

Decision No 641 of 23 September 2020 on the objection of unconstitutionality of the Law amending and supplementing Law No 21/1996 on competition, published in Official Gazette of Romania, Part I, No 1001 of 29 October 2020

Summary

I. As grounds for the objection of unconstitutionality, criticisms of extrinsic and intrinsic unconstitutionality were raised against the Law amending and supplementing Law No 21/1996 on competition.

From an extrinsic point of view, it was argued, in essence, that the Senate, as the decision-making Chamber, had substantially altered the form and content of the law, leading to a breach of the principle of bicameralism. An infringement of Article 75 (2) in conjunction with Article 61 (2) and Article 147 (4) of the Constitution was also alleged by the continuation of the legislative path by the first notified Chamber after the expiry of the 45-day period laid down in the Constitution.

From an intrinsic point of view, it was pointed out that Article II of the contested law, according to which, within 30 days of the entry into force of the law, the procedures for the appointment of members of the Competition Council are to be initiated retroactively, affects the mandates of current members and infringes Articles 15 (2), 16 (1) (a) and 147 (4) of the Constitution.

It was also argued that the contested law, by the provisions relating to the termination of ongoing mandates and the determination of the amount of fines, infringes Directive 1/2019/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market — (ECN+ Directive).

Article I (2) of the contested law, which establishes one of the conditions for appointment as a member of the Competition Council — “not to be incapacitated or convicted of intentional offences, for which the law provides for a custodial sentence of 3 years or more”, establishes a permanent disqualification from the right to serve as a member of the Competition Council, contrary to Articles 1 (3), 15 (1), 16 (3) and 147 (4) of the Constitution.

Specifically, provisions of the Law for amending and supplementing Competition Law 21/1996 were criticised, arguing that they did not meet the requirements of precision, foreseeability and clarity, contrary to the requirements laid down in Article 1 (5) of the Constitution. In essence, it was argued that the expression “a management function with responsibilities involving a high professional and managerial competence” in Article I (2) of the contested law is unclear as regards the conditions required for appointment as President of the Competition Council. The expression “for the remainder of the term of office” in Article I (4) of the contested law, which establishes the legal effects of the failure to take the oath as a result of own fault on the part of the appointed member of the Competition Council, is also unclear and contradicts other provisions of the law. It was argued that Article I (10) of the contested law, using the term “specialised public functions”, is unclear and does not relate to the provisions of Government Emergency Ordinance No 57/2019 on the Administrative Code and that Article I (11) of the contested law amends the status of the Secretary-General and the Deputy Secretary-General of the Competition Council, without clarifying whether these functions remain functions of senior public officials.

II. Having examined the complaints of unconstitutionality relating to the allegations of infringement of the principle of bicameralism, the Court held that they were unfounded. The form adopted by the Chamber of Deputies, as the first notified Chamber, is identical to the form of the initiator, comprising 25 points for amending and supplementing Law No 21/1996,

whereas the form adopted by the Senate, as the decision-making Chamber, comprises 3 articles numbered with Roman numerals. Article I thus contains 17 points relating to amendments and additions to Law No 21/1996, while Articles II and III of the contested law have the character of transitional provisions.

In the case of the contested law, although there are differences between the forms adopted by the Senate and the Chamber of Deputies, it cannot be said that there are major differences in legal content between the forms adopted by the two Chambers of the Parliament. Both forms seek to amend and supplement Law No 21/1996, with regard to the establishment of a new method of organisation and functioning of the Competition Council, and for that purpose, the decision-making Chamber, the Senate, has made amendments and supplements, which are limited to the rules adopted by the first Chamber concerning the appointment and termination of the mandate of members of the Competition Council, the Staff Regulations of the Competition Council, and measures relating to the way in which the Competition Council's revenue is raised and used.

The amendments and additions made by the Senate are targeted at: the number of component members of the Competition Council, the exclusive involvement of Parliament in the nomination of the members of the Plenary of the Competition Council, the establishment of the condition of seniority of at least 10 years in a position as high public official or in a management position with responsibilities implying high professional and managerial competence to be fulfilled by the person proposed for President of the Competition Council, the penalty of removal from office by operation of law if the member of the plenary of the Council no longer satisfies the conditions required by law for appointment, in the event of a serious breach of this law or in the event of conviction by a final judgment for an offence, the cases and procedure for the suspension of the members of the plenary of the Council from office, the appointment of the vice-president of the Council, elected by a majority of the members present, in order to ensure the interim in case of vacancy of the office of president of the Competition Council, the duration of the term of office in the event of failure to take the oath due to own fault, rules on the functioning of the Plenary of the Competition Council and the procedure for carrying out the specific activity, the appointment and dismissal of the Secretary-General and the Deputy Secretary by the Plenary of the Competition Council on a proposal from the President of the Competition Council. The transitional provisions relating to the mandates of current members, contained in Article II of the contested law, constitute a legislative solution which is complementary to the form of the law adopted by the first notified Chamber, designed to achieve a more articulated form of the law as a whole. The decision-making Chamber carried out operations such as rewording, legislative correlations, systematisation of legal texts, deletions of duplications or unnecessary repetitions, and therefore legislative technique operations to ensure regulatory consistency. Therefore, there is no major difference in content between the form adopted by the Chamber of Deputies and that adopted by the Senate, since the final form reflects the aim pursued by the initiators, as is apparent from the explanatory memorandum to the law, namely to ensure the independence of the members of the Plenary of the Competition Council and the independence of the specialised staff conducting investigations, and to amend those legal provisions which seriously affect the functioning of the institution, primarily by the way in which the appointment of members of the Competition Council is currently ensured. In conclusion, in view of the fact that the form adopted by the Senate does not substantially alter the regulatory object, the aim pursued by the legislator or the configuration of the legislative initiative, the Court found that the provisions of the Constitution relating to the principle of bicameralism had not been infringed.

As regards the complaint alleging the infringement of Article 75 (2) in conjunction with Article 61 (2) and Article 147 (4) of the Constitution, the Court noted that, as is apparent from the consultation of the legislative sheet of the legislative act subject to constitutional review,

the Law was tacitly adopted by the Chamber of Deputies, as the first notified Chamber, on 13 June 2018, following the expiry of the 60-day time-limit, having been submitted to the Senate for discussion and adoption, as the decision-making Chamber. Thus, even though the deadline for adoption was changed during the legislative procedure before the Chamber of Deputies (60 days) and the Committee on Industry and Services and the Committee on Legal Affairs, Disciplinary Matters and Immunities adopted an admission report with amendments, the Court found that on 13 June 2018, in line with the provisions of the third sentence of Article 75 (2) of the Constitution, the legislative proposal was deemed to have been adopted by the Chamber of Deputies in its original form, which is tantamount to endorsing the original legal content of the legislative proposal. Consequently, since the first notified Chamber tacitly adopted the law and submitted the legislative proposal in the form submitted by the initiators to the decision-making Chamber, the legislator did not infringe the constitutional provisions relied on.

With regard to the criticisms of unconstitutionality made in relation to Article 15 (2), Article 16 (1) (a) and Article 147 (2) of the Constitution, the Court held that Article II (4) is applicable for the future, after the entry into force of the law. The Competition Council does not fall within the category of fundamental State institutions and is not provided for by the Basic Law (see, to that effect, Decision No 134 of 10 March 2005). It is therefore the legislator's right to change the number of members of the Competition Council, or the duration of their term of office, since these matters are not governed by the Constitution. The Constitution neither determines the number of members of the Competition Council nor the duration of their term of office, and leaves the possibility for the legislator to regulate in this area. The legal basis for the termination of the term of office is the new legislative act adopted, as a result of which new rules have been laid down concerning the conditions and procedure for the appointment of members of the Competition Council and their term of office. In the same vein, in line with the case-law of the Constitutional Court (see, to that effect, Decision No 175 of 26 March 2014 and Decision No 97 of 3 March 2015), the Court held that no constitutional provision precludes the legislator from abolishing the term of office of a non-constitutional nature, such as that of the member of the Competition Council in the present case, the mandate of the member of the Competition Council having a legal status. Consequently, the Court found that, when analysed in the context of the new legislative framework on the organisation and functioning of the Competition Council, the provisions of Article II of the law subject to constitutional review cannot be regarded as contrary to Article 15 (2) of the Constitution.

Nor have the provisions of Article 16 (1) of the Constitution been infringed, since the legal provisions criticised do not create inequalities or discrimination between citizens or categories of persons, but merely provide that the measure adopted by the legislator to initiate the procedure for the appointment of members of the Competition Council, within 30 days of the date of entry into force of the contested law, applies equally to all addressees.

Likewise, by amending the rules on the organisation and functioning of the national competition authority in order to ensure and strengthen its independence, it cannot be held that the provisions of Article 135 (2) (a) of the Constitution relating to the obligation of the State to ensure the protection of fair competition are infringed, since the legislator has a margin of discretion in laying down the rules on the organisation and functioning of the competition authority.

With regard to the allegations concerning the infringement of Directive 1/2019/EU of the European Parliament and of the Council of 11 December 2018 by the provisions relating to the termination of ongoing mandates and the determination of the amount of the fines, relied on in the light of Article 148 of the Constitution, the Court held that they were unfounded because, in the present case, the conditions for the use of a rule of European law in the context of the review of constitutionality were not satisfied. Matters relating to the regulation by

Member States of the organisation and functioning of the national competition authority (such as, for example, guaranteeing the independence of national competition authorities in the exercise of their powers) are not in themselves of constitutional relevance and are not circumscribed by constitutional fundamental principles and rules, such as, for example, those which enshrine fundamental rights, freedoms and duties or those concerning public authorities governed by constitutional texts.

The Court also held that Article I (2) of the contested law does not introduce a permanent disqualification from the right to serve as a member of the Competition Council, since, in the light of Article 16 (3) of the Constitution, it is up to the legislator to lay down those conditions for the exercise of a function, in the light of the social interests protected and the importance attached to the regulated civil service. Thus, whenever the legislator considers it appropriate, having regard to the matter subject to regulation, it may confer on criminal convictions legal effects going beyond the criminal penalty by regulating disqualifications, prohibitions or incapacity resulting from the conviction. These extra-penal consequences deriving from the conviction operate under the conditions and deadlines laid down by law and are resolved by applying Articles 4, 152 (1) or 165 to 171 of the Criminal Code on the criminal law on decriminalisation, post-conviction amnesty and rehabilitation (see Decision No 304 of 4 May 2017, or Decision No 592 of 8 October 2019).

As regards the allegations relating to the infringement of Article 1 (5) of the Constitution by the specific legal provisions complained of, the Court held that, in reality, they concern issues which have no constitutional relevance, in the light of the constitutional requirements of the quality of the law, since the violation of a fundamental right, freedom or principle is not called into question.

III. For all these reasons, by a majority of votes, the Court dismissed the objection of unconstitutionality as unfounded and found that the Law amending and supplementing Law No 21/1996 on competition was constitutional in the light of the criticisms made.