

***Decision No 850 of 25 November 2020 on the objection of unconstitutionality of the Law amending Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment, published in the Official Gazette of Romania, Part I, No 1253 of 18 December 2020***

## **Summary**

**I. As grounds for the objection of unconstitutionality**, the authors argued that, both by the legislative content and by the way in which it was adopted, the Law amending Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment infringes the constitutional provisions of Articles 1 (3), 111 (1) and 138 (5).

As regards the complaint of unconstitutionality in relation to the provisions of Article 1 (3) of the Constitution, the authors of the referral stated, in essence, that the provisions of the law criticised change the value of the social benchmark indicator (hereinafter ISR), in the sense that they increase it. The authors of the referral argued that the legislative technique rules were not complied with by the poor wording of the legislative initiative, since the regulation of a new ISR value within a special legislative act, namely Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment, alters the amount of other social benefits constituted by reference to the amount of the ISR. The authors of the objection criticised the incomplete drafting of the explanatory memorandum for the law subject to constitutional review, namely the fact that its content did not indicate the financial impact on the consolidated general budget, the impact on the legal system and the consultations carried out. They also argued that the law subject to constitutional review regulated beyond the intention expressed in the statement of reasons by its initiators who strictly contemplated the amendment of the amount of the unemployment benefit. Moreover, a legislative lacuna was invoked, namely the absence of a rule linking all social benefits, including those of a fixed amount, to the discounted value of the ISR determined by the law which is the subject of a complaint of unconstitutionality, for those reasons, the legislation lacking foreseeability.

The criticism of the authors of the referral in relation to the provisions of Articles 111 (1) and 138 (5) of the Constitution concerned the failure to comply with the obligation of the initiators to indicate the source of financing, namely that the Government had not been asked to draw up a financial statement on the budgetary impact of the rules proposed by the legislative initiative.

**II. Having examined the challenges of unconstitutionality** in relation to the provisions of Articles 111 (1) and 138 (5) of the Constitution, the Court held, as stated in its case-law, that the requirement to indicate the source of financing for the approval of budgetary expenditure, deriving from the constitutional provisions of Article 138 (5), is a separate aspect from that of the lack of funds to support financing from a budgetary point of view. Thus, the Constitutional Court has held that the determination of the source of funding and the insufficiency of financial resources from the source thus established are two different aspects: the first aspect is linked to the imperatives of Article 138 (5) of the Constitution and the second is not constitutional in nature, being a matter exclusively of political expediency, essentially concerning relations between Parliament and the Government. Article 138 (5) of the Constitution requires both the budgetary allocation, which has the meaning of an expenditure, and the source of financing, which has the meaning of the income needed to bear it, to be determined at the same time, in order to avoid the negative economic and social consequences of the establishment of an uncovered budget expenditure. As regards the scope of the provisions under which a financial statement must be requested, the Court noted that, in the case of proposals to introduce measures/policies/legislative initiatives the adoption of which entails an

increase in budgetary expenditure, the initiators are required to submit the financial statement, and if these are the result of amendments admissible in the legislative procedure, the first notified Chamber or the decision-making Chamber, as the case may be, must request the financial statement.

As regards the law subject to constitutional review, the Court recalled that the legislative initiative, as submitted to the Senate, as the first notified Chamber, provided for an amendment of the provisions of Article 33<sup>1</sup> of Law No 76/2002, which resulted in an increase in the amount of ISR from RON 500 to 1200 with the entry into force of the law, resulting in increases in expenditure in the unemployment insurance budget for the current year. Provision was also made for amending the provisions of Article 127 (2) of Law No 76/2002 on the method of establishing the ISR's value on a regular basis, to the effect that it is amended annually by Government Decision, by 31 January of the current year, on the basis of the rate of increase in consumer prices forecast per year/previous year. Therefore, the initiators had a constitutional obligation to request the financial statement. The analysis of the legislative process did not show that such a request was addressed to the Government, nor was the financial statement found to exist. However, in the course of the legislative procedure which was carried out in the decision-making Chamber, i.e. the Chamber of Deputies, the legislative proposal was amended, providing that the amount of the ISR would be changed from 1 January 2021, without prejudice to the budgetary provisions for 2020.

The Court considered that, by amending the legislative proposal which would have had an impact on the current budget, the decision-making Chamber, acting to correct the issues of extrinsic unconstitutionality of the law under discussion, covered the unconstitutionality defect consisting in the absence of a financial statement. In that regard, the Court observed that, as stated in its case-law, Article 138 (5) the Constitution concerns the objective and effective nature of the source of funding and operates with elements of budgetary certainty and predictability; this constitutional text does not concern the *concrete* existence of sufficient financial resources at the time of the adoption of the law, but rather the fact that that expenditure is properly envisaged in the State budget in order to be certain to be covered during the budgetary year. The Court found that, at the time of adoption of the law subject to constitutional review by the Chamber of Deputies and even at the time of the examination of the objection of unconstitutionality, the Law on the State Social Security Budget for 2021 had not yet been adopted or promulgated, with the result that the Government had the possibility of taking into account the costs entailed by the amendments made to Law 76/2002.

The Court therefore considered that the issue of unconstitutionality relating to failure to comply with the constitutional obligation of the initiators of the law to indicate the source of financing of budgetary expenditure cannot be retained with regard to the Law amending Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment, as adopted by the Chamber of Deputies.

Further examining the complaint of unconstitutionality alleging infringement of the principle of legal certainty derived from the provisions of Article 1 (3) of the Constitution, the Court found that the authors of the referral had criticised the incomplete wording of the statement of reasons for the law subject to constitutional review, namely that its content did not indicate the financial impact on the general consolidated budget, the impact on the legal system and the consultations carried out. They also argued that the law subject to constitutional review governed beyond the will expressed in the statement of reasons by its initiators.

In its case-law, ruling on similar complaints of unconstitutionality, the Court held that it did not have jurisdiction to review the wording of the statements of reasons for the various laws adopted. In that regard, it pointed out that the statement of reasons, let alone its wording, were not enshrined at constitutional level. The explanatory memorandum, in the light of Article 1 (5) of the Constitution, is a statement of reasons required in the procedure for the adoption

of laws, but, once the law has been adopted, its role is limited to facilitating its understanding. The explanatory memorandum to the law is therefore merely an instrument of one of the established methods of interpretation — the teleological method. That means that the meaning of a legal provision must be determined having regard to the objective pursued by the legislator when adopting the legislative act of which that provision forms part. Thus, the explanatory memorandum is only one of many other instruments of an interpretative method. The fact that it is not sufficiently precise or that it does not clarify all aspects of the content of the provision does not lead to the conclusion that that rule itself is unconstitutional for that reason, since it has only an underlying function in the interpretation of the rule adopted. Constitutional review covers the law and not the options, wishes or intentions contained in the explanatory memorandum to the law. The Court therefore concluded that it was not competent to censor the wording of the explanatory memorandum drawn up by deputies, senators or the Government, as the case may be. Therefore, an infringement of Article 1 (3) of the Constitution could not be claimed.

Having examined the provisions of the Law amending Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment in the light of the criticisms of intrinsic unconstitutionality raised by the authors the referral, the Court held that they had relied on a legislative lacuna, namely the absence of “a rule on the correlation of all social benefits, including those of a fixed amount, with the discounted value of the ISR determined by the law subject to the challenge of unconstitutionality”, and for those reasons, the legislation lacks foreseeability.

In response to that complaint, the Court recalled that the contested provisions of law govern the amount of the ISR and the way in which it will be amended in the future. However, the provisions of law amended by the law subject to constitutional review, namely Articles 33<sup>1</sup> and 127 (2) of Law No 76/2002, regulate the same aspects. Therefore, the way in which the authorities will apply the legal provisions amended by the legislative act subject to constitutional review relating to ISR is to be done in the same way as it is done in relation to the current provisions of Articles 33<sup>1</sup> and 127 (2) of Law No 76/2002.

In fact, the Court has held that the claims made by the authors of the referral are based on the premiss that the change in the amount of the ISR must have effect only as regards the calculation of unemployment benefit and must not extend to the calculation of the other social benefits to be determined on the basis of that indicator, and that method of interpretation is not clear from the amending legislation. The Court observed that that complaint does not, in reality, concern a question of unconstitutionality of the legislation, but a lack of consistency between the scope of the legislation subject to constitutional review and the subjective perspective of the authors of the referral on the impact that the Law amending Law 76/2002 on the unemployment insurance scheme and the stimulation of employment should have on the various social benefits calculated on the basis of that indicator.

**III. For all these reasons,** by a majority of votes, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law amending Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment was constitutional in the light of the criticisms made.