Decision No 19 of 15 February 2023 on the objection of unconstitutionality of the provisions of Article 4 (2) (a), (c), (h) and (i), Article 13 (1), Article 14 (1) and (4), Article 15 (1), Article 17, Article 18 (1), Article 19, Article 21 (1), Article 24 (2), Article 26, Article 30 (1) and (2), Article 38 (4), Article 44, Article 57, Article 72 (f), Article 73, Article 74 (1) to (3) and Article 77 of the Law on aquaculture, and of the law as a whole,
Published in the Official Gazette of Romania, Part I, No 347 of 25 April 2023.

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania stated that the Law on aquaculture had been adopted by the Chamber of Deputies, the decision-making Chamber, with a significant number of amendments accepted. The text of the law, as adopted by the Chamber of Deputies, brings about a change in essence and fundamentally departs from both the will of the initiators and the will of the first Chamber referred to, in violation of the constitutional principle of bicameralism.

Moreover, Article 14 (4) of the impugned law violates Article 1 (4) and (5), Article 102 (1) and Article 136 of the Constitution, since it orders the transfer of the plots of land on which fish farms are located and their related land, which are administered by the National Agency for Fisheries and Aquaculture (NAFA), from the public domain of the State into its private domain, by Government decision. Although, formally, the impugned norm refers to Government's decisions as legal acts authorising the transfer of such plots of land from the public domain of the State into its private domain, in reality, the legislator does not establish a procedure that the executive should follow in situations where the Government decides on such transfers on a case-by-case basis. Through this manner of regulation, the legislator substitutes itself for the decision of the executive and, thus, all the plots of land on which fish farms are located and their related land shall be subject to transfer, in complete disregard for the reason behind the administrative function pertaining to the Government.

The author of the objection stated that there was an overlapping between the prerogatives of the State Domains Agency (SDA) and those of the NAFA, as it results from Article 4 (1) and (2) of the impugned law, in violation of Article 1 (5) of the Constitution.

Furthermore, as a result of the cumulative effect of the provisions of Article 14 (4) and Article 30 (1), the plots of lands in the public domain of the State on which fish farms are currently built and their related land shall be transferred into the private domain of the State and then sold directly to the owners of fish farms who send a letter of intent and undertake to maintain the aquaculture activity. The conditions that the legislator has set for carrying out this type of sale are unclear, in violation of the standards related to the quality of the law. Moreover, Article 30 (1) of the impugned law does not merely create the possibility of a direct sale of the land in question, but establishes this type of sale as an obligation to be performed when an intention to purchase is expressed.

With regard to Articles 72 (f) and 73 of the impugned law, it was argued that there is no clear delineation between contraventional liability and criminal liability, since Article 73 criminalises the activity of "fish extraction", while Article 72 (f) sets contraventional sanctions for "fishing". As for confiscation, it is regulated in a confusing and contradictory manner.

II. By examining the objection of unconstitutionality, the Court held that bicameralism did not mean that the two Chambers should decide on an identical legislative solution, that there could be deviations in the form adopted by the decision-making Chamber compared to the form adopted by the Chamber of sober second thought but without a change in the essential purpose of the draft law/legislative proposal. The Court noted that the removal of one of the misdemeanours set out in Article 68 (the form adopted by the Senate) from the

existing nine was not something likely to suggest a violation of the principle of bicameralism. Similarly, a more detailed regulation of confiscation does not equal to a violation of that principle. Finally, the introduction of Chapter XII – Scientific research, technological development and innovation in the field of aquaculture – cannot be considered as a substantial change, of essence, a new conception or philosophy of the law; on the contrary, it follows the same line of thinking envisaged by the first Chamber, detailing the responsibilities of the Ministry of Agriculture and Rural Development in this field.

With regard to Article 14 (4) of the impugned law, the Court noted that it regulated the transfer of property from the public domain into the private domain of the same holder of the right of ownership, namely the State. This transfer is conducted by operation of law, the actual handover and takeover of the land concerned being carried out by Government decision. Thus, the law does not regulate the transfer of an *ut singuli* asset between domains based on the fact that it is an exclusive object of public ownership. The legal provision refers to a generality of determinable assets, as it refers to the plots of land in the public domain of the State on which the fish farms are located and their related land, administered by the NAFA. In this case, their transfer must be carried out by secondary legislation, which may provide for the cessation of the national public use or interest as regards the assets concerned, with an appropriate statement of reasons. Consequently, the Court held that Article 14 (4) of the law violated the principle of the separation of State powers, the competence of the Government and the regime of public ownership, as provided for in Article 1 (4), Article 108 (1) and Article 136 of the Constitution.

Another plea of unconstitutionality refers to an alleged overlapping between the prerogatives of the SDA and those of the NAFA. The Court pointed out that, according to Government Emergency Ordinance No 23/2008, the SDA no longer had jurisdiction over the plots of agricultural land on which fish farms are located. The new aquaculture-related legislation, which is impugned in this case, maintains the same regulatory line. Therefore, the pleas of unconstitutionality are unfounded, considering that NAFA's jurisdiction covers the plots of agricultural land on which fish farms are located, while those of the SDA cover the agricultural land on which fish farms are not located.

Another plea refers to the fact that, under Article 30 (1), read in conjunction with Article 14 (4) of the law (which regulates the transfer of certain plots of land from the public domain into the private domain of the State), a situation arises in which assets in the private domain of the State are purchased directly by owners of fish farms. Or, finding that Article 14 (4) of the impugned law is unconstitutional, such a cumulative effect can no longer be achieved, since only the plots of land that have been transferred into the private property of the State in accordance with Article 361 (1) of Government Emergency Ordinance No 57/2019, i.e., by Government decision, may be sold. Thus, assets from the State's public domain are no longer transferred into its private domain by operation of law, which means that this plea is no longer justified.

With regard to the pleas of unconstitutionality lodged in relation to Article 30 (1) of the law, the Court found that these were well-founded given that, although introducing a method of alienation of such land that derogates from the general law, the impugned text does not use the phrase "by way of derogation from" and it does not provide for a period during which the purchaser is required to continue the aquaculture activity on the land purchased.

With regard to the plea of unconstitutionality according to which there is a normative overlapping between Article 72 (f) and Article 73 of the law, considering that the sanctioned conduct is likely to meet the constituent elements of both misdemeanours, regulated by Article 72 (f), and criminal offences, regulated by Article 73 of the law, the Court held that it was well-founded. In this regard, it should be noted that the act which Parliament characterizes as a misdemeanour, namely illegal fishing, by any means, in fish farms, overlaps with one of the hypotheses of the criminal offence governed by Article 73 (1), namely the extraction of fish

from fish farms without the consent of the manager of the fish farms in question, so that the same act can be both a misdemeanour and a criminal offence. Although there is no identity between the two normative scenarios with respect to the words used, their meaning is similar. Fishing means the extraction of fish.

Consequently, the Court established that one and the same act could not be both a misdemeanour and a criminal offence, be both subject to the effect of criminal law and removed from its scope, be both subject to an administrative regime and excluded from that regime. In its case-law, the Court has ruled on the obligation of the legislator to adopt clear, precise and foreseeable rules. In the case of criminal offences, the legislator must clearly and unequivocally indicate their material purpose in the very content of the legal norm in question, or this must be easily identifiable, by reference to another normative act to which the incriminating text is linked, in order to establish the existence or non-existence of a certain criminal offence. This same principle applies to misdemeanours as well. Consequently, the Court concluded that the two texts analysed, although clearly defining the act that represents a misdemeanour or a criminal offence, did not establish a conceptual delineation between the two legal regimes entailed by the wrongful act, which leads to an inadmissible confusion between them. It follows that both enactments contain an antithetical legislative solution and do not meet the requirements of quality of the law laid down in Article 1 (5) of the Constitution.

Furthermore, the wording relating to the confiscation of the assets used to commit the criminal offences of fish theft is imprecise, as Article 2 (17) is not correlated with Article 72 (f) and Article 73 of the law. Moreover, Article 74 (1) of the law is not correlated with Article 112 (1) (b) of the Criminal Code, which establishes that the assets intended to be used for committing a reprehensible act may be subject to special confiscation. The Court noted that confiscation was regulated both with regard to misdemeanours and criminal offences. However, considering that the legal regime of confiscation varies depending on the field in which it occurs, including in terms of the public authority ordering it, it must be regulated differently for misdemeanours and for criminal offences.

III. For all of those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the provisions of Article 14 (1) and (4), Article 21 (1), Article 30 (1), Article 72 (f), Article 73 and Article 74 (1) to (3) of the Law on aquaculture were unconstitutional.

Also unanimously, the Court dismissed the objection of unconstitutionality as unfounded and stated that the provisions of Article 4 (2) (a), (c), (h) and (i), Article 13 (1), Article 15 (1), Article 17, Article 18 (1), Article 19, Article 24 (2), Article 26, Article 30 (2), Article 38 (4), Articles 44, 57 and 77 of the Law on aquaculture, as well as the law as a whole, were constitutional in relation to the pleas lodged.