

Case C-40/21**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:**

26 January 2021

Referring court:

Curtea de Apel Timișoara (Romania)

Date of the decision to refer:

12 November 2020

Applicant:

T.A.C.

Defendant:

Agenția Națională de Integritate

Subject matter of the main proceedings

Administrative action by which the applicant seeks the judicial annulment of an assessment report in which it was found that he had not complied with the legal regime relating to conflicts of interests in administrative matters.

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

In accordance with Article 267 TFEU, interpretation is sought of Articles 15(1), 47 and 49 of the Charter of Fundamental Rights of the European Union.

Questions referred for a preliminary ruling

1. Is the principle of the proportionality of penalties, enshrined in Article 49 of the Charter of Fundamental Rights of the European Union, to be interpreted as also applying to facts other than those which are formally defined as criminal offences under national law, but which may be regarded as ‘criminal charges’ within the meaning of Article 6 of the European Convention on Human Rights, in

the light of the criteria developed by the case-law of the European Court of Human Rights, in particular the criterion of the severity of the penalty, as in the case in the main proceedings in so far as concerns the appraisal of conflicts of interests which may result in the application of an additional penalty consisting in a prohibition on holding elective public office for a period of three years?

2. In the event that the first question is answered in the affirmative, is the principle of the proportionality of penalties, enshrined in Article 49 of the Charter of Fundamental Rights of the European Union, to be interpreted as precluding a provision of national implementing law pursuant to which, in the case where a person holding an elective public office is found to have acted under a conflict of interests, an additional penalty consisting in a prohibition on holding elective public office for a period of three years applies automatically, by operation of law, without there being any possibility of imposing a penalty that is proportionate to the infringement committed?

3. Are the right to engage in work, guaranteed by Article 15(1) of the Charter of Fundamental Rights of the European Union, and the right to an effective remedy and to a fair trial, guaranteed by Article 47 of the Charter, to be interpreted as precluding a provision of national implementing law pursuant to which, in the case where a person holding an elective public office is found to have acted under a conflict of interests, an additional penalty consisting in a prohibition on holding elective public office for a period of three years applies automatically, by operation of law, without there being any possibility of imposing a penalty that is proportionate to the infringement committed?

Provisions of EU law cited

Charter of Fundamental Rights of the European Union ('the Charter'): Articles 15(1), 47, 49, 51 and 52(3);

Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption ('the MCV Decision').

Provisions of national law cited

Legea nr. 176/2010 privind integritatea în exercitarea funcțiilor și demnităților publice, pentru modificarea și completarea Legii nr. 144/2007 privind înființarea, organizarea și funcționarea Agenției Naționale de Integritate, precum și pentru modificarea și completarea altor acte normative (Law No 176/2010 on integrity in the performance of public duties and the holding of public office and amending Law No 144/2007 on the establishment, organisation and operation of the Agenția Națională de Integritate (National Integrity Agency) and amending certain other acts ('Law No 176/2010'). Article 25 of that law provides as follows:

‘1. In the case where an individual has issued an administrative act, concluded a legal act, adopted a decision or participated in the adoption of a decision in breach of the legal obligations relating to conflicts of interests or to situations entailing incompatibility, his action shall constitute a disciplinary offence and shall be punished in accordance with the rules which apply to his office, function or relevant activities, in so far as the provisions of the present law provide no derogation therefrom and where the action does not constitute a criminal offence.

2. An individual who has been relieved of his duties or dismissed from office in accordance with paragraph 1, or in respect of whom a conflict of interests has been established or a situation entailing incompatibility, shall no longer be entitled to perform the public duties or hold the public office to which the provisions of this law apply, with the exception of electoral duties, for a period of three years from the date on which he is relieved of his duties or dismissed from the public office in question or from the date on which his mandate automatically terminates. In the case where the individual has performed electoral duties, he shall no longer perform the same duties for a period of three years from the date of termination of his mandate. In the case where the individual no longer performs public duties or holds public office at the time when the situation entailing incompatibility or conflict of interests is established, the three-year period of prohibition shall commence, in accordance with the law, on the date on which the assessment report becomes final or on the date on which a judicial decision confirming the conflict of interests or the situation entailing incompatibility becomes final and irrevocable.’

Legea nr. 161/2003 privind unele măsuri pentru asigurarea transparenței în exercitarea demnităților publice, a funcțiilor publice și în mediul de afaceri, prevenirea și sancționarea corupției (Law No 161/2003 adopting certain measures to ensure transparency in the performance of public duties and public functions and in the sphere of business and the prevention and punishment of corruption).

Decizia nr. 418/2014 (Decision No 418/2014) of the Curtea Constituțională (Constitutional Court), according to which the expression ‘*aceeași funcție*’ (‘the same duties’), appearing in Article 25(2) of Law No 176/2010 covers all elective duties, including those of the office of mayor.

Decizia nr. 449/2015 (Decision No 449/2015) of the Curtea Constituțională.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The defendant (the Agenția Națională de Integritate (National Integrity Agency)), is an administrative authority responsible for the assessment of conflicts of interests. The applicant was, at the relevant time, mayor of the city of MN.
- 2 In an assessment report dated 25 November 2019, the defendant found that the applicant had failed to comply with the legal regime governing conflicts of interests in administrative affairs, in that, during his term of office as mayor, he

had concluded a ‘loan for use’ agreement with Asociația T.M.N. (T.M.N. Association), of which the applicant’s wife was a founding member and vice-chairperson. Under that agreement, the association was granted the right to use, free of charge, certain premises belonging to the city of MN for a period of five years, for the purposes of cultural activities.

- 3 On 19 December 2019, the applicant brought an administrative action seeking the annulment of that report. In support of his application, the applicant argues, in substance, that the decision to conclude the ‘loan for use’ agreement had been adopted by the MN city council and that he had therefore been obliged to give effect to that decision. In addition, he contends, the decision in question procured no material advantage for his wife. Lastly, the applicant submits that he was not invited to submit observations and that his rights of defence have therefore been infringed.
- 4 The applicant has also asked the referring court, hearing the dispute, [the Curtea de Apel Timișoara (Court of Appeal, Timisoara) to refer various questions to the Court of Justice for a preliminary ruling. In substance, the applicant takes the view that European Union law precludes the national legislation pursuant to which the ancillary penalty of being barred from holding elective public office for a period of three years (‘the contested penalty’) was imposed on him.

The essential arguments of the parties in the main proceedings

- 5 **The applicant** claims that, if his action is dismissed, he will be exposed, by virtue of Article 25(2) of Law No 176/2010, to grave penalties, namely the termination of his mandate and a prohibition on his holding any elective public office for a period of three years. Law No 176/2010, he contends, is a law implementing the MCV decision and, for that reason, pursuant to Article 51 of the Charter, the guarantees provided for in the Charter apply equally to Law No 176/2010.
- 6 In that context, the applicant raises the question of whether the contested penalty, which applies automatically by operation of law and cannot be applied in proportion to the infringement found, is consistent with a series of rights and principles guaranteed by the Charter.
- 7 In the first place, the applicant maintains that the administrative assessment in conflicts of interests matters provided for by the national legislation corresponds to the concept of ‘criminal charge’ within the meaning of Article 6 of the European Convention on Human Rights, in the light of the criteria developed by the European Court of Human Rights, in particular the criterion of the severity of the penalty. In accordance with Article 52(3) of the Charter, that assessment should be characterised in the same way in the context of EU law. Consequently, even though the action in respect of which he has been penalised is not regarded as a criminal offence, but rather as a disciplinary offence, Article 49 of the Charter, he argues, remains applicable and precludes the national legislation, for reasons pertaining to the proportionality of the penalty in relation to the offence.

- 8 In the second place, the applicant considers that the legislation at issue infringes Article 15(1) of the Charter. Indeed, Article 25(2) of Law No 176/2010 lays down a prohibition on holding elective office for a period of three years from the date of termination of mandate or the date on which the administrative authority's assessment report becomes final. That prohibition, which is not proportionate to the act committed, adversely affects the applicant's right to engage in work.
- 9 In the third place, the applicant takes the view that the fact that the contested penalty cannot be challenged in judicial proceedings and that it comes into force automatically by operation of law infringes his right to an effective remedy, guaranteed by Article 47 of the Charter.
- 10 **The defendant** argues, with reference to the principle of the proportionality of criminal offences and penalties, on which the applicant relies, that the analogy which the latter draws between the rules governing '*incidente de integritate*' (integrity incidents) and those of criminal law is not a reasonable one, since each set of rules has a specific, and therefore different, scope.
- 11 In this connection, the defendant argues that, in Decision No 449/2015, the Curtea Constituțională (Constitutional Court) held that the contested penalty is a penalty of a different legal nature from that of ancillary penalties under criminal law and consists in a temporary ban on the exercise of certain rights, in this case those being electoral rights. In addition, according to the same decision, the objective of Law No 176/2010 is to ensure integrity and transparency in the performance of public duties and the holding of public office and to prevent institutional corruption, that being a sphere which cannot be brought, by analogy, within the specific legal regime of criminal law and criminal-law penalties.
- 12 As regards the alleged infringement of Article 15(1) of the Charter, the defendant relies on Article 52 thereof and submits, in substance, that the limitation of certain fundamental rights is natural if there is compliance with prevailing laws adopted in accordance with the Constitution and with EU law. A legal provision which provides for a penalty is not contrary to EU law or to any other legal provisions establishing fundamental rights of citizens if it entails a restriction of the rights of citizens, provided that a legal penalty is applied.
- 13 The defendant takes the view that the application of a national rule intended to impose a negative obligation on individuals who hold positions of public authority – an obligation that arises precisely because of the status of the individuals in question – cannot constitute an infringement of EU law as long as it occurs in a context of imperative observance of the precepts of the rule of law and of the principles of integrity, transparency and the supremacy of the public interest. The rules on the basis of which the defendant performs its duties are designed to ensure integrity in the performance of public duties and the holding of public office and to prevent institutional corruption, by way of the exercise of authority in the assessment, in particular, of potential conflicts of interests

involving individuals identified by the law during the performance of public duties and the holding of public office.

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

- 14 The referring court observes that Law No 176/2010 is a law implementing the MCV Decision, which established certain benchmarks which Romania is required to fulfil. Benchmark 2 in the annex to that decision concerns the establishment of an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interests, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken. Given that the objective of the action before the referring court is the annulment of a report drawn up by the agency established on the basis of that second benchmark, the present case concerns the application of EU law.
- 15 The referring court states that national law provides that, in the case where a conflict of interests is established in the context of elective duties, as in the present case, the mandate of the person concerned terminates automatically under national law. At the same time, a penalty, such as the contested penalty, applies as an ancillary penalty. It applies automatically, by operation of law, without any analysis of the appropriateness of its imposition and without any variation by reference to the gravity of the infringement found.
- 16 As regards **the first question referred for a preliminary ruling**, the national court points out that the facts in respect of which the applicant was penalised may, in accordance with Article 25(1) of Law No 176/2010, constitute either a disciplinary offence or a criminal offence. The offence of conflict of interests is punishable under national law by a term of imprisonment of between one and five years and a ban on exercising the right to hold public office. Thus, it may be seen that both the legislation on administrative conflicts of interests and criminal law on the offence of conflict of interests govern the penalty of a ban on performing public duties or on holding public office.
- 17 In that context, the question arises as to whether the provisions of Article 49 of the Charter apply also to proceedings other than criminal proceedings (concerning, for example, the disciplinary liability of civil servants, which, under Romanian law, is a public-law matter) which could nevertheless entail criminal liability. On this point, the referring court states that the facts of the present case can be regarded as a ‘criminal charge’ within the meaning of Article 6 of the European Convention on Human Rights, in the light of the criteria developed by the European Court of Human Rights, in particular the criterion of the gravity of the penalty.
- 18 As regards **the second question**, the referring court notes that, in the case where a person who holds an elective public office is found to have acted under a conflict of interests, the contested penalty applies automatically, by operation of law, without there being any possibility of imposing a penalty that is proportionate to the infringement committed. Not even a court analysing a report issued by the

defendant has competence to examine the principal penalty of the termination of mandate or the contested penalty or to apply, if appropriate, a penalty which is proportionate to the infringement in question.

- 19 In that context, in the event that the first question is answered in the affirmative, the question arises as to whether the principle of the proportionality of penalties, enshrined in Article 49(3) of the Charter, precludes national legislation of that kind.
- 20 As regards **the third question**, the referring court states that, under national law, the contested penalty applies automatically, by operation of law, and the court may not examine either the need for the penalty to be applied or its extent, in the light of the specific circumstances of the case. The court can merely verify whether the facts alleged constitute a conflict of interests.
- 21 Consequently, since the individual concerned by the assessment report may dispute before the national court only the existence of the facts alleged, and not the penalty applied, the question arises as to whether Articles 15 and 47 of the Charter preclude legislation of that kind.

WORKING DOCUMENT