

# ECJ Rules on Automatic Penalties for Conflict-of-Interest Situations in Leading Administrative Positions



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EU law does not preclude a person from being prohibited from all elective public office for three years if he / she has infringed the rules relating to conflicts of interest by holding such office. This statement was made by the ECJ in its judgement of 4 May 2023 in Case C-40/21 (*T.A.C. and Agenția Națională de Integritate (ANI)*). The case concerned Romanian legislation on administrative law.

## Background of the case and legal question

In 2016, the person concerned involved in the Romanian legal case was elected mayor of a municipality in Romania for a four-year period. Subsequently, in 2019, the *Agenția Națională de Integritate* (National Integrity Agency, Romania) conducted an investigation and concluded in a report that the mayor had failed to comply with the rules governing conflicts of interest in administrative affairs. This report would have the effect that his term as mayor would automatically come to an end, and he would face an additional three-year ban on holding any elective public office.

The mayor filed a lawsuit seeking to invalidate the report, claiming that EU law precludes automatic penalties without the possibility of modulation for those in conflict-of-interest situations. The referring Romanian court inquired with the ECJ about the compatibility of the prohibition under Romanian law with the principle of proportionality of penalties, the right to engage in work, and the right to an effective remedy and access to an independent tribunal, all of which are safeguarded by the Charter of Fundamental Rights of the European Union (CFR).

## The ECJ's ruling

**Does the principle of proportionality of penalties (Art. 49(3) CFR) apply to measures imposed pursuant to an administrative procedure?**

The ECJ continued its case law from “*Ecotex Bulgaria*” (C-544/19) and held that Art. 49(3) CFR only applies if the prohibition was criminal in nature. This should be determined on the basis of three criteria: first, the legal classification of the offence under national law; second, the intrinsic nature of the offence; and third, the degree of severity of the penalty which the person concerned is liable to incur.

The Court emphasized that, although the prohibition in question (Article 25(1) and (2) of Law No 176/2010) is not classified as criminal law by Romanian law, the intrinsic nature of the offence in question and the

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degree of severity of the penalties to which it is liable to give rise may nevertheless result in its being criminal in nature.

However, the Court found that, given first, the prohibition was issued on the basis of an administrative procedure and second, the prohibition did not pursue a repressive objective (as the focus was on preserving the integrity and function of the Romanian state), the intrinsic nature of the prohibition is not criminal in nature. Furthermore, several factors, such as the limited duration of the ban, a limited target group of persons, and the measure not imposing a sentence of deprivation of liberty or a fine as well as not applying to the right to vote, do not fulfill the third criterion either. As a result, none of the three criteria was fulfilled, the prohibition was not of a criminal nature and the scope of application of Art. 49(3) of the Charter was not opened.

**Does the principle of proportionality preclude measures prohibiting the holding of any elective public office for a predetermined period of three years?**

The judges in Luxembourg stressed that, although Art. 49(3) CFR is not applicable, in any event, the principle of proportionality, as a general principle of EU law must be considered. In this regard, the measure must be suitable for securing the attainment of the legitimate objective pursued and not go beyond what is appropriate and necessary in order to attain it.

Regarding the suitability, they state that the automatic disqualification from office ends the conflict of interest with immediate effect. The imposition of the ban from office secures this for the next three years. Consequently, the regulation is suitable for achieving its objectives.

Furthermore, they found that the measure is necessary because of the serious implications of a conflict of interest in a public elective office. In addition, the provision is to be attributed to the effort to comply with a decision of the Commission of the EU (2006/928/EC) that addresses specific benchmarks for the Romanian state in the fight against corruption.

As to appropriateness, the judges in Luxembourg decided that the public interest in a corruption-free administration, in principle, outweighs the penalty, especially in the national context of increased risk of corruption. However, in individual cases, the rigid penalty of a three-year ban from office without the possibility of modulation could be disproportionately high. This is a matter for the referring Romanian court to decide, taking into account all the details of the case.

**Does the right to engage in work, the right to an effective remedy and to a fair trial preclude the infringed Romanian law?**

The right to engage in work and to pursue a freely chosen or accepted occupation is enshrined in Art. 15(1) CFR. The ECJ found that, although the fundamental right has a broad scope, it does not include the right to hold a democratically obtained electoral mandate for a specified period of time. Special legal provisions in Title V of the Charter entitled "Citizens rights" justify this conclusion.

Regarding the guarantees enshrined in Art. 47 CFR, the ECJ stressed 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. According to the ECJ, Romanian law seems to respect these parameters: The court in Romania is independent and has the power to overrule the National Integrity Agency's evaluation report in which the mayors' conflict of interest was established.

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