

Decision no. 320 of 12 May 2021

regarding the exception of unconstitutionality of the provisions of Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011 regarding the prevention, detection and sanctioning of irregularities arising in the obtaining and use of European funds and /or of the related national public funds,

published in the Official Gazette of Romania, Part I, no. 678 of 9 July 2021

Summary

I. As grounds for the exception of unconstitutionality, the author claimed that the provisions of Article 8 (2) (a) by reference to Article 8 (2) (b) of the Government Emergency Ordinance no. 66/2011 regarding the prevention, detection and sanctioning of irregularities in obtaining and using European funds and/or of the national public funds related to them violate the constitutional provisions of Article 4 (1) in conjunction with those of Article 16 (1) regarding equal treatment of citizens, of Article 23 (11) which provides that "Until the court decision of conviction becomes final, the person is considered innocent", of Article 45 regarding economic freedom, of Article 47 regarding the standard of living and of Article 53 regarding the restriction of the exercise of certain rights or freedoms.

II. Examining the exception of unconstitutionality, the Court held that the Government Emergency Ordinance no. 66/2011 regulates activities of preventing the occurrence of irregularities, as well as those of ascertaining and recovering budgetary receivables, sanctioning irregularities arising in obtaining and using European funds and public funds related to them. Related to the normative content of the criticized regulation, the Court held that, pursuant to Article 8 (1) of the Government Emergency Ordinance no. 66/2011, the authorities with powers in the management of European funds have the obligation to immediately notify the Department for the fight against fraud - DLAF and the criminal investigation bodies in the case of finding indications of fraud or attempted fraud. In this situation, Article 8 (2) of the Government Emergency Ordinance no. 66/2011 provides that if, as a result of the referral to the DLAF, the criminal investigation body submits the case for judgment to the courts, the authority with competences in the management of European funds has the obligation, until the final decision of the court regarding the criminal or non-criminal nature of the deed, to suspend, for the private beneficiaries, the application of the provisions of the financing contract/decision/order/agreement and, subsequently, to suspend the payment/reimbursement of all sums requested by the beneficiary, that is, of all sums of money coming from all subsidies/funds accessed by them, even if they are not related to the subsidy on which the authorities with competences in the management of European funds found the existence of indications of fraud or of attempted fraud, and for public beneficiaries, to suspend payments related to the economic contract upon which the suspicion of fraud hovers.

In this case, the Court held that the dissatisfaction of the author of the exception of unconstitutionality resides, in essence, in the difference in legal treatment, namely in the establishment of discrimination against private beneficiaries [Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011] towards the public beneficiaries [Article 8 (2) (b) of the Government Emergency Ordinance no. 66/2011], regarding the method of applying the sanction of suspension of payment/reimbursement of the amounts requested by them, since the sanction of suspension applied to public beneficiaries concerns only the payment of the subsidy arising from the contract subject to criminal investigation for which there is a referral, while for private beneficiaries there is no such limitation, in the case of the latter applying both

the sanction of suspension of the provisions of the financing contract/decision/order/agreement, as well as, subsequently, the suspension of the payment/reimbursement of all amounts which the private beneficiary would be entitled to collect.

In this case, the problem that had to be analyzed is whether the regulation by the legislator of the suspension by the authority with competences in the management of European funds, for private beneficiaries, of the application of the provisions of the financing contract/decision/order/agreement and, subsequently, of suspending the payment/reimbursement of all the amounts requested by them, represents an appropriate and necessary measure that does not, by default, determine the violation of the economic freedom of the private beneficiaries, and if this measure is proportional to the purpose intended by the legislator.

In this context, the Court stated the fact that, according to the principle of proportionality, any measure taken must be adequate - objectively able to lead to the fulfillment of the purpose, necessary - indispensable for the fulfillment of the purpose and proportional, intended to ensure a fair balance between the concrete interests, for it to be appropriate for the intended purpose. Thus, in order to carry out the proportionality test, it is necessary, first, to establish the goal pursued by the legislator through the criticized measure and whether it is a legitimate one, since the proportionality test will only be able to refer to a legitimate goal.

In this case, the Court found that the purpose pursued by the legislator through Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011 is to ensure good financial management of European funds by the beneficiaries, through the regulation of a control and recovery mechanism of European funds, as well as of their related national public funds, if improperly used. The purpose is legitimate considering the need to protect the financial interests of the Union, by applying measures to prevent fraud, corruption and any other illegal activities, by actual controls and by recovering the amounts improperly paid, and in case of irregularities, through effective, proportionate sanctions with the effect of discouraging such actions.

As regards the measure instituted by the criticized regulation, namely the suspension of the application of the provisions of the financing contract/decision/order/agreement for private beneficiaries, this, *in abstracto*, is a necessary measure to achieve the aim pursued, mentioned above. The Court held, however, that, concretely, the legislator's option to order both the suspension of the application of the provisions of the financing contract/decision/order/agreement and, subsequently, the suspension of the payment/reimbursement of all the amounts requested by the private beneficiaries does not represent a measure necessary and adequate to achieve the intended goal, but, on the contrary, it represents an excessive and disproportionate measure in relation to the hypothesis of the applicability of the measure, namely the opening of a criminal case that concerns a specific deed committed with regard to a certain financing contract/decision/order/agreement. Therefore, any measure adopted by the authorities, in order to meet the requirement of necessity and adequacy, must be related to the imputed deed, and to the corresponding financing contract/decision/order/agreement. However, extending the legal consequences regarding the payment/reimbursement of all amounts requested by the beneficiary, therefore regarding other financing contracts/decisions/orders/agreements than the one in which the alleged fraud was found, exceeds the degree of reasonableness and proportionality. Such a measure has a significant negative impact on the conduct of the economic activity of the private beneficiaries who have accessed European funds, being likely to even cause the interruption of their activity, with the consequence of violating Article 45 of the Constitution, which guarantees the person's free access to an economic activity and free initiative, of course, exercised under the law.

In this context, the Court reiterated that, in principle, the legislator is bound by a condition of reasonableness, i.e. to be concerned that the established requirements are reasonable enough to not call into question the very existence of the right, in this case it is about the economic freedom of the person. Or, by the measure provided by the legislator in Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011, namely that of subsequently suspending the payment/reimbursement of all other amounts requested by the private beneficiary, on which there is no suspicion of fraud, the legislator violated the condition of reasonableness, since, through the effect of the criticized legal provisions, there is an imbalance between the general public interest and that of the private beneficiaries of European funds and/or national public funds related to them, to the detriment of the latter. Therefore, without removing the responsibility of the beneficiary to comply with the obligation to implement the project with maximum professionalism, efficiency and vigilance, in accordance with the best practices in the field concerned and in accordance with the provisions of the financing contract, the Court considered that the measure ordered by Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011, is neither proportionate nor adequate to the legitimate goal pursued from the perspective of the existing relationship between the general interest and the individual interest, in this case of the private beneficiary, having an excessive nature, likely to affect the economic freedom of the private beneficiary, with consequences on the very standard of living of the one affected by the criticized legislative measure.

At the same time, the Court emphasized that in the legislative activity, the legislator must regulate mechanisms to allow the achievement of the legitimate goal pursued at the proposed qualitative standard, without imposing an excessive burden on the parties, regardless of its nature. However, the Court found that the legislative measure instituted by the criticized regulation exceeds the limits of what is necessary to achieve the goal envisaged by the legislator, being liable to divert the goal that it proposed to achieve, the consequence of such measures affecting and even suppressing the economic activity of private beneficiaries.

The Court also held that the measure ordered by Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011 is discriminatory, given that, for the same premise, namely the transmission by the body of the criminal prosecution of the case for judgment by the courts (as a result of the finding by the authorities with competences in the management of European funds of some indications of fraud or attempted fraud and the reporting to the DLAF and the criminal prosecution bodies), in the case of public beneficiaries, in a manner distinct from private beneficiaries, the legislator ordered only the suspension of the payment/reimbursement of all amounts requested by the beneficiary related to the economic contract for which the referral was made, a hypothesis regulated by Article 8 (2) (b) of the Emergency Ordinance of Government no. 66/2011.

Considering the legitimate goal pursued by the criticized regulation, the Court considered that it could be achieved in the case of private beneficiaries, as in the case of public beneficiaries, by the authority with competences in the management of European funds only suspending the payment/reimbursement of the amounts requested by the private beneficiaries, related to the financing contract/decision/order/agreement whose application was suspended and for which the referral was made. The Court found that through the regulation provided in Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011, criticized in this case, the legislator adopted an excessive measure, likely to lead to breaking the fair balance that must exist between rights and interests at stake, since the effect of the criticized regulation produces a difference in treatment to the disadvantage of private beneficiaries of European funds and/or national public funds related to them, such a measure exceeding the limits of what is necessary to achieve the intended purpose. That being the case, the Court found that the legislative solution contained in Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011 violates the constitutional requirements of Article 45 of the Constitution, which enshrines

economic freedom, in conjunction with those of Article 16 (1) of the Constitution, which enshrines the principle of non-discrimination.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 8 (2) (a) of the Emergency Government Ordinance no. 66/2011 regarding the prevention, detection and sanctioning of irregularities arising in the obtaining and use of European funds and/or national public funds related to them are constitutional to the extent that the authority with competences in the management of European funds suspends for private beneficiaries the payment/reimbursement of all amounts requested by them, related to the financing contract/decision/order/agreement whose application was suspended and for which the referral was made.