SUMMARY OF THE CASES DELIVERED BY THE CONSTITUTIONAL COURT
IN THE 1ST SEMESTER OF 2019[1]

In the period from 1 January 2019 to 30 June 2019, the Constitutional Court resolved 901 cases, issuing 418 decisions.

Type of constitutional review/Powers in the exercise of which the aforementioned acts were issued.

In this regard we note the following:

– 34 decisions were issued by means of the *a priori* constitutional review, i.e. in the exercise of the power provided for in Article 146 (a) of the Constitution – constitutional review of laws before promulgation;
– 372 decisions were issued by means of the *a posteriori* constitutional review, i.e. in the exercise of the power provided for in Article 146 (d) of the Constitution – settlement of exceptions of unconstitutionality of laws and ordinances.

Apart from the powers relating to the constitutional review of laws (*a priori* or *a posteriori*) and ordinances (*a posteriori*), the Court issued:

- 1 decision was issued in the exercise of the power provided for in Article 146 (a) of the Constitution – legislative proposal for the revision of the Constitution
– 2 decisions were issued in the exercise of the power provided for in Article 146 (c) of the Constitution – constitutional review of the standing orders of the Parliament, upon referral by one of the Presidents of the two Chambers, by a parliamentary group or by a number of at least fifty Deputies or of at least twenty-five Senators;
– 1 decision was issued in the exercise of the power provided for in Article 146 (e) of the Constitution – settlement of legal disputes of a constitutional nature between public authorities;
– 1 decision was issued in the exercise of the power provided for in Article 146 (i) of the Constitution – settlement of challenges on the observance of the procedure for the organisation and holding of the referendum;
– 1 decision was issued in the exercise of the power provided for in Article 146 (j) of the Constitution – review of the compliance with the conditions for the exercise of the legislative initiative by citizens;
– 6 decisions were issued in the exercise of the power provided for in Article 146 (l) of the Constitution – settlement of other referrals stipulated by the organic law of the Court.

Solutions pronounced:

By the above decisions, the following solutions were pronounced:
– 27 solutions of admission of the objection/exception/referral/request;

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– 264 solutions of dismissal as unfounded of the objection/exception/referral/request;

– 75 solutions of dismissal as inadmissible or dismissal as having become inadmissible of the objection/exception/referral;

– 52 mixed solutions - dismissal as inadmissible/ having become inadmissible/ unfounded/ admission in part, as applicable, of the exception/referral of unconstitutionality.

Authors of referrals

The authors of the objections/exceptions/referrals/requests settled in the reference period are as follows:

– 17 referrals belong to the President of Romania;

– 27 referrals belong to MPs or to the presidents of the two Chambers of Parliament;

– 845 referrals belong to courts/parties to the proceedings.

I. Decisions delivered within the *a priori* constitutional review

1. The constitutional review of laws prior to their promulgation [Article 146 (a) of the Constitution]

In the event that the unconstitutionality of a law as a whole is found, the legislator cannot cover the flaw of unconstitutionality through the review procedure, but it must ascertain the cessation of the legislative process regarding the respective regulation, without having to initiate a separate parliamentary procedure in this regard. Next, it is up to the legislator to decide whether or not it will still legislate in the respective field, and if it maintains its will to regulate, then it must do it *ab initio*, during a new legislative process.

Keywords: *effects of the decisions ascertaining unconstitutionality, law review*

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral claimed that the Law amending and supplementing Law No 254/2013 on the enforcement of custodial sentences and measures ordered by the judicial bodies during criminal proceedings was unconstitutional in its entirety because it disregarded the *erga omnes* binding effect of the decisions delivered by the Constitutional Court. Although it was aware that this law had been found unconstitutional as a whole, the Romanian Senate reviewed the unconstitutional law. The proof that this procedure was continued is the existence of the same registration number of the law during the legislative process, both before its declaration as unconstitutional and afterwards, during the review procedure. After the law was adopted by the Romanian Senate, the legislative procedure continued before the Chamber of Deputies, where it took place after the publication of Decision No 561 of 18 September 2018 in the Official Gazette of Romania, Part I, No 922 of 1 November 2018, when the Parliament was due to ascertain the automatic cessation of the legislative procedure regarding the law in question.

II. By examining the objection of unconstitutionality, the Court found the existence of a specific context in this case, i.e. the review of a law on which the Court had issued two decisions during the *a priori* review. The first of these, in the chronological order, found the unconstitutionality of certain provisions of the law, and the second one found the unconstitutionality of the law as a whole.

According to the Court's case-law, the review applies only when the Court has found the unconstitutionality of some legal provisions, not when the unconstitutionality concerns the regulatory act as a whole. In such a case, the consequence is the cessation of the legislative process regarding the respective regulation, without having to initiate a separate parliamentary procedure in this regard. Next, it is up to the legislator to decide whether or not it will still legislate in the respective field, and if it maintains its will to regulate, then it must do it *ab initio*, during a new legislative process.

The Court held that, in this case, the law review procedure had been initiated based on the first decision issued regarding this law, i.e. Decision No 453 of 4 July 2018, published in the Official Gazette of Romania, Part I, No 617 of 18 July 2018, by which the Court found that the provisions of points (2) to (5) and (10) of the Sole Article of the impugned law were unconstitutional. The review procedure was continued in Parliament

despite the fact that, between the moment of adoption of the reviewed form by the Senate and the moment of its adoption by the Chamber of Deputies, the Constitutional Court issued a new decision by which it found the unconstitutionality of the same law, as a whole, in the form prior to the review, i.e. Decision No 561 of 18 September 2018, published in the Official Gazette of Romania, Part I, No 922 of 1 November 2018. Through this latter decision, the Court found a violation of Article 75 of the Constitution, regarding the principle of bicameralism.

Although it was a known fact that the constitutional court had issued a decision ascertaining the unconstitutionality of the law as a whole, Parliament completed the law review procedure, without ascertaining the cessation of the legislative process. The law subject to constitutional review is not a different regulatory act, adopted following its own legislative process, distinct from the previous one. It is the same law examined when issuing the two decisions of the Constitutional Court, the only substantial difference being introduced upon its review, but the Court was not vested to state on it in this case.

Therefore, the impugned law is unconstitutional, as a whole, being contrary to the provisions of Article 147 (2) and (4) of the Basic Law, with reference to the Constitutional Court's Decision No 561 of 18 September 2018. The Parliament is bound to ascertain the automatic cessation of the legislative process once the law was found unconstitutional in its entirety. Should a new legislative process be initiated regarding the same regulatory area, the Parliament must comply with this decision and with Decision No 561 of 18 September 2018.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law amending and supplementing Law No 254/2013 on the enforcement of custodial sentences and measures ordered by the judicial bodies during criminal proceedings was unconstitutional in its entirety.

Decision No 22 of 16 January 2019 on the objection of unconstitutionality of the Law amending and supplementing Law No 254/2013 on the enforcement of custodial sentences and measures ordered by the judicial bodies during criminal proceedings, published in the Official Gazette of Romania, Part I, No 131 of 19 February 2019

The tangible assets and the financial resources belong to the administrative-territorial units, and the public administration authorities administer them. It results that none of the local public administration authorities can act as shareholder in the trading companies resulting from the reorganisation of the autonomous regies. The administrative-territorial units, alongside the State, can have this capacity.

Keywords: *local public administration authorities, local public administration, public property of the administrative-territorial units, Government emergency ordinances*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania showed that the impugned law has approved, without amendments,

Government Emergency Ordinance No 56/2018 supplementing Law No 15/1990 on the reorganisation of public economic units as autonomous regies and trading companies, whose regulatory content includes it. The Sole Article of Government Emergency Ordinance No 56/2018 introduces a new article, Article 3^1, after Article 3 of Law No 15/1990, whose first paragraph provides: "Autonomous regies can be reorganised as companies regulated by Law No 31/1990 on companies, republished, as subsequently amended and supplemented, through Government decision or, as the case may be, through decision of the local council/county council or through decision of the General Council of the Municipality of Bucharest, having as sole shareholder/associate the Romanian State or the local public administration authority".

Regarding the possibility of the local council to exercise specific rights and fulfil specific obligations under the legal relationships and, implicitly, to acquire the capacity of shareholder, the Constitutional Court, by Decision No 574 of 16 October 2014, ruled that, as the deliberative authority of the local public administration, the local council had no legal personality and, therefore, could not have its own assets, thus it could not exercise its own rights and obligations under the legal relationships.

However, while exercising their powers and tasks, the deliberative authorities of the local public administration can make decisions regarding the participation of the administrative-territorial units in the constitution of the share capital of certain companies regulated by Law No 31/1990. This possibility is not to be mistaken for the exercise of some of its economic rights.

II. By examining the objection of unconstitutionality, the Court held that, after the approval of the emergency ordinance by Parliament, the constitutional review was aimed at the approving law, which was fully integrating the provisions of the approved emergency ordinance. As such, as they become an integral part of the approving law, the provisions of the emergency ordinance may be subject to constitutional review under Article 146 (a) of the Basic Law.

According to the Court, Articles 120, 121 and 122 of the Constitution clearly distinguish, both from a conceptual point of view and from the point of view of the legal regime, between the administrative-territorial unit and the public administration authority. Thus, public administration is done at the level of the administrative-territorial units through the expressly indicated public authorities: local councils and mayors, county councils, communal and town councils.

The phrase "authorities of the local public administration" includes in its scope the following public authorities: local and county councils, mayors and county council presidents. As a result, by using this phrase, the impugned norms confer the ability to become shareholders/associates of the trading companies resulting from the reorganisation of the autonomous regies to the local council, as well as to the county council, the General Council of the Municipality of Bucharest, to the local councils of the administrative-territorial subdivisions of the municipalities, to the mayors of communes, cities, municipalities, of the administrative-territorial subdivisions of the municipalities, to the general mayor of the Municipality of Bucharest and to the presidents of county councils.

But the legal regime of all these public authorities is characterised by a special administrative legal capacity, which gives them the capacity to participate in the administrative reports and to carry out, through the prerogatives exercised, the executive activity of the State. The tangible assets and the financial resources belong to the administrative-territorial units, and the public administration authorities administer

them. Moreover, referring to public property, Article 136 (2) of the Constitution expressly states that it belongs to the State "or to the administrative-territorial units".

As the impugned phrase includes the local council, the Court found that the considerations underlying Decision No 574 of 16 October 2014, published in the Official Gazette of Romania, Part I, No 889 of 8 December 2014, were applicable. By the aforementioned decision, the Court ruled that the administrative-territorial unit, in its capacity as a subject of public law, property holder, was represented in its legal relationships by the local council, the latter exercising rights and undertaking obligations of the administrative-territorial unit. By applying these considerations of principle to the respective case, the Court held that the transfer of the ownership right over the State-owned shares to the Local Council of Municipality of Constanţa, and not to Municipality of Constanţa, was contrary to the provisions of Article 121 (2) of the Constitution.

It results that none of the local public administration authorities can act as shareholder in the trading companies resulting from the reorganisation of the autonomous regies. The administrative-territorial units, alongside the State, can have this capacity. As a result, the pleas filed by the author of the objection of unconstitutionality in relation to the provisions of Article 121, with reference to Article 1 (5) of the Constitution, concerning the violation of the constitutional status of the local public administration authorities are grounded.

But the arguments presented in the viewpoint communicated in this case in support of the impugned legislative solution cannot be upheld, in the sense that other regulations as well, such as Law No 137/2002 regarding some measures to accelerate privatisation, would establish a similar legislative solution. The Court ruled that the errors of appreciation in drafting the regulatory acts should not be perpetuated in the sense of them becoming a precedent in the law-making activity; on the contrary, these errors need to be corrected, in order for the regulatory acts to contribute to achieving a greater security of the legal relationships.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found the unconstitutionality of the phrase "the authority of the local public administration" in the Sole Article of Government Emergency Ordinance No 56/2018 supplementing Law No 15/1990 on the reorganisation of public economic units as autonomous regies and trading companies.

Decision No 25 of 16 January 2019 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 56/2018 supplementing Law No 15/1990 on the reorganisation of public economic units as autonomous regies and trading companies, published in the Official Gazette of Romania, Part I, No 128 of 18 February 2019

The laws governing the organisation of the functioning of the institutions should avoid ambiguous expressions. The lack of precision of the rule infringes the provisions of Article 1 (5) of the Constitution and has direct consequences for the organisation and functioning of the regulated institution.

Keywords: *clarity of law, equal rights, access to public functions, simple majority voting, absolute majority voting*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania indicated that Article I (6) of the impugned law contravenes the provisions of Article 76 (2) of the Constitution, which provide that ordinary laws and rulings are to be adopted by the vote of a majority of the members present in each Chamber. Article I (6) also lacks precision and clarity.

Article I (8) of the impugned law amends Article 5 (6) of Law No 8/2016 as regards the introduction of the possibility of renewing the term of office of the President and of the Vice-President of the Council monitoring the implementation of the Convention on the Rights of Persons with Disabilities, just once, on request. The text is unclear as it does not specify who can make this request for renewal, which may give rise to various interpretations.

Article I (10) of the law subject to constitutional review provides for amendment of Article 6 of Law No 8/2016, establishing under paragraph 2 that the President and Vice-President of the Monitoring Council, who have completed their term, may choose to fill a position in the structures of the Monitoring Council, without a competition, based on the President's approval. It is thus established a privilege for former Presidents and Vice-Presidents of the Council to occupy a position within the institution, to the detriment of other persons, who would fulfil the criteria required for filling that position through competition. It is not apparent why the capacity of President or Vice-President of the Monitoring Council, which ceased upon expiry of the term, may constitute an objective and reasonable justification for regulating a procedure derogating from the regime laid down for the occupation of those public functions. Therefore, Article 16 (1) of the Constitution was infringed upon.

Criticism was also brought as to the lack of clarity in Article I (11) and Article I (14) of the impugned law.

Furthermore, the author of the objection also took the view that Law No 8/2016 should have been replaced by a new regulation, as it was heavily modified by the law subject to constitutional review.

II. Having examined the objection of unconstitutionality, the Court held that Article I (6) of the law, referring to the appointment of the President and Vice-President of the Monitoring Council, establishes that it is done by a decision adopted by a majority of Senators. The latter sentence is criticised in relation to Article 76 and Article 147 (4) of the Constitution, relating to the adoption of laws and resolutions and to the *erga omnes* binding nature of decisions of the Constitutional Court.

The Court found that those complaints were well founded since, as regards compliance with the statutory quorum of the meeting, the rule governing the adoption of Parliament's resolution is to obtain a simple majority of votes, i.e. half plus one of the Senators and/or Deputies present at the meeting. Exceptions to this rule are expressly laid down in the Basic Law. All the resolutions adopted by the Chamber of Deputies or the Senate in separate meetings, with the exception of those concerning their own internal rules for operation and organisation, shall be adopted by the vote of a majority of the members present in each Chamber, in accordance with the rule laid down in Article 76 (2) of the Constitution. Article I (6), which lays down the absolute majority rule for the Senate's resolution to appoint as President and Vice-President of the Monitoring Council, is therefore unconstitutional.

The Court noted that Article I (6), (7) and (8) of the law, although intended to detail the procedure for the appointment of President and Vice-President of the Council, determines, by the imprecise wording, an ambiguous legal regime in respect of that

procedure. It is not understood whether this refers to one or two resolutions of the Senate and what their raison d'être is, in case of two resolutions, or why there are different majorities for the adoption thereof.

Under Article I (8) of the law, the renewal of the term of office of the President and of the Vice-President of the Monitoring Council takes place "just once, on request", without specifying who can make such a request and what procedure should be followed in this situation. The ambiguous wording as well as a lack of correlation between the paragraphs of the same article lead to an obvious lack of precision of the rule, with direct consequences for the organisation and functioning of the respective institution. The appointment of its President and Vice-President must be regulated in precise terms, allowing for a clear interpretation by the addressees of the rule. Only through a transparent procedure access to these positions of suitably qualified persons can be guaranteed.

The complaints relating to Article I (10) are also well founded. This provision states that the President and Vice-President of the Monitoring Council, who have completed their term, may choose to fill a position in the structures of the Monitoring Council, without a contest, based on the President's approval. The legislator did neither specify the positions nor the conditions for their occupation, nor the basis on which the completion of a full four-year terms of office qualifies the former Presidents and Vice-Presidents to occupy without competition any position in the Council, regardless of the legal conditions required for filling the respective positions. In that wording, the legislation gives the former Presidents and Vice-Presidents an unjustified advantage in relation to other persons who, having satisfied the legal conditions, must pass a competition for that purpose. Article I (10) therefore infringes both the constitutional provisions of Article 1 (5), in the light of the lack of clarity and the provisions of Article 16, in the light of the privilege established by the rule complained of.

III. For all these reasons, by a majority vote, as regards the provisions of Article I (10), and by unanimity in respect of the other legal texts, as well as of the law, as a whole, the Court upheld the objection of unconstitutionality and found unconstitutional Article I (6) [with reference to Article 5 (1) and (2)], Article I (7) [with reference to Article 5 (2^2) and (2^3)], Article I (8) [with reference to Article 6 (2)] and Article I (11) [with reference to Article 7 (2) (e)] of the Law amending and supplementing Law No 8/2016 on the establishment of mechanisms provided for by the Convention on the Rights of Persons with Disabilities. The Court has dismissed the objection of unconstitutionality relating to Article I (14) [with reference to Article 9 (2^2)], as well as to the law as a whole.

Decision No 64 of 23 January 2019 concerning the objection of unconstitutionality against the Law amending Law No 8/2016 establishing the mechanisms provided for by the Convention on the Rights of Persons with Disabilities, published in Official Gazette of Romania, Part I, No 134 of 20 February 2019

Parliament cannot replace the executive in regard to its power to declassify the secret State information, as it has only the constitutional power to create the legislative framework required for declassification, and not to order, by law, that legal operation.

Keywords: *principle of the separation and balance of powers in the State, Parliament, laws, decisions of the Government*

Summary

I. As grounds for the objection of unconstitutionality, the High Court of Cassation and Justice formulated complaints of intrinsic unconstitutionality relating to the infringement of Article 1 (5) of the Constitution with reference to the principle of legality, in its component on the quality of law, and with reference to the principle of legal certainty.

In the referral act submitted by 30 Senators, it was pointed out that the legislative proposal was debated and adopted in accordance with the procedure for the adoption of ordinary laws, although it contains provisions that rendered necessary its adoption in the form of an organic law.

The authors of the referral submitted that, in the way it was drafted, the Law on declassification of documents is of individual nature, as it does not regulate social relations in a given matter, but has as its main purpose the declassification of certain protocols concluded with the Romanian Intelligence Service. A law must contain general and impersonal legal rules. The regulation by law of individual situations is prohibited by the Basic Law.

The authors of the exception have indicated that the declassification procedure is already regulated in the Romanian legislation, as a non-contentious administrative procedure which results in an administrative decision by the authority issuing the classified document. Parliament cannot legislate in an area which falls strictly within the scope of competence of other authorities without infringing the principle of separation of powers. The authors of the referral considered that only the authority issuing the document may assess the necessity for its classification or declassification, and the persons who consider themselves injured by the authority's decision may apply to the administrative court. Also, if the declassification of an administrative act is allowed by law, the classification of certain public authorities' documents could be regulated in the same way, which is a distortion of the purpose of Law No 182/2002 and of the constitutional role of the Parliament. Moreover, in Decision No 777 of 28 November 2017, published in the Official Gazette of Romania, Part I, No 1011 of 20 December 2017, it was held that the Parliament cannot exercise its legislative powers in a discretionary manner, at any time and under any conditions, by adopting laws in areas that need to be regulated solely by acts of an administrative nature. Otherwise it would be in breach of Article 61 (1) of the Constitution and the Parliament would be transformed into an executive public authority.

At the same time, the Parliament created a separate legal treatment with regard to the declassification of the documents referred to in Article 1 of the Law, as opposed to the ordinary law, represented by the provisions of Law No 182/2002, without this derogation being based on a rational and objective criterion, as required by Article 16 of the Constitution.

Moreover, the constitutional legislator did not include in the sphere of parliamentary scrutiny exercised by Parliament its power to declassify documents adopted by the Supreme Council of Defence of the Country in the exercise of its constitutional role.

Another referral act was submitted by the President of Romania. He argued that the impugned regulation should have been adopted as an organic law, since it contains provisions relating to administrative litigations and to the status of military staff, which

must be regulated by organic law. He also took the view that the amendments introduced in the Senate had substantially departed from the will of the initiator of the legislative proposal.

II. Having examined the objection of unconstitutionality, the Court held that it is necessary to determine, as a matter of priority, whether the Parliament was empowered to adopt a law in order to declassify documents.

The Court noted that the subject matter of the legislation under examination is the automatic declassification, in lack of a procedure, by way of derogation from Article 24 of Law No 82/2002 on the protection of classified information, of the Decision of the Supreme Council of Defence of the Country No 17/2005 on combating corruption, fraud and money laundering and the protocols concluded between the Romanian Intelligence Service and other institutions of the State.

The Court found that both the classification and the declassification of State secret information are carried out through an administrative procedure, rigorously regulated through the relevant legal framework, namely Law No 182/2002 and the National Standards for the Protection of Classified Information in Romania. Declassification of the secret State information can only be done in the framework of a procedure regulated by law, through a secondary regulatory act (Government decision), falling within the competence of the executive.

Contrary to the legal framework in force, the law under examination establishes that the documents referred to in Article 1 (1) shall be automatically declassified without the need to go through a procedure and the documents listed in Article 1 (3) and (4) and Article 1 "shall be disclosed" (legal operation not covered by Law No 182/2002), through so-called rules derogating from the framework regulation.

The Court has held that the declassification of secret State information must be regulated by infra-legal acts of an administrative nature and cannot take place through the effect of the law, since the law requires the regulation of the broadest possible sphere of social relations. The legislator has no power to make the declassification of secret State information by means of a primary regulatory act, but it has the possibility to regulate by way of a framework law the rules, procedures and conditions under which the Government may carry out such a legal operation. Information classified as State secrets cannot lose the protection regime enshrined in the framework law because the preservation of their confidentiality is vital to the community, and their disclosure would cause irreparable harm to the public interest, affecting the proper functioning of the rule of law.

Therefore, the Court found that the normative act criticised is contrary to the provisions of Article 1 (4) of the Constitution on the principle of the separation and balance of powers in the State. Parliament interfered with the scope of competence of the executive authority, which is the only public authority with tasks in the organisation of law enforcement through the adoption of acts of an administrative nature. Parliament cannot replace the executive in regard to its power to declassify the secret State information, as it has only the constitutional power to create the legislative framework required for declassification, and not to order, by law, that legal operation.

According to the case-law of the Court, the Parliament cannot legislate in areas that need to be regulated only by acts of an administrative nature. Otherwise, it would be converted into an executive public authority. Thus, the Court found that Article 61 (1) of the Constitution was breached.

Consequently, the Court did not examine the conditions under which the law complained of was adopted, by reference to the criticism of extrinsic unconstitutionality

relating to infringement of the principle of bicameralism, that is to say, the adoption of organic laws. Likewise, the challenges of intrinsic unconstitutionality were also left unexamined, since the objection of unconstitutionality was upheld on the grounds that the Parliament was not empowered to adopt a law on the declassification of documents.

III. For all these reasons, the Court, by unanimity, upheld the objection of unconstitutionality and found that the Law on declassifying documents was unconstitutional as a whole.

Decision No 74 of 30 January 2019 concerning the objection of unconstitutionality against the Law on declassification of certain documents, as a whole, and, in particular, against the provisions of Article 1 (1), (3) and (4), Article 2, Article 3 (1), Article 4, Article 5 and Article 6 thereof, published in Official Gazette of Romania, Part I, No 200 of 13 March 2019

In the event of a re-examination of a law at the request of the President of Romania, Parliament must solely take into account the provisions subject to his criticisms. The limits of that request cannot be exceeded in order to bring into agreement the provisions of the adopted law with legislation which entered into force after the submission of the request for re-examination.

Keywords: *re-examination of the law, effects of unconstitutionality decisions*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law for approval of Government Emergency Ordinance No 96/2016 amending certain legislative acts in the fields of education, research, vocational training and health, adopted after the re-examination procedure following Decision No 63 of the Constitutional Court of 13 February 2018, contained a number of provisions which did not fall the limits of the request for re-examination made by the President of Romania and were also contrary to the afore-mentioned Decision.

II. Having examined the objection of unconstitutionality, the Court pointed out that, following the adoption of the impugned law, the President of Romania made a request for re-examination, on the basis of Article 77 (2) of the Constitution. Following the request for re-examination, the law was adopted by the Parliament and sent to the President for promulgation. He referred the matter to the Constitutional Court. By Decision No 63 of 13 February 2018, published in Official Gazette of Romania, Part I, No 201 of 6 March 2018, the Constitutional Court upheld the objection of unconstitutionality raised and found that the provisions of Article I (21) and (26), as well as the law as a whole, were unconstitutional. The finding that the law was unconstitutional as a whole must be interpreted in the light of the considerations set out in point 51 of the Decision, according to which “the procedure for the debate on the request for re-examination must be resumed, under the conditions and within the limits set by Article 77 (2) of the Constitution”. After the re-examination of the law as to be brought into agreement with the Court’s decision, the law adopted was sent to the President of Romania for promulgation. The President formulated the referral of unconstitutionality constituting the subject matter of this case.

One of the arguments raised as grounds for objection of unconstitutionality was that Article I (17), as amended, was not covered by the request for re-examination and therefore falls outside the scope of the request for re-examination.

The Court noted that, during the legislative process for enactment of the impugned law, the original text of Government Emergency Ordinance No 96/2016 was first amended by the sole article of Emergency Ordinance No 54/2017, published in the Official Gazette of Romania, Part I, No 644 of 7 August 2017. It was subsequently amended by the sole article of Law No 100/2018, published in the Official Gazette of Romania, Part I, No 383 of 4 May 2018.

By Decision No 355 of 23 May 2018, published in the Official Gazette of Romania, Part I, No 652 of 26 July 2018, the Court held that "the legislative procedure for re-examination of a law is a special procedure whereby the parliamentary procedure is reopened only in regard to the criticism made by the President of Romania; [...] Moreover, in accordance with Law No 24/2000 on legislative technical rules for drawing up legislative acts, republished in the Official Gazette of Romania, Part I, No 260 of 21 April 2010, legislative duplication must be avoided in the legislative process, being prohibited to include the same regulation in several articles or paragraphs of the same legislative act, or in two or more legislative acts [Article 16 (1)], and, in case of such duplication, the legislator must either repeal or concentrate the matter in single regulatory acts [Article 16 (2)]. Therefore, the draft legislative act must integrate organically in the system of legislation by linking with the regulatory acts with which it is connected (Article 13)."

The alleged correlation between the provisions of the adopted law with legislative acts which entered into force after the request for re-examination made by the President of Romania cannot justify the exceeding of the limits of that request. As a result, the Court found that the criticism made by the author of the referral was well founded, Article I (17) having been adopted in breach of Article 147 (2) and (4) of the Constitution.

Also as concerns the deletion of Article I (27) and (29), the Court cannot accept the alleged correlation referred to, since it was made by reference to other regulations in force and not within the same legislative act.

As a result of the present decision, the Parliament is required to re-examine the provisions of the law within the limits of the decision of the Constitutional Court, which implies that the parliamentary debate will be resumed within the limits of the request for re-examination, but only with regard to the provisions which have been the subject of the constitutional review in the present case. The solution sought by the author of the referral, namely that the Court would find the law unconstitutional as a whole, without Parliament being able to re-examine it, does not have constitutional support.

III. For all these reasons, the Court, by unanimity, upheld the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 96/2016 amending certain legislative acts in the fields of education, research, vocational training and health is unconstitutional as a whole.

Decision No 75 of 30 January 2019 concerning the objection of unconstitutionality of the Law for approval of Government Emergency Ordinance No 96/2016 amending certain legislative acts in the fields of education, research, vocational training and health, published in Official Gazette of Romania, Part I, No 120 of 15 February 2019

The principle of bicameralism is violated where the version adopted by the Chamber of Deputies is substantially different from the text adopted in the Senate and the purpose pursued by the initiator of the law. Similarly, there is a breach of Article 76 (1) and (2) of the Constitution when the Senate adopts the legislative act as an ordinary law and the Chamber of Deputies adopts it as an organic law.

Keywords: *principle of bicameralism, adoption of organic laws, adoption of ordinary laws*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law for approval of Government Emergency Ordinance No 105/2017 amending Article 23 (1) (c) of the Law No 407/2006 on hunting and game wildlife conservation was adopted in violation of Article 61 (2) and Article 75 (1) of the Constitution. The Chamber of Deputies, by adopting the law as decision-making chamber, circumvented the debate in and adoption by the first notified Chamber of changes which concerned essential aspects as to the structure and philosophy of the law (general provisions, administration and management of the game wildlife in Romania, protection of game wildlife, practising of hunting, accountability and sanctions, as well as transitional and final provisions). In addition, the form adopted by the Senate contains a single article consisting of 2 points, the second of which has 3 sub-points, whereas Government Emergency Ordinance No 105/2017 contains only one Article.

The first chamber, i.e. the Senate, also adopted the law as an ordinary law. The second Chamber, i.e. the Chamber of Deputies adopted it as an organic law. This reclassification of the law is precisely the consequence of the fact that the second Chamber has disregarded the principle of the bicameralism enshrined in Article 61 (2) of the Constitution and has made changes pertaining to organic laws in Article I (15) of the law complained of, without the Senate having debated the newly introduced rules relating to the offences laid down in the Law on hunting and game wildlife conservation. Both Chambers of Parliament should have classified the law in the same way, either as an ordinary law or as an organic law.

II. Having examined the objection of unconstitutionality, the Court has held that the changes and additions which the decision-making chamber brings to the draft law adopted by the first notified Chamber make take account of the matter had in view by the initiator and the form in which it was regulated by the first Chamber. Otherwise, a single Chamber, the decision-making Chamber, would legislate alone, which is contrary to the principle of bicameralism.

In the present case, the decision-making Chamber amended or supplemented several articles of Law No 407/2006: Article 1 laying down a new definition of “hunting”; Article 9 (5), replacing “hunting associations” with “management of wildlife”; Article 13 (1), (2) and (4) and the general provisions relating to compensation and the conditions under which they are to be borne by the central public authority for the protection of the environment; Article 17 (2) on the drawing up of studies for the assessment of flocks of sedentary species that can be hunted; Article 18 (1) relating to the obligation of managers to ensure that game wildlife is guarded; Article 19 (2^1) on

the evaluation of populations of the mammalian species referred to in Annex 2 to the Law;

The Court found that the law adopted by the Chamber of Deputies is substantially different from the text adopted in the Senate. By the amendments made, the Chamber of Deputies regulated provisions which have never been in any form subject to the Senate's debate, as the first notified Chamber. Similarly, the law adopted by the Chamber of Deputies departs from the purpose envisaged by its initiator, namely the removal of the ban on pasture on the land of another person, which led to the abandonment of the livestock farming activity. The result was the depopulation of rural areas, the disappearance of jobs and the impossibility to provide food to the population, circumstances having a negative social impact.

In addition to the infringement of the principle of bicameralism, the Court also found that the provisions of Article 76 (1) and Article 2 of the Constitution were infringed. They determine the majority required for the adoption of laws, depending on whether they are organic or ordinary in nature, a majority which must be obtained both in the Chamber of Deputies and the Senate. The Constitution therefore recognises the equality of the Chambers of the Parliament in terms of adoption of draft laws or legislative proposals which, once voted by a Chamber, are transmitted to the other Chamber, which will examine and approve them through an identical procedure.

The Senate adopted the legislative act as an ordinary law. The Chamber of Deputies adopted it as an organic law, in view of the decriminalisation of certain offences, therefore, as result of the amendment of a rule which, in accordance with Article 73 (3) (h) of the Constitution, is organic in nature. If the legislative procedure had complied with the bicameralism principle, both Chambers had voted in favour of the law with the same majority.

III. For all these reasons, the Court, by unanimity, upheld the objection of unconstitutionality and found that the Law for approval of Government Emergency Ordinance No 105/2017 amending Article 23 (1) (c) of the Law No 407/2006 on hunting and game wildlife conservation was unconstitutional as a whole.

Decision No 76 of 30 January 2019 concerning the objection of unconstitutionality of the provisions of the Law for approval of Government Emergency Ordinance No 105/2017 amending Article 23 (1) (c) of the Law on hunting and game wildlife conservation, published in the Official Gazette, Part I, No 217 of 20 March 2019

By amending and supplementing Law No 35/1997 on the organisation and functioning of the institution of the Advocate of the People, the provisions of Article 1 (5) of the Constitution have been infringed. Even if the legislator's intention was to grant as many rights as possible to the Advocate of the People, in view of the undeniable importance which that institution must have in a State governed by the rule of law, the result obtained by the contested rules is that of a confused legal regime, contrary to the requirements of clarity and precision which must characterise the legal provisions.

Keywords: *clarity of the law, Advocate of the People, Deputies of the Advocate of the People, equal rights, right to salary, service pensions, referral to Parliament Chambers, sources of funding*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law amending and supplementing Law No 35/1997 on the organisation and functioning of the institution of the Advocate of the People was adopted by the Chamber of Deputies after the expiry of the 60-day period laid down by Article 75 (2) of the Constitution for the adoption by the first notified Chamber of the codes and other highly complex laws.

Similarly, Article I (8) of the impugned law is inconsistent with the requirements of clarity and foreseeability established by Article 1 (5) of the Constitution. The Advocate of the People and the persons who occupied this position, at the time of retirement or recalculation of the pension previously granted, shall receive a pension which is established and calculated in accordance with Article 71 of Law No 47/1992 on the organisation and functioning of the Constitutional Court. It is unclear whether this right should also apply to individuals who have held the office of Advocate of the People and have lost this status due to their removal from office by the Parliament as a result of the violation of the Constitution and laws. At the same time, in examining Article I (9) of the law, which provides that the service pension of the Advocate of the People is to be updated in relation to the salary of the judges of the Constitutional Court and taxed according to the law, the provisions appear unclear as regards the amount of the resulting pension, as it does not appear whether it will be established and updated in relation to the salary of the Advocate of the People or to the salary of the judges of the Constitutional Court.

The infringement of Article 16 (1) of the Constitution was also brought as a criticism. The office of Advocate of the People is equated in rank to that of Minister, and that of Deputy to the Advocate of the People to that of State Secretary, the people in those positions enjoying thus the same rights. The provision of special pensions to the Advocate of the People and his/her Deputies constitutes an unjustified privilege vis-à-vis other officials of the same rank.

Article I (65) of the impugned law provides that contract staff, that is to say, drivers, receive wages set at the level of remuneration for similar positions within the Parliament's services. It was argued that it was not clear whether the contract staff would be composed only of drivers or whether the intention of the legislator was to equate only the salaries of the drivers belonging to the contractual staff to those paid to persons occupying similar positions within the Parliament's services. For these reasons, the text lacks clarity and results to be in breach of Article 1 (5) of the Constitution.

As the amending law is of particular complexity, in accordance with Article 61 (1) of Law No 24/2000 on the legislative technical rules for the drawing up of legislative acts, Law No 35/1997 on the organisation and functioning of the institution of the institution of the Advocate of the People should have been replaced by a new regulation, and repealed in its entirety. Therefore, the rules under review are contrary to the legislative technical rules for the drafting of regulatory acts and therefore disregard the principle of quality of the law established by the constitutional provisions of Article 1 (5).

The provisions of Article 138 (5) in conjunction with Article 111 (1) of the Constitution were also infringed as the initiators did not specify the budgetary impact, the budgetary expenditure in the current year and the coming years, as well as the sources covering the expenditure generated by the legislative proposal.

II. Having examined the objection of unconstitutionality, the Court found that the entire legal reasoning underlying the challenges of extrinsic unconstitutionality was based on the premise that the deadline laid down in Article 75 (2) of the Constitution is

calculated on the basis of calendar days, including the day on which it begins to run. However, the parliamentary regulation applicable to the present case expressly provides for a different method of calculation, by way of exception to the common rule in public law. According to this calculation, the deadline was respected.

The examination of the complaint alleging infringement of Article 16 (1) of the Constitution presupposes an analysis of the status of the Advocate of the People and of his/her Deputies in order to determine whether it is different from that of the Ministers and State Secretaries, respectively (equated in rank).

The constitutional legislator has regulated the institution of the Advocate of the People separately from the three powers (legislative, executive and judiciary), to support the achievement of the balance of powers, for the benefit of individuals, of their rights which the Advocate of the People is called upon to defend. The regime of incompatibility for the Advocate of the People and his/her Deputies is the same as that regulated by the constituent legislator for the judges of the Constitutional Court and for judges respectively. The position of independence of the Advocate of the People derives from Article 59 (2) of the Constitution, which expressly lays down an obligation for public authorities to provide the Advocate of the People with "the necessary support in the performance of his duties".

Ministers do not have a separate constitutional regulation and the status of State Secretaries is only regulated by law.

There is therefore a much more stringent regime for incompatibilities in case of the Advocate of the People and his/her Deputies, compared to the Ministers and State Secretaries. As regards the constitutional and legal role as well as the relations with other public authorities, in the case of the Advocate of the People, they concern the monitoring of the public administration authorities — including the activity of Ministers and, in certain cases, of the Government itself (contesting simple and emergency ordinances) — and the presentation of the final result to the Parliament, as well as the collaboration with the judicial authority and constitutional justice.

The Advocate of the People and his/her Deputies therefore have a different legal regime to that of Ministers and State Secretaries, irrespective of the rank equations. Such rank equations are intended to establish a specific position of the Advocate of the People, which is of such a kind as to reveal the importance, among the authorities of the State, and not the legal regime identity as regards the powers, salary or pension. As long as the principle of equality before the law requires equal treatment of situations which, depending on the aim pursued, are not different, it cannot be said that the contested rules create discrimination.

However, the Court found that criticism of the same texts is well founded in the light of the provisions of Article 1 (5) of the Constitution, in the light of the lack of clarity. It follows that, although the remuneration of the Advocate of the People is regulated separately from that of the judges of the Constitutional Court, the Advocate of the People receives a pension established and updated in relation to the remuneration of the Court's judges. In principle, the determination and updating of the pension for a position is to be made in relation to the salary established by the legislator for the same position and not in relation to other salaries. The texts are unclear in terms of both the amount of the resulting pension and the entire legal regime of retirement of the Advocate of the People. Article I (8) of the law contains unclear provisions concerning the conditions for the granting of a service pension. It is not apparent whether this is due to all the persons who have held that position, regardless of the duration of the term of office and of the way in which it has ceased.

Even if the legislator's intention was to grant as many rights as possible to the Advocate of the People, in view of the undeniable importance which that institution must have in a State governed by the rule of law, the result obtained by the contested rules is that of a confused legal regime, contrary to the requirements of clarity and precision which must characterise the legal provisions.

Having examined Article I (65), the Court found that the legal provisions were sufficiently clear and precise to allow the addressee of the rule to understand the legal status of the staff of the institution of the Advocate of the People, in terms of the salary rules. The law distinguishes between senior officials, staff in management positions and staff in executive positions having the status of parliamentary civil servant and staff under an individual contract of employment, the latter category covering also the drivers. Even if the text contains editorial shortcomings, they do not constitute a lack of unconstitutionality in the light of Article 1 (5) of the Constitution, as long as it allows the proper understanding and application of the rule.

The President of Romania referred to Article 61 (1) of Law No 24/2000, arguing that, being of particular complexity, the law should have taken the form of a new legislative act and of not an amendment to a pre-existing regulatory act. The Constitutional Court does not carry out a review of constitutionality in relation to Law No 24/2000, but in relation to Article 1 (5) of the Constitution. The constitutional relevance is not demonstrated here, but only a breach of a text of Law No 24/2000, based on a quantitative assessment of the amendments in the contested law. Therefore, the Court cannot accept such challenges, as they constitute a matter of legality, of the competence of the Legislative Council.

The allegations of infringement of Article 138 (5) in conjunction with Article 111 (1) of the Constitution are unfounded. The Court observed that the Advocate of the People's service pension is already regulated by the legislation in force. The criticism of expenditure growth is therefore inaccurate. It is true that the regulation of service pensions for the Deputies of the Advocate of the People and for the persons who have occupied those positions, the granting of allowances and the increase in the number of positions entail budgetary expenditure, and the Government expressed its opinion on the issue, but supported the legislative proposal. Therefore, these are issues relating to the sufficiency of budgetary resources. The Court held that the assessment of sufficiency of financial resources is a political opportunity issue relating to relations between Parliament and the Government. If the Government does not have sufficient financial resources, it may propose the changes that are necessary to ensure them, by virtue of its right of legislative initiative.

III. For all these reasons, by unanimity with respect to point I of the operative part and by a majority vote in relation to point II of the operative part, the Court upheld the objection of unconstitutionality and found that Article I (8) [with reference to Article 9 (4)], Article I (9) [with reference to Article 9 (4) (1)] and Article I (15) [with reference to Article 11 (12) to (13)] of the Law amending and supplementing Law No 35/1997 on the organisation and functioning of the institution of the institution of the Advocate of the People were unconstitutional. The Court dismissed as unfounded the objection of unconstitutionality relating to Article I (10) [with reference to Article 9 (6)], Article I (65) [with reference to Article 55^2 (1), (2) and (4)] and Article I (67) [with reference to Article 57 (2) and (4)], as well as to the law as a whole.

Decision No 77 of 30 January 2019 concerning the objection of unconstitutionality of the Law amending Law No 35/1997 on the organisation and

functioning of the institution of the Advocate of the People, published in Official Gazette of Romania, Part I, No 198 of 13 March 2019

No comparison can be made between the opinion of the Economic and Social Council and the opinion of the Fiscal Council, since, on the one hand, the Fiscal Council is not a public authority of constitutional status, unlike the Economic and Social Council and, on the other hand, the law does not regulate the binding nature of the request for opinion, as opposed to the opinion of the Economic and Social Council which is necessarily consulted in its fields of competence.

The State budget is a financial plan of the State, but it cannot provide with absolute accuracy the economic developments in the course of a budget year, but sets out the main directions of the State's action from a budgetary perspective. Any imbalances that have occurred during the budget year can be corrected by regulatory acts of force of law.

Keywords: *margin of appreciation, opinions and recommendations, Fiscal Council, annual budgetary laws, fiscal plan of the State, fiscal-budgetary policy, budget and commitment appropriations, National programme for local development*

Summary

I. As grounds for the objection of unconstitutionality, criticisms of both extrinsic and intrinsic unconstitutionality were raised.

It was argued that the 2019 State Budget Law was adopted in breach of Article 1 (5) of the Constitution, with reference to the role and powers of the Fiscal Council. In this respect, it has been pointed out that, pursuant to Law No 69/2010 on fiscal-budgetary responsibility, the Fiscal Council has the task of preparing estimates and issuing opinions both on the budgetary impact of the draft legislative acts and on amendments made to annual budgetary laws during parliamentary debates. However, in the present case, the Fiscal Council issued an opinion on the State Budget Law, the Social Insurance Budget Law for 2019 and the Fiscal-Budgetary Strategy for 2019-2021, but not on all the amendments admitted during parliamentary debates.

Moreover, in order to ensure the effectiveness of the legal provisions on fiscal-budgetary responsibility, Law No 69/2010 established the Government's obligation, if it cannot meet the requirement related to the annual budget's compliance with the principles of fiscal responsibility, fiscal rules, the fiscal-budgetary strategy and any other provisions of that law, the Prime Minister and the Minister for Public Finance should state in the declaration the deviation, as well as the measures and deadlines by which the Government will ensure compliance with the principles of fiscal responsibility, with the fiscal rules and with the fiscal strategy. However, the Government derogated from this obligation through subsequent legislation, and adoption of the State Budget Law without fulfilling this legal obligation affects the stability of the rule.

It was argued that the State Budget Law was adopted in breach of Article 11 (1) and (2) and Article 148 (2) and (4) of the Constitution. In this context, it was noted that by Law No 83/2012, Romania ratified the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in Brussels on 2 March 2012. In accordance with Article 3 (1) of the Treaty, the Contracting Parties shall apply the rules set out in this paragraph in addition to their obligations under European Union law

and without prejudice to those obligations. The rules referred to in this paragraph include the rule set out in point (d), according to which "where the ratio of government debt to gross domestic product at market prices is significantly below 60 % and when risks to the long-term sustainability of public finances are low, the lower limit of the medium-term objective specified in point (b) may reach a structural deficit of no more than 1.0 % of the gross domestic product at market prices." It is apparent from the analysis of the provisions of the 2019 State Budget Law and of the fiscal strategy for the years 2019 to 2021 that those provisions are not complied with.

The breach of Romania's obligation under Article 148 (2) and (4) of the Constitution, i.e. that of maintaining a structural deficit of less than 1 % of the GDP, also follows from the Recommendation of the Council of the European Union dated 27 November 2018 with a view to correcting the significant observed deviation from the adjustment path toward the medium-term budgetary objective in Romania (MTO). As Romania has not taken effective action to correct the significant deviation, the Council has concluded that Romania has not taken effective action in this regard, showing that Romania's structural deficit reached 3.4 % of the GDP in 2017 and recommended Romania to take the necessary measures to comply with this Treaty condition.

It was argued that the 2019 State Budget Law was adopted in breach of Article 1 (5) and Article 148 (2) and (4) of the Constitution. In this respect, it has been pointed out that the 2019 report on the macroeconomic situation and its projection for the years 2020-2022 has been submitted by the Government according to its legal obligation, but it is based on a macroeconomic situation which ignores developments in the global and European economy. Although this document contains descriptive provisions, the differences compared to the European Commission's forecasts are not justified, which is contrary to the obligation laid down in Article 30 (3) of Law No 500/2002 on public finances.

With regard to the intrinsic grounds of unconstitutionality it was argued that by introducing in Article 5 (7) of the impugned law a provision derogating from three legislative acts in force affects the foreseeability of the rule, in breach of Article 1 (5) of the Constitution, as developed in the case-law of the Constitutional Court, as well as the provisions of Article 47, Article 50, Article 120 (1) and Article 135 (2) (f) of the Constitution. That conclusion was all the more evident given that the provisions derogated from were not repealed but remained in force by establishing, in practice, a different source of funding for the categories of expenditure listed in Article 5 (7).

II. Having examined the objection of unconstitutionality in relation to the criticism of unconstitutionality concerning the lack of the opinion of the Fiscal Council, the Court found it to be unfounded. In the absence of any express provision on the mandatory consultation of the Fiscal Council, the Court has found that its duties are exercised *ex officio* or on request. Moreover, in this respect, the Court held that, at the request of the Ministry of Public Finance, on 5 February 2019 the Fiscal Council issued an opinion on the State Budget Law, the Social Insurance Budget Law for 2019 for 2019 and the Fiscal-Budgetary Strategy for 2019-2021. As the law does not establish an obligation to request the opinion of the Fiscal Council, the Court found that such request falls within the scope of the Government's discretion. It cannot therefore be argued that Article 1 (5) of the Constitution in relation to Article 53 (2) (e) and (f) of Law No 69/2010 has been infringed.

The Court has held that no comparison can be made between the opinion of the Economic and Social Council and the opinion of the Fiscal Council, since, on the one hand, the Fiscal Council is not a public authority of constitutional level, unlike the

Economic and Social Council (see Article 141 of the Constitution) and, on the other hand, the law does not regulate the binding nature of the request for opinion, as opposed to the opinion of the Economic and Social Council which is necessarily consulted in its fields of competence [see Article 2 (1) of Law No 248/2013, republished in the Official Gazette of Romania, Part I, No 740 of 2 October 2015].

In the light of the relevant legislation, the Court has held that the Prime Minister and the Minister for Public Finance, as well as the Fiscal Council must comply with the law, and, according to the law, the Prime Minister and the Minister for Public Finance sign a declaration attesting solely that the 2019 Draft Budget and the 2020-2022 perspective comply with the targets, objectives and priorities of the 2019-2021 Fiscal-Budgetary Strategy, and, thus, they do not sign a declaration of compliance. However, the law does not provide that, for 2019, the Fiscal Council must issue an opinion on the issued declaration, so that it cannot be asked, as requested by the author of the objection of unconstitutionality, to exercised powers which it does not possess under the law. In this context, the Court has stressed that as long as the law enjoys a presumption of constitutionality, it must be applied as such. Since Government Emergency Ordinance No 114/2018 establishing measures in the field of public investment and fiscal-budgetary measures, amending certain legislative acts and extending certain time-limits, published in Official Gazette of Romania, Part I, No 1116 of 29 December 2018 enjoys this presumption, it must be observed by all public authorities. The Court has also held that *a priori* constitutional review of the present law *is not open to criticism of unconstitutionality relating to legal acts in force*, the constitutionality of which may be contested solely by means of the exception of unconstitutionality or, where appropriate, by means of *a priori* constitutional review of the law approving the Emergency Ordinance.

With regard to the allegation of an alleged infringement of European rules, the Court has held that the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, ratified by Law No 83/2012, published in the Official Gazette of Romania, Part I, No 410 of 20 June 2012, and to the budgetary rules laid down in the framework of that Treaty, the Court held that that treaty is an intergovernmental instrument and is not formally part of European Union law and is concluded on the basis of Article 20 of the Treaty on European Union. It follows that Article 148 of the Constitution does not apply in the light of that Treaty, which is not formally part of European Union law. The Court therefore deemed relevant solely the provisions of Article 11 (1) and (2) of the Constitution, but the objection of unconstitutionality *does not contain any reasoning* as to the alleged breach of the indicator referred to in Article 3 (1) (d) of the Treaty, simply stating that "the analysis of the provisions of the 2019 State Budget Law and of the fiscal-budgetary strategy for the years 2019 to 2012 shows that those provisions are not complied with". However, such a statement of reasons of a declaratory nature cannot be accepted, since the Court cannot itself find reasons of unconstitutionality in order to uphold the infringement of Article 11 (1) and (2) of the Constitution.

Similarly, in that context, the Court has held that the recommendation is not a binding legal act, so that Article 148 (2) of the Constitution has no bearing in relation to that complaint. Moreover, Article 11 (1) and (2) of the Constitution also have no bearing, as the examined issue concerns aspects of European law. *Therefore, as regards the recommendation relied on, only Article 148 (4) of the Constitution is relevant.*

All these aspects, however, concern a specific procedure which is specific to European Union law taking place between the European Commission, the Council of the European Union, the European Parliament and the Member State concerned and the

resulting obligations cannot be converted into constitutional requirements. Recommendations under the procedure laid down in Article 121 TFEU are and remain part of a procedure to ensure the proper functioning of the economic and monetary union and to monitor the conformity of the economic policies of a Member State with the broad guidelines of the economic policies of the Member States and of the Union. The problems identified are addressed as provided by the TFEU. At this point it cannot be concluded that Romania does not fulfil its obligations resulting from the Act of Accession, on the contrary, it should be noted that the State's concern is to comply with Article 126 (1) and (2) TFEU.

The Court noted that the Government had taken into account in the preparation of the 2019 State budget the obligations stemming from Article 126 TFEU. Possible infringements of Article 126 TFEU are established through the excessive deficit procedure provided for in the second sentence of the TFEU and not through a review of the constitutionality of the law on the State budget. The Constitutional Court has no jurisdiction in the procedure governed by Article 121 or Article 126 TFEU; the existing institutional dialogue between the European Commission, the Council of the European Union and the Member State concerned is carried out in accordance with Articles 121 and 126 TFEU. It should be pointed out that the State budget is a financial plan of the State, it cannot provide with an absolute accuracy the economic developments taking place in the course of a budget year, but sets out the broad directions of the State's action from a budgetary perspective. Any imbalances that have occurred during the budget year can be corrected by regulatory acts of force of law. Thus, in its case-law, for example, Decision No 515 of 24 November 2004, published in the Official Gazette of Romania, Part I, No 1195 of 14 December 2004, the Court has held that the financing of budgetary expenditure is made from financial sources allocated to the budget, and that the increase in expenditure is to be financed either by increasing the budget appropriations from the budget reserve fund at the disposal of the Government, or by rectifying the budget.

As regards the other criticisms, having examined the legal framework in this area, the Court noted that, in the legislative dynamics, as regards the financing of the child protection system and of public centres for adults with disabilities and the financing of the rights of personal assistants of severely disabled persons or of the monthly benefits of severely disabled persons, it has undergone various changes and additions, and all the above-mentioned legislative references appear, in principle, in the same area of regulation, namely that contained in Law No 448/2006 on the protection and promotion of the rights of persons with disabilities, republished in the Official Gazette of Romania, Part I, No 1 of 3 January 2008.

However, the provisions of Article 5 (7) of the 2019 State Budget Law comprise derogations, within the meaning of Article 15 (2) and (3) of Law No 24/2000 on the legislative technical rules for the drawing up of legislative acts, in relation to the relevant framework regulation, namely Law No 448/2006 on the protection and promotion of the rights of persons with disabilities, with regard to the financing of the child protection system and public centres for adults with disabilities in the counties and sectors of the municipality of Bucharest, as well as with regard to the financing of the rights of persons with severe disabilities or to the monthly allowances of persons with severe disabilities at the level of communes, cities, municipalities and sectors of the municipality of Bucharest, which is ensured, as appropriate, from their own revenues and, as a complement, from the amounts split from the value added tax to balance local budgets, an area which, as indicated above, has undergone a legislative dynamic in terms of both the method of financing and the allocation of amounts split from the value added tax.

The derogation, as a process of legislative technique, is provided for by Law No

24/2000, so that, in accordance with Article 15 (2) and (3) of that law, the particular nature of a regulation is determined by reference to its subject matter, specific to certain categories of situations, and to the specific nature of the legislative solutions which it establishes, and the regulation derogates if the legislative solutions relating to a particular situation contain different rules in the light of the framework regulation in the matter, the latter retaining its general binding nature for all other cases. On the other hand, as regards repealing, it is necessary and it occurs where there is legislative antinomy, legislative parallelism or where the legislator finds that there are provisions in a legislative act that are contrary to a new regulation of the same or higher level [see Article 64 (1) of Law No 24/2000.

Thus, the derogation presupposes the predisposition of a legislative framework in a particular matter which is of a general nature and scope and from which legislative solutions there is a derogation in the form of a derogation either for certain legal persons or for certain particular situations applicable to them or for specific temporary periods. As such, the derogating provisions contained in Article 5 (7) of the law under review of constitutionality are also part of this register, without any breach of the provisions of Article 1 (5) of the Constitution, from that perspective, since the derogation is a question of Parliament's legislative option, admittedly in compliance with the relevant legal provisions, namely the derogation from a law that the legislative power has adopted, which cannot be converted into unconstitutionality reasons.

As regards the foreseeability of the rule, as a criterion for compliance with the rules on the quality of the law, the Court has established that the requirement of clarity of the law is aimed at the unequivocal nature of the subject-matter of the legislation, the precision requirement relates to the accuracy of the chosen legislative solution and of the language used, while the foreseeability of the law relates to the purpose and the consequences which it entails [Decision No 183 of 2 April 2014, published in the Official Gazette of Romania, Part I, No 381 of 22 May 2014, paragraph 23].

Applying the considerations of principle contained in the case-law of the Constitutional Court to the provisions complained of, the Court observed that they are limited to the aforementioned: thus, they are unequivocal as regards the subject matter of the legislation, which is, in general, the State budget for 2019 and, specifically, Article 5 (7), the financing of the child protection system and of public centres for adults with disabilities in the counties and sectors of the municipality of Bucharest, as well as the financing of the rights of personal assistants of persons with severe disabilities or of the monthly allowances of persons with severe disabilities at the level of communes, towns, municipalities and sectors of the municipality of Bucharest, which is ensured, as appropriate, from their own revenues and, as a complement, from the amounts broken down from the value added tax to balance local budgets, an area which, as indicated above, has undergone a legislative dynamic in terms of both the method of financing and the allocation of amounts broken down from the value added tax, and, thus, the provisions complained of are precise and foreseeable, aimed at ensuring the necessary amounts, precisely with a view to ensuring the effectiveness of the constitutional provisions relating to the protection of individuals in general and of persons with disabilities in particular, which contributes to creating the conditions necessary for the improvement of the quality of life. Thus, the provisions complained of give concrete expression to the positive obligation of the State resulting from Articles 47, 50, 120 (1) and 135 (2) (f) of the Constitution.

As regards the way in which the State provides the resources necessary for the achievement of the relevant national policy, within the meaning of those constitutional provisions, it constitutes an aspect of the appropriateness of legal rules, which is a matter

for the legislator's discretion (see Decision No 165 of 27 March 2018, paragraph 26), since the legislator determines both the method of financing of the various budgetary expenditure and the possibility that they will also be financed by citizens' contributions by virtue of Article 56 of the Constitution, according to which "citizens are obliged to contribute, through taxes and levies, to public expenditure". In addition, the legislator has full constitutional powers to determine both the taxes and duties and shares thereof to be allocated as income to local budgets (see, by way of example, stamp duty in respect of which a certain quota is assigned to the local budgets of the administrative-territorial units).

Moreover, according to the constitutional provisions, it is the exclusive right of the legislator to determine the intended use of taxes and duties, as well as other State budget and State social security budget revenue, in accordance with the law.

According to Article 5 (1) of Law No 273/2006, local budgets revenue is constituted from own revenue, which is made up of: taxes, duties, levies, other payments, other income and quota, broken down from the income tax; amounts broken down from some of the revenue of the State budget; subsidies received from the State budget and other budgets; and amounts received from the European Union and/or other donors on account of payments made and pre-financing received.

To the extent that, in the course of the budget year, the revenue system of the local budgets does not cover the amounts necessary for the financing in question, budget adjustments may be used to balance the local budgets of the administrative-territorial units. Moreover, the State budget is a projection of the budget, i.e. a forecast which can be achieved by 100 % or, on the contrary, can withstand differences that can be adjusted by corrections, which result in budgetary rectifications.

As regards the principle of local autonomy, this principle is developed by Article 16 of Law No273/2006**.** Thus, the administrative-territorial units are entitled to constitute and use, in accordance with the law, sufficient financial resources in relation to all the needs of local authorities; for the purposes set out above, local public administration authorities *have the power to determine the levels of local taxes and charges, within certain limits laid down by law*. The principle of financial local autonomy implies the freedom of the administrative-territorial units to carry out the expenditure provided for within the limit of the revenues approved through the local budget.

On some investment issues, the Court noted that Law No 500/2002 contains in Chapter III: The budgetary process — Section 3 on public investment in the budgetary process; in accordance with Article 38 thereof, investment expenditure financed by public funds shall be included in the draft budgets, on the basis of public investment programmes, which shall be presented as an annex to the budget of each principal authorising officer. In public investment programmes, the main authorising officers will include the investment objectives/projects established on the basis of their assessment and selection criteria.

Indeed, in principle, fiscal-budgetary policy will be carried out in accordance with certain fiscal rules, including the rule that during the budget year, approved and unused commitment appropriations and budgetary appropriations for investment expenditure cannot be transferred and used for current expenditure [Article 12 (e) of Law No 69/2010]. Also, for example, allowances for investment expenditure approved by the principal authorising officer may not be transferred and used for other type of expenditure [Article 47 (4) of Law No 500/2002]. On the basis of appropriate justifications, *transfers of budget appropriations from one chapter to another chapter of the budget classification and between programmes may be carried out* within the limit

of up to 20 % of the provisions of the budget chapter, approved by the annual budget law at the level of the principal authorising officer, and, respectively, within the limit of up to 10 % of the provisions of the programme, cumulatively at the level of one year, to be supplemented, at least one month before the commitment of the expenditure, upon approval by the Ministry of Public Finance [Article 47 (9) of Law No 500/2002]. In these circumstances, transfers of budgetary appropriations may take place as from the third quarter of the budget year. Such transfers shall be carried out if they do not run counter to the aforementioned provisions, the budgetary laws or the rectification laws. Transfers of budgetary appropriations may influence the budgetary appropriations approved in the budgets of the principal authorising officers for the completed quarters only in the event that the budgetary appropriations approved cumulatively from the beginning of the year are higher than the budgetary appropriations available from the principal authorising officer's budget for the same period and than the payments made within their limits [Article 47 (10) of Law No 500/2002]. In this context, the Court has held that Article 46^1 (2) of Law No 500/2002 governs the possibility, in the context of the adoption of the laws of the State budget, that the annual budgetary laws may also lay down provisions derogating from that law relating to the budgetary programming, implementation and/or monitoring of post-accession external funds/other donors and those financed by the repayable funds.

The power granted to the Ministry of Regional Development and Public Administration to carry out transfers of commitment and budgetary appropriations, between budget chapters and between programmes beyond the limits laid down, by reference to the National Local Development Programme and by reference to the legislative context, respectively to the provisions of Law No 500/2002, shall take account of the budgetary implementation, within the approved budgetary provisions, with a view to financing the National Local Development Programme, including Stage II. Similarly, the technical and economic documents relating to the objectives, projects or categories of investment financed, in accordance with the law, by external funds and structural funds are approved, whatever their value, by the Ministry of National Education, within the approved budget provisions. Therefore, Article 29 (2) and Article 41 (3) of the impugned law do not concern budgetary programming, but the implementation of the budget, and the public authorities referred to in those legal texts are not granted the power to exceed the budgetary amounts allocated as a whole to the authorising officer. The provisions which are subject to criticism in the present case are precisely intended to lead to the completion of such programmes, namely to enable those managing such programmes to make the operations necessary for the implementation of the programmes, which are of national interest, in the most useful and responsible manner, in order to achieve their effective, effective and practical implementation.

In this context, the Court has held that the National Local Development Programme is a multi-annual funding programme, coordinated by the Ministry of Regional Development and Public Administration, which has as its general objective to equip administrative-territorial units with all technical-urban facilities, educational infrastructure, health and environmental, sports, social-cultural and tourism-related, as well as administrative facilities, and with access to national roads. The administrative-territorial units represented by the local public administration authorities, i.e. communes, municipalities and towns and cities, including their constituent villages, counties, as well as the local administrative units of inter-community development associations, constituted under the law, for investments made through inter-community development associations may be eligible for funding.

As indicated above, the derogations, as a legislative process, are permissible by

law, the texts in question are clear, also bearing in mind that the contested provisions are addressed to the relevant experts, they do not lead to a breach of the provisions of Article 1 (5) of the Constitution, particularly as transfers of budgetary and commitment appropriations, between the budget chapters and the programmes, are made in compliance with the approved budget provisions.

III. For all these reasons, by a majority vote, the Court dismissed as unfounded the objection of unconstitutionality and found that the provisions of Article 5 (7), Article 29 (2) and Article 41 (3) of the 2019 State Budget Law, as well as the law as a whole, are constitutional in relation to the criticisms made.

Decision No 127 of 6 March 2019 concerning the objection of unconstitutionality against the provisions of Article 5 (7), Article 29 (2) and Article 41 (3) of the 2019 State Budget Law and of the law as a whole, published in Official Gazette of Romania, Part I, No 189 of 8 March 2019

Resumption of debates and votes on a law on which the decision-making Chamber has made a final decision shall be excluded. An interpretation to the contrary would render the term "made a final decision" contained in Article 75 (3) of the Constitution void of purpose.

Keywords: *decision-making Chamber, Regulation of the Chamber of Deputies, promulgation of the law, rule of law, primacy of the Constitution*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argued that, as a result of the final vote cast in the plenary of the decision-making Chamber, the parliamentary legislative procedure for the debate and the adoption of the law in Parliament ends. Neither the Constitution, nor the laws or the parliamentary regulations provide for the possibility of this procedure to re-open, by resuming the entire debate on the law already voted as a whole.

Following the vote thereon in the decision-making Chamber, the Law for approval of the ceilings of some of the indicators specified in the 2019 fiscal-budgetary framework was submitted to the Secretary General of the Chamber of Deputies, in order to exercise the right of referral to the Constitutional Court. Without a prior decision by the plenary of the Chamber of Deputies, the Standing Bureau of that Chamber decided to refer the draft law back to the Committee on Budget, Finance and Banks with a view to drawing up an additional report. The afore-mentioned Committee adopted an additional favourable report with 10 accepted amendments. The Chamber of Deputies met and voted the same law, this time with the amendments proposed by the additional report. At the time when the debate and adoption by the plenary of the Chamber of Deputies were resumed, this Chamber was no longer constitutionally vested and therefore its governing bodies (the Standing Bureau) or the operative bodies (Committee on Budget, Finance and Banks) were no longer competent to act in relation to this legislative initiative.

II. Having examined the objection of unconstitutionality, the Court has held that it may analyse the infringement of the rules of constitutional status and not of regulatory rank, if the latter have no constitutional significance, since they are not expressly or implicitly enshrined in the Constitution. By virtue of the principle of the autonomy of the two Chambers to adopt their own regulations, established by Article 64 (1), first sentence, of the Basic Law, the Court does not have jurisdiction to rule on the application of the regulations. The Deputies' complaints concerning the concrete acts of implementation of the provisions of the Regulation fall within the exclusive competence of the Chamber of Deputies.

The regulation of clear rules in relation to the legislative procedure and compliance with the rules thus laid down constitutes a guarantee against the abuse of powers of the parliamentary majority, hence a guarantee of democracy. In so far as the rules on the legislative procedure are enshrined in the Constitution, the Constitutional Court has jurisdiction to rule on their compliance by the Parliament and to duly sanction their infringement.

In view of the situation described in the referral act, the Court examined the interpretation of the words "made a final decision", contained in Article 75 (3) of the Constitution, to determine whether that provision allows the decision-making Chamber to decide on a draft law by vote and then, for various reasons, before the law is sent on promulgation, to reconsider its content, to resume its debate and vote.

In the light of the literal interpretation of the above article, it follows that a resumption of discussions and votes on a law on which the decision-making Chamber has definitively decided is excluded. As a result of this vote, the draft or legislative proposal becomes law, being signed by the Presidents of the two Chambers and must follow the constitutional procedural course, in the sense that it must be sent for promulgation, under the conditions of Article 77 (1) of the Constitution. The fact that, in the present case, the law was not sent for promulgation is not such as to give rise to another interpretation of those constitutional rules, but may call into question the way in which those rules have been observed.

A contrary interpretation would create perpetual uncertainty for all those involved in the legislative procedure. Moreover, the final vote on the law would be forever in doubt, and the term "final" referred to in Article 75 (3) of the Constitution would be meaningless. However, the Constitutional Court has held that no legal instrument provided for in the Constitution can be deprived of its effectiveness, rendering it meaningless and thus violating the constitutional principle of the rule of law.

In conclusion, the provisions of Article 75 (3) and Article 77 (1) of the Constitution have been breached. Even if, as explained in the opinion of the Chamber of Deputies, the reopening of the debate had a positive aim, namely to correct the law before being sent by Parliament for promulgation, the Court underlined that any "correction" had to be done in accordance with the constitutional provisions. Acceptance of the contrary view would enable the legislator to decide, in practice, whether or not to respect the Basic Law, which is in contradiction with the principle of the supremacy of the Constitution.

The Court has not, in the present case, found relevant the principle of the autonomy of the Parliament in terms of own regulations, since that autonomy cannot be exercised on a discretionary basis, in breach of Parliament's constitutional powers.

III. For all these reasons, the Court, by unanimity, upheld the objection of unconstitutionality and found that the Law for approval of the ceilings of some of the

indicators specified in the 2019 fiscal-budgetary framework was unconstitutional in its entirety.

Decision No 128 of 6 March 2019 concerning the objection of unconstitutionality against the Law for approval of the ceilings of some of the indicators specified in the 2019 fiscal-budgetary framework, published in the Official Gazette, Part I, No 189 of 8 March 2019

The impugned legal standard concerning the contributors to the public pension system is subject to interpretation and so, it is necessary that the law-making process should be carried out in a way that gave more clarity, accuracy and predictability to the text, the legislator having to distinguish between the legal subject as the holder of the obligation to pay the contribution and the legal subject who makes the actual payment.

At the same time, by making the invalidity pension conditional upon reaching a certain age, doubled by the completion of a certain contribution period, the legislator has directly affected the right to a pension.

Keywords: *right to a pension, holder of the obligation to pay the social security contribution, invalidity pension, quality of the law, clarity of the law, predictability of the law*

Summary

I. As grounds for the objection of unconstitutionality, it is indicated that Article 25 of the Law on the public pension system, imposes on the employee, future holder of the right to a pension, the payment of the contributions to the social insurance budget, while, according to the legal texts referred to above, this obligation rests with the employer. The payment of these contributions cannot be a condition for the birth and exercise of the constitutional right to a pension. The fact of imposing a new condition of validity of the right to a pension, i.e. that the employee actually pays the social contributions, is a violation of the principle of legality and of the right to a pension.

It is further considered that Article 53 of the law examined violates the provisions of Articles 16 and 50 of the Constitution, as it regulates a privilege granted by the legislator to a single category of citizens with special needs, without an objective justification. It is considered that this privilege can fall under the scope of the provisions regarding the special protection of the disabled only insofar as it is granted to all the categories of persons with special needs. The legislator has not made any objective argument justifying the exclusion of these persons from the right to have their contribution period reduced by at least one third.

It is claimed that Article 63 (a) of the law is contrary to Article 47 (2) of the Constitution. According to the impugned text of law, one of the conditions that the beneficiaries must fulfil cumulatively in order to receive an invalidity pension is that, on the date of application for the invalidity pension, the minimum contribution period of 15 years be achieved; the other ones are that the respective person should not have reached the standard retirement age and have reduced work capacity due to accidents and illnesses, work-related or not.

II. By examining the objection of unconstitutionality, the Court found that the pleas referred to the constitutionality of the provisions of Article 25 (1), Article 53, Article 63 (a) of the Law on the public pension system. However, the Court noted that, in reality, Article 53 of the law was not challenged directly, but the fact that the benefit granted by it was not regulated with respect to other persons with severe disabilities as well; or, the text in question is Article 52 (a) of the law. Article 63 (a) of the law was also indicated as subject-matter of the review, but, in reality, the plea of unconstitutionality concerns the contribution period regulated by Article 63 (b) of the law, and not the retirement age in the case of the invalidity pension. Therefore, the Court held as subject-matter of the constitutional review the provisions of Article 25 (1), the phrase "of permanent validity" included in Article 52, with reference to point (a), as well as the provisions of Article 63 (b) of the law.

By examining the pleas of unconstitutionality filed regarding Article 25 (1) of the law, the Court found that both natural and legal persons could be contributors to the public pension system, considering that, according to Article 3 (c) of the law, the contributor is defined as "the natural or legal person who pays social security contributions to the public pension system, according to this law". Therefore, the terms "pays" or "pay" refer to the payment obligation in the sense that this contribution depends on the assets of those persons, and not in the sense of making the payment, as a technical operation. According to Article 146 (1) of the Tax Code, "Natural and legal persons who are employers or assimilated thereto are bound to calculate and to withhold the social security contribution due by the natural persons obtaining income from wages or assimilated to wages".

Therefore, to owe and pay, on the one hand, and to calculate and withhold, on the other hand, are different notions that indicate that this contribution is due by the insured ("is owed") and depends on the latter's income ("is paid"), but the calculation of the amount of the contribution, its withholding, which imply the obligation to make the payment to the social security State budget, lies with the employer. However, although the intention of the legislator can be understood, the language used in the law subject to constitutional review is inadequate, in the sense that the notion of "pays" is used both with regard to the legal subject from whose income the contribution is deducted [Article 3 (c), Article 25 (1)], as well as regarding the legal subject withholding and paying the contribution [Article 3 (a), Article 35 (1)].

In this case, on the one hand, the content of the legal standard refers to the holder of the obligation to pay the social security contribution, which is fundamentally different from the holder of the obligation to make the payment/transfer the social security contribution, and on the other hand, the field in which it is enacted is that of the social security contribution, a field of particular importance, which is in direct correlation with the right to a pension, provided for by Article 47 (2) of the Constitution, and with the social security State budget, which, according to Article 138 of the Constitution, is part of the national public budget. The payment of this contribution ensures the rhythmicity of the receipts to this budget, the payment of the pensions and the funding of the second pension pillar.

Also, the number of recipients of the law is very high, as it refers to every employee and employer, and the quality of the recipients of the law varies, so that their degree of understanding of its provisions is also different. Thus, while for an employer the aspects impugned do not pose any difficulty, other employers could have difficulties of interpretation and, given that they will not resort to specialised counselling, they could apply the rule incorrectly. Given that the impugned text has a very large number of recipients, natural and legal persons, it must be characterised by rigour and accuracy.

Or, this standard, as drafted, is subject to interpretation as regards the quality of its recipients and has a high potential to create a significant disturbance of the entire mechanism of collecting the contributions to the social security budget. Thus, the legislator must clarify these aspects that are confusing from a terminological point of view even before the law comes into force, in order to avoid the ambiguity of the law; as such, it is required that the law-making process be carried out in such a way so as to give extra clarity, accuracy and predictability to the text. Therefore, considering the importance of the content of the impugned text, of the field in which it is enacted and the number/quality of its recipients, Article 25 (1) of the law violates Article 1 (5) of the Constitution.

By examining the pleas of unconstitutionality filed with regard to Article 52 (a) of the law, the Court noted that the degrees of disability, according to Article 86 (1) of Law No 448/2006 regarding the protection and promotion of the rights of disabled persons, republished in the Official Gazette of Romania, Part I, No 1 of 3 January 2008, as subsequently amended and supplemented were: mild, moderate, severe and profound, and that, according to Article 86 (2) of the same law, the types of disability were: physical, visual, hearing, deaf-blind, somatic, mental, psychic, HIV/AIDS, associated, rare diseases.

Article 53 of the law states that the beneficiary chosen by the legislator is the person suffering from a profound visual impairment. It is noted that the phrase "profound visual impairment" does not refer directly to a certain degree of disability, but it indicates the type of impairment and its profound nature. However, it is obvious that such a simple finding is not enough, confirmation through the certificate issued by the evaluation committees establishing the degree and type of disability being required. Thus, the phrase under review refers to the profound disability degree and to the type of visual impairment, confirmed by the certificate properly issued by the public authorities. Currently, the notion refers only to the person certified as suffering from a profound disability, the type of visual impairment, with total loss of vision. Consequently, through the new text, the legislator replaced the notion of blind person with a phrase that only indicates the profound disability degree and the type of visual impairment.

The legislator also amended Article 52 (a) of the law, in the sense that a person with a profound disability, regardless of age, receives an old-age pension if the disability certificate is of permanent validity and if that person has completed at least a third of the full contribution period. Therefore, the difference between a person with profound visual impairment and one with a profound disability of another nature seems, at first glance, to be given by the duration of validity of the disability certificate. Thus, a person with a profound visual impairment can receive an old-age pension, regardless of her/his age, if (s)he has completed, in these conditions, at least one third of the full contribution period, regardless of the term of validity of the certificate, while a person with a profound disability of another nature, regardless of age, can do so only if (s)he has completed one third of the full contribution period, provided that there is a disability certificate of permanent validity.

Therefore, all the persons certified as having a profound disability benefit from a similar legal treatment, in the sense that the old-age pension is not conditional upon a certain age, but only upon the completion, in these conditions, of at least one third of the full contribution period. The legislator granted this facility to all the persons holding a profound disability certificate, regardless of the type of disability, of a permanent validity [Article 87 (11) of Law No 448/2006 provides: "For disabled persons whose disease has generated irreversible functional and/or structural-anatomical deficiencies and who cannot follow rehabilitation programs, the Evaluation Commission will grant

permanent validity to the certificate, without having to be present for periodic revaluations]. Although, at first glance, it seems that the legislator granted this benefit to persons certified as having a profound visual impairment, independently of its term of validity, and that the difference between the two categories of persons with profound disabilities is given by the term of validity of the certificate, in fact, it is found that a profound visual impairment is, in principle, irreversible, which implies a certificate of permanent validity. Therefore, the legislator applied the same legal treatment to people with profound disabilities, which generated irreversible deficiencies.

The Court stated that Article 50 of the Constitution enshrined the right of disabled persons to enjoy special protection and, consequently, the State must ensure the implementation of a national policy of equal opportunities, prevention and treatment of disabilities, in order for disabled persons to effectively participate in the life of the community. In order to give effectiveness to this constitutional standard, the legislator regulated a set of rights and measures made available to the disabled in order to facilitate their social integration and inclusion, having regard precisely to their special status (see Decision No 681 of 13 November 2014, published in the Official Gazette of Romania, Part I, No 889 of 8 December 2014, para. 21). Furthermore, by Decision No 632 of 9 October 2018, para. 23, the Court emphasised that the provisions of Article 16 (1) of the Constitution were not incompatible with those of Article 50 of the Constitution offering special protection to a certain category of holders of fundamental rights, i.e. the disabled.

In view of this, the Court held, in relation to this case, that the legislator took into account the provisions of Article 50 of the Constitution, on the special protection that disabled persons must enjoy also with regard to the right to a pension, as well as those of Article 16 (1) of the Constitution, in the sense that people with profound disabilities, which have generated irreversible disabilities, benefit from the same legal treatment, regardless of the type of disability. In view of the foregoing, the Court found that the phrase “of permanent validity” contained in Article 52, with reference to point (a), did not violate Article 16 of the Constitution in relation to Article 50 thereof.

By examining the pleas of unconstitutionality filed regarding Article 63 (b) of the law, the Court found that, by Decision No 680 of 26 June 2012, published in the Official Gazette of Romania, Part I, No 566 of 9 August 2012, it had stated that “The total loss or at least the loss of half of the work capacity due to common illnesses and accidents that are not related to work is a random event that cannot be controlled by the person concerned; consequently, the setting of an age and of a minimum contribution period from which the invalidity pension can be granted is not justified. The conditions that the legislator must impose in this case must strictly refer to the contribution period already completed, so that, regardless of the age of the person covered, (s)he can receive an invalidity pension according to the contribution made. As such, the invalidity pension retains the legal nature of a social security benefit, without being transformed into a social one”. By the same decision, the Court ruled that “the legislator cannot impose unreasonable conditions, in respect of the invalidity pension, on those who have lost all or at least half of their capacity to work due to common illnesses and accidents not related to work.

Moreover, in principle, with regard to pensions, the legislator is bound by a condition of reasonableness (see Decision No 1.612 of 15 December 2010) - *est modus in rebus.* Or, in this case, by making the invalidity pension conditional upon reaching a certain age, doubled by the completion of a certain contribution period, the legislator violated this requirement of reasonableness and directly affected the right to a pension of the persons referred to in Article 68 (1) (c) of Law No 263/2010”.

Therefore, according to the above-mentioned decision of the Constitutional Court, in principle, with regard to the contributory invalidity pension, there is no justification for the existence of a contribution period or a standard retirement age in the absence of an efficient and coherent system of social State compensations, which guarantee a decent standard of living. Accordingly, the Court found that Article 63 (b) and, by extension according to Article 18 (2) of Law No 47/1992, point (a) of the law violated Article 147 (4) of the Constitution in relation to Article 47 (2) thereof.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the provisions of Article 25 (1) and Article 63 (a) ad (b) of the Law on the public pension system were unconstitutional.

The Court dismissed, as groundless, the objection of unconstitutionality and found that the phrase "of permanent validity" included in Article 52, with reference to point (a) of the Law on the public pension system, was constitutional in relation to the pleas filed.

Decision No 138 of 13 March 2019 on the objection of unconstitutionality of the provisions of Article 25 (1), of the phrase "of permanent validity" included in Article 52, with reference to point (a), and of Article 63 (a) ad (b) of the Law on the public pension system, published in the Official Gazette of Romania, Part I, No 375 of 14 May 2019

A merely formal explanatory memorandum, without a thorough substantiation of the contested law, affects its quality and foreseeability, resulting in the infringement of the provisions of Article 1 (5) of the Constitution and the provisions of Article 1 (3) of the Constitution, which enshrine the rule of law and the principle of justice. At the same time, failure by the initiators of draft legislation to comply with the legal obligation to seek the opinion of the Economic and Social Council, for the purposes of its consultation, as a specialised consultative body of the Parliament and of the Government, led to the adoption of the law with disregard for the constitutional provisions of Article 1 (5) on the obligation to comply with the law, in conjunction with Article 141, concerning the role of the Economic and Social Council.

Keywords: *clarity of law, foreseeability of law, rule of law, principle of legal certainty, opinion of the Economic and Social Council*

Summary

I. As grounds for the objection of unconstitutionality, both intrinsic and extrinsic grounds of unconstitutionality were raised.

As regards the *grounds of extrinsic unconstitutionality*, the authors of the referral argue that the Law supplementing Government Ordinance No 13/2011 on the penalty and remunerative legal interest for monetary obligations, as well as some financial and fiscal measures in the banking sector does not correspond to the idea of justice as a constitutional value, the premise of which are the just laws. It is argued that there is no actual statement of reasons for the legislative solutions adopted, either in the explanatory memorandum or in the reports of the specialised committees on the amendments

adopted, so that a mere political majority cannot base a law that seriously affects the Romanian financial and banking systems and the market economy.

In the statement of reasons in support of the extrinsic unconstitutionality, procedural unconstitutionality is also raised in relation to Article 141 of the Constitution concerning the Economic and Social Council, read in conjunction with Article 1 (3) on the rule of law and Article 1 (5) on the principle of legal certainty, as determined by the absence of an opinion from the Economic and Social Council.

Still as a criticism of extrinsic unconstitutionality is formulated the submission related to the unconstitutionality of the impugned legislative act in relation to Article 1 (5) of the Constitution and Articles 13 to 15 of Law No 24/2000, including through the internal contradiction within the body of Government Ordinance No 13/2011. It is stated that the legislative act in question creates a contradiction in the wording of the amended ordinance, namely Government Ordinance No 13/2011 on the penalty and remunerative legal interest for monetary obligations, as well as some financial and fiscal measures in the banking sector. Thus, the legislative act complained of is inconsistent with Article 9 of Government Ordinance No 13/2011, which provides that the interest charged or paid, and the method of calculation thereof, are to be determined by specific legislation.

As regards the *grounds of intrinsic unconstitutionality*, it is claimed that Article 5^1 (2) regarding the amount of the effective annual interest; Article 5^1 (3), regarding the capping of the penalizing interest, in conjunction with Article 5^1 (1); Article 5^1 (4) regarding the applicable penalties; Article 5^2 regarding the application of the new provisions also to ongoing contracts on the date of their entry into force, are unconstitutional.

II. Having examined the objection of unconstitutionality concerning the submissions relating the lack of an "actual" explanatory memorandum for the adoption of the legislative act, against the provisions of Article 1 (3) and (5) of the Constitution with reference to the provisions laid down in Law No 24/2000, i.e. Article 30 — Instruments for presentation and substantiation, Article 31 — Explanatory memorandum and Article 32 — Drafting of the explanatory memorandum, the Court found that they lay down a series of rules concerning the content of the instrument stating the reasons for adoption, designed to ensure a sound substantiation of the draft law. However, having regard to the content of the explanatory memorandum, it is apparent that it is deficient in that regard.

The explanatory memorandum comprises two paragraphs, the wording of which does not clearly show the needs which have rendered necessary the regulatory intervention. Even if several shortcomings of the legislation in force are mentioned therein, no mention is made of the proposed legislative solutions, their basic principles and their purpose, the elements of substantiation provided for by Article 31 (1) (a) of Law No 24/2000 resulting absent. Similarly, neither the socio-economic impact nor the impact on the legal system are presented. Possible consultations which would be the basis for the legislative proposal have not been included either. The explanatory memorandum thus appears as a preliminary version of an instrument stating the reasons for adoption, in that it presents a number of shortcomings in the legislation in force, but does not contain any mention of the proposed amendment of the law. Furthermore, during the parliamentary debates, the Joint Report of the Committee for Economy, Industries and Services, the Committee for Budget, Finance, Banking Activities and Capital Market and the Legal Committee for appointments, discipline, immunities and validations of 20 February 2018 contains a number of amendments accepted and rejected, respectively, without giving reasons in that respect. While the original proposal

has been substantially amended in the course of the legislative procedure, as has been pointed out, it has not been properly motivated with regard to the proposed and adopted legislative solutions.

In the absence of reasoning, in the sense that it has been adopted, of the law adopted, the legislature's raison d'être cannot be known, which is essential for the understanding, interpretation and application of that law. The clear explanation of the proposed legislative solutions and of the expected effects is all the more necessary in the light of the principle of legality referred to, since the subject-matter of the legislative initiative in this case appears to be highly technical and specialised, with effects in a sensitive segment of the market economy, namely the financial and banking sector, and the law itself lacks clarity.

In view of the subject matter of the legislative initiative, which is highly technical and specialised, the Court has held that, in the present case, the formal statement of reasons, without proper substantiation of the contested law, affects its quality and foreseeability, resulting in the infringement of the provisions of Article 1 (5) of the Constitution.

The Court has also held that the complaints made in the light of the provisions of Article 1 (3) of the Constitution, which enshrine the rule of law and, between its values, the principle of justice, are also well founded. A sound substantiation of legislative initiatives is a requirement of the aforementioned constitutional provisions, as it prevents arbitrariness in law-making by ensuring that proposed and adopted laws respond to real social needs and social justice. Accessibility and foreseeability of the law are requirements of the principle of legal certainty, constituting guarantees against arbitrariness, and the role of the review of constitutionality is to ensure those guarantees, which are opposed to any arbitrary legislative intervention. Thus, the Court has held that the failure to state the reasons for the legislative solutions is such as to affect the provisions of Article 1 (3) of the Constitution, which enshrines the rule of law and the principle of justice, within the meaning of the arguments set out above.

With regard to the submissions relating to the infringement of Article 141 (concerning the Economic and Social Council which is the advisory body of Parliament and of the Government in the fields of expertise established by its organic law for establishment, organisation and functioning), in conjunction with Article 1 (3) and (5) of the Constitution, determined by the absence of an opinion from the Economic and Social Council, the Court stressed that, in the application of the constitutional rules of reference, Law No 24/2000 on the legislative technical rules for the drawing up of legislative acts requires, under Article 31 (3), that the final form of the instruments for the presentation and the substantiation of the draft legislative acts must refer to the opinion of the Legislative Council and, where appropriate, of other competent authorities, such as the Economic and Social Council. It is true that, as also stated in the viewpoint sent by the Chamber of Deputies, it is not compulsory to obtain an opinion and that the legislative procedure cannot be obstructed by the passivity of the notifying authorities. However, such an opinion was not sought. In view of the constitutional and legal provisions cited, the absence of a request for an opinion from the Economic and Social Council is such as to support the unconstitutionality of the law, in the light of the provisions of Article 1 (3) and (5) in conjunction with Article 141 of the Constitution.

The Court has stressed that the principle of legality, laid down in Article 1 (5) of the Constitution, read in conjunction with the other principles laid down in Article 1 (3) of the Constitution, requires that both procedural and substantive requirements are complied with in the context of law-making. The rules governing the substance of legislative acts, the procedures to be followed, including the request for opinions from

the institutions provided for by law, are not goals in themselves, but means, tools for ensuring the quality of the law, a law serving citizens and not a law that would create legal uncertainty.

Thus, in line with the submissions of the authors of the referral, the Court found that the law in its entirety was unconstitutional in the light of the provisions of Article 1 (3) and (5) and Article 141 of the Constitution, given the lack of an explanation with regard to the economic, social and legal reasons for adoption of the legislation, as well as given that the ESC's opinion was not sought.

III. For all these reasons, the Court, by unanimity, upheld the objection of unconstitutionality and found that the Law amending Government Ordinance No 3/2011 on the penalty and remunerative legal interest for monetary obligations, as well as some financial and fiscal measures in the banking sector was unconstitutional as a whole.

Decision No 139 of 13 March 2019 concerning the objection of unconstitutionality against the Law amending Government Ordinance No 3/2011 on the penalty and remunerative legal interest for monetary obligations, as well as some financial and fiscal measures in the banking sector, published in Official Gazette of Romania, Part I, No 336 of 3 May 2019

The area of regulation of the legislative proposal refers to consumer protection, a field in which it was required to observe the legal obligation of the initiators to request the opinion of the Economic and Social Council, for the purpose of consulting it, as a specialized advisory body of Parliament and Government. Failure to comply with this obligation has led to the adoption of the impugned law in violation of the constitutional provisions of Article 1 (5), on the obligation to comply with the law, corroborated with those of Article 141, on the role of the Economic and Social Council.

Keywords: *rule of law, consumer protection, opinion of the Economic and Social Council*

Summary

I. As grounds for the objection of unconstitutionality, it is indicated that the Law supplementing Government Emergency Ordinance No 50/2010 on consumer credit agreements violates Article 1 (3) and (5) of the Constitution, due to the lack of motivation of the legislative solutions imposed. However, Articles 30 to 33 of Law No 24/2000 impose the obligation that draft regulatory acts be accompanied by the instruments of presentation and motivation, the authors of the objection of unconstitutionality insisting on the absence of an impact study.

It is claimed that the impugned law violates Article 1 (3) and (5) and Article 141 of the Constitution, as well as Article 31 (3) of Law No 24/2000, being considered that, in the field of reference, the consultation of the Economic and Social Council was mandatory. The lack of this Council's opinion is a flaw of unconstitutionality.

It is claimed that the impugned law violates the principle of legality referred to in Article 1 (5) of the Constitution and Article 13 of Law No 24/2000, being in contradiction with the Civil Code and with the special laws on consumer protection. To

this effect, it is shown that the law does not organically fit in the legislation system, being not correlated with any of the legal institutions in the legal system. It is mentioned that there is no corresponding legal institution that would validate it and allow it to be classified as a special regulation and thus be complemented by the general law to allow a correct interpretation and application.

It is claimed that the main problem of the new law is the legal classification of the new consumer right established by Article 71^3 (1), mirroring the obligation of the assignee, referred to in Article 71^2, not to be able to claim from the consumer debtor more than double the assignment price paid by the assignee to the assignor. Reference is made to the fact that the initiators of the law considered this mechanism to be a contentious retraction similar to the one regulated by Article 1.402 of the 1864 Civil Code. Or, the regulation subject to analysis essentially departs from that of the contentious retraction of the 1864 Civil Code. The classification given to the new legal mechanism established by law as a contentious retraction *sui generis* cannot be accepted since there is no such institution in the Civil Code and there are no general legal provisions to be applied complementarily and which make the regulation intelligible, which leads to the conclusion that the new regulation does not fit into the legislative system, contrary to Article 1 (5) of the Constitution.

Regarding Article 71^3 (1) and Article 71^4, it is shown that they are contrary to Articles 44 and 53 of the Constitution. It is shown that the debt claim is an intangible asset, and its nominal value is the very substance of the debt claim, which is clearly diminished by the impugned law. This deprives the assignee of the right to recover the entire debt in order to allow that the difference in value be found in the debtor's property. The assignee suffers a loss in the value of the debt, consisting of the difference between the nominal value of the debt and the value at which the retraction is exercised, which is equivalent to a partial deprivation of property over the legally acquired debt, which is contrary to Article 44 (1) of the Constitution.

It is also shown that the provisions of Article 44 of the Constitution, read in conjunction with those of Articles 21 and 124, are violated, because: (i) the law does not regulate the conditions under which the consumer can exercise this right, respectively if there is a real motivation and need of the consumer, and (ii) neither does it grant access to justice to the assignee to verify whether or not such forced settlement of the claim by the unilateral will of the consumer is properly motivated.

Regarding Article II of the impugned law, it is shown that the phrase "*in order to balance contractual risks*" in its wording is unclear, since the content of the law does not suggest such a cause that could lead to a contractual imbalance, since both the debt assignment and the agreement assignment cannot generate such an imbalance, being only ways of transferring the debt. It is also considered that Article II of the impugned law has the nature of a novelty in positive law and that it regulates aspects of substantial law. In this context, the text subject to analysis is retroactive, on the one hand, regarding credit and assignment agreements concluded before the entry into force of the law and, on the other hand, regarding credit agreements concluded before the entry into force of the law, with assignment agreements concluded after the entry into force of the law, as the law applicable to them is the law in force on the date when the debt arose because the determination of the law applicable in time is made by reference to the time of conclusion of the agreement. It is shown that, even in the case of credit agreements concluded before the entry into force of the new law, the application of the latter is contrary to the principle of non-retroactivity, even if the assignment agreement is concluded under the rule of the new law. In this respect, reference is made *mutatis mutandis* to Article 135 of Government Emergency Ordinance No 52/2016.

It is concluded that Article II of the law violates Article 15 (2) of the Constitution insofar as it applies to credit agreements concluded before the entry into force of the new law.

II. By examining the objection of unconstitutionality, regarding the plea of unconstitutionality related to the absence of the opinion of the Economic and Social Council, it stated in its case-law (Decision No 681 of 6 November 2018, published in the Official Gazette of Romania, Part I, No 190 of 11 March 2019), that Article 141 of the Constitution enshrined, for the Economic and Social Council, the role of "*advisory body of the Parliament and Government, for the specialized fields stated by the organic law relative to its establishment, organisation and functioning*". The above-mentioned constitutional provisions are resumed in Article 1 (1) of Law No 248/2013 on the organisation and functioning of the Economic and Social Council, republished in the Official Gazette of Romania, Part I, No 740 of 2 October 2015, and, according to Article 2 (1) and (2) (c) of this law, "*(1) The Economic and Social Council must be consulted on the draft regulatory acts initiated by the Government or on the legislative proposals of Deputies or Senators. The result of this consultation materializes in opinions on draft regulatory acts. (2) The specialized fields of the Economic and Social Council are: (...) c) labour relations, social protection, wage policies and equal opportunities and treatment"*.

Regarding the role of the Economic and Social Council and the nature of its opinion, the Court held that, by Decision No 83 of 15 January 2009, published in the Official Gazette of Romania, Part I, No 187 of 25 March 2009, and Decision No 354 of 24 September 2013, published in the Official Gazette of Romania, Part I, No 764 of 9 December 2013, it had stated that Article 141 of the Constitution only enshrined the role of the Economic and Social Council as an advisory body of the Parliament and the Government and, for details on the specialized fields in which it is consulted, the text referred to its organic law of establishment, organisation and operation. The constitutional standard, by synthetically expressing the purely advisory role of the Economic and Social Council for the Parliament and Government, does not make any express reference to the obligation of the initiators of draft regulatory acts to request the advisory opinion of the Economic and Social Council nor regarding the mechanisms for consulting this advisory body, these being dealt with in the latter's law of organisation and operation, to which the Basic Law refers.

In a completely different manner, the framers have regulated, in Article 79 of the Basic Law, the role of the Legislative Council, as a "*specialised consultative body of Parliament, that advises on draft regulatory acts for the purpose of a systematic unification and coordination of the entire legislation. It shall keep the official record of the Romanian legislation*". In this respect, failure to seek the advisory opinion of the Legislative Council leads to the unconstitutionality of the respective law or ordinance - simple or emergency. If the will of the framers were to impose the obligation to request the advisory opinion of the Economic and Social Council, then this would have been expressed in Article 141 of the Basic Law, in a similar manner to the one used in the drafting of Article 79, for the regulation of the role and powers of the Legislative Council.

Consequently, the Court held that failure to comply with the mandatory obligation to request the advisory opinion of the Economic and Social Council could not lead to the unconstitutionality of the respective regulatory act, by reference to Article 141 of the Constitution. These considerations of the Court must be maintained in this case as well, by strict reference to the provisions of Article 141 of the Constitution.

However, by reference to the provisions of Article 1 (5) of the Constitution, according to the same case-law mentioned above, the Court found that the objection of unconstitutionality was well-founded, as it was clear from the legislative sheet of the impugned law that the opinion of this authority has not been requested. Thus, according to Article 1 (5) of the Basic Law, "*In Romania, observance of the Constitution, of its supremacy and of laws is mandatory*". Or, the provisions of Article 2 (2) (e) of Law No 248/2013 stipulate the obligation of the initiators of draft laws or legislative proposals to request the opinion of the Economic and Social Council if the envisaged regulations concern the latter's specialized fields. In this respect, it is noted that the impugned law concerns one of these fields, i.e. consumer protection, as it results from the explanatory statement of the law. Therefore, failure to request this opinion when initiating the legislative parliamentary procedure concerning the regulatory act under review, represents a violation of the provisions of Article 1 (5) of the Constitution. Given the area of regulation of the legislative proposal in question, it was mandatory to request the opinion of the Economic and Social Council, for the purpose of consulting it, as a specialized advisory body of Parliament and Government, being irrelevant if the legislator, in its legislative work, had taken its content into account or not. The fact of ignoring the constitutional principle of the compulsory observance of the law during the parliamentary legislative procedures would place the legislator in a privileged position, prohibited by the constitutional principle of equality, enshrined in Article 16 (2) of the Basic Law, according to which "*No one is above of the law*".

Accordingly, the Court found that the impugned law had been adopted in violation of Article 141 with respect to Article 1 (5) of the Constitution.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law supplementing Government Emergency Ordinance No 50/2010 on consumer credit agreements was unconstitutional.

Decision No 140 of 13 March 2019 on the objection of unconstitutionality of the provisions of the Law supplementing Government Emergency Ordinance No 50/2010 on consumer credit agreements, published in the Official Gazette of Romania, Part I, No 377 of 14 May 2019

Failure to comply, by the initiators of draft regulatory acts, with the legal obligation to request the opinion of the Economic and Social Council, for the purpose of consulting it, led to the adoption of the impugned law, which referred to consumer protection, a field in which such an opinion had to be requested, notwithstanding the constitutional provisions of Article 1 (5), on the obligation to comply with the law, corroborated with those of Article 141, on the role of the Economic and Social Council, as a specialized advisory body of Parliament and Government.

Keywords: *rule of law, consumer protection, opinion of the Economic and Social Council*

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral lodged pleas of both extrinsic and intrinsic unconstitutionality.

According to the authors, the Law amending and supplementing Government Ordinance No 51/1997 on leasing operations and leasing companies, as well as supplementing Article 120 of Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy ignores the fact that the legislation currently in force includes a series of recent regulations that ensure consumer protection as regards avoidance or, at least, mitigation of the impact of declaring early maturity date and initiating foreclosure, creating the false impression that the removal of the enforceable nature would be necessary so that credit institutions do not immediately initiate foreclosure if the debtor has arrears. Or, given the fact that both the credit agreement and the related guarantees are enforceable, the legislation on consumer protection was previously substantially improved in favour of consumers, so that the removal of the enforceable force of the credit agreement appears not as a measure of genuine protection of consumers, but as a measure against the stability of the financial-banking system. It is further impugned that the opinion of the Economic and Social Council, which is mandatory in the field of consumer protection, is missing in the process of adopting this law. It is also shown that the new regulation is in flagrant contradiction with the current legal framework established by the Civil Code and with the special laws on consumer protection. The unclear nature of the regulation in the new law determines a lack of integration in the body of legislation in force and is contrary to the regulations in this field, without being correlated with the legal institutions in the Romanian legal system.

As concerns the substantive criticism, it is shown that Article I (1) of the impugned law, regarding Article 8 (2) of Government Ordinance No 51/1997, violates Article 16 (1) of the Constitution on equal rights and Article 44 (2) of the Constitution on private property. As concerns the changes proposed by the legislator with regard to leasing agreements, it is shown that the draft law falls outside the constitutional framework that aims at the equality of citizens before the law, but, above all, at the protection and guarantee of private property, regardless of its owner. Or, at present, the Romanian legislation includes sufficient legal instruments by which the leasing consumer is protected and by which the legal imbalance that could be considered to exist between the lessor and the consumer is regulated. As concerns the unconstitutionality of Article II of the law subject to criticism, regarding Article 120 (2) of Government Emergency Ordinance No 99/2006 related to Article 16 (1) of the Constitution on equal rights and to Article 44 (2) of the Constitution on private property, it is shown that a possible comparison must be made between creditors in the same situation, i.e. holders of a debt originating from a loan agreement, possibly secured with a real property or chattel mortgage. By extracting and exempting credit agreements and guarantees between credit institutions and consumers from the scope of the contracts that constitute enforceable titles, a different legal treatment for such agreements is obviously established, which leads to a legal inequality between creditors, whether secured or not.

II. By examining the objection of unconstitutionality, the Court held that, in the explanatory note of the Law amending and supplementing Government Ordinance No 51/1997 on leasing operations and leasing companies, as well as supplementing Article 120 of Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy, it was shown that it was aimed at solving different situations in which the consumer, party to acceptance agreements, is at a disadvantage compared to certain economic actors. Thus, the abusive conduct of certain contracting parties, which is very often applied in practice, reveals the need to limit the preferential regime that they have benefited from, i.e. enforceability, and the need to submit them to the prior verification procedures in the case of similar legal acts. Although, according to the case-law of the

Court of Justice of the European Union, courts of law are bound to verify *ex officio* the abusive nature of certain contractual terms, this does not happen in practice, as they only carry out a formal verification of the enforceable title, and not of the conditions of validity thereof. Or, the verification of these situations only at the stage of the enforcement challenge, which involves the payment of a stamp duty by the debtor and its filing only within a certain period [provided that its wording does not suspend the forced execution procedure], makes it extremely difficult to ensure the rights granted to consumers under European Union law.

The Court noted that its authors stated that there was no real motivation and substantiation of the solutions adopted and that, in the absence of an impact study, the fact that the legislator has already put in place sufficient legislative measures for consumer protection was ignored.

Although qualified by the authors of the objection of unconstitutionality as an extrinsic plea, in the Court's case-law, the lack of impact studies was considered a plea of intrinsic unconstitutionality, in the sense that the constitutionality benchmark is not represented only by the lack of impact studies, but this is backed up by the nature and importance of the legislative solutions regulated within the law. Under these circumstances, the Court examined the following plea of extrinsic unconstitutionality:

Thus, with regard to the claims concerning the absence of the opinion of the Economic and Social Council, the Court held that they were well-founded, because, from consulting the legislative sheet of the impugned law, it turned out that it had not been requested, as also certified by the Letter of the Secretary General of the Senate registered with the Constitutional Court under No 283 of 22 February 2019.

The Court noted that Article 141 of the Constitution enshrined the role of the Economic and Social Council as "*advisory body of the Parliament and Government, for the specialized fields stated by the organic law relative to its establishment, organisation and functioning*." These constitutional provisions are resumed in Article 1 (1) of Law No 248/2013 on the organisation and functioning of the Economic and Social Council, republished in the Official Gazette of Romania, Part I, No 740 of 2 October 2015, and, according to Article 2 (1) and (2) (e) of this law, "*(1) The Economic and Social Council must be consulted on the draft regulatory acts initiated by the Government or on the legislative proposals of Deputies or Senators. The result of this consultation materializes in opinions on draft regulatory acts. (2) The specialized fields of the Economic and Social Council are: (...) e) consumer protection and fair competition;"*.

Thus, according to Article 1 (5) of the Basic Law, in Romania, observance of the Constitution, of its supremacy and of laws is mandatory. Or, the provisions of Article 2 (2) (e) of Law No 248/2013 - the organic law for the establishment, organisation and functioning of the Economic and Social Council - stipulate the obligation of the initiators of draft laws or legislative proposals to request the opinion of the Economic and Social Council if the envisaged regulations concern the latter's specialized fields, represented by consumer protection. Accordingly, the Court found that the impugned law referred specifically to consumer protection, a field in which the opinion of the Economic and Social Council had to be requested. Under these circumstances, the Court found that the provisions of Article 1 (5), read in conjunction with those of Article 141 of the Constitution, had been disregarded.

Consequently, the Court found that the Law amending and supplementing Government Ordinance No 51/1997 on leasing operations and leasing companies, as well as supplementing Article 120 of Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy was unconstitutional as a whole.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law amending and supplementing Government Ordinance No 51/1997 on leasing operations and leasing companies, as well as supplementing Article 120 of Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy was unconstitutional as a whole.

Decision No 141 of 13 March 2019 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Government Ordinance No 51/1997 on leasing operations and leasing companies, as well as supplementing Article 120 of Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy, published in the Official Gazette of Romania, Part I, No 389 of 17 May 2019

The legal provisions regarding referendum give legal relevance to the number of persons who did not express their right to vote in any way, but whose presence was recorded in the reports of the polling stations, they may vitiate the quorum condition required for the validity of the referendum, contrary to the requirements of the rule of law.

Keywords: *referendum for the revision of the Constitution, emergency ordinance, extraordinary situation, urgency of the regulation, electoral rights, electoral bureaus, referendum turnout quorum*

Summary

I. As grounds for the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 86/2018 amending and supplementing Law No 3/2000 on the organisation and holding of the referendum, as well as concerning certain measures for the proper organisation and holding of the national referendum for the revision of the Constitution, its author filed pleas of both extrinsic and intrinsic unconstitutionality.

Regarding the pleas of extrinsic unconstitutionality, it was claimed that Government Emergency Ordinance No 86/2018 violated Article 115 (4) of the Constitution, given that the circumstances specified in its preamble and in the explanatory statement of the draft law for its approval did not demonstrate the existence of an extraordinary situation nor the urgency of the regulation. A violation of Article 115 (6) of the Constitution was also claimed, as the impugned emergency ordinance affected electoral rights. There is also a violation of the constitutional role of Parliament, which established, precisely through Law No 3/2000, the date for holding the referendum for the revision of the Constitution, but the Government established, by way of derogation from it, that the referendum was going to be held in two days' time.

Regarding the pleas of intrinsic unconstitutionality, it was claimed that Article 1 (5) of the Constitution was violated, enshrining the principle of lawfulness, in its component regarding the accuracy and clarity of the norms, with reference to the possibility of organising the national referendum simultaneously with the referendum on issues of local interest or on the moment from which the time limit for the establishment of the electoral bureaus begins to run. Through the fact that the electoral bureaus at all levels include only delegates of the parliamentary political parties and of the citizens' organisations belonging to national minorities with their own parliamentary

group in both Chambers of Parliament, the role of the political parties in contributing to the formation of public authorities and in promoting political pluralism, provided by Article 8 (2) of the Constitution, is ignored. Thus, a discriminatory condition is established for the parliamentary political parties that have their own parliamentary group in only one of the Chambers of Parliament. Another criticism refers to the establishment of the rule according to which, in the report concerning the results of the referendum, the number of participants must be higher than or equal to the total number of votes validly cast with the answer "YES", of those with the answer "NO" and of the votes null, because it is thus legislated the possibility that the number of participants should be greater than the number of those who cast a vote, contrary to the principle of the rule of law and democracy.

II. By examining the objection of unconstitutionality, the Court held as follows:

Regarding the pleas of extrinsic unconstitutionality formulated through the fact that the amendments brought to Law No 3/2000 through Government Emergency Ordinance No 86/2018 cannot be justified by the existence of an extraordinary situation nor by an urgency of the regulation, considering that, although these are motivated in view of the organisation of the next referendum for the revision of the Constitution, in fact, they apply to all three types of referendum provided by the Basic Law, the Court considered that these could not be retained. In this regard, it found that the phrase used in the impugned regulatory act was generic, thus covering all three types of referendum, precisely because of the similarities existing between them in terms of procedural and organisational details. The common features of referenda demand common regulations, so that the establishment of certain rules for the referendum for the revision of the Constitution is achieved by organising all types of referendum in the same way, being impossible to invoke the absence of an extraordinary situation and of a real urgency, since the legislative regulation of one of them is implicitly applicable to the others as well.

The Court also considered as groundless the pleas according to which the simultaneous organisation of a local referendum with the local elections would represent a short-term situation, so that there would be no extraordinary situation of an objective nature. However, this is not the sole object of regulation of the impugned emergency ordinance, which has a much wider scope, which complies with the requirements of Article 115 (4) of the Constitution.

The Court also found that Government Emergency Ordinance No 86/2018 did not disregard the provisions of Article 115 (6) of the Basic Law either, according to which emergency ordinances cannot affect electoral rights. In this regard, the repeal of the provisions of Law No 3/2000 that give citizens the opportunity to check their registration on the electoral lists or the exemption from the application of the provisions regarding the Computer system for monitoring turnout and preventing illegal voting were also impugned. From this perspective, the Court held that they were found in other provisions, in other regulatory acts, respectively Law No 208/2015 on the election of the Senate and the Chamber of Deputies, as well as for the organisation and functioning of the Permanent Electoral Authority.

The Court also found that the exclusive competence of Parliament to decide the date of the referendum for the revision of the Constitution was not violated. The day initially set by Parliament was maintained, the period for expressing the voters' option being supplemented by another day, which is not likely to undermine the decision-making sovereignty of Parliament, but gives it a higher efficiency, being done with a

view of fulfilling, as much as possible, the citizens' right to vote in the referendum organised for the revision of the Basic Law.

As regards the pleas of intrinsic unconstitutionality, in relation to the alleged lack of accuracy and clarity of the texts, the Court considered that it could not be withheld, with reference, on the one hand, to the possibility of organising a referendum for the revision of the Constitution simultaneously with a referendum on issues of local interest and, on the other hand, to the moment for establishing the electoral bureaus.

The Court also found that the interpretation according to which the parliamentary political parties that do not have their own group in both Chambers of Parliament would be excluded from the possibility of proposing a member in each electoral bureau could not be retained, as this would be contrary to their constitutional role established by Article 8 (2) of the Basic Law.

The Court also examined the plea referring to the provisions of Article I (18) of Government Emergency Ordinance No 86/2018, according to which, throughout Annexes 2 to 6 of Law No 3/2000, the phrase "*The number of participants must be equal to the sum resulting from the addition of the figures in points 5, 6 and 7*" is replaced by the phrase "*Point 2> / = Point 5 + point 6 + point 7*", where 2 is the number of participants in the referendum, 5 is the number of valid votes cast with the answer "YES", 6 is the number of valid votes cast with the answer "NO", and 7 is the number of votes null. In this regard, the Court noted that, while prior to the amendment of Law No 3/2000, it was considered that the number of participants had to be equal to the sum of the votes validly cast with the answer "YES", of those with the answer "NO" and of the votes null, in the current version, following amendment through Government Emergency Ordinance No 86/2019, Law No 3/2000 stipulated that the number of participants was considered to be equal to or greater than the total number of votes validly cast with the answer "YES", those with the answer "NO" and the votes null. Given that, according to Article 5 (2) of Law No 3/2000, the referendum is valid if at least 30% of the number of persons registered on the permanent electoral lists participate in it, the Court found that the number of participants was crucial with regard to the prerequisite of the turnout quorum, which determines the very validity of the referendum. As such, the legal provisions that give legal relevance to the number of persons who did not express their right to vote in any way, not even by a null vote, but whose presence was recorded in the reports of the polling stations, may vitiate the quorum condition required for the validity of the referendum, artificially increasing the number of participants by also taking into consideration those who did not exercise their right to vote. In this way, the proposed formula tends to distort reality, by granting legal valences to attitudes contrary to the civic spirit and calls into question the rule of law, through the risk involved, of altering the result regarding the validity of the referendum. At the same time, the Court noted that it could not exclude the hypothesis that some of the voters did not exercise their right to vote, although present to the polls, being registered in the records of the electoral bureaus of the respective polling stations. Therefore, for the purpose of legal rigour and for a correct reflection of the factual reality, the formula proposed by the legislator should refer to the number of participants having actually exercised their voting rights, by inserting the ballot paper into the ballot box, regardless of the option expressed. In this context, the Court also emphasized that the Code of Good Practice in Electoral Matters, adopted by the Venice Commission, explicitly stipulated that "unused or cancelled voting slips must never leave the polling station". Accordingly, the Court found that the provisions of Article I (18) of Government Emergency Ordinance No 86/2018 were unconstitutional, being contrary

to the provisions of Article 1 (3) of the Basic Law, enshrining the fact that the Romanian State was governed by the rule of law.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the provisions of the Sole Article [with reference to Article I (18) of Government Emergency Ordinance No 86/2018] of the Law approving Government Emergency Ordinance No 86/2018 amending and supplementing Law No 3/2000 on the organisation and holding of the referendum, as well as concerning certain measures for the proper organisation and holding of the national referendum for the revision of the Constitution were unconstitutional.

The Court also dismissed, as groundless, the objection of unconstitutionality of the provisions of the Sole Article [with reference to Article I (1), (7), (9) and (15) of Government Emergency Ordinance No 86/2018] of the Law approving Government Emergency Ordinance No 86/2018 and found that these were constitutional with regard to the pleas of intrinsic unconstitutionality filed, as well as the law in its entirety, with regard to the pleas of extrinsic unconstitutionality filed.

Decision No 143 of 13 March 2019 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 86/2018 amending and supplementing Law No 3/2000 on the organisation and holding of the referendum, as well as concerning certain measures for the proper organisation and holding of the national referendum for the revision of the Constitution, published in the Official Gazette of Romania, Part I, No 331 of 2 May 2019

Failure by the initiators of draft legislation concerning the organisation and functioning of an institution with tasks which are closely linked to the area of national security to comply with the obligation to seek the advisory opinion of the Supreme Council of National Defence led to the adoption of the law with disregard for the constitutional provisions of Article 1 (5) on the obligation to respect the law, in conjunction with Article 119, concerning the role of the Supreme Council of National Defence, materialised at the level of organic law which establishes the aforementioned competence to issue advisory opinions. Furthermore, the impugned law was adopted in breach of Article 75 (2) of the Constitution, whereas, during the legislative procedure in the first notified Chamber, the time limit for the tacit adoption set out in the relevant constitutional rules was exceeded.

Keywords: *principle of legality, foreseeability of the law, clarity of the law, rule of law, advisory opinion of the Supreme Council of Defence of the country, tacit adoption of the law*

Summary

I. As grounds for the objection of unconstitutionality, both intrinsic and extrinsic grounds of unconstitutionality were raised.

As regards the *grounds of extrinsic unconstitutionality*, the arguments of the author of the referral are based essentially on the fact that Article II point 1 [with reference to Article 26 (1), points 2 and 4 of Law No 218/2002] and Article II point 13 [with reference to Article 38 (1)—(7) of Law No 218/2002] amend Law No 2018/2002 on the organisation and functioning of the Romanian Police, in the sense that they

introduce powers related to the prevention of and fighting against terrorism, as well as far-reaching changes in order to improve the mechanism available to the Romanian Police to ensure public order, subsumed to the significance of the concept of national security, as defined in the case-law of the Constitutional Court. In the opinion of the author of the referral, the provisions of Article 4 (d) point 2 of Law No 415/2002 on the organisation and functioning of the Supreme Council of National Defence relating to its competence to issue advisory opinions thus become relevant, so that the absence of a request for an advisory opinion renders the law unconstitutional in its entirety.

A further criticism of extrinsic unconstitutionality concerns the fact that the legislative act in question was adopted by the Senate in breach of Article 75 (2) in conjunction with Article 61 (2) of the Constitution, and with Article 147 (4) of the Constitution, that is to say, beyond the constitutional time limit for the tacit adoption, resulting in the infringement of the principle of bicameralism.

As regards the *grounds of intrinsic unconstitutionality*, it was claimed that Article II point 8 of the law [with reference to Article 32^2 (1) (a), Article 32^4 (1) (b) and (d), and Article 32^{12}] was in breach of Article 1 (5), having regard to Article 23 and Article 53 of the Constitution. According to the amendment contained in that Article and in the newly introduced Article 32^2 (1), the police officer has the right to legitimise and establish the identity of the person in a situation where "*the respective person is in breach of the legal provisions, or there are reasonable grounds to suspect that the respective person is preparing to commit or has committed an offence*". The words "*reasonable grounds*" are not defined in the amendments to the legislative act, being unclear, such as to deprive the rule of precision and clarity, contrary to Article 1 (5) of the Constitution. Equally, in accordance with Article 32^4 (1) (b), a newly introduced provision, the police officer is entitled to accompany a person to the police station where "*due to behaviour, location, time, circumstances or assets in his possessions, there are reasonable grounds to suspect that he is preparing to commit or has committed an offence*", and, in accordance with Article 32^4 (1) (d), another reason allowing the police officer to accompany a person to the police station is when "*taking legal action, on the spot, could put him or the public order at risk*". The general wording in which those cases are described is unclear and imprecise, such as to infringe the requirements laid down in Article 53 of the Constitution regarding the restriction on the exercise of certain rights or freedoms. Another criticism concerns the newly introduced Article 32^{12}, according to which the use of electro-shock devices by the police officer, in view of the effects which such devices may have on the physical integrity of the persons concerned, is a measure which is disproportionate in relation to its purpose by reference to Article 53 of the Constitution.

II. Having examined the objection of unconstitutionality in terms of the alleged infringement of Article 1 (5), Article 119 and Article 147 (4) of the Constitution, as a result of the absence of a request for an advisory opinion from the Supreme Council of Defence, which is circumscribed to the extrinsic unconstitutionality of the law, the Court held first of all that, as a matter of principle, the lack of requests or of advisory opinions in the procedure for drawing up legislative acts is a matter of compliance with the legal obligations of the authorities involved in that procedure and, consequently, affects the constitutionality of legislative acts (see Decision No 63 of 8 February 2017, published in the Official Gazette of Romania, Part I, No 145 of 27 February 2017, paragraph 108).

As regards the provisions of Article 119 of the Constitution governing the role of the Supreme Council of National Defence, relied on by the author of the referral, they

do not make express reference to the draft legislation initiator's obligation to seek the advisory opinion of that authority. However, such competence to issue advisory opinions is laid down in Law No 415/2002 on the organisation and functioning of the Supreme Council of Defence of the Country, published in Official Gazette of Romania, Part I, No 494 of 10 July 2002, as amended, which is a reflection of the provisions of Article 119 of the Basic Law. The Court has held in this regard that "whether it is a power granted by law or directly by the text of the Constitution, the authorities are required to apply it and to comply with it by virtue of Article 1 (5) of the Constitution". In this regard, Article 4 (d) of Law No 415/2002, invoked by the author of the referral in the application of Article 1 (5) and Article 119 of the Constitution, provides that the institution referred to as "*d) endorses the draft legislative acts initiated or issued by the Government on: 1. national security; 2. general organisation of the armed forces and other institutions with responsibilities in the field of national security*".

In order to determine the meaning of the term "*institutions with responsibilities in the field of national security*" contained in the cited legal text, it must be read in conjunction with the provisions of Law No 51/1991 on the national security of Romania, republished in the Official Gazette of Romania, Part I, No 190 of 18 March 2014, also invoked by the author of the referral, which lists expressly and exhaustively in Article 6 (1) "*State bodies with responsibilities in the field of national security*" as follows: "*the Romanian Intelligence Service, the External Intelligence Service, the Protection an Guard Service, as well as the Ministry of National Defence, the Ministry of Internal Affairs and the Ministry of Justice, through specialised internal structures*." The Romanian Police is not expressly classified by the law as a specialised internal structure by which the Ministry of Internal Affairs exerts responsibilities in the area of national security. Law No 218/2002 on the organisation and functioning of the Romanian Police, republished, as amended and supplemented, establishes in Article 1 that the Romanian Police "*is part of the Ministry of Internal Affairs and is the specialised State institution which exercises tasks relating to the protection of the fundamental rights and freedoms of person, private and public property, prevention and detection of criminal offences, maintenance of law and order, in accordance with the law*". It therefore follows that the regulation of the specific role and powers of the Romanian Police are subsumed under the concept of national security, as defined by Article 1 of Law No 51/1991 itself. Moreover, according to the explanatory memorandum accompanying the legislative statement of the draft Law No 18/2002, it was endorsed by the Supreme Council of National Defence, which would lead to the same conclusion, namely that the role and powers of the Romanian Police were *ab initio* conceived in close connection with national security.

In the statement of grounds for the referral, the author mentioned that the fact that the application of "measures to prevent and combat terrorism" was established as a main responsibility, such was likely to determine the characterisation of the Romanian Police as a body of State entrusted with responsibilities in the field of national security. However, the Court has also found that the law in force relates to the prevention and combating of terrorism and, as a result, it is not a new competence which, in itself, would entail a different classification of the Romanian Police. The separate mentioning of that competence reveals the importance which the legislator confers on it, on account of the gravity and the effects of the acts of terrorism, which justify measures that are appropriate to that gravity. On the other hand, from a purely technical perspective, a separate mentioning of prevention and combating of terrorism in the chapter of the law relating to the powers of the Romanian Police is consistent with the provisions on the

exercise of that power, contained in the chapter on the rights and obligations of the police officer.

Having regard, on the one hand, to the role and powers of the Romanian Police, which were conceived *ab initio* in close connection to national security, and, on the other hand, the extent of the amendments made by the law complained of, including the strengthening of those powers, it was necessary to seek the advisory opinion of the Supreme Council of National Defence. In the present case, the Court found that there was no request for an opinion from the Supreme Council of Defence. However, the obligation to request an advisory opinion on the law complained of is required by the constitutional role of the Supreme Council of National Defence, as enshrined in Article 119 of the Constitution, given concrete expression at the level of organic law by establishing the aforementioned competence to issue advisory opinions. For all of those reasons, the Court found well founded the complaint made by the author of the referral with regard to Article 1 (5), Article 119 and Article 147 (4) of the Constitution, determining the unconstitutionality of the law as a whole.

The alleged violation of the constitutional provisions governing the time limits for the tacit adoption of laws is amongst the grounds of extrinsic unconstitutionality. Thus, under Article 75 (2) of the Constitution, "*The first notified Chamber shall pronounce within 45 days. For codes and other extremely complex laws, the time limit will be 60 days. If such time limits are exceeded, it shall be deemed that the bill or legislative proposal has been adopted*". With regard to the calculation of those time-limits, Article 119 of the Senate's Rules of Procedure, in the version in force at the relevant time, provided that "*for the calculation of procedural time-limits of the legislative process only the days on which the Senate works in plenary or in standing committees shall be taken into account*" and Article 118 of those Rules provides that "*In case of legislative proposals, the legislative time-limits for law-making shall run from the date of their registration with the Standing Bureau, accompanied by the necessary advisory opinions*".

Having verified the timetable displayed on the Senate's website, it was concluded that, regardless of the way in which the constitutional time limit were calculated, i.e. on calendar days, as indicated by the author of the referral, or according to the Senate's Rules in the version in force at the relevant time, as mentioned by the President of the Chamber of Deputies in his viewpoint presented in the case, the time limit for the tacit adoption of the law was exceeded, the procedure for the adoption of the law in the first notified Chamber lasting for almost four calendar months. Thus, the Court declared well founded also the complaint that the Law amending and supplementing certain legislative acts in the area of public order and public security was adopted by the Senate in disregard of the provisions of Article 75 (2) of the Constitution, and that the law thus adopted was unconstitutional, as the legislative procedure before the first notified Chamber exceeded the time limit for the tacit adoption laid down by the relevant constitutional rules.

In view of the afore-mentioned flaws of extrinsic unconstitutionality, with the consequence that the law as a whole was unconstitutional, the Court did not examine the other complaints raised by the author of the objection of unconstitutionality (see, to the same effect, Decision No 681 of 6 November 2018, published in the Official Gazette of Romania, Part I, No 190 of 11 March 2019, Decision No 747 of 4 November 2015, published in the Official Gazette of Romania, Part I, No 526 of 15 July 2015, Decision No 545 of 5 July 2006, published in the Official Gazette of Romania, Part I, No 638 of 25 July 2006, or, *mutatis mutandis*, Decision No 82 of 15 January 2009, published in Official Gazette of Romania, Part I, No 922 of 16 January 2009, or, *mutatis mutandis*,

Decision No 442 of 11 December 2015, published in the Official Gazette of Romania, Part I, No 33 of 10 June 2015).

III. For all these reasons, by a majority vote, the Court upheld the objection of unconstitutionality and found that the Law amending and supplementing certain legislative acts in the area of public order and public security was unconstitutional as a whole.

Decision No 145 of 13 March 2019 concerning the objection of unconstitutionality against the Law amending certain legislative acts in the field of public order and public security, published in Official Gazette of Romania, Part I, No 319 of 24 April 2019

It is unconstitutional to introduce in the total number of voters registered on the lists for the election of the President of Romania the total number of voters registered on the special voters lists, which are regulated exclusively with regard to the elections to the European Parliament and which include the citizens with voting rights of the Member States of the European Union.

Keywords: *referendum, parliamentary political parties, special voters lists, sovereignty, record of voting results, elections for the European Parliament*

Summary

I. As grounds for the objection of unconstitutionality, its author challenges the prohibition of holding, simultaneously with the elections for the European Parliament, other types of elections or national or local referendums, as the legislative authority is free to opt for any legislative solution in the field of referendums, without, however, interfering with the powers of the other public authorities in this field and without modifying their constitutional status or powers provided for by the Basic Law.

Another challenge refers to the fact that the new regulation makes a distinction between parliamentary political parties, organisations of citizens belonging to national minorities with their own parliamentary group in each Chamber of Parliament and those that do not have their own parliamentary group in both Chambers, creating a differentiated treatment between parliamentary political groups, as parliamentary political parties that do not have their own group in both Chambers are excluded from the possibility of proposing a member in each electoral bureau set up for the elections for the President of Romania, which is contrary to the constitutional role of political parties of contributing to the establishment of public authorities and of promoting political pluralism.

Another criticism refers to the lack of clarity of the text of law, according to which, when calculating the number of votes necessary to declare a candidate elected as President of Romania, the citizens of other Member States of the European Union are also taken into consideration.

It is also shown that the calculation formula established by Article I (50) of the law subject to review is logically inapplicable, being contrary to the provisions of Article 1 (5) of the Constitution in its component regarding the quality of the law.

Another criticism refers to the lack of clarity of the legal provisions in which the component regarding the voters registered on the extracts from the voters lists who voted using the special urn lacks from the formula used for calculating the total number of voters registered on the voters lists who cast their ballots.

II. By examining the objection of unconstitutionality, the Court held as follows:

The Court examined the impugned legal provisions in the order in which they appeared in the law subject to constitutional review. Thus, it deemed that it could not hold the interpretation according to which the parliamentary political parties that do not have their own group in both Chambers of Parliament would be excluded from the possibility of proposing a member in each electoral bureau, as the wording envisaged manages to cover all political groups that are representative at national level. The Court noted that the law allowed political parties lacking representation in the Parliament to appoint members to the electoral bureaus, should these propose candidates for the office of President of Romania. Therefore, this right is not conditional upon the existence of a parliamentary group in both Chambers, but it is open even to those who have not obtained any seats of senators or deputies, but demonstrate their active presence on the political scene by appointing candidates in the elections. The same condition also applies to organisations of citizens belonging to national minorities that do not have their own parliamentary group in each Chamber. The setting of such requirements proves the actual participation of the respective political formation in the life of the society and its genuine intention to fulfil the role assigned, by the Basic Law, to political parties, through Article 8, i.e. of contributing to the definition and expression of the political will of the citizens.

The Court found as well-founded the plea regarding the fact that the total number of voters registered on the voters lists also included the total number of voters registered on the special voters lists who cast their ballots at the elections for the President of Romania. This because the special voters lists are regulated exclusively with regard to the elections for the European Parliament and include the citizens of the Member States of the European Union, other than Romania, who have the right to vote, and who have their domicile or residence in Romania, considering that they have the right to choose in Romania representatives to the European Parliament. Or, for the election of the President of Romania, the right to vote belongs only to Romanian citizens, regardless of whether they have their domicile or residence in the country or abroad. As such, the introduction, in the calculation formula for the total number of voters, of those who, being registered on the special lists, are not, hypothetically speaking, Romanian citizens and who, consequently, do not benefit from the right to vote for the representative authorities at national level, i.e. Romanian Parliament and the President of Romania, results in the failure to comply with the constitutional provisions of the first sentence of Article 2 (1), according to which national sovereignty belongs to the Romanian people, who exercises it through its representative bodies, resulting from free, periodic and fair elections.

The right to vote and to be elected in the national representative authorities belongs only to Romanian citizens, by fully implying the exercise of sovereignty as a component of the State. It is true that membership to the European Union has reconfigured the concept of sovereignty from the perspective of the interaction of the Romanian State with its fundamental institutions, which implied the latter’s approval to exercise, together with the other Member States, prerogatives and competences which, prior to accession, had belonged solely to it. But, at the same time, membership to this international organisation offered the Romanian citizens the opportunity to participate in the political life of the Union on an equal footing with all the citizens of the other

Member States. Based on the principle of reciprocity, the citizens of the Member States of the European Union who have their domicile or residence in Romania are currently enjoying the right to vote for the representatives of the Romanian State to the European Parliament. However, their electoral rights are limited to this type of elections, as it is normal that everything that is strictly related to the internal sovereignty of the State, such as the election of the head of State and of the members of the national parliament, should be a prerogative pertaining specifically to the Romanian citizens, reserved exclusively to them.

Another plea referred to the provisions containing the formula which, after receiving the reports recording the vote count from all the electoral bureaus, is used to establish the indicator regarding the number of ballot papers received, contained in the reports recording the vote counts validated, which must be greater than or equal to the sum of the number of ballot papers received, the number of validly cast votes and the number of null votes. After analysing the proposed formula, the Court found it to be wrong, being more than obvious that the verification method intended to be used is vitiated from a logical point of view, given that, in a mathematical formula, it is impossible to have one of the terms equal to or above its own value, to which two other values are added, which, in almost all cases, are above zero. In other words, the sum of several values is, automatically and invariably, greater than one of its terms. The formula proposed by the impugned text of law cannot be valid even in the hypothetical, unlikely, case in which the other two terms of the sum, respectively the number of validly cast votes and the number of null votes, are zero, possible in case of a zero voter turnout at a polling station. Mathematically speaking, the terms in the formula are not correctly determined, given that there is a dissonance between the number to be determined and the elements of the formula. Therefore, the envisaged formula is inapplicable, as the legal text including it does not take into account the requirements related to the quality of the law, which result from the provisions of Article 1 (5) of the Constitution and from the case-law of the European Court of Human Rights. In order to have logical consistency, the formula should have incorporated the idea that the number of ballot papers received should be greater or at least equal to the sum of the number of votes validly cast, the number of votes null and the number of unused ballot papers.

The Court also found as unconstitutional the provisions of Article I (50) of the law subject to review, with reference to Article 50 (14) (a) of Law No 370/2004 for the election of the President of Romania, and those of Article II (50) - with reference to Article 50 (5) (a) of Law No 33/2007 on the organisation and unfolding of the elections for the European Parliament, as the formula for calculating the total number of voters registered on the electoral lists, who voted, does not include the component concerning the voters registered on the extracts from the voters lists, who voted using the special urn. Their absence leads to an alteration of the result and, consequently, to the disregard of the fairness of the electoral process, therefore of the feature of the lawful State, enshrined in Article 1 (3) of the Constitution.

Another plea referred to the provisions of Article II (4) of the law subject to constitutional review, which introduce, in Article 5 of Law No 33/2007 a new paragraph, paragraph (11), according to which "*(...) no other types of elections or referendums at national or local level can be organised on the reference day*". In analysing these pleas, the Court took into account its case-law in this field, by which it found the violation of the provisions of Article 90 and of those of Article 95 (3) of the Constitution. Taking into consideration the matter of the consultative referendum, organised at the initiative of the President of Romania, and of the one organised to dismiss the President of Romania from office, the Court held that, from the analysis of the two above-mentioned

constitutional texts, it resulted that the referendum could be held at any time during the year, if the Parliament was consulted or, where appropriate, if it approved the proposal to suspend the President of Romania from office. Therefore, according to the Constitution, there is no other condition that prohibits the organisation and unfolding of a referendum simultaneously with the presidential, parliamentary, local elections or for the European Parliament or within a certain period of time before or after the aforementioned elections. As such, where the law does not distinguish, neither should its interpreter. Consequently, the conditions established by the legislator for conducting the referendum through the impugned law complement the provisions of the Constitution, which leads to their unconstitutionality. Moreover, the Court noted that the provisions to be introduced in Law No 3/2000 prevented the holding of any referendum, given that, in practice, it is possible that, in Romania, elections be held every year, which is contrary to Article 2 (1) of the Constitution.

Also, these legal provisions can generate constitutional deadlocks, the date of the elections becoming dependent on the date of the referendum. Going further with the reasoning in this regard, the Court found that, while, objectively, the referendum would be organised on specific dates, determined by certain events, i.e. the decree convening the referendum on matters of a national interest that the President deems necessary to hold, and the approval of the suspension of the President of Romania from office in case of serious violations of the provisions of the Constitution, it was obvious that the election date would have to be set so that the two events do not overlap, being inevitably influenced by the firmly established date for holding the referendum, calculated according to certain time frames, as shown above. Similarly, the course of the law proposals/draft laws for the revision of the Constitution implies a procedural sequence that ends with the organisation of a national referendum whose date will depend on the duration of the stages; this may coincide with the date already set for holding the elections for the European Parliament, considering that, according to Article 10 (2) of Law No 33/2007, the reference day is established within the period decided for this purpose by the Council of the European Union.

As regards the prohibition of the simultaneous organisation of the elections for the European Parliament and of other types of elections, the Court found that it was justified, especially since the date for their organisation was not influenced by external events, as shown to be the case, from a procedural perspective, for the referendums for the dismissal of the President from office and for the revision of the Constitution. This avoids confusion among the voters, who would find themselves in the situation of voting with a high number of ballot papers, and it also observes the right to be elected in the event that a candidate who was not elected in the local elections wishes to participate in the national elections for a parliamentary term of office, which is perfectly possible, but only if the elections take place on different dates.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the provisions of Article I (45) [with reference to Article 49 (1) of Law No 370/2004 for the election of the President of Romania] and of Article I (50) [with reference to Article 50 (14) (a) and (b) of Law No 370/2004], as well as those of Article II (4) [with reference to Article 5 (11) of Law No 33/2007 on the organisation and unfolding of the elections for the European Parliament] and of Article II (50) [with reference to Article 50 (5) (a) and (b) of Law No 33/2007] of the Law amending and supplementing certain regulatory acts in electoral matters were unconstitutional.

Furthermore, the Court dismissed as groundless the objection of unconstitutionality and found that the provisions of Article I (11) [with reference to Article 15 (2) of Law No 370/2004 for the election of the President of Romania] and of Article I (12) [with reference to Article 16 (3) of Law No 370/2004], as well as those of Article II (21) [with reference to Article 23 (2) (a) and (b) of Law No 33/2007] and of Article II (22) [with reference to Article 24 (3) of Law No 33/2007] of the Law amending and supplementing certain regulatory acts in electoral matters were constitutional in relation to the pleas filed.

Decision No 146 of 13 March 2019 on the objection of unconstitutionality of the provisions of Article I (11) [with reference to Article 15 (2) of Law No 370/2004 for the election of the President of Romania], of Article I (12) [with reference to Article 16 (3) of Law No 370/2004], of Article I (45) [with reference to Article 49 (1) of Law No 370/2004], of Article I (50) [with reference to Article 50 (14) (a) and (b) of Law No 370/2004], of Article II (4) [with reference to Article 5 (11) of Law No 33/2007 on the organisation and unfolding of the elections for the European Parliament], of Article II (21) [with reference to Article 23 (2) (a) and (b) of Law No 33/2007], of Article II (22) [with reference to Article 24 (3) of Law No 33/2007] and of Article II (50) [with reference to Article 50 (5) (a) and (b) of Law No 33/2007] of the Law amending and supplementing certain regulatory acts in electoral matters, published in the Official Gazette of Romania, Part I, No 240 of 28 March 2019

The impugned texts regarding the ordering that criminal charges be dropped, only once, when a tax evasion offence was committed, if the defendant, during criminal investigation or during trial, until the first court hearing, covers in full the damage caused by having committed the offence, increased by 20% of the calculation base, plus interest and penalties, and also the obligation of the court of law to order, only once, a criminal fine in the event that the defendant, during trial, until the end of the judicial investigation, pays, under the conditions provided for by the legal standard subject to analysis, the damage caused by having committed tax evasion, plus the same increases, represent violations of the principle of legality of criminalisation and sentence, and, at the same time, of the standards related to the quality of the law.

At the same time, the establishment, by the provisions of the impugned law, of a special maximum limit of the sentences for which criminal charges can be dropped higher than the one regulated in Article 318 (1) of the Criminal Procedure Code, as well as for the suspension of the enforcement of the sentence under supervision, in relation to the provisions of Article 91 (1) (a) of the Criminal Code, is likely to violate the principle of legality of criminalisation, as stipulated in Article 23 (12) of the Constitution.

Keywords: *tax evasion, clarity of the law, quality of the law, foreseeability of the law, equal rights, principle of legality of criminalisation and sentence*

Summary

I. As grounds for the objection of unconstitutionality, it is claimed that the impugned law discards the deterrent effect of the criminal sentences and, in this way, undermines the general prevention role of the criminalisation rules provided for in

Articles 8 and 9 of Law No 241/2005, as tax evasion offences pose a very high social risk, because they concern the social relations in the financial and fiscal field and are intended to protect the general consolidated budget, being regulated so as to provide the resources necessary for the State to fulfil its functions. To this effect, it is shown that the impugned law encourages the commission of tax evasion offences, since it states that the perpetrator, if (s)he is a first time offender, regardless of the amount of the damage caused, will not be sanctioned, under point (1) of the Sole Article of the law regarding Article 10 (1) of Law No 241/2005, or will receive only a criminal fine, under point (2) of the Sole Article of the law regarding Article 10 (1^1) of Law No 241/2005, or will benefit from the suspension of the enforcement of the sentence under supervision, under point (2) of the Sole Article of the law regarding Article 10 (1^2) of Law No 241/2005. It is claimed that the impugned law is contrary to the constitutional provisions of Article 1 (3) and (5) regarding the Romanian State and the quality of the law, Article 11 (1) and (2) regarding international law and domestic law, Article 16 regarding equality of rights and Article 124 regarding the administration of justice. At the same time, the authors of the referral invoke the principle of legality of criminalisation and sentence, provided for in Article 23 (12) of the Constitution.

II. By examining the objection of unconstitutionality, regarding the provisions of Article 1 (5) and Article 23 (12) of the Constitution, the Court noted that point (1) of the Sole Article of the law provided for the ordering that criminal charges be dropped, only once, in the event of a tax evasion offence having been committed, if the defendant, during criminal investigation or during trial, until the first court hearing, covered in full the damage caused by having committed the offence, increased by 20% of the calculation base, plus interest and penalties. However, according to Article 327 (b) of the Criminal Procedure Code, only the prosecutor - not the court of law - can drop the criminal charges, by order, which is why this solution can only be delivered until completion of the criminal investigation. Therefore, the legislator failed to provide also for the solution that can be delivered by the court of law, in the event that the defendant covers the damage during trial, until the first court hearing. Moreover, the wording in force of the provisions of Article 10 (1) of Law No 241/2005 provides for the solution to halve the limits of the sentence regulated by law for the deed committed, applicable, both during criminal investigation and during trial, until the first court hearing, provided that the defendant, who committed a tax evasion offence, regulated in Articles 8 and 9 of Law No 241/2005, fully covered the claims of the civil party during one of the aforementioned procedural stages. Furthermore, the legislative proposal underlying the law subject to analysis, in the wording proposed by its initiators, regulated, in the Sole Article, regarding Article 10 (1) of Law No 241/2005, only the hypothesis of the full coverage, by the defendant, of the civil party's claims, during criminal investigation, for which it provided the solution of the case closed. At the same time, in the wording adopted by the Senate, the impugned law only regulated, in point (1) of the Sole Article, regarding Article 10 (1) of Law No 241/2005, the scenario of the coverage, by the defendant, of the damage caused by tax evasion (increased by 50%, together with interest and penalties) during the criminal investigation stage, in which case the criminal charges were dropped. In view of these considerations, the Court deemed that point (1) of the Sole Article of the law [with reference to art. 10 paragraph (1) of Law No 241/2005] was lacking clarity, accuracy and predictability, being practically inapplicable in the event of the payment, during trial, until the first court hearing, of the amounts calculated according to the algorithm provided for by the rule subject to review,

by the defendant having committed one of the offences provided for in Articles 8 and 9 of Law No 241/2005.

As for the plea regarding the lack of correlation between the provisions of point (1) of the Sole Article of the law and the provisions of Article 318 of the Criminal Procedure Code, concerning the maximum limit of the prison sentence for which the prosecutor could drop the criminal charges, the Court held that the institution of dropping the criminal charges had been regulated by the legislator based on the low danger posed by the offences falling under its scope, being applicable, according to Article 318 (1) of the Criminal Procedure Code, only to those offences for which the law stipulated a fine or a prison sentence of no more than 7 years. Under these circumstances, the provisions of Article 10 (1) of Law No 241/2005, as amended by point (1) of the Sole Article of the law subject to analysis, regulate the ordering that criminal charges be dropped, in the case of a criminal offence regulated by Articles 8 or 9 of Law No 241/2005, if the defendant covers the damage caused by committing the offence, increased by 20% of the calculation base, plus interest and penalties. However, the special limits of the prison sentences established for the criminal offences regulated by Article 8 (1) and (2) of Law No 241/2005 range from 3 to 10 years [in the case of the offence provided for by Article 8 (1) of Law No 241/2005] and, respectively, from 5 to 15 years [in the case of the offence provided for by Article 8 (2) of Law No 241/2005]. At the same time, the special limits of the prison sentence established for the criminal offence regulated by Article 9 of Law No 241/2005 range from 2 to 8 years but the maximum limit can be increased by 5 years, according to Article 9 (2) of Law No 241/2005, and the minimum one by 7 years, under Article 9 (3) of the same law. Consequently, the impugned law forces the prosecutor to drop the criminal charges in the case of offences for which the law stipulates a prison sentence exceeding 7 years, which is contrary to the logic of the regulation of the institution of dropping criminal charges. Thus, the Court held that the provisions of Article 10 (1) of Law No 241/2005, read in conjunction with those of Articles 8 and 9 of the same law, allowed the ordering of the above-mentioned solution, in case of prison sentences exceeding 7 years, unlike the provisions of Article 318 (1) of the Criminal Procedure Code, which regulated the 7-year limit as the maximum special limit of the sentences for offences regarding which criminal charges could be dropped. Therefore, the setting, by the provisions of point (1) of the Sole Article of the impugned law, of a special maximum limit of the sentences for which charges can be dropped greater than the one regulated by Article 318 (1) of the Criminal Procedure Code is likely to violate the principle of legality of incrimination, provided for in Article 23 (12) of the Constitution.

Similarly, regarding point (2) of the Sole Article of the law, the Court held that the provisions of Article 10 (1^2) of Law No 241/2005, read in conjunction with those of Articles 8 and 9 of Law No 241/2005, allowed for the suspension of the enforcement of the sentence under supervision in the case of sentences exceeding 3 years, while the provisions of Article 91 (1) (a) of the Criminal Code stipulated that the aforementioned solution could be ordered only if the sentence delivered, including in the case of concurrent offences, was a prison sentence of 3 years at most. However, even if Law No 241/2005 is a special law, it cannot provide for a different regime of application of the criminal law institutions regulated in the General Part of the Criminal Code, e.g. the institution of suspending the enforcement of a sentence under supervision, without infringing the principle of legality of incrimination and sentence, as provided for in Article 23 (12) of the Constitution.

At the same time, the Court found that the regulation, in Article 10 (1^1) of Law No 241/2005, of the compulsory ordering, by the court of law, only once, of a criminal

fine, in the event that a tax evasion offence provided by Articles 8 and 9 was committed, if, during trial, until the end of the judicial investigation, the defendant would fully cover the damage caused by this offence, increased by 20% of the calculation base, plus interest and penalties, was in full contradiction with the provisions of Articles 8 and 9 of Law No 241/2005, which provided for the tax evasion offences that they regulated only the prison sentence, which was not an alternative to the fine. However, from this perspective as well, the legal provisions examined are contrary to the principle of legality of criminalisation, as provided for in Article 23 (12) of the Constitution.

Also, point 2 of the Sole Article of the law refers, in the second sentence of the wording proposed for Article 10 (1^2) of Law No 241/2005, to the *transformation* of the suspension of the enforcement of the sentence under supervision into a prison sentence. But such an institution (that of the "*transformation*") does not exist in Romanian criminal law, which includes only the institutions of cancellation and rescission of the suspension of the enforcement of the sentence under supervision, regulated in Articles 96 and 97 of the Criminal Code. Therefore, the phrase used is non-legal, which goes against the rigours provided in Article 8 (4) of Law No 24/2000 regarding the rules of legislative technique for the preparation of regulatory acts.

Also, paragraph (1^3) of Article 10 of Law No 241/2005 provides that, if the size of the tax evasion provided for in Articles 8 and 9 justifies such a measure, the court may order that the amounts referred to in the previous paragraphs be covered within a period of 1 to 3 years, failure to pay them leading to the consequences set in the previous paragraph. The phrase "*the consequences set in the previous paragraph*" is a vague and equivocal reference, considering that Article 10 (1^2) of Law No 241/2005 provides only one consequence, i.e. the one regulated in the second sentence of the aforementioned rule, i.e. the "transformation" of the suspension of the enforcement of the sentence under supervision into a prison sentence. Moreover, although it indicates that the court may order that the amounts provided for in the previous paragraphs be covered within a period ranging from 1 to 3 years, the impugned text does not indicate the moment from which this period begins, i.e. from the date when the sentence is delivered - as provided for in Article 10 (1^2) of the impugned law - or from the date when the court ruling acquires the force of *res judicata*. Thus, the legal provision subject to analysis is lacking in clarity, accuracy and predictability, and can lead to the enforcement, by the judicial bodies, of different or even contradictory solutions, in identical legal situations.

At the same time, the use, by the legislator, of the phrase "*only once*", in the wording of Article 10 (1) to (1^2) of Law No 241/2005, does not allow the recipients of the law to determine what was the purpose pursued by the legislator, respectively that the act of leniency provided for by the provisions of Article 10 (1) to (1^2) of Law No 241/2005 applied only once to a person having committed the criminal offences provided for in Articles 8 or 9 of the same law, so that the defendant could no longer invoke the benefits regulated in Article 10 (1) to (1^2) of Law No 241/2005 for any other criminal offence of this kind committed subsequently or, on the contrary, if the provisions of Article 10 (1) to (1^2) of Law No 241/2005 apply to such a person four times, respectively once during criminal investigation, once during trial, until the first court hearing, once during trial until the end of the judicial investigation and once during the enforcement of the sentence, for a tax evasion offence committed, each of them at different procedural stages. Therefore, this lack of clarity is also likely to generate an unpredictable implementation of the law, which could result in different solutions being delivered by the judicial bodies, regarding persons in similar legal situations.

With regard to the constitutionality standards, the impugned law violates both the requirements related to the quality of the law, respectively the provisions of Article

1 (5) of the Constitution, as well as the principle of legality of criminalisation and sentence, provided for in Article 23 (12) of the Basic Law.

As regards the pleas of unconstitutionality in relation to the provisions of Article 124 (3) of the Constitution, regarding the obligation of the prosecutor, provided for in point (1) of the Sole Article of the law, to order the dropping of the criminal charges, if the defendant, during criminal investigation, covers in full the damage caused by having committed the offence, increased by 20% of the calculation base, plus interest and penalties, and also the obligation of the court of law, referred to in Article 10 (1^1) of Law No 241/2005, in point (2) of the Sole Article of the impugned law, to order a criminal fine in the event that the defendant pays, under the conditions provided for by the legal standard subject to analysis, the damage caused by having committed tax evasion, plus the same increases, the Court held that these aspects were genuine violations of the principle of legality of criminalisation and sentence, provided for in Article 23 (12) of the Constitution and, at the same time, of the standards related to the quality of the law, provided for in Article 1 (5) of the Constitution.

With regard to the other pleas raised, the Court held that they were not contrary to the constitutional provisions invoked by the authors of the referral.

III. For all these reasons, by a majority vote, the Court upheld the objection of unconstitutionality and found that the provisions of the Sole Article of the Law amending and supplementing Article 10 of Law No 241/2005 on preventing and fighting tax evasion were unconstitutional.

Decision No 147 of 13 March 2019 on the objection of unconstitutionality of the provisions of the Sole Article of the Law amending and supplementing Article 10 of Law No 241/2005 on preventing and fighting tax evasion, published in the Official Gazette of Romania, Part I, No 338 of 3 May 2019

The legislative solutions contained in the emergency ordinance concerning environmental protection and the regime of aliens are not based on the existence of an exceptional situation whose regulation cannot be postponed. The flaw of unconstitutionality of an emergency ordinance issued by the Government cannot be covered by the approval of the respective ordinance by Parliament. As a consequence, the law approving an unconstitutional emergency ordinance is itself unconstitutional.

Keywords: *extraordinary situation, grounds for the urgency to legislate, protection of the environment, aliens' regime, principle of legal certainty*

Summary

I. As grounds for the objection of unconstitutionality, its authors lodged pleas of both extrinsic and intrinsic unconstitutionality.

Regarding the pleas of extrinsic unconstitutionality, their authors claim that Government Emergency Ordinance No 75/2018 violates Article 115 (4) of the Constitution, because they consider that "none of the legislative solutions in GEO No 75/2018 relies on the existence of an exceptional situation whose regulation cannot be postponed". Regarding the pleas of intrinsic unconstitutionality, the authors of the

referral claim a violation of Article 1 (3) and (5), as well as of Article 15 (2) of the Constitution, because "by amending Article 16 (3), Article 18, Article 20, Article 21 (2) and Article 28 (10) and (11) of Government Emergency Ordinance Emergency No 57/2007 the notion of guardians of a protected natural area is discarded, as well as the non-governmental organisations from among the entities that can administer protected natural areas", which results in the violation of the principles of legal certainty and non-retroactivity of the law.

II. By examining the objection of unconstitutionality, the Court analysed to what extent the Government, by adopting Government Emergency Ordinance No 75/2018, had complied with the constitutional requirements of proving the existence of an extraordinary situation, whose regulation could not be delayed, and of motivating this urgency within the ordinance.

After analysing the title and content of Government Emergency Ordinance No 75/2018, the Court held that, by adopting this regulatory act, the Government has amended and supplemented regulatory acts concerning, on the one hand, the field of environmental protection and, on the other hand, the regime of aliens. Thus, in the preamble to the emergency ordinance, the Government was supposed to identify the extraordinary situations whose regulation could not be postponed and to motivate the urgency of the legislation in all the fields amended.

Next, the Court examined the fulfilment of the constitutional requirements enshrined in Article 115 (4) by reference to the two fields subject to amendment by Government Emergency Ordinance No 75/2018.

The Court found that, when justifying the extraordinary situation whose regulation was required through the adoption of an emergency ordinance in the field of environmental protection, in the preamble of the impugned regulatory act, the Government focused on the existence of "an inadequate legislation, which needs improvement and updating". In other words, the question arises as to the need to issue an emergency ordinance that will create "the common framework for making decisions at inter-institutional level between the representatives of the ministries and those of the National Agency for Protected Natural Areas [...] taking into account the fact that the maintenance and amplification of the bureaucratic phenomenon requires the identification of a series of solutions to streamline the activity of the National Agency for Protected Natural Areas by simplifying the decision-making circuit and by prompting the activity of permit issuance". However, such a reason, regardless of how it is expressed, cannot represent an extraordinary situation requiring the adoption of an emergency ordinance. The decision-making process at inter-institutional level, no matter if it is flexible or affected by the bureaucratic phenomenon, is carried out according to the legislation in force and the identification of streamlining solutions cannot be qualified as a regulation whose adoption is urgently required, given that they are not based on the existence of an extraordinary situation. The fact that "most of the deadlines for carrying out the infrastructure projects are blocked due to the unjustified delay or extension of the issuance of the permit by the current guardians, including due to the non-issuance of the permit in the process of obtaining the regulation act, of communicating and cooperating with the current guardians, to the lack of mandatory notification of information regarding the situation in the field" may represent a finding made by evaluating the way in which the legal provisions in force are interpreted and applied by the actors responsible for guarding the protected natural areas. Such information/evaluations may be the reason for which the Government promoted a draft law amending the current regulatory framework in the field of environmental protection,

but by no means an extraordinary situation within the meaning of Article 115 (4) of the Constitution.

Further, the Court noted that, concerned with finding justifications for the adoption of the impugned regulatory act, in the preamble, the Government listed a number of arguments which only demonstrate the need for regulation and which are partially contradictory and inconsistent. Thus, initially, the Government talks about "the non-unitary implementation of environmental legislation regarding the issuance of regulatory acts, some regulatory acts transposing European provisions, issued under the old regulations, being likely to be deemed obsolete, situation that can generate negative effects on the commitments undertaken by Romania towards the European Commission", describing the legislative framework as "very complex, constantly developing"; then, it ascertains that "Government Emergency Ordinance No 195/2005 on environmental protection, approved as subsequently amended and supplemented by Law No 265/2006, as subsequently amended and supplemented, creates the unitary and general framework establishing the principles governing the entire environmental protection activity", and, finally, it identifies "the blockages generated by an inadequate legislation, which needs improvement and updating".

The Court considered that, although the field of environmental protection is a field of public interest, the elements invoked as extraordinary situations, requesting urgent resolution, did not represent objective, quantifiable situations, independent of the Government's will, which would endanger a public interest, and, therefore, did not meet the requirements provided by Article 115 (4) of the Constitution. However, given that the case-law of the Constitutional Court has stated, regarding the concept of extraordinary situation and the concept of urgency, that they did not overlap with the justification of the usefulness of the regulation, of the expediency to adopt the regulatory act or with the purpose/reason for legislating, it is obvious that the extraordinary situation cannot be determined by the existence of a non-unitary, complex, unpredictable legislative framework, and the urgency of the measure cannot be justified by the need to improve this framework or to harmonize Romanian legislation with the European one.

Moreover, as concerns the argument presented by the Government in the explanatory memorandum to the Law amending and supplementing Government Emergency Ordinance No 75/2018 amending and supplementing certain regulatory acts in the field of environmental protection and aliens' regime (N.B. not in the preamble of the emergency ordinance, therefore not within the regulatory act), according to which, "after analysing the situation regarding the implementation of the provisions of Law No 278/2013, it was found that the existence of an insufficient institutional capacity could lead to failure to comply within the deadlines set for achieving the specific objectives, for non-attributable reasons, which could generate situations in which the European Commission triggers the infringement procedure", the Court, by Decision No 15 of 25 January 2000, published in the Official Gazette of Romania, Part I, No 267 of 14 June 2000, ruled that the urgency of the measure could not be justified by the need to harmonize Romanian legislation with that of the European Union, so that "the amendment or unification of the legislation in one field or another does not justify, in itself, the issuance of an emergency ordinance", situation applicable *mutatis mutandis* to this case as well. The Court also noted that the setting in motion of the infringement procedure before the Court of Justice of the European Union in the present case was not imminent within the meaning established by the case-law of the Constitutional Court.

In justifying the extraordinary situation whose regulation is required by the adoption of an emergency ordinance in the field of the aliens' regime, in the preamble of the impugned regulatory act, the Government only indicates that, "considering that

we are in full summer season, when the main activities in the field of tourism and constructions, important fields of the Romanian economy, are at their height, it is necessary that this legislative proposal be adopted as a matter of urgency in order to support the economic operators active in these fields". Or, it is obvious that, in this case, the Government did not even make the effort to identify the elements that made it necessary to legislate, let alone to prove the existence of an extraordinary situation whose regulation cannot be postponed. In this respect, the Government did not comply with the provisions of Article 6 (1) of Law No 24/2000 either, according to which "The solutions that it contains [the regulatory act - A/N] must be well founded, taking into account the social interest, the legislative policy of the Romanian State and the requirements of correlation with all the the internal regulations and of harmonization of the national legislation with the community legislation and with the international treaties to which Romania is a party, as well as with the case-law of the European Court of Human Rights".

With regard to the urgency to legislate in this way, the only temporary mention in the preamble of the emergency ordinance, i.e. that "we are in full summer season", can under no circumstance be a reason to justify the urgent nature of the regulation and it also demonstrates superficiality and the disregard of the constitutional standard and case-law of the constitutional court regarding the obligations incumbent upon the delegated legislator.

Considering all the arguments above, the Court found that the provisions of Government Emergency Ordinance No 75/2018 amending and supplementing certain regulatory acts in the field of environmental protection and aliens' regime violated the provisions of Article 115 (4) of the Constitution. The Constitutional Court has constantly stated in its case-law that the flaw of unconstitutionality of a simple ordinance or of an emergency ordinance issued by the Government could not be covered by the approval of the respective ordinance by Parliament. The law approving an unconstitutional emergency ordinance is itself unconstitutional.

Finally, the Court could not overlook the faulty way in which the Government understood to regulate, through the same regulatory act, two distinct fields, without any connection between them. Thus, in this case, the two fields are not related, they pursue different purposes, so that their regulation through a single regulatory act was not only unnecessary, but it also impinges on the uniqueness of the regulation in this matter, as a requirement of the legislative technique. Thus, the Court found that the regulation adopted in violation of the norms of legislative technique led to a series of situations of incoherence and instability, contrary to the principle of legal certainty.

Regarding the validity of the grounds of extrinsic unconstitutionality, retained by reference to the provisions of Article 115 (4) of the Constitution, which affects both the Law amending and supplementing Government Emergency Ordinance No 75/2018 and Government Emergency Ordinance No 75/2018 amending and supplementing certain regulatory acts in the field of environmental protection and aliens' regime, in their entirety, the Court found that it was no longer necessary to examine the pleas of intrinsic unconstitutionality filed by the authors of the objection of unconstitutionality.

III. For all these reasons, by a majority vote, the Court upheld the objection of unconstitutionality and found that the Law amending and supplementing Government Emergency Ordinance No 75/2018 amending and supplementing certain regulatory acts in the field of environmental protection and aliens' regime, as well as Government Emergency Ordinance No 75/2018 were unconstitutional as a whole.

Decision No 214 of 9 April 2019 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Government Emergency Ordinance No 75/2018 amending and supplementing certain regulatory acts in the field of environmental protection and aliens' regime, as well as of Government Emergency Ordinance No 75/2018 as a whole, published in the Official Gazette of Romania, Part I, No 435 of 3 June 2019

Parliament cannot legislate the modification of the budgetary expenses without asking the Government for information in this regard. Given the imperative nature of the obligation to request the mentioned information, it follows that its non-observance leads to the unconstitutionality of the adopted law.

Keywords: *sources of funding, Parliament information, members of the Government, specialized bodies of the central public administration*

Summary

I. As grounds for the objection of unconstitutionality, its authors have argued that the adoption of a legislative initiative with a budgetary impact, in the absence of a Government point of view and without establishing the funding source, could lead to the impossibility of applying the regulatory act due to lack of budgetary funds. The drafting of the financial statement is mandatory, as confirmed by the Constitutional Court, which held that "The mere participation, in the works of the parliamentary committees having introduced the amendments become legal texts, of some representatives of the Ministry of Public Finances is not likely to meet the above-mentioned constitutional requirements" (Decision No 764 of 14 December 2016).

Another plea of extrinsic unconstitutionality refers to the provisions of Article 117 (2) of the Constitution, according to which "*The Government and its Ministries may, on the authorisation by the Court of Audit, set up specialised bodies in their subordination, but only if the law acknowledges the competence thereof*". Regarding the authorisation of the Court of Audit, the constitutional court ruled that it represented a condition of legality, of constitutional level, for the acts of the Government (ministries) adopted pursuant to Article 117 (2) of the Constitution (Decision No 1414 of 4 November 2009, published in the Official Gazette of Romania, Part I, No 796 of 23 November 2009).

Also, the authors of the objection showed that the law subject to constitutional review contained a series of short, incomplete regulations, likely to affect the efficiency of the regulatory act. Moreover, the impugned law contains a series of legislative parallels, which is prohibited by Article 16 (1) of Law No 24/2000 on the rules of legislative technique for drawing up regulatory acts.

II. By examining the objection of unconstitutionality, the Court held that, according to the provisions of Article 1 of Government Emergency Ordinance No 74/2013, the National Agency for Fiscal Administration (A.N.A.F.) was reorganised as a result of a merger through absorption, by taking over the activity of the National Customs Authority and of the Financial Guard, public institution that was abolished. Also, Article 10 of the same regulatory act regulated the setting up, under the

subordination of the A.N.A.F., of 8 regional general directorates of public finances, public institutions with legal personality.

The Court considered that it could not hold the plea of unconstitutionality related to the provisions of Article 117 (2) of the Constitution, because the specialised bodies subordinated to the Government or the ministries can be set up both by a primary regulatory act (law, Government simple or emergency ordinance), pursuant to Article 116 (2), read in conjunction with Article 117 (2) of the Constitution, as well as by secondary legislation (Government decision, minister order), pursuant to Article 117 (2) of the Constitution. In the latter case, the act depends on the existence of a piece of primary legislation, expressly establishing the powers of the Government or the ministries to set up such bodies.

The Court ruled that Parliament could not legislate the modification of the budgetary expenses without asking the Government for information in this regard. Given the imperative nature of the obligation to request the mentioned information, it follows that its non-observance entails the unconstitutionality of the adopted law. Moreover, the provisions of Article 111 of the Constitution are taken up and detailed in the Standing Orders of the Senate and in those of the Chamber of Deputies.

The Court found that the Government information had been requested by the Senate, through the Chamber's secretary general, in violation of the constitutional provisions in the first sentence of Article 111, expressly establishing that the information and documents are requested by the Senate, through the president of the Chamber. The condition imposed by the constitutional norm represents a requirement of validity of the act by which the information is requested, so that its non-observance affects the very existence of the act.

Regarding the amendments made during the legislative procedure, the recitals of Decision No 764 of 14 December 2016, published in the Official Gazette of Romania, Part I, No 104 of 7 February 2017, apply; in them, the Court ruled that "the actual introduction of certain provisions regarding the salary of budgetary personnel, directly during the final debate of the draft law, after the adoption of the draft law in the first Chamber notified, after completing the endorsement procedure, without a Government information of Parliament thereof, circumvents the constitutional framework established for drafting the public budget; this is why the Government invoked in its referral the constitutional provisions of Article 111, regarding the information of the Parliament, and of Article 138 (5), according to which no budgetary expenditure would be approved without establishing the source of financing".

The obligation to indicate the source of financing for the approval of the budgetary expenditure, provided for by Article 138 (5) of the Constitution, represents an aspect different from the lack of funds to support financing from the budgetary point of view. Thus, the first aspect is related to constitutional imperatives, while the second one does not have a constitutional nature, being a matter of political opportunity, which concerns the relations between Parliament and Government. Therefore, the constitutional norm does not refer to the concrete existence of sufficient financial resources at the time of adoption of the law, but to the fact that the respective expenditure must be included in the State budget in all consciousness in order to be covered with certainty during the budget year.

As the financial statement (initial and updated) is missing, one can only draw the conclusion that, an uncertain, general and not objective source of financing was considered when adopting the law, not a real one. The loyal cooperation between Parliament and Government regarding law-making in budgetary matters must arise both in the drafting of the national public budget and in its modification during the fiscal year,

considering the reason for which such a budget is drawn up, i.e. to provide the possibility of an overview, at macroeconomic level, of public revenues and expenditures.

As the reasons of extrinsic unconstitutionality were found to be well-founded, by reference to the second sentence of Article 111 (1) and to Article 138 (5) of the Constitution, which affect the impugned law as a whole, the Court did not examine the pleas of intrinsic unconstitutionality formulated by the authors of the objection as well.

III. For all these reasons, by a majority vote, the Court upheld the objection of unconstitutionality and found that the Law amending Government Emergency Ordinance No 74/2013 on certain measures to improve and reorganise the activity of the National Agency for Fiscal Administration, as well as amending and supplementing certain regulatory acts was unconstitutional as a whole.

Decision No 331 of 21 May 2019 on the objection of unconstitutionality of the provisions of the Law amending Government Emergency Ordinance No 74/2013 on certain measures to improve and reorganise the activity of the National Agency for Fiscal Administration, as well as amending and supplementing certain regulatory acts, published in the Official Gazette of Romania, Part I, No 493 of 18 June 2019

The introduction of the law as a way of transferring assets from the public domain of the State into the public domain of the administrative-territorial units violates Article 1 (4) and Article 61 (1) of the Constitution. Parliament cannot exercise its prerogatives of legislative authority in a discretionary manner, by adopting laws in areas that must be regulated only by acts of an infra-legal, administrative nature.

Keywords: *principle of separation and balance of State powers, public property, Parliament, local public administration, quality of the law, right of the person injured by a public authority, effects of the decisions ascertaining unconstitutionality*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania has shown that the asset subject to transfer through the impugned law was classified, by organic law, as the exclusive object of public property. By Decision No 406 of 15 June 2016, the Constitutional Court held that the regulatory acts transferring assets from the public domain of the State into the public domain of the administrative-territorial units were either the organic laws amending the organic law by which the respective assets had have been declared the exclusive object of the State's public property, or Government decisions, when the assets were not the exclusive object of the State's public property. The amendment of Article 9 (1) of Law No 213/1998 and the regulation, through law, of the transfer of a good from the State's public domain into the public domain of an administrative-territorial unit, opens the possibility of adopting individual laws for assets that are in the State's public property, but which are not the exclusive object of public property. This contradicts the role of Parliament and its law-making function, as well as the principle of separation of State powers.

A law adopted under the above conditions is contrary to the constitutional principle of equal rights. There is also a violation of Article 16 (2) of the Constitution,

insofar as a certain legal subject is removed from the scope of a legal regulation that is the general law in the matter, by the effect of a legal provision adopted exclusively by considering it and applicable only to it.

Also, the regulation of the possibility, for Parliament, to adopt individual laws with regard to assets in the public domain of the State, but which are not the exclusive object of public property, represents a non-observance of the constitutional prerogatives of this authority. Furthermore, Article 52 of the Constitution is also violated, because the person injured by a public authority through an administrative act can no longer address a court.

II. By examining the objection of unconstitutionality, the Court relied on the considerations of Decision No 406 of 15 June 2016, which it considered applicable in this case, and reiterated its unitary case-law according to which the law, as a legal act of Parliament, regulates general social relations and is generally applicable. When the scope of the regulation is determined in a concrete manner, it is individual in nature, being intended not to be applied to an indefinite number of concrete cases, covered by the hypothesis of the standard, but to a single case, unequivocally predetermined. In such a case, Parliament violates the principle of separation and balance of State powers, enshrined in Article 1 (4) of the Constitution, a flaw that affects the law as a whole.

The Court also held that Parliament could not exercise its prerogatives of legislative authority in a discretionary manner, at any time and under any circumstances, by adopting laws in areas that must be regulated only by acts of an infra-legal, administrative nature. Otherwise, Article 61 (1) of the Constitution would be violated, and Parliament would become an executive public authority.

The Court stated that, by amending Article 9 (1) of Law No 213/1998, in the sense of introducing the law as a way of transferring assets from the public domain of the State into the public domain of the administrative-territorial units, Article 1 (4) and Article 61 (1) of the Constitution were violated. By using the term "law" in an undifferentiated manner, while, according to the Court's case-law, only the assets that are the exclusive object of public property can be transferred from one domain to another by organic law, the impugned text of law unacceptably extends the possibility to carry out, by law, the transfer of certain assets, in a field in which only Government decisions should be issued.

The Court found that Article I of the impugned law also violated Article 1 (5) of the Constitution, in terms of the conditions of clarity, accuracy and predictability, because it introduced the possibility of transferring assets through law, without referring to the type of law by which the transfer is made. Also, the transfer is made by law or by Government decision. Two alternative transfer methods are practically established, both by acts of the legislative power and by acts of the executive power, without any distinction as to their scope.

The provisions of Law No 132/1998 rely on the provisions of the final sentence of Article 102 (1) and of Article 120 (1) of the Constitution. In order to give effectiveness to the constitutional provisions, the legislator regulated a distinct legal regime for the assets that are the object of the State's public property and for those of the administrative-territorial units.

By Decision No 1 of 10 January 2014, the Court ruled that the mechanism for transferring the right of property over certain assets from the State's private domain to the private domain of administrative-territorial units, through the effect of the law and without the existence of these units' consent, represented a violation of the constitutional principle of local autonomy, regulated by Article 120 (1) of the Constitution, concerning

both the organisation and functioning of the local public administration and the management of the interests of the communities that the public authorities represent.

These considerations of principle are applicable in this case as well. Even in the case of a transfer of assets from the public domain of the State into the public domain of the administrative-territorial units, those units must file a reasoned request to this effect, i.e. to give their consent.

Moreover, the amendment of Article 9 (1) of Law No 213/1998, in the sense of introducing the possibility of a transfer by law, which cannot be subject to the review of the administrative courts, but only to the review of the Constitutional Court, leads to the inapplicability of Article 52 of the Basic Law in this field.

The Court held that, under Article II (1) of the law subject to review, together with the transfer of the asset from the public domain of the State to the public domain of the Bacău County, the right of administration was also transferred to the Bacău County Council. Therefore, the State cannot also simultaneously establish the right of administration in favour of the authorities of the local public administration, given that it is no longer the holder of the right of public property, which it has just transferred. Thus, Article II (1) of the law violates Article 136 (4) of the Constitution.

The Court also found a violation of Article 147 (4) of the Constitution, because the decisions of the Constitutional Court regarding the prohibition of specific cases being regulated through laws were not observed.

The provisions of Article 16 (1) and (2) of the Basic Law are not applicable to this case.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law amending Article 9 (1) of Law No 213/1998 on publicly owned assets and for the transfer of an immovable asset from the State's public domain and from the administration of the Prefect's Office - Bacău County to the public domain of the Bacău County was unconstitutional.

Decision No 384 of 29 May 2019 on the objection of unconstitutionality of the Law amending Article 9 (1) of Law No 213/1998 on publicly owned assets and for the transfer of an immovable asset from the State's public domain and from the administration of the Prefect's Office - Bacău County to the public domain of the Bacău County, published in the Official Gazette of Romania, Part I, No 499 of 18 June 2019

II. Decisions issued within the *a posteriori* constitutional review

1. Settlement of exceptions to the unconstitutionality of laws and ordinances [Article 146 (d) of the Constitution]

In order to comply, in particular, with the provisions of Article 118 (2) of the Constitution, concerning the armed forces, the Court stressed that the essential aspects relating to the assessment of the work and conduct of the military staff as part of the essential aspects of the service report and their status must be governed by organic law and the rules specific to the evaluation procedure should be explained and detailed by order of the minister responsible.

Keywords: *public authority, public institution, military staff conduct, prior disciplinary procedure, employment relationship, acts issued in the implementation of a regulatory act, modification of the employment relationship, suspension of the employment relationship, termination of the employment relationship*

Summary

I. As grounds for the exception of unconstitutionality, it was is pointed out, in essence, that the provisions of Article 34 and Article 35 (3) of Law No 80/1995 on the status of military staff were unconstitutional, since they provided that preliminary investigations into disciplinary matters, the application of disciplinary sanctions, the constitution, the organisation and functioning of councils of honour and trial councils were established by an administrative rule, with legal powers lower than organic law, that is to say, by means of a ministerial order or by military regulations. At the same time, it was argued that, in the respective case, the disciplinary investigation, the establishment, organisation and functioning of the trial council and the application of the disciplinary sanction were carried out on the basis of an order (Order No 400/2004 of the Minister of Administration and the Interior on the disciplinary regime for staff in the Ministry of Administration and Interior), issued in the application of the law, which has not been published in the Official Gazette of Romania. In those circumstances, the person under disciplinary investigation does not know the rules under which that procedure is to be conducted, given that the administrative act is not accessible and therefore not enforceable.

In support of the unconstitutionality of the legal provisions criticised, the author relies on Article 1 (4) and (5) on the separation and balance of powers and the obligation to respect the Constitution, its primacy and the law, Article 31 on the right to information, Article 73 (3) (j), which provides for the status of civil servants is regulated by organic law, and Article 78 relating to the entry into force of the law.

II. Having examined the exception of unconstitutionality, the Court, in the light of the relevant legislation, has held that matters concerning the staff of the Romanian Gendarmerie are regulated in Chapter IV of Law No 550/2004 on the organisation and functioning of the Romanian Gendarmerie, published in the Official Gazette of Romania, Part I, No 1.175 of 13 December 2004. According to Article 23 of that law, the Romanian Gendarmerie staff are military personnel and contract staff. The military staff of the Romanian Gendarmerie consists of: military staff, pupils enrolled at military educational establishments, soldiers and staff under contract with lower military ranks, persons carrying out full or reduced military service. The provisions of Law No 80/1995 on the status of military staff, as amended and supplemented, shall apply to the military staff in the Romanian Gendarmerie. Soldiers and staff under contract are subject to the Statute of soldiers and staff under contract approved by law (Law No 384/2006 on the statute of soldiers and staff under contract, published in the Official Gazette of Romania, Part I, No 868 of 24 October 2006). Pupils enrolled at military educational establishments are subject to the provisions of the National Education Law No 1/2011, published in the Official Gazette of Romania, Part I, No 18 of 10 January 2011, as amended, and of Law No 446/2006 on the preparation of the population for defence, published in the Official Gazette of Romania, Part I, No 990 of 12 December 2006, as amended. Contract staff are subject to the rules of the Labour Law in so far as Law No 550/2004 does not provide otherwise.

With regard to the provisions of Article 31 of the Constitution, the Court has noted that they enshrine the right of the person to have access to all information of public interest and the corresponding obligation on public authorities to ensure that citizens are properly informed about public affairs and matters of personal interest. Therefore, the right to information laid down in Article 31 of the Constitution relates only to information of public interest, in the sense of which, at the infra-constitutional level, Article 2 (b) of Law No 544/2001 on free access to information of public interest, published in the Official Gazette of Romania, Part I, No 663 of 23 October 2001, establishes that *"information of public interest shall be taken to mean information relating to the activities or resulting from the activities of a public authority or public institution, regardless of the medium or the modality or form of expression of the information"*. Pursuant to Article 2 (a) of Law No 544/2001, 'by public authority or institution, "*public authority* or *institution* shall mean any authority or public institution which uses or manages public financial resources, any autonomous authority, a company governed by Law on Companies No 31/1990, republished, as amended, under the authority or, as the case may be, in the coordination or subordination of a central or local public authority, and of which the Romanian State or, as the case may be, a territorial administrative unit is the sole or majority shareholder, as well as any operator or regional operator, as defined in the Law on public utility services No 1/2006, republished, as amended. Political parties, sports federations and non-governmental organisations of public utility, which receive public money, shall also be covered by this law;". In those circumstances, any person is granted free and unrestricted access to information of public interest which he is entitled to claim and obtain from the public authorities and institutions (see Decision No 158 of 30 March 2004, published in the Official Gazette of Romania, Part I, No 420 of 11 May 2004). The Court therefore found that Article 31 of the Constitution, relied on in support of the exception of unconstitutionality, has no bearing on the matter, since its constitutional meaning is not to make public the law, operation carried out by virtue of Article 78 of the Constitution, according to which "the law shall be published in the Official Gazette of Romania and shall enter into force 3

days after the date of publication or at a later date specified therein."

As regards the reliance upon the provisions of Article 78 of the Constitution, the Court noted that the alleged infringement of those provisions cannot be upheld, since the contested provisions are published in the Official Gazette of Romania, Part I, and that the condition relating to the quality of the law laid down in Article 1 (5) of the Constitution is fulfilled, and any failure to publish orders concerning the disciplinary status of staff in the Ministry of Internal Affairs, the Ministry of National Defence, as well as other institutions covered by the provisions on the status of military staff or other military regulations, in so far as they are legislative in nature, constitutes a matter of irregularity and not a matter of constitutionality.

With regard to the other aspects that were criticised and which determined the Court to uphold the exception of unconstitutionality in terms of some of the contested provisions, the Court found that, at a law level, as an act of the Parliament or of the Government by means of legislative delegation, it does not establish the minimum criteria for establishing rewards, penalties, actions which constitute disciplinary offences, and for which military staff are sent before trial councils, just as it does not establish how the disciplinary boards and trial councils are set up, and the procedure for challenging the decisions of the councils of honour and trial councils, leaving the possibility of regulation, by means of infra-legal acts, of essential aspects related to military staff's service report by military regulations and ministerial orders, in a context where both the rewards and sanctions affect the career of military staff (demotion in office; deferment of advancement to the next rank for 1 to 2 years, transfer to the reserve or, on the contrary, advancement to the next rank, reward consisting of engraved defence weapons, under the conditions laid down by law.)

With regard to the delegation of regulation of "*essential elements*" relating to the conclusion, the implementation, modification, suspension and termination of the service relationship to the competent minister, which is empowered to adopt orders, the Court also ruled, for example, by Decision No 392 of 2 July 2014, published in the Official Gazette of Romania, Part I, No 667 of 11 September 2014, and declared the unconstitutionality of provisions delegating to the competent minister the regulation of the prior disciplinary proceedings, the application of disciplinary sanctions or the work of the disciplinary board [referring to Article 59 (2), Article 60 (1) and Article 62 (3) of Law No 360/2002 on the status of the police officer, published in the Official Gazette of Romania, Part I, No 440 of 24 June 2002]. Similarly, by Decision No 637 of 13 October 2015, published in the Official Gazette of Romania, Part I, No 906 of 8 December 2015, the Court held that the assessment of the activity and conduct of officials with special status (a police officer) fell within their status and must therefore be regulated by organic law, not by order of the minister responsible [referring to the provisions of Article 26 (3) of Law No 360/2002, found to be unconstitutional]. The recitals and solutions of those decisions apply, *mutatis mutandis*, to the present case.

In the context of this exception of unconstitutionality against the provisions of Article 34 and of Article 35 (2) and (3) of Law No 80/1995, the Court has held that both the military personnel of the Romanian Gendarmerie and the military staff are subjects of a service relationship, and in the exercise of their duties according to the law and the provisions of the military regulations, officers, military masters and subofficers shall be vested with the exercise of official authority and enjoy protection under criminal law (Article 6 of Law No 80/1995). This service relationship arises, is conducted and terminated in accordance with special conditions. Consequently, the essential elements relating to the initiation, execution and termination of service relationships relate intrinsically to the status of military staff, which status must be regulated by organic law,

in accordance with Article 118 (2) of the Constitution, in line with Law No 550/2004 and Law No 80/1995. At the same time, the Court has held that the assessment of the activity and conduct of the military staff refers to the way in which the service relationship is carried out and, through the effects produced, may lead to the modification and even termination of the service, namely the deferral of the advancement to the next rank for 1 to 2 years (Article 33 of Law No 80/1995), or transfer to the reserve, as a penalty [Article 51 (e) of the Military Discipline Regulation], or advancement to the next rank [Article 32 (k) of the Military Discipline Regulation], reward consisting of engraved defence weapons, in accordance with the law [Article 29 (3) (g) of the Military Discipline Regulation]. As such, given that the provisions of Article 34 and Article 35 (3) of Law No 80/1995 on the Statute of the Military Staff delegate to the competent minister the regulation of matters relating to rewards, misconduct, disciplinary sanctions, organisation and functioning of honour councils, the setting up of honour councils, the organisation and functioning of the honour councils, the remedies against the decisions of the honour councils, the organisation and functioning of the trial councils, the setting up of trial councils, he remedies against the decisions of the trial councils, the review of the activities and conduct of military staff as part of the essential aspects of the service relationship and their status, and which are governed by infra-legal acts, respectively by regulations which are approved by orders of the Minister for National Defence, the Court has held that all of those elements must be regulated, in accordance with Article 118 (2) of the Constitution, by means of an organic law.

Therefore, the provisions of Article 34 and Article 35 (3) of Law No 80/1995 on the status of military staff are contrary to the provisions of Article 1 (4) of the Constitution and implicitly to those of Article 118 (2) of the Basic Law, according to which the status of military staff is to be established by organic law. In this context, the Court noted that Article 1 (5) of the Constitution states that "In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory". As an effect of the failure to comply with the afore-mentioned constitutional provisions, the constitutional provisions on respect for the Constitution and its primacy are also affected.

In particular, in order to comply with Article 118 (2) of the Constitution, the Court has stressed that the above-mentioned essential aspects relating to the assessment of the work and conduct of the military staff as part of the essential aspects related to the service relationship and their status, the preliminary disciplinary procedure, the application of disciplinary sanctions or the activity of the disciplinary board and honour and trial councils, including with regard to the regime of arms (granting of engraved defence weapons), must be regulated by organic law and detailed rules on the evaluation procedure must be laid down and detailed by order of the minister responsible.

Moreover, in accordance with Article 77 entitled *Acts issued in the application of a legislative acts* of Law No 24/2000 on legislative technical rules for the drawing up of legislative acts, republished in the Official Gazette of Romania, Part I, No 260 of 21 April 2010, orders with a normative nature are issued solely on the basis of and in accordance with the law, and must be strictly confined to the framework laid down by the acts on the basis of which they were issued and cannot contain solutions contrary to the provisions of that law. However, the legal provisions under review do not cover essential aspects relating to the career of military staff, but delegate the regulation of those important matters to the competent minister who is empowered to adopt orders or regulations, meaning that they do not fall within the constitutional requirements allowing the adoption of normative acts of infra-legal nature only based on the enforcement and the organisation of the law, and are, therefore, deficient in that respect.

It is therefore the case that some essential aspects relating to the enforcement and/or termination of service of military staff are regulated by an administrative act, containing elements that go beyond the limits of the legal framework, or even add to the law.

With regard to the exception of unconstitutionality against the provisions of Article 35 (2) of Law No 80/1995, the Court has held that those provisions constitute an application at the infra-constitutional level of the provisions of Article 118 of the Basic Law, providing the levels at which honour councils and the trial councils are established, i.e. honour are established in each establishment, and the trial councils at the central bodies of the Ministry of National Defence, the major staff of armed forces, the armed force headquarters, and other similar units established by order of the Minister for National Defence. Therefore, the exception of unconstitutionality of Article 35 (2) of Law No 80/1995 is to be rejected as unfounded.

III. For all these reasons, the Court, by unanimity, upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 34 and Article 35 (3) of Law No 80/1995 on the status of military staff.

It also dismissed, as unfounded, the exception of unconstitutionality of the provisions of Article 35 (2) of Law No 80/1995 on the status of military staff in relation to the complaints made.

Decision No 71 of 29 January 2019 concerning the exception of unconstitutionality relating to the provisions of Article 34 and of Article 35 (2) and (3) of Law No 80/1995 on the status of military staff, published in Official Gazette of Romania, Part I, No 352 of 7 May 2019

Although the State, through its authorities with legislative powers, has undertaken a reform in tax matters and criminal matters, it failed to establish a unified reference system for dealing with evidence in criminal matters in relation to tax law, as the way in which the new legislative framework has been shaped indicates that it regulates a criminal procedure which does not fall within the general system of gathering evidence. In criminal matters, the entire system of obtaining evidence is intended to establish the existence or non-existence of accusation in criminal matters, including the procedural safeguards intrinsic thereto, as the legislator has a constitutional obligation to regulate in a consistent and uniform manner the manner in which they are obtained in order not to adversely affect the legal certainty of the person concerned.

Keywords: *nature of the evidence, expert evidence, producing evidence, principle of a single rule on the matter, fiscal verification, tax inspection, National Agency for Fiscal Administration (ANAF)*

Summary

I. As grounds for the exception of unconstitutionality, it was stated, in essence, that the provisions of Article 233^1 of Government Ordinance No 92/2003 on the Code of Fiscal Procedure, also contained in Article 350 of Law No 207/2015 on the Code of Fiscal Procedure, recognise the right of tax inspection bodies to draw up evidence in criminal proceedings through the unregulated standard of proof of fiscal verification, a legislative reality which is such as to vitiate the defendant's right to a fair trial, and that also has reverberations in terms of the role of the public prosecutor in criminal proceedings. These criticisms are formulated not only by reason of the nature

and probative value of the "fiscal verification" or "tax inspection" ordered by the public prosecutor, but above all in the light of the capacity of the tax inspectors who produce such evidence in criminal proceedings.

By attributing to tax inspectors the functional competence to "inspect" and "verify" in criminal proceedings tax law issues, the result of which is to be used by the judicial bodies as evidence, tax inspectors are attributed tasks which go beyond those of a mere expert or specialist, tax inspectors having the power to carry out unspecified and discretionary investigative activities which have the status of genuine acts of criminal investigation.

To recognise the right of civil parties to carry out procedures aimed at the gathering of evidence and to produce evidence constitutes a violation of the principle of equality of arms, as a guarantee of the right to a fair trial and equality before the law of the participants to the criminal proceedings, as well as a disregard of the rights of defence of passive trial subjects (suspect, accused, civilly liable party).

From the point of view of the expert evidence, it is noted that even a findings report, as an evidentiary procedure, is limited in terms of the quasi-adversarial system that is specific to the expert's report, whereas the main subjects to the procedure do not have the right to comment on the objectives of such findings, to participate via an expert of the party or to provide clarification to the expert, namely a restriction of procedural rights, which is justified by the urgency sought by the prosecution body or by the danger of the disappearance of means of proof or the change of factual situations.

Moreover, in the current wording of the new Code of Criminal Procedure, the legislator has attributed to the acts concluded by the bodies entrusted with establishment of facts, as it is, for example, the National Agency for Fiscal Administration, only the status of acts instituting proceedings, the reports of those bodies not having the value of expert findings in the criminal proceedings, precisely in order to fully ensure the guarantees attached to the right to a fair trial.

II. Having examined the exception of unconstitutionality in terms of cooperation between the tax body and the criminal prosecution authorities, the Court has held that the legislator has, on the one hand, imposed an obligation on the tax body to refer the matter to the prosecuting authority if, in its activity, it discovers evidence of a criminal offence (Article 233 of Government Ordinance No 92/2003, and Article 249 of Law No 207/2015, respectively) and, on the other hand, symmetrically, has regulated the possibility that criminal prosecution authorities, at their initiative, obtain the assistance of tax body [(Article 233^1 of Government Ordinance No 92/2003, and Article 350 of Law No 207/2015).

Government Ordinance No 92/2003 provided that evidence shall be obtained by means of fiscal verifications. Thus, at the request of the prosecution bodies, where there is a danger of disappearance of means of evidence or a change of a factual situation and it is necessary to clarify certain facts or circumstances of the case, the designated staff of the National Agency for Fiscal Administration shall carry out fiscal verifications; in duly justified cases, after the opening of the criminal proceedings, with the public prosecutor's consent, the National Agency for Fiscal Administration may be asked to carry out fiscal verifications in accordance with the objectives set; the result of such verifications shall be recorded in minutes, which constitute evidence. Government Ordinance No 92/2003 was in force during the period covered by both the 1968 Code of Criminal Procedure and the new Code of Criminal Procedure. With the entry into force of the new Code of Criminal Procedure, the procedural rules governing the relationship between the prosecution bodies and the tax authorities must relate, in principle, to the

possibility that the prosecution bodies obtain assistance from the tax authorities only in the context of criminal proceedings, that is to say, after the commencement of criminal proceedings, in accordance with Article 305 of the Code of Criminal Procedure. That is why Article 233^1 (5) of Government Ordinance No 92/2003, establishing that the minutes referred to in paragraphs (3) and (4) of the same Article are a means of proof, should be naturally correlated with the provisions of the new Code of Criminal Procedure, and any departure therefrom must be rejected as otherwise it would render relative the concept of criminal proceedings itself. Cooperation between the aforementioned authorities as regards the obtaining of evidence must therefore be subsumed into the overall design of the new Code of Criminal Procedure, which provides in Article 97 (2) that evidence is to be obtained in criminal proceedings by the following means: (a) statements by the suspect or accused person; (b) the injured party's statements; (c) statements by the civil party or the civilly liable party; (d) witness statements; (e) documents, reports of expertise or findings, minutes, photographs, material means of proof; (f) any other evidence which is not prohibited by law.

The Court held that the procedure for making a finding can be initiated only in the course of criminal proceedings, by way of order issued by the prosecution body. The Court has also pointed out that according to Article 172 (9) of the Code of Criminal Procedure, scientific and technical conduct of findings are ordered when there is a danger related to the disappearance of evidence or to the change of a factual situation, or when the urgent clarification of facts or circumstances of the case is necessary. What is specific in the event of a finding, as evidence, is the urgency, the recording of certain elements — which constitute evidence in criminal proceedings — before they disappear or are destroyed by time or by the action of the persons concerned. Through a finding it is established whether the facts at the scene constitute evidence or give rise to reasonable suspicion that a criminal offence has been committed.

Thus, from a teleological interpretation of the rules of criminal procedure, the Court has held that the rule is that where, in the course of a criminal prosecution, the judicial bodies need the opinion of an expert for the purposes of establishing, clarifying or assessing facts or circumstances relevant to the finding of the truth in the case, it is ordered that an expert report be obtained and not a finding. Thus, carrying out a finding will always be the exception, and such operation can be ordered only if the conditions laid down in Article 172 (9) of the Code of Criminal Procedure are met. Thus, the Courts held that the provisions of Article 3 (3) and (4) (a) of Government Emergency Ordinance No 74/2013 must be interpreted and applied in conjunction with the provisions of the Code of Criminal Procedure applicable to that matter, so that the technical and scientific findings made by the anti-fraud inspectors of the Directorate for Combating Fraud can be ordered only in exceptional cases where there is a danger that evidence will cease to exist or that there is an urgent need to clarify facts or circumstances of the case. The Court also held that, in accordance with Articles 112 to 115 of the 1968 Code of Criminal Procedure, a technical and scientific finding could also be conducted in the criminal proceedings, and in that respected the Court stated in its case-law that, being a procedural act requiring urgency, technical and scientific findings are conducted according to a simplified procedure compared to the expertise (Decision No 39 of 13 January 2009, published in the Official Gazette of Romania, Part I, No 100 of 19 February 2009).

Comparing Article 233^1 (3) with Article 233^1 (4) of Government Ordinance No 92/2003, the Court observed that the tax checks provided for in paragraph (4) are carried out after the commencement of criminal proceedings at the request of the prosecuting authority and take the form of reports, which constitute evidence within the meaning of Article 97 (2) (e) of the Code of Criminal Procedure, whereas Article 233^1 (3) of

Government Ordinance No 92/2003 provides that tax checks are to be carried out at the request of prosecution bodies in a specific case, without specifying that they are carried out after the commencement of criminal proceedings. Although it reproduces in part the provisions of Article 172 (9) of the Code of Criminal Procedure relating to the conduct of the finding, so that it appears that the tax checks represent a finding activity and that the finding act in the form of a report constitutes evidence within the meaning of Article 97 (2) (e) of the Code of Criminal Procedure, in reality, it is apparent from its interpretation *per a contrario* in relation to Article (4) of the Code of Criminal Procedure that those tax checks are requested by the prosecution bodies before the commencement of criminal proceedings.

Accordingly, the Court further held that, since the activity of tax verification is carried out before the commencement of criminal proceedings, it means that the resulting act, even bearing the name "report", cannot be classified as "report" in the sense of evidence governed by Article 97 (2) (e) of the Code of Criminal Procedure.

The Court therefore found that the provisions of Article 233^1 (3) and the term "that constitute evidence" comprised in Article 233^1 (5) of Government Ordinance No 92/2003 cannot be interpreted and applied in conjunction with the provisions of the Code of Criminal Procedure applicable to means of proof, on the contrary, there is a normative tension between the content of the afore-mentioned of law and Articles 97 and 100 of the Code of Criminal Procedure. Accordingly, the Court held that those legal texts do not reflect the overall logic of the Code of Criminal Procedure in the matter of evidence.

The Court also noted that the new Code of Criminal Procedure does not contain any more the concept of acts preceding the opening of the criminal proceedings (Article 224 of the 1968 Code of Criminal Procedure), so that no report can be drawn up by the prosecution body certifying the conduct of preparatory acts, which could constitute evidence. Therefore, the report drawn up by the tax authorities in accordance with Article 233^1 (3) of Government Ordinance No 92/2003, although compatible with the 1968 Code of Criminal Procedure, cannot now be used as a statement of completion of the preparatory acts, since they are no longer covered by the new Code of Criminal Procedure, but can only constitute an act seizing the criminal investigation bodies in accordance with Article 61 (5) of the Code of Criminal Procedure.

In conclusion, the Court found that, in the context of the new Code of Criminal Procedure, evidence is taken exclusively in the course of the criminal proceedings, and acts drawn up before the commencement of criminal proceedings could not have the status of evidence. In those circumstances, the Court held that the report governed by Article 233^1 (3) of Government Ordinance No 92/2003, being drawn up by the tax authorities prior to the commencement of criminal proceedings, cannot be classified under the Code of Criminal Procedure in force as evidence. On the other hand, according to the Code of Criminal Procedure, the criminal prosecution authority has jurisdiction, after criminal proceedings have been brought, to order a fiscal verification in accordance with Article 233^1 (4) of Government Ordinance No 92/2003, completed by drawing up report, or a finding in accordance with Article 172 (9) of the Code of Criminal Procedure, concluded with a statement of findings, in which case the report, and the statement of findings constitute evidence in accordance with Article 97 (2) (e) of the Code of Criminal Procedure.

In the light of the foregoing, the Court held that the legal rules relating to criminal proceedings must be clear, precise and foreseeable, which means, inter alia, that the legislator must also lay down a consistent regulatory framework in which the rules laid down are mutually complementary and mutually reinforcing, without creating any contradiction between the legislative act which is in the main regulation in the matter

and those governing particular or special aspects thereof. Accordingly, the latter legislative acts must be reconciled with the Code of Criminal Procedure, to integrate organically in its overall design and to detail the criminal law procedural provisions. Article 233[1] (3) of Government Ordinance No 92/2003, by reference to paragraph (5) of Government Ordinance No 92/2003, is reconciled with the Code of Criminal Procedure and thus does not fulfil the constitutional requirements relating to the quality of the law. Moreover, the European Court of Human Rights, in its judgement of 18 March 1997 in Case of Mantovanelli v. France, paragraph 34, and in its judgement of 29 October 2013 in Case of S.C. IMH Suceava - S.R.L. v. Romania, paragraph 31, stated that although Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to a fair trial, it does not govern the admissibility of evidence as such, which is governed primarily by national law (see also, to that effect, the judgement of 9 June 1998 in Case of Teixeira de Castro v. Portugal, paragraph 34, and judgement of 11 July 2006 in case of Jalloh v. Germany Case, paragraphs 94-96). It is therefore for the Member States to regulate the issues related to the taking of evidence. However, from the assessment of the legislative framework, both the one subject to the review of constitutionality in terms of tax proceedings and those governing criminal proceedings, the Court found that the State, through its authorities with legislative powers, although it carried out a reform in that respect (the new Code of Fiscal Procedure and the new Code of Criminal Procedure), did not also establish a uniform reference system for dealing with evidence in criminal matters in relation to tax law, since the manner in which the criticised text was configured indicates that it regulates a criminal procedure which does not fall within the general system of taking of evidence.

The Court held that, in the absence of a clear and consistent legislative framework for evidence in the tax matters, in compliance with the principle of a single rule on matters of law, the right to a fair trial, laid down by Article 21 (3) of the Constitution, is also infringed. In criminal matters, the entire system of obtaining evidence is intended to establish the existence or non-existence of the charge in criminal matters, including the procedural safeguards intrinsic thereto, as the legislator has a constitutional obligation to regulate in a consistent and uniform manner the way in which they are obtained in order not to adversely affect the legal certainty of the person concerned. In so far as an essential guarantee of the evidence system — obtaining it by means of evidence drawn up after the commencement of criminal proceedings — contained in the Code of Criminal Procedure is breached by the legislator itself by means of statutory legislation with criminal law procedural provisions — the Code of Fiscal Procedure — it means that it becomes inapplicable to persons involved in tax law relationships, who no longer enjoy that criminal procedure safeguard, which results in the principle of equal rights of those persons being infringed in relation to other persons involved in different legal relationships, and in whose respect the general framework for evidence is applicable.

Applying the above mentioned to the present case, the Court found that the legislator had only formally complied with its constitutional powers to legislate, without establishing a correlation between Article 233[1] (3) and the term "that constitute evidence" comprised in Article 233[1] (5) by reference to paragraph (3) of Government Ordinance No 92/2003, on the one hand, and Article 61 (5), Article 97 (2) (e), Article 172 (9) and Article 198 (2) second sentence of the Code of Criminal Procedure, on the other hand, which is contrary to Article 1 (3) and (5), Article 16 and Article 21 (3) of the Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. As a consequence of violations of the principle of equal rights and the right to a fair trial, the Court also found the infringement of the constitutional

provisions of Article 24 (1) and Article 124 (2).

The aforementioned are valid *mutatis mutandis* as regards Article 350 (1) and the phrase "that constitute evidence" comprised in paragraph (3) by reference to paragraph (1) of Law No 207/2015, provisions which, in their turn, are in breach of Article 1 (3) and (5), Article 16 (1) and Article 21 (3) of the Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and as a consequence of the breach of the principle of equal rights and the right to a fair trial, Article 24 (1), and Article 124 (2) of the Constitution are also infringed upon.

With regard to the objection of unconstitutionality against the provisions of Article 233^1 (4) of Government Ordinance No 92/2003 and of Article 350 (2) of Law No 207/2015, the Court found that it was unfounded in relation to the criticisms made, since they give expression to a method of cooperation between the National Agency for Fiscal Administration and the prosecution bodies during criminal proceedings. The result of the tax verifications carried out take the form of a report which, in accordance with Article 233 (5) of Government Ordinance No 92/2003 or Article 350 (3) of Law No 207/2015, as the case may be, constitutes evidence, an aspect that falls within the provisions of Article 97 (2) (e) of the Code of Criminal Procedure. In this case, the National Agency for Fiscal Administration is not acting as a party to the criminal proceedings, but as a specialised body under the provisions of Government Emergency Ordinance No 74/2013 and the Code of Criminal Procedure and does not affect the status or activity of the prosecution bodies.

Therefore, in view of that circumstance, it was not held that Article 233^1 (4) of Government Ordinance No 92/2003 and Article 350 (2) of Law No 207/2015 are contrary to those constitutional provisions invoked by the authors of the exception, including those contained in Article 131 (1) of the Constitution relating to the role of the Public Ministry, namely to represent the general interests of society and to defend the rule of law and the rights and freedoms of citizens.

III. For all these reasons, the Court, by unanimity, upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 2331 (2) and (3) of Government Ordinance No 92/2003 on the Code of Fiscal Procedure and those of Article 350 (1) of Law No 207/2015 on the Code of Fiscal Procedure; upheld the exception of unconstitutionality and found unconstitutional the phrase "*that constitute evidence*" in Article 233^1 (5) of Government Ordinance No 92/2003 with reference to paragraphs (2) and (3) of the same Article; upheld the exception of unconstitutionality and found unconstitutional the phrase "*that constitute evidence*" in Article 350 (3) of Law No 207/2015, with reference to paragraph (1) of the same Article.

The Court dismissed, as having become inadmissible, the exception of unconstitutionality against Article 233^1 (1) of Government Ordinance No 92/2003; it dismissed as unfounded the exception of unconstitutionality against the provisions of Article 233^1 (4) of Government Ordinance No 92/2003 and of Article 350 (2) of Law No 207/2015.

Decision No 72 of 29 January 2019 concerning the exception of unconstitutionality against the provisions of Article 233^1 of Government Ordinance No 92/2003 on the Code of Fiscal Procedure and of Article 350 of Law No 207/2015 on the Code of Procedure, published in Official Gazette of Romania, Part I, No 332 of 2 May 2019

A legislative solution that does not provide for the application of incompatibility cases also in respect of the specialised staff operating within the judicial bodies or independent of such bodies, making a finding in their field of expertise, is unconstitutional, as against the right to a fair trial.

Keywords: *right to a fair trial, incompatibility, incurable nullity*

Summary

I. As grounds for the exception of unconstitutionality against the provisions of Article 174 (1) of the Code of Criminal Procedure, its author submits that the legislator has failed to regulate expressly the incompatibilities of specialists. Thus, unlike the expert, in whose regard the incompatibility cases are provided, the specialist is not subject to any incompatibility. It is argued that incompatibilities are intended to guarantee impartiality, a case of incompatibility being that provided for by Article 64 (1) (e) of the Code of Criminal Procedure on incompatibility of the person who carried out, in a case, criminal investigation operations. In view of the narrow wording of Article 174 (1) of the Code of Criminal Procedure, the incompatibility of the specialist cannot be sanctioned in any way, in breach of the constitutional provisions of Article 1 (3) and (5). The absolute presumption of impartiality of the specialist, resulting from the legislative failure to regulate the incompatibility of the specialist, deprives of content the right to a fair trial.

As regards the exception of the unconstitutionality against the provisions of Article 282 (1) of the Code of Criminal Procedure, its author submits that, in essence, any classification of nullities indicates that the distinction between incurable and relative nullity is that incurable nullity protects a general public interest, while the relative nullity protects a private interest. It is also argued that, in accordance with the unanimous case-law in this respect, the only branch of law in which an infringement of the law does not automatically give rise to a penalty, and the person protected by that legal provision must prove an injury, is the law of criminal procedure. However, to impose on the person benefiting of protection of one of the rights enshrined in the Code of Criminal Procedure the obligation to prove any injury when that right has been breached is at least excessive or even impossible. To establish for a person charged with a criminal offence the obligation to bring an impossible evidence is a manifest breach of the right to a fair trial. At the same time, the rule enshrining the breached right is thus emptied of its contents.

II. Having examined the exception of unconstitutionality, the Court has held that, as regards the incompatibility of specialised staff operating within the judicial bodies or independent of such bodies, the provisions of the Code of Criminal Procedure make no reference to the incompatibility of those persons, so that, unlike experts, the provisions relating to experts are not applicable to them.

In this context, the Court has held that, in accordance with Article 97 (2) (e) of the Code of Criminal Procedure, the expert's reports and findings reports are means of evidence. At the same time, under Article 103 (1) of the Code of Criminal Procedure, "evidence shall not be of a value previously determined by law and shall be subject to the unfettered evaluation of the judicial bodies following the evaluation of all the evidence presented in the case".

The assessment of the evidence is governed by the principle of unfettered discretion, according to which the judicial bodies are entitled to assess freely both the value of each piece of evidence brought (in relation to the others), regardless of the stage

in which it was brought, and its credibility. The evidence does not have an a priori value laid down by the legislator, their importance resulting from their evaluation by the judicial bodies in the context of the examination of all the relevant evidentiary material in question.

Thus, the Court held that the aspects ascertained in a findings report have the same probative value as those ascertained in an expert's report, and there is no need to establish a hierarchy in their regard.

The findings made by the two means of proof can have a significant influence on the judge, since both the expert's report and the findings report are ordered to elucidate matters which require the opinion of a specialist in that field, which does not fall within the area of expertise of the judge. Moreover, the findings made by the two means of proof can sometimes play a decisive role between the elements based on which the judge makes his decision.

However, in those circumstances, the existence of a situation which gives rise to doubts as to the impartiality of the person who is called upon to carry out an analysis of elements in the criminal proceedings determines the questioning of the impartiality of the justice act.

In this context, the Court noted that in its case-law it found that the impartiality, transparency and fairness of the expertise are guaranteed by the fulfilment of the conditions required by the rules of criminal procedure in force when drawing up the expert's report. Thus, the Court held that the legislator regulated a number of incompatibilities relating to the expert in Article 174 of the Code of Criminal Procedure, according to which the person in one of the cases of incompatibility laid down by Article 64 of the Code of Criminal Procedure cannot be designated as an expert and, and, if designated, the judgement cannot be based on the findings and conclusions reached by such person (Decision No 787 of 15 December 2016, published in the Official Gazette of Romania, Part I, No 192 of 17 March 2017, paragraph 20).

However, as regards the specialist who draws up the technical and scientific reports, the legislator did not regulate any case of incompatibility. This implies that the specialist appointed to draw up a technical and scientific report may be at the time when the report is made in any of the situations referred to in Article 64, without that aspect being called into question.

Thus, the specialist may, for example, have carried out, in the case in which the technical and scientific report is drawn up, acts of criminal investigation, he could be the guardian of a party or of a subject of the main procedure, he could be representative or lawyer of a party or of a subject of the main procedure, even in another case, he may be a relative or in-law, up to and including the 4th degree, or in another situation as provided for in Article 177 of the Criminal Code, with one of the parties to the main procedure, the lawyer or the representative of such party in the case in which he was designated, etc.

However, since the legislator has made it absolutely clear that those situations give rise to impartiality on the part of the persons involved in criminal proceedings, having an impact on the fairness of the proceedings, it is clear that the existence of those situations in relation to the specialist has the same impact.

In the light of these considerations, the Court held that the legislative solution contained in Article 174 (1) of the Code of Criminal Procedure, which does not provide for the application of the grounds for incompatibility laid down in Article 64 of the same legislative act also for the specialist operating within the judicial bodies or independent of such bodies, and which makes the finding in accordance with Article 172 (10) of the

Code of Criminal Procedure, is unconstitutional, in breach of the right to a fair trial laid down in Article 21 (3) of the Constitution.

Next, as regards the exception of the unconstitutionality of the provisions of Article 282 (1) of the Code of Criminal Procedure, the Court observed that the relative nullity is a virtual nullity deriving from the fundamental principle of legality and resulting from an infringement of the legal provisions relating to the conduct of criminal proceedings, other than those expressly provided for by law, which attract the incurable nullity. It may be invoked by the public prosecutor, the parties and the subjects to the main proceedings, where they have an own procedural interest in the compliance with the legal provisions infringed. Accordingly, the relative nullity is characterised by the fact that it occurs where the infringement of the legal provisions determined an injury to the rights of previously listed participants in the criminal proceedings, that it must be relied on at a certain stage of the criminal proceedings, or at a certain time, laid down by law, that it is covered only when the holders of the right to invoke it do not exercise that right within the limitation period laid down by law, and by the fact that the parties to the proceedings who may claim a relative nullity must be of the legally prescribed legal status, and they must have an own procedural interest in the compliance with the allegedly infringed legal provision.

Unlike relative nullity, incurable nullity is characterised by the fact that it cannot be ruled out in any way, it may be relied on at any stage of the criminal proceedings, except in the cases referred to in Article 281 (1) (e) and (f) of the Code of Criminal Procedure, which may be invoked under the conditions laid down in Article 281 (4) of the Code, and may be taken into account ex officio. It always leads to the annulment of procedural acts carried out in breach of the provisions laid down by law. The cases of incurable nullity refer to the composition of the panel, the *ratione materiae* jurisdiction and the personal jurisdiction of the courts, the publicity of the hearing, the participation of the prosecutor to the proceedings, where it is compulsory, the presence of the suspect or the defendant, where their participation in the hearing is compulsory under the law, and the procedural acts which are prohibited by law as a result of inadmissibility or forfeiture.

The Court has held that, in the case of incurable nullity, the procedural injury is presumed *iuris et de iure*, as there is no requirement to prove the existence of the infringement, whereas, in the case of relative nullity, the injury caused by non-compliance with the law must be proved by the person requesting such penalty. Even if it is proven, relative nullity will be declared only if the injury can only be overcome by the annulment of the measure.

The Court also held, in its case-law, that nullity constitutes an extreme procedural penalty, which occurs only when other remedies are not possible. However, as not any infringement of a procedural rule causes an injury that can only be repaired by the annulment of the measure, the legislator has established the rule that the annulment of the measure taken in breach of the legal provisions governing the conduct of the criminal proceedings occurs only when the injury caused cannot be remedied in any other way.

The Court has also noted that, although it is recognised that absolute nullity cannot intervene in the case of any infringement of procedural rules, it must be relevant where the procedural rules infringed govern an area with decisive implications for the criminal proceedings (Decision No 302 of 4 May 2017, published in the Official Gazette of Romania, Part I, No 566 of 17 July 2017, paragraph 57). In other words, where procedural rules govern essential elements, with fundamental implications for criminal proceedings, the legislator must lay down appropriate penalties applicable to infringements of those rules.

In the light of these considerations, looking at the criticism of unconstitutionality raised by the author of the exception, the Court found that, in the author's view, the penalty of incurable nullity should be imposed in the event of an infringement of all the rules of criminal procedure, without any distinction. However, that would be tantamount to laying down an absolute presumption that the infringement of any procedural rule results in an injury, which can only be ruled out by the application of the penalty of incurable nullity, and not by the application of other procedural remedies. Such rule would imply that the infringement of any provision of the law entails, per se, the most serious penalty — incurable nullity — which would result in a very difficult conduct of criminal proceedings.

In the light of these considerations, the Court has held that the exception of unconstitutionality relating to Article 282 (1) of the Code of Criminal Procedure is unfounded.

III. For all these reasons, the Court, by unanimity, upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in Article 174 (1) of the Code of Criminal Procedure, which does not provide for the application of the cases of incompatibility laid down in Article 54 of the same legislative act also for the specialist operating within the judicial bodies or independent of such bodies, and who makes the finding under Article 172 (10) of the Code of Criminal Procedure.

The Court dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article 282 (1) of the Code of Criminal Procedure were constitutional in relation to the criticisms made.

Decision No 87 of 13 February 2019 concerning the exception of unconstitutionality against the provisions of Article 174 (1) and Article 282 (1) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No 498 of 19 June 2019

By setting a time limit within which the exception of absolute nullity may be raised in the case of absence of a lawyer during the pre-trial chamber procedure, although under the law his presence is compulsory, the legislator deprives of content the very right to defence, provided by assistance by a court-appointed lawyer, in the cases expressly provided for by law.

Keywords: *right to legally binding legal aid, right of defence*

Summary

I. As grounds for the exception of unconstitutionality, its author claims that, having been referred to the court for the offences of abuse of office and embezzlement, she had, in accordance with the Code of Criminal Procedure, the right to be assisted by a court-appointed lawyer. However, in the course of criminal proceedings, but also at the pre-trial chamber stage, the accused did not receive legal assistance ex officio, although it was compulsory. The author objects to the establishment of a time limit (conclusion of the pre-trial chamber procedure) until which incurable nullity may be invoked, nullity stemming from the failure to observe the provision concerning the

obligation to ensure a lawyer to assist the suspect or defendant at the stage of the pre-trial chamber procedure.

II. Having examined the exception of unconstitutionality, the Court held that, under Article 90 (c) of the Code of Criminal Procedure, legal aid is compulsory during pre-trial chamber procedure and during the trial in cases where the law provides for the offence committed the penalty of imprisonment for life or imprisonment of more than 5 years. The text has been amended in this respect by Article II (14) of Government Emergency Ordinance No 18/2016 amending and supplementing Law No 286/2009 on the Criminal Code, Law No 135/2010 on the Code of Criminal Procedure, as well as for supplementing Article 31 (1) of Law No 304/2004 on judicial organisation, published in the Official Gazette of Romania, Part I, No 389 of 23 May 2016; before the said amendment, legal aid had to be provided only during trial proceedings. It is apparent from the structure of the text that the legislator did not regulate the applicability of that case also for the prosecution stage.

The Court held, with regard to cases of compulsory legal assistance, that Article 91 (1) of the Code of Criminal Procedure imposes an obligation on the judicial body to ensure the presence of a lawyer, ex officio, if the suspect or the defendant has not chosen a lawyer, in cases where legal aid is compulsory. The respect by the judicial body of this obligation is guaranteed by Article 281 (1) (f) of the Code of Criminal Procedure, which penalises by incurable nullity the infringement of the provisions on ensuring legal aid for the suspect or of the defendant and of the other parties when legal aid is mandatory. If the infringement occurred in the course of a prosecution or during pre-trial chamber procedure, the nullity shall be established before the conclusion of the proceedings in the pre-trial chamber, in accordance with Article 281 (4) (a) of the Code of Criminal Procedure.

The Court found that Article 90 (b) and (c) and Article 91 (1) of the Code of Criminal Procedure do not affect the right of defence enshrined in Article 24 of the Constitution, since the right of defence cannot be confused with the right to mandatory legal aid. The first is guaranteed in all cases and the second is a guarantee of the first, created by the legislator, which also sets out the applicability thereof. Thus, since the Basic Law guarantees the right of defence and not the right to compulsory legal aid, the determination of the cases in which it is mandatory is the exclusive attribute of the legislator.

The Court has therefore held that it cannot be argued that the abovementioned provisions are unconstitutional only because they do not provide that legal aid is mandatory in all cases, as long as the exercise of the right to legal aid is guaranteed. The right of defence, enshrined in Article 24 of the Constitution, concern voluntary legal assistance and exceptions to this rule can only be established by the legislator. In cases where the law requires the mandatory legal assistance of the suspect or defendant, the defence has the value of a concept of certain social interest which operates both for the suspect and the defendant and for the purpose of ensuring the proper conduct of the criminal proceedings, in the light of particular situations arising from the list contained in the legal text (Decision No 134 of 20 March 2018, published in the Official Gazette of Romania, Part I, No 565 of 5 July 2018).

It follows from the above that mandatory legal aid is a legislative option. However, the Court has held that the exercise of the right of defence, enshrined in Article 24 of the Constitution, must be effective, which means that in certain cases the presence of a lawyer is a necessary element for the determination of the effectiveness of that right. This is because the defendant's "assistance" by a lawyer means not only the latter's

physical presence, in the situations set forth by the law, but also the "granting of legal aid", so giving the defendant advice about what he/she is required to undertake in the proceedings and exercising his/her procedural rights. However, the Court has held that by regulating a case in which legal aid is mandatory, the legislator presumed that the right of defence can be exercised effectively only by ensuring the presence of the lawyer.

The Court found that the regulation of binding legal aid, in the cases provided for by law, is intended as a right afforded to the suspect, the defendant, the injured party, the civil party and the civilly responsible party. On the other hand, such regulation gives rise to an obligation on the judicial body to assess whether the facts of the case give rise to the application of legislative provisions relating to mandatory legal aid, whether or not the person concerned has applied for it. In other words, the aforementioned regulation imposes on the judicial body an obligation not to be subject to passivity, but, by the exercise of due diligence, to ensure the practical and effective observance of the right of defence of the person concerned.

Therefore, the Court held that the legislator assumed that it was in the interest of justice to regulate the compulsory legal aid in the cases expressly provided for by law, the breach of provisions relating to compulsory legal aid resulting in an infringement of the right to a fair trial.

In that context, the Court noted that, a time limit within which incurable nullity may be invoked in case of absence of a lawyer, although under the law the presence of a lawyer is mandatory, determines a contradictory situation. Thus, the legislator sets a time limit which limits the possibility of invoking incurable nullity, even though it is absolutely presumed that the person present in the proceedings requires the assistance of a lawyer in order to be able to pursue an effective defence, a defence that also includes the possibility to invoke nullities. However, even in the case-law of the courts it has been held that the right to an effective defence occupies a central place in the conduct of criminal proceedings, its importance being that all other rights would remain derisory, without procedural guarantees, the judicial authorities having an obligation to ensure that right. The actual provision of defence is a guarantee, a secure prerequisite for objective and comprehensive research of evidence, a sine qua non condition for finding the truth, for protecting the accused's rights and legal interests, creating the necessary conditions for the issuing of a legal and solid sentence.

Therefore, the Court has held that by setting a time limit within which the exception of incurable nullity may be raised in the case of absence a lawyer during the pre-trial chamber procedure, although the presence of a lawyer if mandatory under the law, the legislator deprives of content the fundamental right of defence itself, which is provided through assistance by a court-appointed lawyer, in the cases expressly provided for by law. Although the failure of the judicial body to comply with the obligation is penalised by the legislator with incurable nullity, the applicable penalty appears to be ineffective given the setting of a time limit (conclusion of the pre-trial chamber procedure) until which incurable nullity may be invoked, nullity stemming from the failure to observe the provision concerning the obligation to ensure assistance by a lawyer at the stage of the pre-trial chamber procedure.

The Court then noted that the cases of incurable nullity which can be invoked in any stage of the proceedings include the one governed by the provisions of Article 281 (1) (d) of the Code of Criminal Procedure on the absence of the public prosecutor, when his participation is compulsory in accordance with the law.

As pointed out above, the provisions of Article 90 of the Code of Criminal Procedure cover cases of mandatory legal aid, also applicable during pre-trial chamber procedure. On the other hand, under Article 344 (4) of the Code of Criminal Procedure,

upon expiry of the time limits laid down in paragraphs (2) and (3) of the same article, if requests have been made or exceptions have been raised, or if the pre-trial chamber judge has raised himself ex officio any exceptions, he sets the time limit for settling them, with the parties and the injured party being summoned and with the participation of the prosecutor. It follows from the above provisions that both legal provisions may be disregarded in the pre-trial chamber procedure, the infringement being punished in both cases with incurable nullity. However, the Court has held that the legislator has regulated differently the time until which incurable nullity may be invoked, depending on the procedural provisions infringed. Thus, if those provisions were complied with during the same proceedings, having regard to the distinction made by the legislator with regard to the time-limit for invoking incurable nullity, incurable nullity resulting from the absence of a lawyer who would assist the defendant or the other parties, where that is compulsory under the law, may be invoked until the end of the pre-trial chamber procedure [in accordance with Article 281 (4) (a) of the Code of Criminal Procedure], whereas incurable nullity deriving from the prosecutor's non-participation, where his participation is compulsory under the law, may be invoked both during pre-trial chamber procedure and in the course of the trial [in accordance with Article 281 (3) of the Code of Criminal Procedure].

The Court noted that the raison d'être of such a provision relating to the setting of a time-limit by which incurable nullity may be invoked is attributable to the role of the procedural stage of the pre-trial chamber, which must examine precisely the procedural irregularities committed, before the trial, in order for the latter to acquire the celerity required by the requirement to settle the case within a reasonable time. Thus, the Court found that the regulation of a new structure of criminal proceedings coupled with the need to settle the case (trial stage) within a reasonable time would be a reason for the legislature's option to rule in certain cases a time limit until which incurable nullity can be invoked.

In this context, the Court has held that it is a legitimate aim to resolve the case within a reasonable time and that the regulation of a new structure of criminal proceedings may determine and justify certain legislative choices. However, the Court has held, in its case-law, that the outcome of the proceedings in the pre-trial chamber concerning the determination of the lawfulness of the taking of evidence and the conduct of procedural acts by the prosecution has a direct bearing on the conduct of proceedings on the substance of the case, and may be decisive for establishing the guilt/innocence of the accused. In view of the importance of that stage and the fact that, in cases where the law governs compulsory assistance, the right of defence can be exercised effectively only in the presence of the lawyer, the Court has held that the regulation of a new stage of the criminal proceedings does not constitute a valid reason for establishing by law a time limit (conclusion of the pre-trial chamber procedure) until which the infringement of the statutory provisions relating to the mandatory assistance of the defendant in the pre-trial chamber procedure can be invoked.

As regards the settlement of the case within a reasonable time, the Court has found that such is desirable in relation to all legal cases/proceedings. However, the settlement of the case within a reasonable time cannot be converted in the justification underlying a legislation that affects the right of defence itself and the right to a fair trial.

The Court has found that the provisions of Article 281 (4) (a) of the Code of Criminal Procedure, with reference to the provisions of Article 281 (1) (f) of the same legislative act, are unconstitutional.

III. For all these reasons, the Court, by unanimity, upheld the exception of unconstitutionality and found that the provisions of Article 281 (4) (a) of the Code of Criminal Procedure, with reference to the provisions of Article 281 (1) (f) of the same legislative act, were unconstitutional.

Decision No 88 of 13 February 2019 concerning the exception of unconstitutionality relating to provisions of Article 281 (4) (a) of the Code of Criminal Procedure, with reference to the provisions of Article 281 (1) (f) of the same legislative act, published in Official Gazette of Romania, Part I, No 499 of 20 June 2019

The essential aspects concerning the filling of operating positions and management positions of civil servants with special status in the system of the prison administration system must be regulated by organic law, not by regulation approved by Order of the Minister for Justice.

Keywords: *status of civil servants, foreseeability of the law*

Summary

I. As grounds for the exception of unconstitutionality, the authors of the latter have argued that the provisions in question are contrary to Article 1 (4) and Article 5 of the Constitution, as they delegate to a member of the Government the task of establishing the modality of occupation of management and operating positions of civil servants with special status in the prison administration system, by issuing acts of an administrative nature, which does not comply with the stability and foreseeability requirements of the Constitution. This creates a state of legal uncertainty, as the infra-legal acts are subject to a high degree of successive changes over time.

Similarly, there is a breach of Article 73 (3) (j) of the Constitution, since the way in which the management and operating positions are occupied is directly related to the employment relationship of a public servant with special status, employment relationship which must be regulated by organic law.

II. Having examined the exception of unconstitutionality, the Court recalled that the public servant with special status is vested with the exercise of official authority and that its legal status derogates from the general provisions governing employment relationships. The Court referred to Decision No 172 of 24 March 2016, published in the Official Gazette of Romania, Part I, No 315 of 25 April 2016. In so doing, the Court has held that, in view of the fact that the essential aspects of employment to management positions of police officers concern a change in employment relationships, those essential aspects, such as, for example, the general conditions for participation in the competition, the conditions of length of service required for participation, the type of competition tests, the conditions under which candidates are declared "admitted" and the possibility of contesting the results, must be regulated by organic law, while the rules specific to the employment procedure must be explained and detailed by order of the minister responsible. Consequently, the regulation of these aspects by administrative acts is contrary to the provisions of Article 73 (3) (j) of the Constitution. Similar recitals also appear in Decision No 306 of 8 May 2018, published in the Official Gazette of

Romania, Part I, No 516 of 22 June 2018, concerning the employment to operating position of police officers.

Having examined the provisions of Law No 293/2004, the Court has held that it governs only the modality of employment of public servants with special status, the general conditions governing the occupation of vacant management and operating positions in the system of the prison administration, as well as the length of service required for the occupation of vacant management positions. The other essential aspects of the occupation of those positions are regulated at infra-legal level, by means of a regulation approved by Order of the Minister for Justice.

Pursuant to Article 31 of Law No 293/2004, Order No 2478/C/2010 of the Minister for Justice was issued, and published in Official Gazette of Romania, Part I, No 751 of 10 November 2010. It covers essential aspects of the occupation of operating and management positions in the system of the prison administration, namely the competition tests, the conditions under which candidates are declared "admitted" and the possibility of challenging the results of the competition/examination.

The Court has held that the abovementioned decisions are applicable in the present case. Pursuant to Article 73 (3) (j) of the Constitution, the special status of the civil servant in the system of prison administration must be governed by organic law, namely Law No 293/2004. Taking into account that the essential aspects of the occupation of operating and management positions are related to the initiation and the modification of the employment relationship, all these essential aspects should be regulated by organic law.

At the same time, the rules on the filling of operating and management positions must comply with certain stability and foreseeability requirements. Delegating the power to establish those rules to a member of the Government, by issuing administrative acts of an infra-legal level, gives rise to a state of legal uncertainty, as such acts are usually subject to increased successive changes over time. Therefore, given the above-mentioned legislative loophole, the legislative solution provided for in Article 31 of Law No 293/2004 is in breach of the legislative technical rules, which provide that orders of a normative nature are issued solely on the basis of and in accordance with the law and must be strictly confined to the framework laid down by the acts on the basis of which they were issued, without them being able to supplement the law. Consequently, there has been a violation of Article 1 (4) and (5) of the Constitution.

III. For all these reasons, the Court, by unanimity, upheld the exception of unconstitutionality against the provisions of Article 31 of Law No 293/2004 on the arrangements concerning the public servants with special status in the National Prison Administration and found that they were unconstitutional.

Decision No 90 of 21 February 2019 concerning the exception of unconstitutionality against the provisions of Article 31 of Law No 293/2004 on the arrangements concerning the public servants with special status in the National Prison Administration, published in Official Gazette of Romania, Part I, No 343 of 6 May 2019

The impugned legal text does not regulate the criteria for the individualisation of the penalty of confiscation of the means of transport with which transport of wood material that had no certification or verification of legal origin was carried out, by reference to the nature and seriousness of the offence, i.e. the

condition that the third party owner of the confiscated property should have knowledge of the purpose for which the property is used. The contested legislative text does not strike a fair balance between the general requirements of the community relating to the protection of the national forestry fund and the fundamental right to property of the offender, that is to say, the third party owner of the property used for the commission of the offence.

Keywords: *confiscation, forestry sector, principle of proportionality, fair balance between the general interest of the society and individual interest, right to property*

Summary

I. As grounds for the exception of unconstitutionality, its authors argued that the impugned provisions of the law, establishing the confiscation of the means of transport with which the transport of wood material which had no legal origin was carried out, contravene the provisions of Article 44 (9) of the Basic Law, since they do not specifically lay down the detailed rules and conditions for the application of that measure. At the same time, it was argued that the law did not distinguish, in the application of the measure of confiscation, in relation to the owner of the means of transport where the latter did not commit any offence. They took the view that the law complained of did not respect the requirement of proportionality, the confiscation of the means of transport, irrespective of the value of the property confiscated, in the administrative offences matter, being contrary to the provisions of Article 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. They also argued that it was inconceivable that the general interest be protected by stronger measures in case of administrative offences, than in case of criminal offences, and in this regard, they relied on the provisions of Article 112 (1) (b) of the Criminal Code according to which "goods which have been used, in any way, or intended to be used in the commission of a criminal offence provided for by criminal law, whether they belong to the offender or to another person who had knowledge of the purpose for which it was used", considering that such a situation is manifestly discriminatory, creating a situation of inequality between persons committing criminal offences in the field of forestry and those committing administrative offences in the same field.

II. Having examined the exception of unconstitutionality relating to the provisions of Article 19 (13) of Law No 171/2010 which provide the confiscation of the means of transport with which the transport of wood material was carried out where such wood material had no certification or verification of legal origin in accordance with the rules relating to the origin, movement and marketing of wood materials, the system of storage facilities for wood materials and round timber processing plants, and Article (14) of the same article concerning the enforcement of the measure of confiscation, the Court held that the grounds of unconstitutionality invoked by the authors of the exceptions were developed specifically with regard to the provisions of Article 19 (13) of Law No 171/2010, the authors invoking the failure to comply with the balance between the general interest of the society and the individual interest concerned by such measure, failure to comply with the condition of proportionality of the penalty with the degree of social danger posed by the offence, infringement of the right of ownership of the offender and of the third party owner of the confiscated means of transport.

The Court found that the measure of confiscation constitutes a deprivation of property, that is to say, a complete and definitive take over of property, the right holder of that right over that property having no possibility of exercising any of the attributes conferred by the right which he had in his assets, and not a restriction of the right to property. From that point of view, the Court has verified the justification of the interference with the right to property by carrying out a 'test' of proportionality in order to establish whether there is a fair balance between the concurring interests. In particular, the Court examined whether the deprivation of property through the mandatory application of the additional penalty of confiscation of the means of transport, pursuant to Article 19 (13) of Law No 171/2010, in the absence of regulation of criteria for the individualisation of the measure, has a legitimate aim, is appropriate, is necessary and ensures a fair balance between the concurring interests. In that context, the Court has held that Article 1 (2) of the First Additional Protocol to the Convention governs three conditions in which deprivation of a property does not constitute an infringement of the right of the holder on that property, namely the deprivation must be provided for by law, that is to say, the domestic rules applicable in the matter, must be imposed by a public utility case and must comply with the general principles of international law. In its case-law, the Strasbourg court added a common condition to both the deprivation of property and the limitations on the exercise of that right, namely that any limitation must be proportionate to the aim pursued by its imposition. In line with the case-law of the European Court, the Constitutional Court has held that a deprivation of property must be provided for by law, pursue a legitimate aim and must observe a relation of proportionality between the means employed and the intended purpose (Decision No 691 of 11 September 2007, published in the Official Gazette of Romania, Part I, No 668 of 1 October 2007, and Decision No 725 of 6 December 2016, referred to above, paragraph 25).

However, the Court found that the measure of confiscation of the means of transport with which the transport of wood material was carried out where such wood material had no certification or verification of legal origin in accordance with the rules relating to the origin, movement and marketing of wood materials, the system of storage facilities for wood materials and round timber processing plants is provided for by law and is governed by the provisions of Article 19 (13) of Law No 171/2010, which is subject to criticism.

Further the Court verified the aim pursued by the legislator set out in the criticised legislative text and whether it was legitimate as the proportionality test could only refer to a legitimate aim. In that regard, the Court has held that, by imposing the additional penalty of confiscation of the means of transport with which the transport of wood material was carried out where such wood material had no certification or verification of legal origin, together with the main administrative penalty of a fine, and the additional penalty of confiscating wood materials, in the event that the forestry offences relating to the dispatch and/or transport of wood materials were committed, the legislator intended to protect the national forestry fund in the light of the increasing incidence of administrative and criminal offences in this area, with the legislator seeking to preserve the forest as a good of public interest in order to recognise everyone's right to a healthy and ecologically balanced environment, in accordance with Article 35 of the Constitution, and from that perspective the objective pursued by the legislator was of a legitimate nature.

At the same time, the Court has held that the additional administrative penalty examined is an appropriate measure, capable of meeting the requirements of the legitimate aim pursued, and also necessary in order to attain the legitimate aim pursued,

in circumstances in which the Constitution excludes the protection of property used in the commission of illegal acts or acquired through such acts, Article 44 (9) stating that "Any goods intended for, used or resulting from a criminal or minor offence may be confiscated only in accordance with the provisions of the law". As the Court has held in its case-law, having committed the offence, the offender is situated outside the sphere of lawfulness, with the natural consequence provided for by Article 44 (9) of the Basic Law.

The law, however, must regulate the measure of confiscation in a manner consistent with the other provisions of the Constitution. And, from that point of view, the Court has held that the legislative text criticised does not regulate the criteria for the individualisation of the penalty of confiscation of the means of transport with which transport of wood material that had no certification or verification of legal origin was carried out, by reference to the nature and seriousness of the offence, namely the condition that the third party owner of the confiscated property had been aware of the purpose for which the property was used. Thus, if the confiscated property is not the property of the offender and the third-party owner thereof did not know the purpose of its use, the Court held that the measure of confiscation so regulated was not proportionate, the application of confiscation in such conditions being equivalent to expropriation which is incompatible with Article 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court therefore held that the legislative text criticised does not strike a fair balance between the general requirements of the community relating to the protection of the national forestry fund and the fundamental right to property of the offender, that is to say, the third party owner of the property used for the purpose of committing the offence, contrary to the provisions of Article 1 (2) of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 44 (8) of the Basic Law.

The Court has stressed that it maintains its case-law according to which "private property may be the subject of restrictive measures, such as those relating to property used or resulting from proceeds of crime or offences", and "the fact that confiscated property does not belong to the offender but to a third party cannot render ineffective that penalty, since the Constitution provides in Article 44 (9) that «Any goods intended for, used or resulting from a criminal or minor offence may be confiscated only in accordance with the provisions of the law», without any distinction according to the capacity of owner or temporary holder", but only in so far as the legislator ensures that the civil penalty thus imposed does not infringe the citizens' fundamental rights to which they are entitled in accordance with the principle of universality enshrined in Article 15 (1) of the Constitution.

The Court further recalled that Article 44 (9) of the Constitution lays down that property intended, used or derived from criminal or administrative offences may be confiscated, but "only in accordance with the provisions of the law". The reference to "the provisions of the law" covers both criminal law (Article 112 and Article 112^1 of the Criminal Code) and administrative law. The administrative offences are similar to criminal offences, but are less serious and, as a consequence, the penalties provided for by the administrative law must be lower than those laid down in the criminal law.

The Court has held that the additional administrative penalty of confiscation is similar to the special confiscation measure which is specific to criminal law, governed by the provisions of Article 112 (1) (a) to (f) of the Criminal Code. Although their legal nature is different, those penalties have the same effect, that is to say, the dispossession of the person who fails to comply with the provisions of the administrative law, or of

criminal law, of the property he has used to commit the offence or which have been acquired as a result of the offence. In its case-law, the Court has held that the provisions of Article 112 of the Criminal Code regulate the measure of special confiscation, which is a criminal law penalty, namely a measure of security, consisting of the transfer, free of charge, of property belonging to the estate of the person who committed an unjustified offence provided for by the criminal law to the State's estate, since, in view of the connection between that property and the offence committed, their continued possession by the person concerned presents the danger that new offences may be committed. Moreover, the Court noted that, according to Article 112 (1) (b) of the Criminal Code, "The following shall be subject to special confiscation: [...] b) goods which have been used, in any way, or intended to be used in the commission of an offence covered by the criminal law, whether they belong to the offender or to another person who had knowledge of the purpose for which it was used; [...]".

With regard to the issue of safeguards similar to criminal law in civil and administrative matters, the Court found, in agreement with the Strasbourg court, that, while it was open to the Member States not to punish certain criminal offences or to eliminate them or to order a sanction by administrative means rather than criminal law, the authors of conduct considered to be contrary to the law must not be in a worse position merely because the legal regime applicable to civil offences is different from that applicable to criminal matters (Judgement of 30 November 2006 in the Case of Grecu v. Romania).

Finally, the Court recalled that the subject matter of the examination in the present cases was Article 19 (13) of Law No 171/2010 on the establishment and punishment of forestry offences, as amended by Article I (26) of Government Emergency Ordinance No 51/2016, where those provisions continue to produce their legal effects, as they are the legal basis for the reports ascertaining the commission of forestry offences, contested by the authors of the exceptions of unconstitutionality through complaints in the context of which the exceptions of unconstitutionality were raised. Following the referral to the Constitutional Court, the provisions of Article 19 (13) of Law No 171/2010 were amended by Article I (52) of Law No 134/2017 amending and supplementing Law No 171/2010 on the establishment and sanctioning of administrative forestry offences, published in the Official Gazette of Romania, Part I, No 445 of 15 June 2017. In those circumstances, the Court noted that the provisions of the law in force lay down criteria for the individualisation of the administrative penalty that is additional to the confiscation of the means of transport with which the transport of wood material was carried out where such wood material had no certification or verification of legal origin.

The Court held that, in Case No 1.171D/2017, the exception of unconstitutionality also concerned the provisions of Article 19 (14) of Law No 171/2010 on the establishment and punishment of administrative forestry offences and of Article 41 (1) of Government Ordinance No 2/2001 on the legal regime of administrative offences, but the Court found that the author of the exception did not raise genuine challenges of unconstitutionality in respect of those provisions, but merely stated that "Article 19 (14) of Law No 171/2010 refers, for the purposes of applying the confiscation measure, to the procedures governed by the general rule, namely Article 41 (1) of Government Ordinance No 2/2001, which contains the same provisions as the constitutional rule, namely Article 44 (9)". Since it is not possible to identify in a reasonable manner any complaint of unconstitutionality with regard to the above-mentioned provisions of the law, the exception of unconstitutionality relating to the

provisions of Article 19 (14) of Law No 171/2010 and of Article 41 (1) of Government Ordinance No 2/2001 are to be dismissed as inadmissible.

III. For all these reasons, the Court, by unanimity, dismissed the exception of unconstitutionality and found unconstitutional the provisions of Article 19 (13) of Law No 171/2010 on the establishment and punishment of forestry administrative offences, as amended by Article I (26) of Government Emergency Ordinance No 51/2016 amending Law No 171/2010 on the establishment and punishment of administrative forestry offences.

The Court dismissed as inadmissible the exception of unconstitutionality against the provisions of Article 19 (14) of Law No 171/2010 on the establishment and punishment of administrative forestry offences and of Article 41 (1) of Government Ordinance No 2/2001 on the legal regime of administrative offences.

Decision No 197 of 9 April 2019 concerning the exception of unconstitutionality against the provisions of Article 19 (13) and (14) of Law No 171/2010 on the establishment and punishment of administrative forestry offences and of Article 41 (1) of Government Ordinance No 2/2001 on the legal regime of administrative offences, published in Official Gazette of Romania, Part I, No 438 of 3 June 2019

The establishment of special rules as regards remedies is in line with the principle of equality of citizens before the law only if such rules ensure the legal equality of citizens in their use. The legislator does not have the right to block access to the appeal in cassation solely on the basis of the date of service of the judgement, without taking into account the fact that the time-limit for lodging an extraordinary appeal was not exceeded.

Keywords: *equal rights, free access to justice, fair trial, remedies, link to case resolution, principle of legality*

Summary

I. As grounds for the exception of unconstitutionality, the authors of the exception argued that Article III of Government Emergency Ordinance No 70/2016 amending and supplementing the Code of Criminal Procedure and Law No 304/2004 on judicial organisation was unconstitutional, as it created different, arbitrary and discriminatory situations in terms of appeal in cassation against judgements issued on appeal by the High Court of Cassation and Justice. The persons to whom the judgements issued on appeal had been communicated were given the opportunity to promote this extraordinary remedy before the entry into force of Government Emergency Ordinance No 70/2016. On the other hand, those covered by Article III (b) of the Order have this right restricted on account of the delay in the drafting and communication of the judgement issued on appeal, since this extraordinary remedy may be exercised from 24 October 2016.

Although Article 129 of the Constitution provides for the use of remedies “in accordance with the law”, this does not mean that the “law” could remove or restrict the exercise of other rights or freedoms expressly enshrined in the Constitution, or that it

might interfere with the substance of the right to appeal against judgements considered to be illegal or unfounded.

There is also an infringement of the principle of equality of citizens before the law and the public authorities provided for by Article 16 (1) of the Constitution, since no legal equality is ensured in the use of legal remedies.

II. Having examined the exception of unconstitutionality, the Court found that the emergency ordinance criticised was adopted in order bring into accord the provisions of Article 434 (1) (I) of the Code of Criminal Procedure with Decision No 540 of the Constitutional Court of 12 July 2016. This decision penalised the legislative solution which excluded the appeal in cassation against judgements issued by the High Court of Cassation and Justice as a court of appeal. Since both judgements in the present case were delivered before the publication of that decision, the possible admission of the unconstitutionality exception would have no effect on their authors. Consequently, Article III (b) of Government Emergency Ordinance No 70/2016 has no relevance for the settlement of cases before the court. An examination of the constitutionality of that provision would convert the review by means of the exception of unconstitutionality into an abstract review, which is not permitted. It does not have only a preventive but also a reparation function, since it is aimed primarily at the specific situation of the citizen aggrieved in his rights by the rule complained of. The exception of the unconstitutionality against the provisions of Article III (b) of Government Emergency Ordinance No 70/2016 is therefore inadmissible.

With regard to Article III (a) of the Ordinance, the Court observed that those to whom the judgement was communicated after 24 October 2016 are exempt from the new rules.

The Court found that the provisions of Article III (a) of Government Emergency Ordinance No 70/2016 were detrimental to the principles enshrined in Article 16 and Article 21 (1) and (3) of the Constitution on equal rights, free access to justice and the right to a fair trial.

The appeal in cassation does not have the purpose of remedying a misinterpretation of the facts. The cassation court does not adjudicate on the case itself, but only on whether the judgement under appeal complies with the applicable rules of law, as it is a guarantee of compliance with the principle of legality enshrined in Article 1 (5) of the Constitution.

The Court has held that the rule criticised gives rise to discrimination both for the defendant and for the other parties. Thus, although they are in similar situations, the parties benefit from different legal treatment depending on when the appeal court communicates its judgement. The difference in treatment is based on reasons unrelated to the procedural standing of the persons concerned, which is contrary to Article 16 of the Constitution, given that the discriminatory treatment has no objective and reasonable justification. The establishment of special rules as regards remedies is in line with the principle of equality of citizens before the law only if such rules ensure the legal equality of citizens in their use. The legislator does not have the right to block access to the appeal in cassation solely on the basis of the date of service of the judgement, without taking into account the fact that the time-limit for lodging an extraordinary appeal was not exceeded.

Although the rules governing the conduct of the proceedings before the courts fall within the exclusive competence of the legislator, the principle of free access to justice requires the unfettered discretion of those concerned to use those procedures, in the forms and in the manner laid down by law. The rule enshrined in Article 21 (2) of

the Constitution, according to which no law may limit access to justice, which means that the legislator cannot exclude any category or social group from the exercise of procedural rights which it has established, needs to be respected.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in Article III (a) of Government Emergency Ordinance No 70/2016 amending and supplementing the Code of Criminal Procedure and Law No 304/2004 on judicial organisation. excluding the appeal in cassation against judgements of the High Court of Cassation and Justice, as a court of appeal, delivered before 24 October 2016, the date of publication in the Official Gazette of Romania, Part I, of the Constitutional Court Decision No 540 of 12 July 2016, and for which the deadline laid down in Article 435 of the Code of Criminal Procedure has not been exhausted. By unanimity, the Court dismissed as inadmissible the exception of unconstitutionality against the provisions of Article III (b) of the same Emergency Ordinance.

Decision No 220 of 9 April 2019 concerning the exception of unconstitutionality against the provisions of Article III of Government Emergency Ordinance No 70/2016 amending and supplementing the Code of Criminal Procedure and Law No 304/2004 on judicial organisation, published in Official Gazette of Romania, Part I, No 421 of 29 May 2019

By establishing that the order delivered by the pre-trial chamber judge is final and by removing thus the judicial review as to the initiation of the trial on the facts and persons in whose regard, during prosecution, criminal proceedings have been set in motion, the constitutional framework relating to the right of defence and the exercise of legal remedies is exceeded.

Keywords: *equal rights, free access to justice, right of defence, role of the Public Ministry*

Summary

I. As grounds for the exception of unconstitutionality, the authors argue that the contested provisions infringe the principle of respect for the primacy of the Constitution, are discriminatory, are contrary to the right to a fair trial, infringe the right to an effective remedy and run counter to the principle of dual degree of jurisdiction in criminal matters, since, in the event that the pre-trial chamber judge delivers the solution provided for by Article 341 (7) (c) of the Code of Criminal Procedure (accepts the complaint, abolishes the contested solution and orders the commencement of proceedings in respect of the facts and persons for whom criminal proceedings have been set in motion), Article 341 (9) of the Code of Criminal Procedure gives the defendant the right to challenge only the way in which the exceptions relating to the legality of the taking of evidence have been dealt with, but not against the solution to start the proceedings, where no such exceptions have been invoked by the defendant or by the court of their own motion.

II. Having examined the exception of unconstitutionality against the provisions of Article 341 (9) of the Code of Criminal Procedure, the Court has held that, as a rule, the indictment, as exclusive attribute of the public prosecutor, is carried out through the indictment act. By way of exception to that rule, if the pre-trial chamber judge, settling the complaint against the decision not to proceed to trial, accepts it on the basis of Article 341 (7) (2) (c) of the Code of Criminal Procedure, he abolishes the contested solution and orders, by order, the commencement of proceedings in respect of the facts and persons for whom the criminal proceedings have been brought into motion.

The Court held, in essence, that the solution laid down in Article 341 (7) (2) (c) of the Code of Criminal Procedure is issued in the form of an order, which constitutes the document instituting the proceedings before the court of first instance and which has the validity of an indictment act. The order for initiation of the legal proceedings concerning the facts and persons in respect of whom criminal proceedings have been set in motion during criminal investigation, issued by the pre-trial chamber judge, is subject to judicial review by formulating the challenge governed by Article 341 (9) of the Code of Criminal Procedure, criminal law procedural rules which are criticised under this exception of unconstitutionality.

The Court held that the current regulation of the appeal in the form of a challenge in the procedure of complaint against non-prosecution or non-indictment solutions ensure the review of the legality of the interlocutory order for initiation of the legal proceedings, delivered pursuant to Article 341 (7) (2) (c) of the Code of Criminal Procedure, only as regards the way in which the exceptions concerning the lawfulness of the taking of evidence and the conduct of the criminal proceedings are to be dealt with, and not as regards the solution to start the proceedings. From that point of view, the Court held that the exclusion of the possibility of bringing an appeal against the solution to initiate legal proceedings by the preliminary order delivered by the pre-trial chamber judge under Article 341 (7) (2) (c) of the Code of Criminal Procedure is such as to affect equality of rights between citizens in the light of the recognition of the fundamental right of free access to justice.

As the Court held in Decision No 18 of 17 January 2017, referred to above, paragraph 19, that "by means of the challenge provided for in Article 347 of the Code of Criminal Procedure, the review of legality is ensured in respect of a series of final orders issued during the pre-trial chamber procedure, as a guarantee of compliance with the requirements of the principle of the legality of criminal proceedings enshrined in Article 2 of the Code of Criminal Procedure, which in turn is based on Article 1 (5) of the Constitution on the principle of legality. The purpose of the challenge during the pre-trial chamber procedure is to correct the errors of law committed by the pre-trial chamber judge when examining, after indictment, the lawfulness of the referral to the court and the lawfulness of the taking of evidence and the conduct of the acts by the prosecution bodies, errors which must be remedied in the same procedural phase, having regard to the reasons underlying the establishment of the pre-trial chamber procedure". The Court held that such errors of law could also arise in the resolution of the complaint against non-prosecution and non-indictment solutions. However, in terms of the interest in requesting and obtaining rectification of those errors of law committed in the verification of the lawfulness of the taking of evidence and the conduct of the prosecution, the complainant and the respondents (defendants) in the procedure concerning the resolution of the complaint against non-prosecution and non-indictment solutions are in a similar situation, in terms of the recognition of free access to justice, with the parties and the injured party in the pre-trial chamber procedure, with regard to challenging the decision of initiation of proceedings taken by the pre-trial chamber judge.

Moreover, the Court held that, since the contested rules of criminal procedure make it possible to challenge the interlocutory order for initiation of the legal proceedings only with regard to the way in which the exceptions relating to the lawfulness of the taking of evidence were settled and in which the prosecution was carried out, where the respondents, being the defendants in criminal proceedings, have no interest in raising such exceptions in the light of the decision of non-prosecution or non-indictment taken, the order issued on the basis of Article 341 (7) (2) (c) of the Code of Criminal Procedure is final.

In order to ensure the equality of citizens in the exercise of their procedural rights, including appeals, the Court has held, in its case-law, that, in establishing rules for access to those rights for individuals, the legislator is bound by the principle of equality of citizens before the law. Thus, the introduction of special rules on remedies is not contrary to that principle as long as they ensure the legal equality of the citizens in their enjoyment. The principle of equality before the law implies that equal treatment is established for situations which, depending on the aim pursued, are not different. It does not exclude but, on the contrary, presupposes different solutions for different situations. Consequently, a different treatment cannot be merely an expression of the exclusive assessment of the legislator, but must be rationally justified, in accordance with the principle of equality of citizens before the law and the public authorities. Article 16 of the Basic Law refers to the equal rights between citizens as regards the recognition in their favour of fundamental rights and freedoms, and not the identity of legal treatment on the application of measures, whatever their nature might be.

In those circumstances, the Court has held that the exclusion of the possibility of challenging the decision to initiate legal proceedings, taken by means of an order delivered by the pre-trial chamber judge under Article 341 (7) (2) (c) of the Code of Criminal Procedure, creates a discriminatory treatment, as it is a consequence of the choice made by the legislator, transposed in the procedural rule, in total disagreement with its raison d'être mentioned in the explanatory memorandum to Law No 255/2013, namely equality of rights between indicted persons under the order of initiation of legal proceedings, that is to say by the indictment. Thus, although they are in similar situations, the complainant and the respondents in the procedure of complaint against non-prosecution or non-indictment decisions, and the parties and the injured party in the pre-trial chamber procedure, benefit from a different legal treatment in terms of the possibility to bring an appeal, under Article 341 (9) of the Code of Criminal Procedure, namely Article 347 (1) of the same legislative act, contrary to Article 16 of the Constitution, whereas discriminatory treatment has no objective and reasonable justification.

In conclusion, the Court found that the differentiated legal treatment resulting from Article 341 (9) of the Code of Criminal Procedure is unjustified and leads to discrimination.

As regards the access to, and lodging and exercise of the appeal in the pre-trial chamber procedure, the Court has held, in its case-law, that they are aspects of the free access to justice, a fundamental right protected by Article 21 of the Constitution. As the Court has held in its case-law, free access to justice implies access to the procedural means through which justice is carried out. At the same time, the Court has held, in its case-law, that free access to justice is not only aimed at the action bringing proceedings before the court of first instance, but also to the seizing of any other court which, in accordance with the law, have jurisdiction to hear earlier or subsequent stages of the proceedings, because the protection of the rights, freedoms and legitimate interests of individuals logically presupposes the possibility of bringing an appeal against

judgements which are considered to be illegal or unfounded. As a result, limiting the right of the parties to exercise legal remedies constitutes a limitation of free access to justice. At the same time, it falls within the exclusive competence of the legislator to establish rules for the conduct of proceedings before the courts, as it results from the provisions of Article 126 (2) and Article 129 of the Constitution, but any limitation of free access to justice must be duly justified, considering the extent to which the disadvantages caused by it do not exceed the possible advantages.

The Court has held that depriving the complainant and the respondents - parties to the procedure for settlement the complaint against the decisions of non-prosecution or non-indictment - of the possibility to request the judicial review of the decision to initiate legal proceedings, as taken through the interlocutory order delivered by the pre-trial chamber judge, pursuant to Article 341 (7) (2) (c) of the Code of Criminal Procedure, constitutes an excessive measure which goes beyond the constitutional framework relating to the right of defence and the exercise of legal remedies. It is undeniable that the legislator may limit the number of legal remedies, but, in the present case, by enshrining the final nature of the order issued under Article 341 (7) (2) (c) of the Code of Criminal Procedure, in terms of the decision to initiate legal proceedings, the only remedy in respect of the latter is ruled out. However, the Court has held in its settled case-law that the term “in accordance with the law”, contained in Article 129 of the Constitution, “concerns the procedural conditions for the exercise of legal remedies and does not have regard to the impossibility of appealing against court rulings concerning the merits of the case” (see Decision No 45 of 14 March 2000, published in the Official Gazette of Romania, Part I, No 370 of 9 August 2000, and Decision No 84 of 4 May 2000, published in the Official Gazette of Romania, Part I, No 367 of 8 August 2000). The order by which the pre-trial chamber judge decides the initiation of legal proceedings, under Article 341 (7) (2) (c) of the Code of Criminal Procedure, constitutes the document instituting the proceedings before the court of first instance, having, as the Court held in its case-law, the valences of an indictment, and the procedure carried out in that matter has a direct bearing on the conduct and the fairness of the subsequent proceedings, including the trial itself.

In those circumstances, by regulating the final nature of the ordered delivered by the pre-trial chamber judge under Article 341 (7) (2) (c) of the Code of Criminal Procedure and by removing, thus, judicial review as to the initiation of the trial on the facts and persons in whose regard, during prosecution, criminal proceedings have been set in motion, the provisions of Article 341 (9) of the Code of Criminal Procedure adversely affect the free access to justice of the complainant and the respondents, in its substance, in breach of Article 21 of the Constitution, and restrict, in a disproportionate manner, their right of defence, as laid down in Article 24 of the Constitution.

With regard to the role of the public prosecutor in the criminal proceedings, the provisions of Article 55 (3) (f) of the Code of Criminal Procedure provide for the task of the public prosecutor to lodge and exercise, in the context of criminal proceedings, the challenges and remedies provided for by law against judicial decisions. In those circumstances, having in view the purpose of the challenge — to ensure the possibility of rectification of errors of law made in the course of settlement of the complaint against the decisions of non-prosecution or non-indictment — and the role of the public prosecutor, which, as the Constitutional Court held in its case-law, acts as the defender of the general interests of society, but also of the parties to the proceedings, in the spirit of legality, the Court has held that the requirements of Article 131 of the Constitution require that the legislator ensures the possibility that, by means of the challenge set forth by the provisions of Article 341 (9) of the Code of Civil procedure, be verified,, even on

the initiative of the prosecutor, the legality of the orders delivered by the pre-trial chamber judge under Article 341 (7) (2) (c) of the Code of Criminal Procedure, both in terms of decision to initiate legal proceedings concerning the facts and persons in respect of whom criminal proceedings have been brought, and with regard to the way in which the exceptions relating to the lawfulness of the taking of evidence were settled and in which the prosecution was carried out.

Given that the procedure carried out in this matter has a direct bearing on the conduct and fairness of the subsequent proceedings, including on the trial itself (Decision No 599 of 21 October 2014, cited above, paragraph 43), the Court has held that the guarantees provided for by Articles 21, 24 and 131 of the Basic Law require that the public prosecutor, the complainant and the respondents be able to challenge the order issued by the pre-trial chamber judge under Article 341 (7) (2) (c) of the Code of Criminal Procedure, both in terms of decision to initiate legal proceedings concerning the facts and persons in respect of whom criminal proceedings have been brought, and with regard to the way in which the exceptions relating to the lawfulness of the taking of evidence were settled and in which the prosecution was carried out.

In conclusion, the Court found that the legislative solution contained in Article 341 (9) of the Code of Criminal Procedure, which excludes the possibility of challenging the decision to initiate proceedings taken by means of the interlocutory order delivered by the pre-trial chamber judge under Article 341 (7) (2) (c) of the Code of Criminal Procedure, was contrary to the constitutional provisions of Article 16 on equal rights, Article 21 on free access to justice, Article 24 on the right of defence and of Article 131 on the role of the Public Ministry.

III. For all these reasons, the Court, by unanimity, upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in Article 341 (9) of the Code of Criminal Procedure, which excludes the possibility of challenging the interlocutory order of the pre-trial chamber judge with regard to the order for initiation of the legal proceedings concerning the facts and persons in respect of whom criminal proceedings have been brought, issued pursuant to Article 341 (7) (2) (c) of the Code of Criminal Procedure.

Decision No 243 of 16 April 2019 concerning the exception of unconstitutionality against the provisions of Article 341 (9) to (6) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No 429 of 30 May 2019

The provisions providing for the maintenance of measures to protect the witness threatened throughout the criminal proceedings if the state of danger has not ceased, must expressly regulate, what is the competent judicial body to verify whether there is a need to maintain or terminate those measures and the procedure for carrying out such verification.

Keywords: *witness protection measures, quality of law, right of defence*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the retention of the order governed by Article 126 (4) of the Code of Criminal Procedure,

whereby the public prosecutor ordered the granting of the status of threatened witness and the application of protection measures, unjustifiably restricts, in a total and indiscriminate manner, the right of the defendant to become aware of the content of that order and to challenge its legality and validity. Moreover, it was stated that the granting of threatened witness status and the taking of protective measures cannot be arbitrary, but strictly based Article 125 of the same Code. It was further argued that all acts of prosecution and the measures taken by the public prosecutor may be appealed against, in accordance with Article 336 of the Code of Criminal Procedure, which cannot be exercised by the defendant, since he is not aware of the content of the order. It was stated that, for the same reasons, the defendant cannot make requests and raise exceptions relating to the legality and merits of the order, in accordance with Article 342 of the Code of Criminal Procedure relating to the pre-trial chamber procedure. For all these reasons, the free access to justice was allegedly infringed upon.

It was further argued that the provisions of Article 126 (4) to (6) of the Code of Criminal Procedure were in breach of Article 1 (5) of the Constitution as they lacked clarity, precision and predictability. It was argued that the legal provisions complained of do not specify whether the public prosecutor carries out the verifications if the conditions which led to the protective measures laid down in Article 126 (5) are maintained only automatically or also on request. It was further argued that the failure to set an objective limit on the time period for which the prosecutor is required to verify whether the conditions which led to the taking of protective measures leaves the field clear for judicial arbitration. It was also indicated that it was not clear from the criticised text whether the public prosecutor issued a reasoned order only when ordering the termination of the protective measures or also when maintaining them. It was also argued that the criticised text did not mention whether and if the order under Article 126 (5) of the Code of Criminal Procedure has the confidential nature referred to in paragraph (4) of the same article.

Similarly, with regard to Article 126 (6) of the Code of Criminal Procedure, it is claimed that Article 126 (6) of the Code of Criminal Procedure has created a non-uniform judicial practice in that it does not establish the competent judicial body to rule on protective measures during the trial stage, in which some courts consider that they fall within their competence and others that they fall within the competence of the public prosecutor. It was also indicated that the criticised text does not specify whether the regulated verifications are regular or the time frame for which they are carried out. It was also argued that it does not result from the impugned legal provisions the act by which the competent body takes a decision or its regime in terms of confidentiality and censorship by means of judicial review. Finally, it is also stated that the contested text only regulates the solution of continuation of protection measures during the trial phase and not their termination.

II. Having examined the exception of unconstitutionality, the Court has found, with regard to Article 126 (6) of the Code of Criminal Procedure, that it provides that the measures referred to in Article 126 (1) are to be maintained throughout the criminal proceedings if the state of danger has not ceased. In accordance with Article 126 (1) of the Code of Criminal Procedure, in the course of criminal proceedings, besides granting the status of threatened witness, the public prosecutor shall order the application of one or more of the following measures during criminal proceedings: a) surveillance and security of the witness's house or provision of a temporary dwelling; b) accompanying and ensuring the protection of the witness or his/her family members in the course of travel; c) protection of identity data, by giving a pseudonym which the

witness will use to sign his/her declaration; d) hear the witness without being present, by means of audiovisual media, with voice and image being distorted, when the other measures are not sufficient. Furthermore, Articles 126, 127 and 128 of the Code of Criminal Procedure govern protection measures ordered in the course of proceedings and the procedure for ordering those measures, without, however, also regulating the situation referred to in Article 126 (6) of the Code of Criminal Procedure, namely the situation in which protection measures the application of which has been ordered by the public prosecutor during the prosecution are maintained during the trial stage. Thus, the legal situation provided for in the contested text leaves unregulated the procedure of verification and termination of the measures ordered in accordance with Article 126 (1) to (5) of the Code of Criminal Procedure.

The criminal procedural law does not provide in Article 126 (6) of the Code of Criminal Procedure, or in a separate rule, the jurisdiction of the court to proceed with the review of protection measures and the act by which the court may order the maintenance or termination of the measures in question.

The Court has found that measures for the protection of witnesses are criminal procedural measures of a complex nature, aimed at increasing the efficiency of the activity of taking evidence and, thereby, of criminal proceedings, guaranteeing the safety of the persons involved. These measures are aimed at ensuring the protection of persons holding information on criminal offences, information relevant to the settlement of criminal cases, persons whose life, integrity, bodily integrity or freedom is at risk because they have supplied that information or have agreed to provide them to the judicial bodies.

In order for a person to acquire the status of threatened witness, in accordance with Article 125 of the Code of Criminal Procedure, there must be reasonable suspicion that the witness's life, body integrity, freedom, property or business activity may be jeopardised as a result of the data which he or she is to provide to judicial bodies or of the false declarations. Therefore, the person concerned must have the status of a witness in the criminal proceedings and be aware of data and information with a determining role in the settlement of criminal cases, data and information that he or she has communicated or is about to communicate to the judicial body.

The taking of testimonial evidence in criminal proceedings, in accordance with the conditions laid down in Article 126 (1) of the Code of Criminal Procedure, is an exception to the general rules on the hearing of witnesses, an exception which results in statements of limited probative value. For that reason, it is necessary for that exception to be expressly regulated, both as regards the judicial bodies competent to order, verify or establish that measures for the protection of witnesses are terminated, and the procedure appropriate to the exercise of those powers, at all stages of the criminal proceedings, in order to comply with the constitutional requirements relating to the clarity, precision and foreseeability of the law referred to in Article 1 (5) of the Basic Law and to ensuring the right to a fair trial and the right of defence, as governed by Article 21 (3) and Article 24 of the Constitution.

In those circumstances, Article 126 (6) of the Code of Criminal Procedure, in so far as it does not expressly establish either the judicial body competent to rule on the protective measures ordered in accordance with paragraph (1) of that article, or on the act and manner in which the afore-mentioned competence is exercised, in the event that the protective measures taken are maintained after the start of the proceedings, lacks clarity, precision and foreseeability, contrary to Article 1 (5) of the Constitution.

Having regard to the requirements of Article 21 (3), in conjunction with Article 24 (1) of the Constitution, the provisions of Article 126 (6) of the Code of Criminal

Procedure, which provide for the continuation of protection measures ordered by the public prosecutor in the course of the proceedings, govern, in fact, the maintenance, at the trial stage, of an exceptional restriction on the exercise of the right of defence of the defendant, without mentioning the procedure by which the need to maintain those measures can be verified, the conditions for their termination and the judicial body responsible for carrying out such checks. However, the continuation of such a restriction, in conjunction with the absence of an expressly regulated procedure to terminate it, when the applicable circumstances no longer require the maintenance thereof, is equivalent to an unlawful restriction on the exercise of the fundamental right examined. Moreover, adducing, in the course of proceedings, the witness evidence, on the basis of the maintenance of witness protection measures ordered in the course of the prosecution, even though there is no longer any need to maintain those measures, may determine the relative nullity of the evidence thus obtained, in accordance with Article 282 of the Code of Criminal Procedure.

The Constitutional Court has held, in its case-law, that the right of defence give any party involved in a trial, according to his/her interests and irrespective of the nature of the proceedings, the possibility of using all the means provided for by law to invoke, in his/her defence, facts or circumstances. This right includes participation in court hearings, the use of evidence and the use of exceptions provided by the law of criminal procedure (see Decision No 667 of 15 October 2015, published in the Official Gazette of Romania, Part I, No 870 of 20 November 2015, paragraph 33). The Court has therefore held that, as a requirement imposed by Article 21 (3) and Article 24 (1) of the Constitution, the provisions of Article 126 (6) of the Code of Criminal Procedure, which provide for the maintenance of measures to protect the witness threatened throughout the criminal proceedings if the state of danger has not ceased, must specifically lay down the judicial body competent to verify the need to maintain or terminate those measures and the procedure for carrying out such verification.

For these reasons, the Court found that the provisions of Article 126 (6) of the Code of Criminal Procedure were unconstitutional, in breach of the right of defence, governed by Article 24 of the Constitution, as a guarantee of the right to a fair trial, as provided for in Article 21 (3) of the Basic Law and Article 6 of the Convention.

With regard to the provisions of Article 126 (4) and (5) of the Code of Criminal Procedure, the Court held that the author alleged their unconstitutionality at the stage of adjudication on the merits of the case, with the present exception of unconstitutionality being brought before the Court by an interlocutory order issued by a 3-judge panel of the High Court of Cassation and Justice — Criminal Section and not by an interlocutory order issued by the pre-trial chamber judge. However, the contested texts concern the ordering of the measures for the protection of witnesses at the stage of the prosecution and their challenge would have been possible at the stage of the pre-trial chamber procedure, in the course of which it should also have been raised, in accordance with Article 282 (4) (a) of the Code of Criminal Procedure. Accordingly, in the light of the foregoing, the provisions of Article 126 (4) and (5) of the Code of Criminal Procedure are not related to the settlement of the case in the procedural stage in which the exception was raised. The Court therefore found inadmissible the exception of unconstitutionality of the provisions of Article 126 (4) and (5) of the Code of Criminal Procedure.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 126 (6) of the Code of Criminal Procedure.

The Court unanimously dismissed as inadmissible the exception of unconstitutionality of the provisions of Article 126 (4) and (5) of the Code of Criminal Procedure.

Decision No 248 of 16 April 2019 concerning the exception of unconstitutionality against the provisions of Article 126 (4) to (6) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No 494 of 19 June 2019

Only by ordering a change in the legal classification of the offence, by means of a judgement which does not settle the substance of the case, after being debated by the parties the new legal classification, but before the settlement of the case, by sentence or decision, it is ensured the fairness of the trial and the possibility of continuing to pursue an effective defence, in criminal proceedings, by the defendant.

Keywords: *change of legal classification of the offence, right to a fair trial, right of defence*

Summary

I. As grounds for the exception of unconstitutionality, the author of the exception claims, in essence, that the rules of criminal procedure of Article 386 (1), while obliging the court to allow the parties to debate on the new legal classification when they consider that the classification given in the document instituting the proceedings is to be changed, allow the court to order a change of legal classification by the judgement given on the merits of the case, with the consequence that the right to a fair trial, individual freedom and the rights of the defence are infringed. In the opinion of the author of the exception, it is appropriate that a separate interlocutory order establishes the change in the legal classification of the offence in the document instituting the proceedings.

II. Having examined the exception of unconstitutionality against the provisions of Article 386 (1) of the Code of Criminal Procedure, which states that "When during the court proceedings, it deems that the legal charges for the crime in the bill of indictment are about to be changed, the court is under an obligation to discuss the new legal charges and to draw the defendant's attention that he has the right to ask for the case to be adjourned for later during the same court session or to be postponed, to prepare his defence", the Court has held that the rule of criminal procedural law imposes a twofold obligation on the court in connection with the change in the legal classification of the offence, that is to say, the obligation of the court to inform the parties the new classification of the offence and the obligation to inform the defendant of having the right to ask for the case to be adjourned for later during the same court session or to be postponed so he can prepare his defence.

In view of the grounds of unconstitutionality raised by the author, the Constitutional Court requested the President of the Tribunal of Bucharest, the President of the Suceava Court of Appeal, the President of the Bucharest Court of Appeal and the President of the High Court of Cassation and Justice to communicate the position taken in the case-law of those courts, as from 1 February 2014, concerning the time of

procedure and the nature of the judgement (order, sentence or decision) by which the court orders the change in the legal classification established in the indictment act.

Compared to those specified by the afore-mentioned courts, the Court has observed that, as a general rule, on changing the legal classification of the offence established in the act instituting the proceedings, the court adjudicates at the end of the trial, by judgement, sentence or decision, depending on the procedural stage, in compliance with the obligations to bring the new classification into question to the parties' attention and debate and to inform the defendant of the right to ask for the case to be adjourned for later during the same court session or to be postponed so he can prepare his defence.

In the light of the foregoing, and in the light of the provisions of Directive 2012/13/EU of the European Parliament and of the Council, concerning the right to information in criminal proceedings, and of the case-law of the European Court of Human Rights relating to "the legal reclassification of the offence", the Court has held that the fact that court is under an obligation to discuss the new legal charges and to draw the defendant's attention that he has the right to ask for the case to be adjourned for later during the same court session or to be postponed, to prepare his defence, as provided for in Article 386 (1) of the Code of Criminal Procedure, has the meaning of "a mere reference to the theoretical possibility of the court to reach a conclusion which is different from that of the public prosecutor's office as regards the classification of the offence", as the European Court has held in its case-law, which is insufficient for the effective exercise of the right of defence and for the preservation of the fairness of the proceedings. The general and mandatory wording of the procedural rule relating to the obligation for the court to bring into discussion any change in legal classification, and the specific manner in which the conduct of such a procedure is regulated before the court, constitutes a guarantee that the parties are not surprised by another legal classification of the facts and that they are not deprived of the possibility of drawing any conclusions as to that new situation. However, compliance by the court with the obligations under Article 386 (1) of the Code of Criminal Procedure, when it rules on the change in the legal classification of the offence in the indictment act at the end of the trial, by means of a judgement, sentence or decision, is not in a position to maintain the fairness of the criminal proceedings and the effective exercise by the defendant of the right of defence in criminal proceedings.

The earlier conclusion is justified in the light of the fact that the legal classification of the offence has an effect both within the scope of substantive law, determining the legal basis for criminal liability, the nature and limits of the penalty imposed, and as regards the maintenance and taking of preventive measures, the ordering of compulsory legal assistance by the lawyer of the defendant, the establishment of the court's jurisdiction, so that the change in the legal classification of the offence in the act instituting the proceedings has consequences in respect of all those aspects, the court being required, in accordance with the rules of criminal procedure in force, to decide on any preventive measures ordered in the case, the obligation to provide legal assistance to the defendant, or to decline jurisdiction in favour of the higher court if the offence is a matter for that court's substantive jurisdiction. However, in so far as the court rules on the change of legal classification (called into question ex officio or according to the request of the parties or of the representative of the Public Ministry) at the end of the trial, by judgement, sentence or decision, depending on the stage of the procedure, a possible action on those issues appears as out of time in terms of the procedure. The Court held that the fairness of the proceedings requires that the resolution of the case be dealt with by a court having substantive jurisdiction, legally taking decisions on the

taking, extension, revocation, replacement of the preventive measures, or making available a lawyer for the defendant, where legal assistance is compulsory, in relation to the "criminal charge" which is the subject of criminal proceedings. Even if the court changes the legal classification given to the offence by means of the acts instituting the proceedings, but such has no relevant procedural effects, the Court has held that by deciding on the new legal classification of the offence directly in the court ruling, at the end of the trial, the court deprives the defendant of the real possibility of defending himself in criminal proceedings, in disregard of Article 24 (1) of the Constitution, and infringes his right to a fair trial, as laid down in Article 6 (1) and (3) (a) of the Convention and Article 21 (3) of the Basic Law.

In those circumstances, the Court has held that only by ordering the change in the legal classification of the offence, by interlocutory order which does not deal with the substance of the case, after allowing the parties to express their opinion on the new legal classification, but prior to the settlement of the case, by sentence or decision, it is ensured the fairness of the proceedings and the possibility of continuing to exercise an effective defence, in criminal proceedings, by the defendant, where it is only in relation to a legal classification definitively established, in the course of the criminal proceedings, not at the end of the criminal proceedings, that the defendant can bring actual an defence.

The Court has also held that the change in legal classification of the offence does not constitute an early expression of the opinion on the solution likely to be adopted in a particular case, so that the judge taking part in its delivery, by way of interlocutory order, does not become incompatible with taking part further in the resolution of that case. Looking at the provisions of Article 386 (1) of the Code of Criminal Procedure in conjunction with the provisions of Article 387 of the Code of Criminal Procedure, which govern the court's resolution of the matters concerned, the Court has held that, according to the intention of the legislator, a change in the legal classification of the offence established by the indictment act is a procedural matter which does not relate to the immediate resolution of the case. However, "the mere fact that a judge has already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his impartiality. What matters is the scope and nature of the measures taken by the judge before the trial. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudged. What is important is for that analysis to be carried out when judgement is delivered and to be based on the evidence produced and argument heard at the hearing" (Judgement of 6 June 2000 in Morel v. France).

The Court has held that, in order to ensure the fairness of the criminal proceedings and in order that the defendant can effectively exercise his rights of defence, the only interpretation that renders the contested text — Article 386 (1) of the Code of Criminal Procedure — consistent with the provisions of the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms is that requiring that the change in the legal classification of offence as established in the act instituting the proceedings be carried out by the court by interlocutory order which does not rule on the substance of the case, after being debated by the parties the new legal classification, but before deciding on the substance of the case.

Although the rules of criminal procedure complained of do not expressly establish the type of ruling by which the court decides to change the legal classification of the offence as established in the indictment act, their interpretation by the court must ensure the effective exercise of the right of defence and the fairness of the proceedings. However, the practice of the courts, including the practice of the High Court of Cassation and Justice, is to change the legal classification as established in the indictment act, at

the end of the trial, by sentence or decision, depending on the stage of procedure, in breach of Articles 21 (3) and 24 (1) of the Basic Law, and of Article 6 (1) and (3) (a) of the Convention for the Protection of Fundamental Rights and Freedoms.

In the light of that practice of the courts, the Court held that the Constitutional Court took the view that the use of legal rules in a way that departs from their legitimate purpose, by systematic incorrect interpreting and application by the courts or by the other subjects called upon to apply the legal provisions, may render that legislation unconstitutional. In this case, the Constitutional Court has the power to rule out the unconstitutional defect thus created, as essential in such situations is ensuring the observance of the rights and freedoms of individuals as well as the primacy of the Constitution (see, to that effect, Decision No 448 of 29 October 2013, published in the Official Gazette of Romania, Part I, No 5 of 7 January 2014, and Decision No 336 of 30 April 2015, published in the Official Gazette of Romania, Part I, No 342 of 19 May 2015, paragraph 30).

Next, the Court held that, in accordance with Article 31 (2) of Law No 47/1992 on the organisation and functioning of the Constitutional Court, since the exception of unconstitutionality of the provisions of Article 386 (1) of the Code of Criminal Procedure is to be upheld, the Constitutional Court will also rule on the constitutionality of the provisions of Article 377 (4), first sentence, of the Code of Criminal Procedure, according to which" When it finds, ex officio, based on the motion of the prosecutor or of the parties that the legal charges for the act in the bill of indictment must be changed, the court is under an obligation to have the new charge debated and draw the attention of the defendant that he has the right to ask for his case to be tried later [...]". The legal classification given to the substantive offences described in the act instituting the proceedings is the court's attribute, and it is not possible to make a change in the legal classification of offence contingent on the potential assumption by the defendant of the offence described in the indictment. The Court has also held that the unconstitutionality arguments concerning the provisions of Article 386 (1) of the Code of Criminal Procedure are also applicable *mutatis mutandis* to these latter rules of criminal procedure.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found constitutional the provisions of Article 377 (4), first sentence, and of Article 386 (1) of the Code of Criminal Procedure in so far as the court decides on the change in the legal classification of the offence as established in the indictment act by an interlocutory order which does not decide the substance of the case.

Decision No 250 of 16 April 2019 concerning the exception of unconstitutionality of provisions of Article 386 (1) to (6) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No 500 of 20 June 2019

The imprecise wording of the phrase complained of, in that it does not expressly state the terms of the extension of the term of office of the Chief of the Defence Staff and the procedure to be followed, creates legal uncertainty in connection with the exercise of a public office in an area of fundamental importance, namely national defence.

Keywords: *quality of the law, principle of separation and balance of powers, commander of the armed forces, military staff*

Summary

I. As grounds for the exception of unconstitutionality, the court held that Article 39 (5) of Law No 346/2006 infringes Article 80 (1) of the Constitution by regulating the sharing of powers between the Head of State and the Minister of National Defence, which is not mentioned in this constitutional text. According to the reasoning of the court, the capacity of Commander-in-Chief of the Armed Forces of the President of Romania, conferred by Article 92 (1) of the Constitution, is neither limited by the constitutional provision, nor is it conditional on the actions or inactions of other political actors, regardless of their positioning in the State. If the constitutional legislator wanted certain acts of the President to be fulfilled on a proposal from other authorities, it would have expressly mentioned this in the Constitution. A rule of a legal force lower than the Constitution cannot introduce limitations on the duties and powers of the Head of State, unless the Basic Law expressly provides such limitations.

II. Having examined the exception of unconstitutionality, the Court found that the subject-matter of the dispute concerns the extension of the term of office as Commander-in-Chief of the Armed Forces, rather than the appointment to that office. The Court therefore ruled only on the procedure for the extension of the term of office.

The Court has held that the meaning of the concept of foreseeability depends to a large extent on the content of the text in question and the scope it covers. In the light of the importance of the regulated field (national defence) and of the office to which the impugned rules refer (“*the military with the highest rank in the armed forces system”*), there is a need for clear and debatable regulation on both of the conditions and of the procedure applicable to the appointment and extension of the term of office of Chief of Defence Staff. As regards the constitutional requirements concerning the quality of the law, the Constitutional Court declared, in Decision No 456 of 4 July 2018, published in the Official Gazette of Romania, Part I, No 971 of 16 November 2018, that the scope of the solutions governed by the legislative act “must cover the whole area of social relations which is the object of the legislation in order to avoid legislative loopholes. Thus, in order for the solutions to be fully overlying, account will be taken of the various situations likely to arise in the implementation of the legislative act, using either the list of the situations envisaged or the outline formulation or the frame formulation of principle, applicable to any possible situations”.

In the current drafting, Article 39 (5) assumes a collaboration within the executive power in the procedure for the appointment of the Chief of Defence Staff. The constitutional texts referred to by the court regulate the powers of the President of Romania in the field of defence (Article 92), exceptional measures (Article 3) and other powers (Article 94). The listing of those powers by the constituent legislator does not mean the exclusion of any other authority from the scope of their exercise, but neither does it mean disregarding the constitutional role of the President. Furthermore, Article 94 (c) of the Constitution establishes that the President of Romania has the power “to make appointments to public offices, under the terms provided by law”, and the extension of the term of office in question falls under that hypothesis. But the legislator has to regulate the conditions and procedure to be followed with respect to the constitutional framework that configures the President’s powers in the field of defence, as well as the principles of separation, balance and loyal cooperation between public authorities.

The imprecise wording of the phrase complained of, in that it does not expressly state the terms of the extension of the mandate of the Chief of Defence Staff and the procedure to be followed, opens the possibility of diametrically opposed interpretations, as in the present case, by creating legal uncertainty as to the exercise of a public office in an area of fundamental importance, namely national defence. It does not fall within the jurisdiction of the court or into that of the Constitutional Court to determine, by means of interpretation, the procedure to be followed. This is solely a matter of law-making, falling within the competence of the legislator, which is under an obligation to set out clearly the conditions and procedure applicable to the extension of the term of office of the Chief of Defence Staff.

III. For all these reasons, the Court, by unanimity, upheld the exception of unconstitutionality and found unconstitutional the phrase " *with the possibility of extension by up to one year*" in Article 39 (5) of Law No 346/2006 on the organisation and functioning of the Ministry of National Defence.

Decision No 391 of 4 June 2019 concerning the exception of unconstitutionality against the provisions of Article 39 (5) of Law No 346/2006 on the organisation and functioning of the Ministry of National Defence, published in Official Gazette of Romania, Part I, No 510 of 24 June 2019

III. Decisions issued in the settlement of legal disputes of a constitutional nature [Article 146 (e) of the Constitution]

The Public Prosecutor's constitutional powers cannot be transferred to the Romanian Intelligence Service through secret protocols of cooperation. In the legal dispute of a constitutional nature, the Parliament was also involved, as it has exercised its responsibility for oversight of the intelligence agency in an inadequate manner.

Keywords: *legal disputes of a constitutional nature, role of the Public Ministry, prosecutors, principle of separation and balance of powers, principle of legality, sole legislative authority, Supreme Council of National Defence, appointment upon proposal by the President of Romania of directors of intelligence agencies and the exercise of oversight of the activities of these agencies, achievement of justice, fair trial, personal, family and private life, individual freedom*

Summary

I. As grounds for the request for settlement of the dispute, the President of the Chamber of Deputies has argued that, by signing two protocols, in 2009 and 2016, with the Romanian Intelligence Service, the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice has breached its own constitutional powers and, by misusing the powers of the Parliament, vested the Romanian Intelligence Service with the task of carrying out activities specific to the criminal investigation bodies, which is expressly prohibited by the legislator in Law No 14/1992 on the organisation and functioning of the Romanian Intelligence Service.

The two protocols are secret, so that they have not been communicated to the courts, have not been made public and have not been published in the Official Gazette, which has led to the prosecution and gathering of evidence by the officials of the Romanian Intelligence Service and Prosecutor's Office on the basis of secret rules which are legally non-existent. Since judges were not aware of the content of the protocols, they could not rule on the lawfulness of the evidence thus obtained, which infringes a person's rights of defence, right to a fair trial and effective access to justice.

The Public Ministry also led judges to abide by not only law but also secret cooperation protocols with the Romanian Intelligence Service. By that conduct, the Public Ministry has breached the principle of sincere cooperation between the State's powers and, through covert, secret acts, it determined a legal dispute of a constitutional nature not only in relation to Parliament, as legislative power, but also to the High Court of Cassation and Justice and the courts, as judicial power.

On the basis of those protocols, the prosecutors together with the officials of the Romanian Intelligence Service have themselves made a pre-selection of evidence, physically removing from the criminal file evidence to their free discretion, which they considered to be 'irrelevant', evidence which can no longer be assessed by an independent judge. By so doing, they replaced the judge. There cannot be a free trial as long as the public prosecutors and officers of the Romanian Intelligence Service present

only a part of the truth, based on the evidence selected by themselves, practically manipulating the evidence and by default the course of the trial. For this reason, the courts have not been able to judge independently and impartially, as provided for in the Constitution.

No secret legislation can create obligations on citizens and can deprive them of rights recognised by law. No procedural act and no court-related activity can be carried out outside the law, on the basis of secret rules, without infringing the constitutional foundation of administration of justice, rule of law and separation of powers.

II. Having examined the dispute resolution request, the Court noted that the author of the request referred to a generalised practice. Therefore, the Court considered as party of the alleged constitutional dispute all courts, under the phrase "High Court of Cassation and other courts". At the same time, the Court found that there was nothing to prevent two constituent elements of the same authority being in conflict — the Public Ministry and the courts.

Although the Public Ministry has a leading role in prosecution, it is alleged to have agreed to divest part of its constitutional and legal powers to a secret service and to use the evidence thus obtained during the criminal proceedings. Therefore, the secret service played a secondary role in the alleged dispute and cannot be considered as part of it.

The Court has held that the main issue brought before it is concerned with the fact that the Public Ministry has assumed the role of the legislator, adding to the law, through "collaboration protocols", with negative consequences for citizens' rights and freedoms. Thus, the litigant has to fight against legal practices and rules that are unconstitutional but institutionalised for more than 9 years.

The principle of separation and balance of powers enshrined in Article 1 (4) of the Constitution prohibits courts from establishing, amending, supplementing or repealing primary regulatory rules. The principle of legality presupposes, in essence, that the judicial bodies act on the basis of the power which the legislator has conferred on them and, subsequently, that they must comply with both substantive and procedural law provisions, including the rules of jurisdiction.

The Court has found that rules of criminal procedure, established by law, do not provide for the task of public prosecutors, whatever the level or function, to enter into "collaboration protocols" in relation to the individual cases they handle. As the protocols did not concern a specific case, but a broad framework of "institutional cooperation", they are not procedural acts that prosecutors could order. The Court has held that the collaboration protocols cannot be administrative acts of management, but only administrative acts of authority, which are of an extrajudicial nature and are subject to review of legality. An administrative act is intended to organise the enforcement or to enforce the law, not to substitute law or to act counter to the law. Therefore, as a rule, the acts of collaboration concluded by the Prosecutor General in the representation of the Public Ministry are administrative acts of a normative nature and cannot include primary normative provisions.

The Prosecutor General, as a representative of the Public Ministry, may conclude cooperation protocols with other public authorities, including the Romanian Intelligence Service. However, the author of the referral indicated that, in reality, the Public Ministry, by means of "collaboration protocols", amended and supplemented in a covert manner the existing primary regulatory framework in the matter of prosecution.

Article 2 of Protocol No 00750 of 4 February 2009 provides that "[t]he parties shall cooperate [...] in the use of information in the field of preventing and combating

criminal offences against national security, acts of terrorism, offences that have a correspondent in threats to national security and other serious criminal offences, in accordance with the law". The Court held that neither the 1969 Criminal Code nor the Criminal Code in force lays down in their general part the concept of a serious criminal offences, meaning that the definition of that term is to be determined by the specific nature of each law. The Protocol was therefore not limited to those categories of criminal offences which fell within the competence of the Romanian Intelligence Service. It is therefore clear that a primary legal standard with flexible content, which could be assessed on a case by case basis by the public prosecutor's office or the intelligence service, was generated in the form of an apparently administrative act.

The Court observed that a rule attributing competence to the secret service could not even be adopted by the Parliament, as it would have meant an implicit redefinition of the role of the Supreme Council of National Defence, governed by Article 119 of the Constitution. As the activity of the Romanian Intelligence Service is organised and coordinated by the Supreme Council of National Defence, it cannot acquire by means of a "collaboration protocol" a broader competence than that of the entity under the auspices of which it operates.

At the time of the conclusion of the Cooperation Protocol under review, the Romanian Intelligence Service was not entrusted with criminal investigation tasks, its activity being limited to providing technical support to the carrying out of criminal investigation activities in relation to criminal offences threatening national security. In principle, procedural acts in the course of criminal proceeding are carried out by prosecution bodies and in no way by other bodies external to them. However, the contested text has a broad normative content which allows that the prosecutor's powers be taken over by the secret service in the investigation of any criminal offence assessed as "serious". In other words, since 2009, normative premises have been created for the Romanian Intelligence Service to carry out criminal investigations in any area. This leads to the infringement of Article 1 (4) on the separation and balance of powers in the State and of Article 61 (1) of the Constitution on the role of Parliament as the sole legislative authority of the country.

The imprecise wording of Article 17 (1) of the Protocol leads to the conclusion that an expert report may be drawn up by experts of the Romanian Intelligence Service. Strict legal regulation of the acquisition of expert capacity ensures, from a regulatory point of view, impartiality and a high degree of professionalism on their part. The Public Ministry has no competence to request expert reports from experts of the Romanian Intelligence Service, by extending the competence of the Romanian Intelligence Service.

The Protocol regulated the competence of the Romanian Intelligence Service to implement the technical surveillance warrant in criminal proceedings without being a criminal prosecution body. Although the Code of Criminal Procedure has not entrusted the secret service with this power, the Public Ministry, on its own initiative, transfers to the secret service a task which should be carried out by the prosecutor. In practice, this protocol adds to the provisions of the Code of Criminal Procedure. However, the Public Ministry does not have the right to transfer its powers derived from the constitutional text of Article 131.

The Protocol sets out the obligation for the Public Ministry to report on how to use of referrals received from the secret service. The Court has pointed out that, according to its case-law, the prosecutor is independent, therefore no relationship of subordination to a secret service in the criminal proceedings can be accepted. This shows that relations have been established between the Public Ministry and the Romanian Intelligence Service contrary to the law and affecting the role and work of the public

prosecutor in the criminal proceedings. The Court therefore found that Article 131 (1) and Article 132 (1) of the Constitution were infringed, with reference to the role of the Public Ministry and the status of the public prosecutor.

Article 65 (2) (h) of the Constitution establishes a civilian oversight of the secret services of the State, by Parliament, in joint meeting. It follows from the analysis of the Verbatim Reports of Joint Meetings of the Chamber of Deputies and the Senate that, upon the submission and discussion of the reports relating to the performance of the duties incumbent on the Romanian Intelligence Service, there was no objection to possible problems arising from the conclusion of the Protocol under review.

The Parliament preferred to remain in a continuous state of passivity, although it had the necessary constitutional means to remove the effects of the Protocol. On the contrary, instead of exercising its power of oversight, Parliament referred the matter to the Constitutional Court. Through the superficial exercise of its powers, Parliament implicitly accepted an act which was contrary to the constitutional order. There is therefore a complex legal dispute of a constitutional nature which was determined by the conclusion of the Protocol under review and favoured by improperly exercised parliamentary oversight.

In addition, the Protocol imposed a certain judicial practice which is not entirely in line with the requirements of Article 124 of the Constitution, according to which justice is to be carried out in the name of the law. The provisions of the Protocol breached a wide scope of fundamental rights and freedoms, in particular those relating to the right to a fair trial [Article 21 (3)], but also to the right to personal, family and private life (Article 26) and individual freedom [Article 23 (1)], since they made it difficult to apply the penalty of absolute nullity of unlawfully obtained evidence.

III. For all these reasons, by a majority vote, the Court upheld the referral and found the existence of a legal dispute of a constitutional nature between the Public Ministry — the Public Prosecutor's Office attached to the High Court of Cassation and Justice and the Parliament of Romania, on the one hand, and the High Court of Cassation and Justice and the other courts, on the other, arising from the conclusion between the Public Prosecutor's Office and the Romanian Intelligence Service of Protocol No 00750 of 4 February 2009, as well as the improper exercise of parliamentary oversight over the activities of the Romanian Intelligence Service. The Court also found that there was a legal dispute of a constitutional nature between the above parties also with regard to the conclusion of Protocol No 09472 of 8 December 2016, but only with regard to Article 6 (1), Article 7 (1) and Article 9. The High Court of Cassation and Justice and the other courts, as well as the Public Ministry — the Public Prosecutor's Office attached to the High Court of Cassation and Justice and the subordinated establishments must verify in the pending cases the extent to which there has been a breach of the provisions relating to the substantive jurisdiction and the individual capacity of the prosecution body and must order appropriate legal measures.

Decision No 26 of 16 January 2019 on the request for settlement of the legal dispute of a constitutional nature between the Public Ministry — the Public Prosecutor's Office attached to the High Court of Cassation and Justice, the Parliament of Romania, the High Court of Cassation and Justice and the other courts, published in Official Gazette of Romania, Part I, No 193 of 12 March 2019.