

TRANSPOSITION AND/OR IMPLEMENTATION OF EUROPEAN UNION LAW BY MEANS OF GOVERNMENT EMERGENCY ORDER. REQUIREMENTS SET IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

Irina ALEXE*
Constantin-Mihai BANU**

ABSTRACT: *The article critically discusses the perspective of the Constitutional Court of Romania concerning the practice of using Government emergency orders (acts regulated by Article 115 of the Constitution of Romania) in order to transpose European Union directives or to implement provisions of European Union law into Romanian law.*

KEYWORDS: *Constitutional Court of Romania; Government emergency order; EU law; transposition and implementation; urgency; exceptional circumstances.*

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1. PRELIMINARY REMARKS

Article 115 (“Legislative delegation”) of the Constitution of Romania (of 1991 in its version amended in 2003)¹ provides for the constitutional framework under which the Government is authorized to issue orders² – “simple” orders, meaning according to requirements established by an Act of the Parliament, and emergency orders. Paragraphs (1)-(3) of the said article deal with the requirements concerning “simple” orders, while paragraphs (4)-(8) of Article 115 regulate the conditions for issuing emergency orders. According to paragraph (4), “[t]he Government can only adopt emergency orders in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents”.³ Important procedural requirements are set out at paragraph (5), while paragraph (6) provides that “[e]mergency

* PhD, University of Bucharest, ROMANIA.

** Associate Researcher, Center for European Legal Studies, Institute for Legal Research ‘Andrei Rădulescu’, Romanian Academy, ROMANIA.

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² A remark pertaining terminology: The term “*Ordonanță*” is translated into English either as “*Ordinance*” or as “*Order*”. The present paper chooses to rely on the latter term (according to IATE database – “Inter-Active Terminology for Europe”, <http://iate.europa.eu>).

³ An English translation of the Constitution of Romania is available at the website of the Chamber of Deputies at <http://www.cdep.ro/pls/dic/site.page?id=371>.

orders cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps [i.e. measures] for transferring assets to public property forcibly.”

Could a directive be transposed into Romanian legal order by means of Government emergency order? And in a broader context: could provisions of European Union law be implemented by Government emergency order? Are the prospects for initiating actions for failure to fulfil obligations (i.e. infringement proceedings) by the European Commission and/or before the Court of Justice of the European Union grounded enough to substantiate the reliance to this type of legislative delegation? The following article discusses certain decisions rendered by the Constitutional Court of Romania (hereinafter “the Constitutional Court” or “the Court”) in that regard.

This short note is divided as follows: section 2 discusses early decisions of the Constitutional Court of Romania issued prior to Romania’s accession to the European Union or regarding circumstances occurred soon after that time. Section 3 assesses decisions given by the Constitutional Court since the accession, in which the Court stated that the Parliament should be the primary (i.e. “default”) legislator and elaborate criteria that need to be met when issuing Government emergency orders. Section 4 comprises few conclusions on the issue whether in this field – issuing Government emergency orders for complying with the European Union duties – the Constitutional Court of Romania carries out a satisfactory constitutional review.

2. FIRST STEPS: URGENCY CONNECTED TO HARMONISATION WORKS PRIOR TO ACCESSION OF ROMANIA TO THE EUROPEAN UNION

Seemingly, in chronological order, the first decision rendered by the Constitutional Court of Romania relevant for the issues under consideration here is the Decision no 15 of 25 January 2000 concerning the objection of unconstitutionality of Government Emergency Order no 23/1999 repealing Law no 31/1996 on state monopolies.⁴ It should be noted in this regard that the decision was rendered under the Constitution as it stands prior to the revision of 2003, which amended the Article 114 and renumbered it as Article 115.⁵ While the court that made the reference to the Constitutional Court (by means of objection of unconstitutionality⁶) supported the view that the Government is not allowed to issue an order in a matter pertaining to an organic law,⁷ the Constitutional Court acknowledged that the constitutionality of the emergency order was challenged from two

⁴ Published in *Monitorul Oficial* no 267 of 14 June 2000.

⁵ An extensive discussion concerning the differences between these two versions is provided in Decision no 255 of 11 May 2005, published in *Monitorul Oficial* no 511 of 16 June 2005; four out of the nine members of the Court joined a separate opinion. No references to issues related to transposition of EC directives were made in the decision though.

⁶ A brief outline of the two main avenues for constitutional review in Romania is useful. According to Article 146 of the Constitution, the Constitutional Court of Romania has the power to review the constitutionality of law before their promulgation (*ex ante*) – according to letter (a) of that article, on one hand, and to decide on objections of unconstitutionality of laws and orders, brought up before courts and tribunals (*ex post*) – according to letter (d) thereof, on the other hand. Therefore, it is no coincidence that the present paper approaches mainly the latter avenue.

⁷ See Article 72(3) of the Constitution (prior to 2003), currently Article 73(3) of the Constitution.

angles: apart from the mentioned ground, the second argument supported the position that the Government did not substantiate within the explanatory memorandum attached to the emergency order a possible exceptional case. Then, the Constitutional Court rejected the first ground, reminding its previous case-law on that matter:⁸ according to Article 114 of the Constitution (as it stands at that time) simple orders and emergency orders are two different classes of acts, and emergency circumstances are liable to lead the Government to issue an emergency order in a matter pertaining to organic law. Concerning the latter ground, the Court stated *inter alia* that the emergency could not be substantiated on the need to harmonise Romanian legislation with EC law, taking into account that “amending or unifying the legislation in a certain field is not able to substantiate as such issuing an emergency order”.⁹ Then it went further: “In case there is a genuine need to do so, this action could be carried out under regular conditions, provided for by the legislation in force, without issuing an emergency order”. Therefore, the plea of unconstitutionality was granted – with majority of votes; two separate opinions were drafted by certain members of the Constitutional Court.¹⁰

It should be pointed out that at the time that decision was issued, the Constitution of Romania of 1991 did not contain a specific provision concerning the relationship with the EC/EU legal order; the latter was included in the Constitution by the revision of 2003 – i.e. the current Article 148 thereof.¹¹ Of course, at that time there was no need to draft such a constitutional rule – and as a reminder, Romania were granted the EU membership in 2007 –, yet the harmonisation duties which were incumbent on a candidate country have to be checked out against other constitutional bases.¹² Unfortunately, the Court did not elaborate on that point. Was the harmonisation work (carried out by the candidate country) an issue concerning simply the legislative approach?¹³

Exceptional circumstances prior to the accession that are liable to substantiate the need to issue a Government emergency order concerned also the need to move on in negotiations for the accession of Romania to the European Union – Decision no 205 of 7 March 2006¹⁴ illustrates this point. The objection of unconstitutionality concerned provisions of a Government emergency ordinance which aimed to limit State aid granted to a Romanian steel undertaking. The Constitutional Court acknowledged that the emergency order was issued with a view to attain harmonisation of relevant legislation in

⁸ Decision no 34 of 17 February 1998, *Monitorul Oficial* no 88 of 25 February 1998; Decision no 65 of 20 June 1995, *Monitorul Oficial* no 129 of 28 June 1995.

⁹ Quoted by the Court from its Decision no 34/1998, above n 8.

¹⁰ The first separate opinion rejected in essence the option of separating the two classes of orders from the point of view of the field reserved to organic laws, while the second separate opinion contended the Constitutional Court lacked the competence to review the urgency circumstances linked to an emergency order.

¹¹ See also Decision no 148 of 16 April 2003 on constitutionality of the legislative proposal amending the Constitution of Romania, published in *Monitorul Oficial* no 317 of 12 May 2003.

¹² E.g. (Bobek M, 2008, pp. 51-63) points out that certain Constitutional Courts of the CEE countries – at the time prior to their accession to the European Union – developed a duty of conform interpretation as mean to ensure the duty to harmonise national legislation with EC law.

¹³ Later on, in what regards its competences, the Constitutional Court held that it has the competence to assess the constitutionality of legislation against provisions of the Constitution or international (sic!) acts to which Romania is a party, yet not to compare provisions of various legislative pieces or to establish potential inconsistencies in domestic legislation (Decision no 16 of 17 January 2012, published in *Monitorul Oficial* no 153 of 7 March 2012).

¹⁴ Published in *Monitorul Oficial* no 340 of 14 April 2006.

the field with provisions of the Accession Treaty and also to make clear that in what concerns State aid granted to undertakings active in the steel industry any State aid is prohibited after 31 December 2004. The urgency of that measure was acknowledged taking into account that Romania carried out accession negotiations with the European Commission under chapter “Competition”, and breaching those provisions of the Accession Treaty was likely to trigger the safeguard clause with the consequence of postponing Romania’s accession to the European Union.

The Constitutional Court answered in affirmative at the question whether is it justifiable for the Government to issue an emergency order which aims to transpose an EC/EU directive by the time of acquiring full membership at the European Union. That issue was dealt with in Decision no 1070 of 8 September 2009 concerning the objection of unconstitutionality of the Government Emergency Order no 119/2007 on combating late payments in commercial contracts.¹⁵ The Court rejected the objection. Related to Article 115(4) of the Constitution, it held that “[f]ulfilling the obligation assumed by Romania to Member States of the European Union consisting in transposition, by the time of accession, of all [EU] directives in force on the date of signature of the Accession Treaty can be considered an extraordinary situation whose regulation cannot be postponed taking into account that [the emergency order aims to] transpose the Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions”.

Interestingly enough, the disputed emergency order was issued on 24 October 2007, almost a year after Romania’s accession to the European Union. Therefore, the reasoning of the Court, while it appears grounded, fails to capture the exact extent of urgency. In the broader perspective, it remains to be settled whether transposing the directives within a prescribed period by means of emergency orders – which aim to fulfil the duties towards the European Union – could be seen as “extraordinary situation”.

3. DIRECTIONS OF POST-ACCESSION CASE-LAW: PARLIAMENT AS “DEFAULT” LEGISLATOR AND THE NEED TO AVOID INFRINGEMENT PROCEEDINGS BY THE EUROPEAN COMMISSION

A first decision of the Constitutional Court relevant for the present discussion is the Decision no 802 of 19 May 2009 concerning the objection of unconstitutionality of Government Emergency Order no 50/2008 introducing a tax on pollution by motor vehicles and more specifically Article 11 thereof.¹⁶ The Court rejected the objection as unfounded. In what concerns the issues of urgency, it was noted that the order was issued as consequence of bringing infringement proceedings by the European Commission according to Article 226 EC,¹⁷ more precisely in order to avoid submission of the matter to the Court of Justice of the European Communities. The Constitutional Court made reference to Article 148(4) of the Constitution, so that the Government is constitutionally empowered to ensure the Romania’s obligations toward the European Union are complied with: “Hence, employing of emergency orders in order to bring into harmony national

¹⁵ Published in *Monitorul Oficial* no 703 of 20 October 2009.

¹⁶ Published in *Monitorul Oficial* no 428 of 23 June 2009.

¹⁷ Now Article 258 TFEU.

legislation with Community legislation when infringement proceedings are imminent to be lodged before the Court of Justice is fully constitutional". The said emergency order was judged as compliant with requirements set by Article 115(4) of the Constitution.

The Court's reasoning reminding the constitutional basis for fulfilling duties towards European Union legal order is to be welcomed; in other words, the duty of co-operation enshrined in Article 148 of the Constitution, much broader as encompasses the three branches of government,¹⁸ concerns also the subject-matter of transposing EU directives, and more specifically by emergency orders.

On the other hand, the Decision no 802/2009 draws a thin line in what concerns urgency as legitimate ground for issuing emergency orders: the urgency is justifiable when an infringement action enters the stage of litigation procedure – i.e. when the pre-litigation procedure ends with the action being lodged by the Commission before the European Court of Justice. *A contrario*, as long as the action is still in pre-litigation procedure as a rule the urgency could not be put forward as valid ground for issuing an emergency order. Yet, is this statement feasible in everyday business? Time will tell.¹⁹

A good opportunity for the Constitutional Court to restate the above line of reasoning was its Decision no 1599 of 9 December 2010 concerning the objection of unconstitutionality of Articles 3(2), 4(a) and 9(1) of Government Emergency Order no 50/2008 introducing a tax on pollution by motor vehicles.²⁰ The Court noted "that the pre-existence of a binding act issued in the European Union is not a prerequisite for adoption of an emergency order, yet, on the contrary, for example, the national measures required to transpose a directive must be adopted in principle by the Parliament in its capacity of primary legislator." Then, the Court went to remind the Decision no 15 of 25 January 2000, and its circumstances – meaning that the harmonisation tasks were carried out prior to joining the European Union. Interestingly, the Constitutional Court briefly concluded

¹⁸ In various instances, the Constitutional Court emphasizes facets of this broad duty, e.g. regarding the Parliament – see Decision no 390 of 2 July 2014 of the Constitutional Court of Romania, published in *Monitorul Oficial* no 532 of 17 July 2014.

In what concerns the duty of Romanian courts and tribunals towards EC/EU law under Article 148 of the Constitution, see the Decision no 137 of 25 February 2010 concerning the objection of unconstitutionality of Article 4(a) of the Government Emergency Order no 50/2008 introducing a tax on pollution by motor vehicles (published in *Monitorul Oficial* no 182 of 22 March 2010), quoting a previous decision – Decision no 1596 of 26 November 2009 (published in *Monitorul Oficial* no 37 of 18 January 2010). The recurring position of the Constitutional Court of Romania towards EC/EU law is that it is the courts and tribunals that have to grant priority of "binding Community rules" over any contrary provision of national legislation, and that the mission accomplished by these courts and tribunals is a matter of applying the law, and not one of constitutional review (i.e. the latter being the responsibility of the Constitutional Court). See also, most recently, the Decision no 64 of 24 February 2015 concerning the objection of unconstitutionality of Article 86(6) of Law no 85/2006 on insolvency proceedings (published in *Monitorul Oficial* no 286 of 28 April 2015), para 33.

¹⁹ According to the settled case-law of the European Court of Justice, in proceedings under Article 258 TFEU the question whether a Member State had failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes – see Case C-265/06 *European Commission v Portuguese Republic* EU:C:2008:210, para 25. In other words, what is at stake here is the fact that the draft act (be it law or order) have to be adopted (and in force) at the time the period laid down in the reasoned opinion expired, because – in proceedings brought before the European Court of Justice – the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes. This construct is illustrated by Case C-557/10 *European Commission v Portuguese Republic* EU:C:2012:662, para 41.

²⁰ Published in *Monitorul Oficial* no 67 of 26 January 2011.

on that point that “the state of affairs is applicable *mutatis mutandis* also in the instant case”. Yet, the Court failed again to distinguish the circumstances – depending on the accession moment – and to consider the constitutional basis for harmonisation tasks after Romania’s full membership to European Union. Then the Court stated: “Therefore, even if at the level of European Union a directive in the field of pollution tax was not enacted, the national legislator, in this case the delegated legislator is entitled to adopt a law meant to regulate this field”. Subsequently, the Court reminded its Decision no 802 of 19 May 2009 and acknowledged that no new elements were liable to lead to reconsider the previous line of arguments of the Constitutional Court.

To sum up, yet again, an extraordinary situation is that when the litigation procedure to the European Court of Justice is imminent. The following decision rendered by the Constitutional Court shed some light on the perspective employed by the latter on the issue of bringing infringement proceedings before the European Court of Justice. By Decision no 1540 of 6 December 2011, the Constitutional Court tackled the objection of unconstitutionality of various provisions of Government Emergency Order no 50/2010 concerning consumer credit agreements.²¹ The objection was raised in various cases by a commercial bank which challenged reports fixing infringements on its part in consumer credit agreements according to Government Emergency Order no 50/2010. Those cases were joined at the Constitutional Court. Among other grounds, the applicant contended that various provisions of that emergency order were in breach of Article 115(4) of the Constitution. The applicant claimed that the State would not be able to rely on passing the time-limit for transposing the applicable European directive in case the State was not able to organize and co-ordinate its institutions in order to ensure transposition was carried out appropriately, long before the time-limit of 11 June 2010.

On the issue of urgency under Article 115(4) of the Constitution, the Constitutional Court acknowledged that Romania had to comply with EU treaties and EU (secondary) binding legislation. That duty was derived from the fact that Romania is a state of law, that is part of the European Union, and that has assumed certain obligations towards it under Article 148(2) and (4) of the Constitution. The Court noted then that transposition and implementation into national law of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC,²² which had to be carried up to 11 June 2010, could not substantiate in itself the reliance on extraordinary circumstances as provided for by Article 115(4) of the Constitution. Moreover, such a conclusion was supported by the fact that the Government had not taken the necessary steps and had not submitted any bill to Parliament in order to transpose Directive 2008/48 so that the Government could not rely on its own fault for its failure to transpose the directive in a timely manner. Nonetheless, the Court conceded that, by adopting the emergency order, the Government helped to alleviate certain economic and financial hardship for the public and also provided for a free competition between credit institutions. On the other hand, the Constitutional Court noted that the time-limit laid down in the Directive is not tantamount to the existence of a situation which, according to Article 115(4) of the Constitution, cannot be postponed. Such would be the case when the European Commission would

²¹ Published in *Monitorul Oficial* no 151 of 7 March 2012.

²² OJ 2008 L 133, p. 66.

decide to institute infringement proceedings according to Article 258 TFEU. Sketching the main features of the procedure regulated by that article – mainly that these proceedings do not have an automatic nature –, the Constitutional Court noted that the initiation of infringement proceedings before the Court of Justice of the European Union in the present case was not imminent. In conclusion, the Constitutional Court found that the extraordinary situation was due to the difficult financial and economic context that prompted swift and firm measures, aimed at reducing effects of economic crisis and austerity measures generated by the former, and also to the need to take positive steps in order not to encroach on the objective of completing the internal market of the European Union. The plea of unconstitutionality was rejected by the Constitutional Court.

Soon afterwards, another decision of the Constitutional Court followed on the same matter and employed a very similar reasoning. Like the above mentioned decision, this new decision – Decision no 1622 of 20 December 2011 concerning the objection of unconstitutionality of various provisions of Government Emergency Order no 50/2010 concerning consumer credit agreements²³ raises the prospects of a loose constitutional review on the exceptional circumstances of issuing such an order. Among other grounds, the Constitutional Court conceded that the (plain) transposition of the directive into Romanian legislation and also its purpose – the completion of the internal market of European Union – substantiate the reliance on emergency order.²⁴

Later on, in Decision no 2 of 17 February 2013 concerning the objection of unconstitutionality of various provisions of the Fiscal Code and of the Code of Fiscal Procedure,²⁵ the Constitutional Court based its reasoning on Decision no 1540/2011 in order to remind that exceptional circumstances for issuing a Government Emergency Order suppose that the European Commission bring the infringement proceedings before the Court of Justice of the European Union. On the other hand, the Court acknowledged that in the instant case exceptional circumstances were connected to the fight against tax evasion that was regarded as seriously prejudicing the State budget.

4. CONCLUSIONS

On one hand, the general questions raised at the beginning of this note should be answered in the affirmative. In the European Union legal order, all State authorities, be it the legislature or the executive, are bound in performing their tasks to comply with the rules laid down by European Union law. This statement mirrors the principle according to which in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive.²⁶ That being said, from the point of view of the European Union legal order, it is irrelevant whether a Directive is transposed in a Member State by the Parliament or by

²³ Published in *Monitorul Oficial* no 156 of 8 March 2012.

²⁴ A very similar reasoning is used in Decision no 1059 of 11 December 2012 concerning the objection of unconstitutionality of various provisions of the same Government Emergency Order (published in *Monitorial Oficial* no 73 of 4 February 2013).

²⁵ Published in *Monitorul Oficial* no 110 of 25 February 2013.

²⁶ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame and Others* EU:C:1996:79, para 34.

the Government (the latter understood as a delegated legislator).²⁷ This is the case also for the broader issue of complying with European Union duties – especially in what concerns implementing European Union law at national level. Therefore, the issues connected to issuing emergency ordinances pertains mainly the constitutional principles of the Member States, not those of the European Union legal order.

On the other hand, the Constitutional Court of Romania asserted its competence to review the way the branches of government (in the instant case – the Parliament and the Government) fulfil their “European” duties under Article 148(4) of the Constitution. Even if it acknowledged the Parliament is the primary legislator (we called the latter as the “default” legislator), the Court did not place a special meaning for the parliamentary procedure compared to Government’s ability when issuing emergency ordinances. The Constitutional Court equates the position of “act of the Parliament” and Government (emergency) “order”; both classes are legislation.²⁸

The final question here is what kind of constitutional review does the Constitutional Court of Romania carry out in what concerns issuing emergency orders? Is this review adequate? For the time being, the question should be answered rather in the negative. It should be noticed that the Court did not review the urgency as such, but in connection with various other grounds.

REFERENCES

Bobek M, 2008. *Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member States*, Review of European and Administrative Law, Vol. 1, No. 1.

²⁷ Cf. Article 288(3) TFEU: “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

²⁸ For an example see Decision no 2 of 17 February 2013 concerning the objection of unconstitutionality of various provisions of the Fiscal Code and of the Code of Fiscal Procedure, above n 25.