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Judgment of the Court in Case C-40/21 | Agenția Națională de Integritate

Fight against corruption: EU law does not preclude a person from being prohibited from all elective public office for three years if he or she has infringed the rules relating to conflicts of interest by holding such office

The person concerned must, however, be able to have such a penalty reviewed by a court, in particular with regard to compliance with the principle of proportionality

In 2016, the applicant in the main proceedings was elected mayor of the municipality of MN (Romania). In a report drawn up in 2019, the Agenția Națională de Integritate (ANI) (National Integrity Agency, Romania) found that he had not complied with the rules governing conflicts of interest in administrative matters. In the event that that report became final, the term of office of the applicant in the main proceedings would terminate automatically and an additional prohibition on holding elective public office for a period of three years would be imposed on him.

The applicant in the main proceedings brought an action seeking the annulment of that report, claiming that EU law precluded national legislation under which a penalty is imposed, automatically and without the possibility of modulation according to the seriousness of the infringement committed, on a person deemed to have acted in a conflict of interest situation. ¹ Ruling on that action, the referring court decided to ask the Court about the compatibility of that prohibition with the principle of proportionality of penalties, ² the right to engage in work ³ and the right to an effective remedy and of access to an independent tribunal, ⁴ guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter').

Findings of the Court

In the first place, the Court holds that Article 49(3) of the Charter does not apply to national legislation which provides, following an administrative procedure, for a measure prohibiting the holding of any elective public office for a predetermined period of three years against a person who has been found to have a conflict of interest in the holding of such an office, in the event that that measure is not criminal in nature.

¹ Article 25 of 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, amending and supplementing Law No 144/2007 on the establishment, organisation and operation of the National Integrity Agency, and amending and supplementing other normative acts) of 1 September 2010. That law implements the second benchmark set out in the annex to 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 (OJ 2006 L 354, p. 56).

² Article 49(3) of the Charter.

³ Article 15(1) of the Charter.

⁴ Article 47 of the Charter.

In that regard, three criteria are relevant for assessing the criminal nature of a penalty: the legal classification of the offence under national law, the intrinsic nature of the offence and the degree of severity of the penalty.

First of all, as regards the first criterion, neither the automatic termination of the term of office in the event of a finding of a conflict of interest nor the prohibition on the holding of any elective public office is regarded under Romanian law as a criminal penalty. Next, the second criterion involves ascertaining whether the measure at issue has, *inter alia*, a punitive purpose. The legislation concerned seeks to ensure integrity and transparency in the exercise and holding of public functions and offices and to prevent institutional corruption. Thus, the purpose of that prohibition, like that of the automatic termination of the term of office, is to preserve the proper functioning and transparency of the State, by putting to a lasting end situations of conflict of interest. Therefore, such a measure pursues an essentially preventive – and not punitive – objective. In terms of the third criterion, that prohibition measure does not consist in imposing a sentence of deprivation of liberty or a fine, but in banning the future exercise of specific activities, namely elective public office, targeting individuals belonging to a limited group with a special status. It is of limited duration and does not apply to the right to vote.

To the extent that it is not criminal in nature, that measure cannot be assessed in the light of Article 49(3) of the Charter.

That said, in so far as it implements EU law, the national legislation at issue in the main proceedings must, in any event, observe the principle of proportionality, as a general principle of EU law.

In that respect, the Court finds, in the second place, that that principle does not preclude that legislation provided that, in the light of all the relevant circumstances, its application results in the imposition of a penalty commensurate with the seriousness of the breach which it penalises, having regard to the objective of ensuring integrity and transparency in the exercise and holding of public functions and offices and preventing institutional corruption. That would not be the case where, exceptionally, the unlawful conduct found to have taken place, having regard to that objective, does not have an element of seriousness, whereas the impact of that measure on the personal, professional and economic situation of that person proves particularly serious.

Imposing the penalty at issue automatically thus makes it possible to put to a lasting end the situation of conflict of interest identified while preserving the functioning of the State and of the elective bodies concerned. Moreover, providing for both the automatic termination of the term of office and an automatic prohibition on holding any elective public office for a sufficiently long predetermined period would appear likely to deter persons who exercise an electoral mandate from placing themselves in such a position and to encourage them to comply with their obligations in that regard.

In addition, in terms of the necessity of the penalty at issue, the Romanian legislature set its duration at three years in view of the intrinsic seriousness, both for the functioning of the State and for society, of the facts constituting a conflict of interest situation. Thus, that prohibition is imposed as a result of the infringement committed by a person holding elective public office and which is undoubtedly serious. In that regard, the scale of the conflicts of interest and the level of corruption observed in the national public sector must also be taken into account. Furthermore, the said prohibition is limited in time, applies only to certain categories of persons performing particular duties and applies only to defined activities, namely elective public functions, and does not prevent the pursuit of any other professional activity.

So far as concerns, last, the proportionality of the measure at issue, in the light of the seriousness of the harm to the public interest resulting from acts of corruption and conflicts of interest, even the least significant, on the part of elected representatives in a national context involving a high risk of corruption, that measure does not appear, in principle, to be disproportionate to the offence which it seeks to penalise. That said, the fact that the duration of that prohibition is not coupled with any possibility of modulation does not rule out the possibility that, in certain exceptional cases, that penalty may prove disproportionate.

In the third place, the Court makes it clear that the right to exercise an elective mandate obtained following a

democratic electoral process, such as that of mayor, is not covered by Article 15(1) of the Charter.

Although that provision is worded broadly, does not include the right to exercise, for a fixed period, such a mandate. Article 15 of the Charter appears in Title II thereof, entitled 'Freedoms', whereas specific provisions concerning the right to stand as a candidate at elections appear in a separate title, namely Title V, entitled 'Citizens' rights'.⁵ The case-law of the European Court of Human Rights supports that interpretation.⁶

In the fourth and last place, the Court finds that Article 47 of the Charter does not preclude the national legislation concerned, provided that the person concerned has had an effective opportunity to challenge the legality of the report that made the finding of a conflict of interest and the penalty imposed on the basis of it, including its proportionality.

The right to an effective remedy includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it. In the present case, that right presupposes that the referring court is able to review the legality of the assessment report calling into question the applicant in the main proceedings and, if necessary, annul that report and the penalties imposed on the basis of it.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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⁵ See Articles 39 and 40 of the Charter on the right to vote and to stand as a candidate at elections to the European Parliament and at municipal elections respectively.

⁶ See ECtHR, 8 November 2016, *Savisaar v. Estonia*.