

Decision No 369 of 5 July 2022 on the exception of unconstitutionality of Law No 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk, as a whole, and of the phrase “within 5 days from the date of publication of the administrative act” in Article 15 (4) of this law, in particular, published in the Official Gazette of Romania, Part I, No 1060 of 2 November 2022.

Summary

I. As grounds for the exception of unconstitutionality, from the perspective of the pleas of extrinsic unconstitutionality brought to Law No 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk, it was argued that the opinion of the Economic and Social Council has not been requested upon the adoption of this normative act, in violation of the constitutional provisions of Article 1 (3) and (5), read in conjunction with Article 141.

Also, regarding the pleas of intrinsic unconstitutionality lodged in this case, it was argued that the phrase “within 5 days from the date of publication of the administrative act”, contained in Article 15 (4) of Law No 136/2020, which limits the deadline for bringing actions against normative administrative acts to 5 days from the date of their publication, was contrary to the constitutional provisions contained in Article 21 on free access to justice, Article 52 on the right of a person aggrieved by a public authority, Article 53 on the restriction of the exercise of certain rights or freedoms and Article 126 (6) on the courts of law.

II. By examining the exception of unconstitutionality, from the perspective of the pleas of extrinsic unconstitutionality brought to Law No 136/2020, according to which, upon the adoption of this normative act, the opinion of the Economic and Social Council was not requested, in violation of the constitutional provisions of Article 1 (3) and (5), read in conjunction with Article 141, the Court held that, by Decision No 216 of 7 April 2022, it had dismissed these pleas as unfounded. When delivering this solution, the Court noted that the Government had unequivocally assumed that Law No 136/2020 had no socio-economic impact, so that the procedure for adopting this normative act has not been carried out in violation of Article 141 of the Constitution on the role of the Economic and Social Council. With regard to the obligation to request the opinion of the Economic and Social Council, the Court held that, unlike the obligation to request the opinion of the Legislative Council, in well-determined circumstances, such as those in which Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic and Law No 136/2020 have been initiated and adopted, the originator of a law could retain a certain margin of appreciation.

By examining the pleas of intrinsic unconstitutionality, the Court noted that, in the current legislative context, all proceedings referring to normative administrative acts, including the decisions of the National Committee for Emergency Situations, on the establishment, amendment or termination of the measures set out in Law No 136/2020, may be brought within 5 days from the date of publication of the respective administrative act. According to Article 15 (21) of Law No 136/2020, the administrative acts referred to by the provisions subject to constitutional review belong to the category of administrative acts referred to in Article 5 (3) of the Administrative Litigation Law No 554/2004, respectively administrative acts issued for the enforcement of the state of war, state of siege or emergency, those concerning national defence and security or those issued for the restoration of public order, as well as for removing the consequences of natural disasters, epidemics and epizootics. The provisions of Articles 14 and 15 of Law No 554/2004 do not apply to these acts, so their enforcement cannot be suspended pending a court decision.

The proceedings for settling the actions for the annulment of those normative administrative acts referred to in the text of law subject to constitutional review derogate, in some respects, from the proceedings established by Law No 554/2004, which makes it obvious that the legislator’s intention was to ensure the settlement of such cases with maximum celerity, by ensuring the shortest deadlines possible. Such a need is imperatively dictated by the fact that the measures that may be ordered under Law No 136/2020 concern restrictions on the exercise of individual freedom.

The Court noted that one of the provisions by which the proceedings provided for by Law No 136/2020 derogate from the provisions of Law No 554/2004 was the actual regulation subject to

constitutional review. Thus, the provisions of Article 15 (4) of Law No 136/2020 establish a deadline for bringing actions against administrative acts of a normative nature, including the decisions of the National Committee for Emergency Situations, on the establishment, amendment or termination of the measures provided for by this law, of 5 days from the date of publication of such acts, a deadline derogating from the general regulation on the matter, as covered by Article 11 (4) of Law No 554/2004, according to which ordinances or provisions thereof that are considered to be unconstitutional, as well as administrative acts of a normative nature that are considered to be illegal may be appealed against at any time.

The Court examined whether or not the legislative solution challenged through this exception of unconstitutionality was justified by a legitimate aim, whether or not it was adequate to this aim and necessary and whether or not a fair balance was maintained between conflicting rights and interests in order to be appropriate to the aim pursued.

As regards the aim pursued by the legislator when establishing the time-limit regulated by Article 15 (4) of Law No 136/2020, the Court considered that it could not be justified by the need to defend the interests of the persons whose rights or legitimate interests would be harmed by the administrative normative acts referred to in this text of law. As the Court has pointed out in its case-law, while expediency in settling cases is imperative when the very restriction of individual freedom is involved, the provision of short procedural time-limits serves this purpose only as of the moment when the person's interest in bringing proceedings to defend her/his rights arises. However, this moment cannot be identified with the date of publication of the normative administrative act, but with the moment from which this act affects and produces effects for a person. However, the Court found that, with regard to the normative acts on the establishment, amendment or termination of measures, these might become incidental and produce effects as concerns the restriction of individual freedom at a date subsequent to their publication and which exceeds by far the 5-day period following publication, as provided by law. This is the case, for example, of persons entering the territory of Romania after the expiry of the time-limit provided by Article 15 (4) of Law No 136/2020, who are then placed in quarantine, as regulated by normative administrative acts that they would have an interest in challenging. Also, the situation is the same for those placed in isolation at a date after the time-limit provided for by Article 15 (4). Although they did not have an interest in challenging the normative administrative act within 5 days from the date of its publication, they will be unable to bring another legal action when they have an interest to do so.

Consequently, the reasons for establishing the impugned legislation must be sought in the interest of protecting public interests, namely legal certainty with regard to the normative acts referring to the establishment, amendment or termination of the quarantine and isolation measures. Thus, the emergence of a legislative void in the field, as a result of the ineffectiveness of these administrative acts, effect of their annulment following legal appeal, at a time when the existence of prompt and adequate measures in situations of epidemiological and biological risk is imperative to prevent the introduction and limit the spread of infectious contagious diseases on the territory of Romania, has particularly serious effects on public health. Therefore, the legislator's intention to limit as much as possible the possibility of such situations occurring is justified. It is also the reason why Article 15 (21) of Law No 136/2020 states that the proceedings regarding the administrative acts provided for in paragraph (4) are not regulated by the provisions of Articles 14 and 15 of Law No 554/2004 on the suspension of the enforcement of such acts and on the request for suspension through the main proceedings. Thus, the enforcement of these administrative acts cannot be suspended while the actions for annulment brought in administrative proceedings are pending adjudication.

The impugned legislative solution, which limits the deadline for bringing actions against normative administrative acts regarding the establishment, amendment or termination of measures regulated by Law No 136/2020 to 5 days from the date of their publication, also responds to the aim pursued by the legislator, ensuring that, after the expiry of this short time-limit, such acts are no longer subject to judicial review.

However, the Court also examined whether the need to protect public interests, even those concerning public health, could be considered as representing a sufficient argument, proportionate with the restriction of the exercise of the right to subject normative administrative acts to judicial review to a period of 5 days from their date of publication.

In this context, the Court deemed relevant to refer to its previous case-law, in which it had analysed the provisions of Article 5 (7) of Government Emergency Ordinance No 33/2007 on the organization and functioning of the National Energy Regulatory Authority, which, similarly to the provisions of Article 15 (4) of Law No 136/2020, limited the right to lodge an administrative appeal against orders and decisions issued by the President of the National Energy Regulatory Authority as part of his duties – unilateral administrative acts of a normative nature – to a period of 30 days from the date of their publication, respectively from the date on which they were notified to the parties concerned. The Court found that the impugned legal provisions introduced a derogation from the constitutional principle of judicial review of administrative acts issued by public authorities, by setting a 30-day deadline for challenging normative administrative acts, without this exception being expressly provided for by Article 126 (6) of the Constitution, which refers, in this respect, only to acts concerning the relations with the Parliament and to military command acts. The Court reminded that Article 126 (6) guaranteed the judicial review of administrative acts issued by public authorities, without any distinction depending on their type – individual or normative ones, and, with regard to normative administrative acts, the special law subject to analysis removed the possibility of challenging them in court beyond the imperative term of 30 days, by derogation from Article 11 (4) of Law No 554/2004 and from Article 126 (6) of the Constitution. However, the Court considered that such an exclusion resembled a new exception applicable to the legal acts exempted from judicial review in administrative proceedings, which leads to the violation of Article 21, Article 52 and Article 126 (6) of the Basic Law.

Taking into account these jurisprudential benchmarks, the Court considered that restricting the exercise of a person's right to challenge in court the normative administrative acts regarding the measures regulated by Law No 136/2020, up to the point of affecting the very substance of this right, was contrary to the constitutional provisions of Article 21, Article 52 and Article 126 (6) guaranteeing the judicial review of the administrative acts issued by public authorities, as long as they are not part of the exceptions exhaustively provided for by the constitutional text.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found that the phrase “within 5 days from the date of publication of the administrative act” in Article 15 (4) of Law No 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk was unconstitutional.

Also, by a majority vote, the Court dismissed the exception of unconstitutionality as unfounded and ascertained that Law No 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk, as a whole, was constitutional in relation to the pleas lodged.