Decision No 404 of 21 September 2022 on the objection of unconstitutionality of the Law amending and supplementing Government Ordinance No 2/2001 on the legal regime for administrative offences, published in the Official Gazette of Romania, Part I, No1092 of 14 November 2022.

Summary

I. As grounds for the objection of unconstitutionality, the Advocate of the People argued that the Law amending Government Ordinance No 2/2001 on the legal regime for administrative offences governed a special procedure, by way of derogation, for appeals against the penalties consisting of a warning or a fine of low value, which infringed Articles 1 (5), 21 and 24 of the Constitution.

The Advocate of the People pointed out that the legislative solution contained in Article I, according to which the complainant is obliged to fill in the administrative complaint form where the contested penalty is a warning or fine not exceeding RON 3.000, uses a mandatory language, based on a presumption of illegality of the report establishing and punishing the offence.

It is also not clear from the wording proposed by the contested law, according to which 'the court shall draw up and deliver', whether it is intended that the judgement be delivered at a time after it has been drawn up, as a derogation from the ordinary law applicable in civil proceedings, or whether the subsequent delivery and drawing up of the judgement must be made within the 30-day period. Moreover, the way in which the 30-day time limit is calculated is also unclear.

The Advocate of the People further argued that the law complained of violated the right to a fair trial and the right of defence, since it involved a written procedure, conducted in camera, as a rule, in the absence of the parties. The provisions of administrative procedure must comply with the principle of *audi alteram partem*. Moreover, there is no provision for an appeal against the judgment given by the court under the new procedure.

II. Having examined the objection of unconstitutionality, the Court found that the claims made by the Advocate of the People regarding the obligation to bring legal proceedings were unfounded, as it was clear from the wording of the text criticised that it applied only where the penalty was contested and not in all cases where the penalty was imposed. The contested law does not establish an obligation to challenge all the reports establishing and punishing the offence, which set the penalty consisting in a warning or an administrative fine of less than RON 3.000, which would amount to a presumption of the unlawfulness of all the reports establishing and penalising the offence, which lay down those penalties. It is clear that if the report is not to be challenged, the administrative complaint form will not be filled in.

The Court held that the simplified special procedure introduced by the contested provisions is similar to that existing in civil matters, provided for in Title X of Book VI of the Code of Civil Procedure. The special procedure laid down in civil matters is optional and the applicant may opt for the ordinary procedure. In accordance with the law complained of, if the contested penalty is a warning or a fine not exceeding RON 3.000, only the special, simplified, written procedure is available to the complainant who cannot choose between that procedure and the ordinary procedure.

As regards the complaint concerning the infringement of Article 1 (5) of the Constitution due to the lack of predictability and clarity of the legal rules, the Court noted that the text uses the terms complainant and infringer in the alternative but does not define the concept of 'complainant', suggesting that it is different from that of an infringer. Therefore, it is not clear from the analysis of the legislative content of the texts introduced by the law criticised under Government Ordinance No 2/2001 whether the complainant is only the infringer or may also be another person, so that the newly introduced procedure cannot be applied either by the interested parties or by the court.

In addition, Article I of the law distinguishes between 'documents which the infringer intends to use' and 'evidence which the complainant intends to use'. However, the Court found that the legislator intended to regulate a written procedure, which usually takes place without the parties having appeared, which would make it impossible for evidence to be taken other than the documents.

Looking at the normative content of Article 36^2 (4), introduced by the law criticised, according to which 'the court shall draw up and deliver its decision', it is not clear whether the legislator intended the judgement to be delivered at a time after it was drawn up, which constitutes a derogation from the

general law applicable in civil procedural matters. Thus, in accordance with Article 426 (5) of the Code of Civil Procedure, the decision shall be drawn up and signed no later than 30 days after the judgement is pronounced. On the other hand, in the event that the parties' appearance is not ordered, the method for calculating the 30-day period within which the judicial decision must be drawn up and delivered is unclear, since, according to the law, that period starts to run from receipt of all the necessary information, without it being possible to determine with certainty how that time limit is to be determined. Therefore, due to the defective wording of Article 36^2, the trial procedure governed therein cannot be applied and contravenes the requirements of Article 1 (5) of the Constitution In order to comply with constitutional principles, the legislator must adopt clear, precise and predictable rules governing the procedure for challenging reports establishing and punishing administrative offences, taking into account all the provisions of Government Ordinance No 2/2001.

As regards the complaint relating to the infringement of the right to a fair trial, enshrined in Article 21 (3) of the Constitution, and of the right of defence guaranteed by Article 24 of the Constitution, the Court held that the specific features of administrative penalties must be taken into account in the regulation of a simplified procedure for administrative offences. According to the case-law of the European Court of Human Rights, the guarantees of the right to a fair trial must apply not only to criminal proceedings, in the strict sense, but whenever the act attributable has a criminal aspect, such as administrative penalties.

The Court noted that, in the simplified written procedure governed by the law criticised, the adversarial principle is respected, since copies of all relevant documents are sent to all interested parties. Thus, the party has a real opportunity to bring its factual and legal arguments to the attention of the other party. It is also possible for the other party to respond to them, which is consistent with the adversarial principle, even if the procedure governed by the law complained of is written and devoid of orality.

However, the Court found that the law subject to review does not provide for an appeal against the judgement delivered by the court. By Decision No 369 of 30 May 2017, the Court held that the legislator may introduce different legal treatment for bringing an appeal on a point of law, regulating certain situations in which an appeal cannot be brought, but that that different legal treatment cannot be merely an expression of the legislator's exclusive assessment, but must be objectively and rationally justified in accordance with the principle of equality of citizens before the law and public authorities, enshrined in Article 16 (1) of the Constitution. Consequently, the legislator has no constitutional right to block, according to the value of the claim brought before the court, the access to the appeal on a point of law, because it places citizens in a different situation without having an objective and reasonable justification. By imposing a value threshold on the request for access to the remedy, the legislator does not ensure the legal equality of citizens as regards access to an extraordinary remedy, a component part of the right to a fair trial.

In view of the establishment of a special procedure for adjudicating on the administrative complaint in the event that the contested penalty is a warning or a fine not exceeding RON 3.000 and the absence in that procedure of the possibility of bringing an appeal against the court decision ruling on the administrative complaint, the Court has established that the threshold for the amount of the penalty imposed in the report establishing and sanctioning the administrative offence cannot constitute an objective and reasonable justification for prohibiting access to the appeal procedure already regulated by Article 34 (2) of Government Ordinance No 2/2001. As the appeal is the only remedy in this matter, its removal would amount to rendering meaningless the provisions of Article 129 of the Constitution relating to legal remedies.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing Government Ordinance No 2/2001 on the legal regime for administrative offences was unconstitutional.