

Decision No 445 of 12 October 2022 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No10/2022 amending Law No 346/2004 on encouraging the establishment and development of small and medium-sized enterprises, published in the Official Gazette of Romania, Part I, No 1136 of 25 November 2022

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania stated that, under points 1 and 2 of the Single Article of the Law approving Government Emergency Ordinance No 10/2022 amending Law No 346/2004 on encouraging the establishment and development of small and medium-sized enterprises governed the obligation of Deputies and Senators to submit for analysis legislative proposals with an impact on the business environment to the Group for the Evaluation of the Economic Impact of Legislative Acts on Small and Medium-sized Enterprises (SMEs), before submitting them for endorsement. It also established the obligation for the initiator of the legislative act to take over the proposals resulting from the consultations that formed the basis of the report on the SME test. Should the proposals not be taken over, the initiator of the legislative act must provide justification by means of a notice published on its website. It follows that Deputies and Senators will be obliged to include in their legislative proposals the proposals resulting from the consultations which formed the basis for the report on the implementation of the SME test. The author of the objection of unconstitutionality considered that this legislative solution was contrary to the constitutional regime of the representative mandate of Deputies and Senators.

Another criticism concerns the use of the term ‘including legislative proposals made by Deputies and Senators’ in Article 9 (2) of Law No 346/2004, which is considered to be in breach of Article 1 (5) of the Constitution in its part relating to the quality of the law, since it is not correlated with Article 9 (1), which provides that the central and local administration, i.e. chambers of commerce and industry, must create a framework favourable to the establishment and development of small and medium-sized enterprises. As point 2 of the Sole Article uses the words ‘initiator of the legislative act’, it is understood that the scope of the initiators includes Deputies and Senators. It is also unclear when the application of the SME test and the submission for endorsement by the Group for the Evaluation of the Economic Impact of Legislative Acts on Small and Medium-sized Enterprises take place.

II. Having examined the objection of unconstitutionality, the Court found that the constitutional principle of the representative mandate is not affected by the introduction of a new criterion for assessing the impact of new legislation. Setting quality requirements for the content of the legislative acts that Deputies and Senators initiate is intended to lead to responsible conduct in the drafting of legislative proposals. Based on the political connection of the parliamentarian with the voters, the representative mandate does not give him absolute freedom, over and above constitutional, legal and regulatory requirements. Moreover, since it is intended to ensure his independence in the exercise of his mandate, that principle cannot be relied on to justify an activity of a parliamentarian beyond the constraints imposed by the legislative technique for the adoption of a legislative act. A contrary approach would lead to the unacceptable conclusion that the representative mandate would exempt Parliament and parliamentarians from compliance with the laws. For these reasons, the Court dismissed as unfounded the complaint based on the provisions of Articles 61 and 69 of the Constitution.

The rule does not lose its character as a recommendation by establishing the obligation for the initiator of the legislative act to take over the proposals resulting from the consultations which formed the basis of the report on the SME test or to justify the refusal to take them over. The aim of the legislative solution is to make these consultations effective and not to invoke them formally. The initiator remains free to take over all or part of the proposals received, but with the consequent obligation to publicly justify, by means of a notice published on its website, the reasons for not taking them up. Similarly, through the analysis carried out by the Group for the Evaluation of the Economic Impact of Legislative Acts on Small and Medium-sized Enterprises on the report on the application of the SME test, even if this demonstrates the inappropriateness of the proposed regulation, its opinion is advisory and is not capable of blocking the procedure for adopting the legislative act. Such requirements

are not only reasonable but also necessary to ensure a uniform and coherent legislative framework in the field.

As regards the complaint concerning the poor wording, which makes unclear the scope of the initiators required to take over the proposals resulting from the consultations which formed the basis for the report on the application of the SME test, the Court observed that the initiators of legislative acts in the regulated field were central and local government bodies, namely chambers of commerce and industry. The legislator merely supplemented, in terms of the scope of the initiators of the legislative act, only the rule contained in Article 9 (2), expressly including Deputies and Senators. If the legislator had envisaged that the contested provisions should also apply to initiators that are Deputies and Senators, this would only have been possible following a correlation with the stages of the parliamentary legislative procedure enshrined in the parliamentary rules. However, since these aspects have not been regulated, the contested legislative solution remains applicable only to the legislative acts drawn up by the authorities referred to in Article 9 (1) of Law No 346/2004. The Court therefore considered that, in this respect, the rules complained of were clear and predictable, thus in accordance with Article 1 (5) of the Constitution.

On the other hand, as regards the confusion as to when the submission for endorsement by the Group for the Evaluation of the Economic Impact of Legislative Acts on Small and Medium-sized Enterprises takes place, the Court noted the wrong wording of the text of the law criticised by reference both to the entire administrative procedure laid down by Law No 346/2004 and to the parliamentary legislative procedure laid down in parliamentary regulations. The regulation of the obligation in question 'before the legislative act is submitted for endorsement' has meaning and is applicable in so far as the analysis concerns legislative acts initiated by ministries, other specialised bodies of the central public administration, local public administration authorities or chambers of commerce and industry. However, if the provisions of Article 9 (2) of Law No 346/2004 also concern legislative proposals initiated by deputies or senators, this legislation is ambiguous and leads to confusion as to the stages of the procedure for drawing up such acts in the parliamentary procedure. The legislator is free to lay down those obligations also for the initiators of legislative acts who have the status of Deputies and Senators, but such a legislative choice must provide for a clear and predictable procedure, integrated at the specific stages of a parliamentary legislative procedure, as to how a Deputy or Senator can comply with the legal obligations laid down in the law criticised.

In conclusion, since, under Article 9 (2) of the law subject to review, the initiators of a legislative act, as identified in Article 9 (1) of the same law, are required to complete a procedure for the preparation and consultation of draft legislative acts before the endorsement procedure, the provisions criticised, by means of the words 'including legislative proposals made by Deputies and Senators', create confusion as to when the advisory opinion issued by the Group for the Evaluation of the Economic Impact of Legislative Acts on Small and Medium-sized Enterprises may be requested by the initiators who are Deputies and Senators. Such legislation is contrary to the requirements of Article 1 (5) of the Constitution, in its part relating to the quality of legal rules.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the words 'including legislative proposals made by Deputies and Senators' in the provisions of point 1 of the Sole Article, with reference to Article 9 (2), of the Law approving Government Emergency Ordinance No 10/2022 amending Law No 346/2004 on encouraging the establishment and development of small and medium-sized enterprises were unconstitutional.

Also unanimously, the Court dismissed as unfounded the objection of unconstitutionality and found that the provisions of point 2 of the Sole Article, with reference to Article 9¹ (4²) of the Law approving Government Emergency Ordinance No 10/2022 amending Law No 346/2004 on encouraging the establishment and development of small and medium-sized enterprises were constitutional in relation to the criticisms made.