

Decision No 41 of 22 February 2023 on the referral of unconstitutionality of Romanian Parliament's Resolution No 35/2022 on the appointment of two members to the Executive College of the National Council for Combating Discrimination, published in the Official Gazette of Romania, Part I, No 227 of 20 March 2023

Summary

I. As grounds for the referral of unconstitutionality, it was stated that Resolution No 35/2022 of the Romanian Parliament was unconstitutional, since the appointment to the Executive College of the National Council for Combating Discrimination (CNCD) of members who were not law graduates infringed Article 23 (4) of Government Ordinance No 137/2000 on preventing and punishing all forms of discrimination, as amended, which provided that at least two thirds of them should be law graduates, and, as a consequence, it infringed Article 1 (3) and (5) of the Constitution.

II. Having examined the referral of unconstitutionality, the Court, in its case-law, examining the constitutionality of certain resolutions of Parliament on the appointment of members to the Governing College of the CNCD in terms of compliance with the condition laid down in Article 23 (4) of Government Ordinance No 137/2000, which provides that, when appointing the members of the Executive College, consideration will be given to the fact that a minimum of two thirds of them must be law graduates, that it is not a supplementary rule, a recommendation or an obligation of means, but rather an obligation of result, which is mandatory and operative. Thus, the meaning of the term 'consideration will be given to the fact' is that the appointing authority must ensure that at least two thirds of the members of the Executive College have legal studies completed with a bachelor's degree. The Court also held that this text must be read in conjunction with Article 23 (2) of the same Ordinance, according to which the Executive College is composed of 9 members with the rank of State Secretary, proposed and appointed, at a joint meeting, by the two Chambers of Parliament. The ratio of two thirds must be related to the total number of persons of which the Executive College is composed, and not to the number of persons in office at the time of appointment, as otherwise there would be a permanent and uncontrolled variation in this number, and, moreover, the number of two thirds might not be natural but decimal.

The Court noted that, following that case-law, the provisions of Article 23 (2) of Government Ordinance No 137/2000 were amended by Article I of Law No 193/2022 amending Article 23 (2) of Government Ordinance No 137/2000, in so far as the Executive College is composed of 11 members with the rank of State Secretary, including a representative of the Parliamentary Group of National Minorities in the Chamber of Deputies, proposed and appointed, at a joint meeting, by the two Chambers of Parliament.

It follows from a combined reading of the two legal rules – Article 23 (4) and Article 23 (2) of Government Ordinance No 137/2000, republished, as amended by Law No 193/2022 – that the two-thirds fraction related to the total number of members of the Executive College (11) mathematically leads to the result of 7,33 (decimal number), which, as is apparent from the use of the term 'minimum' in Article 23 (4) of the Order, represents the lower limit which cannot be exceeded.

From the analysis of the provisions contained in Government Ordinance No 137/2000, the Court noted that it did not establish a clear and precise rule for the assessment of a decimal number, so that the final result for the persons in the composition of the Executive College who are law graduates results in a natural number. There is no doubt that Parliament, as the only legislative authority, is free to establish such a regulatory solution in the future. At present, however, in the absence of a legal provision to that effect, the Constitutional Court

cannot assume the role of creating, repealing or amending a legal rule in order to fulfil the role as a positive legislator, nor can it replace the legislator in adding new provisions to those established.

The Court noted that, on 19 December 2022, the date of adoption of the Romanian Parliament's Resolution No 35/2022, there were 9 members of the Executive College in office, of whom 7 were law graduates and 2 had no such studies. In addition, by Resolution No 35/2022 of the Romanian Parliament, 2 members who were not law graduates were appointed as members of the Executive College. This results in a total of 7 members who are law graduates and 4 members who are not law graduates. In those circumstances, the Court held that the appointment of the two members by Parliament's Resolution No 35/2022 had infringed the lower limit, expressly and mandatorily laid down in Article 23 (4) of Government Ordinance No 137/2000, which cannot be exceeded.

The Court found that Resolution No 35/2022 of the Romanian Parliament was contrary to Article 23 (4) of Government Ordinance No 137/2000 and thus infringed Article 1 (3) and (5) of the Constitution. By adopting this Resolution, Parliament failed to comply with the law, whereas the Constitution stipulates that compliance with the laws is mandatory. Obviously, as compliance with laws is an inherent feature of the rule of law, there was also a breach of the provisions of Article 1 (3) of the Constitution, according to which Romania is a State governed by the rule of law.

III. For all those reasons, the Court unanimously upheld the referral of unconstitutionality and found that the Romanian Parliament's Resolution No 35/2022 on the appointment of two members to the Executive College of the National Council for Combating Discrimination was unconstitutional.