

Decision no. 708 of 28 October 2021

regarding the exception of unconstitutionality of the provisions of Article 136 (2) and of Article 137 (3) sentence two, with reference to the phrase "turnover", from the Criminal Code

Published in the Official Gazette of Romania, Part I, no. 1160 of 7 December 2021

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the provisions of Article 136 (2) of the Criminal Code, regarding the fine as the main punishment applicable to the legal person, are unconstitutional in relation to the provisions of Article 44 (1) and (3) of the Constitution. In this sense, it was argued that the application of the fine penalty to companies or other legal entities undergoing bankruptcy has the effect of reducing the amount to be recovered by the bankrupt entity's creditors. It was also argued that, acting without any reasonable and fair justification, in the sense of diminishing the chances of realizing the claims held on a bankrupt legal entity, the state violates its own obligation to guarantee the property right. The state takes what should be passed on to the creditors, the criminal fine in this case being equivalent to an expropriation under conditions other than those allowed by Article 44 (3) of the Constitution.

At the same time, it was argued that the provisions of Article 137 (3) sentence two of the Criminal Code, regarding the establishment of the amount of the fine for a legal entity, are contrary to the provisions of Article 1 (5) of the Constitution, being unclear. Criticisms were formulated on two levels, as follows: (i) The Criminal Code does not define the phrase "turnover" in relation to which the court determines the amount corresponding to a day-fine in the case of determining the fine for the profit-making legal entity, (ii) The Criminal Code does not specify the moment in relation to which the court applies the individualization criterion provided in Article 137 (3) sentence two of the Criminal Code, regarding the turnover, in the case of the legal entity with a profit-making purpose.

II. Examining the exception of unconstitutionality with reference to the provisions of Article 136 (2) of the Criminal Code, the Court held that the provisions of Article 44 (3) of the Constitution, invoked by the authors, regulate expropriation as a way of deprivation of property for reasons of public utility, which must be established according to the law, with the payment of fair and prior compensation. Therefore, the essence of expropriation, as a legal operation, is the existence of a work of public utility, declared as such according to the law, as well as the payment of compensation, conditions without which the expropriation could not be carried out. However, the Court held that the fine regulated in the Penal Code is a criminal penalty, the transfer to the state budget of the amount of money that the legal person is condemned to pay not being a way of deprivation of property through expropriation, as claimed by the author of the exception. Therefore, the Court found that the provisions of Article 44 (1) and (3) of the Fundamental Law regarding the right to private property are not relevant in the case, the

exception of unconstitutionality of the provisions of Article 136 (2) of the Criminal Code being rejected as unfounded.

The Court found that, according to Article 137 (3) sentence one of the Criminal Code, the court establishes the number of days-fine taking into account the general criteria for individualizing the punishment, and when establishing the amount corresponding to a day-fine taking into account, according to the sentence the second a (3) of the same article, the special condition regarding the economic power of the convicted legal entity, under the conditions that the punishment must not only have a sufficient dissuasive effect, but must also be effective and proportional.

The author of the exception considered that the provisions of Article 137 (3) sentence two of the Criminal Code are contrary to the provisions of Article 1 (5) of the Constitution, her criticisms being formulated on two levels, as follows: (i) The Criminal Code does not define the phrase "turnover", (ii) The Criminal Code does not specify the moment in relation to which the court applies the individualization criterion provided in Article 137 (3) sentence two of the Criminal Code, relating to the turnover, in the case of the legal entity with a profit-making purpose.

In its case-law, the Court held that one of the requirements of the principle of compliance with laws concerns the quality of normative acts and that, in principle, any normative act must meet certain qualitative conditions, among them predictability, which implies that it must be sufficient clear and precise in order to be applied. Thus, the formulation of the normative act with sufficient precision allows the interested persons - who can call, if necessary, on the advice of a specialist - to predict to a reasonable extent, in the circumstances of the case, the consequences that may result from a certain act. Regarding the same requirements of the quality of the law, guarantee of the principle of legality, in its case-law, the European Court of Human Rights retained the obligation to ensure these quality standards of the law as a guarantee of the principle of legality, provided in Article 7 of the Convention for the Protection of Human Rights and fundamental freedoms. Thus, the phrase "provided by law" requires that the incriminated measure has a basis in domestic law, but it also refers to the quality of the law in question: it must, indeed, be accessible to the litigant and predictable in terms of its effects. It was also noted that, in order for the law to satisfy the requirement of foreseeability, it must specify with sufficient clarity the scope and methods of exercising the discretion of the authorities in the respective field, taking into account the legitimate aim pursued, in order to offer the person an adequate protection against arbitrariness.

Putting the considerations of principle developed in the case-law of the court of constitutional review in the context of the grounds of unconstitutionality formulated by the authors, with reference to the first criticism of unconstitutionality, the Court found that, in title X – Meaning of certain words or phrases in criminal law, of the General Part of the Code, the definition of the phrase "turnover" is not found. Therefore, the Court found that the criminal law in force does not establish the meaning of the phrase "turnover" in relation to which the court determines the amount corresponding to a day-fine in the case of determining the fine for the legal entity with a profit-making purpose.

However, definitions of the phrase "turnover" can be found in the special legislation. The Court found that Competition Law no. 21/1996 defines the phrase "turnover" with reference to operations specific to competition law, namely economic concentration operations. The Court also observed that Law no. 227/2015 on the Fiscal

Code provides in Article 282 (3) (a) the final sentence a definition of turnover, which, however, is applicable only in the tax field, with reference to the eligibility for application of the VAT system to the collection of taxable persons. That being the case, since the definitions in the tax and competition fields related to the phrase "turnover" have limited applicability, specialized in the specified matters, the Court found that their translation in criminal matters to determine the amount corresponding to a day-fine in the case of establishing the fine for the profit-making legal entity is contrary to the principle of legality.

At the same time, the Court found that the criticized criminal norm is also flawed in terms of the calculation/establishment, from a temporal point of view, of the turnover of the profit-making legal entity in relation to which the court determines the amount corresponding to a day-fine.

The Court found that, in order to determine the amount of the fine, after determining the number of days-fine, it is necessary for the court to determine the amount corresponding to a day-fine taking into account the criteria regulated in Article 137 (3) sentence two of the Criminal Code, including "turnover" in the case of profit-making legal entities. Or, although the criminal law regulates, in Article 137 (2) sentence two, the minimum/maximum limits between which the court is free to set the amount corresponding to a day-fine, the specific criterion for individualizing the punishment regulated in Article 137 (3) sentence two of the Criminal Code, with reference to "turnover", is not regulated with sufficient clarity and precision.

The Court found that the rule does not specify whether the criticized phrase refers to the turnover achieved in the financial year prior to the commission of the crime/prior to the pronouncement of the court decision/prior to the application of the penalty. At the same time, if the turnover achieved in the financial year prior to the commission of the crime/prior to the pronouncement of the court decision/prior to the application of the penalty cannot be determined, the criticized norm does not specify whether the turnover related to the financial year in which the legal entity will be taken into account that has a profit-making purpose registered turnover, the year immediately preceding the reference year for the calculation of the turnover in order to apply the penalty of the fine.

Under these conditions, referring to the considerations of principle developed in the case-law of the constitutional review court, to those found as a result of the examination of the criticized provisions and considering the fact that the criminal fine applied to the legal entities who are criminally liable has the nature of a criminal sanction, being the only main punishment that can be applied to them, the Court found that the provisions of Article 137 (3) sentence two, as regards the phrase "turnover", do not comply with the constitutional requirements regarding the quality of the law, namely they do not meet the conditions of clarity, precision and predictability, violating the provisions of Article 1 (5) of the Constitution.

III. For all these reasons, unanimously, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Article 136 (2) of the Criminal Code are constitutional in relation to the criticisms formulated.

Also unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 137 (3) sentence two, with reference to the word "turnover", of the Criminal Code are unconstitutional.

