

Decision No 876 of 9 December 2020 on the objection of unconstitutionality of the Law rejecting Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures for the protection of national interests in economic activity, published in the Official Gazette of Romania, Part I, No 1265 of 21 December 2020.

Summary

I. As grounds for the referral of unconstitutionality, the author of the referral argued that the Law on the rejection of Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures to protect national interests in economic activity infringed the final sentence of Article 115 (5) and Article 76 (1) of the Constitution. Law No 173/2020 was adopted as an organic law by both Chambers, i.e. by an absolute majority of the votes of each Chamber, in accordance with Article 76 (1) of the Basic Law. Law No 173/2020 therefore regulated in the area of organic law the scope of which is strictly circumscribed at constitutional level. Government Emergency Ordinance No 166/2020 amended Law No 173/2020, which means that it intervened in the area of organic law, in accordance with its regulatory purpose. In accordance with the principle of the hierarchy of legislative acts resulting from Article 1 (5) of the Basic Law, legislative events occurring with regard to organic laws must be carried out by means of legislative acts with legal force at least equal to the law subject to that legislative event. Therefore, an organic law may be amended/supplemented/repealed by organic law or by Government Emergency Ordinance.

In the present case, the Government amended Law No 173/2020 by means of an emergency ordinance, in compliance with the principle of the hierarchy of regulatory acts. Pursuant to the final sentence of Article 115 (5) of the Constitution, the emergency ordinance containing rules of the nature of the organic law shall be approved by the majority provided for in Article 76 (1) of the Basic Law. Under that provision, the law approving the emergency ordinance must be adopted by an absolute majority of the votes of each Chamber.

The Government stated that, in the context of the parliamentary procedure, the law approving the emergency ordinance had been transformed into a law rejecting it. It should have been adopted by an absolute majority of votes in each Chamber, in accordance with the final sentence of Article 115 (5) in conjunction with Article 76 (1) of the Constitution, since the transformation of the draft approval of the Emergency Order into a draft rejection does not render the law organic, in accordance with Decision No 972 of the Constitutional Court of 31 October 2007. However, the Law rejecting Government Emergency Ordinance No 166/2020 was adopted in the Senate as an organic law, with the majority laid down in Article 76 (1) of the Constitution, and in the Chamber of Deputies the same law was adopted as ordinary law, with the majority provided for in Article 76 (2) of the Constitution.

II. Having examined the complaints of unconstitutionality, the Court held that, according to the title of the legislative act under review, its provisions were intended to regulate the rejection of Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures for the protection of national interests in economic activity. Analysing the normative content of Government Emergency Ordinance No 166/2020, the Court noted that it had amended the provisions of Articles 1 and 2 (1) of Law No 173/2020, replacing the term ‘State holdings’ with the expression ‘State-owned shares’ in those rules. The Court found that the law under review rejected the Emergency Ordinance, so that, from the date of its entry into force, the amendments to Law No 173/2020 would cease to produce legal effects, the normative content of which reverted to the original form which referred to ‘State holdings’.

The Court found that, according to the wording of its wording, the law rejecting the emergency ordinance was adopted by the Romanian Parliament, in compliance with the

provisions of Articles 75 and 76 (2) of the Constitution, i.e. as ordinary law. The Court noted that the amended law (Law No 173/2020) was adopted by the Romanian Parliament, in compliance with Articles 75 and 76 (1) of the Constitution, and thus as an organic law.

In order to determine the effect of Article 76 (1) of the Constitution on the procedure for the adoption of the contested law, the Court referred to its case-law on the procedure for amending organic laws. The Court held that the scope of organic laws is very clearly defined by the text of the Constitution, and Article 73 (3) must be interpreted strictly, with the result that the legislator is required to adopt organic laws only in the areas expressly provided for. In its case-law, the Court has held that whenever a law derogates from an organic law, it must be classified as organic, since it also acts in the area reserved for organic laws. Moreover, it can be concluded that the constituent legislator has indirectly established, in the legislative content of Article 73 (3) of the Constitution, that rules that are special or that derogate from the general legislation on the matter must also be adopted by means of a law of the same category. In other words, the Court held that the provisions of an organic law may be amended only by rules having the same legal force.

The Court also held that the amendment may also be made by ordinary rules, if the amended provisions do not contain rules of the nature of organic law, but concern aspects which are not directly related to the regulatory scope of the organic law. It follows that what is defined for the purpose of defining the two categories of law is the substantive criterion of the law, namely its normative content. In its case-law, the Court has held that an organic law may, for reasons of legislative policy, also contain rules of the nature of the ordinary law, but without those rules pertaining to organic law, since otherwise the areas reserved by the Constitution to organic law would be extended.

In the present case, the Court found that the purpose of the emergency ordinance rejected by the Parliament was to circumscribe the measures adopted for the protection of national interests in economic activity (prohibition, for a period of two years, of the disposal of State shareholdings in domestic companies, as well as in any other company in which the State has the status of shareholder, irrespective of the share held, and, respectively, the suspension for a period of two years of any operation concerning the disposal of State shareholdings in domestic companies, as well as in companies in which the State is a shareholder, initiated previously) in respect of 'State-owned shares'. The law rejecting the emergency ordinance will once again cover 'State holdings', so that the scope of measures intended to protect national interests is the regulatory object of the law. The Basic Law does not contain any express provisions, nor does it require the legal regime governing 'State-owned shares'/'State holdings' to be regulated by rules of the nature of organic law. Therefore, as regards the substantive criterion, since it contains rules which do not fall within the situations expressly provided for in Article 73 (3) of the Constitution, a rule of strict interpretation and application, the law subject to review is an ordinary law.

The Court therefore found, in line with its case-law, that the Law on the rejection of Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures for the protection of national interests in economic activity, adopted by simple majority or by a majority of the members present in each Chamber, on the basis of Article 76 (2) of the Constitution, complies with the constitutional procedure for the adoption of ordinary laws, without infringing the provisions of Articles 73 (3) and 1 (5) of the Basic Law.

III. For all these reasons, by a majority of votes, the Court dismissed the objection of unconstitutionality and found that the Law rejecting Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures for the protection of national interests in economic activity was constitutional in relation to the criticisms made.

