall be endorsed "passed for payment" by the authorising officer or the person mandated to do so, in confirmation of the following:

- the acceptance of the goods supplied, specifying the date and place of acceptance;
- the works have been carried out and the services provided;
- the goods supplied have been recorded in the management accounts and financial accounts, specifying the management and accounting entry note; ...

The signing of the invoice and the apposition of the endorsement "passed for payment" thereon certifies that the service has been carried out by the supplier correctly and that all of the items included in the invoice have been verified. ...

The individual mandated to validate the expenditure shall personally check the supporting documents and shall, under his or her own responsibility, confirm that that check has been carried out.'

*Hotărârea Guvernului nr. 264/2003 privind stabilirea acțiunilor și categoriilor de cheltuieli, criteriilor, procedurilor și limitelor pentru efectuarea de plăți în avans din fonduri publice, republicată, cu modificările și completările ulterioare* (Government Decision No 264/2003 establishing expenditure actions and expenditure categories and the criteria, procedures and limits applicable to the making of advance payments from public funds, republished, as subsequently amended and supplemented)

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 In an official report of 9 May 2013, the Curtea de Conturi a României – Camera de Conturi Călărași (Court of Auditors, Romania – Călărași Section) found, with regard to capital expenditure incurred by the Unitatea Administrativ Teritorială a Comunei Sărulești (Territorial Administrative Unit of the Municipality of Sărulești), that, in the period from 2009 to 2012, the municipal council of Sărulești

had approved, on the basis of the corresponding documentation, expenditure for works that had not in fact been carried out. Those works related to three investment objectives included in the annual programme of public investments for 2009, namely ‘Water supply in the village of Sărulești in the municipality of Sărulești’ (investment objective no 1), ‘Extension of the water supply in the village of Sărulești-Gară in the municipality of Sărulești’ (investment objective no 2) and ‘Construction of a municipal stadium’ (investment objective no 3). The estimated value of the transactions found in the report to be irregular, that is to say, the payments made for works not carried out, was 635 267 Romanian lei (RON).

- 2 On 17 March 2014 the police authorities were notified of the commission of criminal offences by the Territorial Administrative Unit of the Municipality of Sărulești as a result of which RON 635 000 had been paid from public funds for investments that had not been carried out.
- 3 The criminal proceedings in question concluded with the accused persons KN, LY, OC and DW being committed for trial before the Judecătoria Lehliu-Gară (Court of First Instance, Lehliu-Gară), which is the referring court.
- 4 KN is being prosecuted, while under judicial supervision, for the offences of ‘abuse of office by a public official by obtaining an undue benefit for himself or for another’, provided for by Article 13<sup>2</sup> of Law No 78/2000, republished, in conjunction with Article 248 of the VCP, ‘complicity in fraud’, provided for by Article 26 of the VCP, in conjunction with Article 215(1), (2) and (3) of the VCP, ‘forgery of documents under private seal’, provided for by Article 290(1) of the VCP, and ‘*fals intelectual*’ (intentionally false statement by a public official in a public document), provided for by Article 289(1) of the VCP.
- 5 In the document instituting the proceedings, it was asserted, in substance, that, between 2009 and 2012, KN had, in his capacity as mayor of the Municipality of Sărulești and in the exercise of his duties, acted improperly in making payments from public funds. On the basis of progress reports and statements concerning the purchase of materials falsely drawn up by the construction company SC VLAD MAGIC SRL through its legal representative OC and confirmed by the latter, KN had paid the builder for works that had not been carried out and for materials that had not in fact been purchased.
- 6 Specifically, in the light of the applicable legal provisions, it was stated that the accused person KN had not performed his official duties correctly, in that: (i) he had not verified the existence of the payment obligation by checking the supporting documents which must show the creditor’s claim and the reality of the service carried out (the goods delivered, the works carried out); (ii) he had not verified the sums due to the creditor on the basis of documents drawn up by an acceptance committee, the information included in the invoice not in itself being a sufficient basis for payment of the sums in question; (iii) he had not requested from the builder any guarantee issued in accordance with the law by a credit

institution or an insurance company in respect of advance payments; (iv) he had extended, by means of numerous addenda, the works contracts relating to the three investment objectives, without there being any documents to show that circumstances had arisen that were detrimental to their legitimate commercial interests and were unforeseeable at the time when the works contracts were concluded; (v) he had not inspected and appraised within the period stipulated in the contract works which were no longer visible; (vi) he had not terminated the contract and had not claimed compensation for loss and damage on discovering that the builder had culpably failed to fulfil its obligations.

- 7 OC is being prosecuted, while under judicial supervision, for the offences of 'fraud', provided for by Article 215(1), (2) and (3) of the VCP, 'forgery of documents under private seal', provided for by Article 290(1) of the VCP, 'incitement to abuse of office by a public official by obtaining an undue benefit for himself or for another', provided for by Article 25 of the VCP, in conjunction with Article 13<sup>2</sup> of Law No 78/2000, republished.
- 8 In the document instituting the proceedings, it was asserted, in substance, that, between 2009 and 2012, the accused person OC had, in his capacity as legal representative of the construction company SC Vlad Magic SRL, caused the accused person KN to perform his duties incorrectly in connection with the commitment, validation and authorisation of expenditure from public funds, and had caused KN to validate, without any on-site inspection or supporting documents, progress reports and statements concerning the purchase of materials which OC had falsely drawn up and which had been endorsed by the site supervisors LY and DW (the latter having assumed that role without any entitlement to do so) as proof of the completion of works and the purchase of materials which had not in fact been completed or purchased, and had thereby secured the payment to SC Vlad Magic SRL of the value of those works and materials.
- 9 LY is being prosecuted for the offences of 'complicity in fraud', provided for by Article 26 of the VCP, in conjunction with Article 215(1), (2) and (3) of the VCP, 'forgery of documents under private seal', provided for by Article 290(1) of the VCP, and 'complicity in abuse of office by a public official by obtaining an undue benefit for himself or for another', provided for by Article 26 of the VCP, in conjunction with Article 13<sup>2</sup> of Law No 78/2000, republished.
- 10 In the document instituting the proceedings, it was asserted, in substance, that, between 2009 and 2012, LY had, in his capacity as site supervisor for the objectives 'Water supply in the village of Sărulești' and 'Extension of the water supply in Sărulești-Gară', helped the accused person OC, the legal representative of SC VLAD MAGIC SRL, to demonstrate the completion of works which had not in fact been carried out, by endorsing, without any on-site inspection, the progress reports falsely drawn up by OC.

- 11 DW is being prosecuted for the offences of ‘fraud’, provided for by Article 215(1), (2) and (3) of the VCP, ‘forgery of documents under private seal’, provided for by Article 290(1) of the VCP and ‘complicity in abuse of office by a public official by obtaining an undue benefit for himself or for another’, provided for by Article 26 of the VCP, in conjunction with Article 13<sup>2</sup> of Law No 78/2000, republished.
- 12 In the document instituting the proceedings, it was asserted, in substance, that, between November and December 2011, DW had, in his capacity as site supervisor (a role which he had assumed without entitlement) for the objective ‘Construction of a municipal stadium’, endorsed, without any on-site inspection, statements concerning the purchase of materials that had been falsely drawn up by the accused person OC for the purpose of misleading the Territorial Administrative Unit of the Municipality of Sărulești, the injured party.

### **The essential arguments of the parties in the main proceedings**

- 13 KN has requested that the case be referred to the Court of Justice for a preliminary ruling.

### **Succinct presentation of the grounds for the request for a preliminary ruling**

- 14 In the grounds for its request for a preliminary ruling, the referring court sets out KN’s arguments in support of his request that the case be referred to the Court of Justice.
- 15 KN, who relies in this regard on Article 2 TEU and Articles 48 and 49 of the Charter, as well as on the judgment of the Court of Justice of 9 March 1978, *Amministrazione delle finanze dello Stato v Simmenthal* (106/77, EU:C:1978:49), maintains that it is not permissible for the scope of a criminal offence such as abuse of office to extend to acts of a general nature which are not set out in the content of the provision establishing the offence, since, as a consequence of the principle that offences and penalties must be defined by law, criminal law cannot be interpreted to the detriment of the accused person.
- 16 KN refers to the case-law of the Court of Justice in which it has been held that an accused person has the right to be informed, in very clear terms, of the acts and omissions which may render him or her criminally liable, that, when an action is regarded as a criminal offence, the prosecuting authority and the courts may clarify what elements constitute the crime, but may not alter those elements to the accused person’s disadvantage, and that the way in which they will define those constituent elements of the criminal offence must be foreseeable to any person.
- 17 According to the same case-law, the legislature is under an obligation to demonstrate, in the act of legislating, the observance of stricter requirements in order to comply with the principle that laws must be clear and predictable, the

strict interpretation of criminal law by prosecuting authorities and courts being a direct corollary of the principle of the legality of the criminal law, and, in this area, the legislature alone is in a position to regulate the conduct in question in such a way that the offence is defined clearly and not identified by means of a broad interpretation by those applying criminal law, which could result in abusive interpretations.

- 18 The Court of Justice has also held that the principle that a provision of criminal law may not be interpreted broadly to the detriment of the accused person, which is a corollary of the principle that offences and penalties must be defined by law and of the principle of legal certainty in general, precludes the initiation of criminal proceedings with regard to conduct that is not defined clearly by law as being a criminal offence.
- 19 Referring to Article 248 of the VCP, KN emphasises that the words ‘performs ... incorrectly’ mean, as the Curtea Constituțională a României (Constitutional Court, Romania) held in Decision No 405/2016, ‘performs in breach of the law’. However, in the light of the case-law of the Court of Justice just mentioned, the words ‘performs in breach of the law’, which is to say, in breach of any law, do not expressly distinguish the acts, action and omissions which may give rise to criminal liability.
- 20 Those words would, in practice, create a general obligation to comply with an unspecified number of laws, or, more precisely, with all laws, with the consequence that criminal penalties would be imposed without the incrimination of specific acts. The Constitutional Court of Romania also held, in Decision No 405/2016, that the use of such a phrase is the result of a deficient legislative technique, lacking in clarity and predictability, and consequently infringes the principle of legality and proportionality which governs criminal law.
- 21 In so far as Article 2 TEU and Articles 48 and 49 of the Charter are concerned, the provisions of Article 248 of the VCP are formulated in broad, vague terms. That increases unpredictability and opens the way to arbitrary or haphazard interpretation and application and, according to the judgment of the European Court of Human Rights in *Coëme and Others v Belgium*, infringes Article 7(1) of the European Convention on Human Rights.
- 22 In conclusion, the provisions of national law relating to the offence of abuse of office fail to specify the facts which give rise to criminal liability and, moreover, establish the same penalty regardless of the nature or gravity of the facts.