Decision No 390 of 13 July 2022 on the objection of unconstitutionality of the provisions of Article 1 (4), (6) and (7) and Article 19 of the Law on the protection of whistleblowers in the public interest and the law as a whole, published in Official Gazette of Romania, Part I, No746 of 25 July 2022

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that the Law on the protection of whistle-blowers in the public interest was contrary the principle of bicameralism, since the decision-making Chamber adopted numerous amendments which significantly distorted the 'consent' expressed by the Senate to its adoption and deleted essential provisions such as the rules which confer additional protection on whistle-blowers in the public interest. Since the criticised law reduces the current level of protection afforded to whistle-blowers, it also runs counter to Article 15 of the Constitution, relating to the 'acquired right' theory.

The authors of the objection argued that Article 1 (4) of the Law is not clear and precise, lacking foreseeability since it refers to Article 346 of the Treaty on the Functioning of the European Union, which in turn refers to essential State security interests. That article does not set out in a specific and explicit manner which disclosure of offences to the legal framework does not fall within the scope of the law complained of.

As regards the unconstitutionality of Article (19) (1) of the Law complained of, it has been pointed out that Law No 571/2004 provides that a warning may be given directly to the press, without the whistleblower first having to refer the matter to other authorities/bodies, which means that the whistleblower currently has a right of option as to the manner as to how to make disclosures. The new legislation removes that choice of whistleblower and make referral to the press subject both to the prior referral of the matter to the competent authorities and to the failure to take appropriate measures following the referral. Freedom of expression and the right to petition are thus violated.

Article 19 (1) also infringes Article 148 (1) and (2) of the Constitution, since, although Article 25 of Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law establishes that this cannot constitute grounds for lowering the level of protection already granted by Member States with respect to whistleblowers, the law criticised, in transposing the Directive, reduces the level of protection already in place.

II. Having examined the objection of unconstitutionality, the Court held that infringement of the principle of bicameralism cannot be upheld as long as the law adopted by the decision-making Chamber relates to the basic aspects of the proposal/draft law in its form adopted by the reflection Chamber. In the present case, the Court found that the intervention of the decision-making Chamber is minimal, relates to the same subject matter and does not call into question a diversion or a substantive amendment of the legislative content of the law adopted at the level of the reflection Chamber. With regard to the deletion of Article 9 (3) and (6) from the content of the law, the Court pointed out that both chambers ruled on the same legislative solution. Accepting the idea that, in this case, the First Chamber again has to rule on that deletion leads to an endless string of referrals between the two chambers, undermining the decision-making role of the second Chamber. Therefore, the Court found that the law as a whole does not infringe Articles 61 (2) and 75 of the Constitution.

The Court noted that Article 1 (4) of the law is criticised in terms of the quality requirements of the law, as it refers to Article 346 of the Treaty on the Functioning of the European Union (TFEU). The authors of the objection of unconstitutionality are in fact dissatisfied with the content of Article 346 TFEU. In order to clarify its content, account must be taken of the case-law of the Court of Justice of the European Union laying down the conditions for its application. The Court considered that it did not fall within its role and competence to interpret Article 346 TFEU.

With regard to the clarity of the law, the Court has held that the law must not be excessively rigid so it may adapt to changing circumstances. The meaning of the concept of 'foreseeability' depends to a large extent on the content of the legal rule in question, the area it covers and the number and capacity of its addressees. In the case concerned, the whistleblower, by reason of the nature of his or her duties, is an informed person in the field in which he/she decides to make the internal/external reporting or to publicly disclose the information about which he or she learns. He or she knows the categories of information to which he or she has access, their legal regime and the consequences of

failure to comply with it, so that the text of the law is foreseeable in relation to the capacity of the whistle-blower. Therefore, the Court found that Article 1 (4) of the Law does not infringe Article 1 (5) of the Constitution.

As regards infringement of Article 15 of the Constitution by reducing the standard of protection for whistle-blowers existing in Law No 571/2004, the Court does not have jurisdiction to rule on whether or not a legislative solution in the old legislation should have been maintained in relation to Articles 15 and 25 of the Directive. Moreover, in the context of the review of constitutionality, it is inadmissible to compare certain provisions of a law or the provisions of several laws between them and to place the resulting conclusion in relation to provisions or principles of the Constitution.

Article 19 of the law under consideration is criticised for eliminating the possibility for the whistleblower to approach the media directly, which would, from the point of view of the authors of the objection, infringe Articles 30 and 51 of the Constitution. The Court found that the law does not prevent the person concerned from disclosing that information in the media at his or her wish, but in that case will not benefit from the protection afforded by the provisions of the law criticised. The law does not censor the right to freedom of expression and the right to petition and does not have such an objective, but creates the necessary legal framework for the whistleblower concept. Article 19 of the law contains procedural rules whose regulation falls within the exclusive competence of the legislator. It chose internal/external reporting and public disclosure to be carried out successively, not at the same time, protecting both the entity subject to the law and the state of legality in which it must operate. Therefore, the law disciplines the whistleblower's conduct, without affecting his or her ability to publicly disclose the information covered by the law.

As regards the lowering of the level of protection already afforded by Member States in the area of whistleblowing, the Court found that the authors of the objection confuse the legal protection afforded to the whistleblower with the procedure following which public disclosure is carried out. Thus, the legal protection of the whistleblower is adequately regulated by Chapter VI – Protection measures, support measures and remedies – of the law and unquestionably contains appropriate details. Therefore, Article 25 (2) of the Directive is not applicable in the given situation. The fact that the person does not acquire the status of whistleblower if, by failing to comply with the provisions of the law criticised, he or she publicly discloses information relating to the breach of law does not mean that the legal protection of the whistleblower who has disclosed such information in compliance with the law is affected. The legal protection afforded to the whistleblower comes into play once this status has been acquired. Making the capacity subject to a given procedure does not diminish the legal guarantees of protection afforded to the whistleblower. The Court must confine itself to finding that the procedure put in place is not arbitrary.

Likewise, the issues raised by the authors of the objection have no constitutional relevance, being limited to the scope of the conformity of a national law with a directive, without substantial infringements of the constitutional rule being alleged. Moreover, even a possible incorrect transposition of a directive does not lead to the unconstitutionality of the law on such a ground. Therefore, the Court found that Article 19 of the Law does not infringe Article 148 (2) and (4) of the Constitution.

III. For all these reasons, the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Articles 1 (4), (6) and (7) and 19 of the Law on the protection of whistle-blowers in the public interest and the law as a whole were constitutional in relation to the complaints made.